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Introduction

This distance education material has been prepared to enable students to comprehend the history, doctrine and institutional aspects of protection of human rights. The material is tailored with a view to enable prosecutors to have thorough understanding of human rights issues pertaining to their responsibilities. The first aspect of the material dwells up on the meaning of the term human rights itself. This is followed by a thorough analysis of the antecedents and background of the human rights movement. It explores the foundations of human rights in political and moral thought. It further looks in to the precursors of human rights in religious and philosophical traditions. It compares and contrasts universalistic approach of human rights with that of cultural relativism and expounds the import of these approaches with their varying trends.

The term “human rights” does not have a distant past. It is a term which came in to everyday language after WWII. As a result, the material discusses the evolution of the human rights movement focusing on this turning point. In the process, the three “generations” of human rights are elaborated along with the underlying motivations shaping them. Attention is then shifted to the International Bill of Human Rights constituting human rights provisions in the UN Charter, the Universal Declaration of Human Rights, the International Covenant on Civil and Political Right as well as the International Covenant on Economic, Social and Cultural Rights. The discussion of these instruments is believed to be directly pertinent as they have been made the integral part of the Ethiopian law by virtue of the FDRE Constitution. The discussion is also prompted by the fact that Article 13(2) of the FDRE Constitution calls up on judicial and other

authorities to interpret the provisions of national legislation in line with the International Bill of Human Rights.

Apart from the discussion of the salient features of the International Bill of Human Rights, there is also elaboration of some of the principal rights protected in there. Furthermore, attention is drawn to other major UN human rights instruments ratified or acceded to by Ethiopia. The material has also dealt with the institutional framework for the protection of human rights apart from the normative aspect. Another unit is devoted for the purpose of discussion charter-based monitoring mechanisms as well. The material has also devoted a separate unit for the discussion of the Ethiopian Bill of Human Rights, the significance and status of human rights treaties under Ethiopian law as well as the enforcement by Ethiopian courts of law of human rights treaties and problems thereto. Issues such as publication are also dealt with. Having dealt with the international as well as Ethiopian human rights law, the material also dwells up on African Regional System for the Protection of Human Rights. Up on the end of this course, you should be able to:

- Define the term human rights;
- Explain the precursors, origins and development of human rights in political, religious, philosophical and moral thought;
- Identify the constituent elements of the International Bill of Human Rights
- Explain the human rights provisions of the Charter of the United Nations
- Discuss the salient features of the Universal Declaration of Human Rights
- Discuss the salient features of the International Covenant on Civil and Political Rights

- Discuss the salient features of the International Covenant on Economic, Social and Cultural Rights
- Elaborate the objectives of other major UN human rights treaties;
- Explain the substantive content of the right to equality and non-discrimination, the right to life, the right to fair trial, freedom of expression, the right to adequate housing, the right to health;
- Explain the Ethiopian Bill of Human Rights under the FDRE Constitution ;
- Explain the status of human rights treaties under Ethiopian law;
- List the distinguishing features of the African Charter on Human and People's Rights
- Identify the monitoring mechanisms of the African Charter on Human and Peoples' Rights.

UNIT ONE

THE NATURE OF HUMAN RIGHTS

Introduction

In this Unit, we shall be discussing the meaning of the term “human rights”. The starting point for any course material on human rights should be explaining the meaning of the term human rights itself. Accordingly, the Unit explores the nature of human rights and its distinguishing features. In this regard, the vantage point of this Unit or its point of departure is that of international human rights instruments. Thus, bear in mind as you go along with your study of this Unit, that the definition of the term human rights is pursuant to international human rights instruments which you will be examining

subsequently. Also, the Unit gives you the opportunity to identify the characteristic features of human rights.

At the end of this Unit, you should be able to:

- Explain the meaning of human rights;
- Identify the justifications for human rights according to international human rights instruments;
- Identify the characteristic features of human rights based on the International Bill of Human Rights; and
- Elaborate the notion of “human dignity”.

1.1 THE MEANING OF HUMAN RIGHTS UNDER INTERNATIONAL LAW

The idea of civil and political rights and individual rights emanate from natural law and its offspring natural rights.¹ These ideas find expression in the writings of John Locke, the father of human rights. They also find expression in famous articulations in American Declaration of Independence and the French Declaration of the Rights of Man and of the Citizen, also in the US Bill of Rights of 1791 of the US Constitution. Though the idea of human rights owes much to these antecedents, it is different from them.²

Justification of Human Rights

This discussion of the term “human rights” is based on the reading of the International Bill of Human Rights i.e. the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights and major UN human rights instruments. The contemporary idea of human rights does not justify itself on natural law, in social

¹ Louis Henkin *et al* (eds), Human Rights, Foundation Press, New York, 1999), p. 2

² Ibid.

contract, or in any other political theory. The justification of human rights is rhetorical and not philosophical. Rather, human rights are derived from accepted principles or required by accepted ends- such as societal ends such as peace and justice; individual ends such as human dignity, happiness, and fulfillment.³

The term “human dignity”, for instance, can be found in the Preamble of the United Nations. The Preamble makes a reference to “the dignity and worth” of the human person”. Also, Article 1 of the Universal Declaration of Human Rights states that “All human beings are born free and equal in dignity and rights.” Human Rights are depicted as deriving from the inherent dignity of the human person. However, there is no explicit definition of the term “human dignity” in many of the instruments. The term “dignity” derived from the Latin expression “*dignitas*”.⁴ The corresponding word in the French language is “*valeur*”.⁵ The term human dignity is understood as to mean intrinsic worth. As a result, the use of the term “dignity and worth” of the human person is said to amount to the use of two synonymous words. Kantian “Categorical Imperative” suggests the term “human dignity” implies treating every person as an end in himself or herself and not as a means to an end.⁶ In other words, individuals are not to be treated as mere instruments or objects of the will of others. For instance, in political context, emphasis on the dignity and worth of individuals gives rise to strong emphasis on the will and consent of the governed.⁷ The idea of human dignity is believed to manifest individual autonomy and responsibility.⁸ A person in destitution,

³ Louis Henkin, *the Age of Rights*

⁴ Philip Alston and Steiner, *International Human Rights in Context*, Oxford, 2000, p. 401

⁵ *Ibid.*

⁶ *Ibid.*

⁷ *Ibid.*

⁸ *Ibid.* p. 402

deprived of adequate means of subsistence, denied the opportunity to work suffers a deep sense of affront to his dignity and intrinsic worth.⁹

1.2 CHARACTERISTIC FEATURES OF HUMAN RIGHTS

Human Rights are Justified, Legitimate and Valid Claims

Human rights are rights of individuals in society. Rights are defined as legitimate, valid, justified claims to goods and of benefits of up on ones' society.¹⁰ Human rights are benefits deemed to be essential for individual well-being, dignity and fulfillment, and that reflect a common sense of justice, fairness and decency. Human rights include immunities i.e. limitations as to what government can do the individual but also resource claims i.e. what society is required to do to the individual. Human rights include liberties- *freedom from* and *freedom to* claims. Examples of *freedom from* claims include freedom from detention, slavery and torture. Examples of *freedom to* claims include *freedom to* speak, assemble and demonstrate.

Human rights are Universal

Human rights are universal i.e. they belong to every human being in every human society. They pertain to all individuals irrespective of geography, history, culture, ideology, political or economic structure, or stage of societal development. The term "human" implies that all human beings possess them despite differences in sex, race, age, birth, social class, national origin, ethnic affiliation, wealth, occupation, talent, merit, religion or ideology.

⁹ Ibid.

¹⁰ Ibid.

Human Rights are Inalienable

Human rights are inalienable and imprescriptible i.e. they cannot be transferred, forfeited, or waived. Human rights are not susceptible of usurpation. Unlike contractual rights, failure to exercise ones' human rights does not lead to their loss. In other words, one does not lose his rights because he failed to exercise or assert them.

Human Rights are Rights

Human rights are rights i.e. they are not merely aspirations, or assertions of the good. The term "human rights" is suggestive of the fact that they are not only desirable or necessary. The term suggests that it is the duty of the society to respect the immunity or provide the benefits. They are claims as of right implying that they are not obtained by appeal to charity, or brotherhood or love.

Human Rights Imply Duties

Human right implies the obligation of society to satisfy those claims. Thus, the state must create institutions, procedures and laws, must plan, must mobilize resources as necessary to meet those claims. Political and civil rights call for laws, institutions, procedures and other safeguards, against tyranny, against corrupt, immoral and inefficient agencies and officials. Economic and social rights in modern society require taxation and spending and a network of agencies for social welfare.

Human rights are claims up on society. Society bears the obligation to satisfy the claims. Political society must not only respect individual claims and immunities, it must also protect the individual from private invasion. Thus, the state must protect the individual from assault by his neighbor and wolves, and also ensure that the individual has bread

and hospitalization. The rights are asserted not against the neighbor, the wolves, the baker or the hospital.

Human Rights are Fundamental

Human rights are fundamental. Life, dignity and other important human values depend on them. This, however, does not mean that they are absolute. Prima facie, they are inviolable. Human rights are trump cards i.e. they beat all others. In other words, human rights are limitations on what the government might do to the individual despite the fact that this governmental action is desirable for the collective goal or general welfare. Thus, individual rights cannot be disregarded even for the sake of the greatest happiness of the greatest number.

The idea of human rights implies that the individual counts, independent of or in addition to his or her part in the common good. The term “human rights” also suggests that autonomy and liberty of the individual must be respected. The right of the individual may only be sacrificed to another’s right when choice becomes inevitable. Human rights are claims up on society not against society, to be exact not against the interest of society. The good society is one in which individual human rights flourish. The human rights idea requires that the rights of the individual be preferred to some other public good.

The society is better if the rights of the individual are protected.

Activity

1. The justification of human rights under international human rights instruments is philosophical. Do you agree? Why or why not?

2. The human person is an end in himself and not a means to an end. Explain.

3. Explain the meaning of human rights as provided under international human rights instruments.

4. Elaborate the import and meaning of the notion of “human dignity” under the Charter of the United Nations and the Universal Declaration of Human Rights.

5. Discuss the characteristic features of human rights as laid down under the International Bill of Human Rights.

1.3 SUMMARY

In conclusion, human rights are regarded as “important”, “moral” and “universal”.¹¹ They have both intrinsic as well as instrumental value. The right holder is entitled to some good or benefit with a correlative duty. Rights include but are not limited to claims against a government to refrain from certain acts such as not to torture its citizens or deny them their freedom of speech. They also include positive claims to resources. They are not mere aspirational goals but claims one asserts as of course.

1.4 SELF-ASSESSMENT QUESTIONS

1. Which one of the following is the justification of human rights under the International Bill of Human Rights?
 - A. The Theory of Social Contract
 - B. The Theory of Natural Rights
 - C. The Theory of Utilitarianism
 - D. None of the above.

2. Which one of the following is not an accepted individual or societal need which requires human rights?
 - A. Human Dignity
 - B. Peace
 - C. Justice
 - D. Fulfillment
 - E. Happiness
 - F. None of the above.

¹¹ Jerome Shestack, *The Philosophic Foundations of Human Rights*, 20 Hum. Rts. Q. p.3

3. Which one of the following is not *freedom from* claim or liberty?
- A. Freedom from torture
 - B. Freedom from slavery
 - C. Freedom from forced labour
 - D. Resource Claims
 - E. None of the above.
4. Human Rights are *rights* in that
- A. They are mere aspirations
 - B. They are mere aspirations of the good
 - C. They are merely desirable benefits
 - D. They are claims by appeal to grace, charity or brotherhood
 - E. None of the above.
5. Which one of the following is true?
- A. Human rights can be waived.
 - B. Human rights can be forfeited.
 - C. Human rights can be stolen.
 - D. Failure to exercise human rights diligently within the right time leads to lapse and expiry of those rights by period of limitation.
 - E. None of the above.
6. Which one of the following is not true?
- A. Human rights are claims against the society.
 - B. The good society is where human rights flourish.
 - C. The society is better off if human rights are respected.
 - D. None of the above.
7. Which one of the following is not required by human rights?
- A. That the state must protect the individual from private invasion
 - B. That the state has to protect the individual from his neighbor or from the wolves

- C. That the state has to provide bread and hospitalization for the individual
 - D. None of the above.
8. Which one of the following is not true?
- A. Human rights are trump cards.
 - B. Human rights beat all other competing claims.
 - C. Human rights constitute limitations as to what the government can do to the individual.
 - D. Human rights can be disregarded for the sake of the greatest happiness of the greatest number.
 - E. None of the above.

UNIT TWO

PHILOSOPHICAL AND RELIGIOUS FOUNDATIONS OF HUMAN RIGHTS

Introduction

The previous Unit discussed the meaning of the term human rights. This Unit explores the contribution of major religious traditions as a foundation for international human rights. The Unit also looks in to major philosophical thoughts which also contributed a great deal to present day international human rights law. The Unit shows how major religious traditions, in particular, Christianity, Islam, Hinduism, Buddhism and Confucianism serve as justifications for international human rights. Moreover, the Unit also discusses how the philosophy of natural law impacted present day international human rights. In this regard, the writings of early Greek philosophers as well as those of the Age of Enlightenment will be concisely reviewed. The consideration of human nature as depicted by different writers including Thomas Hobbes and John Locke will be studied. This discussion is believed to illustrate the philosophical precursors underlying modern-day international human rights.

The comprehension of the philosophies which shape human rights is pivotal for the understanding of modern day international law. Moreover, the understanding of the moral justification of human rights reinforces compliance with human rights. Understanding the moral and philosophical justifications of human rights also promotes discourse among normative divides which is necessary for universal recognition of human rights. Accordingly, this Unit explores several theories of human rights.

At the end of this Unit, you should be able to:

- Identify the several ancestry and origin of human rights
- Explain the meaning of the Golden Rule shared by major religious traditions
- Explain the principal contributions of major religious traditions to the idea of human rights
- Appreciate why major religious traditions stress responsibilities and duties instead of rights
- Explain the contribution of political and moral philosophy to the idea of human rights
- Distinguish between particular law and universal standards on moral justice
- Explain the doctrine of the divine right of kings and its relation to human rights
- Distinguish between natural law and legal positivism
- Identify the reasons for the need to be concerned with the philosophic foundations of human rights;

2.1 RELIGIOUS FOUNDATIONS OF HUMAN RIGHTS

The notion of human rights does not owe its origin to one single ancestry. Instead various elements of human rights can be traced to different origins and ancestry. The term “human rights” is not traced in traditional religions. However, theology does present a foundation of human rights theory based on law higher than positive law or man-made laws with the Supreme Being as its source. Despite their differences, major religious traditions demonstrate dissatisfaction with the world as it is and seek to make it a better place.¹² These religions discourage self-centeredness and encourage behaving

¹² Paul Gordon Lauren, *The Evolution of International Human Rights* (2nd ed PENN, Philadelphia 2003) 5

towards others as we would have them behave toward us. Major Religions of the world manifest what is widely known as the Golden Rule: *Do unto others as you would have them do un to you.*

As stated above, major religions speak of the existence of higher law. The existence of such higher law which is binding on the governor as it is applicable to the governed is captured by the refusal of the midwives to kill all male Israelite babies. Sacred Scriptures attest and reinforce notions of human rights. The Bible says that Adam was created in the “image of God” thereby vesting high value of self-worth in the human person. This Genesis story indeed supports the equality and dignity of man. Certain commentators contend that this concept of man created in the image of God serves to ground a comprehensive human rights system.

Similarly, the Quran reads “surely we have accorded dignity to the sons of man.” One of the pillars of Islam is charity i.e. lifting the burdens of those who are less fortunate.¹³ One of the obligations owed to Allah by believers is respect for all human beings. Islam also teaches that in the sight of God all men are equal and calls for absolute equality among races.

In the same vein, Hinduism stresses the importance of duty or correct action and good conduct towards others.¹⁴ Hinduism also focuses on responsibilities of individuals to others in particular for those who are hungry, sick, homeless and unfortunate.¹⁵ Moreover, Hinduism holds that human life is sacred, to be respected and to enjoy freedom from

¹³ Ibid.

¹⁴ Ibid.

¹⁵ Ibid.

violence.¹⁶ This explains the reason why Mahatma Gandhi, a traditional Hindu, stressed on non-violence and non-injury to others.¹⁷

The founder of Buddhism, Siddhartha Gautama, also thought about ideas of respect for the life of each person and compassion for fellow human beings.¹⁸ He renounced differences of caste and urged individuals to become members of one society. He himself renounced his own royal privileges. He came up with the Ten Duties of Kings in which he stressed the responsibilities of those who govern for the welfare of the people.¹⁹ He called up on people to overcome their selfish desires and private fulfillment and practice charity.²⁰

Confucianism also conveyed the message that harmony exists when people overcome their own self-interest and egotism.²¹ Confucianism held that within the four seas all men are brothers.²² Confucianism depicts human beings as inherently good. Confucianism holds that “do not impose on others what you yourself do not desire”. Confucianism warns those despotic and oppressive governments that rule their people by force and exploit them.²³

Endorsement of a universal common father implies common humanity, thereby universal human rights which are inalienable by virtue of moral authority.²⁴ However, traditional religions stressed more on duties rather than rights. In fact, religions imposed several limitations

¹⁶ Ibid.

¹⁷ Ibid.

¹⁸ Ibid. p.6

¹⁹ Ibid.

²⁰ Ibid.

²¹ Ibid. p.7

²² Ibid. p.7

²³ Ibid.

²⁴ Jerome Shestack, The Philosophic Foundations of Human Rights, 20 Hum. Rts. Q. p.3

on the freedom of the individual to live as one prefers.²⁵ Still fellow men stand to benefit from these duties which were owed to God. Though the Bible recounts the volition and free will of the individual, he was not as such autonomous and is not entitled to do that which is right in his own eyes. The notion of duties is clearly captured in the story of Abel and Cain. Cain responded by saying “Am I my brother’s keeper?” with a view to avoid responsibility and blame, ²⁶ his false response later serving as a basis for subsequent teachings on ethical behavior and social justice.²⁷ In Leviticus, instructions read: “You shall not oppress. You shall do no injustice. You shall love your neighbor as yourself.”²⁸

In conclusion, major religious traditions have made three significant contributions to international human rights law. Firstly, they established ideals and normative standards about the dignity of all human beings which inspired the campaign for human rights. Secondly, these religious traditions established a concept of responsibility toward common humankind. Thirdly, these religious traditions provided for beginning for discussion of human rights by developing concept of duties. Mahatma Gandhi remarked “The true source of rights is duty.”

Activity: Human Rights and Major Religions

1. Do major religions of the world have anything in common when it comes to human responsibilities? Explain.

²⁵ Louis Henkin, *The Rights of Man Today*, 1988, p.3-13.

²⁶ Genesis 4:9

²⁷ Paul Gordon Lauren, *The Evolution of International Human Rights* (2nd ed PENN, Philadelphia 2003) 6

²⁸ Leviticus 19:13, 15, 18

2. Major religious traditions manifest the Golden Rule in their own ways. What do you understand by the Golden Rule?

3. Major religions of the world put more emphasis on the idea of rights of the human being than his duties. Do you agree with this assertion? Why or why not?

4. How does the story of the two brothers, Abel and Cain in the Bible pertain to human rights?

5. Explain the contribution of major religious traditions to international human rights.

2.2 PHILOSOPHICAL FOUNDATIONS OF HUMAN RIGHTS

Apart from major religious traditions discussed above, the contribution of moral and political philosophy to international human rights has been immense. Different strands of political and moral

philosophy dealt with a variety of issues including human nature, social justice, the universality of fundamental principles, moral responsibilities to others, the role of governments in societies, etc.²⁹ The following discussion focuses on the principal philosophies on human rights.

Natural Law

Classical Greek philosophers argued in favor of universal law of nature. They argued universal standard of moral justice exists. These philosophers include Plato, Zeno and Aristotle. Early traces of natural law theory can be found in Sophocles and Aristotle. Aristotle, who was not only a great philosopher but also a theatergoer, used Sophocles' *Antigone* to illustrate natural law. *Antigone* was the sister of Polyneices. Polyneices, who was on King Creon's bad list, was killed in battle, and so the king was determined to deny Polyneices a rightful burial and leave him to the buzzards. *Antigone* assailed the King, defied him, and buried Polyneices, claiming that no King had the right to deny her brother a decent burial.³⁰

Aristotle seized the moment to make out a distinction between particular law on the one hand and universal law on the other hand. Particular law, he stated, is that which each community sets forth and applies to its members. Universal law, he stated, referred to the law of nature. What did *Antigone* mean when she said that the burial of Polyneices was a just act in spite of the prohibition? She means that it was just by nature. Not of today or yesterday it is, but lives eternal: none can date its birth. Therefore, in the eyes of those classical

²⁹ Paul Gordon Lauren, *The Evolution of International Human Rights* (2nd ed PENN, Philadelphia 2003)10

³⁰ *Antigone* remarked to the King: "I did not think your orders were so strong that you, a mortal man, could over-run the god's unwritten and unfailing laws. Not now, nor yesterday's they always live, and no one knows their origin in time."

philosophers, natural law meant those elementary principles of justice which were right reason, i.e. in accordance with nature, unalterable and eternal.

The Stoics and Cicero did not necessarily view natural law as invalidating and justifying man-made laws. Instead, natural law was perceived as a standard for making, developing and interpreting law so that such laws are consistent with nature. Natural law theory underscored the duties of societies in an orderly cosmos. The duties of societies were to become the rights of the individual. The rights of “conscience” and the right to refuse to commit “unjust” acts were to figure prominently among those natural rights. The Stoics believed that natural law can be discovered through “right reason.” Marcus Tullius Cicero argued that natural law existed ages before any written law existed or any state had been established. *Institutes* of Justinian provided that the principles of law are to live honestly, to hurt no one and to give every one their due. The *Institutes* of Justinian also provided that “Justice is an unswerving and perpetual determination to acknowledge all men’s rights.”³¹ The remarkable law of *jus gentium* was developed based on these principles by Roman jurists.³²

In medieval and early modern Western philosophy, much of the discussion on politics focused on the divine right of kings. The divine right of kings means only the monarch held his place in society by nature and through the will of God. All other individuals are subservient to the monarch. The only power they had was that which was given to them by the monarch. These ideas were articulated by Thomas Hobbes (1588-1679). In his book, *Leviathan*, published in

³¹ Paul Gordon Lauren, *The Evolution of International Human Rights* (2nd ed PENN, Philadelphia 2003) 13

³² Ibid.

1651, Hobbes wrote about what constituted pre-social human nature. In his book, Hobbes argued that human beings are violent and greedy animals, and in their state of nature would have lived in anarchy. However, out of their strong desire for self-preservation and personal security, they came together to establish a set of rules. Individuals surrendered their personal freedoms to the King (the state) in return for the security it offers. Therefore, the King has the *right* to rule and the subjects have the *duty* to obey. This is the basis of what Hobbes and subsequent writers called The Social Contract. The ideas originated by Hobbes were subject to criticism. Some contended that his ideas justified authoritarian government. His defence of the right of the King to rule, however, was justified as it was based on the consent and needs of the people. In effect, while Hobbes was defending the right of the King to rule, he was justifying also the right of the individual to personal security. Therefore, the legitimacy of the state is its ability to provide personal security to its subjects. In the event, the state is unable to ensure security of its citizens, and then the people have the power to overthrow it.

It was, however, the 17th Century English Philosopher John Locke (1632-1704), the father of human rights, who suggested for the first time that there are such things as natural rights. He believed that natural law entailed natural rights. The seventeenth century saw, among others, scientific revolution in fields of mathematics, physics, astronomy and medicine. This period is also known as the Age of Enlightenment. This scientific revolution encouraged the belief that reason can discover not only rational and universal laws in nature but also in human affairs.³³ In *De jure belli et pacis*, (On the Law of War and Peace, 1625), Hugo Grotius contended that natural law existed

³³ Ibid.

independently of any political power or authorities.³⁴ Thus, he argued, natural law is placed above all human-created governments and served as a yardstick against which the laws and practices of any regime could be measured and judged. He further stated that natural law provided all humans with certain “natural right” of protection and just and equal treatment irrespective of religious and civil status.

The period was also characterized by upheavals and rebellions. Rebellions in France and Spain advocated for the right to resist abusive and absolutist governments.³⁵ The Dutch Declared in their revolution that:

“God did not create the subjects for the benefit of the Prince, to do his bidding in all things, whether godly or ungodly, right or wrong, and to serve him as slaves, but the Prince for the benefit of the subjects... to govern them with justice and reason.”³⁶

John Locke was arguably the most prominent natural law theorist of modern times. Natural law theory led to natural rights theory, the theory most closely associated with modern conception of human rights. He built up on the contractarian tradition to argue that individuals have rights by virtue of the fact that they are human. These rights, he suggested, are threefold: the right to life, liberty and property. He argued that these rights existed in the state of nature before humankind entered civil society and set up a body politic.

According to John Locke, these rights are universal, inalienable and cannot be removed by any political authority. Unlike Hobbes, Locke argued that pre-social humans are peaceful and free. According to

³⁴ Ibid.

³⁵ Ibid.

³⁶ 1581 Dutch Act of Abjuration

Locke, the state arose out of the occasional need for an independent arbiter for disputes which arise out of trade and property. In effect, John Locke used the notion of rights as an attack against the idea of strong state. Humankind only surrendered the right to enforce the rights to life, liberty and property not the rights themselves. The state is under contract to safeguard the interests of its members. Failure to safeguard the rights, gives rise to a popular, responsible revolution. In this sense, human rights form the basis of the legitimacy of the modern state. Put simply. Human rights are the creator and master of the modern state.

The theory of natural rights was the philosophic impetus for the wave of revolt against absolutism during the late eighteenth century and early 19th century.³⁷ It provided the rationale for the wave of revolutionary agitation which swept the West in particular France and North America. The idea of natural rights as the sole justification of any political association including the state was a challenge to all established political authority.³⁸ The theory of natural rights is evident in the French Declaration of the Rights of Man, in the US Declaration of Independence, in the constitutions of many states created up on liberation from colonialism, and in the Principal UN Human Rights Instruments.³⁹

Activity 2:

1. Explain as to how Aristotle tried to distinguish between particular law and higher or natural law using the play by Sophocles.

³⁷ Burns Weston, Human Rights, 20 New Encyclopedia Britannica (15th ed 1992)

³⁸ David Sidorsky, Contemporary Reinterpretations of the Concept of Human Rights, Essays on Human Rights (1979), p.89

³⁹ Shestack

2. Explain the meaning of the “divine right” of kings.

3. Discuss as to why the right to personal security is the logical conclusion of Hobbes’ defence of the divine right of the King.

4. Explain as to why John Locke is referred to as the father of human rights. Also, outline the main points of Locke’s theory of natural rights.

5. John Locke’s theory of natural rights compels the conclusion that human rights are the creator as well as the master of human rights. Explain.

6. Discuss the impact of the theory of natural rights on the revolutions which swept the West during the 18th and early 19th centuries.

Thomas Paine (1737-1809) was the most influential proponent of the idea of human rights in the Eighteenth Century. He published his book *The Rights of Man* in 1791-2. He was a firm believer in the idea of the sovereignty of the individual person and the sovereignty of the people (popular sovereignty). For him, representative government is freedom. Paine was a supporter of Locke and advocated for minimal state intervention and the right of the people to education and social welfare. The book, *Rights of Man*, was written as an attack on Edmund Burke who denounced the French Revolution of 1789. Burke also rejected the idea of natural rights and universal rights.

Paine, however, supported the Revolution as well as the subsequent approval of the Declaration of the Rights of Man and the Citizen in 1789. He contended the formal establishment of rights within the political sphere was essential for the establishment of social justice. The two revolutions of his age, he said, are perfectly justifiable since they represented the awakening of the people from their forced slumber and, more importantly, they led to the signing of two documents in which the rights of the individual were enshrined legally and positively. Paine justified rights of mind and personal happiness and freedom by resort to pre-social nature of man, which in his case was the act of Creation. Paine contended constitutionalism as the right of man. He further argued that constitutionalism is the foundation for all rights of man.

However, the theory of natural rights became unpopular among legal scholars and philosophers. The attack on natural rights started during

the late 18th century, but it intensified and broadened during the 19th and 20th centuries. The principal criticism was that rights considered to be natural differ with from theorist to theorist, depending up on their conceptions of nature. Moreover, the fact that the rights were formulated in absolutist terms- inalienable, unalterable, eternal, natural rights came in to conflict with one another. In England, Edmund Burke and David Hume criticized natural rights fearing that public affirmation of natural rights leads to social upheaval. Burke characterized human equality as a monstrous fiction, which inspires false ideas and vain expectations in men destined to travel the obscure walk of laborious life. Hume stated that natural rights are unreal metaphysical phenomena. The most serious criticism on natural law came from the theory of legal positivism. One of the most notable positivists, Jeremy Bentham, criticized natural rights by stating that affirmations, declarations of natural rights would replace effective legislation. Bentham wrote "Rights is the child of law, from real law come real rights; but from imaginary laws, from "law of nature" come imaginary rights....Natural rights is simple nonsense, nonsense up no stilts." As a result of this, there was barely any theorist who supported and defended natural rights after late 19th century.

Jean-Jacques Rousseau (1712-1778) argued in his famous book *The Social Contract* that men reached a point where it is no longer possible to live in the state of nature due to the increasingly formidable hindrance and obstacle individuals were facing. As a result, to change their mode of existence was the only option available to them. Men agreed up on creating a sum of forces to overcome the resistance to their survival and that they can act in concert. Since it is no longer possible for the individual to remain as free as he was in the state of nature, the individual has compacted to alienate oneself along

with one's right entirely to the community. This differs from John Locke's argument that the individual relinquished only his executive power in the state of nature and all of his rights. This is the reason why Rousseau is commonly associated with those who reject the idea of human rights. For Rousseau, each individual will be subject to the general will after society is established. He stated that by the social contract each of us places his person and all his power in common under the supreme direction of the general will; and as one we receive each member as an indivisible part of the whole. Man retains no liberty once he joined the social contract.

The German Philosopher Immanuel Kant (1724-1804) is credited for laying the groundwork for modern day understanding of human rights as ethical practice. For Kant, the sole incontrovertible right is the right to freedom. He is also credited for having recognized fundamental human dignity, which subsequently found its way to contemporary human rights thinking as was discussed in the first Unit. Kant's belief in justice was based on what he termed as categorical imperatives of moral action. For Kant, categorical imperative meant that human beings should always conduct their actions by such maxims as they themselves could will to serve as universal laws and to act as to treat humanity as an end and never a means to an end. According to this, a principle becomes up on fulfillment of three formulae. First, it must be universal. Act only according to that maxim whereby you can at the same time will that it should become a universal law. The second formula is the formula of the end in itself. Act in such a way that you treat humanity, whether in your own person or in the person of any other, always at the same time as an end and never merely as a means. The third formula is the formula of kingdom of ends. Therefore, every rational being must so act as if he were through his maxim always a legislating member in

the universal kingdom of ends. Some argued that the Categorical Imperative is the same as The Golden Rule. The gist of the “Categorical Imperative” is a universal duty to protect the intrinsic worth of all individuals in order that human beings are never treated as means, but always as ends in themselves.

The theory of legal positivism was the most serious criticism against natural rights. The theory of legal positivism dominated the 19th century and commanded wide allegiance in the 20th century. Classical positivists contend that all authority stems from what the state and officials have issued or prescribed. Accordingly, the source of human rights is the edicts and enactments of a system of law with sanctions attached thereto. Views on what the law ought to be are worthless for the positivists. Positivism denies the moral philosophic basis of human rights. Thus, positivists contend that law must be obeyed no matter how immoral it may be. Thus, the anti-Semitic enactments of the Nazis or apartheid laws need to be obeyed as law though they may be repugnant to moral law. As a result, the principal criticism against positivism provides that it justifies obedience to abhorrent laws.

2.3 SUMMARY

The foregoing discussion in the preceding sections concisely surveys the principal tributaries of present day international human rights. It has been stated that major religious traditions have made three significant contributions to international human rights law. Firstly, they established ideals and normative standards about the dignity of all human beings which inspired the campaign for human rights. Secondly, these religious traditions established a concept of responsibility toward common humankind. Thirdly, these religious

traditions provided for beginning for discussion of human rights by developing concept of duties.

Apart from religious traditions, emphasis has been placed on the doctrine of natural right whose contribution to present day international human rights is significant. It has been stated that doctrine of natural law can be traced as far back as Classical Greek philosophers who argued in favor of universal law of nature. The attempt to make distinction between particular laws i.e. laws which each community sets forth and applies to its members and universal law referred to the law of nature has been since Aristotle and Sophocles. According to these Classical Greek Philosophers, natural law is the standard for making, developing and interpreting law so that such laws are consistent with nature. These ideas were further carried by the Romans who argued that the principles of law are to live honestly, to hurt no one and to give every one their due.

These theories depart from the previous doctrine of the divine right of kings which means only the monarch held his place in society by nature and through the will of God. All other individuals are subservient to the monarch. The only power they had was that which was given to them by the monarch. Some contended that his ideas justified authoritarian government. His defence of the right of the King to rule, however, was justified as it was based on the consent and needs of the people. In effect, while Hobbes was defending the right of the King to rule, he was justifying also the right of the individual to personal security. Therefore, the legitimacy of the state is its ability to provide personal security to its subjects.

The discussion amplifies how natural law theory led to natural rights theory, which is the theory most closely associated with modern

conception of human rights. John Locke has contended to build the contractarian tradition to argue that individuals have rights by virtue of the fact that they are human. In particular, he stressed the rights to life, liberty and property.

The Unit also touched up on the contention on the part of Thomas Paine that the formal establishment of rights within the political sphere was essential for the establishment of social justice. The consideration of the arguments put forward by Jean-Jacques Rousseau also helps explain why he is usually associated those who reject the notion of human rights. The criticism against idea also comes from positivists like Jeremy Bentham whose criticism of natural rights appears to be very sever.

2.4 SELF-ASSESSMENT QUESTIONS

1. Which one of the following is true about Buddhism?
 - A. Buddhism teaches about respect for life of each person.
 - B. Buddhism calls up on believers to renounce class and rank and be members of one society.
 - C. Buddhism encourages individuals to practice charity by overcoming their own selfish desires and private fulfillment.
 - D. According to Buddhism, the problems of the world can be solved by showing kindness and love.
 - E. All of the above.

9. Which one of the following is true about Confucianism?
 - A. Confucianism calls for individuals to lead ethical life and display responsibility to others.
 - B. Confucianism depicts human nature as inherently good.

- C. Confucianism calls up on believers not to impose on others what they themselves do not desire.
 - D. Confucianism teaches believers to overcome self-interest and not to harm one another.
 - E. All of the above.
10. Which one of the following is true about Christianity?
- A. The theme of responsibility to others and compassion is manifested in Christianity.
 - B. Christianity demonstrated respect for women, children and outcasts.
 - C. The teachings of Christianity show that human beings are endowed with dignity and worth.
 - D. According to Christianity, one is his brother's keeper.
 - E. All of the above.
11. Which one of the following is the contribution of major religious traditions?
- A. They established ideals and normative standards about the dignity of all human beings which inspired the campaign for human rights.
 - B. Religious traditions established a concept of responsibility toward common humankind.
 - C. Religious traditions provided for beginning for the discussion of human rights by developing concept of duties
 - D. All of the above.
12. Which one of the following is not a proponent of universal law of nature?
- A. Classical Greek Philosophers
 - B. Jeremy Bentham

- C. Thomas Hobbes
 - D. Edmund Burke
 - E. David Hume
 - F. None of the above.
13. Which one of the following characterizations about universal standards on moral justice is true?
- A. Universal standards on moral justice are superior to self-serving and narrow man-made laws.
 - B. Universal standards on moral justice transcend immediate circumstances.
 - C. Universal standards of moral justice are egalitarian and rational.
 - D. Universal standards of moral justice can be identified through "right reason."
 - E. Universal standards on moral justice are unalterable and eternal.
 - F. All of the above.
14. Which one of the following is not the principle of law according to the *Institutes* of Justinian?
- A. Living honestly
 - B. Hurting no one
 - C. Giving every one his due
 - D. None of the above.
15. Which one of the following rights is implied in Hobbes' defense of the divine right of the King?
- A. The Right to Property
 - B. The Right to Liberty
 - C. The Right to Self-Preservation and Personal Security
 - D. The Right to Freedom of Speech
 - E. None of the above.

16. Which one of the following is not among the rights John Locke considered to be natural rights of human beings?
- A. The Right to Life
 - B. The Right to Property
 - C. The Right to liberty
 - D. The Right to Assembly
 - E. None of the above.

UNIT THREE

UNIVERSALISM vs. CULTURAL RELATIVISM AND NATIONAL SOVEREIGNTY

Introduction

In this Unit, you will study the notions of universalism and cultural relativism. You will identify the differences existing between the two. You will see the position of international human rights law on these matters. Moreover, the Unit will also acquaint you with the different strands of universalism and cultural relativism. The Unit also dwells on arguments in favor and against universalism as well as cultural relativism. In this connection, the Unit also examines the relationship existing between sovereignty and human rights.

At the end of this Unit, you will be able:

- Define universalism
- Define cultural relativism
- Identify arguments in favor and against universalism
- Explain arguments in favor and against cultural relativism
- Explain the conceptual , functional, moral relationship between human rights and sovereignty
- Identify the different types of cultural relativism and universalism

3.1 THE MEANING OF UNIVERSALISM AND CULTURAL RELATIVISM

There was no substantial objection to the universality of human rights up on the adoption of the UDHR in 1948. Universalism holds that rights are everywhere and everywhere the same. In other words, it holds that there is a set of moral principles which are universally valid

as standards of judgment. Therefore, international human rights instruments use expressions like “everyone” has the right to liberty, “all persons” are entitled to equal protection, “no one” shall be subjected to torture, and “everyone” has the right to adequate standard of living. Challenges to the idea of universality of human rights began to emerge following the drawing to an end of the Cold War. At the 1993 Vienna Convention on Human Rights some states led by China declared that human rights must be interpreted against the backdrop of cultural differences. This position is referred to as cultural relativism.

Cultural relativism refers to the position that local cultural traditions determine the existence and scope of civil and political rights to be enjoyed by individuals. Accordingly, there are no universal principles according to which human rights practices may be judged acceptable or unacceptable. For the relativists human rights standards vary among cultures. The term culture in this context is widely construed to include not only indigenous traditions and customary practices but also political and religious ideologies. What may amount to a violation of human right in one culture, may be properly lawful in another.

According to the relativists, Western society must refrain from projecting its values and creeds on to the Third World as there is no transcendent, trans-boundary or trans-cultural ideas of right on which all cultures converge. The meaning of human rights norms which exist as a matter of treaties or declarations vary from culture to culture. Moral rights and rules differ since the cultures in which they are rooted differ. Claims of universality amount to “cultural imperialism” of the West.

Some writers make distinction between radical universalism and radical relativism.⁴⁰ Radical universalism holds culture is irrelevant to the validity of moral rights and rules, which are universally valid. Thus, radical universalism amounts to a complete denial of national and sub national ethical autonomy and self-determination. It is criticized as moral imperialism.

Radical relativism, on the other hand, holds culture is the sole source of the validity of a moral right or rule. Accordingly, principles or right or wrong are valid only for the members of the society in which they are found. This version of relativism is akin to the Boasian version of ethical relativism, named after Franz Boas who called for tolerance i.e. respect for the freedom of foreign people to live the way they choose. The values of the American-middle class are valid only for the American middle-class. It contends that we ought to respect others' ways of life. Other people should be left to conduct their affairs the way they please according to their cultural values and beliefs in the society. According to radical relativists, societies should be left to define "civilization" for themselves. Thus, it upholds the status quo.

Relativism is further divided as strong cultural relativism and weak cultural relativism. Strong cultural relativism posits culture as the principal source of the validity of moral right or rule, whereas weak cultural relativism contends that culture is an important source of the validity of a moral right or rule. In the case of strong cultural relativism, universal human rights standards serve as a check on potential excesses of relativism. In the case of weak cultural relativism, human rights standards serve as a check on potential excesses of universalism. Thus, weak cultural relativism admits of comprehensive set of prima facie universal human rights standards,

⁴⁰ Jack Donnelly, *Universal Human Rights in Theory and Practice*, 1989, P. 109-114.

water down by occasional and strictly limited local variations and exceptions.

3.2 THE UNIVERSALIST-RELATIVIST DEBATE

During the Cold War, the universalist-relativist debate was taking place between the communist world and Western democracies. Cultural and value differences between the West and East were stressed by many delegations to the Vienna Conference on Human Rights in 1993. A prominent contention is that Asian values do not regard freedom as important as it is regarded in Western societies. The foreign minister of Singapore warned that the universal recognition of the human rights idea can be harmful if it is used to mask cultural diversity. The foreign minister of China went to the extent of proposing that individuals should put the rights of the state before their own.

Amartya Sen argues, however, that it is difficult to speak of Asian values in a continent where 60 percent of the world lives. Moreover, though Confucius stressed on the importance of order and discipline, there were also writers like Plato and Augustine in the Western world who did the same. He argues that there are a variety of freedom-oriented perspectives in Asia as well. For example, he mentions Buddhism as well as earlier traditions of Indian thinking which stressed on the value of freedom and free choice and volition or free will.

The contention of Asian Values is further criticized for using state sovereignty and the concept of socioeconomic rights as a shield to protect it self from pressure to implement civil and political rights. However, by so doing it disregards the conceptual, functional as well

as moral connections between the concepts of state sovereignty and human rights.

The concepts of sovereignty and human rights have close conceptual relation. At the level of international relations, sovereignty signifies the equal and autonomous status of the state. The equality and autonomy of the states is the extrapolation of the equal and autonomous status of the individual on interpersonal relation. State sovereignty protects weaker states from hegemonic states as human rights protect weaker individuals and minorities. In view of this conceptual homology between the two concepts, it is a contradiction to profess devout allegiance to sovereignty, and disregard the call for the implementation of human rights.

Second, human rights are the compensatory functional complement of sovereignty. The centralization of power in the modern sovereign state encroached up on the medieval system of power dispersed among various authoritative organizations (e.g. church, guilds, cities and so on) each of which had status-specific privileges and vested rights. As a result, individuals were divested of the protective shield provided by these institutions and rendered defenseless exposed to the power of the state. Human rights and separation of powers filled the void by replacing the destroyed medieval safeguards against state tyranny.

Thirdly, although the medieval centers of authority served as safeguards against state tyranny, they exposed the individual to their own social tyranny. Human rights are the moral basis of sovereignty. By destroying the medieval centers of authority, the state liberated the individuals from the internal oppression and status discrimination inherent in those social structures. This heralded the advent of the

sovereign state as the liberator of the individual. Thus, sovereignty requires not only as a compensation for the social structures it dissolved, but also as a positive justification for its emergence. The modern theories of social contract imply the state should be allowed to exist in so far as human rights are both its creator and master. Therefore, critics say that the use of sovereignty to counter claims of human rights is not proper.

Activity

1. Is the use of domestic jurisdiction to counter claims for implementation of human rights tenable? Why or why not?

2. Identify and distinguish between the different strands of universalism and cultural relativism.

3. Explain why it is a contradiction to profess allegiance to sovereignty and disregard implementation of human rights.

3.3 SUMMARY

This Unit explored the universalist-relativist debate. It also defined the notions of universalism and cultural relativism. The Unit shows the fact that the international human rights instruments are bent on embracing universalism than cultural relativism. The different strands of universalism as well as cultural relativism were also examined. The Unit dwelt up on how the debate manifested during the course of the Vienna Conference on Human Rights in 1993. The Unit also scrutinized the conceptual, moral as well as functional link between notions of human rights and sovereignty.

3.4. SELF-ASSESSMENT QUESTIONS

1. Which one of the following is true?
 - A. The difference in opinion as regards universalism and cultural relativism became evident in the course of drafting the UDHR.
 - B. International human rights instruments embrace cultural relativism much more than universalism.
 - C. Asian states are arduous supporters of universalism.
 - D. None of the above.

4. Which one of the following is true?
 - A. Radical cultural relativism holds culture is irrelevant to the validity of moral rights and rules, which are universally valid.
 - B. Radical cultural relativism amounts to a complete denial of national and sub national ethical autonomy and self-determination.
 - C. Radical universalism holds culture is the sole source of the validity of a moral right or rule.

D. None of the above.

5. Which one of the following is true?

A. Weak cultural relativism posits culture as the principal source of the validity of moral right or rule.

B. Strong cultural relativism contends that culture is an important source of the validity of a moral right or rule.

C. For weak cultural relativism, universal human rights standards serve as a check on potential excesses of relativism.

D. None of the above.

6. Which one of the following is not true?

A. Asian government delegates at the Vienna Conference on human Rights argued Asian values do not regard freedom as important as it is regarded in Western societies.

B. Certain Asian government delegates at the Vienna Conference argued the universal recognition of the human rights idea can be harmful if it is used to mask cultural diversity.

C. The Chinese government delegation at the Vienna Conference went to the extent of proposing that individuals should put the rights of the state ahead their own.

D. None of the above.

7. Which one of the following is true?

A. There is a conceptual relation between human rights and sovereignty.

B. There is a functional relation between human rights and sovereignty

C. There is a moral relation between human rights and sovereignty.

D. All of the above.

UNIT FOUR

THE PROMOTION AND PROTECTION HUMAN RIGHTS AFTER WWII

Introduction

In this Unit, the discussion focuses on the evolution of international human rights following the establishment of the United Nations. In the mean time, the Unit tries to elaborate the motivations behind endorsement by the world community of the three “generations” of human rights. The introductory parts of the Unit are devoted for the discussion if the human rights provisions in the Charter of the United Nations create effective machinery for the protection of human rights. Moreover, the Unit will explore the reasons for the adoption of the Universal Declaration of Human Rights and the International Bill of Human Rights in general.

At the end of this Unit, you should be able to:

- Identify the causes for the proclamation at all levels of standards on the respect of human dignity
- List the Four Freedoms stressed by the then President of the United States President Roosevelt
- Identify the different positions taken by states at the San Francisco Conference on the role of the United Nations in the promotion and protection of human rights
- Explain which alignment of states appear to have won the upper hand by pinpointing the human rights provisions in the Charter and other provisions
- Identify the contribution of the United Nations for the promotion and protection of human rights in general

- Explain the Western Doctrine of Human Rights
- Explain the Socialist Doctrine of Human Rights
- Explain the Third World Doctrine of Human Rights

4.1 HUMAN RIGHTS PROVISIONS IN THE CHARTER OF THE UNITED NATIONS

The immediate aftermath of the Second World War represented a turning point in the promotion of human rights. The victors of the Second World War came to the belief that the horror and atrocities witnessed during the course of the war are the result of a vicious philosophy based on utter disregard for the dignity of mankind.⁴¹ The victors also proposed two approaches a means of preventing a return to these kinds of atrocities in the future.⁴² The first approach they followed was the enactment of international criminal law to punish those who are responsible for crimes against peace, war crimes and crimes against humanity. The second approach, which is the more relevant approach in this context, was the proclamation at all levels of standards on the respect of human rights.

So far as the proclamation at all levels of standards on the respect of human rights was concerned, the lead was taken by Western states and in particular by the US President Roosevelt. In his Four Freedoms Speech on January 6, 1941, he outlined four lofty principles. These include the freedom of speech and expression, freedom of every person to worship God in his own ways, freedom from want and freedom from fear. Freedom from want meant securing every nation a healthy and peaceful life for its inhabitants. Freedom from fear meant world-wide reduction of armaments so that no state can conduct acts

⁴¹ Antonio Cassese, *International Law in a Divided World* (Clarendon Press, 1986), 289

⁴² *Ibid*, p.190

of aggression against its neighbors. These lofty concepts were later taken up by the US Delegation to the Dumbarton Oaks Conference in 1944. The Delegation, in its “US Tentative Proposals for a General International Organization”, suggested that the General Assembly of the International Organization would be responsible for initiating studies and making recommendations ... for the promotion of the observance of basic human rights in accordance with the principles or undertakings agreed up on by the States members of the International Organization.⁴³

This proposal was indicative of the fact that the US, the very same country which championed the cause of human rights, was cautious in its approach. The part of the proposal referred to above shows that the US wanted the Organization to have limited powers and the international standards on the respect of human rights by which member states were to be guided were first to be accepted by traditional process of treaty making. These proposals by the US were later further weakened when UK and USSR opposed the US at the Dumbarton Oaks Conference. When this water down provisions on human rights was submitted to the San Francisco Conference in 1945, there was spate of bold amendments, mostly from Latin American Countries. These bold amendments coupled with the fact that the USSR changed to the human rights cause, prompted the Four Powers (UK, USSR, US and China) to strengthen their initial proposals on human rights.⁴⁴

Three alignments of states emerged in the course of the San Francisco Conference. The first alignment consisted chiefly Latin American states like Brazil, Panama, Uruguay, Chile, Cuba, the

⁴³ Ibid, 294

⁴⁴ Ibid, 295

Dominican Republic, Ecuador and Mexico. In addition, there were also some western nations such as Australia, New Zealand and Norway. Also, included in the first alignment of states were some third world nations such as India. This alignment of states called for a definite obligation to respect human rights in the Charter of the UN. The second alignment of states includes major Western nations led by the US. The second alignment of states was opposed to the idea of setting out a definite obligation to respect human rights and also insisted up on the inclusion of a safeguard clause in the Charter to protect national sovereignty. This provision later became Article 2(7) of the Charter of the UN on domestic jurisdiction. The third alignment of states included socialist countries led by the then USSR. This alignment shared the same attitude with the major Western states in that the states were opposed to the inclusion of a definite obligation to respect human rights in the Charter. The one difference they have lies in the insistence of the socialist countries up on the right to self-determination and non-discrimination.⁴⁵

Up on the culmination of the Conference, the first alignment of states did not achieve substantial gains. Instead, there was a compromise between the socialist states and the Western powers. The Charter of the United Nations was adopted on June 26, 1945. Some of the major points of the compromise between these groups of states include the following:

1. No specific obligation to take separate action to promote human rights, let alone to protect under Article 56 of the UN Charter.
2. The right to self-determination was proclaimed under Articles 1 and 55 of the Charter.

⁴⁵ Ibid.

3. The weak powers vested in the General Assembly of the UN was further weakened by the inclusion of the provision on domestic jurisdiction of the Charter i.e. Article 2(7).
4. Respect for human rights was furthered as a means of securing peace.

The foregoing discussion shows that human rights provisions in the Charter of the UN are few and terse. Moreover, there is no language of obligation in the Charter which mandates the UN to protect human rights. Instead, the UN was mandated to promote the observance of basic rights. These shows the initial momentum shown on the part of the victors of the Second World War was later water down. The very same countries which initially championed the human rights cause like the US made sure the UN would have only limited powers in the promotion and protection of human rights. The reason for this is the fact that there were *de jure* and *de facto* laws in the US and other Western states were still colonial powers. Thus, if the UN was to have effective power in terms of protecting human rights and fundamental freedoms, this would expose these same nations for stronger scrutiny.

In view of the fact that the power vested in the organization was weakened, the UN had two options. First, it can become a regular diplomatic conference confined to standard setting. Secondly, it can demand states to account when they commit egregious violations of human rights. Subsequent developments show that the UN in fact opted for the second approach.⁴⁶

Despite the limitations in its constitutive Charter, the United Nations has achieved tremendous lot in terms of promoting and protecting international human rights. Irrespective of its weakness, the adoption

⁴⁶ Ibid, p.296

of the Charter has also led to many important outcomes. Three of these important outcomes of the human rights provisions of the Charter of the United Nations are discussed as follows.⁴⁷ Firstly, the Charter of the United Nations has internationalized human rights. This is a tremendous achievement in that before the adoption of the Charter of the United Nations; generally human rights were regarded as domestic matters. Following the adoption of the Charter of the United Nations, it is no longer possible for a state member to contend that human rights are domestic matters.

Secondly, the obligation of member states of the United Nations to cooperate with the Organization in the promotion of human rights and fundamental freedoms has provided the United Nations with the legal mandate to undertake large scale effort to define and codify these rights. This has led to a veritable code of human rights including the International Bill of Human Rights and other major United Nations human rights instruments to be discussed in this material. Thirdly, the United Nations has managed to clarify the meaning of the obligation to “promote” human rights. The obligation to promote has led to the creation of numerous international monitoring mechanisms including Charter-based and treaty-based organs discussed in this course material.

Antonio Cassese demonstrates the fact that the UN took the second option of holding states accountable for gross violations of human rights as mentioned above by classifying the subsequent developments into three different stages. The first stage starts from 1945 until late 1950s. The second stage extends from 1960s to mid-1970s. The third stage commences from mid-1970s and extends to

⁴⁷ Thomas Buergenthal, *International Human Rights in a Nutshell* (West Group, 1995) 25

present day. These three stages correlate with the generational metaphor suggested by the Czech human rights law expert *Karel Vasak* in the 1970s. Thus, civil and political rights are said to be the first generation of human rights, economic, social and cultural rights are said to be the second generation of human rights. Lastly, rights of the people are said to be the third generation of human rights.

Activity

1. The victors of the Second World War reached a consensus as to the reasons or explanation for the atrocities witnessed during the War. Explain what the consensus between these countries was for the atrocities and indicate the solutions they decided to embark up on to prevent future conflicts.

2. Do you believe that the victors of the Second World War continued championing the cause of human rights as strongly as they did initially? Why or why not?

3. At the San Francisco Conference in 1944, different positions emerged as to the role of the United Nations in the promotion and protection of human rights. Identify these positions and state as to which position gained the upper hand.

4. What are the major contributions of the United Nations for international promotion and protection of human rights?

4.2 THE FIRST STAGE OF INTERNATIONAL PROTECTION OF HUMAN RIGHTS (1945 to the late 1950s)

The Western doctrine of human rights was the domineering doctrine of human rights in the first years following the adoption of the UN Charter. The major points of western doctrine of human rights are the following:⁴⁸

1. though it may be difficult to rank human rights, civil and political rights are of primary importance
2. the right to self-determination is not a full right of peoples
3. international treaties in the field of human rights laying down obligations need to be as clear and precise as possible, treaties using woolly and generic terms should be avoided
4. The adoption of treaties is not sufficient; it must be accompanied by international monitoring mechanisms.

⁴⁸ Antonio Cassese, *International Law in a Divided World* (Clarendon Press, 1986), 297

5. The promotion of human rights is an end to be pursued in its own right, and not to be subordinated to friendly relations between states.

The motivations behind this doctrine are multifold.

1. The West gave preference for civil and political rights as their historical and political philosophy of western nations is based on these rights. Thus, the West wanted to project its creeds and values on to the international arena.
2. Socialist countries are at a disadvantage when it comes to civil and political rights. Therefore, the West realized that civil and political rights can be used as ideological weapon to criticize socialist states.
3. Insistence on international implementation monitoring mechanisms is due to the belief that a rule can be legal so far as it lays down clear standards of behavior accompanied by effective sanctions.
4. The insistence on monitoring mechanisms was also prompted by the fact that such mechanisms are effective as against civil and political rights.
5. Preference to treaties was due to the fact that treaties are more adaptable and flexible as they do not bind states unless they give their consent thereto.

4.3 THE SECOND STAGE OF INTERNATIONAL PROTECTION OF HUMAN RIGHTS (1960 to the Mid 1970s)

The Socialist doctrine of human rights dominated the second phase of the international protection of human rights. This was the stage when economic, social and cultural rights, also known as the second

generation of human rights, became more apparent. Socialist countries prefer these rights along with the right to self-determination and the right to equality or non-discrimination. This explains, partly, the reason why socialist countries opted to abstain in the adoption of the UDHR on December 10, 1948. These countries were not very happy as there was little emphasis placed on economic, social and cultural rights. As the socialist countries were a minority by the time the UDHR was adopted they were unable to have these rights declared in the Declaration in detail.⁴⁹

However, the period from late 1950s until mid-1970s marked the strengthening of the socialist camp. This was for two reasons. First, four Eastern European countries were admitted to the UN. Second, the Cold War was drawing to an end. Furthermore, the socialist countries were supported by growing number of Third World countries which joined the UN in the late 1950s and early 1960s. The socialist countries have also perfected their doctrine of human rights by the time.

What are the major points of the socialist doctrine of human rights? The socialist doctrine of human rights asserts that the Charter of the UN and later UN documents have given a rise to a principle by virtue of which all states must respect human rights. Therefore, the doctrine provides that all states must take the necessary legislative steps to comply with this principle. Once states have done so, the question of respect for human rights becomes an internal question. Thus, it is up to the laws of each state to recognize these rights and up to national authorities to safeguard their enforcement. Individuals should not be permitted to petition international organizations as regards violations of rights. Instead, they must remain content with national remedies.

⁴⁹ Ibid., p. 300

Other states must not interfere in this process. Instead, other states and the UN must take in to account the following points:

1. Other states and the UN must not interfere in the internal affairs of the state
2. Care must be taken that the international protection of human rights from endangering friendly relations between states and peace and security.
3. The role of the UN should be limited to the elaboration of international instruments for ratification
4. The UN should concern itself with individual countries only where there are exceptional circumstances i.e. when a state commits serious, repeated and systematic violations of human rights.

What were the motives behind this socialist doctrine of human rights? The ideological root of the doctrine is Marxism. The insistence on self-determination is motivated by the desire for the destruction of Western colonial empires. The position that individuals should not be granted access to international organizations is prompted by the desire to be guarded from international scrutiny. The insistence on non-interference is a shield against pressure to respect civil and political rights.

4.4. THE THIRD STAGE OF INTERNATIONAL PROTECTION OF HUMAN RIGHTS (Mid 1970s to the Present Day)

The Third World Doctrine of Human Rights became dominant from the period mid-1970s until present day.⁵⁰ The third world doctrine is at least indifferent and at most hostile to civil and political rights for three main reasons.

1. The full recognition of civil and political rights in the Third World undermines the authority of the State.
2. The second reason is economic. The restrictions on civil and political liberties are justified by the precedence to be given to economic and social rights. For example:
 - Restrictions on freedom of movement justified by the desire to stop-brain drain
 - Restrictions on the right to start a family by the desire to prevent population explosion
 - Limitations on the rights and freedoms of trade unions such as the right to strike by the desire to hasten economic development.
3. The third argument rests on the assertion that Third World countries are communitarian and not individualist as it is the case with the West. The social structure of many Asian and African countries is that of a community with a leader exercising undisputed power. Freedom-Liberty dialectic found in the Western European tradition is alien to Third World countries. In other words, freedom of the individual is not regarded in Third World nations as important as it is regarded in Western nations.

⁵⁰ Ibid., p.307

However, closer examination of this indifference reveals that it is motivated by the desire of despotic and authoritarian governments to block unwelcome interference on the part of the UN.

The third world doctrine of human rights is based on the following points. First, primacy needs to be given to economic, social and cultural rights over civil and political rights at least at present. Second, to this end, the international economic order must be changed as it is responsible for the undeveloped condition of the poorer countries and henceforth for lack of recognition of the fundamental rights. Third, a poor nation is accused of violation of human rights, it makes no sense to criticize it and condemn it, instead the economic and social causes must be found and domestic-international context for these violations must be addressed. It is preferable to change the international economic relations and address the objective conditions for these violations. Fourth, organized international community must concentrate on those exceptional cases of countries which involve in the grave violation of all kinds of rights in particular that of countries which pursue policy of racial discrimination and deny the right to self-determination.

4.5 SUMMARY

This Unit explored the evolution of international human rights after the establishment of the Charter of the United Nations. The Unit commenced with the normative framework of human rights provided under the Charter of the United Nations. It inquired whether or not the Charter of the United Nations created effective machinery for the promotion and protection of human rights. It has been stated that the Charter of the United Nations embodied very few provisions on human rights. Apart from the fact that the provisions are few in number, they did not give the Organization strong mandate in the

promotion and protection of human rights. The power vested in the United Nations is that of “promote” as can be seen from Articles 55 and 56 of the Charter of the United Nations.

Moreover, the Unit discussed the three doctrines of human rights. The discussion of the three doctrines of human rights commenced with the elaboration of the principal features of the doctrines. This was accompanied with a discussion of the motivations underlying each doctrine of human rights, namely Western, Socialist as well as Third World doctrines of human rights. In the coming Unit, you will be discussing the outcomes and consequences of these doctrines of human rights in detail.

4.6 SELF-ASSESSMENT QUESTIONS

1. Which one of the following is true about the human rights provisions in the Charter of the United Nations?
 - A. There are extensive and detailed provisions on human rights in the Charter of the United Nations.
 - B. The Charter of the United Nations has given the organization strong and effective powers for the promotion and protection of human rights.
 - C. The power of the United Nations in the promotion and protection of human rights was weakened by the proviso on domestic jurisdiction and non-interference.
 - D. The Charter of the United Nations provides that human rights are purely the internal matters of States Parties.
 - E. All of the above.

2. Which one of the following rights can be found in the Charter of the United Nations?

- A. The Right to Property
- B. Freedom from Non-discrimination
- C. The Right to self Determination
- D. The Right to Social Security
- E. B and C
- F. A and D

3. Which one of the following is true about the Universal Declaration of Human Rights?

- A. The Universal Declaration of Human Rights is a legally binding treaty.
- B. Many of the rights provided under the Universal Declaration of Human Rights are economic, social and cultural rights.
- C. The Universal Declaration of Human Rights has tremendous political and moral force.
- D. None of the above.

4. Which one of the following is the wrong match?

- A. Economic, Social and Cultural Rights - First Generation of Human Rights
- B. Peoples' Rights including the Right to Development- Second Generation of Human Rights
- C. Civil and Political Rights - Third Generation of Human Rights
- D. All of the above.

5. Which one of the following is the contribution of the United Nations in the international promotion and protection of human rights?

- A. The United Nations has internationalized human rights.
- B. The United Nations has led to the adoption of a veritable code of human rights including the International Bill of Human Rights.

- C. The United Nations has clarified the scope of the obligation to “promote” human rights.
- D. All of the above.

6. Which one of the following is the right match?

- A. Civil and Political Rights- Socialist countries
- B. Economic, social and cultural rights- Western nations
- C. Peoples’ Rights- Third World Countries
- D. None of the above.

7. Which one of the following is true?

- A. The Western nations were against the adoption of international monitoring mechanisms of human rights.
- B. Socialist countries argued in favor of individuals who wanted to petition international agencies.
- C. Third World nations were opposed to the notion of national sovereignty and domestic jurisdiction.
- D. None of the above.

8. Which one of the following is not an element of Third World Doctrine of Human Rights?

- A. Third world countries are indifferent to civil and political rights.
- B. Third world countries support giving economic, social and cultural rights priority over civil and political rights.
- C. Third World countries are against the idea of intervention in the internal affairs of states.
- D. Third world nations support intervention in cases of exceptional countries which perform consistent, gross and systemic violations of human rights.
- E. None of the above.

9. Which one of the following is correct about the Western Doctrine of Human Rights?
- A. Western doctrine of human rights ranks civil and political rights above other rights.
 - B. Western doctrine of human rights supports the right to self-determination strongly.
 - C. Western doctrine of human rights argues that the promotion of human rights is not an end to be pursued in itself per se, rather to be relegated to friendly relations between states.
 - D. None of the above.
10. Which one of the following rights is not supported by Socialist Doctrine of Human Rights?
- A. The Right to Self-Determination
 - B. The Right to Equality
 - C. The Right to Non-Discrimination
 - D. All of the above.

UNIT FIVE

THE INTERNATIONAL BILL OF HUMAN RIGHTS

Introduction

In this Unit, you will be studying the International Bill of Human Rights. This includes human rights provisions in the Charter of the United Nations, the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights. As

far as human rights provisions in the Charter of the United Nations are concerned, the Unit will not be dealing with these provisions as you have already studied this in the previous Unit. You will look in to the process of adoption of the Universal Declaration on Human Rights. You will study its formal structure as well as its content. Similarly, you will be studying the reasons that led to the adoption of the International Covenant on Civil and Political Rights and the International Covenant on Economic Social and Cultural Rights as well. Moreover, the relationship existing between the Universal Declaration of Human Rights as well the International Covenant on Civil and Political Rights is one area of focus in this Unit.

At the end of this Unit, you should be able to:

- Explain the background to the adoption of the Universal Declaration of Human Rights
- Discuss why the Universal Declaration of Human Rights is labeled as a common denominator or common standard of achievement
- Discuss the formal structure of the Universal Declaration of Human Rights (UDHR)
- Elaborate the basic content of the Universal Declaration of Human Rights (UDHR)
- Identify the impact of the Universal Declaration of Human Rights on subsequent human rights protection (UDHR)
- Explain the reasons that led to the adoption of the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic Social and Cultural Rights (ICESCR)

5.1. THE UNIVERSAL DECLARATION OF HUMAN RIGHTS

The Universal Declaration of Human Rights is a landmark and fundamental human rights instrument and is one of the most important international human rights instruments in the Twentieth Century. It was adopted on December 10, 1948. 48 states voted in favor of adoption of the UDHR by the General Assembly, only 8 states abstaining. The abstentions came from Socialist countries and certain Islamic states such as Saudi Arabia. There were no objections at all. The task of drafting of the UDHR was given to the then Commission on Human Rights of the UN. The Commission on Human Rights was established in 1946 by the Economic and Social Council (ECOSOC) of the UN pursuant to Article 68 of the UN Charter. The Commission took up on itself the formidable task of drafting an instrument that was acceptable to states which are dissimilar in respect to their political ideology, religious orientation and economic structure. As a result, it is said to constitute the lowest common denominator.⁵¹

Some of the principal figures in the process of the drafting of the UDHR include Rene Cassin of France, Charles Malik of Lebanon as well as Eleanor Roosevelt, the then First Lady of the US. The Charter of the UN does not define the terms human rights and fundamental freedoms. The task of defining these terms was first accomplished by the UDHR. In view of the fact that it took the international community two decades to reach agreement on binding human rights instruments on civil and political rights as well as the economic, social and cultural rights, the adoption of the UDHR was remarkable.

⁵¹ Antonio Cassese, *International Law in a Divided World* (Clarendon Press, 1986), 299

The UDHR has two basic characteristics.⁵² Firstly, it is non-binding. This means that it is not a treaty instead it is a recommendation for member states. Though, the Declaration is not a binding instrument, it has tremendous moral and political force. Secondly, the view of human rights expressed in it is Western. This is due to the fact that the bulk of rights enshrined under the UDHR are civil and political rights, which underlie the historical and political tradition of Western societies. Thus, primarily it reflected the rights of the Age of Enlightenment. It, however, also affirms economic, social and cultural rights in article 22-26. The UDHR is also unique in that it declared rights which were omitted from the two subsequent Covenants on human rights, namely, the right of asylum and the right to property.

Despite its limitations, the UDHR is fundamental for two reasons.⁵³ First, it has stimulated and directed the international promotion of human rights. It served as a spring board for later treaties in the field of human rights and also influenced national constitutions. It also constitutes the authoritative interpretation of the terms human rights and fundamental freedoms in the Charter of the UN. Secondly, the UDHR constitutes unitary and universally valid values to be cherished by member states of the UN in their domestic order.

Activity

1. Explain the basic characteristics of the Universal Declaration of Human Rights (UDHR).

⁵² Ibid.

⁵³ Ibid.

2. Identify the limitations of the Universal Declaration of Human Rights (UDHR).

3. Discuss the importance of the Universal Declaration of Human Rights (UDHR).

5.2.THE ICCPR AND ICESCR

Following the adoption of the Universal Declaration of Human Rights, there was a general consensus to transform non-binding obligations imposed in the Declaration to binding ones. The UDHR recognized two sets of rights adopting a holistic approach i.e. enshrining all human rights together. However, the binding instrument on human rights was dissected in two different instruments, one on civil and political rights, and the other on economic, social and cultural rights on the initiative of Western Nations. The reason for this Western initiative was the conception that the nature of the two sets of rights. As to what this conception is, you will be studying it under item 5.4 of this Unit. Though this approach was opposed by socialist countries who contended that human rights are interdependent and indivisible it prevailed in 1951.

As a result, the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights were adopted in 1966 by the UN. The two instruments entered in to force ten years later in 1976. However, the adoption of two

distinct instruments proved to be unnecessary due to the fact that both instruments enjoy considerable acceptance by the bulk of the member states of the UN. As of March 2000, 142 states were parties to the ICESCR and 144 states were parties to the ICCPR.

5.3 THE RELATIONSHIP BETWEEN THE UDHR AND ICCPR

1. The Universal Declaration of Human Rights is aspirational, hortatory and recommendatory than a binding instrument. This is due to the fact that the Declaration is adopted by the General Assembly different from a treaty which became effective through the required number of ratification. However, the subject matter of the UDHR is of immense importance and the instrument has tremendous political and moral force.⁵⁴ Some argue that parts of the UDHR, if not the entire Declaration, constitute customary international law. On the other hand, the International Covenant on Civil and Political Rights (ICCPR) is binding.
2. The International Covenant on Civil and Political Rights (ICCPR) creates a treaty-body, the Human Rights Committee to monitor the implementation of the Covenant by States Parties. However, the Universal Declaration does not create such monitoring body.
3. The rights affirmed in the International Covenant on Civil and Political Rights (ICCPR) are provided in greater detail than the rights in the Universal Declaration of Human Rights. For instance, you can compare Articles 10 & 11 of the Universal Declaration of Human Rights (UDHR) with Articles 14 & 15 of the International Covenant on Civil and Political Rights (ICCPR).

⁵⁴ Philip Alston and Steiner, *International Human Rights in Context*, Oxford, 2000, p. 142

4. Both the Universal Declaration of Human Rights (UDHR) and International Covenant on Civil and Political Rights (ICCPR) are characterized by individual rights. Group or collective rights are rare. Examples of collective rights are Article 1 and Article 27 of the International Covenant on Civil and Political Rights (ICCPR). Such rights are absent from the Universal Declaration of Human Rights (UDHR).
5. Both the Universal Declaration of Human Rights (UDHR) and International Covenant on Civil and Political Rights (ICCPR) are more rights oriented than duty-oriented. In both instruments, duties relate with states.⁵⁵ However, the idea of responsibilities and duties is touched up on under Article 1 and Article 29 of the UDHR. Article 29 provides that everyone has “duties to the community in which alone the free and full development of his personality is possible.” Article 1 of the UDHR also provides that all human beings “are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.” The idea of duties is also touched upon in the Preamble of the International Covenant on Civil and Political Rights (ICCPR).
6. Article 17 of the Universal Declaration which provides the right to own property and prohibits arbitrary deprivation of property is absent from the list of rights in the ICCPR.
7. Apart from declaring rights, the Universal Declaration of Human Rights provides for the right to effective remedy for violations of human rights by the competent national tribunals. The remedial structure of the ICCPR appears to be more detailed. Article 2 of the ICCPR provides that States Parties to the Covenant agree to ensure to all persons within their territory the rights recognized by the Covenant and adopt legislative and other measures for the achievement of these goals. The provision goes on to

⁵⁵ Ibid.

- provide that States Parties are required to ensure that a person whose rights have been violated is entitled to effective remedy and competent authorities are expected to enforce these remedies when granted. The States Parties are also called up on to develop the possibility of judicial remedy.
8. There is no general provision of *derogation* under the UDHR. The only form of clause which limits the obligations of the states is that of *limitations*.
 9. It is possible to categorize the rights in the Universal Declaration of Human Rights (UDHR) and International Covenant on Civil and Political Rights (ICCPR) as follows⁵⁶:
 - Protection of the Individual's Physical Integrity like provisions on torture, arbitrary arrest, and arbitrary deprivation of life
 - Procedural Fairness when the government deprives an individual of liberty, as in provisions on arrest, trial procedure and conditions of imprisonment
 - Equal protection norms defined in racial, religious, gender and other terms
 - Freedoms of belief, speech and association, such as provisions on political advocacy, the practice of religion, press freedom, and the right to hold an assembly and form associations; and
 - The right to political participation.

This scheme suffers from certain flaws. For example, it is difficult to categorize the right to self-determination (Article 1 of the ICCPR) and on the enjoyment by minorities of their own cultures (Article 27) of the ICCPR.

⁵⁶ Ibid.

5.4. THE DISTINCTION BETWEEN RIGHTS AS “NEGATIVE” AND “POSITIVE”

At the start of the human rights movement, distinction was sometimes between rights as “negative” and “positive”. Civil and Political Rights were characterized as being negative, whereas economic, social and cultural rights were said to be positive. The main reasons for this distinction are threefold.

First, civil and political rights were said to be cost-free, whereas economic, social cultural rights were said to be costly. The rationale underlying these designations was that civil and political rights require non-interference. As such, they were said to impose a duty of “hands-off”. The right to torture was believed to impose the states’ correlative duty not to torture. On the other hand, positive rights were believed to impose positive duties on the state. For example, the right to food would impose the duty to provide food.

Secondly, civil and political rights were characterized as rights of immediate effect. Thus, it was believed that a state can enforce these rights immediately up on ratifying the instruments. On the other hand, positive rights were said to be programmatic and of progressive realization.

Thirdly, civil and political rights are believed to be justiciable, whereas positive rights were said to be “not justiciable.” Thus, civil and political rights were viewed as amenable to judicial adjudication, while economic, social and cultural rights were believed to be not enforceable in a court of law. As a result of these views, the Western nations called for the adoption of two instruments instead of one.

5.5. STATE DUTIES IMPLIED BY HUMAN RIGHTS: IS THE DISTINCTION BETWEEN RIGHTS AS NEGATIVE AND POSITIVE TENABLE?

The consideration of state duties imposed by human rights reveals, however, that the distinction between the two sets of rights as negative and positive is not correct. Human rights norms imply duties to states, non-state actors as well as individuals. The following discussion of the classic duties imposed by human rights norms on states shows how this distinction is erroneous.

Duty to Respect

The duty to respect requires the state to observe the human dignity and self-worth of the human person. The duty requires the state to abstain from interfering with the exercise of the rights of the individual. In this sense, the duty is said to be negative since what it requires is mere non-interference on the part of the state for its realization. The duty essentially calls up on the state not to take measures likely to deprive the individual of the enjoyment of his rights. For example, the freedom from torture would imply the duty to respect of the state not to torture him or interfere with his right to physical security. Likewise, the government should not interfere with the right to work of the individual by preventing him from using his or her labour.

Duty to Create Essential Machinery Essential for the Realization of Rights

Certain rights can be impugned due to the failure of the state to create necessary institutional machinery essential for their realization. The right to vote would be meaningless unless the state creates fair electoral machinery. This shows that voting rights are not

cost-free for the government. This requires public funds and expenditure. Thus, the negative-positive distinction fails at this count.

Duty to Protect Rights/ Prevent Violations

The state must do what is necessary to ensure that rights are protected and violations prevented. To this effect, the state must provide a police force; the state is also required to enact laws like tort or criminal laws, institutions such as courts and jails, etc. The classic immunities here require the classic positive protection. Thus, the negative-positive distinction is not helpful for this purpose, too.

Duty to Provide Goods and Services to Satisfy Rights

The state is also obliged to provide resources such as food, housing, health care to the holder of the right. Therefore, this duty is closely linked with the International Covenant on Economic, Social and Cultural Rights. As opposed to the obligation to respect which requires the state not to worsen the human condition, this duty requires to improve it. It is obvious that this duty requires state expenditure. It is associated with welfare rights. It is important to note that, however, the realization of economic and social rights does not depend on direct or indirect provision. Measures designed to increase employment can serve in reducing poverty and malnutrition.

Duty to Promote Rights

The state is obliged to take measures to improve public consciousness, perception or understanding on human rights issues including civil and political rights. The promotion of rights is useful for their protection. This duty also requires state expenditures. Thus, the negative-positive distinction does not appear to be helpful here as well.

In conclusion, the consideration of the state duties above demonstrates that the distinction between rights as negative and positive is not a valid distinction at all.

5.6 SUMMARY

The International Bill of Human Rights includes human rights provisions in the Charter of the United Nations, Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights. The previous Unit dealt with the human rights provisions in the Charter of the United Nations. In this Unit, attention was shifted to the rest of the elements of the International Bill of Human Rights. The Unit discussed the process of the adoption of the Universal Declaration of Human Rights. The Universal Declaration of Human Rights is characterized as the common denominator. This characterization is owing to the fact that the instrument is essentially acceptable to many of the countries in the world despite their differences. This explains the reason why there was no objection to this Declaration up on its adoption on December 10, 1948 by the General Assembly of the United Nations.

The International Covenant on Civil and Political Rights and the International Covenant on Economic, Social Cultural Rights have been studied in this Unit. The Unit dwelt up on the reasons as to why the two instruments were adopted separately. The validity of the arguments as regards the differences in the two sets of rights has been examined by the consideration of duties incumbent up on states parties under human rights instruments. The next Unit shall focus on the principal rights affirmed in these instruments.

5.7 SELF-ASSESSMENT QUESTIONS

1. Which one of the following bodies was responsible for the drafting of the Universal Declaration of Human Rights (UDHR)?
 - A. The General Assembly
 - B. Commission on Human Rights
 - C. Economic and Social Council
 - D. The Security Council
 - E. None of the above.
2. Which one of the following figures played a prominent role in the drafting of the Universal Declaration of Human Rights?
 - A. Rene Cassin of France
 - B. Charles Malik of Lebanon
 - C. Eleanor Roosevelt of the US
 - D. All of the above.
3. Which one of the following is true about the Universal Declaration of Human Rights?
 - A. The Universal Declaration of Human Rights was a binding treaty.
 - B. The bulk of rights enshrined under the Universal Declaration of Human Rights are economic, social and Cultural Rights.
 - C. The Universal Declaration of Human Rights has stimulated and directed the human rights movement.
 - D. None of the above.
4. Which one of the following is true about the Universal Declaration of Human Rights (UDHR) and the International Covenant on Civil and Political Rights (ICCPR)?
 - A. Both the Universal Declaration of Human Rights (UDHR) and the International Covenant on Civil and Political Rights (ICCPR) are treaties.

- B. Both the Universal Declaration of Human Rights (UDHR) and the International Covenant on Civil and Political Rights (ICCPR) created monitoring body.
 - C. Both the Universal Declaration of Human Rights (UDHR) and the International Covenant on Civil and Political Rights (ICCPR) affirm the right to property.
 - D. Both the Universal Declaration of Human Rights (UDHR) and the International Covenant on Civil and Political Rights (ICCPR) are duty-oriented.
 - E. None of the above.
5. Which one of the following is true about the adoption of the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights?
- A. The adoption of two separate instruments instead of one is for reasons of convenience and not related to the nature of the rights.
 - B. The adoption of two separate instruments is due to the belief that civil and political rights are not justiciable, whereas economic, social and cultural rights are.
 - C. The adoption of two separate instruments is due to the belief that economic, social and cultural rights are of immediate effect, whereas civil and political rights are programmatic.
 - D. None of the above.
6. Which one of the following is true about the International Covenant on Civil and Political Rights (ICCPR)?
- A. The International Covenant on Civil and Political Rights (ICCPR) is silent on human duties and responsibilities.
 - B. The International Covenant includes certain collective rights.
 - C. The remedial structure of the International Covenant on Civil and Political Rights (ICCPR) is general and not detailed as

compared to the Universal Declaration of Human Rights (UDHR).

D. None of the above.

7. Which one of the following is true?

A. Civil and political rights require only non-interference of the government for their observance.

B. Civil and political rights imply only the duty to respect on the government.

C. The duty to respect is negative.

D. Civil and political rights are cost-free.

E. All of the above.

UNIT SIX

PRINCIPAL RIGHTS PROTECTED UNDER ICCPR

Introduction

In the previous Unit, you studied the main features of the International Bill of Human Rights including the International Covenant on Civil and Political Rights (ICCPR). In this Unit, attention is shifted towards the specific content of human rights norms affirmed in the International Covenant on Civil and Political Rights. Human rights provisions in treaties and constitutions appear to be formulated in a general manner. Therefore, one needs to digest the substantive content of human rights norms to be able to apply these general human rights provisions practically. To that effect, it is worthwhile to examine the substantive content of principal human rights norms and the specific obligations they entail.

At the end of this Unit, you should be able to:

- Explain the negative as well as the positive obligations entailed by the right to life
- Distinguish between abolitionist and retentionist countries
- Identify arguments both in favor and against capital punishment
- List the minimum guarantees of fair trial
- Explain the intrinsic and instrumental value of freedom of expression
- Distinguish between the narrower and broader version of instrumental utility of freedom of expression
- Explain the limits on limitations that can be imposed up on human rights

- Identify the legitimate aims in regard to which limitations may be imposed
- Define the concept of discrimination
- Distinguish between direct and indirect forms of discrimination
- Define the concept of minority and indigenous people
- Explain substantive content of freedom of movement

6.1 THE RIGHT TO LIFE

The right to life is said to be the most fundamental right in that no other right can exist without it. As a result, both the UDHR and the ICCPR begin their list of rights with the right to life. The right to life is a non-derogable right. In its General Comment No 6, the Human Rights Committee notes that armed conflicts and acts of mass violence lead to the arbitrary deprivation of thousands of lives. The use or threat of force is prohibited under Article 2(4) of the Charter of the United Nations. The right to life imposes up on States Parties to the Covenant the duty to prevent and punish deprivation of life by criminal acts. Similarly, the right to life also imposes the duty to prevent and punish arbitrary deprivation of life by the security forces of the state as well. Moreover, the right to life also imposes the duty up on the state to prevent disappearance of individuals.

6.1.1 Capital Punishment

Countries in the world can be divided in to two when it comes to capital punishment. In the first category are abolitionist states which have prohibited the imposition of capital punishment in their laws or those states which do not resort to capital punishment in practice even if their laws provides for it. There are more than 105 states in the world which can be *de jure or de facto* abolitionist. These

constitute more than half of the world's countries. Many of Western European states are abolitionist. On the other hand, there are the retentionist countries which still use and practice capital punishment. There are about 95 states which can be considered to be retentionist. Muslim states, India, Japan, the Russian Federation and the US are some of these retentionist states.

Article 6 of the International Covenant on Civil and Political Rights does not prohibit capital punishment. However, the provision discourages capital punishment by imposing different limitations on states. Three treaties provide for abolition. These are the Second Optional Protocol to the International Covenant on Civil and Political Rights, Protocol No. 6 to the European Convention on Human Rights and Additional Protocol to the Inter-American Convention on Human Rights. Moreover, the then Commission on Human Rights of the UN adopted Resolution 1999/61 calling for states to join the Second Optional Protocol and declare moratorium on executions with a view to ban capital punishment entirely. The maximum penalty for persons found guilty of war crimes, crimes against humanity, or genocide in the International Criminal Tribunals of Former Yugoslavia and Rwanda is that of life sentence.

There are a variety of arguments presented in favor of death penalty and against death penalty. The principal arguments against death penalty may be summarized as follows.

- Most persons who face death penalty do not afford legal assistance. As a result, they are defended under the *pro deo* system. The *pro deo* system refers to public defender. Usually, *pro deo* counsels turn out to be young and inexperienced. They are paid nominal fee for their defence. They also lack the

- financial resources and infrastructural support to conduct thorough investigation and to mount effective defence.
- Imperfections are inherent in criminal trials and errors can be committed. Unjust imprisonment can be remedied by releasing and compensating the victim. However, execution or killing of an innocent person is irreparable.
 - Penalty must accord with the dignity of man. Respect for Human Dignity requires the abolition of cruel, inhuman and degrading punishment. Capital punishment destroys human dignity. Capital punishment amounts to ultimate desecration of human dignity. Capital punishment strips the individual of all dignity and treats him or her as an object to be eliminated by the State.
 - The right to life is the supreme human right. It is of immeasurable value for any human being.
 - Capital punishment is believed to be a cruel inhuman, degrading treatment within the meaning of Article 7 of the ICCPR by the Human Rights Committee. Capital punishment is excessive since it involves unnecessary and wanton infliction of pain and is grossly out of proportion to the severity or enormity of the crime.

Arguments in favor of Death Penalty

- Death penalty is a deterrent to violent crime.
- Death Penalty serves two principal social purposes namely retribution and deterrence of capital crimes by prospective offenders. Capital punishment is a manifestation of particularly offensive conduct. Retribution is essential in an ordered society which requires its citizens to rely on legal processes and not on

self-help. Capital Punishment meets society's need for adequate retribution for heinous crimes.

- It is supported by public opinion. In *Gregg vs. Georgia*, Supreme Court of the US stated that many Americans still regard death penalty as appropriate and legitimate sanction.

Activity

1. Distinguish between abolitionist and retentionist states.

2. Explain the difference between *de facto* abolitionist and *de jure* abolitionist.

3. Explain the meaning of *pro deo* system.

4. Discuss arguments in favor of death penalty.

5. Discuss arguments against death penalty.

6.2 THE RIGHT TO FAIR TRIAL

The right to fair trial is affirmed under Article 14 of the International Covenant on Civil and Political Rights and Article 7 of the African Charter on Human and People's Rights. The right to fair trial has several constituent elements including the following.

6.2.1. The right to equality before the law and equal treatment by the law

The right to equality before the law and equal treatment and protection before the law is also enshrined under Article 26 of the International Covenant on Civil and Political Rights. The same right is also provided under article 3 of the African Charter on Human and Peoples' Rights. The right to equality before the courts is a fundamental principle affirmed under article 14(1) of the International Covenant on Civil and Political Rights, which provides that "all persons shall be equal before the courts and tribunals". The principle of equality before the courts implies that every person appearing before a court has the right not to be discriminated against either in the course of the proceedings or in the way the law is applied to the person concerned regardless of one's gender, race, origin or financial status, for instance. In addition, whether individuals are suspected of a minor offence or a serious crime, the rights have to be equally secured to everyone. Secondly, the principle of equality means that all persons must have equal access to the courts.

6.2.2 The Right to be Presumed Innocent

The right to be presumed innocent until proved guilty is a principle enshrined under Article 14(2) of the International Covenant on Civil and Political Rights. The provision states that "everyone charged with

a criminal offence shall have the right to be presumed innocent until proved guilty according to law". The same principle is also affirmed under Article 7(1) (b) of the African Charter on Human and Peoples' Rights. Article 11(1) of the Universal Declaration of Human Rights safeguards the same right for everyone "charged with a penal offence ... until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence".

In its General Comment No 13, the Human Rights Committee asserted that the principle of presumption of innocence implies that "the burden of proof of the charge is on the prosecution and the accused has the benefit of doubt. No guilt can be presumed until the charge has been proved beyond reasonable doubt. In addition, the presumption of innocence implies a right to be treated in accordance with this principle. It is, therefore, a duty for all public authorities to refrain from prejudging the outcome of a trial".

6.2.3 The right to be notified of the charges in a language one understands

Article 14(3)(a) of the International Covenant on Civil and Political Rights provides that in the determination of any criminal charge against him, everyone shall be entitled "to be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him". The African Charter on Human and Peoples' Rights contains no express provision guaranteeing the right to be informed of criminal charges against oneself. However, the African Commission on Human and Peoples' Rights has held that persons arrested "shall be informed promptly of any charges against them".⁵⁷

⁵⁷ ACHPR, Media Rights Agenda (on behalf of Niran Maloulu) v. Nigeria, Communication No. 224/98, adopted during the 28th session, 23 October - 6 November 2000, para. 43 of the text

Principle 10 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment provides that a person under arrest “shall be promptly informed of any charges against him”. The right to be informed of charges in a language one understands means that courts of law must provide adequate interpreters and translators in order to fulfill this requirement, which is essential for the purpose of allowing a suspect to defend himself or herself adequately. This right to provide interpretation during investigation is expressly included in Principle 14 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, according to which “A person who does not adequately understand or speak the language used by the authorities responsible for his arrest, detention or imprisonment is entitled to receive promptly in a language which he understands the information referred to in principle 10, principle 11, paragraph 2, principle 12, paragraph 1, and principle 13 and to have the assistance, free of charge, if necessary, of an interpreter in connection with legal proceedings subsequent to his arrest.”

According to the Human Rights Committee, the right to be informed in article 14(3)(a) “applies to all cases of criminal charges, including those of persons not in detention”, and the term “‘promptly’ requires that information is given in the manner described as soon as the charge is first made by a competent authority”.⁵⁸ The Committee stated that “this right must arise when in the course of an investigation a court or an authority of the prosecution decides to take procedural steps against a person suspected of a crime or publicly names him as such. The specific

of the decision as published at <http://www1.umn.edu/humanrts/africa/comcases/224-98.html>.

⁵⁸ General Comment No. 13 (Article 14), in United Nations Compilation of General Comments, p. 124, para. 8

requirements of subparagraph 3(a) may be met by stating the charge either orally or in writing, provided that the information indicates both the law and the alleged facts on which it is based”.⁵⁹ The Committee made it clear that “detailed information about the charges against the accused must not be provided immediately upon arrest, but with the beginning of the preliminary investigation or the setting of some other hearing which gives rise to a clear official suspicion against the accused”.⁶⁰ The duty to inform the accused under article 14(3) (a) of the Covenant is thus also “more precise than that for arrested persons under” article 9(2) of the Covenant and, as long as the accused has been promptly brought before a judge as required by article 9(3), “the details of the nature and cause of the charge need not necessarily be provided to an accused person immediately upon arrest”.⁶¹ In an earlier case the Committee held, however, that “the requirement of prompt information ... only applies once the individual has been formally charged with a criminal offence”, and that it does not, consequently, “apply to those remanded in custody pending the result of police investigations”, a situation covered by article 9(2) of the Covenant.⁶² The question is, however, whether the reasoning in this latter case is consistent with the Committee’s views as expressed in its General Comment or the earlier cases referred to. In applying the principle of prompt information, the Committee concluded that article 14(3)(a) had not been violated in a case where the author complained that he had been detained for six weeks before being charged with the offence for which he was later convicted. The

⁵⁹ Ibid.

⁶⁰ Communication No. 561/1993, *D. Williams v. Jamaica* (Views adopted on 8 April 1997), UN doc. GAOR, A/52/40 (vol. II), p. 151, para. 9.2; emphasis added.

⁶¹ Communication No. 702/1996, *C. McLawrence v. Jamaica* (Views adopted on 18 July 1997), UN doc. GAOR, A/52/40 (vol. II), p. 232, para. 5.9.

⁶² Communication No. 253/1987, *P. Kelly v. Jamaica* (Views adopted on 8 April 1991), UN doc. GAOR, A/46/40, p. 247, para. 5.8;

Committee concluded simply that it transpired from the material before it that the author had been “informed of the reasons for his arrest and the charges against him by the time the preliminary hearing started”.⁶³ Article 14(3) (a) had however been violated in a case where the victim had not been informed of the charges against him prior to his being tried in camera by a military court that sentenced him to 30 years’ imprisonment and 15 years of special security measures; furthermore, he had never been able to contact the lawyer assigned to him.⁶⁴

6.2.4 The right to legal assistance

The right to prompt legal assistance upon arrest and detention is a fundamental principle forming part and parcel of the right to fair trial. The principle is essential in several ways in particular in order to guarantee the right to an efficient defence and for the purpose of protecting the physical and mental integrity of the person deprived of his or her liberty. Art. 14(3)(d) of the International Covenant, art. 7(1)(c) of the African Charter and art. 6(3)(c) affirm the right of the accused to a legal counsel of his/her own choosing.

6.2.5. The right not to be forced to testify against oneself/The right to remain silent

⁶³ Communication No. 561/1993, D. Williams v. Jamaica (Views adopted on 8 April 1997), UN doc. GAOR, A/52/40 (vol .II), p. 151, para. 9.2.

⁶⁴ Communication No. R.14/63, R. S. Antonaccio v. Uruguay (Views adopted on 28 October 1981), UN doc. GAOR, A/37/40, p. 120, para. 20 as compared with p. 119, para. 16.2.

Article 14(3) (g) of the International Covenant guarantees the right of everyone “not to be compelled to testify against himself or to confess guilt”. The African Charter does not embody a similar provision *express verbis*. The right to remain silent flows from the right not to be compelled to testify against oneself.

6.2.6. The right to adequate time and facilities to prepare one’s defence

Article 14(3)(b) of the International Covenant on Civil and Political Rights provides that everyone shall be entitled “to have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing” in the determination of any criminal charge against him. Article 7(1) of the African Charter on Human and Peoples’ Rights guarantees “the right to defence, including the right to be defended by counsel of his choice”. The right of an accused person to have adequate time and facilities for the preparation of his or her defence is an essential element of the guarantee of a fair trial.

In its General Comment No. 13 on article 14, the Human Rights Committee specified that the meaning of “‘adequate time’ depends on the circumstances of each case, but the facilities must include access to documents and other evidence which the accused requires to prepare his case, as well as the opportunity to engage and communicate with counsel. The Committee further noted that the accused should be able to have recourse to a lawyer if he does not want to defend himself in person.⁶⁵ This provision also “requires counsel to communicate with the accused in conditions giving full respect for the confidentiality of their communications”, and lawyers “should be able to counsel and to represent their clients in

⁶⁵ United Nations Compilation of General Comments, p. 124, para. 9

accordance with their established professional standards and judgment without any restrictions, influences, pressures or undue interference from any quarter”.⁶⁶ Where the author claimed that he did not have adequate time and facilities for the preparation of his defence, the Committee noted that he was actually “represented at trial by the same counsel who had represented him at the preliminary examination”, and further, that “neither the author nor counsel ever requested the Court for more time in the preparation of the defence”; consequently, there was no violation of article 14(3) (b).⁶⁷ If the defence considers that it has not had sufficient time and facilities to prepare itself, it is thus important that it requests an adjournment of the proceedings. The Committee has however emphasized that “in cases in which a capital sentence may be pronounced, it is axiomatic that sufficient time must be granted to the accused and his or her counsel to prepare the defence for the trial”, and that “this requirement applies to all the stages of the judicial proceedings”; again, however, “the determination of what constitutes ‘adequate time’ requires an assessment of the individual circumstances of each case”.⁶⁸

6.2.7. The right to a public hearing

⁶⁶ Ibid.

⁶⁷ Communication No. 528/1993, *M. Steadman v. Jamaica* (Views adopted on 2 April 1997), UN doc. GAOR, A/52/40 (vol. II), p. 26, para. 10.2.

⁶⁸ Communication No. 349/1989, *C. Wright v. Jamaica* (Views adopted on 27 July 1992), UN doc. GAOR, A/47/40, p. 315, para. 8.4

The right to a public hearing in both civil and criminal cases is expressly guaranteed both by article 14(1) of the International Covenant on Civil and Political Rights. In its General Comment No. 13, on article 14 of the Covenant, the Human Rights Committee stressed that “the publicity of hearings is an important safeguard in the interest of the individual and of society at large”. The Committee further noted that “a hearing must be open to the public in general, including members of the press, and must not, for instance, be limited only to a particular category of persons” Apart from the “exceptional circumstances” provided for in article 14(1).⁶⁹ Irrespective of non-publicity of the trial itself, “the judgment must, with certain strictly defined exceptions, be made public” under article 14 of the Covenant.⁷⁰ The duty to hold suits of law in public under article 14(1) is incumbent on the State, and “is not dependent on any request, by the interested party ... Both domestic legislation and judicial practice must provide for the possibility of the public attending, if members of the public so wish”.⁷¹ This duty further implies that “Courts must make information on time and venue of the oral hearings available to the public and provide for adequate facilities for the attendance of interested members of the public, within reasonable limits, taking into account, e.g., the potential public interest in the case, the duration of the oral hearing and the time the formal request for publicity has been made. The principle of publicity implies that trials taking place in secret are contrary to article 14(1).

The African Charter on Human and Peoples’ Rights does not provide for the right to a public trial expressly. However, the African Commission on Human and Peoples’ Rights has decided that it is empowered by articles 60 and 61 of the Charter “to draw inspiration

⁶⁹ United Nations Compilation of General Comments, pp. 123-124, para. 6.

⁷⁰ Ibid., para. 6 at p. 124.

⁷¹ Communication No. 215/1986, G. A. van Meurs v. the Netherlands (Views adopted on 13 July 1990), in UN doc. GAOR, A/45/40 (vol. II), p. 59, para. 6.1.

from international law on human and peoples' rights and to take into consideration as subsidiary measures other general or special international conventions, customs generally accepted as law, general principles of law recognized by the African States as well as legal precedents and doctrine". The Commission then decided that the exceptional circumstances which might justify exceptions to the principle of publicity as provided under Article 14(1) of the International Covenant on Civil and Political Rights are exhaustive. As regards the right to a public judgment, Article 14(1) of the International Covenant provides that "any judgment rendered in a criminal case or in a suit of law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children".

6.2.8 The right to be tried "without undue delay" or "within a reasonable time"

Article 14(3) (c) of the International Covenant on Civil and Political Rights provides that every person facing a criminal charge shall have the right "to be tried without undue delay". Article 7(1)(d) of the African Charter states that everyone has the right to be heard "within a reasonable time". As to the meaning of the terms "without undue delay, the Human Rights Committee stated in its General Comment No. 13 that the right to be tried without undue delay is a guarantee that "relates not only to the time by which a trial should commence, but also the time by which it should end and judgment be rendered; all stages must take place 'without undue delay'. To make this right effective, a procedure must be available in order to ensure that the trial will proceed 'without undue delay', both in first instance and on appeal."⁷² This view has been further emphasized in the Committee's jurisprudence, according to which article 14(3) (c) and (5) "are to be

⁷² United Nations Compilation of General Comments, p. 124, para. 10

read together, so that the right to review of conviction and sentence must be made available without delay”.⁷³ It is noteworthy that the Committee has also made it clear that “the difficult economic situation” of a State party cannot be invoked as an excuse for not complying with the Covenant, and it has emphasized in this respect “that the rights set forth in the Covenant constitute minimum standards which all States parties have agreed to observe”.⁷⁴

Activity

1. Explain the meaning of the right to equality before the courts.

2. Explain the meaning of adequate facilities under Article 14(3)(b) of the ICCPR.

6.3 FREEDOM OF EXPRESSION

Freedom of expression is a fundamental right affirmed in many international human rights instruments. Article 19 of the Universal

⁷³ Communications Nos. 210/1986 and 225/1987, *E. Pratt and I. Morgan v. Jamaica* (Views adopted on 6 April 1989), in UN doc. GAOR, A/44/40, p. 229, para. 13.3.

⁷⁴ Communication No. 390/1990, *B. Lubuto v. Zambia* (Views adopted on 31 October 1995), in UN doc. GAOR, A/51/40 (vol. II), p. 14, para. 7.3.

Declaration of Human Rights provides for the right to seek, receive and impart information and ideas through any media and regardless of frontiers. Article 19 of the International Covenant on Civil and Political Rights affirms the right to freedom of opinion, expression and information. Limitations are not allowed on the freedom to hold opinions without interference. Paragraph 2 of Article 19 goes on to provide the freedom to seek, receive, and impart information and ideas of all kinds orally, in writing, in print, in the form of art, or through other media of one's choice.

The right to freedom of expression as affirmed in the ICCPR has two aspects: the right to seek and receive information as well as the right to express and impart information.⁷⁵ The seeking of information refers to having access to it orally, in print or in the form of art or through the media. In addition to seeking and receiving, there is the right to impart one's opinion orally, in print or other medium. These two facets of the right are separate rights though they are intimately linked. The right to seek and receive information is a right in itself and does not imply the dissemination of information found or received.⁷⁶ The provision is identical to its counterpart in Article 19(2) of the ICCPR except the inclusion of the phrase "without any interference" in the Ethiopian Constitution.

Article 20 of the ICCPR, on the other hand calls up on states parties to the Covenant to prohibit war propaganda, incitement to discrimination, hostility or violence on national, racial or religious grounds.

Freedom of expression is also asserted under Article 9 of the African Charter on Human and People's Rights. The freedom of expression

⁷⁵ Ibid.

⁷⁶ Ibid.

provision of the African Charter is distinctive from the international standards in certain ways. First, it does not include a right to receive ideas or to impart information. Also, express restrictions are not laid out in Article 9 of the Charter itself; instead freedom of expression is subject to the general restrictions stated under Articles 27-29. Accordingly, the individual is entitled to freedom of expression with due regard to the rights of others, collective security, morality and common interest.

There are two forms of justification for freedom of expression: instrumental and intrinsic. Accordingly, free speech is vital since public debate is a useful instrument for achieving other social objectives. These objectives can further be divided into two: for the objective of discovery of truth and its utility in the functioning of a representative democracy. Freedom of expression is valuable for the exercise of electoral rights and democratic participation provided under Article 25 of the ICCPR. Freedom of expression enables citizens to exert influence through public debate and dialogue with their representatives. Free expression is a right which is a guarantee to other rights and freedoms.

When it comes to the intrinsic significance of this freedom, expression is viewed as a human good in itself. It is believed that free communications of feelings, opinions, and ideas is important for the full development of human personality.

6.3.1. The Three Part Test for the Legitimacy of Restrictions on the Freedom of Expression

Freedom of expression is not an absolute right. Thus, the exercise of the right comes along with responsibilities. As a result, restrictions

can rightly be imposed on the right. Some of the reasons for imposing limitations on the freedom of expression as stated under Article 20 of the ICCPR include prohibition of war propaganda and advocacy of racial hatred. However, the question remains what is the limit on the limitations on freedom of expression.

The question raised above becomes all the more important in view of the fact that sweeping limitations are widely used to silence critics. In its General Comment No. 10, the Human Rights Committee, the treaty-body established under Article 28, states that restrictions imposed on freedom of expression must not place the right itself in jeopardy. In other words, restrictions must not nullify the substance of the right itself. The General Comment goes on to state that limitations would put the substance of the right itself in jeopardy if they are not:

1. provided by law
2. imposed for one of the legitimate purposes set out in paragraph 3 of Article 19 of the ICCPR
3. justified as necessary for the State Party for one of those purposes.

Thus, the reading of Articles 19 of the UDHR and ICCPR makes it clear limitations imposed on the freedom of expression would not be legitimate unless they comply with three requirements. First, restrictions must be provided by law. Secondly, these restrictions must serve one of the legitimate aims provided in the provisions. The UDHR permits restrictions in so far as they are aimed at securing “due recognition and respect for the rights and freedoms of others and ... the just requirements of morality, public order, and the general welfare. The ICCPR, on the other hand, permits restrictions on the grounds of protection of the rights and reputation of others, national security, *ordre public*, and public health and morals. Finally, the

restrictions must be necessary in a democratic society. The test of democratic necessity is laid out in Article 29(2) of the UDHR, among others.

6.3.1.1 The Principle of Legality

The first prong of the three-part test submits that restrictions must be provided by law. Restrictions which are not codified in legislations are not warranted. Executive action with no legal basis is not justified and valid restriction. Administrative practices which do not comply with this requirement would not be valid restrictions even if they may have been made public. The principle of legality requires that the law must meet requirements of legal certainty and foreseeability. This means that the law must be formulated with sufficient clarity so as to enable individuals to understand their obligations and foresee whether a particular action is unlawful. The principle of legality shows that restrictions must not be too vague or broad. Accordingly, unclear or ambiguous phrases such as “disinformation”, “agitation” and false rumors” must be avoided.

6.3.1.2 Principle of Legitimate Aim

The second prong of the three part test provides that restrictions must serve one of the legitimate purposes stated under paragraph 3(a) and (b) of Article 19. The legitimate aims stated under the subparagraphs include the rights and reputations of others, national security, public order (*ordre public*), public health and public morals. Article 29(6) of the FDRE Constitution also provides no one shall be absolved of laws enacted to protect public morals, peace, human dignity and democratic rights of citizens as the legitimate purposes. The closer examination of these protected aims is necessary to grasp their exact meaning.

The Rights and Reputations of Others

Article 19(3) of the ICCPR permits restrictions on freedom of expression in the interest of protecting the rights and reputation of others. This restriction is designed in particular with a view to protect the right to freedom of religion of others, the protection against discrimination and the protection of minorities.⁷⁷ Apart from that, restrictions on this ground could also be justified for the purpose of protecting the right to freedom of expression of others.⁷⁸

However, libel and defamation suits have a negative repercussion on the exercise of freedom of expression, access to information and free exchange of ideas. The practice of the Human Rights Committee and other regional organs show that not all individuals have equal degree of protection against defamation under international human rights law. In particular it is well-recognized under international jurisprudence that politicians and public figures should tolerate higher degree of criticism than ordinary citizens should.

Journalists are expected to report on matters of public interest and it is generally recognized that the media have an important role to play as public watchdogs. The use of charges of defamation to defend the reputation of public officials denies the rights of the public to receive information and the rights of journalists to express their opinions about the conduct of public officials. The key role they play in democratic process, the fact they have willingly submitted themselves to public scrutiny and importance of a free flow of information and ideas about political matters to a democratic system of government leads to this conclusion. In addition, since reputation is a private

⁷⁷ Nowak, M., (1993), UN Covenant on Civil and Political Rights - ICCPR Commentary, Kehl am Rhine, p. 354

⁷⁸ Ibid.

interest it is appropriate to remedy defamation through civil sanctions and not prison sentences.

National Security

The right to freedom of expression can also be restricted for the purpose of protecting the national security of the state in the most serious cases of direct political or military threat to the whole state. The tension that exists between national security and freedom of expression is undeniable.⁷⁹ Governments could try to justify suppression of “secret” information or voicing critical opinions on the ground that such speech undermines the very institutions that protect the security and well-being of individuals.⁸⁰ On the other hand, human rights activists argue suppression of information on grounds of national security and related ground paves the way for the worst violations of human rights.⁸¹ Despite the tension that exists between national security and freedom of expression, recent history shows that the former is better protected when the public is in a position to scrutinize government decisions rather than when governments operate in secret.⁸² Needless to say, there are cases where national security may be invoked legitimately to restrict freedom of expression. For example, preventing the publication of sensitive defense information or speech likely to entail violence against the state can be justified in the interest of protection of national security.⁸³ However, the notion of national security and related conceptions such as “state security”, “internal security”, “public security” and “public safety” are so imprecise in effect that they are employed to suppression of

⁷⁹ Coliver, S., (1999) ‘Commentary on the Johannesburg Principles’ in Sandra Coliver and Paul Hoffman (eds.), *Secrecy and Liberty: National Security, Freedom of Expression and Access to Information*, p. 24

⁸⁰ Ibid.

⁸¹ Ibid.

⁸² Ibid.

⁸³ Ibid.

expression that provides protection against government abuse, such as information or expression exposing circumvention of democratic process, attacks on opposition parties, damage to the environment, corruption, wasting of public assets, and other forms of wrongdoing by government officials and their associates.⁸⁴

Public order

Restriction on the right can also be imposed for the purpose of protecting public order (order public). The notion of public order is vague. The Special Rapportuer on the promotion and protection of the right to freedom of opinion and expression noted this notion includes the “prevention of disorder or crime.”⁸⁵ The vagueness of the notion makes its application susceptible of undermining the right to freedom of expression. As a result, limitations on freedom of expression for the purpose of protection of the public order can be justified only where the public order of the state is truly compromised.⁸⁶ On top of that such restriction may be in place for a limited period of time and under certain specific circumstances.

Public Health

The permissible ground of public health permits the prohibition of misleading publication on substances that are health-threatening or on social or cultural practices that affect health negatively.⁸⁷ Such traditional practices include those affecting women and children. These include female genital mutilation, dowry debts and bride burning.⁸⁸ States are within their rights to take positive steps to

⁸⁴ Ibid.

⁸⁵ Commission on Human Rights, E/CN.4/1999/64 Report of the Special Rapportuer on the Protection and Promotion of the Right to Freedom of Opinion and Expression

⁸⁶ Ibid.

⁸⁷ Ibid.

⁸⁸ Ibid.

prevent the dissemination of misleading publications affecting health by curtailing the right to freedom of expression.

Public Morals

The last protected interest on the basis of which restrictions on freedom of expression may be imposed is protection of public morals. The common illustrations for this purpose are pornography and blasphemy. Public morality differs widely from country to country and is contingent up on the national situation including matters of culture and politics. As a result, a margin of appreciation needs to be accorded to the state.

6.3.1.3 Principle of Democratic Necessity

The third prong of the tri-partite test provides that any restriction imposed on free expression must be necessary. The term “necessary” does not refer to what the government considers “necessary”. Instead, it refers to what may be reasonably deemed “necessary” in a democratic society. Article 29(2) of the UDHR qualifies the requirement of necessity by the phrase “in a democratic society.” A democratic society is one which is based on openness, pluralism, tolerance and broadmindedness. The European Court of Human Rights stated that the requirement of necessity implies that the interference must correspond to a pressing social need.⁸⁹ The European Court of Human Rights developed a doctrine used for the determination of the necessity of interference with freedom of expression in a state party, namely the doctrine of margin of appreciation.

There are two assumptions behind the doctrine of Margin of Appreciation.⁹⁰ First, what is necessary to achieve legitimate interest

⁸⁹ Olsson v. Sweden, 24 Mar. 1988 (No.130), 11 E.H.R.R. 259

⁹⁰ European Human Rights Law, p.146

varies from state to state, even in 'democratic societies'. Secondly, international courts should accord some deference to a government's estimate of the necessity. This is due to the fact that international courts are less familiar with relevant local circumstances. This amounts to giving precedence to national sovereignty over excessive interpretation of international standards.⁹¹

However, the deference to be given to government's estimate cannot be total lest there would be blanket approval of their interference. The interference is required to be proportional to the legitimate aim achieved. The requirement of proportionality requires states to prove that their interference is necessary for the protection of respective interests. In this sense, the term proportionality does not denote that the interference must not be excessive than what is necessary to protect the relevant interest. Instead, it involves the examination of the severity of the interference with rights in comparison with the public injury which may ensue as a result of not completely protecting the interest.⁹² This in turn calls for weighing of the relative injuries to that of the individual and of the state. Thus, the principle of proportionality is a safeguard against arbitrary state conduct.⁹³

Activity

1. Discuss the two facets of freedom of expression.

⁹¹ Nowak, p. 60

⁹² Janis, p. 147

⁹³ Nowak, p. 61

2. Discuss the intrinsic as well as the instrumental utility of freedom of expression.

3. Discuss the tripartite test to determine the legitimacy of restrictions up on rights.

4. Explain the two assumptions behind the doctrine of margin of appreciation.

6.4. EQUALITY AND NON-DISCRIMINATION

The principle of non-discrimination is one of the two human rights norms specifically recognized under Article 1(3) of the Charter of the UN.⁹⁴ It is derived from the Christian idea that all men are equal before the law. All mankind are children of God regardless of their natural and social differences. The idea of equality of man is derived from the fact that human beings “by common possession of reason” distinguish themselves from other living beings.

Equality and the prohibition of discrimination is a cross-cutting issue which runs through the International Covenant on Civil and Political Rights. There is a reference to norms of equality and non-discrimination in many articles in the Covenant including Articles

⁹⁴ The other human rights norm specifically provided for in the Charter of the UN itself is the right to self-determination.

2(1), 3, 4(1), 14(1), 20, 23, 24, 25 and 26. In particular, Article 2(1) of the Covenant requires States Parties to respect and ensure to all individuals the rights recognized without distinction of any kind such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. The list of prohibited grounds for discrimination is not limitative.

Article 3 of the Covenant calls up on states parties to ensure the enjoyment of the rights enshrined in the ICCPR equally by men and women. Article 4(1) of the Covenant prohibits discrimination in the process of taking emergency measures and derogation in situations of public emergency. Article 23 of the Covenant requires equality of treatment in marriages and family. Article 24 of the Covenant requires equality of treatment of children. Article 25 of the Covenant requires equality of treatment in the case of political rights.

Article 26 of the ICCPR reads:

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

The issue that revolves around Article 26 is whether it constitutes an autonomous right or whether it is a repetition of the same guarantee laid under Article 2(1) of the Covenant? This issue must be addressed in light with the principle of positive interpretation. Accordingly, legal provisions need to be interpreted in such a way so as to make them effective and not redundant. The Human Rights Committee considers

Article 26 as an autonomous right. This means that a general right of non-discrimination exists independently of other substantive right. This makes Article 26 of the Covenant different from Article 2 since the latter limits the scope of the rights to be protected against discrimination to those provided in the Covenant only. In other words, the application of the principle of non-discrimination in article 26 is not limited to those rights which are provided in the Covenant. This approach contrasts with European Convention Article 14 which affirms non-discrimination only in respect of the rights enshrined under the Covenant.⁹⁵ Article 26 of the ICCPR requires the state to provide equal and effective protection to all persons against discrimination.

What is discrimination?

General Comment 18 of the Human Rights Committee defines the term discrimination as any distinction, exclusion, restriction or preference which is based on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons on an equal footing of all rights and freedoms.

A person who receives less favorable treatment on the grounds stated above is considered a victim of discrimination. There is no requirement that the discrimination be intentional; the prohibition extends to discrimination which is accidental. This is the case as the provision states “purpose or effect”. This means the treatment may still be considered discriminatory even if it is done purposefully if the effect is less favorable treatment. Discrimination can be direct or

⁹⁵ A protocol to the European Convention extended the application of Article 14 beyond the context of the Convention.

indirect. A rule which prohibits black people from using some type of public transportation is direct discrimination as the rule singles out the particular group discriminated clearly. On the other hand, a rule which prohibits persons who are not taller than 1.70 meters from joining the police force is discriminatory though it appears to be neutral at face value. The rule is likely to omit those groups who are generally shorter.

In *Aumeeruddy-Czifra vs. Mauritius* women complained that they have been discriminated on the grounds of sex because of the Immigration and Deportation Acts of 1977. The women argued that the laws deprived the foreign husbands of their Mauritius women. The laws require foreign or alien husbands to apply for permit to residence; the granting of the applications of the alien husbands is discretionary. In case where the applications are not permitted the alien husbands of the Mauritius women can be removed or deported. However, alien wives of Mauritius husbands were not exposed to the same rules. The Human Rights Committee decided that the laws are discriminatory since it caused Mauritius women married to foreigners suffer only because they are women.

In *Graciela Ato del Avellanal v Peru*, the applicant became owner of two apartment buildings. Up on change of ownership, the tenants refused to pay their rent. After unsuccessful attempts to collect her rent, she brought a legal action against the tenants; the court of first instance decided in her favour and required the tenants to pay her rent. The Superior Court, however, quashed the decision of the court of first instance on the argument that Article 168 of the Peruvian Civil Code states that only the husband of married woman can bring legal action before Courts to protect matrimonial property. In other words, a married woman is not qualified to bring a legal action to protection

of matrimonial property and she does not have the capacity to sue. The Human Rights Committee found a clear case of discrimination based on sex.

In *Muller and Engelhard v Namibia*, the applicants complained of discrimination based on sex. The applicants argued that Namibian law imposes stringent and cumbersome conditions when the husband wants to adopt the surname of his wife as a family name. On the other hand, the adoption of the surname of the husband by the wife as family name is very easy. Namibia tried to justify this based on the long-standing tradition in Namibia of the adoption by women of the surname of their husbands as their family name and the need to ensure legal security and certainty of identity. The Human Rights Committee found discrimination as Namibian laws subject possibility of the wife's surname as family name to more stringent and cumbersome procedure.

Activity

1. All forms of differentiation constitute discrimination.
Do you agree.

2. Distinguish between direct and indirect discrimination.

3. Explain the distinction between Article 2(1) and Article 26 of the ICCPR.

6.5. MINORITY RIGHTS

Article 27 of the International Covenant on Civil and Political Rights sets forth protection for individuals belonging to ethnic, religious or linguistic minorities. The provision protects the right of individuals belonging to ethnic, religious and linguistic groups to enjoy their own culture, profess and practice their own religion and use their own language. The provision is of a distinctive nature compared to other provisions in the Covenant as it has collective nature. The same right is also enshrined under Article 27(1) of the Universal Declaration of Human Rights and under Article 17(2) of the African Charter on Human and People's Rights.

Article 27 is considered as an attempt on the part of international law to promulgate the right of minority groups to preserve their special identity.⁹⁶ Moreover, Article 27 is one of the rights which are to be given immediate effect as per Article 2 of the ICCPR. In other words, it is not a right of immediate realization as such.⁹⁷ At the drafting stage of the International Bill of Human Rights, it was believed that the major problem faced by minority groups is that of lack of equality.⁹⁸ There are two principal schools of thought on minority treatment, namely assimilation and recognition. Assimilation calls for the integration of minority groups in to the life and culture of the

⁹⁶ Rhona K.M. Smith, *International Human Rights*, (Oxford, New York), 2005, p 325

⁹⁷ Ibid.

⁹⁸ Ibid.

majority of the public. This approach was largely practiced in Europe and former European colonies. Assimilation was favored to allay or stave off fears of secession. Recognition on the other hand involves the admission of the existence of the minority group and also promotion of minority groups.

The principal objective of Article 27 of the ICCPR is ensuring the survival and continued development of the cultural, religious and social identity of the minorities concerned. The rationale for Article 27 is that protection for minorities will enrich the whole society generally.⁹⁹ Since protection of minorities is a very contentious area of international law and relations, the provision is formulated in a very cautious manner. The Human Rights Committee noted in its General Comment on Article 27 that States Parties confuse their obligations under Article 2(1) and Article 26 of the ICCPR with those obligations envisaged under Article 27 of the ICCPR. States Parties are of the belief that measures they took with a view to ensure equality among individuals would be sufficient and there is no need for separate action as regards Article 27.

The Committee differs with the view expressed above. Article 2(1) of the ICCPR obligates States Parties to ensure the enjoyment of the rights in the Covenant to all individuals living in the territory of the State Party whether they belong to minority groups or not; Article 26 obliges States Parties to guarantee the rights in the Covenant without discrimination and ensure equality before the law along with equal protection from the law. Article 26 governs the exercise of all rights whether protected by the Covenant or not. Belongingness in a minority is not a requirement to enjoy the equality before the law

⁹⁹ Alex Conte and Scott Davidson (*eds*), *Defining Civil and Political Rights*, (Ashgate, Cornwall), p. 183.

safeguard enshrined in the Article. However, the application of Article 27 focuses more on individuals belonging to ethnic, religious and linguistic minorities. Article 27 does not provide for additional rights for individuals belonging to minorities. Rather, its focus is more on the protection of the individual belonging to minorities.

Article 27 applies to persons belonging to ethnic, religious and linguistic minorities. Thus, the application of Article 27 is confined to those states where there are linguistic, religious and ethnic minorities only. As a result, Article 27 is not applicable to immigrant groups. This means that the minority do not have specific rights as a group under the Covenant. Put simply, minorities per se are not subjects of international law.¹⁰⁰ This, however, does not mean that the provision does not have collective aspect as the enjoyment of culture, language and religion is in the community of the minority. The Human Rights Committee has also explained that though the rights under Article 27 are individual rights, their exercise depends up on the ability of the minority group as a whole to maintain its culture, language or religion.

The one problem Article 27 of the Covenant poses is that there is no definition of the term minority. The ICCPR does not define the meaning of the term minority. The most widely accepted definition of minority is one based on numerical determination.¹⁰¹ The numerical determination is not believed to be adequate and must be complemented by other factors including:

- the position of the group in the wider society
- the existence of distinct ethnic, religious or linguistic characteristics

¹⁰⁰ Rhona K.M. Smith, *International Human Rights*, (Oxford, New York), 2005, p 328

¹⁰¹ Ibid. p. 188

- some sense of solidarity among the members
- some indication of relative stability of the group in the territory.¹⁰²

One definition which was suggested by Jules Deschenes, a Canadian member of the Sub-Commission on the Prevention of Discrimination and Protection of Minorities¹⁰³ reads:

“a group of citizens of a State constituting a numerical minority and in a non-dominant position in that state, endowed with ethnic, religious or linguistic characteristics which differ from those of the majority of the population, having a sense of solidarity with one another, motivated, if only implicitly, by a collective will to survive and whose aim is to achieve equality with a majority in fact and in law.”¹⁰⁴

This definition is indicative of both objective (the existence of facts) and subjective (sentiment of solidarity) elements.

The Human Rights Committee has held that the state itself cannot make authoritative determinations as to whether a minority group exists or not. In other words, minority rights apply irrespective of State recognition of the minority. State recognition is not required. Put simply, States Parties are not given any discretion in the determination as to which groups benefit from the protection accorded under Article 27. The determination of whether an individual belongs to a minority group or not depends up on a combination of subjective and objective factors. An individual may not be compelled to embrace membership in a minority if he chooses to assimilate in the majority of the State.¹⁰⁵ Individuals are free to

¹⁰² Ibid.

¹⁰³ Currently, this Sub-Commission has ceased to exist.

¹⁰⁴ UN Doc. E/CN.4/Sub.2 /1985/ 31, para. 181)

¹⁰⁵ Rhona K.M. Smith, *International Human Rights*, (Oxford, New York), 2005, p 328

renounce membership within a given minority group, which itself constitutes a right. Religious minorities can be identified based on belongingness manifested by participation in religious activities. Linguistic minorities can be identified based on the fact that the individual can speak the language mainly in private relations. Ethnic minorities mainly depend on objective considerations and to some extent subjective ones.

Article 27 of the Covenant imposes positive as well as negative duties up on the States Parties. According to the Human Rights Committee the objective of these duties is to ensure the survival and continued development of the cultural, religious and social identity of the minorities concerned, thus enriching the fabric of society as a whole.¹⁰⁶ The principal aim of the article is to ensure that individuals enjoy their rights fully and the minority group remains viable.¹⁰⁷ This in turn requires positive duties apart from non-interference. For example, the State Part has the positive obligation of ensuring private parties or non-state actors do not hinder or prevent the enjoyment of culture, religion and language. For instance, if the state allows private companies to engage in logging activities in a designated wilderness area inhabited by the minority, this could adversely impact the ability of the minority to enjoy their culture.

There are three principal obligations of States Parties under Article 27 towards persons belonging to minorities. These are enjoyment of culture, profession and practice of religion and use of language.

The term culture can be understood to include all that is inherited or transmitted through society, including knowledge, beliefs, sentiments

¹⁰⁶ General Comment No. 23 of the Human Rights Committee, Para.9

¹⁰⁷ Alex Conte and Scott Davidson (*eds*), *Defining Civil and Political Rights*, (Ashgate, Cornwall), p. 187

and literature, written as well as oral. It also includes rules of kinship, methods of education, forms of government all other fashions followed in social relations.¹⁰⁸ Gestures, bodily attitudes and facial expressions are included. The material elements of culture also include fashions in housing and clothing and ranges of tools, manufactures and artistic production. Other aspects of the cultural life of a group also include distinctive clothing, standards of hospitality, language, religious rituals, social organization, ceremonial occasions, performing arts, food, inheritance, marriage and artifacts.

In this regard, Article 27 of the ICCPR would impose obligations on the State to permit minority schools, museums, churches and the like. Moreover, the State must desist from oppressing the culture; instead it is required to promote the culture of the minority group.¹⁰⁹

6.6. Indigenous Groups

The term “minority” in Article 27 differs from the term “people” under Article 1 of the ICCPR as well as the ICESCR. Not all people constitute of minority so as to deserve the protection provided under Article 27. Indigenous groups differ in that they constitute minorities as well as people within the meaning of Article 1 of the ICCPR and ICESCR.

There is no universally valid definition of indigenous people. Many criteria have been considered in the attempt to define indigenous people. One such criterion is race or biological factors. In the past race was the sole criterion used in determining whether a person belongs to an indigenous group or not. This was also manifested in the

¹⁰⁸ UNESCO, Race and Culture

¹⁰⁹ Rhona K.M. Smith, *International Human Rights*, (Oxford, New York), 2005, p 331

1971 “UN Report on Racial Discrimination” as the report uses the color of the skin in the attempt to define the term indigenous. However, the meaning ascribed to the term race is more social than biological. The reliance on race in defining the meaning of the term indigenous is problematic since indigenous groups have mixed with other groups thereby minimizing biological distinctions.

Many consider the criterion of connection to traditional lands indigenous peoples as the sole criterion for the definition of the term indigenous peoples. Therefore, indigenous peoples are those who have always lived in a given area. Other important considerations in defining indigenous groups include distinctive cultural characteristics, self-identification and group-consciousness and political and economic non-dominance.

Activity

1. Discuss the considerations to be taken in to account in the definition of minority.

2. Distinguish minority groups from indigenous peoples.

3. Explain the two schools of thought on minority treatment.

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4. What makes Article 27 of the Covenant on Civil and Political Rights distinctive as compared to other rights under the Covenant?
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6.7 SUMMARY

This Unit focused on the discussion of the substantive content of particular human rights norms. It is believed that the discussion of the human rights norms will be illustrative of the specific obligations imposed up on human rights norms. With this objective in view, the Unit dealt with the right to life, minimum guarantees of fair trial, freedom of expression and minority rights.

In connection with the discussion on the right to life, the Unit touched up on the topic of capital punishment. You studied the differing positions taken on this issue by abolitionist and retentionist countries. Abolitionist countries were further divided in to two as *de facto* abolitionist and *de jure* abolitionist. Moreover, you studied the arguments in favor and against capital punishment.

The Unit also dealt with the minimum guarantees of fair trial. Attempt has been made to deal with the issue of fair trial as it is intertwined with your particular work as a public prosecutor. The Unit explored several minimum guarantees of fair trial including *the right to equality before the law and equal treatment by the law*, the right to be

presumed innocent, the right to be notified of the charges in a language one understands, the right to legal assistance, the right not to be forced to testify against oneself or the right to remain silent, the right to adequate time and facilities to prepare one's defence, the right to a public hearing as well as the right to be tried without undue delay or within a reasonable time.

The discussion on freedom of expression demonstrated that limitations imposed up on this freedom and other rights must fulfill the tripartite test for the legitimacy of restrictions on rights. This discussion clarified the principles of legality, legitimate aim and democratic necessity. The discussion also dealt with the intrinsic as well as instrumental value of freedom of expression.

Other principal right discussed is that of equality and non-discrimination. The section on the topic has defined the meaning of discrimination and its forms. Selected prohibited grounds have also been examined. In addition, the special measures that States Parties to the Covenant must as regards minority groups and indigenous peoples have been scrutinized. In the next Unit, you will be studying the procedural and substantive requirements up on derogation.

6.8. SELF-ASSESSMENT QUESTIONS

1. Which one of the following is not a duty imposed up on the States Parties on account of the right to life?
 - A. the duty to prevent and punish deprivation of life by criminal acts
 - B. duty to prevent and punish arbitrary deprivation of life by the security forces of the state
 - C. the duty up on the state to prevent disappearance of individuals
 - D. None of the above.

2. Which one of the following is true?
- A. Article 6 of the International Covenant on Civil and Political Rights abolishes death penalty.
 - B. The Second Optional Protocol to the International Covenant on Civil and Political Rights falls short of abolishing death penalty.
 - C. Article 6 of the International Covenant on Civil and Political Rights discourages death penalty.
 - D. None of the above.

3. Which one of the following is true?
- A. The International Covenant on Civil and Political Rights allows death penalty on persons under the age of 18.
 - B. The International Covenant on Civil and Political Rights allows death penalty on pregnant women.
 - C. The International Covenant on Civil and Political Rights allows death penalty though the crime may not be serious.
 - D. None of the above.

4. Which one of the following is true about the presumption of innocence?
- A. The principle implies that the burden of proof of the charge is on the prosecution.
 - B. The principle implies that the accused has the benefit of doubt.
 - C. The principle implies that no guilt can be presumed until the charge has been proved beyond reasonable doubt.
 - D. It prohibits all public authorities to refrain from prejudging the outcome of a trial.
 - E. All of the above.

5. Which one of the following is true about the right to be notified of charges promptly?
- A. The right to be notified of charges implies the duty to provide adequate interpretation.
 - B. The right to be notified of charges implies the duty to provide adequate translation.
 - C. The right to be notified of charges implies the duty to provide detailed information about the charges immediately up on arrest.
 - D. None of the above.

6. Which one of the following is true?
- A. According to Article 14 of the ICCPR, hearings must always be public.
 - B. According to Article 14 of the ICCPR, there is no requirement of making decisions public.
 - C. According to Article 14 of the ICCPR, hearings must not be open to the press.
 - D. None of the above.

7. Which one of the following is true?
- A. The right to be tried without undue delay relates to the time by which trial should start.
 - B. The right to be tried without undue delay relates to the time trial should end.
 - C. The right to be tried without undue delay relates to the time up on appellate proceedings.
 - D. All of the above.

8. Which one of the following is not a requirement for the legitimacy of restrictions up on rights?

- A. The limitations must be provided by administrative practice, if not by the laws.
- B. The restrictions must be provided under the law.
- C. The restrictions must serve legitimate interests.
- D. The limitations must be necessary in a democratic society.
- E. None of the above.

9. Which one of the following is not a feature of democratic society?

- A. Broadmindedness
- B. Tolerance
- C. Pluralism
- D. Openness
- E. None of the above.

10. Which one of the following is true?

- A. Differentiation based on reasonable and objective grounds constitute discrimination.
- B. Governmental action may be considered as discriminatory only if it is intentional.
- C. The prohibited grounds of discrimination listed under Article 2(1) and Article 26 of the ICCPR are exhaustive.
- D. None of the above.

UNIT SEVEN

DEROGATION UNDER STATE OF EMERGENCY AND HUMAN RIGHTS

Introduction

In the previous Units, you studied the main features of the International Covenant on Civil and Political Rights and also considered some principal rights affirmed in the Covenant. In this Unit, your attention will be drawn to the issue of derogation under state of emergency. The meaning of state of emergency as well as derogation will be clarified in this unit. Apart from that, the substantive and procedural requirements under state of emergency will be examined. Moreover, the Unit also considers as to which organ of the government is empowered to declare emergency under the FDRE Constitution.

At the end of this Unit, you should be able to:

- Explain the meaning of state of emergency
- Define the concept of derogation
- Explain the substantive requirements to derogate from Covenant rights
- Distinguish between temporal, material as well as territorial scope of derogation
- Identify the circumstances where declaration of state of emergency is allowed under the ICCPR
- Distinguish between the different form of emergencies
- List non-derogable rights
- Identify the procedural safeguards up on derogation

7.1 MEANING OF STATE OF EMERGENCY

State of Emergency is a difficult term to define. However, in the words of Article 4 of the International Covenant on Civil and Political Rights, it is a situation which “threatens the life of the nation”. The International Covenant on Civil and Political Rights stipulates for States Parties to take emergency measures derogating from certain rights in times of emergency. Derogation means suspension of rights temporarily. There is no derogation clause in the African Charter on Human and People’s Rights. The UDHR does not provide for derogation clause.

As stated above, derogation is permitted in situations which threaten the life of the nation as per Article 4 of the ICCPR. What is the meaning of a situation which threatens the life of the nation? As the term clearly shows, it does not include situations which simply threaten the life of the particular system of government, or of the party, or of the head of state. The then European Commission of Human Rights defined the term state of emergency as a situation of exceptional and imminent danger or crisis affecting the general public, as distinct from particular groups, and constituting a threat to the organized life of the community which composes the State in question.” The Paris Minimum Standards of Human Rights Norms in a State of Emergency defines state of emergency as an exceptional situation of crisis or public danger, actual or imminent, which affects the whole population of the area to which the declaration applies and constitutes threat to the organized life of the community of which the state is composed.

State of Emergency can be classified in to two types as *de jure* emergency and *de facto* emergency. *De Jure* emergency refers to

emergencies which are declared in line with the formal requirements of the law. This is a form of emergency declared in keeping with the constitutional and legal requirements. *De facto* emergency, on the other hand, refers to situations governments resort to emergency measures without complying with the constitutional as well as legal requirements for declaration of state of emergency. *De facto* emergencies also take place when emergency measures are employed after the lapse of the period for which the declaration was out in place.

Activity

1. What circumstances amount to state of emergency under the International Covenant on Civil and Political Rights?

2. Distinguish between *de facto* and *de jure* state of emergency.

7.2. REQUIREMENTS FOR DECLARATION OF STATE OF EMERGENCY

There are five different requirements which must be complied with in declaring state of emergency. These are:

- a. Necessity
- b. Proportionality
- c. Non-Derogable Rights
- d. Non-Discrimination
- e. Compatibility of Emergency Measures with other international obligations of the state.

a. The Requirement of Necessity

As stated earlier, Article 4 of the International Covenant on Civil and Political Rights provides state of emergency can be declared only in situations where the life of the nation is threatened. This means the situation must jeopardize some fundamental elements of statehood or survival of populations. It must be temporary in nature and likely to happen soon. Examples of such exigencies include public health threat, international or internal armed conflict, economic calamities, natural disaster, insurrection, etc. The derogating state must show that the regular application of the situation would not suffice to address the problem.

b. The Requirement of Proportionality

Measures taken in emergency situations must be proportional to the threat presented by the situation. Retraction of rights and freedoms must be strictly required by the crisis. Therefore, the measures would be disproportionate if:

- They are taken to destroy the rights altogether
- They impose limitations more excessive than warranted
- They suspend certain specific rights unnecessarily
- They extend the geographical scope of application of the emergency measures to areas which are not affected by the exigency.

General Comment No 5 of the Human Rights Committee provides that the suspension of the freedom of movement and freedom of assembly would generally suffice in most cases. Proportionality has geographical, temporal and material scope.

c. The Requirement of Non-Discrimination

Article 4 of the International Covenant on Civil and Political Rights requires that emergency measures must not be discriminatory. Emergency measures must not suspend rights of individuals based on

race, sex, language, social origin, etc. The prohibition of discrimination is also stated under Article 2 and 26 of the ICCPR.

d. The Requirement of Compatibility

Emergency measures taken derogating from rights must not be incompatible with other international obligations assumed by the state. This requirement demonstrates the overlap and departure between international human rights law and other aspects of international law, in particular international humanitarian law. International Humanitarian Law governs situations of armed conflict. This assures of continuity of norms.

e. The Requirement of Non-Derogable Rights

Article 4 of the ICCPR makes it clear that not all rights are derogable. The list of non-derogable rights in the Covenant includes the right to life, freedom from torture, inhuman and degrading treatment or punishment, prohibition against slavery, prohibition of ex-post facto application of the law and the right to be recognized as a person before the law. There is a variation between Article 93 of the FDRE Constitution and ICCPR when it comes to non-derogable rights. For instance, the right to life is not made expressly non-derogable under the Constitution.

Activity

1. List the rights which cannot be derogated from under states of emergency.

2. Explain the purpose of state of emergency and derogation from rights.

3. Explain the substantive requirements for derogating from Covenant rights.

4. Explain the distinction between derogations and limitations.

7.3 Procedural Safeguards

a. The Requirement of Proclamation

The requirement of proclamation serves three different purposes. Firstly, it reduces the incidence of de facto emergencies, it prevents the use of emergency powers in situations which do not warrant declaration of emergency. Secondly, it informs the population, the temporal, territorial and material scope of the emergency measures. Thirdly, it makes domestic supervision by legislative and judicial bodies possible.

b. The Requirement of Notification

Article 4(3) of the International Covenant on Civil and Political Rights imposes on States Parties the obligation to comply with the international notification. This condition is imposed with a view to prevent abuse of the right to derogate. Article 4(3) of the International Covenant reads “Any State Party to the present Covenant availing itself of the right of derogation shall immediately inform the other States Parties to the present Covenant, through the intermediary of the Secretary-General of the United Nations, of the provisions from which it has derogated and of the reasons by which it was actuated. A further communication shall be made, through the same intermediary, on the date on which it terminates such derogation.”

7.4. DEROGATION UNDER THE FDRE CONSTITUTION

Under FDRE Constitution, derogation may also be made to fundamental human rights in times of serious emergencies. Circumstances that warrant the declaration of a nation-wide state of emergency and trigger suspension of some constitutionally protected human rights are external invasion, a natural disaster or epidemic, a break down of law and order that endanger the constitutional order and which cannot be controlled by regular law enforcement agencies and personnel as set out under Article 93 of the Constitution. State-wide state of emergencies can also be declared in the event of natural disaster or epidemic.

The Council of Ministers has the power to decree a state of emergency. The decree should be presented to the House of Peoples’ Representatives within forty-eight hours if it is in session and within fifteen days if it is not in session. After consideration, the Council of Ministers’ decree has to be accepted by a two third majority of the House of Peoples’ Representatives to remain in effect through a State

of Emergency Proclamation. Such a proclamation can stay in effect for six months and can be renewed for four months by a two third majority vote of the House of Peoples' Representatives. A State of Emergency Inquiry Board will also be established to ensure that derogation of human rights is not arbitrary; measures taken are consistent with the constitution; corrective measures are taken and perpetrators of acts contrary to the Constitution are appropriately punished.

Activity

1. Does the International Covenant on Economic, Social and Cultural Rights provide for derogation? Why or why not?

2. Does the African Charter on Human and Peoples' Rights provide for derogation? Why or why not?

3. Compare and Contrast the non-derogable rights under the FDRE Constitution and the International Covenant on Civil and Political Rights.

7.5. SUMMARY

The International Covenant on Civil and Political Rights permits derogation from certain human rights norms in situations of

exceptional threat. Derogation differs from limitations discussed in the previous Chapter since it is of temporary nature and can be resorted to only in circumstances which threaten the life of a nation. This Unit elaborated the meaning of situations of exceptional nature and circumstances which threaten the life of the nation. The strict condition attached to derogation is due to the need to ensure that it may not be abused by authoritarian regimes.

The objective of derogation is the restoration of normalcy and full respect of Covenant rights. Despite the fact that derogation may be permitted in such situations, certain rights remain non-derogable. These are the right to life (Article 6) , the right to freedom from torture, cruel, inhuman and degrading treatment or punishment, and medical or scientific experimentation without one's free consent (Article 7), the right to freedom from slavery, the slave trade and servitude (Article 8), the right not to be imprisoned on the ground of inability to fulfill a contractual obligation (Article 11), the right not to be subjected to retroactive legislation (*ex post facto laws*) (Article 15), the right to recognition as a person before the law (Article 16) and the right to freedom of thought, conscience and religion (Article 18)

7.6. SELF-ASSESSMENT QUESTIONS

1. Which one of the following rights is non-derogable under the ICCPR?
 - A. The right to life
 - B. Freedom from torture
 - C. Freedom from Slavery
 - D. Freedom from non-retroactive application of the law
 - E. All of the above.
2. Which one of the following situations does not warrant declaration state of emergency?
 - A. public health threat

- B. international or internal armed conflict
 - C. economic calamities
 - D. natural disaster
 - E. None of the above.
3. Which one of the following is not an element of the requirement of proportionality?
- A. Material Scope
 - B. Territorial Scope
 - C. Temporal Scope
 - D. None of the above.
4. Which one of the following is the purpose of the requirement of proportionality?
- A. It reduces the incidence of de facto emergencies.
 - B. It informs the population, the temporal, territorial and material scope of the emergency measures.
 - C. It makes domestic supervision of by legislative and judicial bodies possible.
 - D. All of the above.

UNIT EIGHT

ECONOMIC, SOCIAL AND CULTURAL RIGHTS

Introduction

The previous Units focused primarily on the International Covenant on Civil and Political Rights and the rights enunciated in the Covenant. This Unit shifts attention to economic, social and cultural rights which was briefly touched up on previously in the Unit on International Bill of Human Rights. The fact that the International Covenant on Economic, Social and Cultural Rights constitutes part and parcel of the International Bill of Human Rights has already been explained in connection with the said Unit. This Unit focuses on more detailed discussion of the nature of economic, social and cultural rights. The Unit also investigates the foundations of these rights. The Unit also dwells up on certain specific economic, social and cultural rights with a view to illustrate the substantive content of these rights.

At the end of this Unit, you should be able to:

- Explain the place of economic, social and cultural rights in the Universal Declaration of Human Rights
- Identify economic, social and cultural rights from other sets of rights
- Explain the relationship between economic, social and cultural rights with that of civil and political rights
- Distinguish between the nature of obligations in the case of economic, social and cultural rights with that of civil and political rights
- Discuss the constituent elements of the right to adequate housing
- Explain the constituent elements of the right to adequate health

8.1 ECONOMIC, SOCIAL AND CULTURAL RIGHTS

Economic, social and cultural rights are at times described as the second “generation” of human rights as was explained previously. Economic, social and cultural rights regulate the economic, social and cultural aspects of the life of human beings. Though the Universal Declaration of Human Rights focuses primarily on civil and political rights, Articles 22-28 of the Declaration provides for economic, social and cultural rights. Comprehensive catalogue of economic, social and cultural rights is to be found in the International Covenant on Economic, Social and Cultural Rights (ICESCR). The ICESCR is adopted on December 1966 and came in to force on 3 January 1976.

The rights recognized in the ICESCR include the right to work, the right to the enjoyment of just and favorable conditions of work, the right to form and join trade unions, the right to social security, including social insurance, the right to the protection of the family, the right to an adequate standard of living, the right to the enjoyment of the highest attainable standard of physical and mental health, the right of everyone to education, and the right to take part in cultural life.

The Vienna Declaration adopted at the World Conference on Human Rights in Vienna in 1993 asserted that civil and political rights, on the one hand, economic, social and cultural rights on the other hand are universal, indivisible and interdependent and interrelated. However, this formal consensus conceals the disagreement concerning the proper status of economic, social and cultural rights. There are two extreme positions on this point. On the one hand, there is the position that economic, social and cultural rights are rights superior to civil

and political rights. The proponents of this position argue, for instance, free expression is of no value to those who are starving. On the other hand, there are those who argue that economic, social and cultural rights are inferior to civil and political rights. The exponents of this position argue that the recognition of economic, social and cultural rights undermines the enjoyment of individual freedoms, distorts the functioning of free-market economy by justifying large-scale state intervention, and serves as excuse to downplay the importance of civil and political rights.

Many religious traditions stress the duty to care for those in need and for those who cannot look after themselves. Many religions demonstrate concern for the poor and the oppressed. In 1919, the International Labour Organization (the ILO) was established to abolish the injustice, hardship and privation of workers and to guarantee fair and humane conditions of labour. The ILO came up with international minimum standards on matters including freedom of association, the right to organize trade unions, forced labour, minimum working age, hours of work, weekly rest, sickness protection, accident and old-age insurance, and freedom from discrimination in employment.

There are certain differences between the ICCPR and the ICESCR. Many of the provisions in the ICCPR start with the formula “everyone has the right to...” or no one shall be ...” Whereas many of the provisions in the ICESCR start with the phrase “State Parties recognize the right of everyone...” As opposed to the International Covenant on Civil and Political Rights, most of the obligations under the ICESCR are of progressive realization. This is due to the fact that the realization of economic. The realization of social and cultural rights depends up on the availability of resources and international

cooperation as is provided under Article 2(1) of the ICESCR. Thus, economic, social and cultural rights are labeled as programmatic, whereas civil and political rights are of immediate effect. However, the Committee on Economic, Social and Cultural Rights issued General Comment No.3 stating that though the bulk of the rights in ICESCR are of progressive realization, there are obligations of immediate nature. The examples mentioned include the undertaking by state parties to guarantee the rights without discrimination and that of the obligation to take steps. The Committee also noted minimum core obligation to ensure the satisfaction of at the very least, minimum essential levels of each of the rights.

The Great Depression of the 1930s also demonstrated the need for social protection of those who are unemployed. In his famous Four Freedoms Speech in 1941, President Roosevelt mentioned “freedom from want” as one of the four freedoms. He stressed that individual freedom cannot be attained in the absence of economic security and independence. Article 55(a) of the Charter of the UN also provides the UN shall promote higher standards of living, full employment, and conditions of economic and social progress and development.

Asbjorn Eide, one of the most reputed scholars on economic, social and cultural rights and human rights, is strongly opposed to the suggestion that economic, social and cultural rights must be provided by the government and that these rights lead to overgrown state apparatus. He argues this view emanates from a narrow understanding of these rights and state obligations arising from these rights. He asserts that the individual is the active subject of economic and social development as provided under Article 2 of the Declaration on the Right to Development.

Thus, according to Asbjorn Eide, the individual is expected to find ways to ensure the satisfaction of his or her own needs individually or in association with others through one's effort and own resources. This assertion presupposes that the individual owns resources, normally land or other capital, or labour.

Asbjorn goes on to argue state obligations need to be understood along this line. He then outlines tripartite layers of state obligations arising out of economic, social and cultural rights. These are obligations to respect, protect and fulfill. The first obligation requires the state to respect the resources owned by the individual, his freedom to find a job of preference, and the freedom to take the necessary actions and use the necessary resources to satisfy the needs of the individual. Asbjorn Eide mentions, as an example, the duty to respect the resources belonging to indigenous populations. The rights of peoples to exercise permanent sovereignty also enable them to satisfy the needs of their individual members.

The obligation to protect comes at the secondary level of the tripartite obligations of the state. Accordingly, the state is required to protect individuals from more aggressive subjects. These include more powerful economic interests, protection against fraud, against unethical behavior in trade and contractual relations, against the marketing and dumping of hazardous or dangerous products.

Thirdly, the state has the obligation to fulfill and to assist. This is further divided in to two: the duty to facilitate and the duty to provide. The duty to facilitate includes improving measures of production, conservation and distribution of food through use of technical and scientific knowledge. It also includes developing and reforming

agrarian systems. The duty to fulfill also includes the duty to provide social amenities. This duty to provide comes in three cases.

- When there is unemployment
- To the elderly and disadvantaged
- In case of natural disasters.

Activity

1. Discuss the distinction in the nature of obligations arising from the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights.

2. Identify rights in the International Covenant on Economic, Social and Cultural Rights which are of immediate effect.

3. Discuss the two extremes concerning the nature of economic, social and cultural rights.

8.2. Principal Rights Protected under the International Covenant on Economic, Social and Cultural Rights

What is the Right to Adequate Housing?

The right to adequate housing is a constituent element of the right to adequate standard of living enshrined under Article 11(1) of the International Covenant on Economic, Social and Cultural Rights (ICESCR). Article 11(1) of the ICESCR provides that States Parties “recognize the right of everyone to an adequate standard of living for himself and for his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions.” The right to housing means more than the right to shelter provided by merely having a roof over one’s head.¹¹⁰ It means the right to live somewhere in security, peace and dignity.¹¹¹ Adequate shelter means adequate privacy, adequate space, adequate security, adequate lighting and ventilation, adequate basic infrastructure and adequate location with regard to work and basic facilities- all at a reasonable cost.¹¹²

According to General Comment No. 4, a given shelter is said to constitute adequate housing provided it fulfills the following requirements:

- (i) Legal Security of Tenure: Irrespective of the nature of tenure, all persons should possess a degree of security of tenure which guarantees legal protection against forced eviction, harassment and other threats.

¹¹⁰ General Comment No.4, Committee on Economic, Social and Cultural Rights

¹¹¹ Ibid.

¹¹² Commission on Human Settlements and the Global Strategy for Shelter

- (ii) Availability of Services and Materials, facilities and infrastructure: Housing must fulfill certain facilities essential for health, security, comfort and nutrition. Beneficiaries of housing should have access to resources, safe drinking water, and energy for cooking, heating and lighting, sanitation and washing facilities, means of food storage, refuse disposal, site drainage and emergency services.
- (iii) Affordability: Personal or household financial costs associated with housing should be at a level that the attainment and satisfaction of other basic needs are not threatened or compromised. Steps should be taken by States parties to ensure that the percentage of housing-related costs is, in general, commensurate with income levels. States Parties should establish housing subsidies for those unable to obtain affordable housing as well as housing finance. Tenants should also be protected against unreasonable rent increases. Efforts also must be made to ensure the availability of building materials for housing.
- (iv) Habitability: Housing must be habitable in the sense that it must provide the inhabitants with adequate space and protecting them from cold, damp, heat, rain, wind or other threats to health, structural hazards, and disease vectors. The physical safety of occupants must also be guaranteed.
- (v) Accessibility: Disadvantaged groups such as the elderly, children, persons with disability, persons living with HIV/AIDS and victims of natural disasters

should be given priority consideration in the housing sphere.

- (vi) Location: Adequate housing must be in a location which allows access to employment options, health-care services, schools, child care centers and other social facilities. This is to ensure the temporal and financial costs of getting to and from the place of work can place excessive demands up on the budgets of poor households. Likewise, housing should neither be built on polluted sites nor in immediate vicinity to pollution sources that threaten the life to health of inhabitants.
- (vii) Cultural Adequacy: The way housing is constructed, the building materials used and the policies supporting these must appropriately enable the expression of cultural identity and diversity of housing.

As stated previously, obligations assumed by states in the field of economic, social and cultural rights are not only of progressive nature but also of immediate effect. Accordingly, the International Covenant on Economic, Social and Cultural Rights imposes obligations of immediate nature arising from the right to adequate housing. The right to adequate housing implies the obligation to take steps as well as to undertake effective monitoring of the situation as regards housing. One of the steps which must be taken in this regard is that of the adoption of national housing strategy, which defines the objectives for the development of shelter conditions, identifies the resources available to meet these goals and the most cost-effective way of using them and sets out the responsibilities and time-frame for the implementation of the necessary measure.¹¹³

¹¹³ Para. 32, Global Strategy for Shelter

What is the Right to Health?

Like the case of the right to adequate housing, the right to the highest attainable standard of health is also a component of the right to adequate standard of living enshrined under Article 11(1) of the International Covenant on Economic, Social and Cultural Rights. The right to health has been defined as a right to the underlying determinants of health, such as access to safe and potable water and adequate sanitation, an adequate supply of safe food, nutrition and housing, healthy occupational and environmental conditions, and access to health-related education and information, including on sexual and reproductive health.

The minimum requirements of the right to the highest attainable standard of health include: availability, accessibility, acceptability, and quality of health facilities, goods and services as well as programs.

(i) Availability means that functioning public health and health-care facilities, goods and services, as well as programs, have to be available in sufficient quantity within the State. While the precise nature of the facilities, goods and services will vary depending on the State's developmental level, they will include the underlying determinants of health, such as safe and potable drinking water and adequate sanitation facilities, hospitals, clinics and other health-related buildings, trained medical and professional personnel receiving domestically competitive salaries, and essential drugs.

(ii) Accessibility means that health facilities, goods and services have to be accessible to everyone without discrimination. It has four overlapping dimensions: health facilities, goods and services must be

non-discriminatory (accessible without discrimination on any of the prohibited grounds), physically accessible (within safe physical reach for all sections of the population), economically accessible (affordable for all), and information accessibility (the right to seek, receive and impart information and ideas concerning health issues).

(iii) Acceptability requires that all health facilities, goods and services must be respectful of medical ethics and culturally appropriate, i.e. respectful of the culture of individuals, minorities, peoples and communities, sensitive to gender and life-cycle requirements, as well as being designed to respect confidentiality and improve the health status of those concerned.

(iv) Quality means that health facilities, goods and services must be scientifically and medically appropriate and of good quality. This requires, among others, skilled medical personnel, scientifically approved and unexpired drugs and hospital equipment, safe and potable water, and adequate sanitation and nutrition within the facility.

While the constraints due to the limits of available resources are acknowledged, States parties have immediate obligations relating to the right to health, such as the guarantee that the right will be exercised without discrimination of any kind and the obligation to take deliberate, concrete and targeted steps towards the full realization of the right to health. The *core obligations* in relation to the right to health include at least: ensuring non-discriminatory access to health facilities, goods and services; minimum essential food; basic shelter, housing and sanitation, and an adequate supply of safe and potable water; essential drugs; and adopting and implementing a national public health policy/strategy and plan of action. Ensuring reproductive, maternal and child health care;

immunization against the major infectious diseases; preventing, treating and controlling epidemic and endemic diseases; and providing health education and training are also obligations of comparable priority.

8.3 Protection of ESC Rights under the FDRE Constitution

The FDRE Constitution contains some provisions which are relevant to the protection of economic, social and cultural right. For example, Article 41 of the FDRE Constitution reads as follows:

- (1) Every Ethiopian has the right to engage freely in economic activity and to pursue a livelihood of his choice anywhere within the national territory.
- (2) Every Ethiopian has the right to choose his or her means of livelihood, occupation and profession.
- (3) Every Ethiopian national has the right to equal access to publicly funded social services.
- (4) The State has the obligation to allocate an ever increasing resources to provide to the public health, education and other social services.
- (5) The State shall, within available means, allocate resources to provide rehabilitation and assistance to the physically and mentally disabled, the aged, and to children who are left without parents or guardian.

On the other hand, Article 90 (1) of the FDRE Constitution provides that policies shall aim to provide all Ethiopians access to public health and education, clean water, housing, food and social security to the

extent the country's resources permit. The Constitution does also guarantee ESC rights in its other provisions. It is evident from the list of provisions of the Constitution that the rights to health as well as housing are guaranteed, though not in black letters and directly.

8.4 SUMMARY

The Unit discussed the differences in opinion as regards the nature of economic, social and cultural rights. It elaborated the position that economic, social and cultural rights are rights superior to civil and political rights. The Unit also examined the position of those who argue that economic, social and cultural rights are inferior to civil and political rights. The Unit made it clear that despite these differences almost the same number of states which ratified the International Covenant on Civil and Political Rights have also ratified the International Covenant on Economic, Social and Cultural Rights. The Unit also stated the official position as regards the nature of the two rights that both sets of rights are universal, indivisible and interdependent and interrelated.

The Unit also looked in to the nature of obligations arising from economic, social and cultural rights. In this regard, though the bulk of rights in the ICESCR are of progressive, there are also obligations of immediate effect. These obligations of immediate effect can be exemplified by the obligation to take steps and the obligation to ensure non-discrimination in the enjoyment of economic, social and cultural rights.

The Unit also shifted attention to the elaboration of the tripartite obligations arising from economic, social and cultural rights. The said obligations have been elaborated by considering specific forms of duties. The Unit has considered the specific human rights norms of

the right to adequate housing and the right to health with a view to substantiate the discussion. Moreover, the Unit has briefly considered the place of economic, social and cultural rights in the FDRE Constitution.

8.5. SELF-ASSESSMENT QUESTIONS

1. Which one of the following is not constituent element of the right to adequate standard of living under the International Covenant on Economic, Social and Cultural Rights?
 - A. The right to adequate clothing
 - B. The right to adequate housing
 - C. The right to adequate food
 - D. None of the above.
2. Which one of the following is not an element of the right to adequate housing?
 - A. adequate privacy
 - B. adequate space
 - C. adequate security
 - D. adequate lighting and ventilation
 - E. adequate basic infrastructure
 - F. None of the above.
3. Which one of the following is not implied by the duty to protect?
 - A. Protection of individuals from powerful economic interests
 - B. protection against fraud, against unethical behavior in trade and contractual relations
 - C. Protection against the marketing and dumping of hazardous or dangerous products
 - D. None of the above.

4. Which one of the following is not a core obligation arising from the right to health?
- A. ensuring non-discriminatory access to health facilities, goods and services
 - B. ensuring minimum essential food, basic shelter, housing and sanitation
 - C. adequate supply of safe and potable water
 - D. adequate supply of tertiary level medical services such as treatment against cancer
 - E. None of the above.
5. Which one of the following is not implied by the duty to respect?
- A. The duty to engage proactively in economy.
 - B. Not to interfere with the resources owned by the individual
 - C. Not to interfere with the freedom of the individual to find a job of preference
 - D. Not to interfere with the freedom of the individual to take the necessary actions and use the necessary resources to satisfy his needs
 - E. All of the above.

UNIT NINE

OTHER MAJOR UN HUMAN RIGHTS TREATIES

Introduction

In the previous Units, you studied the international human rights instruments which make up the International Bill of Human Rights. Moreover, you also studied specific human rights norms in those instruments as well as other features. In this Unit, you will focus on other major United Nations human rights instruments. Thus, you will be studying the objectives of instruments including the International Convention on the Elimination of All Forms of Discrimination against Women, the International Convention on the Elimination of All Forms of Racial Discrimination and the Convention on the Rights of the Child. In addition, you will study the main principles enunciated in these instruments. Moreover, the Unit dwells on the mechanisms established under these instruments for the purpose of monitoring compliance.

At the end of this Unit, you should be able to:

- Identify the major international human rights instruments apart from the International Bill of Human Rights
- Explain the objectives of the International Convention on the Elimination of All Forms of Discrimination against Women
- Explain the objectives of the Convention on the Rights of the Child
- Discuss the objectives of the Convention on the Elimination of All Forms of Racial Discrimination
- Enumerate the measures that States parties are required to take to eliminate discrimination

- Explain the four general principles of the Convention on the Rights of the Child
- Discuss the monitoring mechanisms of these Conventions

9.1. CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN

The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) entered into force in 1981. The Convention has 165 States Parties as of March 2000. It is obvious that women benefit from the rights enshrined under the International Bill of Human Rights. Non-Discrimination is a cross-cutting issue which runs through the International Bill of Human Rights. In our previous discussions, we came across assurance of equal protection and non-discrimination in Articles 1(3) and 55(c) of the Charter of the UN, Article 2 of the UDHR, Article 2(1) of the ICCPR, Article 2 of the ICESCR and in other Articles.

CEDAW is adopted in 1979 by the General Assembly of the UN in order to address the distinctive concerns of women. The adoption of CEDAW was prompted by the need to come up with a Convention which addresses gender-based discrimination. The Principal objective of CEDAW is ensuring the equal enjoyment by women of their rights in every sphere on a basis of equality with men. CEDAW adopts a holistic approach in that it provides civil, political rights along with economic, social and cultural rights. Women suffer the most in conditions of poverty and destitution. They have limited access to health care, food and education.

Articles 1 until 16 are primarily concerned with banning discrimination against women and ensuring full equality between men and women. Article 1 of CEDAW also prohibits discrimination based on sex. The term discrimination is defined as follows:

any distinction, exclusion or restriction or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.”

The definition of the term indicates that one does not need to prove State intent as a requirement to demonstrate discrimination as implied by the term “purpose or effect.” This phrase shows that the state can be held responsible for discrimination against women if its practices have such effect even if they may not be intended. This is to mean that the Convention prohibits unintentional discrimination. States Parties have undertook to promote women’s development and advancement in political, social, economic, and cultural fields so that they can participate on *a de facto* equal basis with men in those spheres of life. The Convention makes it clear that affirmative action measures and measures meant to protect maternity are not discrimination.

Article 3 of the Convention calls up on states parties to take all appropriate measures to ensure the full development and advancement of women. The article shows the full development of women is a right to be pursued in its own. Article 4 of the CEDAW also calls up on States Parties to adopt temporary special measures to attain this objective. These temporary special measures widely known

as affirmative actions are meant to achieve the *de facto* equality of women with men.

Article 5(a) of CEDAW calls up on states parties to take affirmative steps to modify cultural patterns that impair the enjoyment of rights on a basis of equality between men and women. It states that States Parties are required to modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or stereotyped roles for men and women. In the same vein, Article 10(c) requires States Parties to eliminate discrimination against women in the field of education by eliminating any stereotyped concept of the roles of men and women at all levels and in forms of education by encouraging coeducation and other types of education which help to achieve this aim and, in particular, by the revision of textbooks and school programmes and the adaptation of teaching methods. For example, the notion that child raising is the duty of the woman has to be replaced with the notion that responsibility for children's upbringing is to be shared by men and women.¹¹⁴

The Convention affirms equal participation in political sphere. Articles 7 and 8 affirm the rights of the woman to vote, to shape government policy, to participate in non-governmental organizations and to represent her country at the international level. The Convention also enshrines equal rights in nationality, including equal status in the determination of nationality of children of the couple.

¹¹⁴ Raija Hanski and Markku Suksi, *An Introduction to International Protection of Human Rights*, (Institute for Human Rights, Abo), 2000, p. 130

Articles 10 up to 14 pertain to economic, social and cultural rights. States parties are obliged to eliminate discrimination in educational opportunities, access to health care as well as employment practices. The following are some of the guarantees affirmed in this regard:

- Women must receive equal pay for equal work.
- Maternity leave and a woman's right to work without discrimination on the grounds of maternity and appropriate health services in regard to pregnancy are guaranteed.
- The Convention guarantees socioeconomic rights to family benefits, financial credit, and participation in recreational activities.
- The Convention also affirms the equal participation by rural women in rural development and benefits accruing from such development.

The Convention also provides that the legal capacity of women and the rights need to be formulated in an identical manner. To this effect, the Convention affirms the equal rights of women to contract, the equal right to property, the right to equality before the law and of the courts and freedom of movement. Article 26 of the Convention also provides that women must have the same rights in choosing spouses freely and the same parental rights and responsibilities. The same provision also affirms the equal rights of women after the dissolution of the marriage.

The Convention does not provide the right to bodily security of women specifically. Also, it does not expressly address the issue of violence against women with the only exception of suppression of the trafficking in women under its Article 6. However, the Committee on the Elimination of Discrimination against women interpreted the Convention as to prohibit violence against women. The Committee

also adopted General Recommendation No. 19 on Violence against Women.¹¹⁵ In its General Recommendation, the Committee stated that the term discrimination under Article 1 of CEDAW includes gender-based violence. It defines gender-based violence so as to mean violence directed against a woman because she is a woman or that affects women disproportionately. The term includes acts that inflict physical, mental or sexual harm or suffering, threats of such acts, coercion and other deprivations of liberty. Specific examples include forced marriage, harmful traditional practices, acid attacks and female circumcision.

The General Assembly of the UN adopted Declaration on the Elimination of Violence against Women in 1993. The preamble of the Declaration states that violence against women is a manifestation of historically unequal power relation between men and women. Violence is defined as “social mechanism by which women are forced in to a subordinate position” in the Declaration. The Declaration calls up on states to exercise due diligence to prevent, investigate, punish acts of violence against women, whether committed by the State or private persons.

Activity

1. Explain the concept of gender-based discrimination.

¹¹⁵ The Committee on the Elimination of All Forms of Discrimination is a treaty-based body which is established under the Convention to monitor the implementation by States Parties of the Convention. This Committee is more influential than the older UN Commission on the Status of Women. The latter was established by the General Assembly of the UN along with Commission on Human Rights.

2. Discuss the measures States parties are required to undertake under the Convention on the Elimination of Discrimination against Women?

3. Discuss the concept of gender-based violence and how the CEDAW deals with it.

9.2 THE CONVENTION ON THE RIGHTS OF THE CHILD

In 1959, the UN General Assembly adopted the Declaration of the Rights of the Child. It was the first major international instrument exclusively devoted to children's rights. It proclaimed the principle that "the best interests of the child" should guide the actions of those affecting children. The Declaration provided the moral and legal basis for developing a binding treaty on the rights of the child.

In 1989, the UN General Assembly adopted the Convention on the Rights of the Child (CRC).¹¹⁶ The CRC was adopted unanimously without modifications by the General Assembly of the United Nations on 20 November 1989. It entered into force as international law on 2 September 1990 after its ratification by the 20 required states. As of November 2003, 192 countries had become State Parties to the

¹¹⁶ Convention on the Rights of the Child, *adopted* 20 Nov. 1989, GA Res. 44/25, 44 UN GAOR Supp. (No. 49) at 165, UN Doc. A/44/736 (1989), *reprinted in* 28 ILM 1448 (1989).

Convention making it the fastest and most universally accepted human rights instrument in history.¹¹⁷

The text, which emerged after the decade-long drafting process, is the uniquely comprehensive list of human rights norms relating to children. It includes child-related provisions of the other human rights treaties, such as those mentioned above. Furthermore, the text includes novel aspects such as survival, protection and development of children, as well as provisions for other rights, including the right to participation. The CRC takes into account the situation of children of minority and indigenous groups, and deals with children threatened by drug abuse and neglect. The CRC constitutes in essence a “bill of rights” for all children, a code of binding obligations for governments, and a minimum standard of responsible conduct for communities and families with respect to the young.

An important aspect of the CRC is that it defines some general principles, which together form an approach to the rights of the child that guides national programs of implementation. The CRC also involves UN bodies and NGOs in the monitoring and implementation efforts.

General Principles of the Convention on the Rights of the Child

The Convention on the Rights of the Child is rooted in some basic values about the treatment of children, their protection and participation in society. These ideas are expressed in some of the early articles in the text. The choice of these articles as “general

¹¹⁷ Only two countries, Somalia and the United States, have not ratified this celebrated agreement. Somalia is currently unable to proceed to ratification as it has no recognized government. By signing the Convention, the United States has signaled its intention to ratify – but has yet to do so.

principles” was made by the UN Committee on the Rights of the Child during its first session in September-October 1991, when it agreed on guidelines on how the initial reports by governments should be written and structured.¹¹⁸ Accordingly, the provisions of articles 2, 3, 6 and 12 of the CRC have acquired the status of general principles. These articles refer to: non-discrimination (Article 2); the best interests of the child as a primary consideration (Article 3(1)); the state’s obligation to ensure necessary care and protection (Article 3(2)); and standards for institutions, services and facilities (Article 3(3)); the right to life, survival and development (Article 6); respect for the views of the child (Article 12).

Best interest of the child: Children, especially when very young, are vulnerable and need special support to be able to enjoy their rights in full. The principle of “the best interests of the child,” formulated in article 3(1) is meant to address these vulnerabilities. The provision reads: “In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration”. As per this principle, the interests of children should be given primary consideration whenever official decisions which affect their interests are taken. The interests of the parents or the state should not be the all-important consideration.

Views of the child: This principle of the best interest of the child logically requires that children be able to express their views on what their interests are. This is why the views of the child are formulated as a principle under article 12(1) of the Convention which reads: “States

¹¹⁸ General guidelines regarding the form and content of initial reports to be submitted by States Parties under article 44, paragraph 1(a), of the Convention on the Rights of the Child, UN Doc. CRC/C/5 (1991); see also Official Records of the General Assembly, Forty-seventh Sess., Supp. (No. 41), UN Doc. A/47/41, Annex III (1992).

Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child be given due weight, in accordance with the age and maturity of the child”.¹¹⁹ This principle recognizes that the child has the right to be heard and have his/her ideas taken seriously.

Right to survival and development: The principle, which is formulated in the right to life article, includes the right to survival and to development. Article 6(2) provides: “States Parties shall ensure to the maximum extent possible the survival and development of the child”.¹²⁰

Nondiscrimination: The fourth general principle of the CRC, as identified by the Committee on the Rights of the Child, is that all children should enjoy their rights and no child should suffer discrimination. The obligation to provide equality of opportunities among children is expressed in article 2, the first paragraph of which reads: “States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child’s or his or her parent’s or legal guardian’s race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status”. This principle seeks to ensure the equal enjoyment of rights. That is, girls should be given the same opportunities as boys; refugee children and children of indigenous or minority groups should have the same rights as all others; and

¹¹⁹ This has been termed by some commentators the “participation” element in the CRC.

¹²⁰ The word “survival” is unusual in human rights treaties; it is borrowed from the terminology used in development discussions. The purpose was to introduce a dynamic aspect to the right to life, thus including the need for preventive action, such as immunization. The term “development” relates to the individual child and should be interpreted in a broad sense. It adds a qualitative dimension to the article. Not only physical health is intended but also mental, emotional, cognitive, social and cultural development.

children with disabilities should be given the same possibility to lead a decent life as the rest.

Measures of Implementation

General Measures of Implementation: The degree of implementation of the CRC is to a large extent a question of political will. When drafting the reporting guidelines, the committee chose to give heavy emphasis to general measures, including those of a political nature, to make a reality of the principles and provisions of the convention. It proposed a comprehensive approach of reform in the spirit of the CRC, not least the establishment of procedures that would encourage constant scrutiny of what actually is done in this domain. Of particular interest here is article 4, which describes obligations of conduct rather than of result; the emphasis is on what efforts the state party makes in promoting the implementation of the CRC. The same is true for the other two articles under General Measures of Implementation—those relating to making the Convention and the state party report widely known to the public (arts. 42 and 44[6]).

Legislative, administrative and other measures: A state party should review its legislation and ensure that the laws are consistent with the CRC. The “administrative and other measures” also include a range of steps in order to make the implementation effective such as mechanisms to coordinate policies and to monitor the implementation of the CRC at the national and local levels. Another important aspect of these measures relates to collecting reliable and relevant facts on the situation of children.

International cooperation: Recognizing that the realization of the rights recognized in the Convention is likely to be beyond the

resources available to some nations, various provisions provide for international cooperation and assistance. One such provision is article 4, which states: "States Parties shall undertake such measures to the maximum extent of their available resources and, where needed, within the framework of international co-operation". Cooperation is also mentioned in other articles such as art. 24(4) relating to means for the provision for the right to health; article 28(3) on the right to education and in article 23 [4] on the rights of disabled children. In article 23(4) there is also an emphasis on exchange of information and knowledge. Furthermore, there are references to international standards and agreements in several of the articles and, as in the case of protection against sexual exploitation, requests for bilateral and multilateral measures in a transnational context (arts. 34 and 35).

Monitoring and Enforcement: The last 13 articles of the Convention establish the ways in which the implementation of the Convention will be monitored. These include the setting up of a Committee on the Rights of the Child, which receives initial reports from governments two years after they have ratified the Convention and every five years thereafter. UN agencies and NGOs are invited to submit relevant information to the Committee in order to support its work. Governments are required to report to the international UN Committee on the Rights of the Child within two years after ratification and thereafter every five years. The Committee may also request a complementary report or additional information between these periods. The report should contain relevant information about legislation, budgets and national plans as well as about the administrative structures to enforce and monitor the policy in line with the Convention at local and national levels. Also, the report should outline progress made and the difficulties encountered. It

should be oriented towards the future and have a self-critical approach.

9.3 CONVENTION ON THE ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION

Protection against discrimination, in particular that of racial discrimination has been one of the major activities of the UN in the realm of human rights. The resolve on the part of the international community against racial discrimination is manifested by the establishment of Sub-Commission on the Prevention of Discrimination and Protection of Minorities in 1947.

The adoption of the Convention on the Elimination of All Forms of Discrimination was hastened by two events.¹²¹ After the Second World War, the world emerged from unprecedented atrocities and utter disregard for human dignity based on theories of superiority of one race over the other by Fascism as well as Nazism. Persons belonging to certain ethnic, racial and national minorities like Jews were exterminated. The UN was established for promoting and encouraging respect for human rights and for fundamental freedoms for all without discrimination based on race, sex, language or religion.

The second set of events pertains to the struggle on the part of Third World countries against colonialism. Colonial domination and alien subjugation was based on the idea of racial superiority. The General Assembly also adopted resolution on the Declaration on the Granting of Independence to Colonial Countries and Peoples.¹²²

¹²¹ Raija Hanski and Markku Suksi, *An Introduction to International Protection of Human Rights*, (Institute for Human Rights, Abo), 2000, p. 125

¹²² *Ibid.* p. 126

The Convention on the Elimination of All Forms of Racial Discrimination was adopted by the General Assembly of the UN in 1965. The Convention entered into force in 1969. The Convention has been ratified by 152 states as of January 1999. The Convention on the Elimination of All Forms of Racial Discrimination is unique from the other treaties as it was drafted not by the Commission on Human Rights as the latter was busy drafting the ICCPR and ICESCR. It is also unique in that it is the first Convention to have its own monitoring mechanism or supervisory body.¹²³ The Convention was adopted in 1965, a year before the adoption of the ICCPR and ICESCR. The Convention entered into force in 1969. As of 8 April 2002 it had 161 States parties. The Convention established a Committee on the Elimination of Racial Discrimination which monitors the implementation of the Convention.

The Convention represents the resolve of the international community to eliminate racial discrimination in particular that of apartheid. The Convention defines racial discrimination as:

any distinction, exclusion, restriction or preference based on race, color, descent or national or ethnic origin" having the purpose or effect of "nullifying or impairing the recognition, enjoyment or exercise on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life."

Art. 1(4) of the Convention provides that special measures taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals ... in order to ensure such groups or

¹²³ Manfred Nowak, Introduction to International Human Rights Regime, (Martinus Nijhoff Publishers, Leiden), p. 83

individuals equal enjoyment or exercise of human rights and fundamental freedoms shall not be deemed racial discrimination, provided that they do not lead to the maintenance of separate rights for different racial groups and that they shall not be continued after the objectives for which they were taken have been achieved. Unlike Article 2(1) of the International Covenant on Civil and Political Rights which only addresses distinction in the enjoyment of the rights recognized in the Covenant, Article 1(1) of the CERD extends to all human rights and fundamental freedoms, whatever their source.¹²⁴

The term race is employed to mean people with a specific combination of physical characteristics of genetic origin. It is a concept applied to a world without clear-cut categories of peoples. Article 1 of the Convention on the Elimination of All Forms of Discrimination provides that the Convention does not apply to distinctions between citizens and non-citizens.

The Convention calls up on States to take appropriate steps to prohibit and to eliminate all forms of discrimination and also to take temporary special measures or affirmative action. Article 2 of the Convention obliges States Parties to condemn racial discrimination and to implement national policies aimed at eliminating racial discrimination and encouraging integration among all races. Article 1 also allows States Parties to take affirmative action measures until such time that the objectives of the Convention are fulfilled. This is indicative of the fact that affirmative action measures within the meaning of the Convention are of temporary nature.

¹²⁴ Louis Henkin and Gerald L. Newman (eds), *Human Rights*, (Foundation Press, New York), p. 1039

Article 4 of the Convention also obliges States Parties to prohibit and punish offences concerning racism and racial discrimination such as racist propaganda. The same provision also calls up on States to illegalize and to prohibit racist organizations. The Convention provides for the express right of access to any places and services intended for use by the general public (even if privately owned). These include means of transport, hotels, restaurants, cafes, theatres and parks which groups of persons discriminated against were excluded from usually.¹²⁵

Article 5 of the Convention lists human rights in the enjoyment of which no form of discrimination is permitted. The central goal of the Convention is *de facto* equality. The States parties undertake not only to prohibit and eliminate racial discrimination, but also “to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights”

- the right to equal treatment before the tribunals and all other organs administering justice art. - 5(a);
- the right to security of person – art. 5(b);
- political rights, such as the right to participate in elections, to take part in the Government and in the conduct of public affairs and to have equal access to public service - art. 5(c);
- other civil rights, such as the right to freedom of movement and residence, the right to leave any country, including one’s own, and to return to one’s own country, the right to nationality, the right to marriage and choice of spouse, the right to own property alone as well as in association with

¹²⁵ Ibid., p.84

others, the right to inherit, the right to freedom of thought, conscience and religion, the right to freedom of opinion and expression, the right to peaceful assembly and association – art. 5(d);

- economic, social and cultural rights, and in particular the rights to work, to free choice of employment, to just and favourable conditions of work, to protection against unemployment, to equal pay for equal work, to just and favourable remuneration, the right to form and join trade unions, the right to housing, the right to public health, medical care, social security and social services, the right to education and training, the right to equal participation in cultural activities –art. 5(e); and
- the “right of access to any place or service intended for use by the general public, such as transport, hotels, restaurants, cafés, theatres and parks” – art. 5 (f).

As pointed out by the Committee itself in General Recommendation XX, the enumeration of political, civil, economic, social and cultural rights in article 5 is not exhaustive and the right not to be subjected to racial discrimination in the enjoyment of rights may be invoked also in the exercise of rights not expressly mentioned therein. In other words, apart from requiring a guarantee that the exercise of human rights shall be free from racial discrimination, article 5, “does not of itself create human rights, but assumes the existence and recognition of these rights”, such as those derived from the Charter of the United Nations, the Universal Declaration of Human Rights and the International Covenants on human rights. This also means that, whenever the States parties impose restrictions on the exercise of the rights enumerated in article 5, they “must ensure that neither in purpose nor effect is the

restriction incompatible with article 1 of the Convention as an integral part of international human rights standards". It follows, consequently, that the limitations authorized under other human rights treaties are indirectly included in article 5 of the Convention on the Elimination of All Forms of Racial Discrimination, and that, conversely, the notion of racial discrimination as defined in article 1 of this Convention is inherent in the international law of human rights as such.

Article 6 obliges States Parties to provide for effective protection against and remedies for acts of racial discrimination in violation of human rights and fundamental freedoms. It also provides for a right to reparation or satisfaction for damage suffered by a victim of racist acts. Article 7 obligates States Parties to adopt immediate and effective policy measures, especially in the field of teaching, education, culture and information.

9.4 SUMMARY

It has been stated that women benefit from the human rights guarantees affirmed under the International Bill of Human Rights. The adoption of the International Convention on the Elimination of All Forms of Discrimination against Women was necessitated by the need to address gender-based discrimination. The Convention aims to achieve de fact equality between men and women. To that effect, it authorizes temporary special measures also known as affirmative action measures. The Convention also calls up on States parties to make efforts with a view to modify cultural patterns based on the notions of superiority of one sex over the other. The General Recommendations by the Committee on the Elimination of All Forms

of Discrimination indicate the term discrimination includes gender-based violence.

The Convention on the Rights of the Child rests on four general principles. The principle of the best interest of the child calls up on States parties to give the interests of children the primary consideration whenever official decisions which affect their interests are taken. The interests of the parents or the state should not be the all-important consideration. Article 12 of the Convention on the Rights of the Child calls up on States parties to ensure that children are able to express their views on matters which affect them. The principle, which is formulated under Article 6 of the CRC, includes the right to survival and to development. The Convention also provides that all children should enjoy their rights and no child should suffer discrimination.

The Convention on the Elimination of All Forms of Racial Discrimination entered into force in 1969. The Convention provides the definition of the term racial discrimination under Article 1. The Convention makes it clear that temporary special measures would not constitute discrimination. The Convention calls up on States parties to condemn Apartheid and racial discrimination. The Convention also calls up on State parties to prevent and punish acts of racial discrimination. The Convention requires State parties to ensure that there is no discrimination practiced on segments of society in the enjoyment of their civil, political, economic, social and cultural rights. The Convention also requires States parties to provide effective remedies to those who allege to be victims of racial discrimination. The Convention requires state parties to combat prejudices leading to

racial discrimination and to promote tolerance, friendship, peaceful resolution of disputes and understanding.

9.5. SELF-ASSESSMENT QUESTIONS

1. Which one of the following is true?

- A. The Convention addresses gender-based violence expressly.
- B. The Convention enunciates civil and political rights only.
- C. The Convention is meant to address gender-based discrimination.
- D. None of the above.

2. Which one of the following is not true?

- A. The Convention on the Elimination of All Forms of Discrimination calls up on state parties to introduce permanent special measures.
- B. The Convention on the Elimination of All Forms of Discrimination calls up on states parties to adopt affirmative measure steps to benefit women.
- C. The objective of the Convention on the Elimination of All Forms of Discrimination is achieving de facto equality between men and women.
- D. None of the above.

3. Which one the following is a measure required to be taken by the Convention on the Elimination of All Forms of Discrimination against Women?

- A. Taking affirmative steps to modify cultural patterns that impair the enjoyment of rights on a basis of equality between men and women.

- B. Eliminating discrimination against women in the field of education by eliminating any stereotyped concept of the roles of men and women.
- C. Ensuring equal participation by women in political sphere.
- D. Taking all appropriate measures to ensure the full development and advancement of women
- E. All of the above.

4. Which one of the following is not true about the Convention on the Rights of the Child?

- A. The Convention on the rights of the Child is holistic.
- B. The Convention has universal adherence.
- C. The Convention entered in to force in record time.
- D. None of the above.

5. Which one of the following is a general principle of the Convention on the Rights of the Child?

- A. Non-discrimination
- B. The right to survival and maximum development
- C. The Best Interest of the Child
- D. Participatory Rights of the Child
- E. None of the above.

6. Which one of the following is not a measure of implementation required under the Convention on the Rights of the Child?

- A. Undertaking legislative review of domestic laws to ensure compatibility
- B. International Cooperation
- C. Collecting reliable and relevant information about the situation of children

- D. None of the above.
7. Which one of the following is true about the Convention on the Elimination of All Forms of Racial Discrimination?
- A. It was drafted by the General Assembly of the United Nations and not by the Commission on Human Rights.
 - B. It is the first treaty to have established its own monitoring mechanism.
 - C. It was adopted before the International Covenant on Civil and Political Rights.
 - D. All of the above.

UNIT TEN

INTERNATIONAL MECHANISMS FOR THE ENFORCEMENT OF HUMAN RIGHTS

Introduction

In the previous Units, you studied the substantive content of the International Bill of Human Rights and other major United Nations human rights instruments. In this Unit, your attention will be drawn to the implementation monitoring mechanisms of the United Nations. International human rights enforcement mechanisms established under the auspices of the UN are of two types. These are treaty based and charter based organs. The treaty bodies are created with the intention of monitoring compliance with specific treaties. Accordingly, this Unit shall be focusing on both Charter-based as well as Treaty-Based Organs for the implementation of human rights treaties.

At the end of this Unit, you should be able:

- Identify Treaty-based organs from Charter-based organs

- Explain the mandate of the Security Council of the United Nations in the promotion and protection of human rights
- Explain the mandate of the Secretary General of the United Nations in the promotion and protection of human rights
- Explain the mandate of the Office of the High Commissioner for Human Rights in the promotion and protection of human rights
- Explain the mandate of the General Assembly of the United Nations in the promotion and protection of human rights
- Explain the mandate of the Human Rights Council of the United Nations in the promotion and protection of human rights
- Explain the functions of the Human Rights Committee in the monitoring of civil and political rights
- Explain the functions of the Committee on Economic, Social and Cultural Rights

10.1. CHARTER-BASED ORGANS

This chapter focuses on charter-based organs. Charter-based organs include those organs whose creation is directly mandated by the UN Charter, such as the General Assembly, the Economic, Social Council and the Commission on Human Rights. They also include bodies which have been authorized by one of those bodies directly mandated by the UN Charter, such as the Sub-Commission on the Promotion and Protection of Human Rights.

The Security Council of the UN

Article 24 of the Charter of the UN vests the Security Council of the UN with the primary responsibility for the maintenance of international peace and security. The Security Council of the UN is the only organ whose decision is binding for all the member states of the UN as per Article 25 of the Charter. The Security Council of the UN has been extremely reluctant to be involved in the protection of

human rights until the mid-1990s. This is due to the strict interpretation of Article 2(7) of the UN Charter on non-interference in the internal matters of a state and the fact that there is no provision in the Charter which gives the Security Council power to protect human rights explicitly. Over the years, however, peace securing and human rights protection measures have merged together and it is evident that gross and systematic violations of human rights constitute a threat to international peace and order subject to Article 39. The Security Council reacts to acts of aggression, breaches of peace by imposing economic and military sanctions in the 1990s like during the invasion of Kuwait by Iraq, Somalia, Haiti, former Yugoslavia, East Timor, Sierra Leone and Afghanistan.

Many of the measures and humanitarian interventions by the Security Council are helpful for the purpose of protecting human rights. The Security Council engaged in peace keeping operations in more than 50 countries and nowadays human rights constitute an essential element of peace keeping operations.

The Secretariat of the United Nations

The Secretariat of the United Nations is led by the Secretary-General. The Secretary-General is appointed by the General Assembly of the United Nations up on the recommendation of the Security Council. A nominee for the post of Secretary-General may be vetoed by any one of the five permanent members of the Security Council. The Secretary-General is the chief administrative officer of the United Nations and exerts tremendous moral authority within international community.¹²⁶ In the past, Secretary-Generals have been reluctant to embrace the human rights cause proactive for fear of offending states

¹²⁶ Philp Alston and Henry Steiner, *International Human Rights in Context*, Oxford, 2000, p. 598

and thereby undermining their role in the promotion of international peace and security.¹²⁷ For instance, Secretary-General Boutros-Ghali went to the extent of opposing the establishment of the Office of the High Commissioner for Human Rights. However, Secretary-General Kofi Annan has assumed a more active role than his previous Secretary-Generals. Secretary-General Kofi Annan had been instrumental mainstreaming human rights throughout the organization. This means that human rights are not the exclusive responsibility of one UN organ only but many more.¹²⁸

Activity

1. Discuss the role of the Security Council in the protection and promotion of human rights.

2. Explain the factors behind the reluctance of the Security Council of the United Nations to get involved in human rights issues.

3. Discuss the role of the Secretary General in the protection and promotion of human rights.

Office of the High Commissioner for Human Rights

¹²⁷ Ibid.

¹²⁸ Ibid.

The High Commissioner for Human Rights is the UN official with principal responsibility for human rights. The High Commissioner for Human Rights has the major responsibility for the entire UN human rights programme and is expected to take an official position on all major human rights issues. The High Commissioner for Human Rights is responsible for human rights crisis management, developing different preventive measures and early warning systems and organizing independent human rights field presences in presently 30 states. The Office is also responsible for entrenching human rights in all UN peacekeeping operations, conducting development cooperation programmes in the field of human rights and representing the human rights programme in the various UN coordinating mechanisms.

The mandate of the HCHR was spelled out in GA Resolution 48/141. This include

- Promotion and protection of the effective enjoyment of civil, cultural, economic, political and social rights; including the right to development
- Provision of advisory services and technical and financial assistance in the field of human rights to states that request them;
- to coordinate UN education and public education programmes in the field of human rights
- to play an active role in removing the obstacles to the full realization of human rights;
- to engage governments in a dialogue to secure respect for human rights; and
- to enhance international cooperation for the promotion and protection of human rights.

The General Assembly

Article 10 of the Charter of the United Nations gives the General Assembly the power to discuss any questions or any matters within the scope of the Charter. Article 13 of the Charter further gives the General Assembly of the United Nations the power to initiate studies and make recommendation for the purpose of, among others, assisting in the realization of human rights. All member states of the UN are represented in the General Assembly. Each of the member states has only one vote irrespective of its population, economic strength or other factors. Many of the issues in the General Assembly are decided by a simple majority. However, decisions on important matters such as matters pertaining to peace, security, admission of new members, and budgetary matters require a two-thirds majority.¹²⁹ The bulk of the work of the General Assembly is conducted on a consensus basis.¹³⁰ The resolutions of the General Assembly are believed to be manifestation of the view of the world community.¹³¹ Resolutions of the General Assembly adopted unanimously are believed to reflect customary international law.

Human Rights Council

The Human Rights Council was established on March 15, 2006 by the General Assembly of the United Nations. The Human Rights Council replaced the Commission for Human Rights which was established in 1946. The Human Rights Council was established on the basis of General Assembly Resolution 60/251. According to the Resolution, all mandates, mechanisms, functions and responsibilities of the Commission on Human Rights, including the Sub-Commission on the Promotion and Protection of Human Rights are assumed by the Human Rights Council.¹³²

¹²⁹ Ibid.

¹³⁰ Ibid.

¹³¹ Ibid.

¹³² The United Nations Sub-Commission on the Promotion and Protection of Human Rights used to be the main subsidiary body of the former Commission on Human

The Commission on Human Rights consisted of 53 member states. The members used to be elected for three-year term by the Economic and Social Council of the United Nations. The Commission for Human Rights was criticized for giving high profile positions for member states of the UN which did not guarantee the human rights of their own citizens. As a result, the Commission was replaced by the Human Rights Council which has 47 member states. The Commission on Human Rights used to be an independent body. The Human Rights Council, however, is a subsidiary body of the General Assembly of the United Nations. The Resolution establishing the Human Rights Council stated that members of the Council shall uphold the highest standards in the promotion and protection of human rights. Moreover, the member state shall also be subject to periodic review. The members of the Human Rights Council need to be approved by a majority of the members of the General Assembly. These changes were made due to the election of Libya for the chairmanship of the Commission. Membership in Human Rights Council is limited to two

Rights. It was established in 1947 with 12 members. It used to be known as the 'Sub Commission on Prevention of Discrimination and Protection of Minorities' up on its establishment in 1947. However, it was renamed in 1999 as the Sub-Commission on the Promotion and Protection of Human Rights.

It was comprised of 26 independent experts in the field of human rights who were elected with due regard to equitable geographical distribution, and who act in their personal capacity. In 2006, the membership consisted of seven experts from Africa, five from Asia, five from Latin America, three from Eastern Europe and six from Western European and other States.

The Sub-Commission's main functions used to be to undertake studies on human rights issues, to make recommendations concerning the prevention of discrimination of any kind relating to human rights and fundamental freedoms and the protection of racial, national, religious and linguistic minorities, and to carry out any other functions which may be entrusted to it. Studies undertaken have addressed various aspects of the realization of human rights, the administration of justice, combating discrimination and protecting the human rights of minorities, indigenous peoples and other vulnerable groups. The Sub-Commission is often described as a 'think tank'.

years only and member of the Council may be suspended by two-thirds vote in the General Assembly.

Human Rights Council Advisory Committee

Human Rights Council Advisory Committee was established pursuant to Human Rights Council Resolution 5/1. The Advisory Committee is composed of 18 experts. The Advisory Committee serves as a think-tank for the Human Rights Council.

The Human Rights Council also adopted a resolution to ensure that the best possible expertise is made available to it.¹³³ The function of the Advisory Committee is to provide expertise to the Council, focusing mainly on studies and research-based advice. Expertise is to be rendered upon the request of the Council, in compliance with its resolutions and under its guidance.

The Advisory Committee is envisaged to be implementation-oriented. The scope of its advice should be limited to thematic issues pertaining to the mandate of the Council; namely promotion and protection of all human rights. The Committee may not adopt resolutions or decisions, but may propose to the Council, within the scope of its work as set out by the Council, suggestions for further enhancing its procedural efficiency, as well as further research proposals within the scope of the work set out by the Council.

In the course of its functions, the Advisory Committee is urged to establish interaction with States, national human rights institutions, non-governmental organizations and other civil society entities in accordance with the modalities of the Council. Member States and observers, including States that are not members of the Council, the specialized agencies, other intergovernmental organizations and

¹³³ Human Rights Council Resolution 6/102

national human rights institutions, as well as non-governmental organizations are entitled to participate in the work of the Advisory Committee based on arrangements, including Economic and Social Council resolution 1996/31 and practices observed by the Commission on Human Rights and the Council, while ensuring the most effective contribution of these entities.

10.2 TREATY-BODIES

The Human Rights Committee

The Human Rights Committee is established pursuant to Article 28 of the International Covenant on Civil and Political Rights. The Human Rights Committee is composed of 18 experts who serve in their individual capacity.¹³⁴ The term individual capacity shows that the members are not to perform their duties as government representatives. This makes it possible for the committee to ensure it is a legal body and not that of a political body where members act as state representatives. This feature is typical of other treaty-bodies as well. Though the independence of minority of members of the Committee has been questionable, by and large the aspiration of ensuring the independence of the Committee has been successful.

The Committee meets three times annually, twice in Geneva and once in New York. Each session lasts for three weeks. The meetings are public with the exception of meetings revolving around communications under the First Optional Protocol to the ICCPR. Article 39 of the International Covenant on Civil and Political Rights requires that decisions of the Committee should be by majority vote. The members are experts who are believed to have high moral character and recognized competence in the field of human rights. As

¹³⁴ Article 28 (1) cum Article 28(3), International Covenant on Civil and Political Rights

regards membership, the ICCPR provides that consideration is given to individuals who have legal experience. In addition, the ICCPR also requires that consideration in elections shall be given to equitable geographical distribution of membership and to the representation of the different forms of civilization and of the principal legal systems.¹³⁵ Membership in the Committee is a part-time work or commitment. The functions of the Committee are provided under Articles 28-45 of the International Covenant on Civil and Political Rights and the First Optional Protocol.

The Human Rights Committee has the following three principal functions:

(1) Consideration of State Reports:

The Committee on Human Rights considers state reports. These are reports which are required to be submitted to the Human Rights Committee pursuant to Article 40 of the International Covenant on Civil and Political Rights. State reports are expected to show measures taken by the States Parties to the ICCPR to 'give effect' to the obligations they have assumed under the Covenant and the progress made in this regard. Once this period reports reach the Committee, the Committee will be studying the reports. However, Article 40 does not clearly provide for the objective and purpose of such a study. State Reports are expected to indicate the factors and difficulties, if any, affecting the implementation of the ICCPR.

Once the Committee is through with the consideration and study of the state reports it is required to submit its own reports and general comments to the State Party concerned. The comments of the Committee are referred to as "Concluding Observations." Concluding

¹³⁵ Article 31(2), International Covenant on Civil and Political Rights

Observations are assessment about the human rights situations of that State Party in light of the information provided therein and information available to the members of the Committee through other sources. Reports are required to be submitted every five years. However, the Committee is enabled to require the submission of state reports at shorter intervals where there are exceptional circumstances in the State Party like that of public emergencies.¹³⁶ As to sources of information, there was a drastic change in the modus operandi of the Committee since 1990s when the Committee decided to allow UN agencies and other bodies of the UN organs to play active role in its activities. Moreover, the Committee also started to entertain oral and written presentations by NGOs which usually contradict the State Reports. These are called “Alternative” or “Shadow Report.”

State-Reporting is mandatory under the ICCPR as it is the case with the other human rights treaties. In the process of drafting the ICCPR, there was general agreement that primary obligation under the ICCPR is implementation at a national level. However, there was disagreement on the issue whether there has to be international measures of implementation or not. Few states, in particular, the Soviet bloc, maintained that there must not be international measures of implementation. They argued that international measures of implementation in particular individual petition system and inter-state complaints would be contrary to Article 2(7) of the UN Charter on the principle of non-interference in the internal or domestic affairs of a state. This explains the reason why inter-state and individual petition system has been rendered optional. However, states did not

¹³⁶ Philip Alston and Steiner, *International Human Rights in Context*, Oxford, 2000, p. 710.

regard the reporting system as risky as the inter-state and individual complaints system was believed to be by the states.

(2) Issuing General Comments:

Article 40 of the ICCPR authorized the Human Rights Committee to transmit general comments which it considers to be appropriate. Article 40(4) of the ICCPR forms the legal basis for General Comments. Initially, the issuance of general comments was directly related to the reporting procedure and not the substantive provisions of the Covenant. However, over the years, the general Comment becomes a distinct juridical instrument whereby the Committee announces its interpretations of different provisions of the Covenant in a manner similar to the advisory opinion practice of international tribunals. The General Comments of the Human Rights Committee is instrumental when the Committee examines state reports and when it adjudicates individual communications.

(3) Consideration of Individual Complaints:

The (First) Optional Protocol to the ICCPR empowers the Committee to receive and consider “communications” from individuals who claim that they are victims of violations by states parties to the ICCPR. After having received and considered the communications, the Committee is in a position to be able to issue its views to the author of the communication or individual who alleges to be a victim of the violation.

As of March 2000, 95 of the 144 States Parties to the ICCPR are also states parties to the First Optional Protocol which established the Individual Communications System. The First Optional Protocol states that the communications must be from individuals who claim to be victims of a violation of any of the rights enshrined in the Covenant.

This makes the individual communications system under the First Optional Protocol different from the 1235 or 1503 procedures in that the violation complained of need not be systemic i.e. a consistent pattern or recurrent phenomenon. Once the State Party is notified of the allegation, it is expected to submit written explanations or statements clarifying the matter. The Committee considers communications in the light of all written information made available to it by the State Party and the individual concerned.

After the Committee entertained the case, it adopts its “**views**” on the matter. However, the precise legal effect of views is not provided in the First Optional Protocol. The “**views**” are not legally binding on the State Party and cannot be enforced. The First Optional Protocol did not provide for any follow-up procedure once the views of the Committee are adopted. Apart from concluding in its views that there is a violation of a certain rights in the Covenant, the Committee goes further and declares reparation or preventive measures.

The Committee on Economic, Social and Cultural Rights

The monitoring of economic, social and cultural rights is a formidable task owing to the scope of the rights and the complex relationship between the rights and resources.¹³⁷ The challenge lies in monitoring “progressive realization” of rights to the “maximum of available resources.” The Committee on Economic, Social and Cultural Rights has adopted “a minimum core content” approach with insistence that each State Party must also establish “benchmarks” against which its performance can be evaluated.¹³⁸

¹³⁷ Henry J. Steiner and Philip Alston (eds), *International Human Rights in Context*, (Oxford University Press, New York), p. 305

¹³⁸ Ibid.

Unlike the ICCPR, the International Covenant on Economic, Social and Cultural Rights did not provide for a special treaty body to monitor the compliance of States Parties to the Covenant. In other words, one cannot find a counterpart provision in the International Covenant on Economic, Social and Cultural Rights like that of Article 28 of the ICCPR establishing a treaty body. The reading of Article 16 of the Covenant is indicative of the fact that initially States Parties were expected to report to Economic and Social Council of the UN (ECOSOC). This is said to be the real weakness of the Covenant on Economic, Social and Cultural Rights. The Article simply provides for a mandatory procedure for monitoring state reports. As mentioned above, the task was given to ECOSOC. It was clear from the inception that the procedure is not going to be successful, ECOSOC decided to establish a body of experts akin to the ones monitoring other human rights treaties.¹³⁹

In 1985, a treaty body namely, the Committee on Economic, Social and Cultural Rights was established pursuant to ECOSOC Resolution 1985/17. The Committee is composed of 18 experts who serve in their individual capacity and not as representatives of states. The mandate of the Committee given to by virtue of this ECOSOC Resolution reads as follows:

The Committee shall submit to the Council a report on its activities, including a summary of its consideration of the reports submitted by States Parties to the Covenant, and shall make suggestions and recommendations of a general nature on the basis of its consideration of those reports and of the reports submitted by the specialized agencies, in order to assist the

¹³⁹ Manfred Nowak, Introduction to International Human Rights Regime, (Martinus Nijhoff Publishers, Leiden), p. 82

Council to fulfill, in particular its responsibilities under Articles 21 and 22 of the Covenant.

Thus, the central supervisory role of the Committee on Economic, Social and Cultural Rights is that of examination and reviewing of state reports. A representative of the State Party whose report is being examined is invited to make introductory comments about the report. The Committee then considers the report on Article by Article basis. Representatives of specialized bodies and other international bodies are entitled to contribute to the dialogue. Representatives of the State are in a position to give answers and clarifications on matters which do not require further research and investigation. Members of the Committee are free to pursue specific issues in view of the information provided.¹⁴⁰

Therefore, the Committee seeks to achieve three principal objectives:

- Developing the Normative Content of the Rights recognized in the International Covenant on Economic, Social and Cultural Rights
- Acting as a Catalyst to state action in developing national benchmarks and devising appropriate mechanisms for establishing accountability, and providing means of vindication to aggrieved individuals and groups at the national level and;
- Holding states accountable at the international level through the examination of reports.¹⁴¹

¹⁴⁰ Louis Henkin and Gerald L. Newman (eds), *Human Rights*, (Foundation Press, New York), p. 516.

¹⁴¹ Henry J. Steiner and Philip Alston (eds), *International Human Rights in Context*, (Oxford University Press, New York), p. 305 & 306.

10.3. SUMMARY

The monitoring mechanisms of the United Nations is generally divided in to charter-based as well as treaty-based. The Unit considered the main charter-based organs. The discussion started with the consideration of the role of the Security Council in the promotion and protection of human rights. The discussion shows the reluctance on the part of the Security Council and successive Secretary Generals in engaging in the promotion and protection of human rights. However, over the years, the involvement of the Security Council has increased as peace securing and protection of human rights merged together. Similarly, Secretary General Koffi Annan has been proactively mainstreaming human rights in the work of the United Nations.

Other Charter-based organs studied in this Unit also include the Office of the High Commissioner for Human Rights and the Human Rights Council. The Unit has detailed the mandate of the Office of the High Commissioner for Human Rights. The Human Rights Council replaced the Commission for Human Rights which was established in 1946. The Human Rights Council was established on the basis of General Assembly Resolution 60/251. According to the Resolution, all mandates, mechanisms, functions and responsibilities of the Commission on Human Rights, including the Sub-Commission on the Promotion and Protection of Human Rights are assumed by the Human Rights Council. The Unit has also attempted to demonstrate the factors that led to the establishment of the Human Rights Council and its differences with the previous Commission on Human Rights. By so doing, the Unit has tried to document the recent institutional changes in the UN System in the field of human rights.

10.4. SELF-ASSESSMENT QUESTIONS

1. Which one of the following is true?

- A. Successive Secretary Generals of the United Nations have been engaged proactively in the promotion and protection of human rights.
 - B. Secretary General Boutros-Ghali was one of the arduous supporters of establishment of the Office of the High Commissioner for Human Rights.
 - C. Secretary General Koffi Annan mainstreamed human rights in the work of the United Nations.
 - D. None of the above.
2. Which one of the following is true?
- A. The Security Council of the United Nations has been proactively engaged in the protection of human rights since its inception.
 - B. The Charter of the United Nations gives express mandate to the Security Council to protect human rights.
 - C. Gross and systematic violations of human rights constitute a threat to international peace and order subject to Article 39.
 - D. All of the above.
3. Which one of the following is not the mandate of the Office of High Commissioner for Human Rights?
- A. Promotion and protection of the effective enjoyment of civil, cultural, economic, political and social rights; including the right to development

- B. Provision of advisory services and technical and financial assistance in the field of human rights to states that request them
 - C. Coordinating UN education and public education programmes in the field of human rights
 - D. Playing an active role in removing the obstacles to the full realization of human rights
 - E. None of the above.
4. Which one of the following is true?
- A. The Charter of the United Nations gives the General Assembly strong powers.
 - B. The General Assembly is mandated to undertake studies in the field of human rights.
 - C. The General Assembly is mandated to deliberate on human rights situations in a given country.
 - D. All of the above.
5. Which one the following organs was replaced by the Human Rights Council?
- A. The Commission on Human Rights
 - B. Economic and Social Council
 - C. The Commission on the Status of Women
 - D. Trusteeship Council
 - E. None of the above.

6. The Sub-Commission on the Promotion and Protection of Human Rights was replaced by_____.
- A. The Sub-Commission on the Prevention of Discrimination and Protection of Minorities
 - B. ILO Working Group on Indigenous Peoples'
 - C. Human Rights Council Advisory Committee
 - D. None of the above.
7. Which one of the following is the function of the Human Rights Committee?
- A. Issuing General Comments
 - B. Consideration of Individual Complaints
 - C. Consideration of State Reports:
 - D. All of the above.
8. Which one the following is the function of the Committee on Economic, Social and Cultural Rights?
- A. Issuing General Comments
 - B. Consideration of Individual Complaints
 - C. Consideration of State Reports:
 - D. A and C
 - E. C and B
 - F. All of the above.

UNIT ELEVEN

AFRICAN HUMAN RIGHTS PROTECTION SYSTEM

Introduction

In this Unit, you will study the African Charter on Human and Peoples' Rights and instruments adopted by the OAU/AU. Apart from the African System of Human Rights, there are other regional human rights systems. In particular, the European System of Human Rights Protection and the Inter-American System of Human Rights deserve special mention. However, this Unit does not deal with the two since they are directly relevant to the Ethiopian context. Since Ethiopia is one of the signatories of the African Charter, emphasis is placed on the African System of Human Rights in the Unit. The Unit will explore the distinctive features of this Charter. Moreover, the Unit also discusses the institutional mechanisms which are in place to follow-up compliance with the African Charter as well as other human rights instruments adopted under the auspices of the Organization of the African Unity, now the African Union.

At the end of this Unit, you will be able to:

- Explain the place of human rights under the Constitutive Act of the African Union
- Explain the differences as regards the position of the former OAU and the AU in regard to human rights matters
- Identify the human rights instruments constituting the normative African Human Rights System
- Explain the substantive content of the African Charter on Human and Peoples' Rights

- Identify the distinctive features of the African Charter on Human and Peoples Rights as compared to the international human rights system
- Identify the weak as well as strong points of the African Charter on Human and Peoples' Rights
- Discuss the principal features of the African Commission on Human and Peoples' Rights
- Explain the relationship existing between the African Court of Human Rights and the African Commission on Human Rights

11.1. HUMAN RIGHTS UNDER THE CONSTITUTIVE ACT OF THE AFRICAN UNION

In 1981, the Assembly of Heads of State and Government of the Organization of African Unity adopted the African Charter on Human and Peoples' Rights. The Charter entered into force on 21 October 1986, and as of 29 April 2002 had 53 States parties, all member states of the OAU, which was transformed to the African Union (AU) in 2002. While the Charter of the OAU of 1963 made only fleeting reference to the concept of human rights¹⁴², the Constitutive Act of the AU of 2001 has now placed human rights squarely on the agenda of the new regional body.¹⁴³ The African Charter on Human and Peoples' Rights,

¹⁴² 47 U.N.T.S. 39 (1963), The Preamble stated adherence to the principles of the Universal Declaration of Human Rights. The Charter of the OAU was nevertheless a human rights document in the sense that it was aimed at the abolition of colonialism and apartheid.

¹⁴³ Constitutive Act of the African Union CAB/LEG/23.15 (May 26, 2001), The Preamble of the Constitutive Act refers to the African struggles for independence and human dignity "by our peoples" and the determination of the Heads of State and Government "to promote and protect human and peoples' rights." According to article 3: the objectives of the Union shall be to ... (e) encourage international

also known as the Banjul Charter after the capital city of the Gambia where its' drafting was finalized, is the most distinctive of the three regional human rights systems.

In addition to the African Charter, the African regional human rights system is comprised of:

- Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (2003)
- OAU Convention Governing the Specific Aspects of Refugee Problems in Africa ("African Refugee Convention") of 1969
- African Charter on the Rights and Welfare of the Child ("African Children's Charter"); and
- Cultural Charter for Africa of 1976 came into force in 1990.

cooperation, taking due account of the Charter of the United Nations and the Universal Declaration of Human Rights;" and to "... (h) promote and protect human and peoples' rights in accordance with the African Charter on Human and Peoples' Rights and other relevant human rights instruments.

Constitutive Act, at art.3. It is stated in article 4: The Union shall function in accordance with the following principles: ... (g) non-interference by any Member State in the internal affairs of another; (h) the right of the Union to intervene in a Member State pursuant to a decision of the Assembly in respect of grave circumstances, namely war crimes, genocide and crimes against humanity; ... (l) promotion of gender equality; (m) respect for democratic principles, human rights, the rule of law and good governance; (n) promotion of social justice to ensure balanced economic development; (o) respect for the sanctity of human life, condemnation and rejection of impunity and political assassination, acts of terrorism and subversive activities; (p) condemnation and rejection of unconstitutional changes of governments.

Id. At art. 4. According to article 23(2): any Member State that fails to comply with the decisions and policies of the Union may be subjected to ... sanctions, such as the denial of transport and communications links with other Member States, and other measures of a political and economic nature to be determined by the Assembly. Id. at art. 23(2). Article 30 provides: "Governments which shall come to power through unconstitutional means shall not be allowed to participate in the activities of the Union." Id. at art. 30. For a discussion, see Evarist Baimu, *The African Union: Hope for better Protection of Human Rights in Africa?*, 1 Afr. Hum. Rts. L.J. 299 (2001). A new set of proposed amendments by the Executive Council of the AU, adopted unanimously in February 2003 by the Assembly, envisages a stronger role for the AU in terms of the restoration of peace and order in member states. See African Union, Executive Assembly 4(I), Ppt(I) (2003). This could potentially be used to undermine human rights.

Activity

1. Compare and contrast the prominence given to human rights promotion and protection under the former Organization of African Unity and the African Union.

2. Identify the human rights instruments of the African Union.

11.2. THE AFRICAN CHARTER ON HUMAN AND PEOPLES' RIGHTS

In 1979, a meeting of experts was gathered by the OAU in Dakar, Senegal to prepare a preliminary draft of a human rights charter for Africa. The meeting yielded the Draft African Charter on Human and Peoples' Rights, which was finalized in Banjul, The Gambia in 1981. The African Charter was formally adopted by the OAU in Kenya later that year.

The Charter affirms a long list of rights, covering a wide range not only of civil and political rights, but also of economic, social and cultural rights. The African Charter is also distinctive as a result of its emphasis on peoples' or third "generation" rights. The civil and political rights recognized in the Charter include:

- freedom from discrimination-art. 2

- the right to equality before the law and equal protection of the law-art. 3
- the right to respect for one's life and personal integrity-art. 4;
- the right to life;
- the right to respect for one's inherent dignity as a human being, including freedom from slavery, the slave trade, torture, cruel, inhuman or degrading punishment and treatment - art. liberty and security;
- the right to liberty and to the security of one's person; freedom from arbitrary arrest or detention-art.6;
- the right to have one's cause heard, and "the right to an appeal to competent national organs against acts of violating" one's human rights;
- the right to be presumed innocent until proved guilty by a competent court or tribunal; the right to defence;
- and the right to be tried within a reasonable time by an impartial tribunal; freedom from ex post facto laws - art. 7;
- freedom of conscience, the profession and free practice of religion - art. 8;
- the right to receive information and the right to express and disseminate one's opinions "within the law" - art. 9;
- the right to freedom of association (art. 10) and the right to assemble freely with others - art. 11;

- the right to freedom of movement and residence within the borders of a State;
- the right to leave any country including one's own and to return to one's country; the right to asylum in case of persecution; prohibition of mass expulsions - art. 12;
- the right to participate freely in the government of one's country, either directly or through freely chosen representatives; the right to equal access to the public service of one's country and to access to public property and services - art. 13;
- the right to property - art. 14;

Another controversial issue of the Charter revolves around Article 18(3), which reads: "The state shall ensure the elimination of every discrimination against women and also ensure the protection of the rights of the woman and the child as stipulated in international declarations and conventions." This provision has been a matter of controversy for having lumped women along with children. This controversy is one of the reasons for the later adoption of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa in 2003.

Another vexing aspect of the Charter is the manner it provides for limitations as regards civil and political rights. This was one of the problems which pose a formidable difficulty in interpreting the civil and political rights of the Charter. The African Charter does not contain a general limitation clause (although article 27(2) is starting to play this role)¹⁴⁴. Thus, there are no general guidelines on how

¹⁴⁴ Article 27(2) of the Charter is entitled "Duties". It provides that: "The rights and freedoms of each individual shall be exercised with due regard to the rights of

Charter rights should be limited as was the case with the three part test discussed in Unit Six.

This difficulty pertains to what are called "claw-back clauses." "Claw-back clauses" dictate that limitations should be done "within the law." For example, article 9(2) provides that: "Every individual shall have the right to express and disseminate his opinions within the law." Claw-back clauses seem to recognize the right in question only to the extent that such a right is not infringed upon by national law.¹⁴⁵ Prof. Christof Heyns has the following to say as regards this outcome:

If that is the correct interpretation, the claw-back clauses would obviously undermine the whole idea of international supervision of domestic law and practices and render the Charter meaningless in respect to the rights involved. Domestic law will, in those cases, have to be measured according to domestic standards--a senseless exercise. What is given with the one hand is seemingly taken away with the other.¹⁴⁶

However, the Charter appears to have adopted a very expansive approach in respect to interpretation. Article 60 and 61 of the Charter provide that the African Commission on Human and Peoples' Rights has to draw inspiration from international human rights law in interpreting the provisions of the Charter. The Commission has used these provisions very liberally in a number of instances to bring the Charter in line with international practices, and the claw-back clauses are no exception.

others, collective security, morality and common interest." This provision is now considered as a general limitation clause by the African Commission.

¹⁴⁵ Christof Heyns, *The African Regional Human Rights System: The African Charter*, (2004), p.7

¹⁴⁶ *Ibid.*

The exercise of many of the rights and freedoms guaranteed by the African Charter is conditioned by limitation provisions, which in some cases indicate specific aims for which limitations might be imposed, but which in others simply refer back to the conditions laid down in national law. Article 12(2) thus provides that the right to leave any country including one's own, and to return to one's own country, "may only be subject to restrictions provided for by law for the protection of national security, law and order, public health or morality". However, everyone has the right to free association "provided that he abides by the law" (art. 10), without there being any indication as to the grounds the national law can legitimately invoke to limit that freedom of association.

In the context of the claw-back clauses, the African Commission has held that provisions in articles that allow rights to be limited "in accordance with law," should be understood to require such limitations to be done in terms of domestic legal provisions, which comply with international human rights standards.¹⁴⁷ By so doing the, the Commission has been commended for having cured one of the most troublesome inherent deficiencies in the Charter.¹⁴⁸

The African Charter on Human and Peoples' Rights is also unique in that it is the only regional human rights instrument which provides for economic, social and cultural rights along side civil and political rights. This is important for two reasons.¹⁴⁹ First, it reinforces the concept of indivisibility of human rights. Second, it underscores the importance of developmental issues. However, the list of economic, social and cultural rights enshrined is limited. These include:

¹⁴⁷ Ibid.

¹⁴⁸ Ibid.

¹⁴⁹ Christof Heyns, *The African Regional Human Rights System: The African Charter*, (2004), p.8

- the right to work and the right to equal pay for equal work – art. 15;
- the right to enjoy the best attainable state of physical and mental health – art. 16;
- the right to education, and freely to take part in the cultural life of one's country – art. 17; and
- the right of the family, the aged and the disabled to special measures of protection – art. 18.

The right to food and water, the right to social security and the right to housing are not provided for, *express verbis*. A somewhat ambitious feature of the African Charter as regards economic, social and cultural rights is the absence of qualification of the rights such as progressive realization and availability of resources. However, in *SERAC v. Nigeria*, the African Commission on Human and Peoples' Rights decided the presence of an implicit right to "housing or shelter" in the Charter has to be deduced from the explicit provisions on health, property and family life in the Charter.¹⁵⁰ Similarly, a right to food has to be read into the right to dignity and other rights.¹⁵¹ This decision on the part of the Commission is indicative of its efforts to fill the gaps in the Charter.¹⁵²

State Obligations and Measures of Implementation

The States parties to the Charter "shall recognize the rights, duties and freedoms enshrined [therein] and shall undertake to adopt

¹⁵⁰ Org. of African Unity, African Comm'n, Communication 155/96, *The Social & Economic Rights Action Center & Another v. Nigeria*, 15th Annual Activity Report (2001-02).

¹⁵¹ *Ibid.*

¹⁵² Christof Heyns, *The African Regional Human Rights System: The African Charter*, (2004), p.8

legislative or other measures to give effect to them” (art. 1). It is further provided that they “shall have the duty to promote and ensure through teaching, education and publication, the respect of the rights and freedoms contained in the present Charter, and to see to it that these freedoms and rights as well as corresponding obligations and duties are understood” (art. 25). Moreover, the States parties “shall have the duty to guarantee the independence of the Courts and shall allow the establishment and improvement of appropriate national institutions entrusted with the promotion and protection of the rights and freedoms guaranteed by the ... Charter” (art. 26). These two latter provisions thus emphasize the need for education, information and an independent administration of justice in order to ensure the effective protection of human rights. Lastly, several provisions of the Charter are also couched in the form of duties of the States parties to ensure certain rights, such as, for instance, the “promotion and protection of morals and traditional values recognized by the community”(art. 17(3)) and the right to development (art. 22(2)).

Duties

Another unique aspect of the African Charter is that it is the only regional human rights instrument which provides for a list of human duties. Article 27(1) provides that “every individual shall have duties towards his family and society, the State and other legally recognized communities and the international community”. Article 28 concerns itself with the individual’s duty towards other individuals, providing that “every individual shall have the duty to respect and consider his fellow beings without discrimination, and to maintain relations aimed at promoting, safeguarding and reinforcing mutual respect and tolerance”. Lastly, article 29 lists specific individual duties including:

- To preserve the harmonious development of the family – art. 29(1);
- To serve one’s national community – art. 29(2);
- Not to compromise the security of the State – art. 29(3);
- To preserve and strengthen the social and national solidarity – art. 29(4);
- To preserve and strengthen the national independence and territorial integrity of one’s country – art. 29(5);
- To work to the best of one’s abilities and competence and to pay taxes – art. 29(6);
- To preserve and strengthen positive African cultural values – art. 29(7); and, finally,
- The duty to contribute to the best of one’s abilities to the promotion and achievement of African unity – art. 29(8).

Derogations in States of Emergency

The African Charter does not contain a provision either allowing or disallowing derogation from its provisions during a state of emergency. Unlike the International Covenant on Civil and Political Rights and the American and European Conventions on Human Rights, the African Charter does not provide for any right of derogation for the States parties in public emergencies. This absence has been interpreted by the African Commission on Human and Peoples’ Rights to mean that derogations are not permissible under the African Charter¹⁵³. The African Charter on Human and Peoples’

¹⁵³ Org. of African Unity, African Comm’n, Communication 74/92, Commission Nationale des Droit de l’Homme et des Libertes v. Chad, 9th Annual Activity Report

Rights is specific in that it protects not only rights of individual human beings but also rights of peoples. The Charter also emphasizes the individual's duties towards certain groups and other individuals. While some provisions of the African Charter allow for limitations to be imposed on the exercise of the rights guaranteed, derogations are not allowed from the obligations incurred under this treaty.

Activity

1. The African Charter on Human and Peoples' Rights adopts expansive approach towards interpretation. Explain.

2. Explain the meaning of claw-back clauses.

11.3 THE IMPLEMENTATION MECHANISM

The African Charter on Human and Peoples' Rights provided for the establishment of the African Commission on Human and Peoples' Rights. The African Commission on Human and Peoples' Rights consists of eleven members serving in their individual capacity (art. 31). The Commission has two functions. First, it is charged with the task of promoting human and peoples' rights. Secondly, it is engaged in the protection of these rights (art. 30), including the right to

(1995-96) [hereinafter Org. of African Unity, Commission Nationale]; see also Org. of African Unity, African Comm'n, Communication 155/96, The Social & Economic Rights Action Center & Another v. Nigeria, 15th Annual Activity Report (2001-02).

receive communications both from States and from other sources. In other words, the Commission has a protective as well as a promotional mandate.

The Complaints Procedure

The African Charter allows both states and individuals to bring complaints to the African Commission alleging violations of the African Charter by state parties. The procedure by which one state brings a complaint about an alleged human rights violation by another state is also known as inter-state complaint procedure and is rarely used.

The individual communication or complaints procedure is not clearly provided for in the African Charter. As per article 58 of the Charter communications could be considered only where "serious or massive violations" are at stake. However, the African Commission has held that it has the mandate to deal with complaints about any human rights violations under the Charter, so long as the admissibility criteria are met.

Though the Charter is silent on the question of who can bring such complaints, the Commission has accepted complaints from individuals as well as non-governmental organizations. The African Charter imposes certain admissibility criteria before the Commission may entertain complaints.¹⁵⁴ These criteria include the important requirement of exhausting local remedies. The complain may be submitted to the attention of the Commission provided that the matter has been pursued in the highest court in the country in question without success or the prospect of success. There is also a requirement that the communications are "not written in disparaging

¹⁵⁴ Article 56, African Charter on Human and People's Rights
OAU/CAB/LEG/67/3/Rev.5 (Org. of African Unity) (1996)

or insulting language directed against the state concerned and its institutions or to the Organization of African Unity.

When a complaint is filed, the state in question is asked to respond to the allegations against it. In the event the State fails to respond, the Commission considers the matter on the basis of the facts as provided in the complaint. If the decision of the Commission is that there has indeed been a violation or violations of the Charter, the Commission may suggest recommendations that continuing violations should stop (e.g., prisoners be released) or specific laws be changed; but mostly the recommendations are rather vague, and the state party is merely urged to "adopt measures in conformity with the decision." Article 58 requires that special cases which reveal the existence of serious or massive violations of human and peoples' rights must be referred by the Commission to the Assembly. Afterwards, the Assembly may then request the Commission to undertake an in-depth study of these cases.

Article 59 of the Charter requires that "all measures taken" by the African Commission remain confidential until approved by the Assembly. The expression "all measures" has been interpreted to include any information about individual communications. Sessions of the African Commission dealing with communications are conducted privately or secretly.

Examination of State Reports

Each state party is required to submit a report every two years on its efforts to comply with the African Charter. Although it is not provided for in the African Charter that the reports should be submitted specifically to the African Commission, the Commission recommended

to the Assembly that the Commission be given the mandate to consider the reports. The Assembly has endorsed this recommendation. Non-governmental organizations ("NGO") are allowed to submit shadow or alternative reports, but the impact of this avenue is diminished by the NGO's lack of timely access to the state reports to which they are supposed to respond. The reports are considered by the Commission in public sessions. Reporting by state parties under the African Charter has to be done in accordance with the guidelines mentioned above. Reporting under the Charter, as in other systems, is aimed at facilitating both introspection and inspection. "Introspection" refers to the process when the state, in writing its report, measures itself against the norms of the Charter. "Inspection" refers to the process when the Commission measures the performance of the state in question against the Charter. The objective is to facilitate a "constructive dialogue" between the Commission and the states. Reporting has been very tardy, with approximately half of the state parties not submitting any reports. In 2001, the Commission started to issue concluding observations in respect to reports considered.

African Court of Human Rights

The 1981 Banjul Charter laid the basis for the African Commission on Human and Peoples' Rights with a view to promote human and peoples' rights and ensure their protection in Africa. The Commission was envisaged to accomplish this task through the promotion, protection and interpretation of the Charter.

By and large, the Commission could not deliver on those promises as it lacked effective powers to discharge its promotional, protective and interpretational mandate. The Commission is empowered to receive and examine communications from states parties, individuals and non-

governmental organizations. Up on such examination, the Commission sends a report on the facts, its findings and recommendations to the AU Assembly. The weaknesses of the Commission emanated from the Charter itself and its structure. To begin with, the conditions laid down in the African Charter on Human and Peoples' Rights severely restrict access to justice for individuals before the Commission. Secondly, as the Commission was entitled to make recommendations, it was devoid of enforcement powers. Thirdly, the Commission was further weakened by the requirements of confidentiality barring the body from publishing its recommendations as the power to do so was vested in the AU Assembly. Fourthly, the lack of independence and resources are also amongst the major setbacks faced by the Commission.

The inability of the Commission to prove itself the vanguard of human rights in Africa due to the above reasons and others has called for the establishment of the African Court of Human and Peoples' Rights. The Protocol gives broader jurisdiction in the Court to entertain cases and disputes concerning the interpretation and application of the Charter, the Protocol, and any other relevant human rights instruments ratified by the states concerned. According to Article 5 of the Protocol, cases can be submitted to the Court by the Commission, by states parties involved in procedures before the Commission, by states parties whose citizens are victims of human rights violations, by African governmental organizations, by non-governmental organizations and by individuals.

In the absence any express requirement in the Protocol calling up on the African Commission to make finding be it on admissibility or merits of the case, three scenarios present themselves.¹⁵⁵ Firstly, the

¹⁵⁵ Frans Viljoen, *A Human Rights Court for Africa and Africans*,

Commission may submit a case to the African Court without making any findings concerning admissibility and merits of the case. Accordingly, the Commission would handover the communication to the African Court following a preliminary hearing. However, this approach runs a risk of rendering the protective mandate of the Commission of no or little consequence. Secondly, the Commission could submit a case after making some findings, for example, concerning after a finding of fact, a finding on admissibility, or after unsuccessful attempt to negotiate a friendly settlement. By virtue of this approach, the African Commission would submit the case to the Court following a partial review on admissibility and possibly finding of fact. By so doing the Commission would flush out inadmissible communications from reaching the African Court. This fluid approach is said to be advantageous in that it could lead to a more efficient division of labor, fewer delays, and a better use of resources since witnesses would only testify once and only one set of arguments and pleadings would be required.¹⁵⁶ This approach also enables the African Court to concentrate more on legal, rather than factual, questions. Still the approach inhibits the Commission to exercise its protective mandate and relegates it to the status of fact finder or mere arbiter. According to some scholars this is the best reading one could give to the requirement of "complementarity" between the Commission and Court.¹⁵⁷ Thirdly, the Commission could submit a case to the Court up on its final disposition on the merits or a friendly settlement.

11.4. SUMMARY

This Unit explored the normative and institutional framework of human rights protection in Africa. It commenced by elaborating the

¹⁵⁶ Ibid.

¹⁵⁷ Ibid.

prominence accorded to the promotion and protection of human rights in Africa. The Unit also touched up on the human rights instruments of which the African Human Rights Normative System is composed of. The Unit shifted attention to examine the African Charter on Human and Peoples Rights from different angles. The distinctive features of the African Charter on Human and Peoples Rights have been discussed. Most importantly, the fact that the African Charter is duty-oriented, the absence of provision on derogation, the claw-back clauses, the expansive approach the Charter has adopted and other unique features have been looked in to.

Apart from the normative framework, the institutional framework of the African System of Human Rights has also been studied in the Unit. In this regard, emphasis was placed on the African Commission on Human and Peoples Rights and the African Court of Human Rights. The weaknesses of the African Commission which led to the establishment of the African Court of Human Rights have been scrutinized. Moreover, the principle of complementarity has been elaborated in the Unit.

11.5. SELF-ASSESSMENT QUESTIONS

1. Which one of the following does not constitute the African System of Human Rights?
 - A. Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa
 - B. OAU Convention Governing the Specific Aspects of Refugee Problems in Africa ("African Refugee Convention")

- C. African Charter on the Rights and Welfare of the Child ("African Children's Charter")
 - D. Cultural Charter for Africa
 - E. None of the above.
2. Which one of the following set of rights is not enunciated under the African Charter on Human and Peoples' Rights?
- A. Civil and Political Rights
 - B. Economic, Social and Cultural Rights
 - C. Peoples' Rights
 - D. None of the above.
3. Which one of the following is not distinctive feature of the African Charter on Human and Peoples' Rights?
- A. It is duty-oriented.
 - B. It includes a provision on derogation.
 - C. It has claw-back clauses.
 - D. None of the above.
4. Which one of the following duties is not provided under the African Charter on Human and Peoples' Rights?
- A. The duty to preserve the harmonious development of the family
 - B. The duty to serve one's national community

- C. The duty not to compromise the security of the State
 - D. The duty to preserve and strengthen the social and national solidarity
 - E. The duty to preserve and strengthen the national independence and territorial integrity of one's country
 - F. None of the above.
5. Which one of the following is not applicable in the African Commission on Human NAD Peoples Rights?
- A. Inter-state Complaints
 - B. Individual Communications
 - C. State Reporting
 - D. None of the above.
6. Which one of the following is not a requirement to submit individual communications to the African Commission on Human and Peoples Rights?
- A. Exhaustion of local remedies
 - B. Requirement that the communications are "not written in disparaging or insulting language"
 - C. Communication may be submitted on information obtained solely from outlets of media
 - D. None of the above.

7. Which one of the following is not the mandate of the African Commission on Human and Peoples' Rights?
- A. promotional
 - B. protective
 - C. interpretational
 - D. None of the above.
8. Which one of the following is not true about the African Commission on Human and Peoples' Rights?
- A. The conditions laid down in the African Charter on Human and Peoples' Rights severely restrict access to justice for individuals before the Commission.
 - B. The Commission was entitled to make recommendations; it was devoid of enforcement powers.
 - C. The Commission can publish its recommendations without securing the permission of the Assembly of Heads of States of the AU.
 - D. The lack of independence and resources are also amongst the major setbacks faced by the Commission.
 - E. The Commission was further weakened by the requirements of confidentiality barring the body from publishing its recommendations.
 - F. None of the above.

UNIT TWELVE

HUMAN RIGHTS UNDER THE ETHIOPIAN LEGAL SYSTEM

Introduction

This Unit focuses on matters which are of particular importance to Ethiopia. The previous Units has explicated the substantive and institutional framework of the international human rights system of which Ethiopia is a party. In this Unit, the focus would be on three principal issues. The first part of the Unit shall dwell on how human rights and fundamental freedoms have been reflected under the FDRE Constitution. The next section shifts attention on the status of international human rights instruments under Ethiopian law and it would look in to the issues revolving around the enforcement of human rights and fundamental freedoms under Ethiopian law.

At the end of this Unit, you should be able to:

- Explain the human rights and fundamental freedoms enunciated under the FDRE Constitution
- Identify the features the human rights provisions in the FDRE Constitution has in common with international human rights instruments
- Discuss the salient features of the FDRE Constitution as regards human rights and fundamental freedoms
- Identify the different sets of human rights under the FDRE Constitution
- Identify the human rights treaties acceded to or ratified by Ethiopia

- Discuss the status of international human rights instruments under Ethiopian law
- Explain the importance of publication of human rights under Ethiopian law
- Discuss the difficulties involved in the enforcement of human rights norms under Ethiopian law

12.1 HUMAN AND DEMOCRATIC RIGHTS UNDER THE FDRE CONSTITUTION

Human rights are primarily protected in national law. The study of human rights and of the means of protecting them is principally the study of the rights in domestic laws and of remedies. The study of human rights in Ethiopian law shows the extent to which this law lives up to international standards. Ethiopian domestic legislation protects the rights to life, physical security, autonomy and liberty, and the right to property through civil law, law of non-contractual obligations and of property as well as criminal laws. These laws protect against private infringement of rights, also against official violation. Rights recognized as of particular importance are also protected under Ethiopian Constitutional law.

In this sense, the study of tort law, property law and criminal law is study of Ethiopian human rights law. The idea of human rights is usually associated with the Constitution. Likewise, the FDRE Constitution is the supreme law of the land and the ultimate guardian and vanguard of human rights in Ethiopia (Article 9 of the FDRE Constitution). The FDRE Constitution is the protector of individual as well as collective rights. The preamble of the FDRE Constitution states the necessity of respect for the fundamental rights of

individuals and of the nations and nationalities. The preamble also protects economic development, equal treatment for all ethnic groups, and democracy.

The FDRE Constitution can be viewed as a contract among all the peoples to create a single political community. The FDRE Constitution provides extensive protection for human rights and fundamental freedoms. Article 10 of the Ethiopian Constitution provides that human rights are inherent and inalienable. They are not granted by the state and cannot be taken away by the state. They are not charities or gifts from the society or the government. They precede the government and even the Constitution. Article 8 of the Ethiopian Constitution vests sovereignty in the nations, nationalities and peoples of Ethiopia. This sovereignty manifests itself in representation, parliamentary supremacy and direct participation.¹⁵⁸ Though Article 5 of the Ethiopian Constitution provides that Amharic is the official language of the Federal government, all other languages spoken in the country enjoy equal state recognition. Article 11 of the Ethiopian Constitution provides for the separation of State and religion. The Constitution also provides that Ethiopia is a secular state and there shall be no state religion. Article 12 provides for accountability of the government as one of the pillars of the Constitution.

The Constitutional Bill of Rights is divided into two parts: Part one on human rights guarantees fundamental human rights that are applicable to all individuals within the territorial jurisdiction of the country¹⁵⁹ and Part two on democratic rights providing political rights that can be enjoyed by citizens.¹⁶⁰ The rights enshrined in FDRE

¹⁵⁸ T.S. Twibell, 'Ethiopian Constitutional Law: The Structure of Ethiopian Government and the New Constitution's Ability to Overcome Ethiopia's Problems' (1999), 21 Loy. L.A. Int'l & Comp. L.J. 399, p. 27

¹⁵⁹ Part one Art 14-28 Human Rights

¹⁶⁰ Part two Art 29- 44 Democratic Rights

Constitution correlate with the generational metaphor which was considered in the first chapter. Accordingly, it is possible to classify the rights in to civil and political rights, economic, social and cultural rights and solidarity or people's rights as follows.

The formulae employed in the FDRE Constitution converges with that the Universal Declaration of Human Rights. This shows that the Bill of Rights under the FDRE Constitution is very much influenced by the Western models and basic human rights instruments. The themes of human rights and liberty emphasized in the Constitution are suggestive of insistence on democratic legitimacy. Moreover, the FDRE Constitution also emphasizes on judicial and other remedies for violations of human rights. The consideration of the FDRE Constitution is suggestive of the fact that the Constitution can be characterized as liberal-style. This can be attributed to two factors. The first factor pertains to the *horizontal* influence i.e. the influence of powerful countries in the liberal constitutional tradition. The second factor pertains to vertical influence i.e. the influence of the human rights movement in constructing international system of norms.

The FDRE Constitution is premised on the notion of popular sovereignty as can be gathered from Article 8 which provides that sovereignty resides in the nations, nationalities and peoples of Ethiopia. Moreover the FDRE Constitution goes on to provide notions of accountability to the people through a variety of methods including periodic and genuine elections in a multi-party system. Article 38 of the FDRE Constitution affirms the right to vote and be elected. Article 53 establishes two federal houses or chambers, namely the Council of Peoples' Representatives and the Council of the Federation. Article 54(1) of the FDRE Constitution states that the members of the Council

of Peoples' Representatives shall be elected every five years in a direct, free and fair elections. Article 61(3) provides that the Members of the Council of the Federation may be elected by State Councils. One of the principal functions of the House of Federation is interpretation of the Constitution as provided under Article 62(1) of the Constitution. Article 73 of the Constitution provides that the Prime Minister is to be elected from among the members of the House of Peoples Representatives by the political party or a coalition of political parties which has obtained a majority of seats in the Council.

The FDRE Constitution also provides mechanisms to control and limit the power of the government. These techniques include separation of powers and independence of the judiciary. The judiciary is presented as the essential vanguard of rule of law and human rights. The judiciary is envisaged to ensure that the executive acts within the established legal framework and based on established processes. However, the power vested in courts of law under the FDRE Constitution does not extend to that of judicial review whereby courts can subject the legality and legitimacy of governmental action. Instead, Article 82 of the FDRE Constitution provides for Council of Constitutional Inquiry. The Council of Constitutional Inquiry is composed of the President and Vice-President of the Federal Supreme Court, six legal experts appointed by the President of the Republic on the Recommendation of the House of Peoples' Representatives and three persons designated by the House of the Federation. Article 83(1) of the Constitution goes on to provide that all constitutional disputes shall be decided by the House of the Federation. The Council of Constitutional Inquiry investigates constitutional disputes as per Article 84(1) of the FDRE Constitution. If the Council deems it fit to interpret the Constitution, it submits its recommendations to the

House of the Federation.¹⁶¹ Article 84(2) also provides that where any Federal or State law is contested as being unconstitutional and such a dispute is submitted to it by any court or interested party, the Council shall consider the matter and submit it to the House of Federation for a final decision. The House of Federation is given 30 days to decide the constitutional dispute as per Article 83(2) of the FDRE Constitution. Moreover, the Council of Constitutional Inquiry itself is not in a position to decide constitutional issues. Instead, it is expected to submit these issues along with its recommendations to the House of Federation. The House of Federation is a political organ composed of representatives having the power to decide constitutional disputes. Thus, there is no judicial review under the FDRE Constitution.

The existence of free and competent press is one of the requirements to ensure that constitutional rights are protected. Freedom of expression is affirmed under Article 29 of the FDRE Constitution in detail. As was stated previously, free speech is vital since public debate is a useful instrument for achieving other social objectives. These objectives can be divided into two: for the objective of discovery of truth and its utility in the functioning of a representative democracy. Freedom of expression is valuable for the exercise of electoral rights and democratic participation provided under Article 25 of the ICCPR. Freedom of expression enables citizens to exert influence through public debate and dialogue with their representatives. Free expression is a right which is a guarantee to other rights and freedoms.

Civil and Political Rights in the FDRE Constitution

- the right to life,
- liberty and security of person,

¹⁶¹ Article 84(1), FDRE Constitution

- the right to prohibition against inhuman treatment,
- rights applicable in the event of arrest and detention,
- rights of accused person,
- the rights of a person in custody and convicted prisoners,
- the right to prohibition against double jeopardy,
- the right to honour and reputation,
- the right to equality before the law,
- the right to privacy,
- the right to freedom of religion, belief and opinion,
- right to freedom of thought and expression,
- the right of assembly, demonstration and petition,
- freedom of association,
- freedom of movement,
- right of nationality, family and personal rights,
- the right to political participation,
- the right to property, and
- the right of access to justice.

Economic, Social Cultural Rights in the FDRE Constitution

- the right to labor,
- the right to education
- the right to housing and;
- economic social and cultural rights.

People's Rights in the FDRE Constitution

- the right to development
- the right to clean and healthy environmental rights.

Activity

1. Explain the link between civil law, law of non-contractual obligations and of property as well as criminal laws and human rights law.

2. Discuss the theory of human rights under the FDRE Constitution.

3. Classify the human rights and fundamental freedoms under the FDRE Constitution based on the generational metaphor.

4. Explain the factors behind the liberal-style nature of the FDRE Constitution.

12.2. IMPLEMENTATION OF HUMAN RIGHTS TREATIES IN ETHIOPIA

This section focuses on the interpenetration of international and Ethiopian systems. It also examines the significance of treaties under Ethiopian law. The section studies how the treaties adopted influence the Ethiopian legal system. It would also dwell on the method of incorporation of international human rights instruments under Ethiopian law. Moreover, the section deals with the status of international human rights treaties in Ethiopian legal system.

Attention is also drawn to how courts of law in Ethiopia give effect to the international human rights instruments ratified by the country.

The following tables shows major human rights treaties Ethiopia acceded to or not.

Treaty	Status	
International Covenant on Civil and political Rights (ICCPR) of 1966	Acceded to on 11 June 1993	
the International Covenant on Economic, Social and Cultural Rights of 1966	Acceded to on 11 June 1993	
International Convention on the Elimination of All forms of Racial Discrimination (CERD) of 1965		
Optional Protocol to the ICCPR relating to Individual Complaints Procedure		
Second Optional Protocol to the ICCPR relating to the Abolition of the Death Penalty		
1984 Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment	Acceded to on 14 March, 1994	

Optional Protocol to the CAT		
1952 Convention on the Political Rights of Women		
1989 Convention on the Rights of the Child	Acceded to on 14 May 1991	
Optional Protocol to the CRC on the involvement of Children in Armed Conflict		
Optional Protocol to the CRC relating to Sale of Children , Child Prostitution and Child Pornography		
1979 Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW	Acceded to 23 June 1976	
Optional Protocol to the CEDAW relating to Individual Complaints Mechanism		
1981 African Charter on Human and Peoples' Rights in 1998		
The African Charter on the Rights and Welfare of the Child in 2001		
Convention on the Rights of Persons with Disabilities		

Other United Nations and Human Rights Documents

Instrument	Signature	Ratification	Accession	Remark
Convention on the	11 Dec	1 July		

Prevention and Punishment of the Crime of Genocide, 1948	1948	1949		
Slavery Convention, 1926 as amended 1955				Party since 21 January 1969
Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others, 1949				Party since 10 Sep 1981
Convention relating to the Status of Refugees, 1951, and its 1967 Protocol			10 Nov 1969	
Convention relating to Stateless Persons, 1954				Not a party
Convention on the Reduction of Statelessness , 1961				Not a party
Rome Statute of the International Criminal Court, 1998				Not a party
United Nations Convention against Transnational Organized Crime, 2000, and its Protocols against the Smuggling of Migrants by Land, Sea and Air, and to Prevent, Suppress and				Party since 23 Jul 2007

Punish Trafficking in Persons, especially Women and Children				
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Conventions of the International Labour Organization

Instrument	Signature	Ratification	Accession	Remark
Weekly Rest (Industry) Convention, 1921 (No. 14)				Party since 28 Jan 1991
Forced or Compulsory Labour Convention, 1930 (No. 29)		2 Sep 2003		
Freedom of Association and Protection of the Right to Organize Convention, 1948 (No. 87)		4 June 1963		
Right to Organize and Collective Bargaining Convention, 1949 (No. 98)		4 June 1963		
Equal Remuneration Convention 1951 (No. 100)		24 March 1999		
Abolition of Forced Labour Convention, 1957 (No. 105)		24 March 1999		
Weekly Rest (Commerce and Offices) Convention, 1957 (No. 106)				28 Jan 1991
Discrimination (Employment and Occupation) Convention, 1958 (No. 111)		11 Jun 1966		

Minimum Age Convention, 1973 (No. 138)				27 May 1999
Occupational Safety and Health Convention, 1981 (No. 155)		28 Jan 1991		
Worst Forms of Child Labour Convention, 1999 (No. 182)			2 Sep 2003	

Regional Human Rights Instruments

Instrument	Signature	Ratification	Accession	Remark
The African Charter on Human and Peoples Rights, June 1981			15 June 1998	
African Charter on the Rights and Welfare of the Child, 11 July 1990			2 Oct 2002	
OAU Convention Governing the Specific Aspects of Refugee Problems in Africa, 10 September 1969	10 Sep 1969	15 Oct 1973		
Protocol to the African Charter on Human and People's Rights on the Establishment of the African Court on Human and People's Rights	9 Jun 1998			

Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa	Not signed			
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12.2.1 The Status of Treaties vis a vis the FDRE Constitution

Different designations are used to refer to international agreements. They are referred to as pacts, protocols, covenants, conventions, charters, treaties, etc. Article 27 of the Vienna Convention on the Law of Treaties asserts the supremacy of international treaty law over national laws. The provision prohibits states from invoking their domestic laws to avoid international obligations. In other words, the provision states that nations cannot invoke their national laws with a view not to perform or carry out their international obligations. The invocation of national laws as excuse not to perform international obligations is not acceptable by international tribunals as well. In *Polish Nationals in Danzing* case the Permanent Court of International Justice made it clear that states cannot rely on their own Constitutions “with a view to evading obligations incumbent upon it under international law as conventions in force.”

Article 38(1) (a) of the Statute of the International Court of Justice calls up on the Court to apply “international conventions, whether general or particular, establishing rules expressly recognized by the contesting parties”. As a result, treaties are on top of the list of Article 38 preceding international custom, general principles of law and others.¹⁶² Thus, treaties are considered to be the principal

¹⁶² Henry J. Steiner and Philip Alston (eds), *International Human Rights in Context*, (Oxford University Press, New York), p. 104

manifestation of international law and the most effective basis for the regulation of international disputes.

The position of states as regards the status of international treaties differs. In this regard, one can categorize nations into three different groups.¹⁶³ Firstly, there are countries which accord treaties superior position than their Constitutions. In Netherlands, a ratified treaty assumes a superior position *vis a vis* the Constitution.¹⁶⁴ The same is true for Switzerland.¹⁶⁵ The 1958 French Constitution provides that a convention may be ratified upon the order of the French Constitutional Council following an amendment to the Constitution.¹⁶⁶

Secondly, there are countries which accord treaties equal status and rank to that of their Constitutions. For example, in the US ratified international agreements are placed on equal footing with that of the US Constitution. Article VI¹⁶⁷ Para. 2 of the US Constitution states that all conventions made, or which shall be made under the authority of the United States, shall together with the Constitution itself and laws made in pursuance thereof, be the supreme law of the land.

The last category of states accord subordinate positions to treaties to that of their Constitutions. In countries like Portugal, Spain and Greece international agreements have subordinate position to the

¹⁶³ Ibrahim Idris, The Place of International Conventions in the 1994 Federal Democratic Republic of Ethiopia (FDRE) Constitution, *Journal of Ethiopian Law*, vol.20, 2000, p. 130

¹⁶⁴ Jonkheer H.F. Van Parprys, *The Netherlands Constitution and International Law*, *American Journal of International Law*, Vol.47, 1953, pp. 549-550.

¹⁶⁵ Arthur Haefliger, Hierarchy of Constitutional Norms: Its Functions in Protecting Human Rights: Swiss Report, *Human Rights Journal* vol. 13, No.3, 1992, p.87

¹⁶⁶ A case in point is the Maastricht Treaty which was submitted to the Constitutional Court of France to ensure if its ratification calls for amendment to the 1958 Constitution.

¹⁶⁷ Article VI is also known as the Supremacy Clause.

Constitution. As a result, international treaties will not be applicable if they run counter to their respective Constitutions.¹⁶⁸

Article 122 of the 1955 Revised Constitution of Ethiopia provides that “the present Constitution, together with international treaties, conventions and obligations to which Ethiopia shall be a party, shall be the supreme law of the Empire, and all future legislation, decrees, orders, judgments, decisions and acts inconsistent therewith shall be null and void.” Therefore, the provision in the 1955 Revised Constitution puts treaties, international conventions, and other international obligations on equal footing with the Constitution as the supreme law of “the Empire”. Accordingly, domestic subsidiary legislations cannot modify or terminate international obligations, like human rights treaties and international customary law or general principles of law.

Under the Constitution of the Federal Democratic Republic of Ethiopia, Article 9(4) provides that all ratified international agreements form part and parcel of the law of the land. The provision renders international agreements integral part of the law of the land. However, by virtue of Article 9(1) of the FDRE Constitution only the Constitution is the supreme law of the land. Under the FDRE Constitution, treaties do not constitute the supreme law of the land as it used to be the case under the 1955 Revised Constitution of Ethiopia. Moreover, Article 86(4) of the FDRE Constitution provides that Ethiopia will “observe international agreements which ensure respect to Ethiopia’s sovereignty and are not contrary to the interests of its people.”

¹⁶⁸ Ibrahim Idris, The Place of International Conventions in the 1994 Federal Democratic Republic of Ethiopia (FDRE) Constitution, *Journal of Ethiopian Law*, vol.20, 2000, p. 131

Accordingly, Ethiopia is in a position to disregard the treaties that it deems contrary to its own national interest regardless that it might have ratified those instruments. Moreover, ordinary law may contradict international human rights and they still remain constitutional. Treaties do not have the normative legal rank or value like that of the FDRE Constitution. This shows international agreements assume subordinate position in the Ethiopian legal regime.

12.2.2. The Status of Treaties vis a vis Proclamations

Under the FDRE Constitution, the task of negotiating and signing of treaties is accorded to the executive branch of the government. The power of negotiating and signing is given to the Ministry of Foreign Affairs. The treaty is submitted to the House of People's Representatives for ratification following its signing by the Executive. The power to ratify international agreements is clearly vested in the House of Peoples' Representatives by virtue of Article 55(12) of the Constitution. If the House of Peoples' Representatives finds the international agreement in line with the Constitution, it enacts the same in the form of proclamation. The term "proclamation" refers to statute issued by the House of Peoples' Representatives.¹⁶⁹ In addition, the proclamation ranks next to the Constitution.¹⁷⁰ As a result, some argue that international agreements ratified by the House of Peoples' Representatives are given the status of a proclamation.

However, the FDRE Constitution is silent as to whether or not international human rights convention would prevail over

¹⁶⁹ Ibrahim Idris, The Place of International Conventions in the 1994 Federal Democratic Republic of Ethiopia (FDRE) Constitution, *Journal of Ethiopian Law*, vol.20, 2000, p. 132

¹⁷⁰ Ibid.

proclamation. The question remains what happens if a certain proclamation issued by the House is in conflict with an international agreement which has been ratified by the House in the form of a proclamation. Different countries adopt varied positions in order to solve conflict between their national laws and international human rights agreements. In this regard, three of these approaches are the most widely practiced.¹⁷¹

Firstly, in countries where international agreements are accorded superior status over their national laws the latter are set aside. The fact that the national law is anterior or posterior does not make a difference in these countries. Examples of countries which adopt this approach include France, Italy, the Netherlands, Luxemburg and Portugal.¹⁷² International agreements have direct effect and prevail over inconsistent provisions of national legislation of whatever date.¹⁷³ As a result, international agreements have greater effect than ordinary legislation. Secondly, international agreements which are contrary to national laws of the country will be set aside and the national law supersedes or prevails. This position is applicable in countries like Sweden, Norway, Canada and Belgium.¹⁷⁴

Finally, in countries which accord international agreements equal position with that of national laws, ordinary rules of interpretation will be applicable to solve the conflict as this is a conflict between laws of equal standing. These ordinary rules of interpretation include *lex posterior derogate lege priori* and *lex specialis derogate lex generalis*. Ethiopia being one of the countries which accords equal status to international agreements it ratified with that of proclamations, it can be categorized in the third group of nations. Accordingly, it is argued

¹⁷¹ Ibid.

¹⁷² Ibid. pp132,133

¹⁷³ Mark Janis *et al*, *European Human Rights Law*, Oxford, (2000), p 489

¹⁷⁴ Ibid.

that Ethiopia has two options at its disposal to resolve conflict between international agreements and proclamations. Firstly, such conflict can be resolved through the application of ordinary rules of interpretation including *lex posterior derogate lege priori* and *lex specialis derogate lex generalis*.

Secondly, the conflict can be resolved by inquiring whether or not the treaty in question is contrary to the national interest of the country in line with Article 86(2) of the FDRE Constitution.¹⁷⁵ According to this provision, international agreements ratified by Ethiopia must serve the purpose of promoting Ethiopia's interest. It is believed that Ethiopia will not sign agreements which are not contrary to the interests of the country. In the event a treaty signed and ratified turns out to be contrary to the interests of the country, it can be argued that national law including proclamation shall override the said international agreement. In other words, national law prevails over international agreements which are inimical to the national interest of Ethiopia.¹⁷⁶

Irrespective of whichever option the country may take, it would violate the *Vienna Convention on the Law of Treaties*. The basic postulate and doctrine of international law and the Vienna Convention on the Law of Treaties is the principle "*pacta sunt servanda*": promises made must be kept. This is due to the fact that a

¹⁷⁵ Article 86(2) of the FDRE Constitution states that one of the principles of foreign relations is the promotion of foreign relations based on equality and mutual benefit; ensuring that international agreements entered into, protect the interests of Ethiopia. The idea is reinforced by Article 86(3) of the FDRE Constitution which states requires respect for international laws and agreements that respect Ethiopian sovereignty and are not contrary to the interests of its peoples.

¹⁷⁶ Ibrahim Idris, The Place of International Conventions in the 1994 Federal Democratic Republic of Ethiopia (FDRE) Constitution, *Journal of Ethiopian Law*, vol.20, 2000, p. 135

treaty is formed up on the express volition and free will of the parties. Furthermore, the effectiveness of treaties signed by the executive branch is postponed until the treaty is ratified by the House of Peoples' Representatives. Article 52 of the Vienna Convention provides that a treaty will be void if its conclusion has been procured by the threat or use of force in violation of the principles of international law embodied in the Charter of the United Nations. However, the expression threat or use of force does not include economic pressure. Therefore, Ethiopia cannot invoke economic duress and the national interest contention not to implement the treaty. In addition, the country could have made use of reservations to parts of the treaties which are not to its liking so far as such reservations are not incompatible with the object and purpose of the treaty. Moreover, in international law, the national law of a state including its constitutional law cannot be relied up on by that state as a justification for failure to perform its obligations under a treaty as is provided under Article 27 of the Vienna Convention on the Law of Treaties.

12.2.3 Publication of Ratified International Human Rights Convention

Different countries adopt differing approaches as regards the issue of publication of ratified international agreements. The first category of states include France, Germany, Switzerland, Turkey, Portugal, Croatia, UK and Belgium where publication of ratified international agreement is a requirement for the said agreement to have legal effect.¹⁷⁷

Publication is not a requirement in the case of the second category of states. The US is a case in point. There is no requirement of

¹⁷⁷ Ibid.

publication of the international agreement in US official law gazette. International Conventions ratified by a state require that the ratifying state must take all appropriate legislative measures to give the instrument legal effect. One such measure is that of publication in the official gazette of the country with a view to bring the instrument to the attention of the public and concerned bodies.¹⁷⁸

The FDRE Constitution is not clear as to whether or not publication of ratified international agreement is a requirement. Some argue that the mere fact of ratification of the international human rights instrument by the House of People's Representatives is sufficient to render the instrument effective. The proponents of this view invoke Article 9(4) of the FDRE Constitution.¹⁷⁹ They argue the absence of publication does not undermine the validity of the ratified instrument.

On the other hand, others argue that publication of the international agreement is a requirement for such agreement to have legal effect. The proponents of this view invoke Article 71(2) of the FDRE Constitution which requires that the President of the Republic to proclaim in the Negarit Gazetta laws and international conventions ratified by the House of Peoples' Representatives. Moreover, proponents of the second position also contend on the basis of Article 2(3) of the 1995 Federal Negarit Gazeta Establishment Proclamation which indicates that publication of federal laws including ratified international agreements is an absolute requirement for taking judicial notice.

¹⁷⁸ Ibid.

¹⁷⁹ Ibid.

Methods of Publication

There are three different methods of publication of international human rights treaties within the domestic legal order.¹⁸⁰ These are:

- By enacting the whole text of the ratified international human rights instrument in a proclamation;
- By enacting a proclamation which makes reference to the convention but without expressly enacting its provisions, either with or without expressly enacting its provisions; and
- By incorporating in to the law the convention or the relevant provisions of the convention.

The Federal *Negarit Gazeta* Establishment Proclamation does not specify which of the three options is applicable in Ethiopia. The legislative practice of the country attests that neither one nor the other of the three options has been consistently adopted. The legislative experience in this regard appears to be varied. The English version as well as the Amharic version of the OAU Charter was published in the *Negarit Gazeta*. This method of publication is much more useful in the case of international human rights law treaties. This is because international human rights law treaties are of special type in that their implementation is dependent up on public awareness of their existence and import.¹⁸¹ Individuals and groups alike are in a position to avail themselves of norms and principles of international human rights instruments only they are knowledgeable about the contents of these instruments. As a result certain treaty bodies have suggested that Ethiopia has to publish the text of ratified

¹⁸⁰ Ibid.

¹⁸¹ Ibid. p.127

instruments in its official law gazette.¹⁸² The same suggestion was made by the Human Rights Committee which calls up on States parties to publish the text of the Covenant on Civil and Political Rights in all its languages.¹⁸³ In the words of Lawrence Peruses:

“Publication brings it to the knowledge of private citizens, fixes the point of time at which arises their obligation to conform to its provisions, and their right to invoke it before the courts and other organs of the state.”¹⁸⁴

On the other hand, international agreements pertaining to the Convention on the Rights of the Child and Chemical Weapons Convention can be cited as examples of the second method of publication. The proclamations ratifying these Conventions simply provide that the said Conventions are ratified. They simply make reference to these instruments without annexing the Conventions; be it the English version or the Amharic version.¹⁸⁵ The Genocide Convention and the Four Geneva Conventions can be cited as examples of the third method of publication whereby important provisions of these Conventions are incorporated in to the Criminal Code of Ethiopia.

12.3. Ethiopian Human Rights Commission

The Ethiopian Human Rights Commission was established in 2000 by the Ethiopian government. It draws its mandate from Article 55(14) of the FDRE Constitution. It is established for the purpose of protecting and promoting human rights in Ethiopia by virtue of Proclamation

¹⁸² The Concluding Observations adopted by the Committee on the Rights of the Child at its 371st Meeting (Fourteenth Session), held on January 24, 1997, p.7

¹⁸³ General Comment No 3 (13),

¹⁸⁴ Lawrence Peruses, The Relationship of International Law to Internal Law in the French Legal Constitutional System, American Journal of International Law, vol.44, 1950, pp.650-651.

¹⁸⁵ Ibid. p.126

210/2000. The vision of Ethiopia as a nation is captured in the national development plan of the country, namely the Plan for Accelerated and Sustained Development to End Poverty (PASDEP). Accordingly, the vision of Ethiopia is to reach a middle-income country where democracy and good governance are maintained through peoples' participation where good will and social justice are secured. The preamble of the establishment Proclamation of the Ethiopian Human Rights Commission also reiterates the aspiration of the Ethiopian people to establish one political community based on the rule of law. The Preamble also underlines the fact socio-economic development cannot be achieved without guaranteeing respect for human rights of individuals as well as nations, nationalities and peoples'. With these in mind, Article 2 of the Proclamation 210/2000 states that the EHRC is established to promote and protect human rights of the individuals.

The Ethiopian Human Rights institution is established with a view to ensure respect for human rights and fundamental freedoms as is provided under Article 2 of Proclamation 210/2000. The Ethiopian Human Rights Commission has promotional, protective, advisory and investigative as well as monitoring mandate. Article 6 of Proclamation 210/2000 provides the mandate of the Ethiopian Human Rights Commission as follows:

The Commission shall have the powers and duties to:

- Ensure that the human rights and freedoms provided for under the Constitution of the Federal Democratic Republic of Ethiopia are respected by all citizens, organs of the state, political organizations and other associations as well as by their respective officials;

- Ensure that laws, regulations and directives as well as government decisions and orders do not contravene the human rights of the citizens guaranteed by the Constitution;
- Educate the public, using mass media and other means, with a view to enhancing its tradition of respect for, and demand for the enforcement of, rights up on acquiring sufficient awareness regarding human rights;
- Undertake investigation, up on complaint or its own initiation, in respect of human rights violations;
- Make recommendations for the revision of existing laws, enactment of new laws and formulation of policies;
- Provide consultancy services on matters of human rights;
- Forward its opinion on human rights reports to be submitted to international organs;
- Translate in to local vernaculars, international human rights instruments adopted by Ethiopia and disperse same;
- Participate in international human rights meeting, conferences or symposia; ...

The Paris Principles require that national human rights institutions need to be credible, legitimate, effective and relevant. The fact that promotional and protective mandate is vested in the Ethiopian Human Rights Commission makes Proclamation 210/2000 compatible with the Paris Principles on National Human Rights Institutions. Moreover, the Commission is given broad mandate as is required by the Paris Principles. In particular, there is specific mention of the mandate to

promote as well as to protect human rights. Pursuant to Principle 3 of Paris Principles the Ethiopian Human Rights Commission is empowered to give opinions, recommendations, reports on matters concerning the promotion and protection of human rights. Such opinions, recommendations, proposals and reports pertain, among others, to the compatibility of laws, regulations and directives with international human rights standards. Proclamation 210/2000 also calls up on the Ethiopian Human Rights Commission to call for the adoption of new laws and formulation of new policies. The Ethiopian Human Rights Commission is also given the competence to contribute in the preparation of reports Ethiopia is expected to submit to UN as well as other bodies.

12.4. SUMMARY

This Unit commenced by emphasizing the relationship between human rights law and domestic civil and criminal laws as well. It explained the prominence given to human rights and fundamental freedoms. It classified human rights and fundamental freedoms using the generational metaphor explained in introductory units of the course material. It posited the FDRE Constitution as a Social Contract among people. It briefly touched up on the theory of human rights under the FDRE Constitution. The Unit also tried to explain the convergence in the formulae of human rights provisions in the FDRE Constitution and international human rights norms. The Unit also mentioned the pillars of the FDRE Constitution including the consent of the governed, free and competent press, control over the government, etc.

In addition, the Unit explored the position of international human rights norms following a scheduler presentation of the human rights treaties ratified by the country. The Unit made it clear that human

rights treaties are not given superior status to the FDRE Constitution as it is practiced other countries. The Unit also clarified that human rights treaties are not accorded equal status to the FDRE Constitution. The Unit also compared the position of human rights treaties *vis a vis* proclamations. The Unit attempted to show the problems this may lead to in light of the Vienna Convention on the Law of Treaties. The Unit also briefly laid out the importance of publication for the implementation of human rights.

12.4. SELF-ASSESSMENT QUESTIONS

1. Which one of the following is true?
 - A. Under the FDRE Constitution, human rights are inherent and inalienable.
 - B. Under the FDRE Constitution, human rights are granted by the state and can be taken away by the state.
 - C. Under the FDRE Constitution, human rights are charities or gifts from the society or the government.
 - D. Under the FDRE Constitution, human rights precede the government and even the Constitution.
 - E. None of the above.
2. Which one of the following is not true about the Bill of Rights under the FDRE Constitution?
 - A. The Bill of Rights under the FDRE Constitution is very much influenced by the Western models and basic human rights instruments.
 - B. The themes of human rights and liberty are emphasized in the Constitution as to indicate insistence on democratic legitimacy.
 - C. The FDRE Constitution also emphasizes on judicial and other remedies for violations of human rights.

- D. The FDRE Constitution can be characterized as liberal-style.
 - E. None of the above.
3. Which one of the following is not the feature of the FDRE Constitution?
- A. Consent of the governed
 - B. Free and Competent Press
 - C. Judicial Review
 - D. Popular sovereignty
 - E. None of the above.
4. Which one of the following is not true?
- A. Under the Vienna Convention on the Law of Treaties, nations can invoke their national laws not to carry out their international obligations.
 - B. Under the Vienna Convention on the Law of Treaties, nations are entitled not to carry out international obligations contrary to their national interest.
 - C. Under the Vienna Convention on the Law of Treaties, states are at liberty to give effect to the treaties they have signed consensually or not.
 - D. None of the above.
5. Which one of the following is not a source of international law?
- A. International Custom
 - B. Treaties
 - C. General Principles of Law
 - D. None of the above.
6. Which one of the following is true?
- A. Human rights treaties are accorded superior position to that of the FDRE Constitution.
 - B. Human rights treaties are accorded equal position to that of the FDRE Constitution.

- C. Human rights treaties are accorded inferior position to that of the FDRE Constitution.
- D. None of the above.

Worksheet on the Human Rights Law Module

PART I. CHOOSE THE CORRECT ANSWER.

1. According to international human rights instruments, human rights are:
 - A. Universal
 - B. Necessary for freedom and maintenance of a “reasonable” quality of life.
 - C. Inalienable
 - D. Standards for the respect of human dignity
 - E. All of the Above.

2. One of the following is a non-derogable right.
 - A. The Right to Life
 - B. The Right to Fair Trial
 - C. Access to information
 - D. The Right to Privacy
 - E. None of the above.

3. One of the following is part and parcel of the International Bill of Human Rights.
 - A. Human Rights Provisions in the UN Charter
 - B. The Universal Declaration of Human Rights
 - C. The International Covenant on Civil and Political Rights

D. The International Covenant on Economic, Social and Cultural Rights.

E. All of the above.

4. One of the following is a state duty entailed by human rights norms.

A. The duty to provide

B. The duty to respect

C. The duty to protect

D. The duty to create institutional machinery

E. All of the above.

5. One of the following is a distinctive feature of the African Charter on Human and Peoples' Rights as compared to other regional human rights instruments.

A. It is duty-oriented.

B. It has a general provision on derogation.

C. It emphasizes on civil and political rights than that of economic and social rights.

D. It enshrines the right to privacy.

E. None of the above.

6. One of the following is true about torture.

A. Torture differs from other forms of mistreatment due to the severity of pain involved.

B. States can not be held accountable for torture carried out by private individuals and non-state actors.

C. According to Article 1 of the Convention against Torture, suffering arising out of lawful punishments like death penalty is torture.

- D. There is no difference between torture and cruel, inhuman and degrading treatment.
- E. None of the above.

7. One of the following is true.

- A. The Universal Declaration of Human Rights is a technically binding treaty.
- B. The Universal Declaration of Human Rights has stimulated and directed the human rights movement.
- C. The Universal Declaration of Human Rights enshrines civil, political but not economic and social rights.
- D. The Universal Declaration of Human Rights was drafted by the General Assembly of the UN.
- E. All of the above.

8. One of the following is true.

- A. Most economic, social and cultural rights are of immediate realization.
- B. Civil and political rights are cost free.
- C. The non-interference of the state is the sole requirement for the realization of civil and political rights.
- D. All civil and political rights are to be realized progressively.
- E. None of the above.

9. One of the following is true.

- A. All forms of differentiation not based on objective and reasonable grounds are discriminatory.
- B. Affirmative action constitutes a form of discriminatory practice.
- C. All forms of differentiation constitute discrimination.

D. A given measure is said to be discriminatory where it has the effect of achieving equality, though not the purpose.

E. None of the Above.

10. One of the following is a general principle of the Convention on the Rights of the Child.

A. Non-Discrimination

B. The Best interest of the child as the primary consideration in matters affecting children.

C. The right of the child to be heard or participatory rights

D. The Right to Life and Maximum Development

E. All of the Above.

11. One of the following is the function of the Human Rights Committee.

A. Examining initial and periodic State Reports.

B. Interpreting the International Covenant on Civil and Political Rights.

C. Providing concluding observations on state reports.

D. Undertaking on site fact finding activities relating human rights violations.

E. All of the above.

12. One of the following is the source of international human rights law.

A. International Conventions

B. International Custom

C. General Principles of Law

D. Teachings of most highly qualified scholars

E. All of the above.

13. One of the following is true.

- A. Reservations which are incompatible with *jus cogens* are acceptable.
- B. Reservations which are inconsistent with the object of the treaty are not permissible.
- C. A State Party to a given treaty may not submit its objections to the reservations made by another State Party.
- D. Reservations need to be formulated as broadly as possible.
- E. None of the above.

14. One of the following is not true.

- A. Limitations cannot be imposed on rights.
- B. Limitations on rights need to be provided by the law.
- C. Limitations are not legitimate so far as they are not necessary in a democratic society.
- D. Limitations are acceptable only when they serve legitimate aims.
- E. None of the above.

15. One of the following is not true.

- A. The Charter of the United Nations has internationalized human rights.
- B. The United Nations has developed a veritable code of human rights.
- C. The United Nations has established a variety of mechanisms for the protection of human rights.
- D. The United Nations has clarified the meaning of the obligation to promote observance of human rights.
- E. None of the above.

16. One of the following is not true.

- A. The Convention against Elimination of All Forms of Discrimination against Women (CEDAW) advances the status of women by granting freedoms and rights to women on the same basis as men.
- B. CEDAW calls up on states parties to remove discriminatory social and cultural rights.
- C. It encourages the use of affirmative action measures to promote the rights of women.
- D. It promotes the participation of women in decision making.
- E. None of the above.

17. One of the following is not a requirement to file individual complaint before a treaty body.

- A. Exhaustion of Local Remedies
- B. Absence of abusive or disparaging language in the communications.
- C. The allegation must relate to the rights stipulated in the treaty which is overseen by the Committee to which the complaint is presented.
- D. The communication must not be pending before another international procedure.
- E. None of the Above.

18. An individual is not expected to comply with the requirement of exhaustion of local remedies except in one of the following conditions.

- A. if there is no legal process in that country to protect the rights alleged to have been violated
- B. Where access to remedies through the local courts has been denied or prevented

- C. If there is unreasonable delay locally in entertaining the complaint
- D. Where a consistent pattern of gross violations of human rights makes any prospect of remedies meaningless.
- E. All of the above.

19. One of the following is not true.

- A. The African Court on Human and Peoples' Rights have both contentious and adjudicatory jurisdiction.
- B. The African Court on Human and Peoples' Rights has a complementary relationship with the African Commission on Human and Peoples' Rights.
- C. African Commission on Human and Peoples' Rights can render binding decisions on State Parties to the African Charter on Human and Peoples' Rights.
- D. The African Court on Human and Peoples' Rights can render binding decisions on States Parties against which complaints have been submitted notwithstanding that the Party might not have recognized the competence of the Court to do so.
- E. C and D.

20. Which one of the following is not among the reasons for the establishment of the Ethiopian Human Rights Commission?

- A. to educate the public on human rights
- B. to see to it that human rights are protected, respected and fully enforced
- C. to take the necessary measures where human rights are found to be violated
- D. to hear complaints on human rights abuses
- E. All of the above.

PART II MATCHING

Match the following items with the corresponding term or phrases provided below.

1. _____ A statement made by a state by which it purports to exclude or alter the legal effect of certain provisions of a treaty
2. _____ Temporary suspension of rights in the event of state of public emergency
3. _____ Peremptory norms of general international law
4. _____ Provisions that ostensibly make the African Charter on Human and Peoples' Rights subject to limitations imposed by domestic law
5. _____ Tools clarifying the normative content of Covenants and announcing the interpretation of provisions of Covenants by Treaty Bodies
6. _____ Any distinction, exclusion or preference which is not based on objective and reasonable grounds

having the effect of nullifying or impairing the equal enjoyment of rights

7. _____ 'Temporary' special protective measures to prevent or compensate for structural disadvantages to obtain effective equality

A. *Jus cogens*

B. Discrimination

C. Claw- back clauses

D. Reservations

E. General Comments

F. *Opinio juris*

G. Affirmative action

H. Derogation

Part III. Case

1. Explain the tests applied to determine whether restrictions imposed on rights are legitimate or not.
2. Sometimes distinction is made between rights as negative and positive. Explain the nature of this distinction and comment on its validity.
3. Discuss the status of international human rights treaties under Ethiopian law.

REFERENCES

- Louis Henkin *et al* (eds), *Human Rights*, Foundation Press, New York, 1999),
- Philip Alston and Steiner, *International Human Rights in Context*, Oxford, 2000
- Jerome Shestack, *The Philosophic Foundations of Human Rights*, 20 Hum. Rts. Q.
- Paul Gordon Lauren, *The Evolution of International Human Rights* (2nd ed PENN, Philadelphia 2003)
- Burns Weston, *Human Rights*, 20 New Encyclopedia Britannica (15th ed 1992)
- David Sidorsky, *Contemporary Reinterpretations of the Concept of Human Rights*, Essays on Human Rights (1979)
- Jack Donnelly, *Universal Human Rights in Theory and Practice*, 1989,
- Antonio Cassese, *International Law in a Divided World* (Clarendon Press, 1986),
- Thomas Buergenthal, *International Human Rights in a Nutshell* (West Group, 1995)
- Alex Conte and Scott Davidson (eds), *Defining Civil and Political Rights*, (Ashgate, Cornwall),
- Rhona K.M. Smith, *International Human Rights*, (Oxford, New York), 2005,
- Raija Hanski and Markku Suksi, *An Introduction to International Protection of Human Rights*, (Institute for Human Rights, Abo), 2000
- Manfred Nowak, *Introduction to International Human Rights Regime*, (Martinus Nijhoff Publishers, Leiden)
- Louis Henkin and Gerald L. Newman (eds), *Human Rights*, (Foundation Press, New York)
- Christof Heyns, *The African Regional Human Rights System: The African Charter*, (2004)

T.S. Twibell, 'Ethiopian Constitutional Law: The Structure of Ethiopian Government and the New Constitution's Ability to Overcome Ethiopia's Problems' (1999), 21 Loy. L.A. Int'l & Comp. L.J.