A photograph of a person kneeling on a paved surface, seen from behind with their hands clasped behind their head. They are wearing a black tank top and dark pants. In the background, several police officers in riot gear are visible, standing in a line. The scene is brightly lit, suggesting a sunny day.

**SABINE C. CAREY  
MARK GIBNEY  
ANITA R. GOHDES**

# **THE POLITICS OF HUMAN RIGHTS**

The Quest for Dignity  
in the 21st Century

**SECOND  
EDITION**

# The Politics of Human Rights

## Second Edition

Accessible and engaging, *The Politics of Human Rights* offers a fresh, empirical approach to understanding human dignity and the global responsibility to protect it. Unlike traditional texts, this textbook moves beyond theory, using data-driven insights to explore why human rights violations occur and how they can be prevented. It emphasizes shared responsibility across borders to uphold human rights. Designed for students and educators, this fully updated edition enhances learning with discussion questions, recommended readings, and a unique collection of films, podcasts, and websites that bring human rights issues to life. It provides a well-rounded perspective, grounded in the latest social scientific research, for anyone interested in human rights. Whether used for introductory courses or interdisciplinary studies, this book equips readers with the knowledge and tools to critically engage with human rights issues, making it an essential resource for understanding and advocating for human dignity in the twenty-first century.

**Sabine C. Carey** is Chair of Political Science, International Relations at the University of Mannheim.

**Mark Gibney** is Belk Distinguished Professor at the University of North Carolina, Asheville.

**Anita R. Gohdes** is Professor of International and Cyber Security at the Hertie School in Berlin.

'This book is a must-read primer on human rights, perfect for undergraduate courses, graduate seminars, as a comprehensive guide for scholars moving into studying human rights, and as a reference tool for scholars already studying human rights or repression. It expansively covers essential topics ... but does so accessibly and with a myriad of engaging examples.'

Jennifer Earl, *Chair and Professor, Department of Sociology  
and Criminal Justice, University of Delaware*

'The Politics of Human Rights offers an insightful and empirically grounded exploration of human rights, their violations, and the mechanisms designed to protect them. This revised edition integrates rigorous scientific analysis with real-world case studies, making it an invaluable resource for students, scholars, and practitioners ... an essential guide for understanding both the challenges and the progress in the fight for human dignity.'

Bonny Ibhawoh, *Senator William McMaster Chair in Global  
Human Rights, McMaster University*

'This is an excellent introduction to the politics of human rights and what we know from existing research. It provides a framework to help readers understand how challenges to human rights arise, highlighting the specific actors and their choices, as well the scope for efforts to improve human rights.'

Kristian Skrede Gleditsch, *Regius Professor of Political Science,  
University of Essex and Research Associate,  
Peace Research Institute Oslo*

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**To our students and teachers**



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# Preface

This book is designed as an introduction to the politics of human rights. It is suitable for anyone interested in this field and is intended for classes on human rights and for the treatment of the subject in related courses. In our view, 'human rights' is one of the most important and most interesting subjects. The study of human rights is essentially about how we treat all other people with whom we share this planet. Striving for the respect of human rights is a quest for human dignity. Human rights are about *recognizing, honouring, and protecting* the human dignity of each one of the eight billion people on this planet. When human rights are not protected, the victim's human dignity is ignored. But what it also does is to deny the humanity in all of us. We have made every effort to focus on the humanity on which human rights is based. Therefore, this book is less theoretical and less historical than other books in this realm. We have maintained and further strengthened the unique features of the first edition in this extensively revised version.

## Our Approach

.....

This book offers a markedly different conceptualization of human rights compared to the treatment typically found in other textbooks. While the dominant approach acknowledges the universality of human rights, it often contradicts this principle by confining the responsibility for their protection solely to the territorial state. This perspective risks reducing human rights to little more than a catalogue of atrocities committed in distant lands, perceived as issues involving and affecting only 'others'. Our approach departs significantly from this framework. We emphasize

that human rights are not only universal in nature but that the duty to protect and enforce them is equally universal. Human rights are grounded in the principle of *shared humanity*, but they also demand a *shared responsibility* to uphold them.

Another distinguishing feature of this second edition, as of the first, is our empirical approach, using *quantitative methods to explore the politics of human rights*. At a minimum, human rights brings together law, politics, history, economics, ethics, religion, and morality. We are convinced that the study of human rights is greatly enhanced through scientific method, including statistical analysis. Although this might sound off-putting at first – or worse, induce maths anxiety – you will soon discover how useful and informative this approach to human rights can be to understand *where* and *what* types of human rights are violated, *why* they are violated, and *what can be done* to protect them. In this second edition, we draw on a wide range of empirical studies to introduce the reader to the latest findings on why human rights are violated and what might improve the protection of human rights.

Another novel aspect of our book is that we not only provide discussion questions and suggestions of further books on the subjects covered in each chapter. We put together an extensive list of films and, newly added in the second edition, podcasts and websites that emphasize the importance of human rights for respecting and protecting our human dignity. For more film suggestions, we point the reader to Mark Gibney's book *Watching Human Rights, the 101 Best Films* (2013).

## The Organization of the Second Edition

.....

In the second edition, we have condensed the first part, which examines the nature of human rights and the different responsibilities to protect these rights. Chapter 1 provides a short overview of the *development of the modern human rights system* and gives a short introduction to its main players. Chapter 2 examines the *responsibilities* of states to safeguard civil and political rights as well as economic, social, and cultural rights. It also investigates whether this obligation extends beyond their own territory.

Part II introduces scientific research to *map the state of human rights and to analyse where and why violations occur*. This second part has been significantly updated and expanded by two new chapters, one on the nature and motivations of *perpetrators* of human rights violations, the other on the impact the *Internet* has had on human rights. Chapter 3 demonstrates how human rights can be observed and how trends can be tracked over time and compared across countries with plots, maps, and tables. We highlight various measures of human rights, discussing the opportunities, challenges, and limitations of these data. The newly added Chapter 4 delves into the primary perpetrators of human rights violations, exploring their motivations and how they might be constrained. Chapter 5 focuses on the influence of political regimes in safeguarding fundamental rights. It examines how various socio-economic factors correlate with the respect for – or violations of – human rights. Chapter 6 has been newly added to reflect the significant changes that have taken place in the realm of human rights since the first edition came out. It explores how the digital revolution has transformed the politics of human rights, and highlights how digital tools have empowered individuals to protect rights, while providing states with new methods of digital repression.

Part III examines how to *restore human dignity* when serious human rights violations have occurred. Chapter 7 explores the manner in which societies might re-establish trust and security in the aftermath of atrocities. We discuss and compare the retributive and restorative approach to justice and highlight the difficult circumstances in which societies that try to establish transitional justice find themselves. In this second edition we have newly added an evaluation of how successful transitional justice mechanisms have been, based on the latest research in this field. In Chapter 8 we present the main characteristics and differences between the most important international mechanisms that are commonly used to protect human rights, and take a look at how successful they have been in achieving this objective. Finally, in a brief conclusion, we highlight some of the progress that has been made and the continued challenges we face in realizing the respect for human rights and a life in dignity.

# Acknowledgements

We would like to thank everyone who has encouraged us to work on a revised version of this book. We are delighted that our approach of introducing the reader to this important topic has resonated with so many. We are grateful to Maurice Schumann and Karina Ourfalian for their invaluable research assistance and to Aylin Arslan for her insightful comments. We thank our copy editor David Hemsley for his remarkable attention to detail and extremely thoughtful suggestions.

We are delighted and extremely grateful that Anita Gohdes has joined as co-author for this second edition. So many of the changes and new additions would not have been possible without her. She replaces our co-author from the first edition, Steve Poe, who passed in 2007. Steve was a dear friend and trusted mentor to so many. He recognized and honoured the dignity in all people, and his life was an embodiment of these values. In so many ways and for so many people, Steve was the personification of human rights. We hope that this book will help readers to understand the importance of continuously striving for their protection.

# Abbreviations

<b>ANC</b>	African National Congress	<b>ECOWAS</b>	Economic Community of West African States
<b>ATT</b>	Arms Trade Treaty	<b>ECtHR</b>	European Court of Human Rights
<b>CAT</b>	Committee Against Torture	<b>ESAD</b>	Ethnic Stacking in Africa Dataset
<b>CAVR</b>	Commission for Reception, Truth and Reconciliation	<b>ETA</b>	Euskadi Ta Askatasuna (Basque Country and Freedom)
<b>CEDAW</b>	Convention on the Elimination of All Forms of Discrimination Against Women	<b>EU</b>	European Union
<b>CJTF</b>	Civilian Joint Task Force	<b>FARC</b>	Revolutionary Armed Forces of Colombia
<b>CPPCG</b>	Convention on the Prevention and Punishment of the Crime of Genocide	<b>GHG</b>	greenhouse gas
<b>CPED</b>	Convention for the Protection of All Persons from Enforced Disappearance	<b>HDI</b>	Human Development Index
<b>CRC</b>	Committee on the Rights of the Child	<b>IACtHR</b>	Inter-American Court of Human Rights
<b>CRP</b>	Community Reconciliation Processes	<b>ICC</b>	International Criminal Court
<b>CRPD</b>	United Nations Convention on the Rights of Persons with Disabilities	<b>ICCPR</b>	International Covenant on Civil and Political Rights
<b>CSDDD</b>	Corporate Sustainability Due Diligence Directive	<b>ICERD</b>	International Convention on the Elimination of All Forms of Racial Discrimination
<b>ECHR</b>	European Convention on Human Rights	<b>ICESCR</b>	International Covenant on Economic, Social and Cultural Rights
		<b>ICJ</b>	International Court of Justice

<b>ICRMW</b>	International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families	<b>NPFL</b>	National Patriotic Front of Liberia
<b>ICTR</b>	International Criminal Tribunal for Rwanda	<b>OSCE</b>	Organization for Security and Co-operation in Europe
<b>ICTY</b>	International Criminal Tribunal for the former Yugoslavia	<b>PGM</b>	pro-government militia
<b>IDI</b>	Inclusive Development International	<b>PGMD</b>	Pro-Government Militias Database
<b>IMT</b>	International Military Tribunals	<b>PKK</b>	Kurdistan Workers' Party
<b>IRA</b>	Irish Republican Army	<b>PMSC</b>	private military and security company
<b>ISIL/ISIS</b>	Islamic State of Iraq and the Levant/Islamic State of Iraq and Syria	<b>PTS</b>	Political Terror Scale
<b>LEA</b>	law enforcement agency	<b>R2P</b>	Responsibility to Protect
<b>LTTE</b>	Liberation Tigers of Tamil Eelam	<b>SG</b>	Secretary-General (United Nations)
<b>MINUSMA</b>	United Nations Multidimensional Integrated Stabilization Mission in Mali	<b>SSF</b>	State Security Forces (Dataset)
<b>MINUSTAH</b>	United Nations Stabilizing Mission in Haiti	<b>SVS</b>	savages—victims—saviours
<b>MNCs</b>	multinational corporations	<b>TRC</b>	Truth and Reconciliation Commission
<b>MONUSCO</b>	United Nations Organization Stabilization Mission in the Democratic Republic of the Congo	<b>UAE</b>	United Arab Emirates
<b>MOSOP</b>	Movement for the Survival of the Ogoni People	<b>UCDP</b>	Uppsala Conflict Data Program
<b>NATO</b>	North Atlantic Treaty Organization	<b>UK</b>	United Kingdom
<b>NGO</b>	non-governmental organization	<b>UDHR</b>	Universal Declaration of Human Rights
		<b>UN</b>	United Nations
		<b>UNCAT</b>	United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
		<b>UNCRC</b>	United Nations Convention on the Rights of the Child
		<b>UNDP</b>	United Nations Development Programme

## List of Abbreviations

<b>UNFICYP</b>	United Nations Peacekeeping Force in Cyprus	<b>UNSMIS</b>	United Nations Supervision Mission in Syria
<b>UNHCR</b>	United Nations High Commissioner for Refugees	<b>UN-TAET</b>	United Nations Transitional Administration in East Timor
<b>UNIFIL</b>	United Nations Interim Force in Lebanon	<b>UNTSO</b>	United Nations Truce Supervision Organization
<b>UNMIL</b>	United Nations Mission in Liberia	<b>US</b>	United States
<b>UNMISS</b>	United Nations Mission in South Sudan	<b>VPN</b>	virtual private network

# Part



# Human Rights and State Responsibilities



# Chapter

# 1

# What Are Human Rights?

**This chapter introduces** the meaning of human rights, what those rights are, and where they can be found, but it also offers some critiques of human rights, especially the charge that they represent little more than Western values. The chapter discusses the universality of human rights, embodied in the Universal Declaration of Human Rights, and the fact that all human beings have human rights no matter where they live and no matter whether their own state has ratified various human rights conventions. It introduces international human rights law, which takes human rights from the moral or ethical sphere into real law. We discuss the relationship between domestic and international human rights law. We conclude with an introduction to the major players in the human rights field with examples of the kind of work these bodies engage in.

## 1.1 Where Do Human Rights Come From?

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The concept of basic human rights is not an invention of the United Nations (UN) or another modern actor. Instead, it can be traced back to all major world religions and across different philosophical ideas. Hinduism, the world's oldest religion (4,500 years ago), teaches that all life is sacred, emphasizing *ahimsa*, or non-harm. Judaism (3,300 years old) highlights the sanctity of life and human responsibility, illustrated by Cain's question, 'Am I my brother's keeper?' Christianity (2,000 years ago) stresses caring for the poor, sick, and hungry, exemplified in the parable of the Good Samaritan. Buddhism (2,500 years ago) centres on respect for life, compassion, and rejecting caste-based inequality, as taught by Siddhartha Gautama. Around the same time, Confucianism in China promoted morality, social justice, and *Jen* ('benevolence'), linking personal righteousness to global peace. Islam (1,500 years ago) emphasizes equality, tolerance, and charity. The Koran teaches compassion and justice, and the prophet Muhammad advocated for social equality, rejecting privilege and asserting that all are equal in Allah's eyes.

Philosophy has long sought to address complex questions about human relationships. Early philosophies of human rights focused on universal duties rather than rights, with theories evolving through centuries of political, economic, and social conflict. In ancient China, Mo Zi emphasized duty, self-sacrifice, and universal respect. In Babylon, King Hammurabi's legal code championed justice and equal protection, while Cyrus the Great's Charter recognized rights like liberty, freedom of religion, and social protections. In Greece, thinkers like Plato and Aristotle advanced ideas of natural law and virtue, advocating justice and charity beyond personal gain. Cicero's natural law theory emphasized universal justice and service to others. The Roman *jus gentium* extended natural law to all humanity, transcending citizenship.

Thomas Aquinas adapted Aristotle's natural law, proposing a divine basis for justice and asserting the individuality of each person beyond state membership. Later, Christian humanists expanded on these ideas, blending religious duty with moral philosophy to advocate for political and economic reform. The scientific revolution further advanced reason

as a tool to understand natural law, rejecting the ‘divine right’ of kings.

The Enlightenment shifted focus from duties to rights. John Locke articulated that natural rights – life, liberty, and property – existed in a state of equality and were preserved through government. His ideas challenged oppressive structures and influenced thinkers like Rousseau, who declared, ‘Man is born free’, and Kant, who emphasized treating others as ends, not means. In America, Enlightenment principles shaped the Declaration of Independence, asserting unalienable rights to life, liberty, and the pursuit of happiness. Similarly, Thomas Paine’s *Rights of Man* emphasized natural human rights as the foundation of society.

## 1.2 The Birth of the Modern Human Rights Movement

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Despite these early traces of human rights in religion and philosophy, in practice for nearly all of human history, individuals had whatever rights their own government decided to bestow upon them. But what if a state granted few rights – or worse, if it engaged in cruel and barbaric behaviour against its own citizens? Until the mid-1940s, this was viewed as a purely domestic or internal matter between a government and its own people and was thus treated as being outside the purview of the rest of the international community.

All this has changed, at least in theory. The greatest impetus for the present-day human rights revolution was the Holocaust, where an estimated six million Jews were cruelly and systematically killed during the Second World War. The Holocaust was undeniable and incontrovertible proof that citizenship might offer absolutely no protection against a government that sought to make war on a particular group of people within a given society and to violate their most basic human rights. But what the horrors of the Holocaust also showed was that this laissez faire attitude about how a government treated its own citizens was simply no longer acceptable. What emerged from the arguably darkest period in all human history was what we will term the human rights revolution.

### 1.2.1 The Post-Second World War Period and the UN Declaration of Human Rights

The legal philosopher Michael Perry has summed up the essence of human rights by positing that there are certain things that ought never to be done to people and certain other things that should be done (Perry, 1998). These ‘things’, then, are human rights and these rights are best spelled out in several international human rights instruments, most notably what has been termed the International Bill of Rights.

The first and most important component is the 1948 *Universal Declaration of Human Rights* (UDHR), which is often termed the Magna Carta of human rights instruments. The Universal Declaration proclaimed that all people have human rights – civil and political rights as well as economic, social, and cultural rights – and set everything else in motion. In the words of Johannes Morsink, who has written the definitive account of the drafting history, the UDHR has ‘profoundly changed the international landscape, scattering it with human rights protocols, conventions, treaties and derivative declarations of all kinds. At the end of the twentieth century there is not a single nation, culture, or people that is not in one way or another enmeshed in a human rights regime’ (Morsink, 1999: X).

The Universal Declaration is just that: a declaration. Thus, it is not binding international law, although a strong argument could be made that it has now reached the status of customary international law in the sense that its provisions are something that states feel they must abide by. The effort to transform the UDHR into international law resulted in two separate treaties: the *International Covenant on Economic, Social and Cultural Rights* (ICESCR or Economic Covenant) and the *International Covenant on Civil and Political Rights* (ICCPR or Political Covenant). These two International Covenants comprise the other two legs of the International Bill of Rights, next to the UDHR.

Why was the UDHR broken down into two separate treaties? The standard story is that this reflects Cold War tensions, with Western democracies championing civil and political rights and the Communist states supporting economic, social, and cultural rights. However, Whelan’s (2010) scholarship goes far in exposing this as myth. What Whelan has found instead is that there was near universal support for both sets of rights, but there was also a general recognition that the

two sets of rights were different from one another – different in terms of substance of the right involved, different in terms of enforcement of those rights, and finally, different in terms of levels of international assistance and cooperation that would be needed to protect these rights.

As shown in Box 1.1, in the decades that have followed international human rights law continues to broaden in scope, although some critics, most notably Hopgood (2013) and Posner (2014), believe that this rights expansion ultimately has been counterproductive because this will dilute those rights that have already been recognized. In addition to international standards, regional instruments, most notably the European Convention and the American Convention, have played an important role in the development of human rights. These rights include the following partial list, which is summarized from the UDHR:

### Box 1.1 Timeline of the Major Human Rights Treaties

- 1945 United Nations Charter
- 1945–1946 Nuremberg Trials
- 1948 Universal Declaration of Human Rights
- 1948 Genocide Convention
- 1949 Geneva Conventions
- 1950 European Convention on Human Rights (entered into force 1953)
- 1951 Refugee Convention (entered into force 1954)
- 1966 Convention on Elimination of Racial Discrimination (entered into force 1969)
- 1966 Economic Covenant (entered into force 1976)
- 1966 Political Covenant (entered into force 1976)
- 1969 American Convention on Human Rights (entered into force 1978)
- 1976 African Charter on Human and Peoples' Rights (entered into force 1986)
- 1979 Convention on Discrimination Against Women (entered into force 1981)
- 1984 Torture Convention (entered into force 1987)
- 1990 Children's Convention (entered into force 1990)
- 1990 Migrant Workers Convention (entered into force 2003)
- 2006 Convention on the Rights of Persons with Disabilities (entered into force 2008)
- 2006 International Convention for the Protection of All Persons from Enforced Disappearance (entered into force 2010)

- a right to life, liberty and security of the person (Art. 3);
- freedom from torture or cruel, inhuman or degrading treatment or punishment (Art. 5);
- a right to equal protection against discrimination (Art. 7);
- a right to an effective remedy for violations of fundamental rights (Art. 8);
- freedom from arbitrary arrest, detention or exile (Art. 9);
- a right to a fair and public hearing by an independent and impartial tribunal in criminal proceedings (Art. 10);
- a right to freedom of movement (Art. 13);
- a right to seek and enjoy asylum in other countries (Art. 14);
- freedom of thought, conscience and religion (Art. 18);
- a right to work, to free choice of employment, to just and favorable conditions of work and to protection against unemployment (Art. 23);
- a right to education that is directed at the full development of the human personality and to the strengthening of respect for human rights and fundamental freedoms (Art. 26);
- a right to social security, and the realization through national effort and international cooperation of the economic, social and cultural rights indispensable for a person's dignity and the free development of their personality (Art. 22); and
- the right to a social and international order in which rights and freedoms can be fully realized (Art. 28).

## 1.3 The Universality of Human Rights

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Despite its name, the Universal Declaration is not universal in the sense that although no country voted against the Declaration, eight countries abstained.<sup>1</sup> In addition, at the time of the vote in 1948 large parts of the globe, particularly in Africa and Asia, were under colonial rule and

<sup>1</sup> Czechoslovakia, Poland, Saudi Arabia, Soviet Union, Belarussian SSR, Ukrainian SSR, South Africa, and Yugoslavia.

thus were not truly represented in either the drafting of the UDHR or when the document was voted on in the UN General Assembly. Much of the doubt concerning human rights that continues to exist in many parts of the globe was based on this hypocrisy of proclaiming the universality of human rights – while maintaining colonial and neo-colonial relationships (Ibhawoh, 2020).

Still, human rights are universal in the sense that all human beings possess human rights by the mere fact of their existence. Like all other human rights instruments that have followed, the UDHR speaks in terms of protecting ‘everyone’ and denying human rights protection to ‘no one’. It does not matter where a person lives or what kind of government a person lives under. It also does not matter whether a particular state has agreed to be bound by any particular human rights treaty or not. For example, although the United States (US) is the only country that is not a state party to the *Convention on the Rights of the Child* (Children’s Convention), this does not mean that young people in the US do not have any human rights. Instead, this means that these (human) rights will have to be protected solely through domestic (US) means.

Human rights are often dismissed as being unrealistic and even utopian in nature. The reality, however, is very different. Human rights represent the bare minimum that is required for a person to live a human – as opposed to an inhuman – existence. Thus, human rights are more properly thought of as establishing a floor beneath which no individual is to be allowed to fall. Yet, human rights should not be viewed in terms of taking care of people. Rather, it is about creating conditions so that people can take care of themselves if they are able. More importantly, human rights create the (legal) guarantee that people will be able to provide for themselves. As Nobel Prize recipient Sen (1981) has emphasized, hunger is not a simple by-product of the unavailability of food, but rather the unavailability of an entitlement to food.

One of the great misconceptions is to view human rights simply as moral rights or as rights based on certain religious or ethical principles – but nothing beyond that. Human rights are most certainly based on particular values of how people ought to live and how people ought to be treated. Much of this book will be devoted to the idea that human rights are also legal rights. But we take this principle one step further by positing that states have certain well-defined legal obligations to

protect those rights. Thus, not only are human rights universal, but the responsibility to protect human rights is universal as well.

No doubt, one of the problems in accepting the idea that human rights are legal rights comes from the chasm between promise and reality – between the rights proclaimed by international human rights instruments versus the cruel reality that a substantial portion of humanity is denied some form of human rights protection (see Box 1.2). We have a couple of responses, although we admit that we are not adequately satisfied with either of them.

### Box 1.2 Human Rights and Croesus's World of Global Inequality

The legal historian Samuel Moyn has been one of the harshest critics of how human rights has tended to ignore ever-increasing levels of inequality in the world. In his book *Not Enough: Human Rights in an Unequal World*, Moyn (2018) concedes the central role that human rights have come to play in the world. Yet, he argues that the decision to place human rights squarely within the framework of free market capitalism has led to a world divided between rich and poor states, resulting in a 'weak and cheap' version of human rights.

But they [human rights] have also become our language for indicating that it is enough, at least to start, for our solidarity with our fellow human beings to remain weak and cheap. To a startling extent, human rights have become prisoners of the contemporary age of inequality. (Moyn, 2018: 6)

Moyn concludes his book by telling the story of a man who owns everything, calling him Croesus, named after the ancient king who in popular lore was incredibly wealthy. Like his namesake, Croesus is a benevolent ruler, ensuring that all his subjects have the bare necessities of life and banning all forms of political repression. In this state, the worst off have enough. But, as Moyn notes, 'they are in a yawning hierarchy, far beneath the have-mores' (Moyn, 2018: 212).

As should be evident, we increasingly are living in Croesus's world. 'Tiny numbers of rich people dwarf the rest in their wealth, and some national settings have been trending toward absolute inequality, even if the global picture is more complex' (Moyn, 2018: 212). The question Moyn asks is whether Croesus's world is the kind of world

that we want to live in and his reply is that it is not. The problem is that, as presently conceived, human rights have nothing to say about material inequality.

Moyn foresees a 'populist rage' in reaction to this growing inequality and the enormous dislocations this will have in terms of the protection of human rights. He concludes this provocative book by suggesting that human rights defenders can no longer turn a blind eye to the expanding inequality all around us. Or in his words: 'Croesus's world of basic rights and needs fulfilled in the midst of continuing or even escalating inequality is not only still immoral: it has become clearer every day that it is destined to instability and ruin' (Moyn, 2018: 220).

The first response is to point out that this disjunction between promise and reality is by no means confined to the realm of human rights. This same problem can exist under domestic law as well. For example, the 14th Amendment of the US Constitution promises equal protection under the law. Yet, as Kozol (1991) shows in his disturbing book *Savage Inequalities*, there is an enormous gap between the educational opportunities that rich children in the US enjoy and those afforded to children from poor families. Does this disparate treatment prove that the Equal Protection clause of the 14th Amendment is meaningless? And does this mean that the language of rights should not be used in this particular context?

A second response is to admit what should be evident, namely that the greatest and gravest weakness in the entire realm of human rights concerns the lack of effective enforcement and protection of those rights. We repeatedly come back to this issue. While we acknowledge that some important gains have been made, it is crucial that the issue of human rights enforcement is addressed head on.

## 1.4 Human Rights and the West

One of the most compelling and challenging critiques of human rights has been given by Mutua (2001), who has developed what he terms the *savages-victims-saviours* (SVS) metaphor in his criticism of the dominant approach to human rights. The *savage* in this model consists

of non-Western states – but really, non-Western cultures – that refuse to follow the dictates of the European/American model.

The *victims* are the nameless masses of sympathetic but helpless innocents who are thought to suffer under the misrule and misdeeds of these savage states. The third and final component is the *saviour*, which is made up of various Western institutions including the UN, Western countries (most notably the US), and non-governmental organizations (NGOs) such as Amnesty International and Human Rights Watch that are based in the West. According to Mutua, human rights are based on the un-stated precept that the saviour must protect the victim from the cruelties of the savage.

Mutua argues that what is so often missing from any discussion of human rights is a broader historical and political context. In his view, what those who promote human rights systematically ignore is the long and ugly history of Western intervention – whether through colonial rule or the so-called ‘civilizing’ goal of Christian missionary work, for example – that has brought great harm to non-Western people, but which has always been carried out under the banner of providing help and assistance to these ‘unfortunate people’.

Mutua describes what he sees as a seemingly incurable virus: ‘the impulse to universalize Eurocentric norms and values by repudiating, demonizing, and “othering” that which is different and non-European’ (Mutua, 2001: 210). According to his analysis, what we now know as ‘human rights’ is little more than just another attempt by the West to exert its control and influence on people and governments in all other parts of the world – but done under the guise of so-called ‘universal’ values. Mutua maintains that while Western people are quite enamoured by the human rights edifice that they have constructed, non-Western people are able to see right through this, which is why (in his view at least) the concept of human rights has virtually no legitimacy outside the West itself.

Another element of Western hypocrisy involves the lack of Western self-examination or self-criticism. While Western institutions are desperately intent on exposing the horrors carried out in these ‘Savage’ societies, these same institutions are either incapable or unwilling to recognize the wrongs that they themselves commit. While discrimination and abuse of females in non-Western countries is fodder for investigation and recrimination by the various ‘Saviour’ institutions, what

is systemically ignored are all the forms of discrimination and abuse suffered by females in Western states.

Finally, Mutua addresses the 'typical' white American high school or college student who earnestly joins the local chapter of Amnesty International, and in the course of doing so protests against such things as female genital mutilation in faraway lands or writes letters of protest to political or military leaders with names that do not easily roll off the English speaking tongue, as Mutua describes it (2001: 219):

The zeal to see all humanity as related and the impulse to help those defined as in need is noble and is not the problem addressed here. A certain degree of human universality is inevitable and desirable. But what that universality is, what historical and cultural stew it is made of, and how it is accomplished make all the difference. What the high school or college student ought to realize is that her zeal to save others – even from themselves – is steeped in Western and European history. If one culture is allowed the prerogative of imperialism, the right to define and impose on others what it deems good for humanity, the very meaning of freedom itself will have been abrogated. That is why a human rights movement that pivots on the SVS metaphor violates the very idea of the sanctity of humanity that purportedly inspires it.

Makau Mutua presents a disturbing challenge to the entire notion of human rights; one that all those who believe in human rights (or say they do) need to confront and address. We contrast his work with that by Ignatieff (2001), a human rights scholar, activist, and a former Canadian politician, and one of the great defenders of human rights and its values. Ignatieff does not deny the primacy of Western states (and Western lawyers) in the drafting of the UDHR. Yet, rather than proclaiming Western superiority, Ignatieff sees this document, written in the wake of the massive horrors of the Second World War, in just the opposite light: as a frank and painful acknowledgement of the enormous failures of the West. He writes (Ignatieff, 2001: 65):

The Declaration may still be a child of the Enlightenment, but it was written when faith in the Enlightenment faced its deepest crisis of confidence. In this sense, human rights is not so much the declaration of the superiority of European

civilization as a warning by Europeans that the rest of the world should not seek to reproduce its mistakes.

This recognition of the shortcomings of the West does not mean that human rights are not based on certain Western values. Ignatieff takes the position that the most important value of all – protecting the individual from powerful oppressive forces within a given society – is a decidedly Western concept and there is no need to apologize for this. However, Ignatieff argues that these (Western) values have now become universal values, and this has been achieved by empowering the powerless and by giving voice to the voiceless in places the world over. Furthermore, Ignatieff adamantly opposes the notion that human rights are in any way an attempt to fundamentally change these societies – or the people who live there. What human rights do, instead, is provide the choice of opting out, but only when the individual himself or herself finds it necessary to do so. He writes (Ignatieff, 2001: 70):

It is simply not the case, as Islamic and Asian critics contend, that human rights forces the Western way of life upon their societies. For all its individualism, human rights does not require adherents to jettison their other cultural attachments ... What the Declaration does mandate is the right to choose, and specifically the right to leave when choice is denied.

Thus, while Makau Mutua sees human rights as a cover for the continued domination of Western interests and Western values, Michael Ignatieff sees human rights as transcending these things, and providing a common language to an equally shared, but contentious, conversation of how people are to be treated:

But once this universal right to speak and be heard is granted, there is bound to be tumult. There is bound to be discord. Why? Because the European voices that once took it upon themselves to silence the babble with a peremptory ruling no longer take it as their privilege to do so, and those who sit with them at the table no longer grant them the right to do so. (Ignatieff, 2001: 94)

We leave it up to the reader to determine who has the better reasoned argument. Like Ignatieff, we believe that there is certainly no need to

apologize for defending and promoting human rights – if anything, there should be an apology for not doing vastly more than we do.

In terms of Mutua's approach, we agree that human rights are riddled with hypocrisy and inconsistencies. In addition, we believe that it is essential that human rights be viewed with a cynical eye and that it is vitally important to place it within a broader historical context. However, one of our concerns about Mutua's approach is that it can easily lead to an excuse for doing nothing, the rationale being that any Western involvement in attempting to eliminate human rights violations in a non-Western country would only be another form of 'Western imperialism'. The point is that the policies of Western states already have a profound effect on human rights practices in developing countries. To ignore those realities and to remove ourselves from any participation in preventing these wrongs is, in a word, a cop-out.

Box 1.3 provides an overview of some of the feminist critiques of human rights.

### Box 1.3 Feminism and Human Rights

There is no one feminist critique of human rights. Instead, any number of scholars and practitioners have criticized the way in which women – no matter what country they live in – suffer the highest levels of human insecurity, whether it be in the form of physical harm, economic exploitation, or societal norms that effectively remove many life prospects from them. Catherine MacKinnon (2007) has gone so far as to question the use of the term 'human' when speaking of women's human rights:

If women were human, would we be a cash crop shipped from Thailand in containers into New York's brothels? Would we be sexual and reproductive slaves? . . . Would our genitals be sliced out to 'cleanse' us (our body parts are dirt?), to control us, to mark us and define our cultures? . . . Would we be kept from learning to read and write? If women were human, would we have so little voice in public deliberations and in governments in the countries where we live? Would we be hidden behind veils and imprisoned in houses and stoned and shot for refusing? Would we be beaten nearly to death, and to death, by men with whom we were close? Would we be sexually molested in our families? Would we be raped in genocide to terrorize and eject and destroy our ethnic communities, and raped again in that undeclared war that goes on every day in every country in the world in what is called peacetime? If women

(Continued)

were human, would our violation be enjoyed by our violators? And, if we were human, when these things happened, would virtually nothing be done about it? (MacKinnon, 2007: 41)

How is it that 'human rights' has failed women in this way? One explanation relates to the meaning of what it is to have a 'right', which is invariably based on Dworkin's (1977) notion that a right serves as a 'trump' against the state. Yet, under this approach to rights, societies are made up of little more than autonomous individuals without any necessary connection to one another. One of the things that feminist scholarship has pressed for is the understanding of rights as also involving social relations and the critical importance of inclusion (Binion, 1995).

Another feminist criticism is that 'human rights' only focuses on the actions of the state – thereby ignoring the multitude of ways in which women suffer at the hands of private actors. One response to this is to point out that under international human rights law, states have a duty to protect against violations carried out by non-state actors. Why is it, then, that we continually associate human rights only when a state acts – but not when it fails to protect?

## 1.5 International Human Rights Law

International human rights law serves as the cornerstone of human rights. Without this law, human rights would be confined to the moral realm. With this law, there is both the hope and the possibility – but more importantly, the obligation – to make these ideals into reality.

Yet, notwithstanding what is now a wealth of international human rights treaties, there are several misunderstandings about them. The first is the idea that there is a sharp demarcation between domestic and international law. Furthermore, the former is invariably treated as being 'real' law, while the latter is almost never viewed in this same way. Yet, this represents a misreading of both domestic and international law. Rather, when a country becomes a state party to an international human rights treaty – that is, when the government of a country signs and then ratifies a particular human rights instrument – what this state is thereby doing is incorporating this particular component of international law

into its own domestic law. In that way, there is no distinction or separation between the two. Instead, the two become one and the same.

Consider the US accession to the Torture Convention. The UN General Assembly adopted the treaty without a vote on 10 December 1984 and it was then opened for signature on 4 February 1985. Article 27 specifies that the treaty will enter into force 30 days after the 20th state has signed and ratified the treaty, and this was achieved on 26 June 1987. The US signed the treaty on 18 April 1988. Under the US Constitution Article II, Section 2, in order for a treaty to become part of US law, the US Senate must give its 'advice and consent'. The US Senate did so on 21 October 1994. At this point this international human rights treaty now became a part of US domestic law, and what this also means is that any acts of torture that American security officials are a party to (Box 1.4) constitutes a violation of both domestic and international law.

### Box 1.4 Human Rights and the 'War on Terror'

Following the 11 September 2001 attacks on the US, the US government led a world-wide effort to eradicate international terrorism. In his influential book *The Lesser Evil: Political Ethics in an Age of Terror*, Michael Ignatieff (2004) argues that Western states might have to resort to 'evil' measures in order to protect themselves from international terrorism. He justified this tactic this way:

It is tempting to suppose that moral life can avoid this slope simply by avoiding evil means altogether. But no such angelic option may exist. Either we fight evil with evil or we succumb. So if we resort to the lesser evil, we should do so, first, in full awareness that evil is involved. Second, we should act under a demonstrable state of necessity. Third, we should choose evil means only as a last resort, having tried everything else. Finally, we must satisfy a fourth obligation: we must justify our actions publicly to our fellow citizens and submit to their judgment as to their correctness. (Ignatieff, 2004: 19)

And what is to prevent Western states from taking this 'evil' too far? Ignatieff's answer is that democracy itself will ensure this.

While it is impossible to determine whether this is true or not, it is important to note at least two things regarding the 'War on Terror'. The first is simply the number of states – more than a quarter of the countries in the world – that engaged in

(Continued)

this 'war' in one manner or another. Along with the US, the Open Society (2013) has documented the participation of 54 states, listed in alphabetical order and with Western democracies in bold:

Afghanistan, Albania, Algeria, **Australia, Austria**, Azerbaijan, **Belgium**, Bosnia-Herzegovina, **Canada**, Croatia, Cyprus, Czech Republic, **Denmark**, Djibouti, Egypt, Ethiopia, **Finland**, Gambia, Georgia, **Germany, Greece, Hong Kong, Iceland**, Indonesia, Iran, **Ireland, Italy**, Jordan, Kenya, Libya, **Lithuania**, Macedonia, Malawi, Malaysia, Mauritania, Morocco, Pakistan, **Poland, Portugal, Romania**, Saudi Arabia, Somalia, South Africa, **Spain**, Sri Lanka, **Sweden**, Syria, Thailand, **Turkey**, United Arab Emirates, **United Kingdom**, Uzbekistan, Yemen, and Zimbabwe.

The second thing to note is that although Ignatieff was of the belief that democratic governance would be enough to keep 'evil' from going outside of acceptable bounds, what also has to be recognized is that nearly every attempt was made to prevent the populations in these states from ever finding out the practices that its own state was engaged in, which is the antithesis of 'democracy'. A case in point would be the worldwide surveillance practices undertaken by the US, but hidden for years from the American public as well as the international community (Risen and Lichtblau, 2005).

Perhaps a more serious misconception about international human rights law concerns its scope and meaning. As a general if not universal rule, states operate under the belief that their obligations under international human rights law only apply to their actions within their own domestic realm, but that these same human rights obligations do not bind them when they act outside their own territorial borders. The starkest example of this approach to human rights was the policy of the Bush administration to house 'enemy combatants' at Guantanamo Bay, Cuba, rather than in federal prisons within the US. The rationale behind this policy was that the US government would not have the same human rights obligations towards these individuals if they were housed at Guantanamo Bay that they would if they were placed in detention somewhere within US national borders.

We strongly oppose a vision of human rights that provides two different sets of standards: one at home and another set of standards

when a country operates outside its own territorial borders. International human rights law – *all* international human rights law – gives rise to *both* domestic and to international obligations, or what we call extraterritorial obligations.

We will use the Torture Convention to clarify our point and ask this simple question: why would a country become a state party to the Torture Convention? The answer seems obvious. A country becomes a state party to prevent or eliminate torture. If a state were only interested in preventing torture within its own domestic borders – but it was completely indifferent to whether this odious practice was carried out any place else – why would it go through the trouble of signing and ratifying an international human rights instrument? Why not simply ban torture through domestic legislation and leave matters at that?

Our answer is that international human rights treaties mean something more than this. In becoming a state party to an international human rights treaty, each state party is committing itself not only to protect human rights within its own territorial borders, but each state is also committing itself to help work towards the elimination of violations of human rights no matter where these might take place. Although human rights treaties are, in essence, communal undertakings to eradicate harmful policies that violate human rights standards, this extraterritorial dimension is more pronounced in some international treaties than it is in others.

Some of the clearest language of extraterritorial intent can be found in the Torture Convention. Although a substantial portion of the treaty relates solely to domestic obligations – that is, the obligation to criminalize torture (Art. 4), the duty to investigate any alleged acts of torture that occur within the territorial borders of that state (Art. 12) – the extraterritorial goal of eliminating torture worldwide runs throughout the Convention, beginning with the Preamble, which concludes: ‘Desiring to make more effective the struggle against torture and other cruel, inhuman or degrading treatment or punishment throughout the world ...’

Other provisions underscore the importance that states avoid any form of complicity with respect to torture that occurs outside its national borders. For example, Article 3 (*nonrefoulement*), prohibits a state party from sending a person to another state where there are ‘substantial grounds’ for believing this individual would be in danger of being

tortured. Similarly, Article 5 demands that state parties ‘shall take such measures as may be necessary to establish its jurisdiction’ whenever torture is alleged. Thus, each of the state parties must exercise jurisdiction even if the torture had not taken place within its territory, and even if neither the victim nor the perpetrator is a national of that state. And what are the state parties obligated to do if an alleged torturer is found within its national borders? Article 7 provides that each state party must either prosecute any alleged torturer who is within its territory, or else extradite this individual to some other state that will do so.

Going even further, like other human rights treaties, the Torture Convention obligates state parties to provide an ‘*effective remedy*’ for victims of torture. Article 13 covers situations where a person is tortured within that country and it reads in part:

Each State Party shall ensure that any individual who alleges he has been subjected to torture in any territory under its jurisdiction has the right to complain to, and to have his case promptly and impartially examined by, its competent authorities.

Article 14(1) goes beyond this by imposing on the state parties an obligation to effectuate a remedy for torture victims no matter where the torture occurs (Hall, 2007). Unlike Article 13, Article 14(1) has no geographical restriction. It reads in part:

Each State Party shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible.

To be sure, as shown in Box 1.5, some states, including Canada, have interpreted Article 14 differently, demanding that the obligation to provide an effective remedy only applies if the torture occurs within the national borders of that state.

### Box 1.5 Concluding Observations

Much of international human rights law relies on self-enforcement. Thus, although the experts who serve in the various UN treaty bodies have no real power over the states,

what they can offer is their interpretation of the law. An example of this is has been the ongoing dialogue between the Committee Against Torture (CAT) and the Canadian government regarding Article 14. In its 2018 Concluding Observations to Canada's report, the CAT once again criticized not only the Supreme Court's interpretation that Canada's duty to provide an 'effective remedy' to torture victims was only applicable if the torture had taken place within the country's territorial borders, but also the government's failure to amend the State Immunity Act to achieve that result. Below is an excerpt from its 2018 Concluding Observation:

The Committee regrets that the State party has not taken any measures to review its legislation in order to ensure that all victims of torture are able to access remedy and obtain redress, wherever acts of torture have occurred and regardless of the nationality of the perpetrator or victim, as recommended by the Committee in its previous concluding observations . . . In this regard, the Committee regrets the State party's reluctance to amend the State Immunity Act with a view to providing an exception to State immunity for acts of torture committed outside Canada by foreign States or their representatives. (para. 40)

Finally, Article 21 provides that one state party can bring a complaint against one of the other state parties on the grounds that the latter is not meeting its obligations under the treaty – that is, it continues to practise torture. Unfortunately, notwithstanding the epidemic of torture that continues to exist, no state has ever filed a complaint under Article 21 against another state.

## 1.6 Introducing the Major Players

There are a multitude of institutions and actors involved in human rights. We close this chapter by briefly introducing some of the major players.

### 1.6.1 The United Nations Human Rights System

The Preamble of the United Nations Charter begins with this stirring challenge:

We the Peoples of the United Nations determined:

to save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind, and

to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small, and

to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained, and

to promote social progress and better standards of life in larger freedom, ...

Thus, the protection of human rights is one of the primary objectives of the UN and there are several bodies within the UN that address human rights issues, either directly or indirectly.

### **Commission on Human Rights/Human Rights Council**

Arguably, the principal UN organ dealing with human rights has been the UN Commission on Human Rights (also known as the Human Rights Commission), which was replaced with the Human Rights Council in 2006. The Commission's contribution to human rights cannot be overstated. It was, after all, the Human Rights Commission that did the vital and painstaking work of initiating the drafting of nearly every one of the international human rights treaties, including the International Bill of Rights.

However, the Commission did not become (and was not allowed to become) the Great Defender of human rights that people around the world wanted it to become, as evidenced by the tens of thousands of petitions it initially received each year from victims of human rights abuse. This changed, at least to a certain degree, starting in 1967 when the Commission was given some authority to discuss human rights violations with particular countries, and in 1970 it was authorized to investigate complaints (but not individual complaints) if there was evidence of 'a consistent pattern of gross and reliably attested violations of human rights and fundamental freedoms'. However, this process has been both time-consuming and anything but transparent.

Still, the Commission/Council has produced some important and innovative work – most notably in establishing human rights standards,

but also in subjecting human rights abusing states to some level of scrutiny and, at times, condemnation.

The UN Human Rights Council came into existence in 2006 as a replacement for the Commission. It is made of up 47 member states that are elected annually by majority vote. The rationale behind this change is that the Commission had become too politicized and that countries that were some of the worst violators of human rights were being elected to serve on the Commission. Perhaps the most novel aspect of the new Council is that it subjects each country to a universal periodic review, based on objective and reliable information. Of course, political considerations cannot be completely removed from the process.

### **UN High Commissioner for Human Rights**

This position was created following the 1993 World Conference on Human Rights in Vienna, with the idea of having a single office serving as a focal point for human rights activity in the UN system. To a certain extent this has been the case, although the power of the position has seemingly waxed and waned depending on the political skills but also the visibility of the High Commissioner.

### **UN Human Rights Treaty Bodies**

The UN has established treaty bodies to monitor and administer the major international human rights treaties. With the exception of the ICCPR (Political Covenant), which is monitored and implemented by the Human Rights Committee (not to be confused with the Human Rights Commission/Council), the names of the treaty body are virtually the same as the treaty itself. Thus, the Committee Against Torture is responsible for administering the Torture Convention. The Committee on Economic, Social and Cultural Rights is responsible for the Economic Covenant, and so on. Unlike the Human Rights Commission/Council, whose membership consists of state representatives, each of the treaty bodies is comprised of independent experts. The state parties to each treaty are obligated to file periodical reports with the appropriate treaty bodies. The treaty body then offers commentary on these reports in the form of 'Concluding Observations', which were discussed earlier in the context of Canada's interpretation of Article 14 of the Torture Convention and CAT's much different interpretation. Some of the most

important work of the treaty bodies has come in the form of ‘General Comments’, two examples of which can be found in Box 1.6.

### Box 1.6 General Comments: Extraterritorial Obligations and Human Rights

One of the major themes of this book is that states have human rights obligations both inside and outside their own national borders. To some, this will be self-evident. After all, why would it be illegal for a state to torture a political dissident within its own territorial boundaries – but not illegal to do so in some other state?

Yet, the ‘territorial’ interpretation of international human rights law has long been dominant and there are at least two main reasons for this. The first is that a host of international rights treaties make reference to ‘territory’ and/or ‘jurisdiction’. One such example of this is the Political Convention (Art. 2(1)):

Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its *territory* and subject to its *jurisdiction* the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.  
[emphasis added]

Thus, a literal interpretation of the ICCPR is that states only have obligations to individuals who are *both* within its territory *and* also within its jurisdiction.

Yet, even when there is no mention of either of these two terms, there has been a strong tendency to adopt a ‘territorial’ interpretation and in large part this can be explained by the international law principle that states are not to interfere in the ‘domestic’ affairs of other states. A good example of this is the Economic Convention. Article 2(1) reads:

Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, 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 by all appropriate means, including particularly the adoption of legislative measures

Although there is no mention of either ‘territory’ or ‘jurisdiction’ – and the state parties are obligated to undertake ‘international assistance and cooperation’ with

one another – for a long period of time the ICESCR has been given a ‘territorial’ interpretation.

This is beginning to change and the most authoritative means of achieving this is through the issuance of **General Comments**. The Committee on Economic, Social and Cultural Rights in its General Comment 24 (State Obligations under the International Covenant on Economic, Social and Cultural Rights, 10 August 2017) stated: ‘The extraterritorial obligation to respect requires States parties to refrain from interfering directly or indirectly with the enjoyment of the Covenant rights by persons outside their territory’ (para. 29).

Similarly, the Human Rights Committee in its General Comment 36 (Right to Life) interpreted the term ‘jurisdiction’ in functional terms, referring to the ability of one state to affect the ‘enjoyment’ of the right to life of a person living in another state.

Finally, several treaties have an optional protocol that allows for individual complaints to be filed – but only when a state has agreed to be subject to this procedure. Box 1.7 provides an analysis of an intriguing, but ultimately unsuccessful, attempt to employ the individual complaint procedure.

### Box 1.7 The CRC Individual Complaint Procedure: The Sacchi Petition

Few people – especially young people – will need to be convinced that the most important, but also the most intractable, human rights issue facing all of mankind is climate change and the multitude of social, political, and economic dislocations that will follow from this. An intriguing attempt to employ the individual complaint procedure as a way of addressing climate change was the Sacchi petition filed with the Committee on the Rights of the Child (CRC) (UN Committee on the Rights of the Child, 2021).

The petitioners in this case were 16 children from Argentina, Brazil, France, Germany, and Turkey who claimed that each of these countries were not making sufficient cuts in terms of the production of greenhouse gas (GHG) emissions, and as a result were violating their human rights. Nearly all cases filed under the optional protocol procedure involve an individual filing a case against his/her own government. Thus, this aspect of the case is itself unusual.

(Continued)

Moreover, the petitioners were not only bringing a case against their own government – that is, German petitioners filing a case against Germany – but they also claimed that because GHG emissions do not respect national borders, and because each of these five countries produces a substantial amount of GHG emissions, they were not only within the jurisdiction of their home state, but within the ‘jurisdiction’ of each of these other states as well. Using the same approach as that taken by the Inter-American Court of Human Rights (IACtHR) in its 2017 Advisory Opinion, the CRC ruled that if an individual is harmed by the actions or omissions of some other state, it was thereby within the jurisdiction of that state.

The CRC ultimately dismissed the petition on the grounds that the claimants had not exhausted domestic remedies within their respective states. The children had sought to address this issue in their initial filings by pointing to the exigencies of climate change, while also documenting the considerable length of time that litigation so often took in each of these countries. The Committee was not moved by this argument. Because of this, the children won in terms of substance, but lost in terms of procedure.

## Security Council

The Security Council has the primary responsibility for maintaining international peace and security. It is the only UN body that can authorize the use of force, and in that way it can be instrumental in the protection of human rights. But the Council has often been accused of shirking this duty, whether it is the non-response to the Rwandan genocide in 1994, or the manner in which gross and systematic human rights violations have continued in the Darfur region of the Sudan for decades. One of the biggest hurdles in getting the Security Council to act is the veto power of its five permanent members. In large part, this helps explain the non-involvement of the Security Council in the wars in both Syria and Ukraine that started in 2011 and 2022 respectively.

## Secretary-General

The Secretary-General of the UN is the head of the Secretariat (one of the principal organs of the organization) and acts as the leader and spokesperson of the UN. Article 97 of the UN Charter defines the Secretary-General as the ‘chief administrative officer’, but the role of the Secretary-General goes far beyond this, particularly the

Secretary-General's ability to place the world spotlight on the world's troubled areas.

### **General Assembly**

The General Assembly's competence is unlimited and under Article 13 it can 'initiate studies and make recommendations' for the purpose of 'Assisting in the realization of human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion'. The most direct role that the General Assembly has played in the protection of human rights is that a number of declarations passed by the General Assembly have eventually become binding international human rights treaties.

### **International Court of Justice (ICJ)**

The International Court of Justice (ICJ) is the principal judicial body of the UN and is housed in The Hague, Netherlands. Not to be confused with the International Criminal Court (ICC), the ICJ attempts to settle legal disputes submitted to it by member states and it gives advisory opinions on legal questions submitted by authorized international organs and the General Assembly. We will be referencing several ICJ opinions in various places in this book. Unlike domestic courts, there is no hierarchy of international tribunals. However, the ICJ, which is the successor of the Permanent Court of International Justice under the League of Nations, is certainly the most visible and prestigious international judicial body.

### **International Criminal Court (ICC)**

The ICC is a permanent tribunal established in 2002 by the Rome Statute of the International Criminal Court. It is also based in The Hague. The ICC prosecutes individuals while the ICJ deals with state-state disputes. The ICC's authority is derived from Article 5 of the Rome Statute, and it grants jurisdiction over four types of crimes: genocide, crimes against humanity, war crimes, and crimes of aggression.

### **Regional and Country-Specific International Tribunals**

Prior to the establishment of the ICC, the UN created two regional bodies to prosecute war criminals in two particular conflicts: the International Criminal Tribunal for the former Yugoslavia (ICTY), which was also housed in The Hague, and the International Criminal Tribunal for Rwanda (ICTR), which was based in Arusha, Tanzania. In addition to

this, the UN helped establish the so-called hybrid tribunal in Sierra Leone – hybrid because it had both international and domestic (Sierra Leone) judges. And in early 2009 a UN-backed court – the Extraordinary Chambers in the Courts of Cambodia – brought its first criminal proceedings against Khmer Rouge leaders who had carried out genocide in that country more than three decades before.

## 1.6.2 Regional Actors

Some of the most important human rights work has been done under regional human rights instruments and by various regional actors.

### **African Charter on Human and People's Rights**

Also known as the Banjul Charter, the African Charter was created by the Organization of African Unity (since replaced by the African Union). In a 1979 Assembly of Heads of State and Government, the resolution was adopted for a committee to draft a continent-wide human rights instrument like ones that existed in Europe and the Americas. In 1986 the African Commission on Human and Peoples' Rights was created as a judicial body to enforce the provisions of the Banjul Charter. The African Court's jurisprudence has been quite progressive and impactful, especially on economic and social rights, although it has struggled on getting African governments to implement its rulings.

### **American Convention on Human Rights**

The American Convention was adopted in San José, Costa Rica in 1969 and came into force in 1978. The purpose of the Convention is 'to consolidate in this hemisphere, within the framework of democratic institutions, a system of personal liberty and social justice based on respect for the essential rights of man'. The American Convention is implemented at the first level by the Inter-American Commission on Human Rights, which then determines what cases are to be brought before the IACtHR.

### **European Convention on Human Rights (ECHR)**

The European Convention on Human Rights (ECHR) was adopted under the aegis of the Council of Europe in 1950 to protect human rights and fundamental freedoms. Notably, the Convention established the

European Court of Human Rights (ECtHR), which many consider to be the single most important human rights adjudicatory body in the world.

### 1.6.3 Non-governmental Organizations

Finally, some of the most important players are the NGOs that push and prod states, the UN, international financial institutions, the media, and so on, in the cause of human rights. There are literally thousands of NGOs, including Amnesty International, Human Rights Watch, Doctors Without Borders, Oxfam, and so forth. Box 1.8 provides a brief introduction to the advocacy work of Inclusive Development International (IDI), which has developed a unique and highly effective way of fighting against harmful projects.

#### Box 1.8 Inclusive Development International

Inclusive Development International is a civil society groups organization located in Asheville, North Carolina. What is so unique about the work that IDI does is that it (literally) ‘follows the money’. Nearly all of IDI’s work is with dispossessed communities in the Global South that are victims of land grabbing. IDI develops for these affected communities a roadmap of the multitude of entities – including insurance companies, commercial banks, and in many instances the World Bank itself through its International Finance Corporation – that are financing harmful projects. This information then allows the local community to enable entities that do not wish to be associated with such projects to withdraw their financial support.

### Conclusion

In this chapter we examined what human rights are and whether they are as universal as they claim to be. We took up the question of whether human rights are a Western concept that might have little meaning to the rest of the world and introduced various players in the United Nations that address human rights issues.

## GLOSSARY

**Concluding Observations:** When a country ratifies an international human rights treaty it is required to report to the treaty body that monitors that particular convention. The Concluding Observations are the Committee's response to this report, often establishing a useful dialogue between the UN treaty body and that state.

**Effective remedy:** All human rights treaties promise victims an 'effective remedy'. However, enforcement of international human rights law remains a significant problem, often leading to a kind of 'double victimization'. The first victimization occurs in the violations itself; the second in the denial of any form of effective remedy.

**Extraterritorial obligations:** These are human rights obligations that states have beyond their own national borders.

**General Comments:** General Comments are issued by UN treaty bodies as a way of providing their interpretation of the substance of the law.

**Global inequality:** Human rights historian Samuel Moyn has levelled the charge that human rights has largely ignored the growing levels of inequality – both within states and between states.

**Nonrefoulement:** States are prohibited from sending an individual to a country where their life or wellbeing would be threatened. One question is when (and where) this obligation arises.

## DISCUSSION QUESTIONS

- 1.1 Peruse the list of human rights earlier in the chapter. Do you think there are too many rights – or not enough? What about a human right to a safe and healthy environment? Or a human right to choose one's gender identity?
- 1.2 How 'real' would you say human rights would be to most people on the planet? What measures should be taken to close the gap between formal international human rights law and those who possess such rights?
- 1.3 Do you see human rights more as theoretical rights – or as legal rights that can (and must be) enforced? If the former, how would you propose to make human rights less theoretical and more real?

## RELATED READINGS

- Hunt, Lynn. 2008. *Inventing Human Rights: A History*. New York: W.W. Norton & Company. Hunt's fascinating thesis is that literature from the eighteenth and nineteenth centuries helped to develop a societal-wide sense of empathy with the 'other', which in turn helped give rise to what we have come to know as human rights.
- Moyn, Samuel. 2012. *The Last Utopia: Human Rights in History*. Cambridge, MA: Belknap Press of Harvard University Press. Moyn offers a critical discussion about the origin and nature of the concept of human rights.
- Ibhawoh, Bonny. 2007. *Imperialism and Human Rights: Colonial Discourses of Rights and Liberties in African History*. Albany, NY: SUNY Press. Ibhawoh shows that human rights was not merely a project developed by the Global North that was then handed down to the Global South. Instead, his research shows that this was more in the nature of a shared dialogue. Moreover, the human rights principles that emerged served as an important component in the various decolonization efforts.

## RELATED WEBSITES AND PODCASTS

- United Nations – Human Rights, [www.un.org/en/global-issues/human-rights](http://www.un.org/en/global-issues/human-rights). The website of the UN provides an overview of their human rights instruments.
- Amnesty International, [www.amnesty.org/](http://www.amnesty.org/) and Human Rights Watch, [www.hrw.org/](http://www.hrw.org/). Two of the largest non-governmental global human rights organizations, issuing regular reports about the situation of human rights around the globe.
- Africa Rights Talk, [www.chr.up.ac.za/podcast](http://www.chr.up.ac.za/podcast). Podcast series by the Centre for Human Rights, exploring human rights issues in Africa.

## RELATED FILMS

- *Zone of Interest* (Jonathan Glazer, 2023). This feature film is centred on Rudolph Höss and his wife Hedwig, an ambitious German couple raising a young family during the Second World War. Höss is the Commandant of the Auschwitz concentration camp, the horrors of which are never seen – but omnipresent.

- *Moolade* (Ousmane Sembene, 2004). As explained in this film, ‘moolade’ means a safe haven, and a small group of women and their daughters are seeking such a place from their fellow villagers who want to subject these young girls to the purification ritual of female genital mutilation.
- *The Pianist* (Roman Polanski, 2002). This is the story of Wladyslaw Szpilman, a brilliant Jewish musician who goes from a world of concert halls and acclaim to the confines of the Warsaw Ghetto and then the destitution and ruins of war-ravaged Europe. Szpilman is played brilliantly by Adrien Brody, who was awarded the Oscar for best actor. *The Pianist* is able to show the horrors of the Holocaust by focusing on the suffering of one person.
- *Schindler’s List* (Steven Spielberg, 1993). This Academy Award-winning film remains unmatched in terms of its ability to convey the horror of the Holocaust. The film focuses on Oskar Schindler, who at the beginning of the film is a man with extensive business dealings with the Nazi regime. Schindler slowly becomes transformed and ends up risking his life and fortune to save the lives of his Jewish workers.



**Chapter**

**2**

# Responsibilities and Obligations

**This chapter examines** the obligations and responsibilities for protecting human rights and it does so by focusing mainly on ways in which states and other entities contribute to the violation of human rights standards. One of the major questions addressed here is whether the human rights obligations of states end at their territorial borders, or whether they also have extraterritorial obligations.

In Chapter 1, we examined the notion of rights and in the present chapter we explore the flip side to this, namely, the responsibility or obligation to protect and ensure human rights. The approach that is usually taken is to employ Shue's (2020) respect/protect/fulfil framework. The obligation to *respect* means that a state is not to violate human rights standards itself. The obligation to *protect* means that the state also has a duty to ensure that private actors do not violate human rights. Finally, the obligation to *fulfil* means that the state must at times take particular measures – that is, provide food and shelter to those without; establish an independent judiciary to protect other rights such as freedom of speech or the right to a fair trial; and so on – to ensure that human rights standards are met.

While there is much to commend the respect/protect/fulfil approach, we believe that all too often it has resulted in little more than a cursory examination of states' human rights obligations. To use an example, a state that does not engage in torture would thereby 'respect' this right. We argue that this should only be an important first step in assessing whether a state is meeting its responsibilities under the Torture Convention (Jackson, 2016). Among the questions that could also be asked is whether this state is in any way complicit with other states that do carry out torture. Does this state provide an 'effective remedy' to victims of torture? Does it attempt to 'prosecute or extradite' torturers who are within its national borders, and does it press other state parties to do likewise? Finally, does it provide sovereign immunity protection to states that torture?

Answers to these types of questions would provide a much deeper understanding of the degree to which a state is committed to human rights in general, and in this instance, to the obligations set forth in the Torture Convention in particular. Unfortunately, there is virtually no data to draw upon regarding such state practices, and for this reason the empirical chapters in this book are in large part limited to the ways in which human rights violations have been measured. Still, in this chapter we examine some of the ways in which states are responsible for helping to contribute to violations of human rights standards.

Section 2.1 addresses these issues in different contexts. One involves the prohibition against torture. In addition to not carrying out torture itself, what other responsibilities do states have under international human rights law – and what responsibilities should they have? We then

examine the right to life and look at the obligations of states in terms of both civil and political rights as well as economic, social, and cultural rights. Finally, we take up the issue of climate change, where all states have an obligation – individually as well as collectively – to significantly reduce greenhouse gas (GHG) emissions. However, the issue we focus on is how we should measure what constitutes a state's contribution to climate change. Is it simply GHG emissions produced within the state's territorial borders – or is it imperative to take a much broader perspective?

Section 2.2 looks at situations of unquestionable human rights violation, but where the victims are denied a remedy because they are not within the harming state's 'jurisdiction'. This has been a particularly contentious issue in Europe because the European Court of Human Rights (ECtHR) has interpreted the European Convention in such a way that, absent 'exceptional circumstances', its protections do not apply when the contracting states act outside of Europe.

Finally, Section 2.3 examines the state/non-state divide and it does so within the context of human rights violations carried out by multinational corporations (MNCs). One issue is whether a state's obligation to protect against human rights violations by private actors (including MNCs) extends outside its own national borders. In particular, does the 'home' state have a legal responsibility to regulate the egregious practices of one of its own MNCs operating in some other country in the absence of any meaningful regulation by the 'host' state? Going beyond this, we address the question of whether international human rights law should also apply directly to MNCs.

## 2.1 A Broader Understanding of States' Human Rights Obligations

The Vienna Convention on the Law of Treaties is a treaty intended to instruct states on how to interpret international conventions. Article 31(1) (*General rule of interpretation*) provides: 'A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its

object and purpose’ (see Box 2.1). As should be evident, the *object* and the *purpose* of all human treaties is to prevent human rights violations from occurring. From this, the appropriate standard should be the extent to which a state’s actions (as well as its inactions) promote this end – but also the extent to which they do not.

### Box 2.1 *Soering v. United Kingdom* (1989)

*Soering v. United Kingdom* (1989) is generally regarded as one of the landmark holdings of the ECtHR. Jens Soering is a German national who was accused of committing a double murder in the state of Virginia, but who then fled to the United Kingdom (UK) where he was taken into custody. Authorities in Virginia sought Soering’s return and the question for the ECtHR was whether extraditing Soering, with the likely prospect that he would eventually be placed on death row under conditions the Court ruled amounted to torture and degrading treatment, would constitute a violation of Article 3 of the European Convention.

In terms of our discussion of responsibility, the position of the British government is particularly interesting. The United Kingdom argued that after an extradition was carried out, it would not bear any responsibility for the manner in which Jens Soering might subsequently be treated because at that point any harm done to him would be carried out on foreign (US) soil and at the hands of non-British actors. The ECtHR flatly rejected this position. It held that extradition under circumstances where torture and/or degrading treatment might ensue would violate the ‘spirit and the intention’ of Article 3 specifically, and the European Convention more broadly.

## 2.1.1 The Prohibition Against Torture

In the previous chapter we spent some time on the prohibition against torture and this is where we will begin the present analysis. The object and purpose of the Torture Convention is to prevent torture from taking place, and to achieve this, the Convention requires, among other things, that all states: (1) criminalize torture; (2) investigate allegations of torture; (3) refrain from extraditing or otherwise expelling an individual to a country where he might be subjected to torture; (4) prosecute those who either directed or carried out torture – or else extradite this individual to another state that will do so; and finally, (5) provide an ‘effective remedy’ to victims of torture.

### If a State Tortures in Some Other State?

Article 2(1) of the Convention provides: 'Each State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction.' Because the treaty references both 'territory' and 'jurisdiction', an initial question might be whether a state's obligations only apply to torture that is carried out within its domestic realm – or whether these responsibilities would also extend beyond its own national borders. Box 2.2 examines the *Lopez Burgos* case (1981), where Uruguay had asserted the claim that its human rights obligations, including the prohibition against torture, did not apply when Uruguayan state agents tortured a political dissident in another country (Argentina). The Human Rights Committee soundly rejected this argument.

#### Box 2.2 The *Lopez Burgos* Case (1981)

The *Lopez Burgos* case (1981) arose out of the 'dirty wars' in the various Southern Cone countries in the late 1970s and early 1980s. The applicant, a Uruguayan national, claimed that Uruguayan agents had kidnapped her husband and had secretly detained him in Argentina. The Uruguay government denied these allegations, but it also held that the communication should be dismissed as being inadmissible because the ICCPR (Political Convention) does not apply to actions taken by a state outside its own territorial jurisdiction. Article 2 of the Political Covenant provides: 'Each State Party . . . undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant . . .' The argument of the Uruguayan government was that while in Argentina, Mr Lopez Burgos was not within Uruguayan territory, and therefore the Convention's provisions did not apply there, at least with respect to Uruguay.

The Human Rights Committee soundly rejected this position. It held that this language merely imposes a mandate on the state parties to uphold the provisions of the Covenant within its own territory, but that it says nothing that would permit states to perpetrate violations in the territory of another state. The Committee went on to hold that: 'it would be unconscionable to so interpret the responsibility under Article 2 of the Covenant to permit a State party to perpetrate violations of the Covenant on the territory of another State, which violations it could not perpetrate on its own territory' (para. 12.3).

### Where Does a State's Nonrefoulement Obligation Begin?

Article 3 of the Torture Convention provides: 'No State Party shall expel, return ("refouler") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.' One way in which states have sought to reduce their obligations under the Convention is to argue that their nonrefoulement obligations only become operative *after* a refugee gains access to its territory – but not before then. This was the central issue in the US Supreme Court case of *Sale v. Haitian Centers Council* (1993), where the Court ruled that the Coast Guard's interdiction programme, which halted makeshift rafts carrying Haitian refugees and then took those individuals back to that country, was lawful (see Box 2.3).

#### Box 2.3 *Sale v. Haitian Centers Council* (1993)

The issue in this case decided by the US Supreme Court was whether the Coast Guard's interdiction programme aimed squarely at Haitian refugees was consistent with both domestic US and international law. In terms of the former, the governing federal statute reads: 'The Attorney General shall not deport or return any alien . . . to a country if the Attorney General determines that such alien's life or freedom would be threatened in such country . . .'

Previously, the Attorney General was authorized 'to withhold deportation of any alien . . . within the United States in which in his opinion the alien would be subject to persecution'. However, subsequent to this, a number of significant changes in the law were made. One was to eliminate the requirement that in order to receive protection the alien had to be physically present in the US. The second change, brought about by the passage of the 1980 Refugee Act, was that the Attorney General was not only barred from 'deporting' aliens but also from 'returning' an alien whose life or freedom would be threatened. Finally, the prohibition was now made mandatory, thus eliminating the Attorney General's discretion over such decisions.

In terms of international law, Article 33(1) of the Refugee Convention (which the US had ratified in 1968) provides:

Prohibition of expulsion or return ('refoulement')

1. No Contracting State shall expel or return ('refouler') a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.

The Supreme Court ruled in favour of the US government, mainly on the meaning of the term 'return'. According to the majority, when the US Coast Guard intercepted vessels on the high seas and then took the passengers back to Haiti, it was not effectuating a 'return' – or at least not a return in a legal sense. According to the Court, a 'return' is a defensive act of resistance and a means to 'repulse' rather than to 'reinstate'. Moreover, a 'return' can only be effectuated at a state's territorial borders – but not before then.

*Sale* was an 8–1 decision, with the lone dissent being filed by Justice Blackmun. In his view, the language of Article 33(1) is unambiguous and settles the matter completely. 'Vulnerable refugees shall not be returned. The language is clear, and the command straightforward: that should be the end of the inquiry.' In Blackmun's view, the majority not only ignored the obvious 'object and purpose' of the Refugee Convention – which is to protect refugees or those who claim refugee status – but the 'ordinary meaning' of the term 'return'. In his view, a 'return' was not dependent on whether an individual had arrived at their destination or not. And what must have informed his opinion was that the Coast Guard was going to great lengths to prevent this from ever taking place.

Although there was a great deal of criticism of the Supreme Court's ruling, much of it coming from European states, within a short period of time many of these same countries began enforcing their own immigration laws far from their national borders as a way of preventing refugees from being able to access the asylum system in these states (Gammeltoft-Hansen, 2011). One of the challenges to this *extraterritorial immigration enforcement* policy was raised in *Hirsi Jamaa and Others v. Italy* (2012), where the ECtHR ruled that *refugees* whose voyage was halted by Italian authorities and whose passengers were placed onboard the intercepting ships and returned were within the 'jurisdiction' of Italy, and thus protected by the European Convention.

### People on the Move

According to the United Nations High Commissioner for Refugees (UNHCR), at the end of 2023 there were more than 117 million people worldwide who were forcibly displaced from their homes – or 1 in every 69 individuals on this planet. As shown in Figure 2.1, these numbers have increased substantially since 2010. Of this number, 43.4 million were refugees – individuals who were outside their country of origin

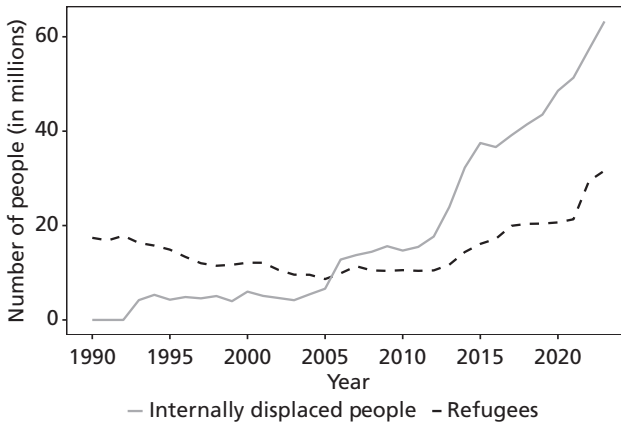


Figure 2.1  
**Yearly number of international refugees and internally displaced people.**

Source: UNHCR (2025).

due to persecution, compared with 68.3 million who were internally displaced persons: individuals in a refugee-like situation but who have not left their country of origin. The largest proportion were from Afghanistan and Syria (6.4 million each), followed by Venezuela (6.1 million) and Ukraine (6.0 million). There is a common (mis)perception that Western democracies have been hosting the lion's share of the world's refugees. While this might be true in the case of refugees from the war in Ukraine, the UNHCR has found that 75 per cent of the world's refugees are hosted in low to moderate income countries and 69 per cent in neighbouring states (UNHCR, 2024).

Under international law, there is no 'right' to be granted refugee status. Rather, all those seeking refugee protection have a right against refoulement, spelled out in Article 33 of the 1951 Refugee Convention: 'No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.'

In response, many European states have undertaken less direct measures to prevent refugee flows from arriving at their borders. Most notably, Italy has essentially reconstituted the Libyan Coast Guard as a way of preventing would-be refugees from being able to leave that

country altogether. A case that is pending (as of May 2025) before the ECtHR is whether this form of 'contactless control' still gives rise to the exercise of 'jurisdiction' over the affected individuals (see Box 2.4).

### Box 2.4 The Right to Rescue at Sea?

One of the defining phenomena of our age are the attempts by refugees to cross the Mediterranean Sea to gain access to Europe, but at a terribly high cost in terms of human life. The UN has estimated that 26,000 migrants have died or gone missing in the Mediterranean between 2014 and 2023 (United Nations News, 2023). At the same time, according to the Office of the High Commissioner for Human Rights, the European Union (EU) and its Member States have significantly reduced their maritime search and rescue (SAR) operations, while the Libyan Coast Guard (LCG) has increased its role in intercepting migrants and returning them to Libya.

In January 2021, the Human Rights Committee determined that Italy and Malta (*AS and Others v. Italy*; *AS and Others v. Malta*) had both failed to protect the right to life of 200 migrants who perished in a shipwreck in 2013. The complainants were three survivors who brought the action on behalf of themselves and those who perished. An individual on board the distressed vessel had contacted Italian authorities; however, no rescue units were dispatched, although an Italian ship was in the vicinity. At that time the ship was within Malta's designated SAR zone, yet there was no assistance provided by this state either.

### Indirect Involvement in Torture: Extraordinary Rendition

One response to the 'War on Terror' was a programme known as extraordinary rendition, which nearly always involved the kidnapping of a suspected terrorist in one country, who would then be transferred to any number of other states, before being subjected to torture in countries such as Egypt and Syria. The Open Society (2013) estimates that 54 countries were engaged in the extraordinary rendition programme in one manner or another. The moving force behind all of this was the US, although every effort was made to offshore as much of this as possible in an effort to prevent the application of US legal protections – international and domestic alike (Center for Human Rights and Global Justice, 2004).

This raises the question of the legal responsibility of states where torture was not carried out, but where the country had some form

of connection to the extraordinary rendition programme, whether by allowing 'torture flights' over its airspace and perhaps even allowing refuelling for these flights to take place within its territory, to situations where a country provided intelligence that was then used during torture sessions, and finally, the responsibility of the US (and to a lesser extent the UK), which masterminded virtually the entire programme. One of the few cases where much is known about the extraordinary rendition programme is discussed in Box 2.5, contrasting the response of the American judiciary with that of the ECtHR.

### **Box 2.5 El-Masri: The US and European Judiciaries Compared**

Khaled El-Masri is a German citizen of Lebanese descent. On New Year's Eve 2003 he was seized by Macedonian authorities while attempting to cross the border between Serbia and Macedonia. On 23 January 2004, several men entered his hotel prison and forced him to sign a statement that he had not been mistreated. He was then blindfolded and driven to an airstrip approximately an hour away. Upon his arrival he was beaten, stripped of his clothing, and sodomized with a foreign object. When his captors removed his blindfold, he saw a group of men dressed in black wearing black ski masks. El-Masri contends that these were members of the CIA's 'black rendition' team. He alleges that these men dressed him in a diaper, tracksuit, and earmuffs, and dragged him, semi-conscious, to an airplane.

After he landed, he was placed in a cold cell that he maintains was the infamous 'Salt Pit' in Kabul, Afghanistan, where he spent the next several months and was repeatedly tortured. El-Masri remained imprisoned until 28 May 2004, at which time he was flown in a private jet from Kabul to Albania, where he was deposited by his captors on the side of an abandoned road. With the assistance of Albanian authorities, El-Masri eventually made his way back home to Germany, only to find that his wife and children, believing that he had abandoned them, had returned to Lebanon.

El-Masri filed a suit in federal (US) district court against the Director of the CIA and certain unknown agents of the CIA. His complaint was dismissed in district court and this ruling was upheld on appeal on the basis of the 'state secrets' doctrine, which is that any trial would expose sensitive government information. El-Masri's argument, which was rejected by both courts, was that with all the publicity that had been given to the extraordinary rendition programme after it had been exposed, there was no longer any 'secret' for the judiciary to maintain.

In addition to his (unsuccessful) suit in US court, Khaled El-Masri brought a case against Macedonia, which was decided by the ECtHR. The Court not only found that Macedonia was responsible for human rights violations carried out by Macedonian agents, but for those carried out by the CIA as well.

The question is – or at least should be – whether the actions of these ‘assisting’ states were consistent with the object and purpose of the Torture Convention. In answering this question make note of Article 2 (2) of the Convention, which provides that the prohibition against torture is absolute: ‘No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture.’ Thus, have all 54 states violated international law? If so, should there be different levels of state responsibility? Or, instead, are these merely the kinds of ‘evil’ policies Michael Ignatieff (see Chapter 1) suggested would be ‘acceptable’ in fighting international terrorism?

### **The Pinochet Principle and its Aftermath**

One of the signature achievements in human rights law was the international effort to extradite Augusto Pinochet, the former Chilean dictator, from the UK to Spain in order to face prosecution for the torture carried out against both Chilean and foreign nationals under his brutal reign. In a landmark decision (*Regina v. Bartle and Commissioner of Police* 1999), the British High Court ruled that Pinochet could be extradited – establishing what has been termed the ‘*Pinochet Principle*’. However, subsequent to this ruling, the British Home Secretary allowed the ageing Pinochet to return home based on humanitarian considerations.

Although the Pinochet case represents one of the highwater marks in terms of the protection of human rights, subsequent practice has been something altogether different. Rather than opening the floodgates to both domestic and international proceedings against those who ordered or carried out torture, only isolated prosecutions have followed since then. Note, however, that the Torture Convention demands that all state parties either prosecute an alleged torturer who is within a state’s territorial borders, or if not, the state must extradite this person to another state where they will be put on trial.

The International Court of Justice (ICJ) placed an enormous obstacle in the way of domestic prosecutions in its ruling in the *Democratic Republic of the Congo (DRC) v. Belgium* (2002) case. The issue in this case was a dispute over an international arrest warrant issued on 11 April 2000 by a Belgian examining judge against the acting Congolese Minister for Foreign Affairs seeking his detention and subsequent extradition to Belgium for alleged crimes constituting ‘grave violations of international humanitarian law’. The ICJ ruled in favour of the DRC on the basis that customary international law provides immunity to heads of states (and their ministers). The Court noted two other things. One is that this immunity would end if and when the minister leaves office. The second is that the immunity only applies to prosecutions in domestic courts in other countries, but not international tribunals, such as the International Criminal Court (ICC).

The ICJ’s ruling in *Belgium v. Senegal* (2012) addressed a different issue, namely, whether Belgium had any legal standing to file a claim against Senegal due to the latter’s failure to institute proceedings against former Chad dictator Hissène Habré who had been given refugee status in that country some years before. Senegal’s response was that Belgium could not establish that any Belgian citizen had been harmed. The ICJ rejected this argument. It ruled that as a state party to the Torture Convention, Belgium had every interest in eliminating the practice of torture no matter where it occurred and no matter whether the victims were Belgian or not. According to the Court:

As stated in its Preamble, the object and purpose of the Convention is to ‘make more effective the struggle against torture . . . throughout the world’. The States parties to the Convention have a common interest to ensure, in view of their shared values, that acts of torture are prevented and that, if they occur, their authors do not enjoy impunity. The obligations of a State party to conduct a preliminary inquiry into the facts and to submit the case to its competent authorities for prosecution are triggered by the presence of the alleged offender in its territory, regardless of the nationality of the offender or the victims, or of the place where the alleged offences occurred. All the other States parties have a common interest in compliance with these obligations by the State in whose territory the alleged

offender is present. That common interest implies that the obligations in question are owed by any State party to all the other States parties to the Convention. (para. 68)

### Complicity and Sovereign Immunity Protection

The final issue we look at regarding a state's responsibility under the Torture Convention (in addition to not engaging in torture itself) is what, if any, responsibility should be assigned to a state that provides sovereign immunity protection to another country that engages in torture. In the previous chapter (Box 1.5), we analysed the disagreement between the CAT, on the one hand, and the Canadian government in terms of the obligations of the state parties under the Torture Convention to provide an 'effective remedy'.

In *Saudi Arabia v. Nelson* (1993), the US Supreme Court addressed a similar question whether a state that engages in torture still enjoys *sovereign immunity protection* under the governing federal statute: Foreign Sovereign Immunity Act (FSIA). The FSIA is structured so that foreign states receive sovereign immunity protection in US courts, subject to a short list of exceptions. One of these exceptions is when a foreign state engages in a 'commercial activity' within the US. However, the Supreme Court concluded that the Saudi government's recruitment of Scott Nelson in Virginia was not a 'commercial activity' and it upheld the dismissal of his case. One thing that should be pointed out is that the Court did not spend any time analysing the obligations the US undertook when it became a state party to the Convention, nor did it attempt to reconcile how a *jus cogens* norm such as the prohibition against torture could be trumped by a domestic sovereign immunity statute.

Finally, as discussed further in Box 2.6, one of the more intriguing cases involving foreign sovereign immunity is *Al-Adsani v. United Kingdom*, decided by the Grand Chamber of the ECtHR by the narrowest of margins (9–8).

#### Box 2.6 *Al-Adsani v. United Kingdom* (2001): The Case That Could Have Changed Human Rights

*Al-Adsani v. United Kingdom* is a 2001 decision of the ECtHR. The applicant, Sulaiman Al-Adsani, is a dual national of Kuwait and the UK and a former fighter pilot who was

(Continued)

living in Great Britain when the first Persian Gulf War was fought. Al-Adsani travelled to Kuwait to fight against the Iraqi invasion of that country, but while in Kuwait he became involved in some nasty business with the country's royal family and was tortured on two separate occasions, suffering both physical and mental harm. What aggravated his condition were the repeated death threats that he received after his return to the UK, warning him not to take any action or to give publicity to his situation. In August 1992, Al-Adsani filed a civil action in British courts for compensation against the Sheikh of Kuwait and the State of Kuwait.

The British State Immunity Act of 1978 (Section 1) reads: 'A State is immune from the jurisdiction of the court of the United Kingdom except as provided in the following provisions of the Act'. Section 5 provides: 'A State is not immune as respects proceedings in respect of (a) death or personal injury . . . caused by an act or omission in the United Kingdom.' The court held that the grant of sovereign immunity is unambiguous in the sense that Kuwait had not brought about a death or injury in the UK and it dismissed his complaint. The result was upheld on appeal. In November 1996, Al-Adsani sought to appeal to the House of Lords, but his claim was refused leave to appeal.

Rather than allowing the matter to drop, Al-Adsani proceeded to file a case before the ECtHR – only his claim now was not against Kuwait but against the UK. The basis for his suit was that in providing sovereign immunity protection to Kuwait, the UK had violated various provisions of the European Convention, including Article 3, which prohibits torture. The case was moved to the ECtHR's Grand Chamber, and in a 9–8 decision the Court ruled in favour of the UK.

The Court held that Article 3 has only a 'limited' extraterritorial application. Yet, it is not even clear that this case presents an extraterritorial claim. Certainly, Al-Adsani's physical torture had taken place outside the territorial boundaries of the UK. However, the decision to grant sovereign immunity was made by the British Parliament and it was this domestic law that was being applied to a British subject in a British courtroom. Still, the Court concluded that the UK did not have any 'causal connection' with the torture, and that under such circumstances 'it cannot be said that the High Contracting Party was under a duty to provide a civil remedy to the applicant in respect of torture allegedly carried out by the Kuwaiti authorities'.

The *Al-Adsani* case elicited several noteworthy concurring and dissenting opinions. The one we will focus on is the dissenting opinion by Judge Ferrari Bravo, which opens with this line: 'What a pity!' Ferrari Bravo took the position that the *Al-Adsani* case is merely the logical extension of the House of Lords' judgment in the Pinochet case. Still, Judge Ferrari Bravo closes on a somewhat hopeful note: 'There will be other

such cases, but the Court has unfortunately missed a very good opportunity to deliver a courageous judgment.'

Although the result in *Al-Adsani* might well be seen as a 'pity' or a lost opportunity to render a 'courageous judgment', the importance of the case can better be seen if one imagines the 9–8 vote had gone in the opposite direction and the UK was found to be in violation of the European Convention by granting Kuwait sovereign immunity protection.

### 2.1.2 The Right to Life

In this section we move away from an exclusive focus on the prohibition against torture and consider, more broadly, the responsibility of states to protect the most basic human right of all – the right to life. Article 6(1) of the Political Covenant provides: 'Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.' And as the Human Rights Committee has elaborated: 'The right to life is a right that should not be interpreted narrowly. It concerns the entitlement of individuals to be free from acts and omissions that are intended or may be expected to cause their unnatural or premature death, as well as to enjoy a life with dignity' (UN Human Rights Committee 2019: para. 3). In this context we examine the responsibilities of states in two different contexts. The first involves violations of civil and political rights, while the second are the responsibilities of states in the protection of economic, social, and cultural rights.

#### Civil and Political Rights

It should be clear that when a state kills one of its own citizens it has violated the law. Similarly, when a state kills citizens of some other state outside the theatre of war – perhaps by assassination, or by conducting bombing missions or drone strikes – it also has violated international law. However, what is less clear is whether a state bears any 'responsibility' when it 'aids and assists' or is 'complicit' in killings that occur in some other land. As you will see, one of the more puzzling aspects of international law is that it appears to be heading in two different directions at the same time. There are particular initiatives, including the Arms Trade Treaty (ATT) (Box 2.7), where the international

community has recognized a state's obligation to protect human rights in other states. The former by working to prevent gross and systematic human rights violations from taking place; the second by prohibiting the sale of arms and munitions to states that violate human rights and humanitarian law standards.

### Box 2.7 The Arms Trade Treaty (ATT)

The ATT is an international treaty that regulates the international trade in conventional arms and seeks to prevent and eradicate illicit trade and diversion of conventional arms and by establishing international standards governing arms transfers. The ATT came into force on 24 December 2014 and at the present time (May 2025) it has 116 state parties and 26 states that have signed but not yet ratified the Treaty. The operative language of the ATT is Article 6(3):

A State Party shall not authorize any transfer of conventional arms . . . if it has knowledge at the time of authorization that the arms or items would be used in the commission of genocide, crimes against humanity, grave breaches of the Geneva Conventions of 1949, attacks directed against civilian objects or civilians protected as such, or other war crimes as defined by international agreements to which it is a Party.

The US is the largest arms dealer with fully 41.7 per cent of the world's sales between 2019 and 2023. The US signed the ATT on 25 September 2013 and on 9 December 2016 President Obama transmitted the treaty to the Senate for ratification. However, on 29 April, 2019 President Trump notified the Senate that he had decided to 'withdraw' the treaty (Congressional Research Service, 2023). In 2023, the Biden Administration was reviewing its policy with respect to the ATT. As of May 2025, the US had not ratified the treaty.

France (10.9 per cent) is now the second largest arms exporter, supplanting Russia (10.5 per cent). Neither the US nor Russia are state parties to the ATT. China (5.8 per cent) and Germany (5.6 per cent), both of which are parties to the ATT, round out the top five.

At the same time, however, the law on state responsibility appears to allow states to provide massive amounts of military, political, and economic support, either to other states or to entities in another state, that are carrying out gross and systematic human rights violations

and even genocide, while avoiding any 'responsibility' for the resulting harms so long as the sending state does not exercise 'effective control' over the recipients of this assistance. Thus, what remains unclear is what a state's obligation to protect the right to life, at least with respect to foreign nationals, happens to be.

### ***Nicaragua v. United States (1986)***

Our analysis focuses on two rulings by the ICJ. The first, *Nicaragua v. United States* (1986), involves a situation where the US government was providing enormous levels of military, political, and economic support to a rebel group in Nicaragua, the Contras, that were seeking to overthrow the leftwing Sandinista government in that country. In response, Nicaragua brought a case against the US on two grounds. The first is that the US had violated international law when it engaged in direct action against the Nicaraguan state, such as when US agents mined Nicaragua's harbours. The ICJ ruled in favour of Nicaragua on this issue, although this will not be our focus here. Rather, it is Nicaragua's second claim, which is that by providing aid and assistance to the Contras, a group that had been accused of carrying out gross and systematic human rights abuses against civilian populations, the US was 'responsible' (or at least shared some degree of responsibility) for these human rights violations.

In answering this question, the Court spent a considerable amount of time detailing the longstanding relationship between the US government and the Contras. Moreover, the Court acknowledged how this assistance had fundamentally changed the nature and scope of the Contras' operations. However, despite this, the Court ruled that in order to establish US responsibility it would have to be established that the Contras were totally 'dependent' on the US:

The Court has taken the view . . . that United States participation, even if preponderant or decisive, in the financing, organizing, training, supplying and equipping of the Contras, the selection of its military or paramilitary targets, and the planning of the whole of its operation, is still insufficient in itself, on the basis of the evidence in the possession of the Court, for the purpose of attributing to the United States the acts committed by the Contras in the course of their military or paramilitary operations. (para. 115)

The ICJ proceeded by announcing what has come to be known as the ‘*effective control*’ standard – which should not be confused with the ECtHR’s ‘effective control’ test, which will be discussed later in this chapter.

All of the forms of United States participation mentioned above, and even the general control by the respondent State over a force with a high degree of dependency on it, would not in themselves mean, without further evidence, that the United States directed or enforced the perpetration of the acts contrary to human rights and humanitarian law alleged by the applicant State. Such acts could well be committed by members of the Contras without the control of the United States. For this conduct to give rise to legal responsibility of the United States, it would in principle have to be proved that the State had effective control of the military and paramilitary operations in the course of which the alleged violations were committed. (para. 115)

What constitutes ‘effective control’? The ICJ is never clear on this, but the level of control it appears to be demanding is evident in this passage:

In light of all the evidence and material available to it, the Court is not satisfied that *all* the operations launched by the *contra* force, at *every* stage of the conflict, reflected strategy and tactics *wholly* devised by the United States. (para. 106, additional emphasis added)

To reiterate what was said earlier, all states have an obligation to protect the right to life, and one would think that this obligation applies not only to a state’s own citizens and inhabitants within its own territorial borders, but to all human beings. In light of this, there are a number of aspects of the *Nicaragua* ruling that are in need of closer scrutiny. One is the level of ‘control’ demanded by the Court. One could read the ICJ’s ruling as holding that a state would be able to provide massive levels of military hardware, along with political and economic support, to another state or a rebel group in some other state that is carrying out gross and systematic human rights violations and yet avoid any legal responsibility for the ensuing harm – so long as the sending state did not exercise total (or near-total) control over every (or nearly

every) action that the recipient engaged in. To point out the obvious, this evinces a rather puzzling approach to human rights.

The second oddity of the ICJ's approach is that 'responsibility' is treated in an either-or fashion. Either a sending state (somehow) does exercise the requisite level of 'effective control' – in which case it is responsible for all the human rights violations carried out by the recipient – or else (and more likely) the control that it does exercise does not rise to this level, in which case it does not bear any responsibility. To make this more concrete, under the ICJ's ruling, notwithstanding all of the aid and assistance the US provided to the Contras, the United States would have no more legal 'responsibility' for the resulting human rights violations directed against Nicaraguan citizens than some bystander state that had absolutely no relationship or connection whatsoever to the Contra rebel forces. Again, this is a puzzling interpretation of human rights generally, and the obligation of states to protect human life in particular (Gibney, Tomasevski, and Vedsted-Hansen, 1999).

### ***Bosnia v. Serbia* (2007)**

The second ICJ case dealing with extraterritorial state responsibility is *Bosnia v. Serbia* (2007), which raised some of the same kinds of issues that had been taken up in *Nicaragua*, although within the particular context of the Genocide Convention. Article 1 of the Genocide Convention provides: 'The Contracting Parties confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and to punish.' Similar to *Nicaragua*, Bosnia essentially presented two claims. The first is that Serbia had itself carried out genocide in Bosnia. The ICJ concluded that it had not. The second is that because of the enormous levels of military, political, and economic support Serbia had provided to various Bosnian Serb paramilitary forces, Serbia was responsible for 'aiding and assisting' in these acts of genocide. The Court rejected this claim as well.

Relying heavily on the Articles of State Responsibility, which were completed by the International Law Commission in 2001 and then forwarded to the UN General Assembly, the Court began its analysis by ruling that Bosnian Serbs were not 'organs' of Serbia (Art. 4), and that Serbia had not exercised the requisite level of 'effective control' over its Bosnian Serb allies (Art. 8).

The ICJ then turned to Article 16 of the Articles of State Responsibility, which is entitled 'Aid or assistance in the commission of an internationally wrongful act'. The Court held that providing 'aid and assistance' to a perpetrator of the crime of genocide 'cannot be treated as complicity in genocide unless at the least that organ or person acted knowingly . . . , in particular, was aware of the specific intent . . . of the principal perpetrator' (para. 421). According to the Court, this requisite genocidal intent could not be proven 'beyond any doubt'. It explains:

A point which is clearly divisive in this connection is that it was not conclusively shown that the decision to eliminate physically the adult male population of the Muslim community from Srebrenica was brought to the attention of the Belgrade authorities when it was taken: the Court has found . . . that that decision was taken shortly before it was carried out, a process which took a very short time (essentially between 13 and 16 July 1995), despite the exceptionally high number of victims. It has therefore not been conclusively established that, at the crucial time, Serbia supplied aid to the perpetrators of the genocide in full awareness that the aid supplied would be used to commit genocide. (para. 423)

Yet, while the ICJ held that Serbia had not carried out genocide itself, nor was it 'complicit' or had 'aided and assisted' in the commission of genocide, the Court went on to rule that it had not met its obligation to 'prevent' genocide. What kinds of obligations do states have to *prevent genocide*? Recognizing that states have different capacities as well as different relationships with the state where genocide is being carried out, the Court emphasized that the obligation of the states was one of conduct and not of results. That is, a state is under no obligation to succeed but rather 'to employ all means reasonably available to them, so as to prevent genocide as far as possible' (para. 430). Furthermore, what does not matter is whether other states are meeting their own obligations to prevent genocide, and what also does not matter is whether the sum total of all these efforts would be successful or not. Perhaps a better way of expressing this is to say that each one of the state parties has to do everything in its power to prevent genocide. The ICJ then focused on Serbia and concluded that because of the enormous 'influence' that the Serb state had over the Bosnian Serb paramilitary forces carrying

out genocide, it had not exercised this influence sufficient to prevent torture, and because of this it failed to meet its obligations under the Genocide Convention.

In sum, although all states have an obligation to protect the right to life – within their own domestic borders, but outside their territory as well – in the two cases analysed here the ICJ provides states a substantial amount of leeway in terms of pursuing foreign policy goals that might cause great harm to foreign populations (see also Box 2.8).

### Box 2.8 The Obligation to Prevent Genocide

Although the Genocide Convention obligates the state parties to do everything in their power to prevent genocide no matter where it occurs, states have remained hesitant to do so. Yet, there have been some notable exceptions. On 29 December 2023, South Africa filed an application instituting proceedings against Israel before the ICJ on the grounds that Israel's conduct in Gaza following the 7 October 2023 terrorist attack by Hamas was in violation of its responsibilities under the Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention). In its application, South Africa stated that it was 'acutely aware of the particular weight of responsibility in initiating proceedings against Israel' (para. 3), but that it was also 'acutely aware of its own obligation – as a State party to the Genocide Convention – to prevent genocide' (para. 3).

Several years prior to this, on 19 November 2019, The Gambia instituted similar proceedings with the ICJ against Myanmar on the grounds that Myanmar had engaged in genocide against its Rohingya ethnic minority. Myanmar's response was essentially that The Gambia – located literally thousands of miles away – was not an injured party and because of this it should not be able to proceed with its claim. Based on these different interpretations of the treaty, in January 2020 the ICJ ruled that it had jurisdiction over this matter and it ordered various provisional measures for Myanmar to follow, most notably that Myanmar was to ensure that it was not committing genocide. In the months that followed, several other states also intervened in support of The Gambia, and in late 2023, six states – Canada, Denmark, France, Germany, the Netherlands, and the UK – issued a joint declaration of intervention in this matter.

Perhaps the more interesting question is not so much what South Africa and The Gambia have done, but what the other state parties to the Genocide Convention have not done. That is, if intervention with the ICJ (or approaching the 'competent organs' of the UN in some other way) is not only consistent with Article VIII of the Convention but perhaps even required by it, how should we view the non-response of other states?

### **Economic, Social, and Cultural Rights**

A state's obligation to protect the right to life applies equally to economic, social, and cultural rights. What this means is that under international law, all states have an obligation to ensure that their own citizens have the means of subsistence, including adequate food, water, shelter, health care, and so on. Although the reality on the ground is often much different from this, what is unchallenged is whether states have these human rights responsibilities. However, what is challenged is whether these obligations extend beyond a state's territorial borders. At the present time there are 171 states that are parties to the International Covenant on Economic, Social and Cultural Rights (ICESCR). While the US signed the convention on 5 October 1977, it has never ratified it. Still, under international law the US is obligated to act in compliance with the treaty's provisions.

The Preamble of the ICESCR reads:

The States Parties to the present Covenant,

Considering that, in accordance with the principles proclaimed in the Charter of the United Nations, recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world,

Recognizing that these rights derive from the inherent dignity of the human person,

Recognizing that, in accordance with the Universal Declaration of Human Rights, the ideal of free human beings enjoying freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his economic, social and cultural rights, as well as his civil and political rights,

Considering the obligation of States under the Charter of the United Nations to promote universal respect for, and observance of, human rights and freedoms,

Realizing that the individual, having duties to other individuals and to the community to which he belongs, is under a responsibility to strive for the promotion and observance of the rights recognized in the present Covenant,

Agree upon the following articles:

Article 2(1) provides:

Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, 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 by all appropriate means, including particularly the adoption of legislative measures.

There are a few things to note about the ICESCR more generally and Article 2 in particular. Unlike virtually all other international human rights treaties, there is no mention of 'territory' or 'jurisdiction'. Another thing to note is the specific obligation of states to engage in '*international assistance and co-operation*'. In terms of some of the other operative language in Article 2, states have often rationalized their failure to adequately meet the economic, social, and cultural rights of its citizens in two ways. One is by claiming that it was already expending the 'maximum of its available resources', attempting to meet its economic, social, and cultural rights; and the second by positing that the Covenant itself does not demand that the economic, social, and cultural rights be met immediately – but only that states achieve a 'progressive' realization of this right.

But to return to the question raised earlier: do states have extraterritorial obligations in the area of economic, social, and cultural rights? One of the most instructive episodes where this issue was raised directly involved a country study of Sweden conducted by the UN Special Rapporteur on the Right to Health (Paul Hunt). To be clear, not only does Sweden fulfil its obligations to meet the health needs of Swedish residents, but it is one of the most 'generous' countries in the world in terms of the amount of foreign aid it provides as a percentage of its gross national product (see Box 2.9). However, when Hunt asked whether, as a state party to the ICESCR, Sweden was obligated to provide any foreign aid, a Swedish official demurred. In his report, Hunt (2008b: 28) takes strong exception to this position:

### Box 2.9 The US and Foreign Aid

The US provides more foreign aid than any other country. In 2023, that amount was \$66 billion, or more than twice the amount as the next two donors Germany (\$36.7 billion) and Japan (\$19.6 billion) (Hirschfeld, 2024). The \$66 billion represents 0.24 per cent of gross national income, which is considerably less than all other developed countries, which is around 0.4 per cent. In 2023 only five countries (Norway, Sweden, Luxembourg, Denmark, and Germany) have met the threshold established by wealthy states in 1970 of providing 0.7 per cent of GDP.

The views of the American public regarding foreign aid are also quite instructive. Opinion polls show that the US public is of the belief that 25 per cent of the federal budget goes to foreign aid, which is well above the figure of 10 per cent that respondents believe would be the 'right' amount. The reality, however, is that less than 1 per cent of the federal budget goes to foreign aid (Ingram, 2019).

[I]f there is no legal obligation underpinning the human rights responsibility of international assistance and cooperation, inescapably all international assistance and cooperation is based fundamentally upon charity. While such a position might have been tenable 100 years ago, it is unacceptable in the twenty-first century.

One of the other things to point out about Hunt's country study of Sweden is that he then travelled to Uganda, which at the time was the largest recipient of Swedish foreign aid, as a way of examining the extent to which Sweden was contributing to the protection of the right to health – in Uganda. And finally, Hunt travelled to Washington DC in order to examine the extent to which Sweden was meeting its human rights obligations to protect the right to health in Uganda through its work with the World Bank and the International Monetary Fund.

We ask the reader this. Is Paul Hunt correct that under international law, and the ICESCR in particular, Sweden has a legal obligation to provide foreign aid – or is the Swedish government correct that there is no legal obligation to do so?

### 2.1.3 Climate Change

Few people would question that climate change will pose the gravest and perhaps most intractable human rights issue in the decades ahead.

One of the most unique features of climate change is that all states contribute to the problem through the production of GHG emissions, albeit at vastly different levels. Greenhouse gas emissions do not respect national borders, which is to say that the GHG emissions that are having a negative effect on Canadians today may (but may not) have been produced within Canada's territorial borders. Instead, these GHG emissions might well have been produced within the US, or China, but quite likely from any number of other countries.

### Greenhouse Gas Emissions by Major Polluting States

There is both good news and bad news in terms of how states are addressing climate change. In terms of total GHG emissions, China produces approximately 30 per cent of the world's total, while the US produces about 15 per cent. However, if one were to look at the per capita production of GHG emissions among the major polluting states, the US clearly produces more per person (Figure 2.2).

One of the great challenges for international human rights law is attempting to deal with a problem that, almost by definition, traverses national borders. The causes (as well as possible solutions) of human rights violations is nearly always much more complex than we have led ourselves to believe (see also Box 2.10).

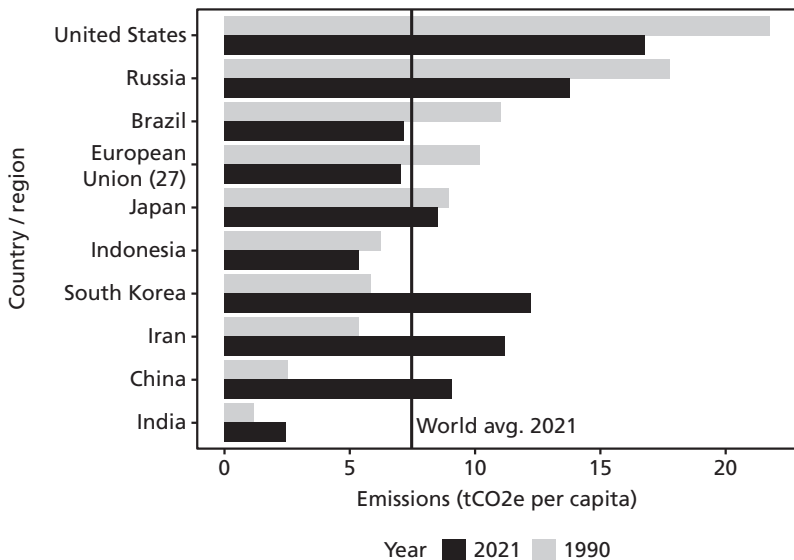


Figure 2.2  
Per capita emissions in 1990 and 2021.  
Source: Climate Watch (2025).

### Box 2.10 The Philippine National Inquiry on Climate Change

The Philippine Commission on Human Rights (CHRP) has made a significant contribution in addressing climate change. In its final report released in 2022, the Commission not only examined the contributions of non-state actors, but what was most contentious is that it included MNCs that are not located within the Philippines, but which contribute GHG emissions that are causing harm to Filipino nationals. The Commission explains:

Many of the respondent oil companies also raised the issue of *territoriality* – they questioned the power of our Commission to inquire into their activities, since they did not operate within the territory of the Philippines.

Stripped of legal niceties, the contention was that our Commission, or, indeed, the Philippine State, in general, may only inquire into the conduct of corporate entities operating within Philippine territory, even if the corporations' operations outside our territory were negatively impacting the rights and lives of our people.

We cannot accept such a proposition. (p. 4)

The report is particularly notable for the extraterritorial perspective that the CHRP champions. Under this progressive approach, protecting the human rights of Philippine citizens would take priority over rigid 'technicalities' and eventually become international law:

The CHRP is mandated by the Philippine Constitution with the duty to investigate and inquire into allegations of human rights violations suffering by our people

Our Commission decides on how it must perform its constitutional duty. And the performance of this duty is neither constrained by nor anchored on the principle of territoriality alone.

The challenge of NHRIs [National Human Rights Institutions] is to test boundaries and create new paths; to be bold and creative, instead of timid and docile; to be more idealistic, or less pragmatic; to promote soft laws into becoming hard laws; to see beyond technicalities and establish guiding principles that can later become binding treaties; in sum, to set the bar of human rights protection to higher standards. (pp. 4–5)

Another thing to consider is that although every state is a part of the problem in that each state produces GHG emissions of at least some sort, those states that produce the lowest levels of GHG emissions are the same states that already have been the most negatively affected by climate change (see Box 2.11).

### Box 2.11 Climate Change Refugees

Although there is no explicit human right to a safe and healthy environment, climate change is already having a decidedly negative effect on particular human rights, including the right to food and housing. As climate change continues to worsen, it is estimated that some of the small islands in the South Pacific will eventually disappear altogether. In Teitota, a citizen of Kiribati filed a communication with the Human Rights Committee after he had been denied asylum in New Zealand. Teitota claimed that where he lived in Kiribati had already become uninhabitable and that by denying him asylum New Zealand had violated his right to life under the ICCPR. However, the Committee sided with New Zealand on the grounds that there was no 'imminent' threat to Teitota's right to life.

In the present case, the Committee accepts the author's claim that sea level rise is likely to render the Republic of Kiribati uninhabitable. However, it notes that the timeframe of 10 to 15 years, as suggested by the author, could allow for intervening acts by the Republic of Kiribati, with the assistance of the international community, to take affirmative measures to protect and, where necessary, relocate its population. (para. 9.12)

Committee member Duncan Laki Muhumuza filed a powerful dissent, holding that the author faces a 'real, personal and reasonably foreseeable risk of a threat to his right to life as a result of the conditions in Kiribati' (para. 5).

Muhumuza concludes:

[W]hile it is laudable that Kiribati is taking adaptive measures to reduce the existing vulnerabilities and address the evils of climate change, it is clear that the situation of life continues to be inconsistent with the standards of dignity for the author, as required under the Covenant. The fact that this is a reality for many others in the country, does not make it any more dignified for the persons living in such conditions. New Zealand's action is more like forcing a drowning person back into a

(Continued)

sinking vessel, with the 'justification' that after all there are other voyagers on board. Even as Kiribati does what it takes to address the conditions; for as long as they remain dire, the life and dignity of persons remains at risk. (para. 6)

If you were on the Human Rights Committee, how would you have decided this case? And looking at this issue more broadly, what obligations do the states that produce the major share of GHG emissions owe to people who are either dispossessed or suffer from the ravages of climate change?

Internationally, the signature achievement has been the *2015 Paris Agreement*, where states have set targets for reducing GHG emissions. A few things to note about this. One is that the Paris Agreement is not a 'treaty' as such in the sense that there is no legal obligation to meet the target that each state has set for itself. In other words, if a state fails to meet its target to reduce GHG emissions, we would not conclude that this state has acted in breach of its legal obligations or that it has committed an internationally wrongful act in doing so. On the other hand, although not legally binding, the Paris Agreement provides a vital benchmark for states, and as shown in Box 2.12, a growing number of domestic courts have used this target as a way of ordering governments to significantly reduce their GHG emissions even further.

### Box 2.12 Climate Change Litigation in Domestic Courts

One of the more surprising aspects of the attempt to address climate change is the central role that a number of domestic courts have come to play. The Sabin Center at Columbia University has catalogued the number of climate change litigation cases that have been filed, which is now more than 2,000. We mention three of these. The first is the landmark ruling in *Urgenda v. the Netherlands* (2019), brought by a Dutch civil society groups organization and a group of Dutch citizens. The Dutch Supreme Court rejected the government's argument that Dutch contributions to climate change were minuscule at best, and it ordered the government to significantly reduce GHG emissions well below the country's Paris Agreement target. Using *Urgenda* as a

springboard, in *Milieudefensie and Others v. Royal Dutch Shell* (2021) a district court in The Hague ordered Royal Dutch Shell (RDS) to not only reduce its GHG emissions within the Netherlands but in its entire worldwide operations as well. However, in late 2024, a Dutch appeals court overturned this ruling.

*Neubauer et al. v. Germany* (2021) is a case filed in a German domestic court. The plaintiffs were a group of German citizens, but who were joined by plaintiffs from Nepal and Bangladesh. Taking an inter-generational approach, the German Constitutional Court held that 'one generation must not be allowed to consume large portions of the CO<sub>2</sub> budget while bearing a relatively minor share of the reduction effort, if this would involve leaving subsequent generations with a drastic reduction burden and expose their lives to serious losses of freedom' (para. 192). The Court ordered the German Parliament to set a clear reduction target, which the government complied with.

Our focus is on what states are responsible for. Is it simply the GHG emissions produced within the domestic realm – or does this ignore the way in which states contribute to climate change but more indirectly (see Boxes 2.13 and 2.14)? The example we use for this is the *Greenpeace Nordic Association v. Ministry of Petroleum and Energy* (2020) case in Norway, which raised these issues directly.

### Box 2.13 Climate Change and Regional Human Rights Courts

The 2017 Advisory Opinion by the Inter-American Court of Human Rights (IACtHR) has already achieved landmark status. The question addressed by the IACtHR is whether an individual who is physically located in one state could also be within the 'jurisdiction' of some other state. Article 1 of the American Convention on Human Rights provides:

The States Parties to the Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms . . .

The IACtHR unequivocally took the position that 'territory' and 'jurisdiction' are not one and the same, and therefore an individual in one state who is harmed by the

(Continued)

policies and practices of some other state can be within the 'jurisdiction' of this other state so long as a causal connection exists.

In contrast to this, in *Duarte Agostinho and Others v. Portugal and 32 Others*, the ECtHR ruled as inadmissible a case brought by a group of Portuguese children against other state parties to the European Convention. The children had claimed that because they were harmed by GHG emissions from these other countries, they were therefore within the 'jurisdiction' of those states and should be allowed to make a claim against them.

The same day that the ECtHR dismissed the *Duarte Agostinho* case, it ruled in favour of a case brought by Senior Women for Climate Protection, a Swiss civil society groups organization of women over the age of 64. The Court ruled that Switzerland was not doing enough to address climate change.

### Box 2.14 What do Wealthy States Owe Poorer Countries?

Although all states contribute to climate change through GHG emissions, there is little question that those states that produce the least amount of CO<sub>2</sub> have been – and will continue to be – the most negatively affected by an ever-warming planet. For years, poorer countries have been clamouring for financial assistance from the richest countries, many of which are among the largest producers of GHG emissions. Finally, after decades of resistance, in November 2022 rich countries agreed to create a 'loss and damage' fund as a way of assisting more vulnerable states. Although it is widely recognized that billions of dollars will be needed for this, the promised contributions at the COP27 in Scotland were in the millions – and the US, the second largest producer of GHG emissions, declined to make any contribution to this fund (Gelles, 2022).

The plaintiffs in *Greenpeace Nordic* consisted of various Norwegian environmental groups that were challenging a drilling licence that had been issued by the Norwegian government in 2013 on the grounds that such actions violated Article 112(1) of the Norwegian Constitution, which provides:

Every person has the right to an environment that is conducive to health and to a natural environment whose

productivity and diversity are maintained. Natural resources shall be managed on the basis of comprehensive long-term considerations which will safeguard this right for future generations.

Norway's GHG emissions – at least within the country's national borders – are quite small. In addition, under the Norwegian Climate Act of 2017, the government is legally obligated to achieve a 40 per cent reduction in GHG emissions by the year 2030. However, Norway is also the third largest exporter of natural gas and the 15th largest oil exporter. To put this in a broader context, emissions resulting from exported petroleum are *95 per cent higher* than territorial emissions.

The Oslo District Court sided with the government ministry on the grounds that the national Parliament had considered, but rejected, several proposals to review the previous licensing decision in light of Norway's accession to the 2015 Paris Agreement. According to the District Court, the involvement of the Parliament was sufficient to indicate that the constitutional duty to protect environmental rights had been fulfilled, holding that 'emissions of CO<sub>2</sub> abroad from oil and gas exported from Norway are irrelevant when assessing whether the [licensing permit] entails a violation of Article 112'.

The plaintiffs appealed the decision to the Court of Appeals, arguing that the District Court had interpreted Article 112 too narrowly by finding that Norway is only responsible for GHG emissions produced within Norwegian territory. The Court of Appeals agreed with this position, however. It upheld the District Court's ruling on the grounds that the granting of an exploration licence, by itself, will not necessarily lead to an increase in GHG emissions. This ruling was appealed to the Norwegian Supreme Court. Although the Supreme Court readily recognized the severe nature of climate change and acknowledged that Article 112 protects citizens from environmental and climate harms, it also viewed the role of the judiciary as being quite limited.

In terms of the geographic scope of Article 112, the Supreme Court took what we might describe as a 'quasi-territorial' approach:

A final question is whether it is relevant to consider greenhouse gas emissions and effects outside Norway. It is only emissions and effects on Norwegian territories that are relevant under Article 112 of the Constitution, or must the

assessment also include emissions and effects in other countries? Article 112 does not provide general protection against actions and effects outside its realm. However, if Norway is affected by activities taking place abroad that Norwegian authorities may influence directly on or take measures against, this must also be relevant to the application of Article 112. An example is combustion of Norwegian-produced oil or gas abroad, when this causes harm also in Norway. (para. 149)

Later in its ruling, the Court stated: ‘the clear principle is that each state is responsible for combustion on its own territory’ (para. 159). Which of these judicial rulings would you join – and which would you reject?

## 2.2 ‘Jurisdiction’ and the Denial of Accountability

In this section we examine ways in which states that have violated international human rights standards have been able to avoid accountability because it has been determined that the victims were not within the ‘jurisdiction’ of those states. This has been a particularly contentious issue with the ECtHR, beginning with the Court’s decision in *Banković et al. v. Belgium et al.* (2001). In that case, the ECtHR ruled that Serbian civilians who were killed and/or injured during the course of a 1999 NATO bombing raid were not within the ‘jurisdiction’ of those states and it dismissed a complaint brought by the victims as inadmissible.

As noted earlier, while Article 1 of the European Convention makes reference to ‘jurisdiction’ there is no mention of ‘territory’. According to the applicants, ‘jurisdiction’ and ‘territory’ do not always have to refer to the same entity. In that way, Article 1 is not referring to the territorial boundaries of states, but rather that the contracting states must secure the rights and freedoms of the Convention to all those within or subject to their actual power. In other words, a contracting state is bound by the Convention not only when it acts within its own territorial borders but also when it does so abroad. According to the applicants, ‘jurisdiction’

is based on the level of authority and control exercised by a state over the affected individuals, and in this case the contracting states exercised the ultimate authority by injuring and/or killing the applicants.

In contrast to this, the contracting states argued that the term 'jurisdiction' must be interpreted in accordance with its 'ordinary meaning' under international law. They argued that in order to exercise 'jurisdiction' over a person there must be some form of pre-existing relationship between the state acting extraterritorially and the victim.

The Court essentially adopted the position of the respondent states. In its view, although the reference to 'territory' in the original draft of Article 1 was removed, the ECtHR described the Convention as being 'primarily' or 'essentially' territorial, although the Court also acknowledged that the protections of the Convention could be extended beyond the territory of the European states when 'exceptional circumstances' arose. The Court never sufficiently explained how or what constituted 'exceptional circumstances'. However, on the basis of the decision in the *Bankovic* case it must be concluded that dropping bombs on civilians does not constitute an 'exceptional circumstance' (Roxstrom, Gibney, and Einarsen, 2005).

Since *Bankovic*, the Court has backtracked, at least to some degree, from its 'territorial' interpretation of the Convention. One exception has been when one of the contracting states is exercising physical control over an individual. This rule initially was announced in the *Ocalan* case (2000) where Turkish officials had arrested the former PKK leader in Kenya. We have also seen earlier an extension of the 'effective control' test in our discussion of the *Hirsi Jamaa* case where Italian authorities had intercepted boats carrying refugees and taken the occupants on board before returning them to Libya. A second exception the Court has created is when European actors are physically present on the territory of some other state and exercising some form of public authority. The Court enunciated this rule most clearly in *Al-Skeini v. United Kingdom* (2011), where six Iraqi civilians who had been killed by British occupying forces were deemed to be within the 'jurisdiction' of the UK, and thus protected by the European Convention.

To be clear, when the contracting states operate outside their territorial borders they are still bound by international human rights law. However, foreign nationals who are harmed by the policies and practices of these states will, with only rare exception, be deemed to be outside the

‘jurisdiction’ of the harming state, and therefore will be denied the opportunity to present a claim before the ECtHR. Unfortunately, where these victims will be able to press their claim is anything but apparent.

## 2.3 Human Rights Responsibilities by Multinational Corporations

International human rights law has been based exclusively on the acts and omissions of states and to a large extent this makes sense. After all, it is states – and only states – that sign and ratify human rights conventions. Yet, what we also know is that states do not have any kind of monopoly in terms of violating human rights standards – witness the fact that 80 per cent of all GHG emissions in the world since 2016 have been produced by 57 companies (Watts, 2024).

There is an enormous range of non-state actors and we will make no attempt to cover anywhere near the entirety of this. Rather, in this section we raise the question whether the state/non-state divide continues to make sense, especially if the goal of human rights is to provide human security. As noted earlier, states have an obligation to respect human rights – which is to say that they are not to violate human rights standards themselves – but they also have a responsibility to protect against human rights violations by non-state actors. There is no question that states have this obligation within their domestic realm. However, how far (literally) does this obligation extend?

Our focus is on MNCs, some of which have more economic power, and perhaps even more political power, than all but a select group of countries. For all the good they might do in the world, MNCs have long been associated with violations of human rights standards. In the words of Rachel Chambers (2021: 519): ‘Human rights violations are perpetrated by corporate actors with troubling frequency. In most instances, victims do not have access to remedy.’

In response to this, over the past few decades the UN has instituted several ‘soft law’ initiatives, including: Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights; the Declaration of the Rights and Responsibilities of Individuals, Groups and Organs of Society to Promote and Protect

Universally Recognized Human Rights and Fundamental Freedoms; and the UN Global Compact. Note that all of these initiatives were voluntary in nature, and all ultimately failed to rein in corporate abuses.

The most recent effort at the international level has been the *Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework*, perhaps better known as the Ruggie Principles after John Ruggie who previously served as the UN Special Representative for Business and Human Rights. The Human Rights Council immediately endorsed the report after its release, and much of the discussion of corporate reform, both at the UN but also the state level, have relied on the Principles as a guide. However, consistent with all other UN efforts at corporate reform, the Guiding Principles are voluntary. Most notably, the Guiding Principles conclude that while a 'home' state may regulate the extraterritorial operations of one of its own MNCs, international law does not require it to do so – even in the absence of any meaningful regulation by the 'host' state, and even in situations where the MNC was causing great harm.

One of the more telling examples of this involved TVI Pacific, a Canadian based mining corporation with operations on the island of Mindanao in the Philippines (Seck, 2008). In 2004, a delegation of community members from Mindanao travelled to Canada and met with Canadian lawmakers about the environmental devastation and the consequent health problems caused by the company's operations. The following year in March 2005, two community members presented further evidence to a parliamentary committee, which then endorsed a proposal to establish 'clear legal norms' to regulate Canadian MNCs and to hold corporations accountable for any failure to meet these standards. However, such legislation was never pursued, the rationale being that the international community is still in the early stages of defining and measuring corporate social responsibility, particularly in the area of human rights. Instead, the Canadian government merely promised to examine the 'best practices' of other states.

The problem then, and now, is that there are no 'best practices' to draw upon. Instead, the Ruggie Principles notwithstanding, no 'home' state has sought to regulate the extraterritorial practices of its own MNCs, although a few countries such as France and Germany have instituted 'due diligence' laws that require parent corporations to exercise some

degree of control over their subsidiaries (Human Rights Watch, 2024a) (see Box 2.15).

### Box 2.15 The EU Corporate Sustainability Due Diligence Directive

On 24 May 2024, the EU adopted the Corporate Sustainability Due Diligence Directive (CSDDD), which requires all EU members to introduce or update laws obligating MNCs to ensure compliance with certain human rights, labour rights, and environmental standards throughout their entire supply chain. However, the directive only applies to companies with at least 1,000 employees and more than €450 million in annual turnover, or approximately 1 per cent of EU-based companies.

By way of some contrast with the Guiding Principles, the *Maastricht Principles on Extraterritorial Obligations in the Area of Economic, Social and Cultural Rights* read existing international law much differently. According to the Maastricht Principles, not only does the ‘home’ state have an obligation to regulate its own MNCs, especially in situations where the ‘host’ state is either unwilling or unable to do so, but other states that are in a position to exercise their ‘influence’ to prevent harmful corporate behaviour are obligated to act as well. Principle 24 reads in part:

All States must take necessary measures to ensure that non-State actors which they are in a position to regulate . . . such as private individuals and organisations, and transnational corporations and other business enterprises, do not nullify or impair the enjoyment economic, social and cultural rights.

How would this work? Consider a hypothetical Nike plant in Cambodia that was employing child labour. As the ‘host’ state, Cambodia has the primary obligation to prevent this. However, if Cambodia does not act, as the ‘home’ state the US would have an obligation to act. Note that even when operating in Cambodia (or any other country), Nike is still bound by a host of domestic laws, including US anti-bribery law, US securities law, US tax law, US trademark law, US civil rights law, US anti-discrimination law, and US anti-trust law. Finally, according to the

Maastricht Extraterritorial Obligations Principles, other states that could influence Nike – including countries where Nike shoes and clothing are sold – would also have an obligation to take whatever measures they could to halt these violations of human rights standards.

The discussion thus far has been focused on state responsibilities. But should international human rights law also apply directly to MNCs? In her book *Children's Rights and Business: Governing Obligations and Responsibility*, Erdem Türkelli (2020) points to the particular vulnerability of children as well as gaps in the law in terms of protecting human rights and argues that what is needed is an expansion of human rights duty bearers, which in some circumstances would include MNCs.

## Conclusion

All rights – including human rights – have obligations and responsibilities associated with them. Without this, rights would not be 'rights'. Still, there is little question that assigning responsibilities and obligations has been the single weakest aspect of 'human rights'. In this chapter we have attempted to go beyond instances where a state violates human rights standards directly to encompass situations when states contribute to violations more indirectly. The 'object and purpose' of all human rights treaties is to protect human rights. The question explored throughout this chapter is the extent to which the acts or omissions of a state work towards that end – and the extent to which it does not.

## GLOSSARY

**Duty to prevent:** The Genocide Convention mandates that all state parties must do everything in their power 'to prevent' genocide from occurring.

**Effective control:** The ICJ employed an 'effective control' test in *Nicaragua v. United States* to determine if the US had exerted enough power and control over the Contra rebels it was supporting in order to be responsible for human rights violations carried out by them. The ECtHR used the same terminology as a way of determining whether there was 'exceptional circumstance' present in order to give the European Convention an extraterritorial reading.

**Extraordinary rendition:** A policy adopted by Western states to fight against international terrorism, usually involving the kidnapping of a suspected terrorist in one state and engaging in 'enhanced interrogation' in some other state. It is estimated that more than a quarter of all countries participated in the extraordinary rendition programme.

**Extraterritorial immigration enforcement:** An increasing number of Western states are enforcing their immigration laws far from their national borders as a way of preventing refugees from accessing their territory.

**Jurisdiction:** The term usually refers to the power or authority a state has over a person. One of the more pressing questions in international human rights law is whether an individual who is harmed by the policies and practices of another state is therefore within the 'jurisdiction' of this other state.

**Refugees:** Individuals who are outside their country of origin and who can establish having a 'well-founded fear' of persecution on account of one of five factors: race, religion, political opinion, nationality, and membership of a particular social group.

**Sovereign immunity:** This is the immunity that states provide to other states that are sued in its courts, although there is no international legal standard governing this.

## DISCUSSION QUESTIONS

- 2.1 There is a terrible mismatch between the amount of international human rights law, on the one hand, and the fact that human rights violations continue virtually unabated, on the other. Why is this? And what can (and should) be done about changing this?
- 2.2 Climate change is a classic case where the policies and practices of one state can have a profound effect on individuals in other states. What we also have seen is that the states that produce the lowest amounts of GHG emissions are nearly always those that suffer the most from this. If you were the Foreign Minister of such a country, how do you think you would respond to this?

## RELATED READINGS

- Gammeltoft-Hansen, Thomas. 2011. *Access to Asylum: International Refugee Law and the Globalisation of Migration Control*. Cambridge, UK: Cambridge University Press. The author offers a critical discussion of refugees' access to asylum amidst growing global obstacles to migration.
- Gibney, Mark. 2008. *International Human Rights Law: Returning to Universal Principles*. Boulder, CO: Rowman & Littlefield Publishers. Gibney argues that there has been a fundamental misreading of international human rights law, and he suggests ways of going back to the original intent and meaning behind human rights.
- Moyn, Samuel. 2018. *Not Enough: Human Rights in an Unequal World*. Cambridge, MA: Harvard University Press. A provocative book about the role of human rights in a world of global inequality.
- Skogly, Sigrun. 2006. *Beyond National Borders: States' Human Rights Obligations in International Cooperation*. Antwerpen: Intersentia. Skogly focuses on the drafting of the ICESCR. She found that there was a general consensus that economic human rights could only be protected by means of international assistance and cooperation. Skogly's research provides some of the strongest support for the proposition that human rights are not territorially based.

## RELATED WEBSITES AND PODCASTS

- UNHCR, [www.unhcr.org/](http://www.unhcr.org/). Website of the UN Refugee Agency, including data on refugees globally.
- Himal Interviews: Radhika Coomaraswamy on the UN report on the Rohingya crisis, 19 September 2018, [www.himalmag.com/himal-interviews-radhika-coomaraswamy-on-un-report-on-myanmar/](http://www.himalmag.com/himal-interviews-radhika-coomaraswamy-on-un-report-on-myanmar/)

## RELATED FILMS

- *Darwin's Nightmare* (Hubert Sauper, 2004). A. O. Scott of the *New York Times* described this Academy Award nominee as a 'masterpiece', and

this might well be an understatement. There are no ‘talking heads’ in this film. Rather, the viewer watches this morality tale unfold as European concerns remove several tons of Nile Perch fish from Lake Victoria each day – at the same time that Tanzania is experiencing a famine. No one in the film can seem to make any kind of connection between these two things.

- *Flee* (Jonas Poher Rasmussen, 2021). This animated film tells the harrowing story of Amin Nawabi, a young gay male from Afghanistan who, against seemingly all odds, is able to gain asylum in Denmark.
- *Green Border* (Agnieszka Holland, 2023). The border in the title is that which separates Poland and Belarus, but what the Syrian migrants seeking asylum in Europe immediately discover is that they are not welcome in either country.
- *Io Capitano* (Matteo Garrone, 2023). Two young cousins, Seydou and Moussa, leave their homes in Dakar, Senegal hoping to find a rich and bountiful life in Europe. On their trek through Africa and then the perilous journey across the Mediterranean Sea, these two, along with a group of other unfortunate migrants, face a nightmarish hell.



# Part

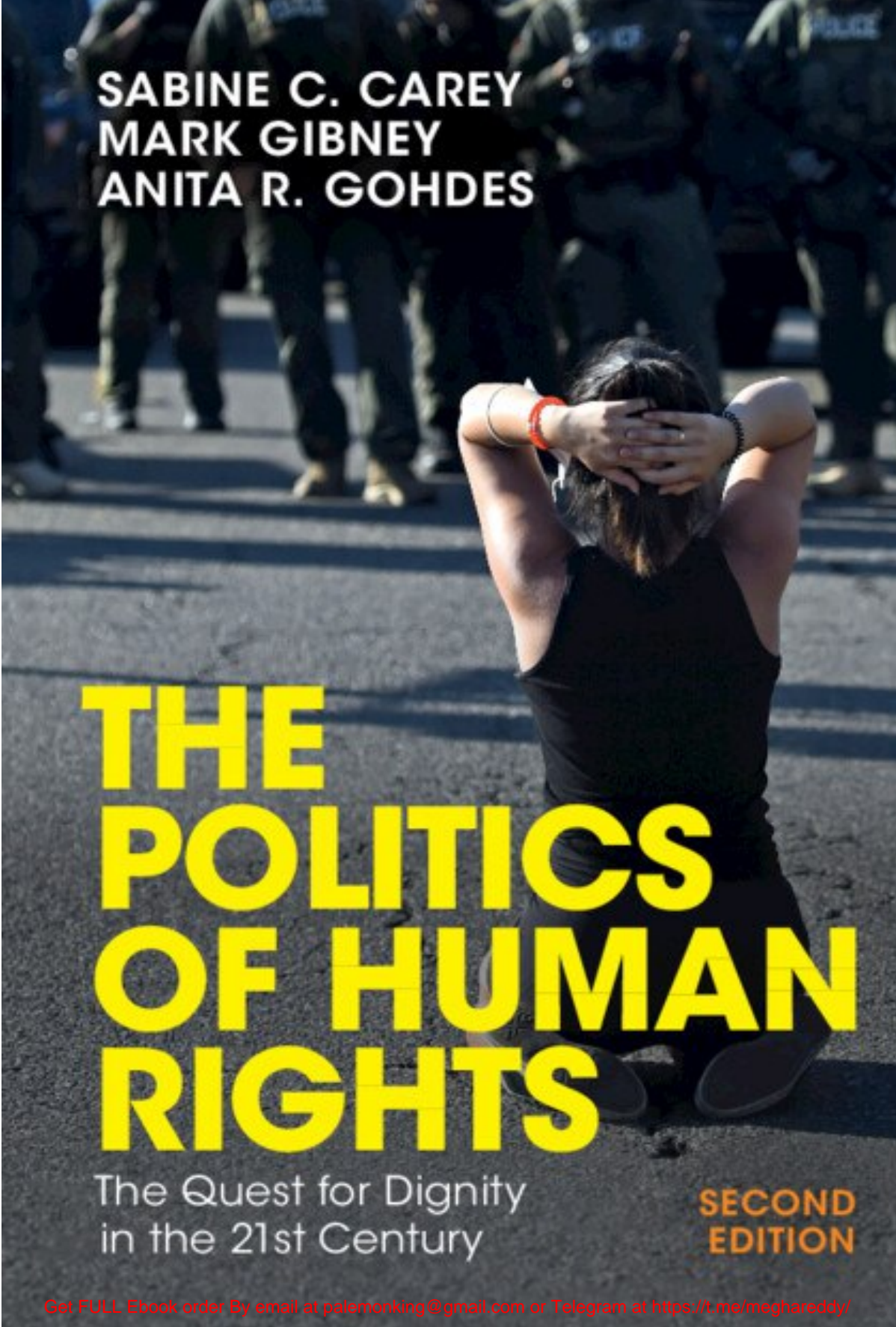


# Explaining Human Rights Violations



# Chapter

# 3

A photograph of a woman with dark hair, wearing a black tank top, kneeling on a paved street. She has her hands clasped behind her head. In the background, several police officers in riot gear are visible, suggesting a protest or civil unrest scene. The lighting is bright, casting shadows on the ground.

**SABINE C. CAREY  
MARK GIBNEY  
ANITA R. GOHDES**

# **THE POLITICS OF HUMAN RIGHTS**

The Quest for Dignity  
in the 21st Century

**SECOND  
EDITION**

# The Politics of Human Rights

## Second Edition

Accessible and engaging, *The Politics of Human Rights* offers a fresh, empirical approach to understanding human dignity and the global responsibility to protect it. Unlike traditional texts, this textbook moves beyond theory, using data-driven insights to explore why human rights violations occur and how they can be prevented. It emphasizes shared responsibility across borders to uphold human rights. Designed for students and educators, this fully updated edition enhances learning with discussion questions, recommended readings, and a unique collection of films, podcasts, and websites that bring human rights issues to life. It provides a well-rounded perspective, grounded in the latest social scientific research, for anyone interested in human rights. Whether used for introductory courses or interdisciplinary studies, this book equips readers with the knowledge and tools to critically engage with human rights issues, making it an essential resource for understanding and advocating for human dignity in the twenty-first century.

**Sabine C. Carey** is Chair of Political Science, International Relations at the University of Mannheim.

**Mark Gibney** is Belk Distinguished Professor at the University of North Carolina, Asheville.

**Anita R. Gohdes** is Professor of International and Cyber Security at the Hertie School in Berlin.

‘This book is a must-read primer on human rights, perfect for undergraduate courses, graduate seminars, as a comprehensive guide for scholars moving into studying human rights, and as a reference tool for scholars already studying human rights or repression. It expansively covers essential topics ... but does so accessibly and with a myriad of engaging examples.’

Jennifer Earl, *Chair and Professor, Department of Sociology  
and Criminal Justice, University of Delaware*

‘The Politics of Human Rights offers an insightful and empirically grounded exploration of human rights, their violations, and the mechanisms designed to protect them. This revised edition integrates rigorous scientific analysis with real-world case studies, making it an invaluable resource for students, scholars, and practitioners ... an essential guide for understanding both the challenges and the progress in the fight for human dignity.’

Bonny Ibhawoh, *Senator William McMaster Chair in Global  
Human Rights, McMaster University*

‘This is an excellent introduction to the politics of human rights and what we know from existing research. It provides a framework to help readers understand how challenges to human rights arise, highlighting the specific actors and their choices, as well the scope for efforts to improve human rights.’

Kristian Skrede Gleditsch, *Regius Professor of Political Science,  
University of Essex and Research Associate,  
Peace Research Institute Oslo*

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To our students and teachers



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# Preface

This book is designed as an introduction to the politics of human rights. It is suitable for anyone interested in this field and is intended for classes on human rights and for the treatment of the subject in related courses. In our view, 'human rights' is one of the most important and most interesting subjects. The study of human rights is essentially about how we treat all other people with whom we share this planet. Striving for the respect of human rights is a quest for human dignity. Human rights are about *recognizing, honouring, and protecting* the human dignity of each one of the eight billion people on this planet. When human rights are not protected, the victim's human dignity is ignored. But what it also does is to deny the humanity in all of us. We have made every effort to focus on the humanity on which human rights is based. Therefore, this book is less theoretical and less historical than other books in this realm. We have maintained and further strengthened the unique features of the first edition in this extensively revised version.

## Our Approach

.....

This book offers a markedly different conceptualization of human rights compared to the treatment typically found in other textbooks. While the dominant approach acknowledges the universality of human rights, it often contradicts this principle by confining the responsibility for their protection solely to the territorial state. This perspective risks reducing human rights to little more than a catalogue of atrocities committed in distant lands, perceived as issues involving and affecting only 'others'. Our approach departs significantly from this framework. We emphasize

that human rights are not only universal in nature but that the duty to protect and enforce them is equally universal. Human rights are grounded in the principle of *shared humanity*, but they also demand a *shared responsibility* to uphold them.

Another distinguishing feature of this second edition, as of the first, is our empirical approach, using *quantitative methods to explore the politics of human rights*. At a minimum, human rights brings together law, politics, history, economics, ethics, religion, and morality. We are convinced that the study of human rights is greatly enhanced through scientific method, including statistical analysis. Although this might sound off-putting at first – or worse, induce maths anxiety – you will soon discover how useful and informative this approach to human rights can be to understand *where* and *what* types of human rights are violated, *why* they are violated, and *what can be done* to protect them. In this second edition, we draw on a wide range of empirical studies to introduce the reader to the latest findings on why human rights are violated and what might improve the protection of human rights.

Another novel aspect of our book is that we not only provide discussion questions and suggestions of further books on the subjects covered in each chapter. We put together an extensive list of films and, newly added in the second edition, podcasts and websites that emphasize the importance of human rights for respecting and protecting our human dignity. For more film suggestions, we point the reader to Mark Gibney's book *Watching Human Rights, the 101 Best Films* (2013).

## The Organization of the Second Edition

.....

In the second edition, we have condensed the first part, which examines the nature of human rights and the different responsibilities to protect these rights. Chapter 1 provides a short overview of the *development of the modern human rights system* and gives a short introduction to its main players. Chapter 2 examines the *responsibilities* of states to safeguard civil and political rights as well as economic, social, and cultural rights. It also investigates whether this obligation extends beyond their own territory.

Part II introduces scientific research to *map the state of human rights and to analyse where and why violations occur*. This second part has been significantly updated and expanded by two new chapters, one on the nature and motivations of *perpetrators* of human rights violations, the other on the impact the *Internet* has had on human rights. Chapter 3 demonstrates how human rights can be observed and how trends can be tracked over time and compared across countries with plots, maps, and tables. We highlight various measures of human rights, discussing the opportunities, challenges, and limitations of these data. The newly added Chapter 4 delves into the primary perpetrators of human rights violations, exploring their motivations and how they might be constrained. Chapter 5 focuses on the influence of political regimes in safeguarding fundamental rights. It examines how various socio-economic factors correlate with the respect for – or violations of – human rights. Chapter 6 has been newly added to reflect the significant changes that have taken place in the realm of human rights since the first edition came out. It explores how the digital revolution has transformed the politics of human rights, and highlights how digital tools have empowered individuals to protect rights, while providing states with new methods of digital repression.

Part III examines how to *restore human dignity* when serious human rights violations have occurred. Chapter 7 explores the manner in which societies might re-establish trust and security in the aftermath of atrocities. We discuss and compare the retributive and restorative approach to justice and highlight the difficult circumstances in which societies that try to establish transitional justice find themselves. In this second edition we have newly added an evaluation of how successful transitional justice mechanisms have been, based on the latest research in this field. In Chapter 8 we present the main characteristics and differences between the most important international mechanisms that are commonly used to protect human rights, and take a look at how successful they have been in achieving this objective. Finally, in a brief conclusion, we highlight some of the progress that has been made and the continued challenges we face in realizing the respect for human rights and a life in dignity.

# Acknowledgements

We would like to thank everyone who has encouraged us to work on a revised version of this book. We are delighted that our approach of introducing the reader to this important topic has resonated with so many. We are grateful to Maurice Schumann and Karina Ourfalian for their invaluable research assistance and to Aylin Arslan for her insightful comments. We thank our copy editor David Hemsley for his remarkable attention to detail and extremely thoughtful suggestions.

We are delighted and extremely grateful that Anita Gohdes has joined as co-author for this second edition. So many of the changes and new additions would not have been possible without her. She replaces our co-author from the first edition, Steve Poe, who passed in 2007. Steve was a dear friend and trusted mentor to so many. He recognized and honoured the dignity in all people, and his life was an embodiment of these values. In so many ways and for so many people, Steve was the personification of human rights. We hope that this book will help readers to understand the importance of continuously striving for their protection.

# Abbreviations

<b>ANC</b>	African National Congress	<b>ECOWAS</b>	Economic Community of West African States
<b>ATT</b>	Arms Trade Treaty	<b>ECtHR</b>	European Court of Human Rights
<b>CAT</b>	Committee Against Torture	<b>ESAD</b>	Ethnic Stacking in Africa Dataset
<b>CAVR</b>	Commission for Reception, Truth and Reconciliation	<b>ETA</b>	Euskadi Ta Askatasuna (Basque Country and Freedom)
<b>CEDAW</b>	Convention on the Elimination of All Forms of Discrimination Against Women	<b>EU</b>	European Union
<b>CJTF</b>	Civilian Joint Task Force	<b>FARC</b>	Revolutionary Armed Forces of Colombia
<b>CPPCG</b>	Convention on the Prevention and Punishment of the Crime of Genocide	<b>GHG</b>	greenhouse gas
<b>CPED</b>	Convention for the Protection of All Persons from Enforced Disappearance	<b>HDI</b>	Human Development Index
<b>CRC</b>	Committee on the Rights of the Child	<b>IACtHR</b>	Inter-American Court of Human Rights
<b>CRP</b>	Community Reconciliation Processes	<b>ICC</b>	International Criminal Court
<b>CRPD</b>	United Nations Convention on the Rights of Persons with Disabilities	<b>ICCPR</b>	International Covenant on Civil and Political Rights
<b>CSDDD</b>	Corporate Sustainability Due Diligence Directive	<b>ICERD</b>	International Convention on the Elimination of All Forms of Racial Discrimination
<b>ECHR</b>	European Convention on Human Rights	<b>ICESCR</b>	International Covenant on Economic, Social and Cultural Rights
		<b>ICJ</b>	International Court of Justice

<b>ICRMW</b>	International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families	<b>NPFL</b>	National Patriotic Front of Liberia
<b>ICTR</b>	International Criminal Tribunal for Rwanda	<b>OSCE</b>	Organization for Security and Co-operation in Europe
<b>ICTY</b>	International Criminal Tribunal for the former Yugoslavia	<b>PGM</b>	pro-government militia
<b>IDI</b>	Inclusive Development International	<b>PGMD</b>	Pro-Government Militias Database
<b>IMT</b>	International Military Tribunals	<b>PKK</b>	Kurdistan Workers' Party
<b>IRA</b>	Irish Republican Army	<b>PMSC</b>	private military and security company
<b>ISIL/ISIS</b>	Islamic State of Iraq and the Levant/Islamic State of Iraq and Syria	<b>PTS</b>	Political Terror Scale
<b>LEA</b>	law enforcement agency	<b>R2P</b>	Responsibility to Protect
<b>LTTE</b>	Liberation Tigers of Tamil Eelam	<b>SG</b>	Secretary-General (United Nations)
<b>MINUSMA</b>	United Nations Multidimensional Integrated Stabilization Mission in Mali	<b>SSF</b>	State Security Forces (Dataset)
<b>MINUSTAH</b>	United Nations Stabilizing Mission in Haiti	<b>SVS</b>	savages—victims—saviours
<b>MNCs</b>	multinational corporations	<b>TRC</b>	Truth and Reconciliation Commission
<b>MONUSCO</b>	United Nations Organization Stabilization Mission in the Democratic Republic of the Congo	<b>UAE</b>	United Arab Emirates
<b>MOSOP</b>	Movement for the Survival of the Ogoni People	<b>UCDP</b>	Uppsala Conflict Data Program
<b>NATO</b>	North Atlantic Treaty Organization	<b>UK</b>	United Kingdom
<b>NGO</b>	non-governmental organization	<b>UDHR</b>	Universal Declaration of Human Rights
		<b>UN</b>	United Nations
		<b>UNCAT</b>	United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
		<b>UNCRC</b>	United Nations Convention on the Rights of the Child
		<b>UNDP</b>	United Nations Development Programme

## List of Abbreviations

<b>UNFICYP</b>	United Nations Peacekeeping Force in Cyprus	<b>UNSMIS</b>	United Nations Supervision Mission in Syria
<b>UNHCR</b>	United Nations High Commissioner for Refugees	<b>UN-TAET</b>	United Nations Transitional Administration in East Timor
<b>UNIFIL</b>	United Nations Interim Force in Lebanon	<b>UNTSO</b>	United Nations Truce Supervision Organization
<b>UNMIL</b>	United Nations Mission in Liberia	<b>US</b>	United States
<b>UNMISS</b>	United Nations Mission in South Sudan	<b>VPN</b>	virtual private network

# Part



# Human Rights and State Responsibilities

# Chapter

# 1

# What Are Human Rights?

**This chapter introduces** the meaning of human rights, what those rights are, and where they can be found, but it also offers some critiques of human rights, especially the charge that they represent little more than Western values. The chapter discusses the universality of human rights, embodied in the Universal Declaration of Human Rights, and the fact that all human beings have human rights no matter where they live and no matter whether their own state has ratified various human rights conventions. It introduces international human rights law, which takes human rights from the moral or ethical sphere into real law. We discuss the relationship between domestic and international human rights law. We conclude with an introduction to the major players in the human rights field with examples of the kind of work these bodies engage in.

## 1.1 Where Do Human Rights Come From?

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The concept of basic human rights is not an invention of the United Nations (UN) or another modern actor. Instead, it can be traced back to all major world religions and across different philosophical ideas. Hinduism, the world's oldest religion (4,500 years ago), teaches that all life is sacred, emphasizing *ahimsa*, or non-harm. Judaism (3,300 years old) highlights the sanctity of life and human responsibility, illustrated by Cain's question, 'Am I my brother's keeper?' Christianity (2,000 years ago) stresses caring for the poor, sick, and hungry, exemplified in the parable of the Good Samaritan. Buddhism (2,500 years ago) centres on respect for life, compassion, and rejecting caste-based inequality, as taught by Siddhartha Gautama. Around the same time, Confucianism in China promoted morality, social justice, and *Jen* ('benevolence'), linking personal righteousness to global peace. Islam (1,500 years ago) emphasizes equality, tolerance, and charity. The Koran teaches compassion and justice, and the prophet Muhammad advocated for social equality, rejecting privilege and asserting that all are equal in Allah's eyes.

Philosophy has long sought to address complex questions about human relationships. Early philosophies of human rights focused on universal duties rather than rights, with theories evolving through centuries of political, economic, and social conflict. In ancient China, Mo Zi emphasized duty, self-sacrifice, and universal respect. In Babylon, King Hammurabi's legal code championed justice and equal protection, while Cyrus the Great's Charter recognized rights like liberty, freedom of religion, and social protections. In Greece, thinkers like Plato and Aristotle advanced ideas of natural law and virtue, advocating justice and charity beyond personal gain. Cicero's natural law theory emphasized universal justice and service to others. The Roman *jus gentium* extended natural law to all humanity, transcending citizenship.

Thomas Aquinas adapted Aristotle's natural law, proposing a divine basis for justice and asserting the individuality of each person beyond state membership. Later, Christian humanists expanded on these ideas, blending religious duty with moral philosophy to advocate for political and economic reform. The scientific revolution further advanced reason

as a tool to understand natural law, rejecting the ‘divine right’ of kings.

The Enlightenment shifted focus from duties to rights. John Locke articulated that natural rights – life, liberty, and property – existed in a state of equality and were preserved through government. His ideas challenged oppressive structures and influenced thinkers like Rousseau, who declared, ‘Man is born free’, and Kant, who emphasized treating others as ends, not means. In America, Enlightenment principles shaped the Declaration of Independence, asserting unalienable rights to life, liberty, and the pursuit of happiness. Similarly, Thomas Paine’s *Rights of Man* emphasized natural human rights as the foundation of society.

## 1.2 The Birth of the Modern Human Rights Movement

Despite these early traces of human rights in religion and philosophy, in practice for nearly all of human history, individuals had whatever rights their own government decided to bestow upon them. But what if a state granted few rights – or worse, if it engaged in cruel and barbaric behaviour against its own citizens? Until the mid-1940s, this was viewed as a purely domestic or internal matter between a government and its own people and was thus treated as being outside the purview of the rest of the international community.

All this has changed, at least in theory. The greatest impetus for the present-day human rights revolution was the Holocaust, where an estimated six million Jews were cruelly and systematically killed during the Second World War. The Holocaust was undeniable and incontrovertible proof that citizenship might offer absolutely no protection against a government that sought to make war on a particular group of people within a given society and to violate their most basic human rights. But what the horrors of the Holocaust also showed was that this laissez faire attitude about how a government treated its own citizens was simply no longer acceptable. What emerged from the arguably darkest period in all human history was what we will term the human rights revolution.

### 1.2.1 The Post-Second World War Period and the UN Declaration of Human Rights

The legal philosopher Michael Perry has summed up the essence of human rights by positing that there are certain things that ought never to be done to people and certain other things that should be done (Perry, 1998). These ‘things’, then, are human rights and these rights are best spelled out in several international human rights instruments, most notably what has been termed the International Bill of Rights.

The first and most important component is the 1948 *Universal Declaration of Human Rights* (UDHR), which is often termed the Magna Carta of human rights instruments. The Universal Declaration proclaimed that all people have human rights – civil and political rights as well as economic, social, and cultural rights – and set everything else in motion. In the words of Johannes Morsink, who has written the definitive account of the drafting history, the UDHR has ‘profoundly changed the international landscape, scattering it with human rights protocols, conventions, treaties and derivative declarations of all kinds. At the end of the twentieth century there is not a single nation, culture, or people that is not in one way or another enmeshed in a human rights regime’ (Morsink, 1999: X).

The Universal Declaration is just that: a declaration. Thus, it is not binding international law, although a strong argument could be made that it has now reached the status of customary international law in the sense that its provisions are something that states feel they must abide by. The effort to transform the UDHR into international law resulted in two separate treaties: the *International Covenant on Economic, Social and Cultural Rights* (ICESCR or Economic Covenant) and the *International Covenant on Civil and Political Rights* (ICCPR or Political Covenant). These two International Covenants comprise the other two legs of the International Bill of Rights, next to the UDHR.

Why was the UDHR broken down into two separate treaties? The standard story is that this reflects Cold War tensions, with Western democracies championing civil and political rights and the Communist states supporting economic, social, and cultural rights. However, Whelan’s (2010) scholarship goes far in exposing this as myth. What Whelan has found instead is that there was near universal support for both sets of rights, but there was also a general recognition that the

two sets of rights were different from one another – different in terms of substance of the right involved, different in terms of enforcement of those rights, and finally, different in terms of levels of international assistance and cooperation that would be needed to protect these rights.

As shown in Box 1.1, in the decades that have followed international human rights law continues to broaden in scope, although some critics, most notably Hopgood (2013) and Posner (2014), believe that this rights expansion ultimately has been counterproductive because this will dilute those rights that have already been recognized. In addition to international standards, regional instruments, most notably the European Convention and the American Convention, have played an important role in the development of human rights. These rights include the following partial list, which is summarized from the UDHR:

### Box 1.1 Timeline of the Major Human Rights Treaties

- 1945 United Nations Charter
- 1945–1946 Nuremberg Trials
- 1948 Universal Declaration of Human Rights
- 1948 Genocide Convention
- 1949 Geneva Conventions
- 1950 European Convention on Human Rights (entered into force 1953)
- 1951 Refugee Convention (entered into force 1954)
- 1966 Convention on Elimination of Racial Discrimination (entered into force 1969)
- 1966 Economic Covenant (entered into force 1976)
- 1966 Political Covenant (entered into force 1976)
- 1969 American Convention on Human Rights (entered into force 1978)
- 1976 African Charter on Human and Peoples' Rights (entered into force 1986)
- 1979 Convention on Discrimination Against Women (entered into force 1981)
- 1984 Torture Convention (entered into force 1987)
- 1990 Children's Convention (entered into force 1990)
- 1990 Migrant Workers Convention (entered into force 2003)
- 2006 Convention on the Rights of Persons with Disabilities (entered into force 2008)
- 2006 International Convention for the Protection of All Persons from Enforced Disappearance (entered into force 2010)

- a right to life, liberty and security of the person (Art. 3);
- freedom from torture or cruel, inhuman or degrading treatment or punishment (Art. 5);
- a right to equal protection against discrimination (Art. 7);
- a right to an effective remedy for violations of fundamental rights (Art. 8);
- freedom from arbitrary arrest, detention or exile (Art. 9);
- a right to a fair and public hearing by an independent and impartial tribunal in criminal proceedings (Art. 10);
- a right to freedom of movement (Art. 13);
- a right to seek and enjoy asylum in other countries (Art. 14);
- freedom of thought, conscience and religion (Art. 18);
- a right to work, to free choice of employment, to just and favorable conditions of work and to protection against unemployment (Art. 23);
- a right to education that is directed at the full development of the human personality and to the strengthening of respect for human rights and fundamental freedoms (Art. 26);
- a right to social security, and the realization through national effort and international cooperation of the economic, social and cultural rights indispensable for a person's dignity and the free development of their personality (Art. 22); and
- the right to a social and international order in which rights and freedoms can be fully realized (Art. 28).

## 1.3 The Universality of Human Rights

Despite its name, the Universal Declaration is not universal in the sense that although no country voted against the Declaration, eight countries abstained.<sup>1</sup> In addition, at the time of the vote in 1948 large parts of the globe, particularly in Africa and Asia, were under colonial rule and

<sup>1</sup> Czechoslovakia, Poland, Saudi Arabia, Soviet Union, Belarussian SSR, Ukrainian SSR, South Africa, and Yugoslavia.

thus were not truly represented in either the drafting of the UDHR or when the document was voted on in the UN General Assembly. Much of the doubt concerning human rights that continues to exist in many parts of the globe was based on this hypocrisy of proclaiming the universality of human rights – while maintaining colonial and neo-colonial relationships (Ibhawoh, 2020).

Still, human rights are universal in the sense that all human beings possess human rights by the mere fact of their existence. Like all other human rights instruments that have followed, the UDHR speaks in terms of protecting ‘everyone’ and denying human rights protection to ‘no one’. It does not matter where a person lives or what kind of government a person lives under. It also does not matter whether a particular state has agreed to be bound by any particular human rights treaty or not. For example, although the United States (US) is the only country that is not a state party to the *Convention on the Rights of the Child* (Children’s Convention), this does not mean that young people in the US do not have any human rights. Instead, this means that these (human) rights will have to be protected solely through domestic (US) means.

Human rights are often dismissed as being unrealistic and even utopian in nature. The reality, however, is very different. Human rights represent the bare minimum that is required for a person to live a human – as opposed to an inhuman – existence. Thus, human rights are more properly thought of as establishing a floor beneath which no individual is to be allowed to fall. Yet, human rights should not be viewed in terms of taking care of people. Rather, it is about creating conditions so that people can take care of themselves if they are able. More importantly, human rights create the (legal) guarantee that people will be able to provide for themselves. As Nobel Prize recipient Sen (1981) has emphasized, hunger is not a simple by-product of the unavailability of food, but rather the unavailability of an entitlement to food.

One of the great misconceptions is to view human rights simply as moral rights or as rights based on certain religious or ethical principles – but nothing beyond that. Human rights are most certainly based on particular values of how people ought to live and how people ought to be treated. Much of this book will be devoted to the idea that human rights are also legal rights. But we take this principle one step further by positing that states have certain well-defined legal obligations to

protect those rights. Thus, not only are human rights universal, but the responsibility to protect human rights is universal as well.

No doubt, one of the problems in accepting the idea that human rights are legal rights comes from the chasm between promise and reality – between the rights proclaimed by international human rights instruments versus the cruel reality that a substantial portion of humanity is denied some form of human rights protection (see Box 1.2). We have a couple of responses, although we admit that we are not adequately satisfied with either of them.

### Box 1.2 Human Rights and Croesus's World of Global Inequality

The legal historian Samuel Moyn has been one of the harshest critics of how human rights has tended to ignore ever-increasing levels of inequality in the world. In his book *Not Enough: Human Rights in an Unequal World*, Moyn (2018) concedes the central role that human rights have come to play in the world. Yet, he argues that the decision to place human rights squarely within the framework of free market capitalism has led to a world divided between rich and poor states, resulting in a 'weak and cheap' version of human rights.

But they [human rights] have also become our language for indicating that it is enough, at least to start, for our solidarity with our fellow human beings to remain weak and cheap. To a startling extent, human rights have become prisoners of the contemporary age of inequality. (Moyn, 2018: 6)

Moyn concludes his book by telling the story of a man who owns everything, calling him Croesus, named after the ancient king who in popular lore was incredibly wealthy. Like his namesake, Croesus is a benevolent ruler, ensuring that all his subjects have the bare necessities of life and banning all forms of political repression. In this state, the worst off have enough. But, as Moyn notes, 'they are in a yawning hierarchy, far beneath the have-mores' (Moyn, 2018: 212).

As should be evident, we increasingly are living in Croesus's world. 'Tiny numbers of rich people dwarf the rest in their wealth, and some national settings have been trending toward absolute inequality, even if the global picture is more complex' (Moyn, 2018: 212). The question Moyn asks is whether Croesus's world is the kind of world

that we want to live in and his reply is that it is not. The problem is that, as presently conceived, human rights have nothing to say about material inequality.

Moyn foresees a 'populist rage' in reaction to this growing inequality and the enormous dislocations this will have in terms of the protection of human rights. He concludes this provocative book by suggesting that human rights defenders can no longer turn a blind eye to the expanding inequality all around us. Or in his words: 'Croesus's world of basic rights and needs fulfilled in the midst of continuing or even escalating inequality is not only still immoral: it has become clearer every day that it is destined to instability and ruin' (Moyn, 2018: 220).

The first response is to point out that this disjunction between promise and reality is by no means confined to the realm of human rights. This same problem can exist under domestic law as well. For example, the 14th Amendment of the US Constitution promises equal protection under the law. Yet, as Kozol (1991) shows in his disturbing book *Savage Inequalities*, there is an enormous gap between the educational opportunities that rich children in the US enjoy and those afforded to children from poor families. Does this disparate treatment prove that the Equal Protection clause of the 14th Amendment is meaningless? And does this mean that the language of rights should not be used in this particular context?

A second response is to admit what should be evident, namely that the greatest and gravest weakness in the entire realm of human rights concerns the lack of effective enforcement and protection of those rights. We repeatedly come back to this issue. While we acknowledge that some important gains have been made, it is crucial that the issue of human rights enforcement is addressed head on.

## 1.4 Human Rights and the West

One of the most compelling and challenging critiques of human rights has been given by Mutua (2001), who has developed what he terms the *savages-victims-saviours* (SVS) metaphor in his criticism of the dominant approach to human rights. The *savage* in this model consists

of non-Western states – but really, non-Western cultures – that refuse to follow the dictates of the European/American model.

The *victims* are the nameless masses of sympathetic but helpless innocents who are thought to suffer under the misrule and misdeeds of these savage states. The third and final component is the *saviour*, which is made up of various Western institutions including the UN, Western countries (most notably the US), and non-governmental organizations (NGOs) such as Amnesty International and Human Rights Watch that are based in the West. According to Mutua, human rights are based on the un-stated precept that the saviour must protect the victim from the cruelties of the savage.

Mutua argues that what is so often missing from any discussion of human rights is a broader historical and political context. In his view, what those who promote human rights systematically ignore is the long and ugly history of Western intervention – whether through colonial rule or the so-called ‘civilizing’ goal of Christian missionary work, for example – that has brought great harm to non-Western people, but which has always been carried out under the banner of providing help and assistance to these ‘unfortunate people’.

Mutua describes what he sees as a seemingly incurable virus: ‘the impulse to universalize Eurocentric norms and values by repudiating, demonizing, and “othering” that which is different and non-European’ (Mutua, 2001: 210). According to his analysis, what we now know as ‘human rights’ is little more than just another attempt by the West to exert its control and influence on people and governments in all other parts of the world – but done under the guise of so-called ‘universal’ values. Mutua maintains that while Western people are quite enamoured by the human rights edifice that they have constructed, non-Western people are able to see right through this, which is why (in his view at least) the concept of human rights has virtually no legitimacy outside the West itself.

Another element of Western hypocrisy involves the lack of Western self-examination or self-criticism. While Western institutions are desperately intent on exposing the horrors carried out in these ‘Savage’ societies, these same institutions are either incapable or unwilling to recognize the wrongs that they themselves commit. While discrimination and abuse of females in non-Western countries is fodder for investigation and recrimination by the various ‘Saviour’ institutions, what

is systemically ignored are all the forms of discrimination and abuse suffered by females in Western states.

Finally, Mutua addresses the 'typical' white American high school or college student who earnestly joins the local chapter of Amnesty International, and in the course of doing so protests against such things as female genital mutilation in faraway lands or writes letters of protest to political or military leaders with names that do not easily roll off the English speaking tongue, as Mutua describes it (2001: 219):

The zeal to see all humanity as related and the impulse to help those defined as in need is noble and is not the problem addressed here. A certain degree of human universality is inevitable and desirable. But what that universality is, what historical and cultural stew it is made of, and how it is accomplished make all the difference. What the high school or college student ought to realize is that her zeal to save others – even from themselves – is steeped in Western and European history. If one culture is allowed the prerogative of imperialism, the right to define and impose on others what it deems good for humanity, the very meaning of freedom itself will have been abrogated. That is why a human rights movement that pivots on the SVS metaphor violates the very idea of the sanctity of humanity that purportedly inspires it.

Makau Mutua presents a disturbing challenge to the entire notion of human rights; one that all those who believe in human rights (or say they do) need to confront and address. We contrast his work with that by Ignatieff (2001), a human rights scholar, activist, and a former Canadian politician, and one of the great defenders of human rights and its values. Ignatieff does not deny the primacy of Western states (and Western lawyers) in the drafting of the UDHR. Yet, rather than proclaiming Western superiority, Ignatieff sees this document, written in the wake of the massive horrors of the Second World War, in just the opposite light: as a frank and painful acknowledgement of the enormous failures of the West. He writes (Ignatieff, 2001: 65):

The Declaration may still be a child of the Enlightenment, but it was written when faith in the Enlightenment faced its deepest crisis of confidence. In this sense, human rights is not so much the declaration of the superiority of European

civilization as a warning by Europeans that the rest of the world should not seek to reproduce its mistakes.

This recognition of the shortcomings of the West does not mean that human rights are not based on certain Western values. Ignatieff takes the position that the most important value of all – protecting the individual from powerful oppressive forces within a given society – is a decidedly Western concept and there is no need to apologize for this. However, Ignatieff argues that these (Western) values have now become universal values, and this has been achieved by empowering the powerless and by giving voice to the voiceless in places the world over. Furthermore, Ignatieff adamantly opposes the notion that human rights are in any way an attempt to fundamentally change these societies – or the people who live there. What human rights do, instead, is provide the choice of opting out, but only when the individual himself or herself finds it necessary to do so. He writes (Ignatieff, 2001: 70):

It is simply not the case, as Islamic and Asian critics contend, that human rights forces the Western way of life upon their societies. For all its individualism, human rights does not require adherents to jettison their other cultural attachments ... What the Declaration does mandate is the right to choose, and specifically the right to leave when choice is denied.

Thus, while Makau Mutua sees human rights as a cover for the continued domination of Western interests and Western values, Michael Ignatieff sees human rights as transcending these things, and providing a common language to an equally shared, but contentious, conversation of how people are to be treated:

But once this universal right to speak and be heard is granted, there is bound to be tumult. There is bound to be discord. Why? Because the European voices that once took it upon themselves to silence the babble with a peremptory ruling no longer take it as their privilege to do so, and those who sit with them at the table no longer grant them the right to do so. (Ignatieff, 2001: 94)

We leave it up to the reader to determine who has the better reasoned argument. Like Ignatieff, we believe that there is certainly no need to

apologize for defending and promoting human rights – if anything, there should be an apology for not doing vastly more than we do.

In terms of Mutua's approach, we agree that human rights are riddled with hypocrisy and inconsistencies. In addition, we believe that it is essential that human rights be viewed with a cynical eye and that it is vitally important to place it within a broader historical context. However, one of our concerns about Mutua's approach is that it can easily lead to an excuse for doing nothing, the rationale being that any Western involvement in attempting to eliminate human rights violations in a non-Western country would only be another form of 'Western imperialism'. The point is that the policies of Western states already have a profound effect on human rights practices in developing countries. To ignore those realities and to remove ourselves from any participation in preventing these wrongs is, in a word, a cop-out.

Box 1.3 provides an overview of some of the feminist critiques of human rights.

### Box 1.3 Feminism and Human Rights

There is no one feminist critique of human rights. Instead, any number of scholars and practitioners have criticized the way in which women – no matter what country they live in – suffer the highest levels of human insecurity, whether it be in the form of physical harm, economic exploitation, or societal norms that effectively remove many life prospects from them. Catherine MacKinnon (2007) has gone so far as to question the use of the term 'human' when speaking of women's human rights:

If women were human, would we be a cash crop shipped from Thailand in containers into New York's brothels? Would we be sexual and reproductive slaves? . . . Would our genitals be sliced out to 'cleanse' us (our body parts are dirt?), to control us, to mark us and define our cultures? . . . Would we be kept from learning to read and write? If women were human, would we have so little voice in public deliberations and in governments in the countries where we live? Would we be hidden behind veils and imprisoned in houses and stoned and shot for refusing? Would we be beaten nearly to death, and to death, by men with whom we were close? Would we be sexually molested in our families? Would we be raped in genocide to terrorize and eject and destroy our ethnic communities, and raped again in that undeclared war that goes on every day in every country in the world in what is called peacetime? If women

(Continued)

were human, would our violation be enjoyed by our violators? And, if we were human, when these things happened, would virtually nothing be done about it? (MacKinnon, 2007: 41)

How is it that 'human rights' has failed women in this way? One explanation relates to the meaning of what it is to have a 'right', which is invariably based on Dworkin's (1977) notion that a right serves as a 'trump' against the state. Yet, under this approach to rights, societies are made up of little more than autonomous individuals without any necessary connection to one another. One of the things that feminist scholarship has pressed for is the understanding of rights as also involving social relations and the critical importance of inclusion (Binion, 1995).

Another feminist criticism is that 'human rights' only focuses on the actions of the state – thereby ignoring the multitude of ways in which women suffer at the hands of private actors. One response to this is to point out that under international human rights law, states have a duty to protect against violations carried out by non-state actors. Why is it, then, that we continually associate human rights only when a state acts – but not when it fails to protect?

## 1.5 International Human Rights Law

International human rights law serves as the cornerstone of human rights. Without this law, human rights would be confined to the moral realm. With this law, there is both the hope and the possibility – but more importantly, the obligation – to make these ideals into reality.

Yet, notwithstanding what is now a wealth of international human rights treaties, there are several misunderstandings about them. The first is the idea that there is a sharp demarcation between domestic and international law. Furthermore, the former is invariably treated as being 'real' law, while the latter is almost never viewed in this same way. Yet, this represents a misreading of both domestic and international law. Rather, when a country becomes a state party to an international human rights treaty – that is, when the government of a country signs and then ratifies a particular human rights instrument – what this state is thereby doing is incorporating this particular component of international law

into its own domestic law. In that way, there is no distinction or separation between the two. Instead, the two become one and the same.

Consider the US accession to the Torture Convention. The UN General Assembly adopted the treaty without a vote on 10 December 1984 and it was then opened for signature on 4 February 1985. Article 27 specifies that the treaty will enter into force 30 days after the 20th state has signed and ratified the treaty, and this was achieved on 26 June 1987. The US signed the treaty on 18 April 1988. Under the US Constitution Article II, Section 2, in order for a treaty to become part of US law, the US Senate must give its 'advice and consent'. The US Senate did so on 21 October 1994. At this point this international human rights treaty now became a part of US domestic law, and what this also means is that any acts of torture that American security officials are a party to (Box 1.4) constitutes a violation of both domestic and international law.

### Box 1.4 Human Rights and the 'War on Terror'

Following the 11 September 2001 attacks on the US, the US government led a world-wide effort to eradicate international terrorism. In his influential book *The Lesser Evil: Political Ethics in an Age of Terror*, Michael Ignatieff (2004) argues that Western states might have to resort to 'evil' measures in order to protect themselves from international terrorism. He justified this tactic this way:

It is tempting to suppose that moral life can avoid this slope simply by avoiding evil means altogether. But no such angelic option may exist. Either we fight evil with evil or we succumb. So if we resort to the lesser evil, we should do so, first, in full awareness that evil is involved. Second, we should act under a demonstrable state of necessity. Third, we should choose evil means only as a last resort, having tried everything else. Finally, we must satisfy a fourth obligation: we must justify our actions publicly to our fellow citizens and submit to their judgment as to their correctness. (Ignatieff, 2004: 19)

And what is to prevent Western states from taking this 'evil' too far? Ignatieff's answer is that democracy itself will ensure this.

While it is impossible to determine whether this is true or not, it is important to note at least two things regarding the 'War on Terror'. The first is simply the number of states – more than a quarter of the countries in the world – that engaged in

(Continued)

this 'war' in one manner or another. Along with the US, the Open Society (2013) has documented the participation of 54 states, listed in alphabetical order and with Western democracies in bold:

Afghanistan, Albania, Algeria, **Australia, Austria**, Azerbaijan, **Belgium**, Bosnia-Herzegovina, **Canada**, Croatia, Cyprus, Czech Republic, **Denmark**, Djibouti, Egypt, Ethiopia, **Finland**, Gambia, Georgia, **Germany, Greece, Hong Kong, Iceland**, Indonesia, Iran, **Ireland, Italy**, Jordan, Kenya, Libya, **Lithuania**, Macedonia, Malawi, Malaysia, Mauritania, Morocco, Pakistan, **Poland, Portugal, Romania**, Saudi Arabia, Somalia, South Africa, **Spain**, Sri Lanka, **Sweden**, Syria, Thailand, **Turkey**, United Arab Emirates, **United Kingdom**, Uzbekistan, Yemen, and Zimbabwe.

The second thing to note is that although Ignatieff was of the belief that democratic governance would be enough to keep 'evil' from going outside of acceptable bounds, what also has to be recognized is that nearly every attempt was made to prevent the populations in these states from ever finding out the practices that its own state was engaged in, which is the antithesis of 'democracy'. A case in point would be the worldwide surveillance practices undertaken by the US, but hidden for years from the American public as well as the international community (Risen and Lichtblau, 2005).

Perhaps a more serious misconception about international human rights law concerns its scope and meaning. As a general if not universal rule, states operate under the belief that their obligations under international human rights law only apply to their actions within their own domestic realm, but that these same human rights obligations do not bind them when they act outside their own territorial borders. The starkest example of this approach to human rights was the policy of the Bush administration to house 'enemy combatants' at Guantanamo Bay, Cuba, rather than in federal prisons within the US. The rationale behind this policy was that the US government would not have the same human rights obligations towards these individuals if they were housed at Guantanamo Bay that they would if they were placed in detention somewhere within US national borders.

We strongly oppose a vision of human rights that provides two different sets of standards: one at home and another set of standards

when a country operates outside its own territorial borders. International human rights law – *all* international human rights law – gives rise to *both* domestic and to international obligations, or what we call extraterritorial obligations.

We will use the Torture Convention to clarify our point and ask this simple question: why would a country become a state party to the Torture Convention? The answer seems obvious. A country becomes a state party to prevent or eliminate torture. If a state were only interested in preventing torture within its own domestic borders – but it was completely indifferent to whether this odious practice was carried out any place else – why would it go through the trouble of signing and ratifying an international human rights instrument? Why not simply ban torture through domestic legislation and leave matters at that?

Our answer is that international human rights treaties mean something more than this. In becoming a state party to an international human rights treaty, each state party is committing itself not only to protect human rights within its own territorial borders, but each state is also committing itself to help work towards the elimination of violations of human rights no matter where these might take place. Although human rights treaties are, in essence, communal undertakings to eradicate harmful policies that violate human rights standards, this extraterritorial dimension is more pronounced in some international treaties than it is in others.

Some of the clearest language of extraterritorial intent can be found in the Torture Convention. Although a substantial portion of the treaty relates solely to domestic obligations – that is, the obligation to criminalize torture (Art. 4), the duty to investigate any alleged acts of torture that occur within the territorial borders of that state (Art. 12) – the extraterritorial goal of eliminating torture worldwide runs throughout the Convention, beginning with the Preamble, which concludes: ‘Desiring to make more effective the struggle against torture and other cruel, inhuman or degrading treatment or punishment throughout the world ...’

Other provisions underscore the importance that states avoid any form of complicity with respect to torture that occurs outside its national borders. For example, Article 3 (*nonrefoulement*), prohibits a state party from sending a person to another state where there are ‘substantial grounds’ for believing this individual would be in danger of being

tortured. Similarly, Article 5 demands that state parties ‘shall take such measures as may be necessary to establish its jurisdiction’ whenever torture is alleged. Thus, each of the state parties must exercise jurisdiction even if the torture had not taken place within its territory, and even if neither the victim nor the perpetrator is a national of that state. And what are the state parties obligated to do if an alleged torturer is found within its national borders? Article 7 provides that each state party must either prosecute any alleged torturer who is within its territory, or else extradite this individual to some other state that will do so.

Going ever further, like other human rights treaties, the Torture Convention obligates state parties to provide an ‘*effective remedy*’ for victims of torture. Article 13 covers situations where a person is tortured within that country and it reads in part:

Each State Party shall ensure that any individual who alleges he has been subjected to torture in any territory under its jurisdiction has the right to complain to, and to have his case promptly and impartially examined by, its competent authorities.

Article 14(1) goes beyond this by imposing on the state parties an obligation to effectuate a remedy for torture victims no matter where the torture occurs (Hall, 2007). Unlike Article 13, Article 14(1) has no geographical restriction. It reads in part:

Each State Party shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible.

To be sure, as shown in Box 1.5, some states, including Canada, have interpreted Article 14 differently, demanding that the obligation to provide an effective remedy only applies if the torture occurs within the national borders of that state.

### Box 1.5 Concluding Observations

Much of international human rights law relies on self-enforcement. Thus, although the experts who serve in the various UN treaty bodies have no real power over the states,

what they can offer is their interpretation of the law. An example of this is has been the ongoing dialogue between the Committee Against Torture (CAT) and the Canadian government regarding Article 14. In its 2018 Concluding Observations to Canada's report, the CAT once again criticized not only the Supreme Court's interpretation that Canada's duty to provide an 'effective remedy' to torture victims was only applicable if the torture had taken place within the country's territorial borders, but also the government's failure to amend the State Immunity Act to achieve that result. Below is an excerpt from its 2018 Concluding Observation:

The Committee regrets that the State party has not taken any measures to review its legislation in order to ensure that all victims of torture are able to access remedy and obtain redress, wherever acts of torture have occurred and regardless of the nationality of the perpetrator or victim, as recommended by the Committee in its previous concluding observations . . . In this regard, the Committee regrets the State party's reluctance to amend the State Immunity Act with a view to providing an exception to State immunity for acts of torture committed outside Canada by foreign States or their representatives. (para. 40)

Finally, Article 21 provides that one state party can bring a complaint against one of the other state parties on the grounds that the latter is not meeting its obligations under the treaty – that is, it continues to practise torture. Unfortunately, notwithstanding the epidemic of torture that continues to exist, no state has ever filed a complaint under Article 21 against another state.

## 1.6 Introducing the Major Players

There are a multitude of institutions and actors involved in human rights. We close this chapter by briefly introducing some of the major players.

### 1.6.1 The United Nations Human Rights System

The Preamble of the United Nations Charter begins with this stirring challenge:

We the Peoples of the United Nations determined:

to save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind, and

to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small, and

to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained, and

to promote social progress and better standards of life in larger freedom, ...

Thus, the protection of human rights is one of the primary objectives of the UN and there are several bodies within the UN that address human rights issues, either directly or indirectly.

### **Commission on Human Rights/Human Rights Council**

Arguably, the principal UN organ dealing with human rights has been the UN Commission on Human Rights (also known as the Human Rights Commission), which was replaced with the Human Rights Council in 2006. The Commission's contribution to human rights cannot be overstated. It was, after all, the Human Rights Commission that did the vital and painstaking work of initiating the drafting of nearly every one of the international human rights treaties, including the International Bill of Rights.

However, the Commission did not become (and was not allowed to become) the Great Defender of human rights that people around the world wanted it to become, as evidenced by the tens of thousands of petitions it initially received each year from victims of human rights abuse. This changed, at least to a certain degree, starting in 1967 when the Commission was given some authority to discuss human rights violations with particular countries, and in 1970 it was authorized to investigate complaints (but not individual complaints) if there was evidence of 'a consistent pattern of gross and reliably attested violations of human rights and fundamental freedoms'. However, this process has been both time-consuming and anything but transparent.

Still, the Commission/Council has produced some important and innovative work – most notably in establishing human rights standards,

but also in subjecting human rights abusing states to some level of scrutiny and, at times, condemnation.

The UN Human Rights Council came into existence in 2006 as a replacement for the Commission. It is made of up 47 member states that are elected annually by majority vote. The rationale behind this change is that the Commission had become too politicized and that countries that were some of the worst violators of human rights were being elected to serve on the Commission. Perhaps the most novel aspect of the new Council is that it subjects each country to a universal periodic review, based on objective and reliable information. Of course, political considerations cannot be completely removed from the process.

### **UN High Commissioner for Human Rights**

This position was created following the 1993 World Conference on Human Rights in Vienna, with the idea of having a single office serving as a focal point for human rights activity in the UN system. To a certain extent this has been the case, although the power of the position has seemingly waxed and waned depending on the political skills but also the visibility of the High Commissioner.

### **UN Human Rights Treaty Bodies**

The UN has established treaty bodies to monitor and administer the major international human rights treaties. With the exception of the ICCPR (Political Covenant), which is monitored and implemented by the Human Rights Committee (not to be confused with the Human Rights Commission/Council), the names of the treaty body are virtually the same as the treaty itself. Thus, the Committee Against Torture is responsible for administering the Torture Convention. The Committee on Economic, Social and Cultural Rights is responsible for the Economic Covenant, and so on. Unlike the Human Rights Commission/Council, whose membership consists of state representatives, each of the treaty bodies is comprised of independent experts. The state parties to each treaty are obligated to file periodical reports with the appropriate treaty bodies. The treaty body then offers commentary on these reports in the form of 'Concluding Observations', which were discussed earlier in the context of Canada's interpretation of Article 14 of the Torture Convention and CAT's much different interpretation. Some of the most

important work of the treaty bodies has come in the form of ‘General Comments’, two examples of which can be found in Box 1.6.

### Box 1.6 General Comments: Extraterritorial Obligations and Human Rights

One of the major themes of this book is that states have human rights obligations both inside and outside their own national borders. To some, this will be self-evident. After all, why would it be illegal for a state to torture a political dissident within its own territorial boundaries – but not illegal to do so in some other state?

Yet, the ‘territorial’ interpretation of international human rights law has long been dominant and there are at least two main reasons for this. The first is that a host of international rights treaties make reference to ‘territory’ and/or ‘jurisdiction’. One such example of this is the Political Convention (Art. 2(1)):

Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its *territory* and subject to its *jurisdiction* the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.  
[emphasis added]

Thus, a literal interpretation of the ICCPR is that states only have obligations to individuals who are *both* within its territory *and* also within its jurisdiction.

Yet, even when there is no mention of either of these two terms, there has been a strong tendency to adopt a ‘territorial’ interpretation and in large part this can be explained by the international law principle that states are not to interfere in the ‘domestic’ affairs of other states. A good example of this is the Economic Convention. Article 2(1) reads:

Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, 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 by all appropriate means, including particularly the adoption of legislative measures

Although there is no mention of either ‘territory’ or ‘jurisdiction’ – and the state parties are obligated to undertake ‘international assistance and cooperation’ with

one another – for a long period of time the ICESCR has been given a ‘territorial’ interpretation.

This is beginning to change and the most authoritative means of achieving this is through the issuance of **General Comments**. The Committee on Economic, Social and Cultural Rights in its General Comment 24 (State Obligations under the International Covenant on Economic, Social and Cultural Rights, 10 August 2017) stated: ‘The extraterritorial obligation to respect requires States parties to refrain from interfering directly or indirectly with the enjoyment of the Covenant rights by persons outside their territory’ (para. 29).

Similarly, the Human Rights Committee in its General Comment 36 (Right to Life) interpreted the term ‘jurisdiction’ in functional terms, referring to the ability of one state to affect the ‘enjoyment’ of the right to life of a person living in another state.

Finally, several treaties have an optional protocol that allows for individual complaints to be filed – but only when a state has agreed to be subject to this procedure. Box 1.7 provides an analysis of an intriguing, but ultimately unsuccessful, attempt to employ the individual complaint procedure.

### Box 1.7 The CRC Individual Complaint Procedure: The Sacchi Petition

Few people – especially young people – will need to be convinced that the most important, but also the most intractable, human rights issue facing all of mankind is climate change and the multitude of social, political, and economic dislocations that will follow from this. An intriguing attempt to employ the individual complaint procedure as a way of addressing climate change was the Sacchi petition filed with the Committee on the Rights of the Child (CRC) (UN Committee on the Rights of the Child, 2021).

The petitioners in this case were 16 children from Argentina, Brazil, France, Germany, and Turkey who claimed that each of these countries were not making sufficient cuts in terms of the production of greenhouse gas (GHG) emissions, and as a result were violating their human rights. Nearly all cases filed under the optional protocol procedure involve an individual filing a case against his/her own government. Thus, this aspect of the case is itself unusual.

(Continued)

Moreover, the petitioners were not only bringing a case against their own government – that is, German petitioners filing a case against Germany – but they also claimed that because GHG emissions do not respect national borders, and because each of these five countries produces a substantial amount of GHG emissions, they were not only within the jurisdiction of their home state, but within the ‘jurisdiction’ of each of these other states as well. Using the same approach as that taken by the Inter-American Court of Human Rights (IACtHR) in its 2017 Advisory Opinion, the CRC ruled that if an individual is harmed by the actions or omissions of some other state, it was thereby within the jurisdiction of that state.

The CRC ultimately dismissed the petition on the grounds that the claimants had not exhausted domestic remedies within their respective states. The children had sought to address this issue in their initial filings by pointing to the exigencies of climate change, while also documenting the considerable length of time that litigation so often took in each of these countries. The Committee was not moved by this argument. Because of this, the children won in terms of substance, but lost in terms of procedure.

## Security Council

The Security Council has the primary responsibility for maintaining international peace and security. It is the only UN body that can authorize the use of force, and in that way it can be instrumental in the protection of human rights. But the Council has often been accused of shirking this duty, whether it is the non-response to the Rwandan genocide in 1994, or the manner in which gross and systematic human rights violations have continued in the Darfur region of the Sudan for decades. One of the biggest hurdles in getting the Security Council to act is the veto power of its five permanent members. In large part, this helps explain the non-involvement of the Security Council in the wars in both Syria and Ukraine that started in 2011 and 2022 respectively.

## Secretary-General

The Secretary-General of the UN is the head of the Secretariat (one of the principal organs of the organization) and acts as the leader and spokesperson of the UN. Article 97 of the UN Charter defines the Secretary-General as the ‘chief administrative officer’, but the role of the Secretary-General goes far beyond this, particularly the

Secretary-General's ability to place the world spotlight on the world's troubled areas.

### **General Assembly**

The General Assembly's competence is unlimited and under Article 13 it can 'initiate studies and make recommendations' for the purpose of 'Assisting in the realization of human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion'. The most direct role that the General Assembly has played in the protection of human rights is that a number of declarations passed by the General Assembly have eventually become binding international human rights treaties.

### **International Court of Justice (ICJ)**

The International Court of Justice (ICJ) is the principal judicial body of the UN and is housed in The Hague, Netherlands. Not to be confused with the International Criminal Court (ICC), the ICJ attempts to settle legal disputes submitted to it by member states and it gives advisory opinions on legal questions submitted by authorized international organs and the General Assembly. We will be referencing several ICJ opinions in various places in this book. Unlike domestic courts, there is no hierarchy of international tribunals. However, the ICJ, which is the successor of the Permanent Court of International Justice under the League of Nations, is certainly the most visible and prestigious international judicial body.

### **International Criminal Court (ICC)**

The ICC is a permanent tribunal established in 2002 by the Rome Statute of the International Criminal Court. It is also based in The Hague. The ICC prosecutes individuals while the ICJ deals with state-state disputes. The ICC's authority is derived from Article 5 of the Rome Statute, and it grants jurisdiction over four types of crimes: genocide, crimes against humanity, war crimes, and crimes of aggression.

### **Regional and Country-Specific International Tribunals**

Prior to the establishment of the ICC, the UN created two regional bodies to prosecute war criminals in two particular conflicts: the International Criminal Tribunal for the former Yugoslavia (ICTY), which was also housed in The Hague, and the International Criminal Tribunal for Rwanda (ICTR), which was based in Arusha, Tanzania. In addition to

this, the UN helped establish the so-called hybrid tribunal in Sierra Leone – hybrid because it had both international and domestic (Sierra Leone) judges. And in early 2009 a UN-backed court – the Extraordinary Chambers in the Courts of Cambodia – brought its first criminal proceedings against Khmer Rouge leaders who had carried out genocide in that country more than three decades before.

## 1.6.2 Regional Actors

Some of the most important human rights work has been done under regional human rights instruments and by various regional actors.

### **African Charter on Human and People's Rights**

Also known as the Banjul Charter, the African Charter was created by the Organization of African Unity (since replaced by the African Union). In a 1979 Assembly of Heads of State and Government, the resolution was adopted for a committee to draft a continent-wide human rights instrument like ones that existed in Europe and the Americas. In 1986 the African Commission on Human and Peoples' Rights was created as a judicial body to enforce the provisions of the Banjul Charter. The African Court's jurisprudence has been quite progressive and impactful, especially on economic and social rights, although it has struggled on getting African governments to implement its rulings.

### **American Convention on Human Rights**

The American Convention was adopted in San José, Costa Rica in 1969 and came into force in 1978. The purpose of the Convention is 'to consolidate in this hemisphere, within the framework of democratic institutions, a system of personal liberty and social justice based on respect for the essential rights of man'. The American Convention is implemented at the first level by the Inter-American Commission on Human Rights, which then determines what cases are to be brought before the IACtHR.

### **European Convention on Human Rights (ECHR)**

The European Convention on Human Rights (ECHR) was adopted under the aegis of the Council of Europe in 1950 to protect human rights and fundamental freedoms. Notably, the Convention established the

European Court of Human Rights (ECtHR), which many consider to be the single most important human rights adjudicatory body in the world.

### 1.6.3 Non-governmental Organizations

Finally, some of the most important players are the NGOs that push and prod states, the UN, international financial institutions, the media, and so on, in the cause of human rights. There are literally thousands of NGOs, including Amnesty International, Human Rights Watch, Doctors Without Borders, Oxfam, and so forth. Box 1.8 provides a brief introduction to the advocacy work of Inclusive Development International (IDI), which has developed a unique and highly effective way of fighting against harmful projects.

#### Box 1.8 Inclusive Development International

Inclusive Development International is a civil society groups organization located in Asheville, North Carolina. What is so unique about the work that IDI does is that it (literally) 'follows the money'. Nearly all of IDI's work is with dispossessed communities in the Global South that are victims of land grabbing. IDI develops for these affected communities a roadmap of the multitude of entities – including insurance companies, commercial banks, and in many instances the World Bank itself through its International Finance Corporation – that are financing harmful projects. This information then allows the local community to enable entities that do not wish to be associated with such projects to withdraw their financial support.

### Conclusion

In this chapter we examined what human rights are and whether they are as universal as they claim to be. We took up the question of whether human rights are a Western concept that might have little meaning to the rest of the world and introduced various players in the United Nations that address human rights issues.

## GLOSSARY

**Concluding Observations:** When a country ratifies an international human rights treaty it is required to report to the treaty body that monitors that particular convention. The Concluding Observations are the Committee's response to this report, often establishing a useful dialogue between the UN treaty body and that state.

**Effective remedy:** All human rights treaties promise victims an 'effective remedy'. However, enforcement of international human rights law remains a significant problem, often leading to a kind of 'double victimization'. The first victimization occurs in the violations itself; the second in the denial of any form of effective remedy.

**Extraterritorial obligations:** These are human rights obligations that states have beyond their own national borders.

**General Comments:** General Comments are issued by UN treaty bodies as a way of providing their interpretation of the substance of the law.

**Global inequality:** Human rights historian Samuel Moyn has levelled the charge that human rights has largely ignored the growing levels of inequality – both within states and between states.

**Nonrefoulement:** States are prohibited from sending an individual to a country where their life or wellbeing would be threatened. One question is when (and where) this obligation arises.

## DISCUSSION QUESTIONS

- 1.1 Peruse the list of human rights earlier in the chapter. Do you think there are too many rights – or not enough? What about a human right to a safe and healthy environment? Or a human right to choose one's gender identity?
- 1.2 How 'real' would you say human rights would be to most people on the planet? What measures should be taken to close the gap between formal international human rights law and those who possess such rights?
- 1.3 Do you see human rights more as theoretical rights – or as legal rights that can (and must be) enforced? If the former, how would you propose to make human rights less theoretical and more real?

## RELATED READINGS

- Hunt, Lynn. 2008. *Inventing Human Rights: A History*. New York: W.W. Norton & Company. Hunt's fascinating thesis is that literature from the eighteenth and nineteenth centuries helped to develop a societal-wide sense of empathy with the 'other', which in turn helped give rise to what we have come to know as human rights.
- Moyn, Samuel. 2012. *The Last Utopia: Human Rights in History*. Cambridge, MA: Belknap Press of Harvard University Press. Moyn offers a critical discussion about the origin and nature of the concept of human rights.
- Ibhawoh, Bonny. 2007. *Imperialism and Human Rights: Colonial Discourses of Rights and Liberties in African History*. Albany, NY: SUNY Press. Ibhawoh shows that human rights was not merely a project developed by the Global North that was then handed down to the Global South. Instead, his research shows that this was more in the nature of a shared dialogue. Moreover, the human rights principles that emerged served as an important component in the various decolonization efforts.

## RELATED WEBSITES AND PODCASTS

- United Nations – Human Rights, [www.un.org/en/global-issues/human-rights](http://www.un.org/en/global-issues/human-rights). The website of the UN provides an overview of their human rights instruments.
- Amnesty International, [www.amnesty.org/](http://www.amnesty.org/) and Human Rights Watch, [www.hrw.org/](http://www.hrw.org/). Two of the largest non-governmental global human rights organizations, issuing regular reports about the situation of human rights around the globe.
- Africa Rights Talk, [www.chr.up.ac.za/podcast](http://www.chr.up.ac.za/podcast). Podcast series by the Centre for Human Rights, exploring human rights issues in Africa.

## RELATED FILMS

- *Zone of Interest* (Jonathan Glazer, 2023). This feature film is centred on Rudolph Höss and his wife Hedwig, an ambitious German couple raising a young family during the Second World War. Höss is the Commandant of the Auschwitz concentration camp, the horrors of which are never seen – but omnipresent.

- *Moolade* (Ousmane Sembene, 2004). As explained in this film, ‘moolade’ means a safe haven, and a small group of women and their daughters are seeking such a place from their fellow villagers who want to subject these young girls to the purification ritual of female genital mutilation.
- *The Pianist* (Roman Polanski, 2002). This is the story of Wladyslaw Szpilman, a brilliant Jewish musician who goes from a world of concert halls and acclaim to the confines of the Warsaw Ghetto and then the destitution and ruins of war-ravaged Europe. Szpilman is played brilliantly by Adrien Brody, who was awarded the Oscar for best actor. *The Pianist* is able to show the horrors of the Holocaust by focusing on the suffering of one person.
- *Schindler’s List* (Steven Spielberg, 1993). This Academy Award-winning film remains unmatched in terms of its ability to convey the horror of the Holocaust. The film focuses on Oskar Schindler, who at the beginning of the film is a man with extensive business dealings with the Nazi regime. Schindler slowly becomes transformed and ends up risking his life and fortune to save the lives of his Jewish workers.



# Chapter

# 2

# Responsibilities and Obligations

**This chapter examines** the obligations and responsibilities for protecting human rights and it does so by focusing mainly on ways in which states and other entities contribute to the violation of human rights standards. One of the major questions addressed here is whether the human rights obligations of states end at their territorial borders, or whether they also have extraterritorial obligations.

In Chapter 1, we examined the notion of rights and in the present chapter we explore the flip side to this, namely, the responsibility or obligation to protect and ensure human rights. The approach that is usually taken is to employ Shue's (2020) *respect/protect/fulfil* framework. The obligation to *respect* means that a state is not to violate human rights standards itself. The obligation to *protect* means that the state also has a duty to ensure that private actors do not violate human rights. Finally, the obligation to *fulfil* means that the state must at times take particular measures – that is, provide food and shelter to those without; establish an independent judiciary to protect other rights such as freedom of speech or the right to a fair trial; and so on – to ensure that human rights standards are met.

While there is much to commend the *respect/protect/fulfil* approach, we believe that all too often it has resulted in little more than a cursory examination of states' human rights obligations. To use an example, a state that does not engage in torture would thereby 'respect' this right. We argue that this should only be an important first step in assessing whether a state is meeting its responsibilities under the Torture Convention (Jackson, 2016). Among the questions that could also be asked is whether this state is in any way complicit with other states that do carry out torture. Does this state provide an 'effective remedy' to victims of torture? Does it attempt to 'prosecute or extradite' torturers who are within its national borders, and does it press other state parties to do likewise? Finally, does it provide sovereign immunity protection to states that torture?

Answers to these types of questions would provide a much deeper understanding of the degree to which a state is committed to human rights in general, and in this instance, to the obligations set forth in the Torture Convention in particular. Unfortunately, there is virtually no data to draw upon regarding such state practices, and for this reason the empirical chapters in this book are in large part limited to the ways in which human rights violations have been measured. Still, in this chapter we examine some of the ways in which states are responsible for helping to contribute to violations of human rights standards.

Section 2.1 addresses these issues in different contexts. One involves the prohibition against torture. In addition to not carrying out torture itself, what other responsibilities do states have under international human rights law – and what responsibilities should they have? We then

examine the right to life and look at the obligations of states in terms of both civil and political rights as well as economic, social, and cultural rights. Finally, we take up the issue of climate change, where all states have an obligation – individually as well as collectively – to significantly reduce greenhouse gas (GHG) emissions. However, the issue we focus on is how we should measure what constitutes a state's contribution to climate change. Is it simply GHG emissions produced within the state's territorial borders – or is it imperative to take a much broader perspective?

Section 2.2 looks at situations of unquestionable human rights violation, but where the victims are denied a remedy because they are not within the harming state's 'jurisdiction'. This has been a particularly contentious issue in Europe because the European Court of Human Rights (ECtHR) has interpreted the European Convention in such a way that, absent 'exceptional circumstances', its protections do not apply when the contracting states act outside of Europe.

Finally, Section 2.3 examines the state/non-state divide and it does so within the context of human rights violations carried out by multinational corporations (MNCs). One issue is whether a state's obligation to protect against human rights violations by private actors (including MNCs) extends outside its own national borders. In particular, does the 'home' state have a legal responsibility to regulate the egregious practices of one of its own MNCs operating in some other country in the absence of any meaningful regulation by the 'host' state? Going beyond this, we address the question of whether international human rights law should also apply directly to MNCs.

## 2.1 A Broader Understanding of States' Human Rights Obligations

The Vienna Convention on the Law of Treaties is a treaty intended to instruct states on how to interpret international conventions. Article 31(1) (*General rule of interpretation*) provides: 'A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its

object and purpose’ (see Box 2.1). As should be evident, the *object* and the *purpose* of all human treaties is to prevent human rights violations from occurring. From this, the appropriate standard should be the extent to which a state’s actions (as well as its inactions) promote this end – but also the extent to which they do not.

### Box 2.1 *Soering v. United Kingdom* (1989)

*Soering v. United Kingdom* (1989) is generally regarded as one of the landmark holdings of the ECtHR. Jens Soering is a German national who was accused of committing a double murder in the state of Virginia, but who then fled to the United Kingdom (UK) where he was taken into custody. Authorities in Virginia sought Soering’s return and the question for the ECtHR was whether extraditing Soering, with the likely prospect that he would eventually be placed on death row under conditions the Court ruled amounted to torture and degrading treatment, would constitute a violation of Article 3 of the European Convention.

In terms of our discussion of responsibility, the position of the British government is particularly interesting. The United Kingdom argued that after an extradition was carried out, it would not bear any responsibility for the manner in which Jens Soering might subsequently be treated because at that point any harm done to him would be carried out on foreign (US) soil and at the hands of non-British actors. The ECtHR flatly rejected this position. It held that extradition under circumstances where torture and/or degrading treatment might ensue would violate the ‘spirit and the intention’ of Article 3 specifically, and the European Convention more broadly.

## 2.1.1 The Prohibition Against Torture

In the previous chapter we spent some time on the prohibition against torture and this is where we will begin the present analysis. The object and purpose of the Torture Convention is to prevent torture from taking place, and to achieve this, the Convention requires, among other things, that all states: (1) criminalize torture; (2) investigate allegations of torture; (3) refrain from extraditing or otherwise expelling an individual to a country where he might be subjected to torture; (4) prosecute those who either directed or carried out torture – or else extradite this individual to another state that will do so; and finally, (5) provide an ‘effective remedy’ to victims of torture.

### If a State Tortures in Some Other State?

Article 2(1) of the Convention provides: 'Each State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction.' Because the treaty references both 'territory' and 'jurisdiction', an initial question might be whether a state's obligations only apply to torture that is carried out within its domestic realm – or whether these responsibilities would also extend beyond its own national borders. Box 2.2 examines the *Lopez Burgos* case (1981), where Uruguay had asserted the claim that its human rights obligations, including the prohibition against torture, did not apply when Uruguayan state agents tortured a political dissident in another country (Argentina). The Human Rights Committee soundly rejected this argument.

#### Box 2.2 The *Lopez Burgos* Case (1981)

The *Lopez Burgos* case (1981) arose out of the 'dirty wars' in the various Southern Cone countries in the late 1970s and early 1980s. The applicant, a Uruguayan national, claimed that Uruguayan agents had kidnapped her husband and had secretly detained him in Argentina. The Uruguay government denied these allegations, but it also held that the communication should be dismissed as being inadmissible because the ICCPR (Political Convention) does not apply to actions taken by a state outside its own territorial jurisdiction. Article 2 of the Political Covenant provides: 'Each State Party . . . undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant . . .' The argument of the Uruguayan government was that while in Argentina, Mr Lopez Burgos was not within Uruguayan territory, and therefore the Convention's provisions did not apply there, at least with respect to Uruguay.

The Human Rights Committee soundly rejected this position. It held that this language merely imposes a mandate on the state parties to uphold the provisions of the Covenant within its own territory, but that it says nothing that would permit states to perpetrate violations in the territory of another state. The Committee went on to hold that: 'it would be unconscionable to so interpret the responsibility under Article 2 of the Covenant to permit a State party to perpetrate violations of the Covenant on the territory of another State, which violations it could not perpetrate on its own territory' (para. 12.3).

### Where Does a State's Nonrefoulement Obligation Begin?

Article 3 of the Torture Convention provides: 'No State Party shall expel, return ("refouler") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.' One way in which states have sought to reduce their obligations under the Convention is to argue that their nonrefoulement obligations only become operative *after* a refugee gains access to its territory – but not before then. This was the central issue in the US Supreme Court case of *Sale v. Haitian Centers Council* (1993), where the Court ruled that the Coast Guard's interdiction programme, which halted makeshift rafts carrying Haitian refugees and then took those individuals back to that country, was lawful (see Box 2.3).

#### Box 2.3 *Sale v. Haitian Centers Council* (1993)

The issue in this case decided by the US Supreme Court was whether the Coast Guard's interdiction programme aimed squarely at Haitian refugees was consistent with both domestic US and international law. In terms of the former, the governing federal statute reads: 'The Attorney General shall not deport or return any alien . . . to a country if the Attorney General determines that such alien's life or freedom would be threatened in such country . . .'

Previously, the Attorney General was authorized 'to withhold deportation of any alien . . . within the United States in which in his opinion the alien would be subject to persecution'. However, subsequent to this, a number of significant changes in the law were made. One was to eliminate the requirement that in order to receive protection the alien had to be physically present in the US. The second change, brought about by the passage of the 1980 Refugee Act, was that the Attorney General was not only barred from 'deporting' aliens but also from 'returning' an alien whose life or freedom would be threatened. Finally, the prohibition was now made mandatory, thus eliminating the Attorney General's discretion over such decisions.

In terms of international law, Article 33(1) of the Refugee Convention (which the US had ratified in 1968) provides:

Prohibition of expulsion or return ('refoulement')

1. No Contracting State shall expel or return ('refouler') a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.

The Supreme Court ruled in favour of the US government, mainly on the meaning of the term 'return'. According to the majority, when the US Coast Guard intercepted vessels on the high seas and then took the passengers back to Haiti, it was not effectuating a 'return' – or at least not a return in a legal sense. According to the Court, a 'return' is a defensive act of resistance and a means to 'repulse' rather than to 'reinstate'. Moreover, a 'return' can only be effectuated at a state's territorial borders – but not before then.

*Sale* was an 8–1 decision, with the lone dissent being filed by Justice Blackmun. In his view, the language of Article 33(1) is unambiguous and settles the matter completely. 'Vulnerable refugees shall not be returned. The language is clear, and the command straightforward: that should be the end of the inquiry.' In Blackmun's view, the majority not only ignored the obvious 'object and purpose' of the Refugee Convention – which is to protect refugees or those who claim refugee status – but the 'ordinary meaning' of the term 'return'. In his view, a 'return' was not dependent on whether an individual had arrived at their destination or not. And what must have informed his opinion was that the Coast Guard was going to great lengths to prevent this from ever taking place.

Although there was a great deal of criticism of the Supreme Court's ruling, much of it coming from European states, within a short period of time many of these same countries began enforcing their own immigration laws far from their national borders as a way of preventing refugees from being able to access the asylum system in these states (Gammeltoft-Hansen, 2011). One of the challenges to this *extraterritorial immigration enforcement* policy was raised in *Hirsi Jamaa and Others v. Italy* (2012), where the ECtHR ruled that *refugees* whose voyage was halted by Italian authorities and whose passengers were placed onboard the intercepting ships and returned were within the 'jurisdiction' of Italy, and thus protected by the European Convention.

### People on the Move

According to the United Nations High Commissioner for Refugees (UNHCR), at the end of 2023 there were more than 117 million people worldwide who were forcibly displaced from their homes – or 1 in every 69 individuals on this planet. As shown in Figure 2.1, these numbers have increased substantially since 2010. Of this number, 43.4 million were refugees – individuals who were outside their country of origin

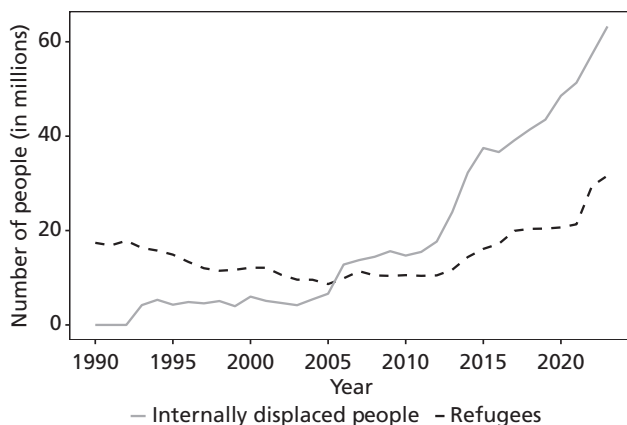


Figure 2.1

**Yearly number of international refugees and internally displaced people.**

Source: UNHCR (2025).

due to persecution, compared with 68.3 million who were internally displaced persons: individuals in a refugee-like situation but who have not left their country of origin. The largest proportion were from Afghanistan and Syria (6.4 million each), followed by Venezuela (6.1 million) and Ukraine (6.0 million). There is a common (mis)perception that Western democracies have been hosting the lion's share of the world's refugees. While this might be true in the case of refugees from the war in Ukraine, the UNHCR has found that 75 per cent of the world's refugees are hosted in low to moderate income countries and 69 per cent in neighbouring states (UNHCR, 2024).

Under international law, there is no 'right' to be granted refugee status. Rather, all those seeking refugee protection have a right against refoulement, spelled out in Article 33 of the 1951 Refugee Convention: 'No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.'

In response, many European states have undertaken less direct measures to prevent refugee flows from arriving at their borders. Most notably, Italy has essentially reconstituted the Libyan Coast Guard as a way of preventing would-be refugees from being able to leave that

country altogether. A case that is pending (as of May 2025) before the ECtHR is whether this form of 'contactless control' still gives rise to the exercise of 'jurisdiction' over the affected individuals (see Box 2.4).

### Box 2.4 The Right to Rescue at Sea?

One of the defining phenomena of our age are the attempts by refugees to cross the Mediterranean Sea to gain access to Europe, but at a terribly high cost in terms of human life. The UN has estimated that 26,000 migrants have died or gone missing in the Mediterranean between 2014 and 2023 (United Nations News, 2023). At the same time, according to the Office of the High Commissioner for Human Rights, the European Union (EU) and its Member States have significantly reduced their maritime search and rescue (SAR) operations, while the Libyan Coast Guard (LCG) has increased its role in intercepting migrants and returning them to Libya.

In January 2021, the Human Rights Committee determined that Italy and Malta (*AS and Others v. Italy*; *AS and Others v. Malta*) had both failed to protect the right to life of 200 migrants who perished in a shipwreck in 2013. The complainants were three survivors who brought the action on behalf of themselves and those who perished. An individual on board the distressed vessel had contacted Italian authorities; however, no rescue units were dispatched, although an Italian ship was in the vicinity. At that time the ship was within Malta's designated SAR zone, yet there was no assistance provided by this state either.

### Indirect Involvement in Torture: Extraordinary Rendition

One response to the 'War on Terror' was a programme known as extraordinary rendition, which nearly always involved the kidnapping of a suspected terrorist in one country, who would then be transferred to any number of other states, before being subjected to torture in countries such as Egypt and Syria. The Open Society (2013) estimates that 54 countries were engaged in the extraordinary rendition programme in one manner or another. The moving force behind all of this was the US, although every effort was made to offshore as much of this as possible in an effort to prevent the application of US legal protections – international and domestic alike (Center for Human Rights and Global Justice, 2004).

This raises the question of the legal responsibility of states where torture was not carried out, but where the country had some form

of connection to the extraordinary rendition programme, whether by allowing 'torture flights' over its airspace and perhaps even allowing refuelling for these flights to take place within its territory, to situations where a country provided intelligence that was then used during torture sessions, and finally, the responsibility of the US (and to a lesser extent the UK), which masterminded virtually the entire programme. One of the few cases where much is known about the extraordinary rendition programme is discussed in Box 2.5, contrasting the response of the American judiciary with that of the ECtHR.

### **Box 2.5 El-Masri: The US and European Judiciaries Compared**

Khaled El-Masri is a German citizen of Lebanese descent. On New Year's Eve 2003 he was seized by Macedonian authorities while attempting to cross the border between Serbia and Macedonia. On 23 January 2004, several men entered his hotel prison and forced him to sign a statement that he had not been mistreated. He was then blindfolded and driven to an airstrip approximately an hour away. Upon his arrival he was beaten, stripped of his clothing, and sodomized with a foreign object. When his captors removed his blindfold, he saw a group of men dressed in black wearing black ski masks. El-Masri contends that these were members of the CIA's 'black rendition' team. He alleges that these men dressed him in a diaper, tracksuit, and earmuffs, and dragged him, semi-conscious, to an airplane.

After he landed, he was placed in a cold cell that he maintains was the infamous 'Salt Pit' in Kabul, Afghanistan, where he spent the next several months and was repeatedly tortured. El-Masri remained imprisoned until 28 May 2004, at which time he was flown in a private jet from Kabul to Albania, where he was deposited by his captors on the side of an abandoned road. With the assistance of Albanian authorities, El-Masri eventually made his way back home to Germany, only to find that his wife and children, believing that he had abandoned them, had returned to Lebanon.

El-Masri filed a suit in federal (US) district court against the Director of the CIA and certain unknown agents of the CIA. His complaint was dismissed in district court and this ruling was upheld on appeal on the basis of the 'state secrets' doctrine, which is that any trial would expose sensitive government information. El-Masri's argument, which was rejected by both courts, was that with all the publicity that had been given to the extraordinary rendition programme after it had been exposed, there was no longer any 'secret' for the judiciary to maintain.

In addition to his (unsuccessful) suit in US court, Khaled El-Masri brought a case against Macedonia, which was decided by the ECtHR. The Court not only found that Macedonia was responsible for human rights violations carried out by Macedonian agents, but for those carried out by the CIA as well.

The question is – or at least should be – whether the actions of these ‘assisting’ states were consistent with the object and purpose of the Torture Convention. In answering this question make note of Article 2 (2) of the Convention, which provides that the prohibition against torture is absolute: ‘No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture.’ Thus, have all 54 states violated international law? If so, should there be different levels of state responsibility? Or, instead, are these merely the kinds of ‘evil’ policies Michael Ignatieff (see Chapter 1) suggested would be ‘acceptable’ in fighting international terrorism?

### **The Pinochet Principle and its Aftermath**

One of the signature achievements in human rights law was the international effort to extradite Augusto Pinochet, the former Chilean dictator, from the UK to Spain in order to face prosecution for the torture carried out against both Chilean and foreign nationals under his brutal reign. In a landmark decision (*Regina v. Bartle and Commissioner of Police* 1999), the British High Court ruled that Pinochet could be extradited – establishing what has been termed the ‘*Pinochet Principle*’. However, subsequent to this ruling, the British Home Secretary allowed the ageing Pinochet to return home based on humanitarian considerations.

Although the Pinochet case represents one of the highwater marks in terms of the protection of human rights, subsequent practice has been something altogether different. Rather than opening the floodgates to both domestic and international proceedings against those who ordered or carried out torture, only isolated prosecutions have followed since then. Note, however, that the Torture Convention demands that all state parties either prosecute an alleged torturer who is within a state’s territorial borders, or if not, the state must extradite this person to another state where they will be put on trial.

The International Court of Justice (ICJ) placed an enormous obstacle in the way of domestic prosecutions in its ruling in the *Democratic Republic of the Congo (DRC) v. Belgium* (2002) case. The issue in this case was a dispute over an international arrest warrant issued on 11 April 2000 by a Belgian examining judge against the acting Congolese Minister for Foreign Affairs seeking his detention and subsequent extradition to Belgium for alleged crimes constituting ‘grave violations of international humanitarian law’. The ICJ ruled in favour of the DRC on the basis that customary international law provides immunity to heads of states (and their ministers). The Court noted two other things. One is that this immunity would end if and when the minister leaves office. The second is that the immunity only applies to prosecutions in domestic courts in other countries, but not international tribunals, such as the International Criminal Court (ICC).

The ICJ’s ruling in *Belgium v. Senegal* (2012) addressed a different issue, namely, whether Belgium had any legal standing to file a claim against Senegal due to the latter’s failure to institute proceedings against former Chad dictator Hissène Habré who had been given refugee status in that country some years before. Senegal’s response was that Belgium could not establish that any Belgian citizen had been harmed. The ICJ rejected this argument. It ruled that as a state party to the Torture Convention, Belgium had every interest in eliminating the practice of torture no matter where it occurred and no matter whether the victims were Belgian or not. According to the Court:

As stated in its Preamble, the object and purpose of the Convention is to ‘make more effective the struggle against torture . . . throughout the world’. The States parties to the Convention have a common interest to ensure, in view of their shared values, that acts of torture are prevented and that, if they occur, their authors do not enjoy impunity. The obligations of a State party to conduct a preliminary inquiry into the facts and to submit the case to its competent authorities for prosecution are triggered by the presence of the alleged offender in its territory, regardless of the nationality of the offender or the victims, or of the place where the alleged offences occurred. All the other States parties have a common interest in compliance with these obligations by the State in whose territory the alleged

offender is present. That common interest implies that the obligations in question are owed by any State party to all the other States parties to the Convention. (para. 68)

### Complicity and Sovereign Immunity Protection

The final issue we look at regarding a state's responsibility under the Torture Convention (in addition to not engaging in torture itself) is what, if any, responsibility should be assigned to a state that provides sovereign immunity protection to another country that engages in torture. In the previous chapter (Box 1.5), we analysed the disagreement between the CAT, on the one hand, and the Canadian government in terms of the obligations of the state parties under the Torture Convention to provide an 'effective remedy'.

In *Saudi Arabia v. Nelson* (1993), the US Supreme Court addressed a similar question whether a state that engages in torture still enjoys *sovereign immunity protection* under the governing federal statute: Foreign Sovereign Immunity Act (FSIA). The FSIA is structured so that foreign states receive sovereign immunity protection in US courts, subject to a short list of exceptions. One of these exceptions is when a foreign state engages in a 'commercial activity' within the US. However, the Supreme Court concluded that the Saudi government's recruitment of Scott Nelson in Virginia was not a 'commercial activity' and it upheld the dismissal of his case. One thing that should be pointed out is that the Court did not spend any time analysing the obligations the US undertook when it became a state party to the Convention, nor did it attempt to reconcile how a *jus cogens* norm such as the prohibition against torture could be trumped by a domestic sovereign immunity statute.

Finally, as discussed further in Box 2.6, one of the more intriguing cases involving foreign sovereign immunity is *Al-Adsani v. United Kingdom*, decided by the Grand Chamber of the ECtHR by the narrowest of margins (9–8).

#### Box 2.6 *Al-Adsani v. United Kingdom* (2001): The Case That Could Have Changed Human Rights

*Al-Adsani v. United Kingdom* is a 2001 decision of the ECtHR. The applicant, Sulaiman Al-Adsani, is a dual national of Kuwait and the UK and a former fighter pilot who was

(Continued)

living in Great Britain when the first Persian Gulf War was fought. Al-Adsani travelled to Kuwait to fight against the Iraqi invasion of that country, but while in Kuwait he became involved in some nasty business with the country's royal family and was tortured on two separate occasions, suffering both physical and mental harm. What aggravated his condition were the repeated death threats that he received after his return to the UK, warning him not to take any action or to give publicity to his situation. In August 1992, Al-Adsani filed a civil action in British courts for compensation against the Sheikh of Kuwait and the State of Kuwait.

The British State Immunity Act of 1978 (Section 1) reads: 'A State is immune from the jurisdiction of the court of the United Kingdom except as provided in the following provisions of the Act'. Section 5 provides: 'A State is not immune as respects proceedings in respect of (a) death or personal injury . . . caused by an act or omission in the United Kingdom.' The court held that the grant of sovereign immunity is unambiguous in the sense that Kuwait had not brought about a death or injury in the UK and it dismissed his complaint. The result was upheld on appeal. In November 1996, Al-Adsani sought to appeal to the House of Lords, but his claim was refused leave to appeal.

Rather than allowing the matter to drop, Al-Adsani proceeded to file a case before the ECtHR – only his claim now was not against Kuwait but against the UK. The basis for his suit was that in providing sovereign immunity protection to Kuwait, the UK had violated various provisions of the European Convention, including Article 3, which prohibits torture. The case was moved to the ECtHR's Grand Chamber, and in a 9–8 decision the Court ruled in favour of the UK.

The Court held that Article 3 has only a 'limited' extraterritorial application. Yet, it is not even clear that this case presents an extraterritorial claim. Certainly, Al-Adsani's physical torture had taken place outside the territorial boundaries of the UK. However, the decision to grant sovereign immunity was made by the British Parliament and it was this domestic law that was being applied to a British subject in a British courtroom. Still, the Court concluded that the UK did not have any 'causal connection' with the torture, and that under such circumstances 'it cannot be said that the High Contracting Party was under a duty to provide a civil remedy to the applicant in respect of torture allegedly carried out by the Kuwaiti authorities'.

The *Al-Adsani* case elicited several noteworthy concurring and dissenting opinions. The one we will focus on is the dissenting opinion by Judge Ferrari Bravo, which opens with this line: 'What a pity!' Ferrari Bravo took the position that the *Al-Adsani* case is merely the logical extension of the House of Lords' judgment in the Pinochet case. Still, Judge Ferrari Bravo closes on a somewhat hopeful note: 'There will be other

such cases, but the Court has unfortunately missed a very good opportunity to deliver a courageous judgment.'

Although the result in *Al-Adsani* might well be seen as a 'pity' or a lost opportunity to render a 'courageous judgment', the importance of the case can better be seen if one imagines the 9–8 vote had gone in the opposite direction and the UK was found to be in violation of the European Convention by granting Kuwait sovereign immunity protection.

## 2.1.2 The Right to Life

In this section we move away from an exclusive focus on the prohibition against torture and consider, more broadly, the responsibility of states to protect the most basic human right of all – the right to life. Article 6(1) of the Political Covenant provides: 'Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.' And as the Human Rights Committee has elaborated: 'The right to life is a right that should not be interpreted narrowly. It concerns the entitlement of individuals to be free from acts and omissions that are intended or may be expected to cause their unnatural or premature death, as well as to enjoy a life with dignity' (UN Human Rights Committee 2019: para. 3). In this context we examine the responsibilities of states in two different contexts. The first involves violations of civil and political rights, while the second are the responsibilities of states in the protection of economic, social, and cultural rights.

### Civil and Political Rights

It should be clear that when a state kills one of its own citizens it has violated the law. Similarly, when a state kills citizens of some other state outside the theatre of war – perhaps by assassination, or by conducting bombing missions or drone strikes – it also has violated international law. However, what is less clear is whether a state bears any 'responsibility' when it 'aids and assists' or is 'complicit' in killings that occur in some other land. As you will see, one of the more puzzling aspects of international law is that it appears to be heading in two different directions at the same time. There are particular initiatives, including the Arms Trade Treaty (ATT) (Box 2.7), where the international

community has recognized a state's obligation to protect human rights in other states. The former by working to prevent gross and systematic human rights violations from taking place; the second by prohibiting the sale of arms and munitions to states that violate human rights and humanitarian law standards.

### Box 2.7 The Arms Trade Treaty (ATT)

The ATT is an international treaty that regulates the international trade in conventional arms and seeks to prevent and eradicate illicit trade and diversion of conventional arms and by establishing international standards governing arms transfers. The ATT came into force on 24 December 2014 and at the present time (May 2025) it has 116 state parties and 26 states that have signed but not yet ratified the Treaty. The operative language of the ATT is Article 6(3):

A State Party shall not authorize any transfer of conventional arms . . . if it has knowledge at the time of authorization that the arms or items would be used in the commission of genocide, crimes against humanity, grave breaches of the Geneva Conventions of 1949, attacks directed against civilian objects or civilians protected as such, or other war crimes as defined by international agreements to which it is a Party.

The US is the largest arms dealer with fully 41.7 per cent of the world's sales between 2019 and 2023. The US signed the ATT on 25 September 2013 and on 9 December 2016 President Obama transmitted the treaty to the Senate for ratification. However, on 29 April, 2019 President Trump notified the Senate that he had decided to 'withdraw' the treaty (Congressional Research Service, 2023). In 2023, the Biden Administration was reviewing its policy with respect to the ATT. As of May 2025, the US had not ratified the treaty.

France (10.9 per cent) is now the second largest arms exporter, supplanting Russia (10.5 per cent). Neither the US nor Russia are state parties to the ATT. China (5.8 per cent) and Germany (5.6 per cent), both of which are parties to the ATT, round out the top five.

At the same time, however, the law on state responsibility appears to allow states to provide massive amounts of military, political, and economic support, either to other states or to entities in another state, that are carrying out gross and systematic human rights violations

and even genocide, while avoiding any 'responsibility' for the resulting harms so long as the sending state does not exercise 'effective control' over the recipients of this assistance. Thus, what remains unclear is what a state's obligation to protect the right to life, at least with respect to foreign nationals, happens to be.

### ***Nicaragua v. United States (1986)***

Our analysis focuses on two rulings by the ICJ. The first, *Nicaragua v. United States* (1986), involves a situation where the US government was providing enormous levels of military, political, and economic support to a rebel group in Nicaragua, the Contras, that were seeking to overthrow the leftwing Sandinista government in that country. In response, Nicaragua brought a case against the US on two grounds. The first is that the US had violated international law when it engaged in direct action against the Nicaraguan state, such as when US agents mined Nicaragua's harbours. The ICJ ruled in favour of Nicaragua on this issue, although this will not be our focus here. Rather, it is Nicaragua's second claim, which is that by providing aid and assistance to the Contras, a group that had been accused of carrying out gross and systematic human rights abuses against civilian populations, the US was 'responsible' (or at least shared some degree of responsibility) for these human rights violations.

In answering this question, the Court spent a considerable amount of time detailing the longstanding relationship between the US government and the Contras. Moreover, the Court acknowledged how this assistance had fundamentally changed the nature and scope of the Contras' operations. However, despite this, the Court ruled that in order to establish US responsibility it would have to be established that the Contras were totally 'dependent' on the US:

The Court has taken the view . . . that United States participation, even if preponderant or decisive, in the financing, organizing, training, supplying and equipping of the Contras, the selection of its military or paramilitary targets, and the planning of the whole of its operation, is still insufficient in itself, on the basis of the evidence in the possession of the Court, for the purpose of attributing to the United States the acts committed by the Contras in the course of their military or paramilitary operations. (para. 115)

The ICJ proceeded by announcing what has come to be known as the ‘*effective control*’ standard – which should not be confused with the ECtHR’s ‘effective control’ test, which will be discussed later in this chapter.

All of the forms of United States participation mentioned above, and even the general control by the respondent State over a force with a high degree of dependency on it, would not in themselves mean, without further evidence, that the United States directed or enforced the perpetration of the acts contrary to human rights and humanitarian law alleged by the applicant State. Such acts could well be committed by members of the Contras without the control of the United States. For this conduct to give rise to legal responsibility of the United States, it would in principle have to be proved that the State had effective control of the military and paramilitary operations in the course of which the alleged violations were committed. (para. 115)

What constitutes ‘effective control’? The ICJ is never clear on this, but the level of control it appears to be demanding is evident in this passage:

In light of all the evidence and material available to it, the Court is not satisfied that *all* the operations launched by the *contra* force, at *every* stage of the conflict, reflected strategy and tactics *wholly* devised by the United States. (para. 106, additional emphasis added)

To reiterate what was said earlier, all states have an obligation to protect the right to life, and one would think that this obligation applies not only to a state’s own citizens and inhabitants within its own territorial borders, but to all human beings. In light of this, there are a number of aspects of the *Nicaragua* ruling that are in need of closer scrutiny. One is the level of ‘control’ demanded by the Court. One could read the ICJ’s ruling as holding that a state would be able to provide massive levels of military hardware, along with political and economic support, to another state or a rebel group in some other state that is carrying out gross and systematic human rights violations and yet avoid any legal responsibility for the ensuing harm – so long as the sending state did not exercise total (or near-total) control over every (or nearly

every) action that the recipient engaged in. To point out the obvious, this evinces a rather puzzling approach to human rights.

The second oddity of the ICJ's approach is that 'responsibility' is treated in an either-or fashion. Either a sending state (somehow) does exercise the requisite level of 'effective control' – in which case it is responsible for all the human rights violations carried out by the recipient – or else (and more likely) the control that it does exercise does not rise to this level, in which case it does not bear any responsibility. To make this more concrete, under the ICJ's ruling, notwithstanding all of the aid and assistance the US provided to the Contras, the United States would have no more legal 'responsibility' for the resulting human rights violations directed against Nicaraguan citizens than some bystander state that had absolutely no relationship or connection whatsoever to the Contra rebel forces. Again, this is a puzzling interpretation of human rights generally, and the obligation of states to protect human life in particular (Gibney, Tomasevski, and Vedsted-Hansen, 1999).

### ***Bosnia v. Serbia* (2007)**

The second ICJ case dealing with extraterritorial state responsibility is *Bosnia v. Serbia* (2007), which raised some of the same kinds of issues that had been taken up in *Nicaragua*, although within the particular context of the Genocide Convention. Article 1 of the Genocide Convention provides: 'The Contracting Parties confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and to punish.' Similar to *Nicaragua*, Bosnia essentially presented two claims. The first is that Serbia had itself carried out genocide in Bosnia. The ICJ concluded that it had not. The second is that because of the enormous levels of military, political, and economic support Serbia had provided to various Bosnian Serb paramilitary forces, Serbia was responsible for 'aiding and assisting' in these acts of genocide. The Court rejected this claim as well.

Relying heavily on the Articles of State Responsibility, which were completed by the International Law Commission in 2001 and then forwarded to the UN General Assembly, the Court began its analysis by ruling that Bosnian Serbs were not 'organs' of Serbia (Art. 4), and that Serbia had not exercised the requisite level of 'effective control' over its Bosnian Serb allies (Art. 8).

The ICJ then turned to Article 16 of the Articles of State Responsibility, which is entitled 'Aid or assistance in the commission of an internationally wrongful act'. The Court held that providing 'aid and assistance' to a perpetrator of the crime of genocide 'cannot be treated as complicity in genocide unless at the least that organ or person acted knowingly . . . , in particular, was aware of the specific intent . . . of the principal perpetrator' (para. 421). According to the Court, this requisite genocidal intent could not be proven 'beyond any doubt'. It explains:

A point which is clearly divisive in this connection is that it was not conclusively shown that the decision to eliminate physically the adult male population of the Muslim community from Srebrenica was brought to the attention of the Belgrade authorities when it was taken: the Court has found . . . that that decision was taken shortly before it was carried out, a process which took a very short time (essentially between 13 and 16 July 1995), despite the exceptionally high number of victims. It has therefore not been conclusively established that, at the crucial time, Serbia supplied aid to the perpetrators of the genocide in full awareness that the aid supplied would be used to commit genocide. (para. 423)

Yet, while the ICJ held that Serbia had not carried out genocide itself, nor was it 'complicit' or had 'aided and assisted' in the commission of genocide, the Court went on to rule that it had not met its obligation to 'prevent' genocide. What kinds of obligations do states have to *prevent genocide*? Recognizing that states have different capacities as well as different relationships with the state where genocide is being carried out, the Court emphasized that the obligation of the states was one of conduct and not of results. That is, a state is under no obligation to succeed but rather 'to employ all means reasonably available to them, so as to prevent genocide as far as possible' (para. 430). Furthermore, what does not matter is whether other states are meeting their own obligations to prevent genocide, and what also does not matter is whether the sum total of all these efforts would be successful or not. Perhaps a better way of expressing this is to say that each one of the state parties has to do everything in its power to prevent genocide. The ICJ then focused on Serbia and concluded that because of the enormous 'influence' that the Serb state had over the Bosnian Serb paramilitary forces carrying

out genocide, it had not exercised this influence sufficient to prevent torture, and because of this it failed to meet its obligations under the Genocide Convention.

In sum, although all states have an obligation to protect the right to life – within their own domestic borders, but outside their territory as well – in the two cases analysed here the ICJ provides states a substantial amount of leeway in terms of pursuing foreign policy goals that might cause great harm to foreign populations (see also Box 2.8).

### Box 2.8 The Obligation to Prevent Genocide

Although the Genocide Convention obligates the state parties to do everything in their power to prevent genocide no matter where it occurs, states have remained hesitant to do so. Yet, there have been some notable exceptions. On 29 December 2023, South Africa filed an application instituting proceedings against Israel before the ICJ on the grounds that Israel's conduct in Gaza following the 7 October 2023 terrorist attack by Hamas was in violation of its responsibilities under the Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention). In its application, South Africa stated that it was 'acutely aware of the particular weight of responsibility in initiating proceedings against Israel' (para. 3), but that it was also 'acutely aware of its own obligation – as a State party to the Genocide Convention – to prevent genocide' (para. 3).

Several years prior to this, on 19 November 2019, The Gambia instituted similar proceedings with the ICJ against Myanmar on the grounds that Myanmar had engaged in genocide against its Rohingya ethnic minority. Myanmar's response was essentially that The Gambia – located literally thousands of miles away – was not an injured party and because of this it should not be able to proceed with its claim. Based on these different interpretations of the treaty, in January 2020 the ICJ ruled that it had jurisdiction over this matter and it ordered various provisional measures for Myanmar to follow, most notably that Myanmar was to ensure that it was not committing genocide. In the months that followed, several other states also intervened in support of The Gambia, and in late 2023, six states – Canada, Denmark, France, Germany, the Netherlands, and the UK – issued a joint declaration of intervention in this matter.

Perhaps the more interesting question is not so much what South Africa and The Gambia have done, but what the other state parties to the Genocide Convention have not done. That is, if intervention with the ICJ (or approaching the 'competent organs' of the UN in some other way) is not only consistent with Article VIII of the Convention but perhaps even required by it, how should we view the non-response of other states?

### **Economic, Social, and Cultural Rights**

A state's obligation to protect the right to life applies equally to economic, social, and cultural rights. What this means is that under international law, all states have an obligation to ensure that their own citizens have the means of subsistence, including adequate food, water, shelter, health care, and so on. Although the reality on the ground is often much different from this, what is unchallenged is whether states have these human rights responsibilities. However, what is challenged is whether these obligations extend beyond a state's territorial borders. At the present time there are 171 states that are parties to the International Covenant on Economic, Social and Cultural Rights (ICESCR). While the US signed the convention on 5 October 1977, it has never ratified it. Still, under international law the US is obligated to act in compliance with the treaty's provisions.

The Preamble of the ICESCR reads:

The States Parties to the present Covenant,

Considering that, in accordance with the principles proclaimed in the Charter of the United Nations, recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world,

Recognizing that these rights derive from the inherent dignity of the human person,

Recognizing that, in accordance with the Universal Declaration of Human Rights, the ideal of free human beings enjoying freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his economic, social and cultural rights, as well as his civil and political rights,

Considering the obligation of States under the Charter of the United Nations to promote universal respect for, and observance of, human rights and freedoms,

Realizing that the individual, having duties to other individuals and to the community to which he belongs, is under a responsibility to strive for the promotion and observance of the rights recognized in the present Covenant,

Agree upon the following articles:

Article 2(1) provides:

Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, 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 by all appropriate means, including particularly the adoption of legislative measures.

There are a few things to note about the ICESCR more generally and Article 2 in particular. Unlike virtually all other international human rights treaties, there is no mention of 'territory' or 'jurisdiction'. Another thing to note is the specific obligation of states to engage in '*international assistance and co-operation*'. In terms of some of the other operative language in Article 2, states have often rationalized their failure to adequately meet the economic, social, and cultural rights of its citizens in two ways. One is by claiming that it was already expending the 'maximum of its available resources', attempting to meet its economic, social, and cultural rights; and the second by positing that the Covenant itself does not demand that the economic, social, and cultural rights be met immediately – but only that states achieve a 'progressive' realization of this right.

But to return to the question raised earlier: do states have extraterritorial obligations in the area of economic, social, and cultural rights? One of the most instructive episodes where this issue was raised directly involved a country study of Sweden conducted by the UN Special Rapporteur on the Right to Health (Paul Hunt). To be clear, not only does Sweden fulfil its obligations to meet the health needs of Swedish residents, but it is one of the most 'generous' countries in the world in terms of the amount of foreign aid it provides as a percentage of its gross national product (see Box 2.9). However, when Hunt asked whether, as a state party to the ICESCR, Sweden was obligated to provide any foreign aid, a Swedish official demurred. In his report, Hunt (2008b: 28) takes strong exception to this position:

### Box 2.9 The US and Foreign Aid

The US provides more foreign aid than any other country. In 2023, that amount was \$66 billion, or more than twice the amount as the next two donors Germany (\$36.7 billion) and Japan (\$19.6 billion) (Hirschfeld, 2024). The \$66 billion represents 0.24 per cent of gross national income, which is considerably less than all other developed countries, which is around 0.4 per cent. In 2023 only five countries (Norway, Sweden, Luxembourg, Denmark, and Germany) have met the threshold established by wealthy states in 1970 of providing 0.7 per cent of GDP.

The views of the American public regarding foreign aid are also quite instructive. Opinion polls show that the US public is of the belief that 25 per cent of the federal budget goes to foreign aid, which is well above the figure of 10 per cent that respondents believe would be the 'right' amount. The reality, however, is that less than 1 per cent of the federal budget goes to foreign aid (Ingram, 2019).

[I]f there is no legal obligation underpinning the human rights responsibility of international assistance and cooperation, inescapably all international assistance and cooperation is based fundamentally upon charity. While such a position might have been tenable 100 years ago, it is unacceptable in the twenty-first century.

One of the other things to point out about Hunt's country study of Sweden is that he then travelled to Uganda, which at the time was the largest recipient of Swedish foreign aid, as a way of examining the extent to which Sweden was contributing to the protection of the right to health – in Uganda. And finally, Hunt travelled to Washington DC in order to examine the extent to which Sweden was meeting its human rights obligations to protect the right to health in Uganda through its work with the World Bank and the International Monetary Fund.

We ask the reader this. Is Paul Hunt correct that under international law, and the ICESCR in particular, Sweden has a legal obligation to provide foreign aid – or is the Swedish government correct that there is no legal obligation to do so?

### 2.1.3 Climate Change

Few people would question that climate change will pose the gravest and perhaps most intractable human rights issue in the decades ahead.

One of the most unique features of climate change is that all states contribute to the problem through the production of GHG emissions, albeit at vastly different levels. Greenhouse gas emissions do not respect national borders, which is to say that the GHG emissions that are having a negative effect on Canadians today may (but may not) have been produced within Canada's territorial borders. Instead, these GHG emissions might well have been produced within the US, or China, but quite likely from any number of other countries.

### Greenhouse Gas Emissions by Major Polluting States

There is both good news and bad news in terms of how states are addressing climate change. In terms of total GHG emissions, China produces approximately 30 per cent of the world's total, while the US produces about 15 per cent. However, if one were to look at the per capita production of GHG emissions among the major polluting states, the US clearly produces more per person (Figure 2.2).

One of the great challenges for international human rights law is attempting to deal with a problem that, almost by definition, traverses national borders. The causes (as well as possible solutions) of human rights violations is nearly always much more complex than we have led ourselves to believe (see also Box 2.10).

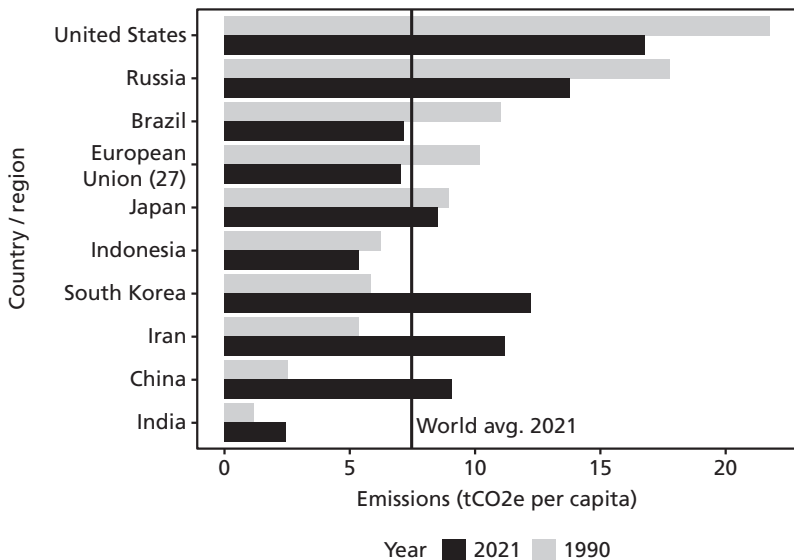


Figure 2.2  
Per capita emissions in 1990 and 2021.  
Source: Climate Watch (2025).

### Box 2.10 The Philippine National Inquiry on Climate Change

The Philippine Commission on Human Rights (CHRP) has made a significant contribution in addressing climate change. In its final report released in 2022, the Commission not only examined the contributions of non-state actors, but what was most contentious is that it included MNCs that are not located within the Philippines, but which contribute GHG emissions that are causing harm to Filipino nationals. The Commission explains:

Many of the respondent oil companies also raised the issue of *territoriality* – they questioned the power of our Commission to inquire into their activities, since they did not operate within the territory of the Philippines.

Stripped of legal niceties, the contention was that our Commission, or, indeed, the Philippine State, in general, may only inquire into the conduct of corporate entities operating within Philippine territory, even if the corporations' operations outside our territory were negatively impacting the rights and lives of our people.

We cannot accept such a proposition. (p. 4)

The report is particularly notable for the extraterritorial perspective that the CHRP champions. Under this progressive approach, protecting the human rights of Philippine citizens would take priority over rigid 'technicalities' and eventually become international law:

The CHRP is mandated by the Philippine Constitution with the duty to investigate and inquire into allegations of human rights violations suffering by our people

Our Commission decides on how it must perform its constitutional duty. And the performance of this duty is neither constrained by nor anchored on the principle of territoriality alone.

The challenge of NHRIs [National Human Rights Institutions] is to test boundaries and create new paths; to be bold and creative, instead of timid and docile; to be more idealistic, or less pragmatic; to promote soft laws into becoming hard laws; to see beyond technicalities and establish guiding principles that can later become binding treaties; in sum, to set the bar of human rights protection to higher standards. (pp. 4–5)

Another thing to consider is that although every state is a part of the problem in that each state produces GHG emissions of at least some sort, those states that produce the lowest levels of GHG emissions are the same states that already have been the most negatively affected by climate change (see Box 2.11).

### Box 2.11 Climate Change Refugees

Although there is no explicit human right to a safe and healthy environment, climate change is already having a decidedly negative effect on particular human rights, including the right to food and housing. As climate change continues to worsen, it is estimated that some of the small islands in the South Pacific will eventually disappear altogether. In Teitota, a citizen of Kiribati filed a communication with the Human Rights Committee after he had been denied asylum in New Zealand. Teitota claimed that where he lived in Kiribati had already become uninhabitable and that by denying him asylum New Zealand had violated his right to life under the ICCPR. However, the Committee sided with New Zealand on the grounds that there was no 'imminent' threat to Teitota's right to life.

In the present case, the Committee accepts the author's claim that sea level rise is likely to render the Republic of Kiribati uninhabitable. However, it notes that the timeframe of 10 to 15 years, as suggested by the author, could allow for intervening acts by the Republic of Kiribati, with the assistance of the international community, to take affirmative measures to protect and, where necessary, relocate its population. (para. 9.12)

Committee member Duncan Laki Muhumuza filed a powerful dissent, holding that the author faces a 'real, personal and reasonably foreseeable risk of a threat to his right to life as a result of the conditions in Kiribati' (para. 5).

Muhumuza concludes:

[W]hile it is laudable that Kiribati is taking adaptive measures to reduce the existing vulnerabilities and address the evils of climate change, it is clear that the situation of life continues to be inconsistent with the standards of dignity for the author, as required under the Covenant. The fact that this is a reality for many others in the country, does not make it any more dignified for the persons living in such conditions. New Zealand's action is more like forcing a drowning person back into a

(Continued)

sinking vessel, with the 'justification' that after all there are other voyagers on board. Even as Kiribati does what it takes to address the conditions; for as long as they remain dire, the life and dignity of persons remains at risk. (para. 6)

If you were on the Human Rights Committee, how would you have decided this case? And looking at this issue more broadly, what obligations do the states that produce the major share of GHG emissions owe to people who are either dispossessed or suffer from the ravages of climate change?

Internationally, the signature achievement has been the *2015 Paris Agreement*, where states have set targets for reducing GHG emissions. A few things to note about this. One is that the Paris Agreement is not a 'treaty' as such in the sense that there is no legal obligation to meet the target that each state has set for itself. In other words, if a state fails to meet its target to reduce GHG emissions, we would not conclude that this state has acted in breach of its legal obligations or that it has committed an internationally wrongful act in doing so. On the other hand, although not legally binding, the Paris Agreement provides a vital benchmark for states, and as shown in Box 2.12, a growing number of domestic courts have used this target as a way of ordering governments to significantly reduce their GHG emissions even further.

### Box 2.12 Climate Change Litigation in Domestic Courts

One of the more surprising aspects of the attempt to address climate change is the central role that a number of domestic courts have come to play. The Sabin Center at Columbia University has catalogued the number of climate change litigation cases that have been filed, which is now more than 2,000. We mention three of these. The first is the landmark ruling in *Urgenda v. the Netherlands* (2019), brought by a Dutch civil society groups organization and a group of Dutch citizens. The Dutch Supreme Court rejected the government's argument that Dutch contributions to climate change were minuscule at best, and it ordered the government to significantly reduce GHG emissions well below the country's Paris Agreement target. Using *Urgenda* as a

springboard, in *Milieudefensie and Others v. Royal Dutch Shell* (2021) a district court in The Hague ordered Royal Dutch Shell (RDS) to not only reduce its GHG emissions within the Netherlands but in its entire worldwide operations as well. However, in late 2024, a Dutch appeals court overturned this ruling.

*Neubauer et al. v. Germany* (2021) is a case filed in a German domestic court. The plaintiffs were a group of German citizens, but who were joined by plaintiffs from Nepal and Bangladesh. Taking an inter-generational approach, the German Constitutional Court held that 'one generation must not be allowed to consume large portions of the CO<sub>2</sub> budget while bearing a relatively minor share of the reduction effort, if this would involve leaving subsequent generations with a drastic reduction burden and expose their lives to serious losses of freedom' (para. 192). The Court ordered the German Parliament to set a clear reduction target, which the government complied with.

Our focus is on what states are responsible for. Is it simply the GHG emissions produced within the domestic realm – or does this ignore the way in which states contribute to climate change but more indirectly (see Boxes 2.13 and 2.14)? The example we use for this is the *Greenpeace Nordic Association v. Ministry of Petroleum and Energy* (2020) case in Norway, which raised these issues directly.

### Box 2.13 Climate Change and Regional Human Rights Courts

The 2017 Advisory Opinion by the Inter-American Court of Human Rights (IACtHR) has already achieved landmark status. The question addressed by the IACtHR is whether an individual who is physically located in one state could also be within the 'jurisdiction' of some other state. Article 1 of the American Convention on Human Rights provides:

The States Parties to the Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms . . .

The IACtHR unequivocally took the position that 'territory' and 'jurisdiction' are not one and the same, and therefore an individual in one state who is harmed by the

(Continued)

policies and practices of some other state can be within the 'jurisdiction' of this other state so long as a causal connection exists.

In contrast to this, in *Duarte Agostinho and Others v. Portugal and 32 Others*, the ECtHR ruled as inadmissible a case brought by a group of Portuguese children against other state parties to the European Convention. The children had claimed that because they were harmed by GHG emissions from these other countries, they were therefore within the 'jurisdiction' of those states and should be allowed to make a claim against them.

The same day that the ECtHR dismissed the *Duarte Agostinho* case, it ruled in favour of a case brought by Senior Women for Climate Protection, a Swiss civil society groups organization of women over the age of 64. The Court ruled that Switzerland was not doing enough to address climate change.

### Box 2.14 What do Wealthy States Owe Poorer Countries?

Although all states contribute to climate change through GHG emissions, there is little question that those states that produce the least amount of CO<sub>2</sub> have been – and will continue to be – the most negatively affected by an ever-warming planet. For years, poorer countries have been clamouring for financial assistance from the richest countries, many of which are among the largest producers of GHG emissions. Finally, after decades of resistance, in November 2022 rich countries agreed to create a 'loss and damage' fund as a way of assisting more vulnerable states. Although it is widely recognized that billions of dollars will be needed for this, the promised contributions at the COP27 in Scotland were in the millions – and the US, the second largest producer of GHG emissions, declined to make any contribution to this fund (Gelles, 2022).

The plaintiffs in *Greenpeace Nordic* consisted of various Norwegian environmental groups that were challenging a drilling licence that had been issued by the Norwegian government in 2013 on the grounds that such actions violated Article 112(1) of the Norwegian Constitution, which provides:

Every person has the right to an environment that is conducive to health and to a natural environment whose

productivity and diversity are maintained. Natural resources shall be managed on the basis of comprehensive long-term considerations which will safeguard this right for future generations.

Norway's GHG emissions – at least within the country's national borders – are quite small. In addition, under the Norwegian Climate Act of 2017, the government is legally obligated to achieve a 40 per cent reduction in GHG emissions by the year 2030. However, Norway is also the third largest exporter of natural gas and the 15th largest oil exporter. To put this in a broader context, emissions resulting from exported petroleum are *95 per cent higher* than territorial emissions.

The Oslo District Court sided with the government ministry on the grounds that the national Parliament had considered, but rejected, several proposals to review the previous licensing decision in light of Norway's accession to the 2015 Paris Agreement. According to the District Court, the involvement of the Parliament was sufficient to indicate that the constitutional duty to protect environmental rights had been fulfilled, holding that 'emissions of CO<sub>2</sub> abroad from oil and gas exported from Norway are irrelevant when assessing whether the [licensing permit] entails a violation of Article 112'.

The plaintiffs appealed the decision to the Court of Appeals, arguing that the District Court had interpreted Article 112 too narrowly by finding that Norway is only responsible for GHG emissions produced within Norwegian territory. The Court of Appeals agreed with this position, however. It upheld the District Court's ruling on the grounds that the granting of an exploration licence, by itself, will not necessarily lead to an increase in GHG emissions. This ruling was appealed to the Norwegian Supreme Court. Although the Supreme Court readily recognized the severe nature of climate change and acknowledged that Article 112 protects citizens from environmental and climate harms, it also viewed the role of the judiciary as being quite limited.

In terms of the geographic scope of Article 112, the Supreme Court took what we might describe as a 'quasi-territorial' approach:

A final question is whether it is relevant to consider greenhouse gas emissions and effects outside Norway. It is only emissions and effects on Norwegian territories that are relevant under Article 112 of the Constitution, or must the

assessment also include emissions and effects in other countries? Article 112 does not provide general protection against actions and effects outside its realm. However, if Norway is affected by activities taking place abroad that Norwegian authorities may influence directly on or take measures against, this must also be relevant to the application of Article 112. An example is combustion of Norwegian-produced oil or gas abroad, when this causes harm also in Norway. (para. 149)

Later in its ruling, the Court stated: ‘the clear principle is that each state is responsible for combustion on its own territory’ (para. 159). Which of these judicial rulings would you join – and which would you reject?

## 2.2 ‘Jurisdiction’ and the Denial of Accountability

In this section we examine ways in which states that have violated international human rights standards have been able to avoid accountability because it has been determined that the victims were not within the ‘jurisdiction’ of those states. This has been a particularly contentious issue with the ECtHR, beginning with the Court’s decision in *Banković et al. v. Belgium et al.* (2001). In that case, the ECtHR ruled that Serbian civilians who were killed and/or injured during the course of a 1999 NATO bombing raid were not within the ‘jurisdiction’ of those states and it dismissed a complaint brought by the victims as inadmissible.

As noted earlier, while Article 1 of the European Convention makes reference to ‘jurisdiction’ there is no mention of ‘territory’. According to the applicants, ‘jurisdiction’ and ‘territory’ do not always have to refer to the same entity. In that way, Article 1 is not referring to the territorial boundaries of states, but rather that the contracting states must secure the rights and freedoms of the Convention to all those within or subject to their actual power. In other words, a contracting state is bound by the Convention not only when it acts within its own territorial borders but also when it does so abroad. According to the applicants, ‘jurisdiction’

is based on the level of authority and control exercised by a state over the affected individuals, and in this case the contracting states exercised the ultimate authority by injuring and/or killing the applicants.

In contrast to this, the contracting states argued that the term 'jurisdiction' must be interpreted in accordance with its 'ordinary meaning' under international law. They argued that in order to exercise 'jurisdiction' over a person there must be some form of pre-existing relationship between the state acting extraterritorially and the victim.

The Court essentially adopted the position of the respondent states. In its view, although the reference to 'territory' in the original draft of Article 1 was removed, the ECtHR described the Convention as being 'primarily' or 'essentially' territorial, although the Court also acknowledged that the protections of the Convention could be extended beyond the territory of the European states when 'exceptional circumstances' arose. The Court never sufficiently explained how or what constituted 'exceptional circumstances'. However, on the basis of the decision in the *Bankovic* case it must be concluded that dropping bombs on civilians does not constitute an 'exceptional circumstance' (Roxstrom, Gibney, and Einarsen, 2005).

Since *Bankovic*, the Court has backtracked, at least to some degree, from its 'territorial' interpretation of the Convention. One exception has been when one of the contracting states is exercising physical control over an individual. This rule initially was announced in the *Ocalan* case (2000) where Turkish officials had arrested the former PKK leader in Kenya. We have also seen earlier an extension of the 'effective control' test in our discussion of the *Hirsi Jamaa* case where Italian authorities had intercepted boats carrying refugees and taken the occupants on board before returning them to Libya. A second exception the Court has created is when European actors are physically present on the territory of some other state and exercising some form of public authority. The Court enunciated this rule most clearly in *Al-Skeini v. United Kingdom* (2011), where six Iraqi civilians who had been killed by British occupying forces were deemed to be within the 'jurisdiction' of the UK, and thus protected by the European Convention.

To be clear, when the contracting states operate outside their territorial borders they are still bound by international human rights law. However, foreign nationals who are harmed by the policies and practices of these states will, with only rare exception, be deemed to be outside the

‘jurisdiction’ of the harming state, and therefore will be denied the opportunity to present a claim before the ECtHR. Unfortunately, where these victims will be able to press their claim is anything but apparent.

## 2.3 Human Rights Responsibilities by Multinational Corporations

International human rights law has been based exclusively on the acts and omissions of states and to a large extent this makes sense. After all, it is states – and only states – that sign and ratify human rights conventions. Yet, what we also know is that states do not have any kind of monopoly in terms of violating human rights standards – witness the fact that 80 per cent of all GHG emissions in the world since 2016 have been produced by 57 companies (Watts, 2024).

There is an enormous range of non-state actors and we will make no attempt to cover anywhere near the entirety of this. Rather, in this section we raise the question whether the state/non-state divide continues to make sense, especially if the goal of human rights is to provide human security. As noted earlier, states have an obligation to respect human rights – which is to say that they are not to violate human rights standards themselves – but they also have a responsibility to protect against human rights violations by non-state actors. There is no question that states have this obligation within their domestic realm. However, how far (literally) does this obligation extend?

Our focus is on MNCs, some of which have more economic power, and perhaps even more political power, than all but a select group of countries. For all the good they might do in the world, MNCs have long been associated with violations of human rights standards. In the words of Rachel Chambers (2021: 519): ‘Human rights violations are perpetrated by corporate actors with troubling frequency. In most instances, victims do not have access to remedy.’

In response to this, over the past few decades the UN has instituted several ‘soft law’ initiatives, including: Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights; the Declaration of the Rights and Responsibilities of Individuals, Groups and Organs of Society to Promote and Protect

Universally Recognized Human Rights and Fundamental Freedoms; and the UN Global Compact. Note that all of these initiatives were voluntary in nature, and all ultimately failed to rein in corporate abuses.

The most recent effort at the international level has been the *Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework*, perhaps better known as the Ruggie Principles after John Ruggie who previously served as the UN Special Representative for Business and Human Rights. The Human Rights Council immediately endorsed the report after its release, and much of the discussion of corporate reform, both at the UN but also the state level, have relied on the Principles as a guide. However, consistent with all other UN efforts at corporate reform, the Guiding Principles are voluntary. Most notably, the Guiding Principles conclude that while a 'home' state may regulate the extraterritorial operations of one of its own MNCs, international law does not require it to do so – even in the absence of any meaningful regulation by the 'host' state, and even in situations where the MNC was causing great harm.

One of the more telling examples of this involved TVI Pacific, a Canadian based mining corporation with operations on the island of Mindanao in the Philippines (Seck, 2008). In 2004, a delegation of community members from Mindanao travelled to Canada and met with Canadian lawmakers about the environmental devastation and the consequent health problems caused by the company's operations. The following year in March 2005, two community members presented further evidence to a parliamentary committee, which then endorsed a proposal to establish 'clear legal norms' to regulate Canadian MNCs and to hold corporations accountable for any failure to meet these standards. However, such legislation was never pursued, the rationale being that the international community is still in the early stages of defining and measuring corporate social responsibility, particularly in the area of human rights. Instead, the Canadian government merely promised to examine the 'best practices' of other states.

The problem then, and now, is that there are no 'best practices' to draw upon. Instead, the Ruggie Principles notwithstanding, no 'home' state has sought to regulate the extraterritorial practices of its own MNCs, although a few countries such as France and Germany have instituted 'due diligence' laws that require parent corporations to exercise some

degree of control over their subsidiaries (Human Rights Watch, 2024a) (see Box 2.15).

### Box 2.15 The EU Corporate Sustainability Due Diligence Directive

On 24 May 2024, the EU adopted the Corporate Sustainability Due Diligence Directive (CSDDD), which requires all EU members to introduce or update laws obligating MNCs to ensure compliance with certain human rights, labour rights, and environmental standards throughout their entire supply chain. However, the directive only applies to companies with at least 1,000 employees and more than €450 million in annual turnover, or approximately 1 per cent of EU-based companies.

By way of some contrast with the Guiding Principles, the *Maastricht Principles on Extraterritorial Obligations in the Area of Economic, Social and Cultural Rights* read existing international law much differently. According to the Maastricht Principles, not only does the ‘home’ state have an obligation to regulate its own MNCs, especially in situations where the ‘host’ state is either unwilling or unable to do so, but other states that are in a position to exercise their ‘influence’ to prevent harmful corporate behaviour are obligated to act as well. Principle 24 reads in part:

All States must take necessary measures to ensure that non-State actors which they are in a position to regulate . . . such as private individuals and organisations, and transnational corporations and other business enterprises, do not nullify or impair the enjoyment economic, social and cultural rights.

How would this work? Consider a hypothetical Nike plant in Cambodia that was employing child labour. As the ‘host’ state, Cambodia has the primary obligation to prevent this. However, if Cambodia does not act, as the ‘home’ state the US would have an obligation to act. Note that even when operating in Cambodia (or any other country), Nike is still bound by a host of domestic laws, including US anti-bribery law, US securities law, US tax law, US trademark law, US civil rights law, US anti-discrimination law, and US anti-trust law. Finally, according to the

Maastricht Extraterritorial Obligations Principles, other states that could influence Nike – including countries where Nike shoes and clothing are sold – would also have an obligation to take whatever measures they could to halt these violations of human rights standards.

The discussion thus far has been focused on state responsibilities. But should international human rights law also apply directly to MNCs? In her book *Children's Rights and Business: Governing Obligations and Responsibility*, Erdem Türkelli (2020) points to the particular vulnerability of children as well as gaps in the law in terms of protecting human rights and argues that what is needed is an expansion of human rights duty bearers, which in some circumstances would include MNCs.

## Conclusion

All rights – including human rights – have obligations and responsibilities associated with them. Without this, rights would not be 'rights'. Still, there is little question that assigning responsibilities and obligations has been the single weakest aspect of 'human rights'. In this chapter we have attempted to go beyond instances where a state violates human rights standards directly to encompass situations when states contribute to violations more indirectly. The 'object and purpose' of all human rights treaties is to protect human rights. The question explored throughout this chapter is the extent to which the acts or omissions of a state work towards that end – and the extent to which it does not.

## GLOSSARY

**Duty to prevent:** The Genocide Convention mandates that all state parties must do everything in their power 'to prevent' genocide from occurring.

**Effective control:** The ICJ employed an 'effective control' test in *Nicaragua v. United States* to determine if the US had exerted enough power and control over the Contra rebels it was supporting in order to be responsible for human rights violations carried out by them. The ECtHR used the same terminology as a way of determining whether there was 'exceptional circumstance' present in order to give the European Convention an extraterritorial reading.

**Extraordinary rendition:** A policy adopted by Western states to fight against international terrorism, usually involving the kidnapping of a suspected terrorist in one state and engaging in 'enhanced interrogation' in some other state. It is estimated that more than a quarter of all countries participated in the extraordinary rendition programme.

**Extraterritorial immigration enforcement:** An increasing number of Western states are enforcing their immigration laws far from their national borders as a way of preventing refugees from accessing their territory.

**Jurisdiction:** The term usually refers to the power or authority a state has over a person. One of the more pressing questions in international human rights law is whether an individual who is harmed by the policies and practices of another state is therefore within the 'jurisdiction' of this other state.

**Refugees:** Individuals who are outside their country of origin and who can establish having a 'well-founded fear' of persecution on account of one of five factors: race, religion, political opinion, nationality, and membership of a particular social group.

**Sovereign immunity:** This is the immunity that states provide to other states that are sued in its courts, although there is no international legal standard governing this.

## DISCUSSION QUESTIONS

- 2.1 There is a terrible mismatch between the amount of international human rights law, on the one hand, and the fact that human rights violations continue virtually unabated, on the other. Why is this? And what can (and should) be done about changing this?
- 2.2 Climate change is a classic case where the policies and practices of one state can have a profound effect on individuals in other states. What we also have seen is that the states that produce the lowest amounts of GHG emissions are nearly always those that suffer the most from this. If you were the Foreign Minister of such a country, how do you think you would respond to this?

## RELATED READINGS

- Gammeltoft-Hansen, Thomas. 2011. *Access to Asylum: International Refugee Law and the Globalisation of Migration Control*. Cambridge, UK: Cambridge University Press. The author offers a critical discussion of refugees' access to asylum amidst growing global obstacles to migration.
- Gibney, Mark. 2008. *International Human Rights Law: Returning to Universal Principles*. Boulder, CO: Rowman & Littlefield Publishers. Gibney argues that there has been a fundamental misreading of international human rights law, and he suggests ways of going back to the original intent and meaning behind human rights.
- Moyn, Samuel. 2018. *Not Enough: Human Rights in an Unequal World*. Cambridge, MA: Harvard University Press. A provocative book about the role of human rights in a world of global inequality.
- Skogly, Sigrun. 2006. *Beyond National Borders: States' Human Rights Obligations in International Cooperation*. Antwerpen: Intersentia. Skogly focuses on the drafting of the ICESCR. She found that there was a general consensus that economic human rights could only be protected by means of international assistance and cooperation. Skogly's research provides some of the strongest support for the proposition that human rights are not territorially based.

## RELATED WEBSITES AND PODCASTS

- UNHCR, [www.unhcr.org/](http://www.unhcr.org/). Website of the UN Refugee Agency, including data on refugees globally.
- Himal Interviews: Radhika Coomaraswamy on the UN report on the Rohingya crisis, 19 September 2018, [www.himalmag.com/himal-interviews-radhika-coomaraswamy-on-un-report-on-myanmar/](http://www.himalmag.com/himal-interviews-radhika-coomaraswamy-on-un-report-on-myanmar/)

## RELATED FILMS

- *Darwin's Nightmare* (Hubert Sauper, 2004). A. O. Scott of the *New York Times* described this Academy Award nominee as a 'masterpiece', and

this might well be an understatement. There are no ‘talking heads’ in this film. Rather, the viewer watches this morality tale unfold as European concerns remove several tons of Nile Perch fish from Lake Victoria each day – at the same time that Tanzania is experiencing a famine. No one in the film can seem to make any kind of connection between these two things.

- *Flee* (Jonas Poher Rasmussen, 2021). This animated film tells the harrowing story of Amin Nawabi, a young gay male from Afghanistan who, against seemingly all odds, is able to gain asylum in Denmark.
- *Green Border* (Agnieszka Holland, 2023). The border in the title is that which separates Poland and Belarus, but what the Syrian migrants seeking asylum in Europe immediately discover is that they are not welcome in either country.
- *Io Capitano* (Matteo Garrone, 2023). Two young cousins, Seydou and Moussa, leave their homes in Dakar, Senegal hoping to find a rich and bountiful life in Europe. On their trek through Africa and then the perilous journey across the Mediterranean Sea, these two, along with a group of other unfortunate migrants, face a nightmarish hell.



# Part



# Explaining Human Rights Violations



# Chapter

# 3

**Chapter**

**9**

# Towards the Future

**Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.**

Universal Declaration of Human Rights, Article 2

As we head into the future, we want to highlight four points that have guided our introduction to the politics of human rights. First, we return to the Universal Declaration of Human Rights (UDHR) to emphasize the core feature of human rights: human rights are defined, envisaged and enshrined in international law as a *universal and inalienable right*. Human rights apply to everybody simply because they are a human being. These rights do not have to be earned, and they cannot be lost. Recognizing this and working towards the realization of basic human rights for all lies at the heart of a life in dignity. Just as human rights are themselves universal, so are the *responsibilities* that come with them. With rights come obligations, obligations not to violate them but also the responsibility to protect them. We have emphasized, especially in Part I, that the responsibility to work towards protecting universal human rights does not end at country borders, but crosses national, ethnic, religious, and political boundaries.

Second, systematic and scientific academic research is essential for understanding *where and why human rights* are violated, and to be able to predict and to prevent abuse in the future. The growing body of empirical research of the academic community provides an increasingly detailed and expansive knowledge base grounded in real-world observations, shedding light on why so many individuals are denied their human rights and, consequently, their ability to live in dignity. Documenting violations is a necessary first step. In Chapter 3 we introduced numerous efforts to do just that. We have also pointed to the challenges of uncovering, classifying, and recording diverse human rights violations across different regions and time periods. The rigour of scientific methods is crucial for establishing an unbiased understanding of where abuses occur, and for addressing the fundamental question of why they happen and how they can be prevented. In Chapter 4 we explored the latest insights into what drives leaders to order human rights abuse and why various actors violate fundamental rights enshrined in both international and domestic law. We hope, and expect, that this academic attention to the topic of human rights will further improve our understanding of the politics of human rights, of why and under what conditions they are most likely to be violated, and when they are most likely to be respected. The next and crucial step is to translate this improved understanding into actions that enable more and more people to lead their lives in dignity.

Third, when *threats* to universal human rights increase, the need to understand and protect them becomes more urgent. As we complete this second edition of our book, we are witnessing a growing influence of forces within politics and wider society that challenge the *principle* of universal and inalienable human rights set forth in the UDHR. In many places, public debates and political decisions become more polarized, playing out different groups against each other, and attempting to deny some people their basic rights and their humanity. This is true for both autocratic countries *and* for democratic countries, which for a long time were seen as predominately rights respecting contexts. The latest insights from research discussed in Chapter 5 clearly shows the need to not be complacent about the protection of human rights in democracies.

Finally, we want to remind the reader of the *remarkable progress* made in improving basic human rights. In Chapter 3 we showcased increasing efforts to uncover and document human rights abuses, and the growing attention national and international communities have given to a wider range of violations. While these efforts have revealed the extent of ongoing abuses, they should not overshadow the real progress achieved in protecting fundamental rights. Globally, physical integrity rights are better safeguarded than they were just a few decades ago, and more people now enjoy basic economic rights than ever before. In Part III we introduced the expanding body of research on strengthening human rights protections. It has become more commonplace to consider, design, and implement transitional justice proceedings in societies affected by gross human rights violations. Although these efforts are not always successful and are sometimes driven by ulterior political motives, they reflect a shift in mindset, where restoring justice and fostering reconciliation are now widely recognized as essential norms. Chapter 8 introduced numerous international tools and mechanisms that were designed to reduce human suffering and improve lives. Even if their impact has sometimes fallen short of expectations, their successes should not be overlooked.

Our ability to protect human rights and to ensure a life of dignity for all *depends on all of us*. Human rights are fundamentally about how we treat one another. When we see them in this light, it becomes clear why this is such an important topic – to study and in everyday life.

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