

## 5 Human rights

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International human rights law is mainly treaty law (a characteristic of modern international law) with some human rights principles having passed into customary international law and some having acquired the status of general principles of law. Prior to the development of international human rights treaties, a relatively small number of states provided protection of human rights through their constitutions or specific domestic laws, but even fewer provided an effective legal system of remedies. There has been a parallel growth in domestic provision and international instruments for the promotion and protection of human rights, with important cross-over between the domestic and international.<sup>1</sup> The focus of this chapter is on the international law of human rights. Nonetheless, some consideration is given to domestic law as a source of law in this area and also, crucially, as a source of remedy. Indeed, a principle common to all human rights treaties is that they may only be invoked by individuals when domestic instruments have failed to provide a remedy for breaches of human rights.

In the first section we consider the content of international human rights law as rules, liberal or community values and discourse. The next section explores the reasons for state compliance with human rights law. Here we might note the curious irony of this area of international law, namely, that individual states have nothing to gain by it. Unlike use of force and trade, where legal regulation promises mutual benefit for states – peace and prosperity – human rights law restricts the sovereign right of states to do as they please in their own domain. Moreover, with few exceptions, states of all creeds, from liberal democracies to dictatorships, have signed up for human rights law. Raising the question why? Also noteworthy is the growing breadth and depth of international human rights law. The final section examines the formal, policy and social processes of change in this area of international law.

<sup>1</sup> Henry J. Steiner and Philip Alston, *International Human Rights in Context – Law, Politics, Morals* (Oxford: Oxford University Press, 2000), Chapter 12.

### The content of international human rights law

There exist today more than one hundred international treaties on the protection of human rights; some of a multilateral character, others of a bilateral character. In addition, the International Court of Justice (ICJ) has recognised that all United Nations (UN) member states have a legal obligation to respect human rights under the UN Charter and under general international law.<sup>2</sup> It further held that some universally recognised human rights constitute not only individual rights but also generally held obligations on all governments.<sup>3</sup> Even though the ICJ itself has not yet defined the extent to which human rights also limit the actions of the UN (e.g., the Security Council) and of its specialised agencies,<sup>4</sup> a general consensus in law exists that such actions are indeed required to respect peremptory norms of general international law, such as inalienable core human rights. This section discusses the content of human rights as being either rules (i.e., a minimal set of rules that states have clearly signed for), community values (such as universal principles or ethics) or a discourse (i.e., a process of communication, argumentation and legitimation).

Human rights clearly encompass values but some lawyers tend to conceptualise human rights in terms of rules and principles. This view is best illustrated by the work of Ian Brownlie, Emeritus Professor of Public International Law at Oxford. In his writing for the Académie of International Law on 'International Law at the Fiftieth Anniversary of the United Nations', Brownlie considered the nature of international law in terms of 'the actual use of rules described as rules in international law by Governments'. For Brownlie, these 'rules are essentially principles of self-delimitation and, for Governments, they are immanent and not external'.<sup>5</sup> Not surprisingly, therefore, his discussion relating to 'the protection of human rights' concentrates on those 'rules' as they appear in the League Covenant of 1919, the UN Charter of 1945, the Universal Declaration of Human Rights (UDHR) of 1948, the Helsinki Act of 1975 and the Paris Charter of 1990. Brownlie further notes that '[t]here can be no doubt that the main corpus of human rights standards consists of

<sup>2</sup> *Barcelona Traction* (ICJ judgment, ICJ Reports 1970, 32) and *Nicaragua v. USA* (ICJ judgment, ICJ Reports 1986, 114).

<sup>3</sup> *Ibid.*

<sup>4</sup> Ernst-Ulrich Petersmann, 'Human rights and the law of the World Trade Organization', *Journal of World Trade* (2003), 245–6.

<sup>5</sup> I. Brownlie, 'International law at the Fiftieth Anniversary of the United Nations', *Académie de droit international, Recueil des cours* 1995, Tome 255 (Dordrecht, The Netherlands: Martinus Nijhoff, 1996), at 32. Brownlie further considers that 'the rules applicable should be reasonably ascertainable and reflect the normal expectations of States'. *Ibid.*, 36.

an accumulated code of multilateral standard-setting conventions'. These can be listed as being the two International Covenants, on Civil and Political Rights and on Economic, Social and Cultural Rights, adopted in 1966, the European Convention on Human Rights (ECHR) of 1950, the American Convention on Human Rights (ACHR) of 1969, the African Charter on Human and Peoples' Rights of 1981, and finally the conventions dealing with specific wrongs (genocide, torture, racial discrimination) and the protection of specific categories of people (refugees, women, children, migrant workers).

Brownlie recognises that the rules contained within these treaties flow from and contribute to principles of customary international law.<sup>6</sup> Indeed, it is generally recognised that the growing corpus of human rights law is increasingly applicable to all states regardless of what treaties they have signed up for. Arguably, however, states still take centre stage in human rights law. Indeed, international law codifies a 'state-centric' conception of human rights: hence breaches of human rights involve state action (or inaction) and are distinct from domestic crime. We also noted that the state is first port of call for individuals seeking remedial action under human rights treaties. This is consistent with a positivist perspective on the primacy of the state in international law. Liberals would argue that individuals have become subjects of modern international law under human rights treaties, which grant rights to individuals that they may enforce directly before an international body.<sup>7</sup> But this is only after the state in question has failed to provide effective remedy. Moreover, positivists would point out that these rights conferred by treaties are provided by state consent and that includes the right to appeal directly to an international body for remedy.<sup>8</sup>

As values, the immediate post-Second World War human rights instruments reflect Western liberal conceptions of rights – emphasising civil and political over economic, social and cultural rights, and individual rights over the rights of the community. The main rights protected in international law include the right to life, liberty and security, as well as the right to expression, non-discrimination and association. Fundamental human rights are also protected via the prohibitions against slavery, genocide and

<sup>6</sup> *Ibid.*, 83–4.

<sup>7</sup> Rosalyn Higgins, 'The European Convention on Human Rights', in T. Meron, (ed.), *Human Rights in International Law: Legal and Policy Issues* (Oxford: Clarendon Press, 1984), 537. Mark Janis, 'Individuals as subjects of international law', *Cornell International Law Journal* 17 (1984), 61.

<sup>8</sup> Louis Henkin, 'Compliance with international law in an inter-state system', *Académie de droit international, Recueil des cours* 1989, Tome 216 (Dordrecht, The Netherlands: Martinus Nijhoff, 1990), 208–73, 227.

torture under international law. Over time, however, the whole notion of universal rights has been undermined by the development of ideas of cultural relativism.<sup>9</sup> The reality about most ideas relating to human rights is that they developed primarily in a western context. This is, of course, a point of enormous significance if we consider the possibility of creating, implementing and advancing *international* human rights standards. This is not to say that other cultures did not have any concern with the suffering of individuals and with the need for human dignity, but they approached these problems from rather different perspectives. In particular, most non-Western traditional cultures tend to emphasise the notion of **duties** rather than rights. For example, modern Islamic writers sometimes claim that Islam enshrines certain human rights principles that are far older than those that developed in the West. But if we look at these rights closely, we find that they tend to be responsibilities and obligations imposed by God on rulers rather than rights possessed by individuals simply by virtue of their humanity.<sup>10</sup> Muslims are instructed to treat their fellow human beings with respect and dignity, rulers to act justly and so forth.<sup>11</sup> Much the same point is true of Confucian thought in Imperial China and of traditional African culture. All of these societies had notions of humanity and justice but this is not the same as saying that they had notions of individual human rights. This is a point of considerable contemporary importance. What has happened in the human rights debate, essentially, is that everybody accepts that human rights are a 'good thing' but non-Westerners are wary of what they see as Western cultural imperialism. So they get drawn into a confused and often contradictory argument in which they say, at the same time, that human rights are not a Western invention but a universal discovery, but that their societies have particular problems that prevent them from fully implementing human rights and that, in any case, Western attempts to push human rights are a form of imperialism and even that some Western

<sup>9</sup> The African system, for instance, emphasises greatly the concept of 'duties' as well as 'rights', and its Charter (the African Charter on Human and Peoples' Rights) is grounded in regional cultural distinctiveness. Makau wa Mutua, 'The Banjul Charter and the African Cultural Fingerprint: an evaluation of the language of duties', *Virginia Journal of International Law* 35 (1995), 339–80; Mutua, 'The Ideology of Human Rights', *Virginia Journal of International Law* 36 (1996), 598–657.

<sup>10</sup> Jack Donnelly, *Universal Human Rights in Theory and Practice* (Ithaca, NY: Cornell University Press, 1989), 50–2.

<sup>11</sup> See Antony Black, *The West and Islam: Religion and Political Thought in World History* (Oxford: Oxford University Press, 2008) and Mashood Baderin, 'Islam and the realization of human rights in the Muslim world: a reflection on two essential approaches and two divergent perspectives', *Muslim World Journal of Human Rights* 4 (2007), 1 for a detailed discussion of this issue.

ideas of human rights are not appropriate in their societies. These underlying tensions were much in evidence at a UN conference on human rights held in Vienna in 1993, where China and other Asian states in particular tried to resist pressure from the Western states to promote a more effective human rights regime. The Final Declaration of the conference stated 'All human rights are universal, indivisible, interdependent and interrelated' but went on to say that 'the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind'.<sup>12</sup>

The most emphatic relativist position is inevitably advanced by those non-liberal states seeking to prevent international interference in their domestic affairs. On balance, however, what may be termed an 'ultra-sovereignist' position has become harder to uphold in the face of the growth of the global human rights culture which – whatever misgivings some states may have – has won increasing acceptance.<sup>13</sup>

Relevant here is the concept of *erga omnes* obligations; these are obligations that apply to the international community as a whole and not just individual states. This concept was introduced by the ICJ in the *Barcelona Traction* case (1970). The Court held that some rights by their very 'nature' and 'importance' are rights that 'all States can be held to have a legal interest in their protection; they are obligations *erga omnes*'. By way of illustration, it further noted that '[s]uch obligation derives, for example, in contemporary international law, from the outlawing of acts of aggression, and of genocide, as also from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination'.<sup>14</sup> Thus, in the *East Timor* case (1995), the ICJ recognised the nature of the right of self-determination to be *erga omnes*.<sup>15</sup> In a similar vein of argument, the European Court of Human Rights (ECtHR) in Strasbourg has recognised the ECHR as constituting much more than a treaty of international law; it is also an instrument of European public order (*ordre public*) for the protection of individual human beings.<sup>16</sup>

Human rights law is concerned with all three core liberal values: human dignity, system stability and peace, and liberal democracy. Judge Rosalyn Higgins (President of the ICJ 2006–2009) argues that human rights are 'part and parcel of the integrity and dignity of the human being'. Thus, she notes, while such rights are most effectively protected within

<sup>12</sup> [www.unhcr.ch/huridocda/huridoca.nsf/\(symbol\)/a.conf.157.23.en](http://www.unhcr.ch/huridocda/huridoca.nsf/(symbol)/a.conf.157.23.en).

<sup>13</sup> Higgins, *Problems*, 96; Donnelly, *Universal Human Rights*, 118.

<sup>14</sup> *Barcelona Traction* case, ICJ Reports 1970, 3, 32, paras. 33–4.

<sup>15</sup> ICJ Reports 1995, 90, 102, para. 29. <sup>16</sup> *Loizidou v. Turkey* (1995), para. 75.

domestic legal systems, they 'cannot be given or withdrawn' by domestic law.<sup>17</sup> But equally, the origins of modern human rights law in the construction of the UN system, is rooted in a concern for the stability of the international system. Following the Second World War, the victorious powers (and especially the United States (US)) came to appreciate, as Antonio Cassese notes, 'that the Nazi aggression and the atrocities perpetrated during the war had been fruits of a vicious philosophy based on utter disregard for the dignity of human beings'.<sup>18</sup> Proclaiming basic standards in human rights was thus viewed as integral to post-war peace and security. And, as David Forsythe points out, '[i]t is not by accident' that Article 55, in which the UN commits itself to promoting 'universal respect for, and observance of, human rights and fundamental freedoms', begins by noting that it shall do so: 'With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations.'<sup>19</sup> Some liberal scholars maintain that there is an emerging right to democracy. A key element of this is the right to freedom of expression, which is recognised in the UDHR as well as a raft of other human rights treaties. More directly, the right of individuals to partake in genuine and periodic elections, resulting in representative and accountable government, is recognised in Article 3, protocol 1 of the ECHR (1950), Article 23 of the ACHR (1969) and Article 25 of the International Covenant on Civil and Political Rights (ICCPR) (1966). There has been some disagreement by states as to the precise meaning of these rights – hence socialist states felt able to argue during the Cold War that their citizens enjoyed these rights when they manifestly did not.<sup>20</sup>

Finally, as a discourse, human rights law provides the vocabulary, concepts and terms of debate over the relationship between the state and individuals. In this sense, it does much more than regulate this relationship. It actually constitutes it. As Donnelly argues, '[h]uman rights constitute individuals as a particular kind of political subject: free and equal rights-bearing citizens. And by establishing the requirements and limits of legitimate government, human rights seek to constitute states of a particular kind.'<sup>21</sup> This is very much a debate between states, but non-state actors

<sup>17</sup> Higgins, *Problems*, 96; see also Myres S. McDougal, Harold D. Lasswell and Lung-chu Chen, *Human Rights and World Public Order: The Basic Policies of an International Law of Human Dignity* (New Haven and London: Yale University Press, 1980).

<sup>18</sup> Cassese, *International Law*, 377.

<sup>19</sup> David P. Forsythe, *Human Rights in International Relations* (Cambridge: Cambridge University Press, 2000), 35.

<sup>20</sup> Franck, 'The emerging right to democratic governance', 46–91; Cassese, *International Law*, 395; Alastair Mowbray, 'The promotion of democracy by the European Court of Human Rights: recent cases', *Human Rights Law Review* 4 (1999), 16–23.

<sup>21</sup> Donnelly, *Universal Human Rights*, 16.

(especially, human rights international non-governmental organisations (INGOs)) are also powerful voices in this discourse. Courts and tribunals, at the national, regional and international levels, are equally important agents in interpreting and applying (and thereby also 're-reading') legal norms of human rights.

This discourse is rooted in the past whilst also looking to the future. Modern international human rights law partly owes its origins to customary law on the treatment of alien visitors and their assets – but also to treaty law on the treatment of minorities and international humanitarian law on the treatment of individuals leading to humanitarian intervention. The law relating to aliens developed in the context of the expansion of Western capital into the extra-European world. Much of this law concerns enunciating international minimum standards of treatment for aliens and equality of treatment under national law.<sup>22</sup> While the law of aliens continues to be applicable, human rights law has created a higher bar for states regarding the minimum standards of treatment both for nationals and aliens.

Human rights law as a visionary and aspirational discourse is illustrated in the UN Charter and the UDHR. The Preamble to the UN Charter proclaims that member states 'reaffirm faith in fundamental human rights, in the equal rights of men and women'. Also, Article I includes amongst the purposes of the UN, 'international co-operation . . . in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion'. We have already noted that Article 55 commits the UN to promoting human rights and fundamental freedoms. In even stronger terms, Article 56 states that 'All Members pledge themselves to take joint and separate action in co-operation with the Organization for the achievement of the purposes set forth in Article 55.' In spite of its historical importance, it is generally recognised that the legal obligation to respect and observe human rights for all in the UN Charter is too general in provenance. Thus, as soon as it was established (1947), the UN Commission on Human Rights drafted the UDHR (1948) as an authoritative guide to the interpretation of the UN Charter. In spite of its non-binding legal status, the UDHR has had considerable normative impact, affecting the content of national laws and being expressly invoked by domestic as well as international courts. Many of its provisions indeed are now binding through customary law, and are reflected in national constitutions.

<sup>22</sup> Ian Brownlie, *Principles of Public International Law*, 6th edition (Oxford: Oxford University Press, 2003), 497–527.

There was obviously a gap between aspiration and reality in the human rights discourse of the early Cold War period. Many states were far from meeting their commitments under the UN Charter to promote and protect human rights. Nonetheless, human rights law has increasingly functioned to regulate and constitute relations between states and their citizens. Human rights law provides an alternative discourse on the moral purpose of the state to the traditional realist discourse of national interest (*raison d'État*). It provides new standards for judging the ethics and efficiency of state action. Often it is non-state actors – non-governmental organisations like Human Rights Watch and Amnesty International, and international organisations like the OSCE and the Council of Europe – that do the judging and hold states to account when they fail in their duties to their citizens. And yet human rights law is also a discourse between states – especially between progressive liberal democracies and more conservative illiberal and non-democratic states, but also between liberal democracies – about the rights of individuals and the role of states in providing for these rights.<sup>23</sup> Through this discourse, states communicate and affirm settled norms of state-society relations (e.g., the norm against torture), deliberate over the scope and effect of norms (e.g., the norm of self-determination which prohibits the violent oppression of minority groups) and argue over emerging norms (e.g., the norm of democratic government).

### Compliance with international human rights law

Notwithstanding an expanding body of treaty law, there has not been universal compliance with human rights. Instead, it varies greatly across space and time. The general trend since 1948 has been one of growing numbers of states committing to human rights treaties. But we should be cautious in inferring increasing compliance from increasing rhetorical commitment to human rights.<sup>24</sup> A transnational human rights movement gained increasing voice from the 1970s onwards. In the late 1980s and 1990s, state compliance with these treaties significantly increased worldwide. Empirical evidence suggests a correlative relationship between the end of the Cold War and the growing global culture of human rights;<sup>25</sup> a causal relationship may be inferred from the post-Cold War wave of

<sup>23</sup> Risse-Kappen et al., (eds.), *The Power of Human Rights*.

<sup>24</sup> Hans Peter Schmitz and Kathryn Sikkink, 'International human rights', in Walter Carlsnaes, Thomas Risse-Kappen and Beth A. Simmons, (eds.), *Handbook of International Relations* (Thousand Oaks, CA: Sage, 2002), 529.

<sup>25</sup> Jack Donnelly, 'International human rights: a regime analysis', *International Organization* 40 (1986).



democratisation, both in Europe and Asia but also in Latin America and Africa.<sup>26</sup> Yet even today, there is great variation in the promotion and implementation of human rights. In part, this is because many human rights treaties, especially at the international level, do not contain enforcement mechanisms.<sup>27</sup> States are merely obliged to self-validate compliance with these treaties through period reports, and even this reporting obligation is poorly complied with. States can have a clear interest in complying with human rights law, as in the case of the refugee protection regime. But in this area of international law, more so than in the law on the use of force and trade, persuasion, congruence and habit are key motives for compliance with human rights.

There are three principal agencies in the UN that are charged with monitoring state compliance with human rights law: the Commission on Human Rights (now the Human Rights Council), the Human Rights Committee and the Office of the High Commissioner for Human Rights. From 1946 to 2006, the UN Commission on Human Rights was the main forum for negotiating international human rights standards (such as the UDHR and the Covenants). It also gained some very modest monitoring powers. ECOSOC resolution 1503 (1970) authorised the Commission on Human Rights to investigate complaints (communications) that 'appear to reveal a consistent pattern of gross and reliably attested violations of human rights'. Practice shows that the 1503 procedure was by no means an efficient or timely implementation procedure; the admissibility threshold (e.g., only situations of gross and systematic violations are covered) was very high, the entire procedure was confidential, delays were frequent and political considerations were very strong due to the fact that the Commission was composed of states' representatives, and not of independent experts.<sup>28</sup> This led Jack Donnelly to describe the procedure as 'largely a promotional device involving weak, sporadic, and limited monitoring'.<sup>29</sup> An additional problem with the UN Commission on Human Rights was that it was constituted by a rotating membership so that any UN member, regardless of their human rights record, could

<sup>26</sup> Samuel P. Huntington, *The Third Wave: Democratization in the Late Twentieth Century* (Norman: University of Oklahoma Press, 1991).

<sup>27</sup> Internal accountability measures may operate as surrogate enforcement mechanisms in liberal democracies. But non-democratic states may commit to human rights treaties with little fear of actually having to make good on the legal obligations that flow from such commitments. This has triggered some debate among IL scholars about what, if anything, one can infer from the growth in numbers and membership of human rights treaties. Oona A. Hathaway, 'Do human rights treaties make a difference?', *Yale Law Journal* 111 (2002), 1944–5; Ryan Goodman and Derek Jinks, 'Measuring the effects of human rights treaties', *European Journal of International Law* 14 (2003), 171–83.

<sup>28</sup> Donnelly, *Universal Human Rights*, 129 and 132. <sup>29</sup> *Ibid.*, 32.

sit on the Commission (or even chair it). Thus, in 2006 Cuba, Saudi Arabia and Sudan – all serious human rights abusers – were members of the Commission.<sup>30</sup> The Commission on Human Rights ceased to exist in April 2006 and was replaced by the Human Rights Council. This Council was to meet more often and for longer periods of time than the Commission, but with membership still drawn from the full list of UN members.<sup>31</sup> In practice, the Council has been no less controversial than its predecessor. It has forty seven seats, of which thirteen are allocated to Asia and thirteen to Africa, with only seven allocated to Western Europe and a group of countries including Australia, Canada and New Zealand. This has, in effect, allowed a bloc composed of Islamic and Asian states, often with support from China and Russia, to dominate the proceedings, with those states with the strongest human rights legal cultures reduced to a permanent minority voice. Around half of all resolutions are used to condemn Israel, revealing what US Secretary of State Hillary Clinton termed in 2011 a ‘structural bias’ in the Council.<sup>32</sup> The Council has produced an unending stream of vague and wordy resolutions, often emphasising the ‘right to development’ rather than the traditional civil and political rights stressed in the West. In 2008 it controversially amended the duties of the Special Rapporteur on freedom of expression so that the Rapporteur would report on instances in which freedom of expression had been ‘abused’ in ways constituting racial or religious discrimination. This and other pronouncements against religious defamation were opposed by the Western states as, in effect, restricting rather than expanding freedom of expression.

The second UN body competent to promote human rights at the international level is the Human Rights Committee, which was created under the ICCPR (1966) to monitor compliance with the Covenant. This is a treaty based body and not a UN Charter mandated body. Unlike the Commission on Human Rights/Human Rights Council, the Human Rights Committee is composed of independent experts whose primary function is to review reports submitted periodically by the states parties to the ICCPR. However, in many cases, states remain uncooperative: reports are often incomplete and submitted late, if at all. A more interesting mechanism also provided under the ICCPR, allows states to consent to the Committee receiving communications from other states

<sup>30</sup> Hence, David Harris described the Commission as ‘a highly political animal, with its initiatives and priorities reflecting bloc interests as well as the human rights merits of each case’. D. J. Harris, *Cases and Materials on International Law*, 6th edition (London: Sweet & Maxwell, 2004), 628.

<sup>31</sup> UN General Assembly Resolution 60/251, 3rd April 2006.

<sup>32</sup> *Jerusalem Post*, 28 February 2011.

parties concerning alleged violations. But this mechanism has proved to have limited effect because states are reluctant to bring formal complaints against one another for fear of political and economic retaliation, or counter-allegations of human rights violations. Finally, the Human Rights Committee also has jurisdiction over petitions brought by individuals but this enforcement procedure is only optional; the state against which a petition is being brought must be a party to the First Optional Protocol to the ICCPR. This system illustrates the reluctance of states to accept a worldwide system of human rights 'supervision' let alone 'enforcement'.<sup>33</sup> But, as highlighted by Henry Steiner, there is much more to the dispute-resolution function of the Human Rights Committee, particularly in its key role in engaging in an on-going, fruitful dialogue with states parties, non governmental and inter-governmental institutions, advocates, scholars and students.<sup>34</sup>

The third UN body established to promote and protect human rights at the international level is the Office of the UN High Commissioner for Human Rights (UNHCHR) (1993). The UNHCHR has a rolling mandate, under the authority of the UN Secretary-General, to promote and protect human rights, principally through naming and shaming human rights violators. The UNHCHR has been successful in drawing attention to gross violations of human rights though often effective enforcement action does not follow on from this. Most recently it has been playing a role in the so-called 'Arab Spring' pro-democracy movement in 2011. For example, it issued an assessment report including various recommendations after the departure of the Tunisian President and has been involved in advising on 'transitional justice' in Tunisia, which is defined as coming to terms with a legacy of past human rights violations in order to ensure accountability, serve justice and achieve reconciliation.<sup>35</sup>

The UN has also sponsored several other human rights treaties: the International Covenant on Economic, Social and Cultural Rights (ICESCR), the Conventions on the Elimination of All Forms of Racial Discrimination (1966) and Discrimination Against Women (1979), the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) (1984), and the Convention on the Rights of the Child (1989). Each has its own monitoring system and its

<sup>33</sup> Richard Gardiner, *International Law* (Harlow, England: Longman, 2003), 276.

<sup>34</sup> Henry Steiner, 'Individual claims in a world of massive violations: What role for the Human Rights Committee?', in Philip Alston and James Crawford, (eds.), *The Future of UN Human Rights Treaty Monitoring* (Cambridge: Cambridge University Press, 2000), 15–53.

<sup>35</sup> [www.ohchr.org/EN/NewsEvents/Pages/WindsofChangeinTunisia.aspx](http://www.ohchr.org/EN/NewsEvents/Pages/WindsofChangeinTunisia.aspx).

own success rate in terms of compliance, but generally its success rate is poor. For example, the system of supervision under the ICESCR is very loose (even looser than under the ICCPR and Optional Protocol) because as far as these rights are concerned, states compliance is dependent on having the necessary resources. Equally, the Convention on the Elimination of All Forms of Racial Discrimination establishes a Committee on the Elimination of Racial Discrimination but this Committee has adopted a very narrow interpretation of its powers and depends on self-reporting by contracting parties.<sup>36</sup>

Human rights treaties at the regional level developed in parallel with UN treaties. Of the three regions providing human rights treaties (i.e., Europe, the Americas and Africa), Europe is by far the most advanced in its system of protection, thanks largely to state consent for an effective mechanism of enforcement. The ECHR adopted under the auspices of the Council of Europe (Strasbourg) in 1950, favours a system of enforcement over a reporting requirement.<sup>37</sup> This system is generally regarded as being very effective. The principle of subsidiarity still operates (under Article 1 of the ECHR) which places primary responsibility for the protection of human rights on state authorities.<sup>38</sup> It is when the state fails, that the Strasbourg Court steps in. The Court may go beyond individual redress for a breach of human rights, and require a contracting party to change its law or practice. However, as a general rule, the Court's judgments are declaratory of violations, leaving it to the member states how best to address the violation. Since 1998, the jurisdiction of the Court is compulsory for contracting parties, and individuals within these states have a right of direct petition to the Court. Enforcement depends on the state in question taking remedial action. Recalcitrant states face pressure from the Committee of Ministers of the Council of Europe but its punitive powers are limited – ultimately it may threaten to expel a recalcitrant member from the organisation of the Council of Europe. But in the vast bulk of cases, states do comply with Court judgments, even if only after some time.<sup>39</sup> The Council of Europe also established

<sup>36</sup> On the work of each of these UN monitoring systems, see Philip Alston and James Crawford, *The Future of UN Human Rights Treaty Monitoring* (Cambridge: Cambridge University Press, 2000), 15–198.

<sup>37</sup> Economic, social and cultural rights are protected by the Council of Europe (albeit less robustly) under the 1961 European Social Charter.

<sup>38</sup> Paul Mahoney, 'Marvelous richness of diversity or invidious cultural relativism,' *Human Rights Law Journal* 19 (1998), 1.

<sup>39</sup> R. R. Churchill and J. R. Young, 'Compliance with judgments of the European Court of Human Rights and decisions of the Committee of Ministers: the experience of the United Kingdom, 1975–1987,' *British Yearbook of International Law* 62 (1991), 283.

a Commissioner for Human Rights in 1999. The Commissioner deals directly with governments and issues opinions, reports and recommendations regarding human rights. In short, the effectiveness of this regional regime rests more on consent than coercion. This point is underlined by Jack Donnelly, who puts the success of the European regime down to state consent and a strong collective commitment to effective monitoring and enforcement. Indeed, he sees these enforcement measures as 'less a cause than a reflection of the regime's strength'.<sup>40</sup>

In the Americas, the human rights system comprises of two main treaties. The American Declaration of the Rights and Duties of Man (1948), adopted at the founding of the Organisation of American States (OAS), presents a list of human rights very similar to that of the UDHR. The American Convention on Human Rights (ACHR) (1969) recognises personal, legal, civil and political rights, and the right to property.<sup>41</sup> The latter establishes the Inter-American Court of Human Rights (1979, San Jose, Costa Rica) which has both an advisory and a dispute settlement function, but since its jurisdiction is optional on contracting parties it has had limited effectiveness. In addition, the Inter-American Commission on Human Rights was established in 1959 to protect rights under both the OAS Charter and the ACHR. When dealing with states parties to both the Charter and the ACHR, it has powers of enforcement through a system of complaint similar to that provided originally under the ECHR. But its powers are more limited – to making recommendations for effective compliance – when it comes to states that are only party to the Charter.<sup>42</sup> Overall, the Inter-American system has been less successful than its European counterpart, especially in its impact on the domestic legal systems of contracting parties. Nonetheless, the Commission, rather than the Court, has exercised a broad range of powers and thereby been more effective in protecting human rights. Here coercion, especially as exercised by the US, has been a motive in state compliance; this empirical finding is consistent with the realist emphasis on the role of hegemonic power in ensuring regimes' effectiveness. At the same time, as suggested above, progressive democratisation in the region has led to

<sup>40</sup> Donnelly, *Universal Human Rights*, 141. The limitations, in general, of coercive measures in inducing compliance with international law is explored in Andrew T. Guzman, 'A compliance-based theory of international law', *California Law Review* 90 (2002), 1823–87.

<sup>41</sup> Economic, social and cultural rights came to be recognised by the 1988 Protocol of San Salvador which came into force in 1999.

<sup>42</sup> Cecilia Medina, 'The Inter-American Commission on Human Rights and the Inter-American Court of Human Rights: reflections on a joint venture', *Human Rights Quarterly* 12 (1990), 439–64.

increasing voluntary acceptance of (and consent to) the human rights system largely replacing external coercion.<sup>43</sup>

The African Charter on Human and Peoples' Rights or Banjul Charter (1981), unlike its other regional counterparts, seeks to protect community (i.e., collective or peoples) as well as individual rights, and to impose duties. Furthermore, it contains no derogation clauses comparable to Article 15 of the ECHR (i.e., war or other public emergency) – having said that it does allow for so-called 'claw-backs' clauses.<sup>44</sup> Thus from a normative perspective, the African Charter offers considerable innovations over its counterparts in Europe and the Americas. However, its monitoring system is weak. It provides a reporting system similar to international human rights treaties, as well as a largely ineffective (and under-used) Commission to hear complaints. The system can be described as mostly conciliatory.<sup>45</sup> In 1998, a Protocol for the Establishment of an African Court of Human and Peoples' Rights was signed. The new African Court has advisory, conciliatory and contentious jurisdiction. However, only states parties to the Protocol, the African Commission and African inter-governmental organisations (IGOs) have direct access to the Court; not individuals, nor NGOs. In short, of all the regional systems, the African one has been the least successful in shaping state compliance with human rights.<sup>46</sup> This is mainly the result of institutions that still need time to develop.

Finally, in Asia there are neither regional norms nor monitoring procedures. The 1996 Asian Human Rights Charter was drafted by NGOs and has attracted no state support. In the Middle East, the League of Arab States established a Permanent Arab Commission on Human Rights in 1968, but it has been famously inactive, except on the issue of the human rights situation in the Israeli-occupied territories. As far as the normative framework is concerned, it is equally weak. The Arab Charter of Human Rights, which was drafted in 1971, was only adopted by the Council of the League in 1994 and remains largely ignored.<sup>47</sup>

<sup>43</sup> Risse-Kappen et al., (eds.), *The Power of Human Rights*.

<sup>44</sup> Rose M. D'Sa, 'Human and peoples' rights: distinctive features of the African Charter', *Journal of African Law* 29 (1985), 72–81.

<sup>45</sup> Brownlie, *Principles of Public International Law*, 545. For a more optimistic account of the work of the Commission, see, Chidi Anselm Odinkalu, 'The individual complaints procedure of the African Commission on Human and Peoples' Rights: a preliminary assessment', *Transnational Law and Contemporary Problems* 8 (1998), 359 (most of this article is reproduced in Steiner and Alston, *International Human Rights*, 923–29).

<sup>46</sup> Donnelly, *Universal Human Rights*, 144; Shaw, *International Law*, 363–5; Ann Pieter van der Mei, 'The new African Court on Human and Peoples' Rights: towards an effective human rights protection mechanism for Africa?', *Leiden Journal of International Law*, 18 (2005), 113–29.

<sup>47</sup> Donnelly, *Universal Human Rights*, 144–5.

Consent goes some way to explaining this variation in the effectiveness of regional human rights regimes, and the limitation of international instruments. But we would argue that congruence, internalisation and habit are equal, if not more important, motives.<sup>48</sup> Most obvious is congruence between norms of liberal democracy and human rights. The European human rights regime is so effective because of the concentration of liberal democracies in this region. Indeed, a state must be democratic to join the Council of Europe. One of the stated purposes of the OAS is 'to promote and consolidate representative democracy'. However, many of the twenty one founding members have not been democracies for most of the organisation's history: included here are Argentina, Brazil, Chile, Colombia, Cuba, El Salvador, Guatemala, Nicaragua and Peru. Not surprisingly, democracies have a far better track record when it comes to protecting and promoting human rights than non-democracies. Democratic governments may be held to account for human rights violations whereas non-democratic governments often rely on systematic abuses of human rights to stay in power. Liberalism is also important. As we noted in Chapter 3, restraint on the internal use of state violence is a core liberal value. Again, Europe has a far higher concentration of liberal countries than other regions. Indeed, the human rights regime that has emerged in Europe very much reflects the liberal values and aspirations of these states.<sup>49</sup> The extension of the Council of Europe to new democracies in Eastern Europe and the former Soviet Union presents a challenge to the regime, in that there is less congruence between the political culture of these states and human rights law than in Western Europe. This goes to underline the importance of the Council of Europe as an agent of socialisation in driving the eastward expansion of the European human rights regime.<sup>50</sup>

Compliance with human rights law ultimately depends on internationalisation of international rules in domestic legal systems. In this sense, Henkin argues that the international law of human rights differs greatly from international law in general because 'compliance with international human rights law [. . .] is wholly internal'.<sup>51</sup> Indeed, there cannot be a violation of international human rights law unless state authorities

<sup>48</sup> Koh, 'Why do nations obey?', 2598–9.

<sup>49</sup> Andrew Moravcsik, 'The origins of human rights regimes: democratic delegation in postwar Europe', *International Organization* 54 (2000), 217–52.

<sup>50</sup> Checkel, 'Norms, institutions, and national identity', 83–114. Paul Mahoney, 'Marvelous richness of diversity or invidious cultural relativism', *Human Rights Law Journal* 19 (1998), 1.

<sup>51</sup> Louis Henkin, 'Compliance with international law in an inter-state system', *Recueil des cours, Académie de droit international 1989*, Tome 216 (Dordrecht, The Netherlands: Martinus Nijhoff, 1990), 250.

fail to provide adequate remedies. The remedy in question may have its source in the international law of human rights (e.g., the UN Convention Against Torture requires states to ‘ensure that all acts of torture are offences under its criminal law’) but equally a remedy may be found in domestic law and state practice (e.g., the granting of asylum to refugees is not provided under the 1951 Refugee Convention but has evolved as practice in many states). David Forsythe also emphasises the importance of internationalisation to compliance. He argues that one of the basic functions of all law, including international law, is ‘to educate in an informal sense’. By informing foreign policy, military doctrine and training and the action of private groups (corporations and NGOs), international human rights law takes pervasive effect. In this sense, conformity and compliance with international human rights law does not depend on judicial enforcement. Indeed, for Forsythe, ‘the optimum situation is for legal standards to be internalized by individuals to such an extent that court cases are unnecessary’.<sup>52</sup>

Of course, this perspective raises the issue of the process of internalisation and, in particular, variation in the willingness and capacity of states to internalise international rules on human rights. Congruence between domestic culture and international rules can ease the process of internalisation. This is true for domestic political culture, as noted earlier, but also for legal culture. Some legal cultures are more prepared to adapt in line with international regimes. The legal cultures of the European Union (EU) member states are noteworthy in this respect. The decades-long process of European integration has socialised these states into accepting the primacy of the EU. This has produced a habit of internalisation among EU states that makes them more ready to internalise international human rights law. Domestic legal culture matters also in terms of variation in state capacity to internalise international law. Even among EU states there is some variation. For instance, international law is generally given priority over domestic law in civil law systems (e.g., France, Germany, Spain and Poland), whereas in common law systems (such as the United Kingdom (UK) and Ireland) the judiciary need only recognise international rules that have been incorporated in domestic legislation. There is even more pronounced variation between the established and emerging democracies of Europe, in terms of the capacity of domestic legal systems to absorb international human rights law.<sup>53</sup> In general, international and regional human rights law requires profound

<sup>52</sup> Forsythe, *Human Rights in International Relations*, 14.

<sup>53</sup> Mark Janis, ‘Russia and the “legality” of Strasbourg Law’, *European Journal of International Law* 8 (1997).



and wide-ranging change to the legal and law-enforcement systems of new democracies seeking to catch-up with their Western neighbours. Such profound internal change may occur in any democratising state (or even non-democracy) as part of a broader process of ‘acculturation’ into human rights.<sup>54</sup> Thus, as we discuss in the next section, internalisation often actually involves socialisation by states into the norms and rules codified in human rights regimes.

The refugee protection regime provides a good example of where state compliance may be motivated by self-interest. That is not to say that other reasons – such as congruence – do not operate here. Thus, the norm of providing refuge for those fleeing persecution is arguably constitutive of modern liberal democracy.<sup>55</sup> At the same time, states have a strong interest in regulating the cross-border flow of refugees.<sup>56</sup> Historically, the refugee protection regime originated in the need to give some stability to post-colonial and post-war spurts of state building. Thus, Bruce Cronin argues ‘the [international protection regime] IPR for refugees was not created to assist those displaced from war. Rather states constructed the system to address post-war political developments that were related to the construction of new states and new political orders’.<sup>57</sup> Fairness was also relevant, in that state leaders shared a common sense of responsibility for the welfare of refugees.<sup>58</sup> State interest took a new twist during the Cold War, as Western states used the Refugee Convention as a political tool to embarrass the Soviet bloc and sweep up defectors.<sup>59</sup> The EU committed itself to creating a common asylum regime for the Union at the turn of the new millennium. Underlying this new regime is a liberal

<sup>54</sup> Ryan Goodman and Derek Jinks, ‘How to influence states: socialization and human rights law’, *Duke Law Journal* 54 (2004), 621–703. See also Koh, ‘Why do nations obey?’.

<sup>55</sup> Matthew J. Gibney, *The Ethics and Politics of Asylum: Liberal Democracy and the Response of Refugees* (Cambridge: Cambridge University Press, 2004).

<sup>56</sup> James C. Hathaway, ‘Framing refugee protection in the New World disorder’, *Cornell International Law Journal* 34/2 (2001), 257–320.

<sup>57</sup> Bruce Cronin, *Institutions for the Common Good – International Protection Regimes in International Society* (Cambridge: Cambridge University Press, 2003), 156.

<sup>58</sup> John Garvey, ‘Towards a reformulation of international refugee law’, *Harvard International Law Journal* 26 (1985); Vera Gowlland-Debbas, ‘La Charte des Nations Unies et la Convention de Genève du 28 juillet 1951 relative au statut des réfugiés’, in *La Convention de Genève du 28 juillet 1951 Relative au Statut des Réfugiés 50 ans après: Bilan et Perspectives* (Brussels: Bruylant, 2001), 207–8; Paul Weis, ‘The 1967 Protocol Relating to the Status of Refugees and some questions of the Law of Treaties’, *British Yearbook of International Law* (1967), 61.

<sup>59</sup> Gil Loescher and J. A. Scanlan, *Calculated Kindness: Refugees and America’s Half-Open Door, 1945 to the Present* (New York: Free Press, 1986). Gil Loescher, *The UNHCR and World Politics: A Perilous Path* (Oxford: Oxford University Press, 2001); Gil Loescher *Beyond Charity: International Cooperation and the Global Refugee Crisis* (Oxford: Oxford University Press, 1993).

vision promising expanded rights to refugees and other persons in need of protection. But driving the process is self-interest: the need for the EU to harmonise and improve efficiency in this policy area. Indeed, national self-interest and some dispute about the fair distribution of costs among EU members, are compromising the original liberal vision.<sup>60</sup>

### **Change in international human rights law**

States have played a central role in the evolution of international human rights law. This body of law rests on a raft of major treaties at the international level (e.g., ICPPR, ICESCR, CAT, and the Refugee Convention) and regional level (especially the ECHR and ACHR). Some fundamental human rights principles, such as, the prohibition of torture, genocide and slavery, and the principle of racial non-discrimination, exist in customary international law. Arguably state consent is less central to customary law than treaty law, because customary law may be said to express the collective will of states – that is, the will of most states, especially the most powerful states – and, in any case, does not require explicit state consent. Thus, unlike treaties where states must actively give consent, inaction or silence by a state is taken to mean that it has consented to new customary law. It may be possible for a state through persistent objection not to be bound by an emerging rule of customary law (this possibility does not exist for established customary rules). But where that rule expresses a peremptory norm, derogation by individual states is not permitted. We have already noted that many of the principles of human rights law are peremptory in nature. Of course, states exercise some leeway in interpreting the precise meaning of many human rights norms; for example, on whether abortion violates the right to life or whether capital punishment is permissible. Another, very controversial and current example is state disagreement over what constitutes torture and degrading treatment (which we discuss in the conclusion to this chapter in the context of the US ‘global war on terror’). These issues of interpretation aside, the peremptory character of human rights norms is further expressed in international human rights treaties to which almost all states have consented. Accordingly, it may be said that international human rights law has evolved through a formal process where states have been the major agents of law-creation and change, and so state consent has played a central role.

<sup>60</sup> Hélène Lambert, ‘The EU Asylum Qualification Directive, its impact on the jurisprudence of the United Kingdom and international law’, *International and Comparative Law Quarterly* 55 (2006), 161–92.

At the same time, it is abundantly clear that change in international human rights law involves a plurality of actors, including transnational policy networks, INGOs/NGOs and judiciaries. Policy networks embedded in IGOs play an essential role in formulating new rules of human rights law. Hence, the UN Commission on Human Rights spent twenty years preparing the ICCPR and the ICESCR, in order to put flesh on the bones of the UDHR. This can be read through the realist lens as illustrating state action. But equally, transnational policy coalitions can emerge within IGOs to pressure home governments to adopt particular policies.<sup>61</sup> Transnational policy networks also play a crucial role in elaborating human rights standards, and coordinating implementation of human rights rules.<sup>62</sup> For instance, EU harmonisation on standards of refugee protection is being advanced by a transnational network of policymakers based in member states (empowered through the Council of the EU) and in the EU Commission. EU Directives on asylum, as on other matters, are a source of EU law. But, at the same time, this process of law making is essentially one of policy elaboration and coordination between EU member states.<sup>63</sup>

NGOs operating at the national and transnational level have also played a crucial role, both in creating a general climate conducive to the advancement of human rights law, and in influencing change in specific areas through informing public and policy debate. INGOs/NGOs wield such influence through their expert knowledge of and moral standing on human rights issues. INGOs often lead international campaigns to evolve human rights law. This effort usually involves mobilising political support in host (liberal) states to exert pressure for change in human rights law, as well as working directly with NGOs and opposition groups to resist oppression in non-Western states.<sup>64</sup> A classic example of NGO led change in this area of law is the abolition of slavery, which was outlawed following a campaign by British abolitionist groups in the nineteenth century to pressure the British government to deploy the Royal Navy to closing down slave trading routes.<sup>65</sup> More recently, an umbrella of human rights and health NGOs, working with progressive Western states, led the

<sup>61</sup> This is illustrated in the context of security policy in Thomas Risse-Kappen, *Cooperation Among Democracies: The European Influence on US Foreign Policy* (Princeton, NJ: Princeton University Press, 1995).

<sup>62</sup> Anne-Marie Slaughter, *A New World Order*, 24.

<sup>63</sup> Lambert, 'EU Qualification Directive'.

<sup>64</sup> Klotz, *Norms in International Relations*; Keck and Sikkink, *Activists Across Borders*; Risse-Kappen et al., (eds.), *The Power of Human Rights*.

<sup>65</sup> Ethan A. Nadelmann, 'Global prohibition regimes: the evolution of norms in international society', *International Organization* 44 (1990), 491–8.

campaign to create the CAT.<sup>66</sup> NGOs may also indirectly influence the evolution of human rights law through informal and occasionally formal channels of policy consultation. Thus, some NGOs (such as the AIRE Centre) have recognised ‘participatory status’ at the Council of Europe.<sup>67</sup>

Another important way that international law can change is through the interpretation given by international courts or other quasi-legislative bodies such as the UN General Assembly. The difficulty here, in terms of establishing change, is well summarised by Oscar Schachter: ‘the line between interpretation and new law is often blurred. Whenever a general rule is construed to apply to a new set of facts, an element of novelty is introduced; in effect new content is added to the existing rule. This is even clearer when an authoritative body re-defines and makes more precise an existing rule or principle.’<sup>68</sup> An obvious example is the role played by the ECtHR in the development of the principles guaranteed in the ECHR. For instance, in the context of the norm prohibiting torture (Article 3), the Strasbourg Court lowered the threshold for what constitutes torture in recognition of ‘the increasingly high standard being required in the area of the protection of human rights’, which demands ‘greater firmness in assessing breaches of the fundamental values of democratic societies’.<sup>69</sup> The Court further requires states not only to refrain from torture, but also to enforce this prohibition in their own legal systems. Thus, change here was to the effect of significantly strengthening the rule against torture, both in its substantive and procedural scope.<sup>70</sup> Unlike in common law systems, there is no rule of precedent at the Strasbourg Court, nor at the ICJ or European Court of Justice (ECJ). Thus decisions by these courts, while binding on the parties to the dispute, are not strictly binding on the courts themselves. However, these decisions are commonly taken to be statements of existing law and are used as benchmarks in future cases.<sup>71</sup> Hence states accept these interpretations of law, even when it works against them in future cases. As Rasmussen observes, ‘even governments overtly hostile to the Court’s authority do not seek to

<sup>66</sup> Preslava Stoeva, *New Norms and Knowledge in World Politics: Protecting People, Intellectual Property and the Environment*, (London and New York: Routledge, 2010).

<sup>67</sup> ‘Discours de Daniel Zielinski, Président sortant de la Commission de Liaison des OING’, at [http://www.coe.int/T/e/Com/Files/Events/2004-01-NGO/news\\_zielinski.asp](http://www.coe.int/T/e/Com/Files/Events/2004-01-NGO/news_zielinski.asp).

<sup>68</sup> Oscar Schachter, *International Law in Theory and Practice* (Dordrecht, Boston and London: Martinus Nijhoff, 1991), 85.

<sup>69</sup> *Selmouni v. France*, judgment of 28 July 1999, para. 101.

<sup>70</sup> Hélène Lambert, *The Position of Aliens in Relation to the European Convention on Human Rights* (Strasbourg: Council of Europe, 2006), 41.

<sup>71</sup> Anne-Marie Burley and Walter Mattli, ‘Europe before the court: a political theory of legal integration’, *International Organization* 47 (1993), 67.

ask the [ECJ] to overturn a previous ruling but rather use it as a statement of the law and use it as a point of departure for making arguments in subsequent cases'.<sup>72</sup> Anne-Marie Slaughter locates the Strasbourg Court at the centre of a transnational legal network and emerging 'global jurisprudence' on human rights. In addition to a 'vertical dialogue' within Europe between the Strasbourg Court and domestic courts, she points to the 'persuasive authority' of the Strasbourg Court's decisions beyond Europe. Hence, the highest courts in Israel, Jamaica, South Africa and Zimbabwe, as well as the Inter-American Court of Human Rights, and the UN Human Rights Committee have all cited judgments of the Strasbourg Court.<sup>73</sup> It may also be noted that the traffic in persuasive decisions is two-way between international courts and quasi-judicial bodies: hence the Committee Against Torture has cited the Strasbourg Court and vice versa.<sup>74</sup>

Finally, human rights law has changed through a social process involving elite learning, community socialisation and internalisation of new norms. This is well illustrated in the Helsinki Final Act of the Conference on Security and Co-operation in Europe, adopted in 1975, which included a 'basket' on human rights. Like the UDHR (which was used as a standard when drafting the Final Act), the Final Act is a non-binding instrument which has had considerable normative impact, especially in validating the universal applicability (i.e., in the Soviet bloc) of Western conceptions of human rights.<sup>75</sup> It facilitated learning of Western human rights norms by Soviet political elites, and gave support to norm entrepreneurs within the Soviet Union that were seeking to promote political liberalisation.<sup>76</sup> The political class in post-Soviet Russia has become socialised into accepting political human rights and people expect to exercise the right to vote, to free expression and free association. However, it is too early to judge whether these norms have become internalised in functioning institutions and are habitually practised. Indeed, some argue that democracy has become de-railed in Russia, under the corrupting

<sup>72</sup> Hjalte Rasmussen, *On Law and Policy in the European Court of Justice*, 275–81, quoted in Burley and Mattli, 'Europe before the court', 67.

<sup>73</sup> Anne-Marie Slaughter, *New World Order*, 79–81.

<sup>74</sup> Hélène Lambert, 'The influence of the European Court of Human Rights judgments on other international treaty bodies – Keynote presentation', in *2nd colloquy on the European Convention on Human Rights and the protection of refugees, asylum-seekers and displaced persons* (Strasbourg: Council of Europe, 2000), 124–7.

<sup>75</sup> ICJ, *Nicaragua v. USA* (1986) para.189 and para. 264.

<sup>76</sup> Thomas Risse-Kappen, 'Ideas do not float freely: transnational coalitions, domestic structures, and the end of the Cold War', *International Organization* 48 (1994), 185–214; Matthew Evangelista, *Unarmed Forces: The Transnational Movement to End the Cold War* (Ithaca, NY: Cornell University Press, 1999).

influence of rapid economic liberalisation and in the face of an authoritarian executive inadequately held to account by a weak legislature.<sup>77</sup> The social process of normative change is much more complete in Western Europe, with elite learning of new human rights rules leading, for the most part smoothly, to internalisation in domestic policy and law. As already suggested, this easy path to internalisation is understandable given the congruence between Western political and legal culture and evolving international human rights law. Congruence may also explain variation in the levels of internalisation of international human rights law elsewhere around the world, both across and within regions. Hence the poor provision for political and civil rights in the Middle East may be explained in terms of an Arab political culture that is antipathetic to Western style democracy.<sup>78</sup> Equally, the stark contrast between the breadth and depth of internalisation of human rights law in China and Japan is down to an East-West divide within this region between authoritarian Communist China and democratic Westernised Japan.

Norm entrepreneurs have been instrumental in developing international human rights law and in diffusing these rules around the world. We have already noted the prominent role played by NGOs in this regard – such as the anti-slavery movement in Victorian Britain (and the US) – and the human rights and medical groups that lobbied for a ban on torture. In refugee law, the UN High Commission on Refugees (UNHCR) has and continues to play a vital role in elaborating law in this area, and in educating new and democratising states in their obligations under the 1951 Refugee Convention.<sup>79</sup> External shock has also been important to the recent development of refugee law. Conventionally, protection under the Refugee Convention is only offered to those who can demonstrate an individual fear of persecution. The shock of the wars in the former Yugoslavia in the 1990s, generating mass flight of populations from Balkan war zones, caused the conventional refugee regime to collapse. In response, some Western governments offered refugee status to whole categories of those fleeing war. Other Western states offered temporary asylum on a non-legal basis but, again, this was to whole groups of

<sup>77</sup> M. Steven Fish, *Democracy Derailed in Russia: The Failure of Open Politics* (Cambridge: Cambridge University Press, 2005); Michael McFaul, *Russia's Unfinished Revolution: Political Change from Gorbachev to Putin* (Ithaca, NY: Cornell University Press, 2001).

<sup>78</sup> Arab political culture does create space for some democratic practices but arguably these do not allow for the institutionalised protection of human rights. See Larbi Sadiki, *The Search for Arab Democracy* (New York: Columbia University Press, 2001).

<sup>79</sup> Guy S. Goodwin-Gill, *The Refugee in International Law* (Oxford: Oxford University Press, 1996), 212–20. James C. Hathaway, *The Rights of Refugees under International Law* (Cambridge: Cambridge University Press, 2005), 112–18.

people. A new EU Asylum Directive gives legal force to the provision of temporary protection in law in all EU states.<sup>80</sup>

Notwithstanding the growing strength of international human rights law, human rights continue to be abused by many states around the world. Most of these cases involve violations of international law. Massive abuses of human rights in the 'ethnic conflicts' of the 1990s have triggered changes in international criminal law (e.g., with the extension of humanitarian law to civil wars) and law on the use of force (e.g., with the evolving state practice of forcible humanitarian intervention). These changes are dealt with in Chapters 6 and 4 respectively. More minor violations of international human rights law can also lead to legal change where such violations are caused by lack of clarity in the substance and/or application of the law (as opposed to where the law is clear and the state is plainly violating it). In such cases, where there is judicial oversight (e.g., by the Strasbourg Court), this may also involve judicial interpretation, which, as we noted earlier, can produce change in international law.

### Conclusion

All three lenses provide useful perspectives on international human rights law. This area of law is characteristic of modern international law given that it is mostly treaty law. Consistent with the realist lens, this points to the role of state consent as reason for compliance, and to legal change as a formal process. At the same time, international human rights law expresses core values of the international community. Human rights rest on the dignity of the individual, while the protection of human rights serves system stability. Arguably, democratic rights are also increasingly being recognised by the international community. The liberal lens has less use when it comes to explaining state compliance with international human rights law. Self-interest is not a powerful motive for compliance as international law in this area generally serves to restrain state freedom of action.<sup>81</sup> One exception may be refugee law, where states do have a mutual interest in managing the movement of people across their borders. However, the liberal notion of legal change as a policy process has

<sup>80</sup> Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and in bearing the consequences thereof.

<sup>81</sup> In this sense there is a cost in committing to human rights treaties, though this cost is greater for liberal democracies than non-democracies, since the latter can more easily evade their legal obligations under such treaties. Oona A. Hathaway, 'The cost of commitment', *Stanford Law Review* 55 (2003), 1821–62.

considerable explanatory power in the area of human rights, especially in terms of the plurality of actors involved. The authoritative decision-making process in human rights substantially involves international organisations, courts and other quasi-legal bodies. NGOs operating through transnational coalitions led campaigns to advance international human rights law. Much of the law in this area is elaborated and implemented through transnational policy networks. Judicial interpretation is also an important method of change in international human rights law, and here too there is much transnational traffic of those judicial decisions that carry 'persuasive authority'. Finally, the constructivist lens draws our attention to the role of international human rights law as a discourse – as constituting the relationship between state and citizens, and as providing a vocabulary and moral purpose for judging state action. Congruence and internalisation emerge as powerful and reinforcing reasons for compliance with international human rights law – thus, explaining significant national and regional variation in compliance. Change in international human rights law – especially in terms of its spreading influence – may be explained in terms of a social process centered on elite learning and state socialisation. Key actors – NGOs and progressive states – have also played the vital role of norm entrepreneurs in pushing forward the boundaries of international human rights law.

Empirically, the overall picture is one of the growing normative strength (both in breadth and depth) of international human rights law. As we noted, many norms of human rights law are peremptory in character from which no derogation is permitted, such as the prohibitions against slavery, genocide, racial discrimination and torture. Moreover, the new 'doctrine of human rights' has also brought changes in many other areas of traditional international law; included here are the recognition of individuals as subjects of international law, the expansion of international organisations, international monitoring of compliance with law, the notion of *jus cogens*, the development of the international criminal justice system and the expanding scope of humanitarian law. It might even be argued that in recent decades there has been a shift from a slowly evolving consent based international law of human rights to a more dynamic doctrine that expresses community values.<sup>82</sup>

This conclusion might appear odd to some in the context of the challenge presented by the US to some aspects of human rights. The redefinition of torture by the administration of George W. Bush to make lawful interrogation techniques, and the non-recognition of rights and detention without trial of terrorists and other 'unlawful combatants' held

<sup>82</sup> Cassese, *International Law*, 393.



in Guantanamo Bay, dramatically illustrate the limits of international human rights law. Here is the most powerful state in the world apparently trampling over the rules in its treatment of detainees.<sup>83</sup> US action, which offends core liberal values and defies condemnation by a host of international and non-governmental human rights organisations, is hard to understand from a liberal perspective. A realist lens offers one explanation – namely, as the world hegemon, the US has the power to introduce more permissive human rights standards for the treatment of unlawful combatants, and, in the context of the new threat from catastrophic terrorism, it claims the right to do so. But this is an impoverished account. A richer account is provided by the constructivist lens. It points to the role of international human rights law as providing the moral resources to debate and judge what the US is doing in its self-proclaimed ‘war on terror’. From the US point of view, it is consciously acting as a norm entrepreneur in seeking to revise human rights and humanitarian law to permit extraordinary measures against what it portrays as an extraordinarily dangerous and unusually barbaric enemy. The terrorist attacks of September 11th 2001 on the US homeland provided the shock for normative change within the US, both in terms of permitting law-enforcement measures that restrict civil liberties and in mobilising support for those calling for a more forceful military unilateralism in US foreign policy. Congruence is also significant. It is true that the US considers itself to be a champion of human rights around the world, though its record on human rights is mixed. But more significant is a legal culture that is more punitive in nature than in Europe, in terms of the treatment of prisoners in the criminal justice system (a treatment that includes lawful execution, which is banned in the EU). Also significant is a legal culture that permits the ‘purposive’ reading of international law to serve vital national policy.<sup>84</sup> Here we may see the New Haven School as a manifestation of US legal culture. From the perspective of US legal culture, therefore, its treatment of detainees at Guantanamo Bay is not as bad as the Europeans make out, and represents a necessary and acceptable re-interpretation of international law given the threat to US security.<sup>85</sup>

<sup>83</sup> Philippe Sands, *Lawless World: America and the Making and Breaking of Global Rules* (London: Allen Lane, 2005), 143–173.

<sup>84</sup> This constructivist reading of the US war on terror draws on Theo Farrell, ‘Strategic culture and American empire’, *The SAIS Review* 25 (2005), 9–10, 13–14. See also, chapters by Helen Kinsella and Michael Sherry in Armstrong et al., *Force and Legitimacy in World Politics*.

<sup>85</sup> ‘Guantanamo regime defended by US’, BBC News, 14 February 2004, at [www.bbc.co.uk/news/](http://www.bbc.co.uk/news/).

The international discourse on this indicates a general scepticism in the international community regarding the lawfulness, and hence legitimacy, of this new US practice. This, in turn, generated some disquiet in the US polity about the prudence, if not ethics, of the attempt by the Bush administration to re-define international norms on the detention and treatment of prisoners.<sup>86</sup> In early 2006, the UN Commission on Human Rights produced a damning report on Guantanamo Bay. It found that the interrogation methods used amounted to degrading treatment in violation of Article 7 of the ICCPR and Article 16 of the CAT. Furthermore, it expressed considerable alarm at the failure to permit detainees to challenge legally their detention as provided in Article 9 of the ICCPR. Finally, it concluded that the use of military commissions to try detainees amounted to violations of Article 14 of the ICCPR, which provides for the right to a fair trial before an impartial tribunal.<sup>87</sup> In June 2006, the military commissions were subsequently struck down by the US Supreme Court in *Hamden v. Rumsfeld*, for violating US domestic law, in that they were not authorised by the US Congress. In response, Congress passed the Military Commissions Act (MCA) in September 2006, which provided the necessary authorisation. The MCA does criminalise the worst interrogation techniques that the administration had previously tried to argue were lawful. But, at the same time, it removes the right of detainees to invoke the Geneva Conventions in making legal challenges against their treatment; it codifies in law the use of military commissions to try civilian detainees held in Guantanamo and removes the right of detainees to challenge their detention before US courts. Human rights groups in the US are intent on challenging the legality of the MCA. But it is clear that the Bush administration's basic position, that the law must evolve to enable civilised states to fight barbaric enemies, is one that now enjoys broad political support in the US – one reason, perhaps, why the Obama administration has yet to act on its electoral promise to close down Guantanamo Bay.<sup>88</sup>

The final issue to consider is whether the international human rights regime is essentially a reflection of Western values and whether this

<sup>86</sup> Jeffrey Smith and Dan Eggen, 'Justice expands "torture" definition: earlier policy drew criticism', *Washington Post*, 31 December 2004, A01, at <http://www.washingtonpost.com/>.

<sup>87</sup> UN Commission on Human Rights, Sixty-second session, items 10 and 11 of the provision agenda, 'Situation of detainees at Guantanamo Bay', Future E/CN.4/2006/120, 15 February 2006.

<sup>88</sup> Human Rights Watch, 'Q and A: Military Commissions Act of 2006', at <http://hrw.org/backgrounder/usa/qna1006/usqna1006web.pdf>; Amnesty International, 'USA: Military Commissions Act of 2006 – turning bad policy into bad law', AMR 51/154/2006, 29 September 2006, at <http://web.amnesty.org/library/index/ENGAMR511542006>.

matters. We have argued that laws that seek to assign rights to *individuals* do indeed derive from primarily Western origins and from a Western perspective on history, society and politics. The picture with regard to so-called 'second generation' rights (essentially economic, social and cultural rights) and 'third generation' rights (belonging to some collective entity, such as an ethnic group, an indigenous people, or involving a right to collective goods such as development, or a clean environment) is more complex. While all three sets of rights emerged from specific political and economic circumstances, namely the struggle against absolute monarchies in seventeenth to eighteenth century Europe, the socio-economic consequences of the Industrial Revolution, the combined effects of the Third World majority in the UN and new issues coming to the fore after the Second World War, second and third generation rights have always been controversial. Mainly because of the deep Cold War divisions, the UDHR was followed by two (legally binding) human rights Covenants, one for first generation rights (supported by the US), the other for second generation rights (supported by the Soviet Union). Later debate, both amongst scholars and politicians, focused on what were seen as key differences between the two types of right. The Reagan administration issued an 'unqualified rejection' of second generation rights, arguing that while political and civil rights required, in essence, little more than a democratic system and an effective legal culture to uphold them, economic and social rights needed much more. As Secretary of State, Elliott Abrams put it: 'the rights that no government *can violate* [i.e. civil and political rights] should not be watered down to the status of rights that governments should *do their best* to secure [i.e. economic, social and cultural rights]'.<sup>89</sup> Writers such as Henry Shue and John Vincent countered such assertions by arguing that without at least a 'basic right' of minimum subsistence, political and civil liberties would be meaningless.<sup>90</sup>

A further American concern centred on the nature of the *obligations* towards the larger international community that flowed from the acceptance of a right enshrined in international law. Article 28 of the UDHR states that 'everyone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized', while Article 2.1 of the ICESCR commits states 'to take steps, individually and through international assistance and cooperation,

<sup>89</sup> Philip Alston, 'US ratification of the Covenant on Economic, Social and Cultural Rights: the need for an entirely new strategy', *American Journal of International Law* 84 (1990), 365–93.

<sup>90</sup> Henry Shue, *Basic Rights: Subsistence, Affluence and US Foreign Policy* (Princeton: Princeton University Press, 1980); R. J. Vincent, *Human Rights and International Relations*, (Cambridge: Cambridge University Press, 1986).

especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant'. On the face of it, the combined effect of these two Articles would be for an 'international order' to be created in which each state would be obliged both to structure its own internal policies around some kind of 'welfare state' that guaranteed goods like subsistence, education and health care to its own citizens as well as providing 'the maximum of its available resources' to ensure that all other states could achieve the same standards.

In terms of IR theory, these two perspectives on human rights derive from, respectively, a 'pluralist' and a 'solidarist' conception of international society: where pluralism involved a world of sovereign states with different values and interests, while solidarism had the underlying premise of a community of human beings rather than a society of states.<sup>91</sup> However, an alternative way of looking at this fundamental dispute about the nature of the society/community that underpins international law (or should underpin it) is in terms of the power relations that are inseparable from any discussion of international relations or international law. By one understanding of the history of the last few decades, we have been witnessing what amounts to a form of American imperialism, where such norms and rules that have been permitted to take hold to significant degrees in the actual conduct of international affairs simply reflect American interests. Hence, the US insistence on prioritising political and civil rights reflects its narrow interest in avoiding being the principal financier of a solidarist international society from which it would acquire few direct benefits as well as the broader interest, which dates almost from the beginning of the US, of building a world more in the American image. Less critical appraisals of the US role would see it – as neoliberal theory would also suggest – playing the crucial role of hegemon in upholding a global political and economic order from which many benefit.

In reality, US policy has shown less consistency, particularly since the end of the Cold War, than some of its critics appear to appreciate. In part this is because, while it may well be a 'unipolar' actor, it is far from being a 'unitary' actor. Individual states, the Congress, corporations and banks and a vast array of individuals and groups, ranging from film actors to churches, have influenced US policy over the years, so that, although 'national interest' has always been a common theme in

<sup>91</sup> There is now a vast literature on these two opposing conceptualisations. For a strong statement in support of pluralism, see Robert Jackson, *The Global Covenant*. For solidarist perspectives, see in particular the work of Tim Dunne. For the fullest discussion of 'English School' literature, see Barry Buzan's Bibliography at <http://www.polis.leeds.ac.uk/assets/files/research/english-school/es-bibl-10.pdf>.

all discourse about foreign policy, this has been understood in different ways. This has inevitably fed into the US's relationship with international law and international institutions, with Washington's responses to both ranging from hostility through indifference to relatively enthusiastic endorsement.<sup>92</sup> Here again constructivism, with its nuanced emphasis on how change occurs via discourse, negotiation, elite learning, internalisation and socialisation may have more to offer than rationalist interpretations that emphasise unbendable interests.

### Discussion questions

- What is the difference between an 'obligation *erga omnes*' and a 'peremptory norm' of international law? Give an example of each.
- What evidence can you provide that human rights operate in a positivist rule-based system? How does such a system accommodate the more liberal view that individuals have become the subjects of international law?
- In what way do human rights express core liberal values?
- What role does the UN Charter play in the protection of human rights? Have the relevant UN Charter provisions been implemented (e.g., internalised)?
- What makes human rights treaties difficult, in general, to implement? What makes the ECHR system so successful in terms of compliance? Why does the refugee protection regime provide a good example of the role of self-interest in motivating states to comply with international law?
- Who are the main agents of change in international human rights law?
- How may we best explain the US redefinition of norms on the detention and treatment of foreign prisoners?
- Does the international human rights system reflect essentially Western norms or is it genuinely universal?

### SUGGESTIONS FOR FURTHER READING

Cronin, Bruce, *Institutions for the Common Good – International Protection Regimes in International Society*, Cambridge: Cambridge University Press, 2003. A clearly written and strongly argued book on the links between international stability and the creation of international protection regimes. *A truly excellent read.*

<sup>92</sup> Rosemary Foot, S. Neil MacFarlane and Michael Mastanduno, (eds.), *US Hegemony and International Organizations* (Oxford: Oxford University Press, 2003).

- Donnelly, Jack, *Universal Human Rights in Theory and Practice*, Ithaca, NY: Cornell University Press, 2nd edition, 2003. An excellent book that takes human rights into the twenty-first century with a wide range of issues being discussed including cultural relativism, humanitarian intervention, democracy and human rights, group rights and 'Asian values'.
- Forsythe, David P., *Human Rights in International Relations*, Cambridge: Cambridge University Press, 2000. An excellent book, in the same series as this one, which examines the policymaking processes pertaining to human rights in the context of international relations.
- Freeman, Michael, *Human Rights*, Cambridge, UK: Polity Press, 2002. An interdisciplinary account of human rights, with particular references to the social sciences, philosophy and law.
- Gearty, Conor, *Can Human Rights Survive?*, The Hamlyn Lectures 2005, Cambridge University Press, 2006. Most enjoyable read of 'the story of human rights' with a warning against complacency and a lucid look at the future.
- Gibney, Matthew J., *The Ethics and Politics of Asylum: Liberal Democracy and the Response to Refugees*, Cambridge: Cambridge University Press, 2004. A well-argued work on the obligations of liberal democracies to asylum-seekers with an empirical focus on the US, Germany, the UK and Australia.
- Goodwin-Gill, Guy S. and Jane McAdam, *The Refugee in International Law*, Oxford: Oxford University Press, 2007. Probably the best substantial textbook on refugee law with a clear international focus.
- Rehman, Javaid, *International Human Rights Law*, London: Longman, 2003. A comprehensive and accessible textbook.
- Risse-Kappen, Thomas, Stephen C. Ropp and Kathryn Sikkink, (eds.), *The Power of Human Rights: International Norms and Domestic Change*, Cambridge: Cambridge University Press, 1999. An evaluation of the impact of human rights norms articulated in the UDHR on the behaviour of national governments in five different regions of the world (i.e., Northern Africa, Sub-Saharan Africa, Southeast Asia, Latin America, and Eastern Europe), with a particular focus on internalisation.
- Simpson, Brian, *Human Rights and the End of Empire: Britain and the Genesis of the European Convention*, Oxford: Oxford University Press, 2001. An astonishing historical account of the negotiations on the European Convention on Human Rights, with a particular focus on the role of Britain.
- Smith, Rhona, *Textbook on International Human Rights*, Oxford: Oxford University Press, fourth edition, 2010. Very thorough overview of the subject, with chapters devoted to history, the UN, regional organisations, monitoring, implementing and reporting systems and specific rights.
- Steiner, Henry J., Philip Alston and Ryan Goodman, *International Human Rights in Context – Law, Politics, Morals*, Oxford: Oxford University Press, 3rd edition, 2007. This book is unique in providing the 'big picture' of the 'human rights movement'. Highly readable, it is a masterpiece in inter-disciplinary scholarship and in critical legal thinking.