Introduction to the Laws of Kurdistan, Iraq
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Preface to the Series: *Introduction to the Laws of Iraq and Iraqi Kurdistan*

Iraq and Iraq's Kurdistan Region is at a compelling juncture in their histories. In the wake of the transition to a democratic state, the country and region economy has prospered and its institutions have grown more complex. As institutional capacity has grown, so too has the need for a robust rule of law. An established rule of law can provide assurances to investors and businesses, while keeping checks on government and private powers and protecting citizens' fundamental rights. Institutions of higher learning, such as universities and professional training centers, can and should play a key role in stimulating and sustaining this dynamic. Indeed, education is foundational.

This paper is part of the *Introduction to the Laws of Iraq and Iraqi Kurdistan*, a series of working papers produced by the Iraqi Legal Education Initiative (ILEI) of Stanford Law School. This series seeks to engage Iraqi students and practitioners in thinking critically about the laws and legal institutions of Iraq and Iraqi Kurdistan. Founded in 2012, ILEI is a partnership between the American University of Iraq in Sulaimani (AUIS) and Stanford Law School (SLS). The project seeks to positively contribute to the development of legal education and training in Iraq.

The working paper series devotes significant attention to pedagogy. By writing in clear and concise prose and consulting with local experts at each step of the writing process, the authors strive to make the texts accessible to diverse and important constituencies: undergraduate law students, lawyers and judges, government officials, members of civil society, and the international community. By discussing the Iraqi and Kurdish legal regimes and applying specific laws to factual situations, the authors model how to “think like a lawyer” for the reader. They also use hypothetical legal situations, discussion questions, and current events to stimulate critical thinking and encourage active engagement with the material.

These working papers represent the dedicated efforts of many individuals. Stanford Law School students authored the texts and subjected each working paper to an extensive editing process. The primary authors for the initial series including papers on Commercial Law, Constitutional Law, and Oil and Gas Law, were John Butler, Mark Feldman, David Lazarus, Ryan Harper, and Neil Sawhney under the guidance of the Rule of Law Program Executive Director, Megan Karsh. Jessica Dragonetti, Emily Zhang, and Jen Binger authored the remaining papers on domestic law. Kara McBride, Cary McClelland, Neel Lalchandani, Charles Boker, Liz Miller, Brendan Ballou, and Enrique Molina authored papers primarily concerned with Iraq’s engagement with international law. I also thank the former and current deans of Stanford Law School, Deans Larry Kramer and Liz Magill, for their financial support, and the Stanford Law School alum, Eli Sugarman (J.D., 2009), who acts as an advisor to the project.

The faculty and administration of American University of Iraq in Sulaimani provided invaluable guidance and support throughout the writing process. Asos Askari and Paul Craft in particular played a leadership role in getting the program off the ground and instituting an introductory law class at AUIS. Ms. Askari taught the first law class in the 2014 spring semester. Former presidents of AUIS, Dr. Athanasios Moulakis and Dr. Dawn Dekle, provided unwavering support to the project. And finally, a special thanks to Dr. Barham Salih, founder and Chair of AUIS, without whose foresight and vision this project would not have been possible.
Finally, the authors of this series of papers owe an extraordinary debt of gratitude to many thoughtful Kurdish judges, educators, lawyers, and others who work within Iraqi institutions for their critical insights. In particular, the textbooks received vital input from Rebaz Khursheed Mohammed, Karwan Eskerie, and Amanj Amjad throughout the drafting and review process, though any mistakes are solely the authors’ responsibility.

ILEI plans to continue publishing working papers. All texts will be published without copyright and available for free download on the internet.

To the students, educators, legal, and government professionals that use this set of working papers, we sincerely hope that it sparks study and debate about the future of Iraqi Kurdistan and the vital role magistrates, prosecutors, public defenders, private lawyers, and government officials will play in shaping the country’s future.

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INTernational Human Rights Law

Chapter Objectives

• To understand the history and current general role of international human rights law, and its application to the Republic of Iraq.

• To read provisions from major international human rights instruments and understand what rights they protect, and the limits on those rights.

• To compare different regional human rights regimes, understanding their similarities and differences.

• To look closely at the weaknesses and strengths of international human rights instruments and organizations.

1. Introduction

Though this may be the first time that you are studying human rights in a classroom, it is likely that you are already familiar with the term. You may have seen the term in an article on the internet or heard politicians debate human rights on the news. Human rights are a frequently discussed topic worldwide. What can make the study of human rights complicated is that the term encompasses a broad range of ideas and people use it to mean different things in different contexts. Speaking very generally, human rights are certain entitlements or freedoms believed to belong justifiably to every human simply by virtue of being human. In other words, human rights are universal rights: rights that apply to all people, regardless of their nationality or country of residence. Examples of commonly cited human rights are the right to be free from torture, the right to be free from slavery, the right to education, and the right to a fair trial.

In this Chapter, we will focus less on the substance of the particular rights, and more on international human rights law, meaning the body of international laws, regulations, and organizations designed to promote and protect human rights worldwide. Though international human rights law is international in that it is intended to enforce universal norms, it is created and implemented at global, regional, and domestic levels. International human rights law began with a focus on governing the relationships between states, but has expanded to include the way states directly interact with individuals and groups. International human right law protects individuals and groups, without regard to their status as nationals or aliens, against violations of their fundamental human rights.
This Chapter will discuss the processes and tools used to create human rights law. These include treaties and conventions, customary law, general principles, and national laws. We will discuss critical human rights agreements, such as the Universal Declaration of Human Rights and the Cairo Declaration of Human Rights, and their key provisions or terms. We will also talk about how these agreements are implemented, monitored, and enforced, and the challenges and tensions that often arise.

We will focus less on discussing the substance of the rights, or entitlements, themselves. The field of international human rights is rapidly developing. New norms, or required standards for how humans should be treated, are constantly emerging and being debated. The way that rights are understood at the time we are writing this chapter may change by the time you are reading it.

It is also important to note that international human rights law is the codification or formalization of norms into law. Norms vary significantly from culture to culture—China has different norms from Kurdistan, which has different norms from the United States—so the universality of certain norms (in other words, whether certain norms apply to all cultures and countries) is often the subject of significant debate. While these debates are extremely important to have, and we encourage you to do so, our primary aim is to equip you with the knowledge of how norms, once agreed upon, become law.

Before beginning our study, we need to differentiate international human rights law from two types of international law with which it is commonly confused. First, international human rights are different from international humanitarian law. International humanitarian law is about laws in a specific context: the relationship between the state and combatants and civilians in an armed conflict. This is why international humanitarian laws are often referred to as the “rules of war.” A separate, different legal framework regulates international humanitarian law. In comparison to international humanitarian law, international human rights law is broader. International human rights law limits states’ conduct in times of both peace and war. However, there is overlap between these two areas of law. For example, both international humanitarian law and international human rights law include restrictions on the use of torture.

The dominant modern framework for international human rights arose at the end of the Second World War, at the same time that international criminal law (discussed in Chapter X) developed. International criminal law was established to bring to justice war criminals, retroactively punishing those guilty of atrocities. In comparison, international human rights law began from states’ desire to prevent the recurrence of similar atrocities in the future. This is why international human rights law establishes rules and standards that states have to observe, even during peacetime.

Now that you have a basic understanding of what international human rights are, we will turn to why some states have chosen to recognize international human rights laws.
1.1. Why states recognize international human rights

There are many different rationales for why we should have international human rights, and not have states pass their own human rights laws. When states sign international agreements, there are often several different reasons motivating them to do so. They may stand to gain economic benefits from the agreement, or they may be pressured to agree by other powerful countries. The simplest reason for a state to sign an international human rights agreement is that it agrees with the principles embodied in the agreement. In other words, sometimes states sign international human rights agreements because they want to protect the rights enshrined in the agreement, whether that is the right to education, the right to be free from enslavement, or other rights. The state may believe that recognizing and protecting these rights is necessary out of respect for basic human dignity. The idea that individuals are afforded rights by virtue of being human comes from the Western philosophical tradition. This belief is based in the idea that human rights are not gifts or the result of goodwill, but rather are a matter of right. In other words, all people have these rights simply because they are human. Whether or not they have these rights should not depend on whether they live in Canada, China, Russia, or Iraq.

A second reason that states choose to sign binding international human rights agreements is economic development. Proponents argue that the protection of human rights leads to economic stability nationally, regionally, and internationally. For example, an agreement may have positive externalities, or effect, on the nation. For example, the agreement may help to preserve peace in a region and therefore prevent the large movement of refugees. Preventing a refugee crisis is beneficial for all neighboring countries.

A third reason why states sign international human rights agreements is that international human rights promote international security, preventing conflicts that result in grave human rights violations. Furthermore, some argue that protecting human rights internationally prevents the disenfranchisement and abuse that can cause individuals to turn to violence.

Another rationale for human rights is religion. Some Western philosophers have turned to Christianity to justify protecting certain rights for all people. The Cairo Declaration, a treaty we will study later in this Chapter, is based on the idea that Islamic law (Shari’a) established a comprehensive legal system that includes international law. There are many more rationales for international law: can you name another reason why a state would want international human rights law, rather than domestic human rights laws?

1.2. Why states may not want to recognize international human rights

Internationally binding obligations can challenge state sovereignty. State sovereignty is a state’s capacity to exercise supreme authority within a territory. International obligations like treaties and agreements require a compromise between state sovereignty and the requirement that states

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1 See Beth Simmons, Mobilizing for Human Rights (2009).
comply with international standards on human rights.\(^2\) International human rights law can cause states to adopt agreements as domestic law and forces states to give account of how they treat their nationals, administer justice, and run their prisons.\(^3\) In other words, states have to give up some of their power when they recognize these agreements. They also sometimes have to agree to being monitored by organizations and commissions.

States often do not want to give up their sovereignty by signing international human rights agreements. This is why states sometimes do not sign or **ratify** international human rights agreements. They may be worried that if they sign an agreement that promises a certain right, but the government does not recognize that right, they will face many lawsuits from their citizens. To address this concern, countries sometimes ratify human-rights agreements with the condition that they will not overrule existing laws. These conditions are called **reservations**.

Only states can sign an international human rights treaty. Several of the treaties that will be discussed in this Chapter have been signed by the Republic of Iraq. However, because it is not currently an independent, sovereign state, Kurdistan cannot sign these treaties on its own.

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### Application Exercise

1. List one strength and one weakness of international human rights law, as compared to domestic law. Write them down. Do you think that it is easier to enforce international human rights law or domestic law? Do you think it is easier for judges in Kurdistan to interpret and apply domestic laws or international human rights laws?

As you read through this chapter, return to this list and add more weaknesses and more strengths of international human rights law.

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### 1.3. Origins of Modern International Human Rights Law

The idea of recognized and shared cultural norms has existed throughout history, but the birth of the modern field of international human rights law can be traced to the end of the Second World War. During World War II, Nazi Germany attempted to systematically exterminate Europe’s Jewish population, and targeted other groups such as the disabled, Gypsies, communists, and homosexuals. Historians estimate that approximately 11 million people were killed.

When the Second World War ended in 1945 news of the **genocide** (the deliberate killing of a large group of people, especially those of a particular ethnic group or nation) spread throughout the world. People were horrified by the images and news of the atrocities. The idea emerged that a proclamation of certain basic standards of respect for human rights would prevent a return to

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\(^3\) Cassese at 375.
the aggression and atrocities committed during the war. Western countries, particularly the United States, played a large role in writing the covenants, treaties, and agreements. Western countries also played a key role in establishing international bodies such as the United Nations (UN). World War II was not the last time that there was genocide, but it was a turning point because it resulting in the founding of the United Nations. The Charter that established the United Nations created the modern international human rights framework.

The Charter was written in 1945 and was intended to establish a system for ensuring global peace and security. The preamble (an introductory section to a legal document) states "We the peoples of the United Nations [are] determined . . . 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".

The Charter emphasized non-discrimination. Non-discrimination is the principle of not treating people different because of characteristics such as their religion, or whether they are male or female. Article 55 of the UN Charter stated the principle of non-discrimination: “the United Nations shall promote . . . universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language or religion.” While the Charter is vague with regard to other topics, its definition of non-discrimination is a clear principle. The Charter repeatedly refers to a concept of “human rights” but the Charter does not define this idea.

The Charter was an important achievement. The fifty-eight member states that constituted the United Nations at that time had different ideologies, political systems, religious and cultural backgrounds, and patterns of socio-economic development. Yet, they all signed the Charter. The agreement represented a common statement of shared goals and aspirations. It was the first time in history that a document considered to be universal (applying to all, regardless of nationality or country of residence) was adopted by an international organization. It was also the first time that an international agreement listed fundamental rights and freedoms in detail.

The Charter was powerful because it listed specific human rights that its member states agreed to “promote.” But it is unclear whether the Charter actually imposes real legal obligations on states. In Article 56 of the Charter, all members of the United Nations “pledge themselves to take joint and separate action in cooperation with the Organization for the achievement of the purposes set forth in Article 55.” It has been argued that the word “pledge” is too vague and imprecise to be legally binding. Do you think that this language imposes real legal obligations on states? Or do you think that the language is too vague and imprecise?

If you think that Article 56 imposes binding legal obligations, you can find support for your view in a 1971 advisory opinion from the International Court of Justice, the court for the United

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4 See Cassese at 377.
Nations. In an **advisory opinion**\(^5\) condemning the practice of apartheid\(^6\) in South Africa, the Court spoke about “the international obligations assumed by South Africa under the Charter of the United Nations.” The Court stated that apartheid was “a flagrant violation of the purposes and principles of the Charter.”\(^7\) South Africa, the Court said, had “pledged itself to observe and respect, in a territory having an international statute, human rights and fundamental freedoms for all without distinction as to race.” In other words, because South Africa signed the United Nations Charter, it has a legal obligation to follow the rights enshrined within the Charter.

However, the more common view is that the Charter is *not* a legally binding document because the language is too vague and imprecise, and as a result its signatories do not have a legal obligation to protect the rights it enshrines.

While the Charter may not be legally binding, it is important because it provided the starting point for the codification of human rights law that followed. As stated previously, codification is the process of putting laws together as a formal code or system. The codification of the rights enshrined in the Charter included the Universal Declaration of Human Rights in 1948. The Declaration delineated thirty different fundamental rights, including the rights to life, to liberty, and to security of person (Article 3) and to an adequate standard of living (Article 27).

Following the Declaration, UN member states created the International Covenant on Civil and Political Rights (ICCPR) and International Covenant on Economic and Social Rights (ICESCR), both in 1966. Unlike the Charter, however, both the ICCPR and the ICESCR are legally binding obligations. Legally binding covenants are more than recommendations or statements of shared aspiration; they create obligations that can be enforced and require states to follow their provisions. The Charter has since also served as a model for many national constitutions.

Western countries dominated international human rights discourse at the end of World War II, but since then there has been a shift from Western dominance to greater involvement of non-Western countries. An example of a non-western human rights law is the Cairo Declaration, a human rights agreement drafted and ratified by Muslim countries in the Middle East. The Cairo Declaration will be discussed later in this Chapter.

### 2. MAJOR REGIMES OF HUMAN RIGHTS LAW

This Chapter will examine three different regimes of international human rights law: global, regional, and national. By regime, we mean the relationship among different rules, principles, 

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\(^5\) An advisory opinion is an opinion written by a court that is not legally binding; in other words it states a particular interpretation of law (and may be followed in subsequent, binding opinions), but it does not adjudicate a specific legal case

\(^6\) Apartheid was the systematic racial segregation enforced by the government of South Africa from 1948 to 1994.

and organizations that make up a system. Therefore, the **global regime** refers to the different conventions and treaties that have been signed by countries around the world, their implementation, how they are monitored and enforced, and how these agreements interact with each other.

Regional human rights regimes are relatively independent and coherent sub-regimes. Regional regimes can be thought of as being nested within broader international human rights regimes. Picture Russian nesting dolls: each regional regime is like a smaller doll that fits inside a larger hollow doll representing the international human rights regime. The key regional human rights instruments are the Cairo Declaration, the Arab Charter on Human Rights, the African Charter on Human and People’s Rights, the American Convention on Human Rights, and the European Convention on Human Rights.

National human rights regimes fill in the gap created when international and regional bodies do not intervene. They apply only within that one nation, but the regime may reflect international customary norms or trends. Picture national human rights regimes as the smallest Russian nesting doll, resting inside the regional regime, which is inside the international regime.

### 2.1. Global Human Rights Regime

As noted above, the current international framework for human rights law originated with the United Nations Charter that began the United Nations in 1945. It emphasized **non-discrimination**. Discrimination is when lines are established that not only separate groups but suggest that one group is superior or inferior simply because of race, color, sex, language, religion, political opinion, or national or social origin. The Charter repeatedly referred to a concept of human rights, although it did not provide a definition for human rights. However, it provided the starting point for the codification of human rights law that followed. This section will look at a number of important international human rights agreements, including the Universal Declaration of Human Rights (UDHR), the International Covenant on Civil and Political Rights (ICCPR), and the International Covenant on Economic and Social Rights (ICESCR). Together, the UDHR, ICCPR, and ICESCR are referred to as the “International Bill of Rights.” Think of a Bill of Rights as a list of important rights.

There are other important international human rights treaties, discussed at the end of this chapter. These agreements broadly fall into two categories. Some are anti-discriminatory. These include treaties that provide specific protections for vulnerable groups such as women or refugees. The second broad category of international treaties provides for the criminalization of certain human rights abuses regarded by the international community to be egregious. This category includes the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or

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2.1.1. Universal Declaration of Human Rights

The Universal Declaration of Human Rights (UDHR) was written at the end of World War II, when many countries were cooperating in an effort to prevent future atrocities. The Declaration opens with the words, “All human beings are born free and equal in dignity and rights.” Its preamble explains that disregarding these human rights resulted in the violence of World War II. It states that recognizing these rights of all humans will set the foundation for freedom, justice, and peace in the world.

The UDHR was adopted by the United Nations General Assembly in 1948. It currently has 200 signatories, or countries that signed the agreement, including Iraq. The UDHR is a declaration and not a treaty or convention, which is an important distinction. Declarations are statements, in this case made by UN member states, of values and intent to act in accordance with those values. Member states are expected to negotiate these declarations in good faith and try to fulfill any terms set forth within. Declarations are different from treaties and covenants, which are international agreements to which states agree to be legally obligated. We will revisit the significance of treaties and covenants again below, but for now it is important to note that UDHR is a statement of intent, but not a binding agreement.

Declarations and resolutions that are not legally binding are sometimes called soft law. These agreements cannot be enforced in courts. For example, Article 9 of the UDHR states, “No one shall be subjected to arbitrary arrest, detention or exile.” Because the UDHR is not legally binding, if the government of Iraq violates this law and arbitrarily arrests you, you cannot sue the government and bring government officials to an international human rights court.

If the UDHR is not legally binding, then why is it important? It is important because it produced a concept of some values that all states should protect domestically. It also provided a starting point for the international protection of human rights. Later agreements such as the ICCPR and the ICESCR helped to fill in the gaps. Furthermore, the Declaration can be a normative moral force, persuading its member states to adopt the rights that it protects. After states have adopted its rights, these rights can then become binding as customary international law. We will address customary international law at the end of this Chapter.

The UDHR consists of thirty different articles. You can see the full text of the Declaration on the United Nations website but we will discuss key provisions in this chapter. More of the articles are about civil and political rights than economic, social, and cultural rights. Civil and political rights establish prohibitions, for example prohibiting slavery or torture. Economic, social, and cultural rights are affirmative rights that require the state to act. They go beyond the scope of civil and political rights. For example, the right to education requires the state to

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provide access to schools and teachers. Another example of an economic, social, or cultural right is the right to fair labor conditions. The box below lists several articles from the UDHR. Which articles state civil and political rights? Which articles state economic, social, and cultural rights?

**Universal Declaration of Human Rights**

**Article 3.**
Everyone has the right to life, liberty and security of person.

**Article 4.**
No one shall be held in slavery or servitude; slavery and the slave trade shall be prohibited in all their forms.

**Article 5.**
No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.

**Article 8.**
Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.

**Article 9.**
No one shall be subjected to arbitrary arrest, detention or exile.

**Article 10.**
Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.

**Article 11.**
(1) Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence.

(2) No one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the penal offence was committed.

**Article 12.**
No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks.
Article 18.

Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance.

Article 22.

Everyone, as a member of society, has the right to social security and is entitled to realization, through national effort and international co-operation and in accordance with the organization and resources of each State, of the economic, social and cultural rights indispensible for his dignity and the free development of his personality.

Article 23.

(1) Everyone has the right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment.

(2) Everyone, without any discrimination, has the right to equal pay for equal work.

(3) Everyone who works has the right to just and favourable remuneration ensuring for himself and his family an existence worthy of human dignity, and supplemented, if necessary, by other means of social protection.

(4) Everyone has the right to form and to join trade unions for the protection of his interests.

Article 24.

Everyone has the right to rest and leisure, including reasonable limitation of working hours and periodic holidays with pay.

Article 25.

(1) Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.

(2) Motherhood and childhood are entitled to special care and assistance. All children, whether born in or out of wedlock, shall enjoy the same social protection.
1. Adnan is a journalist. He recently wrote a story in the *AUIS Daily Newspaper* that accused two local government officials of taking bribes. The story angered the officials and they made a public statement saying that Adnan was a liar and a criminal because he had not paid his taxes. The next day, unidentified people broke into Adnan’s home. They beat Adnan and he was then put into a room alone. This was three months ago; Adnan is still locked in the room. No one knows where Adnan is. Adnan does not know if there are criminal charges against him.

Look at the articles from the UDHR in the box above. Which of Adnan’s human rights (as stated in the UDHR) have been violated? Which articles state these rights?

2. When the UDHR was written, the developing human rights framework mainly addressed how governments behaved towards their citizens. However, with globalization, many businesses and corporations today have more money and power than governments. While governments are legally accountable to their citizens, businesses are not accountable. The heads of corporations are not elected by the citizens. Therefore, corporations have little public accountability. As a result, they are often accused of violating human rights.

Using the UDHR as a reference, in what ways could a large international company violate the human rights of its employees? In what ways could it violate the rights of people in general?

**Answer**

1. Many of Adnan’s human rights (as stated in the UDHR) have been violated, including:
   - Article 3 – Adnan has been deprived of his right to liberty and security because he is locked in a room.
   - Article 5 – Adnan has been subjected to torture or cruel, inhuman or degrading treatment or punishment.
   - Article 8 – Adnan has not been given an effective remedy by a competent national tribunal. He has not gone to a court or had a judge look at his case.
   - Article 9 – Adnan has been subjected to arbitrary arrest and detention.
   - Article 11 – Adnan has not had a public trial with the guarantees (such as a lawyer) necessary for his defense.
   - Article 12 – Adnan has been subjected to arbitrary interference with his privacy, family, home and correspondence. He has not seen his family for three months. He cannot correspond with others. He does not have privacy.

2. A wide range of answers is possible. A company could not provide a safe working environment, which would violate Article 23. The company could fire its employees if they take any holidays off of work (Article 24). The company could have a rule that all of its employees must be Muslim, which would violate Article 18 (providing for the freedom of religion). The company could violate the rights of the public if, for example, it pollutes the air around its factories, causing people to get sick and even die. This violates Article 25, which states that...
everyone has the right to a standard of living adequate for health and well-being. Broadly, the company would be violating Article 28, which states “everyone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized.”

A critique of the UNDHR, and of many of the human rights conventions in general, is that they show a Western approach to thinking about rights. This has to do, in part, with the creation of the documents. The UDHR was primarily drafted by Eleanor Roosevelt, the Chairwoman of the Commission that authored the Declaration. Eleanor Roosevelt was the wife of the former American president Franklin Delano Roosevelt. John Peter Humphrey, a Canadian who was the Director of the Division of Human Rights within the United Nations Secretariat, also played a significant role in drafting. Therefore, some argue that the UDHR largely reflects an American, Canadian, and European idea of human rights standards. Yet it is important to note that Charles Malik of Lebanon was a representative on the Commission, as were representatives from the Republic of China, Egypt, India, Iran, the Philippines, and Uruguay.

Following the UDHR, UN member states created two legally binding covenants in 1966: the International Covenant on Civil and Political Rights (ICCPR) and International Covenant on Economic and Social Rights (ICESCR). These two global instruments differ from the UDHR because they create legally binding obligations. The next sections will discuss each of these agreements in greater detail, explaining their key provisions and how they differ from each other.

2.1.2. International Covenant on Civil and Political Rights

The International Covenant on Civil and Political Rights (ICCPR) is a legally binding covenant adopted by the United Nations General Assembly in 1966. Along with the ICESCR, the ICCPR reflects many of the same principles stated in the Declaration of Human Rights, but with binding force. In other words, states are not only encouraged to follow its principles; they are legally obligated to protect the rights in this covenant. The ICCPR commits parties to the treaty to respect individuals’ civil and political rights, including freedom of religion, freedom of speech, electoral rights, and the right to a fair trial. As of January 2015, the Covenant has 74 signatories and 168 parties. Iraq ratified the ICCPR in 1971.

The ICCPR is important because it is legally binding. States that ratify the Covenant have an immediate obligation to “respect and ensure” the rights in the Covenant, as stated in Article 2(1). States must implement domestic legislation that gives effect to the treaty’s provisions (see Article 2(2)). States that ratify the Covenant must also provide an effective remedy for the violation of those rights (Article 2(3)).

Each article of the ICCPR describes a right and then describes any limitations on that right. The ICCPR contains some absolute rights, which social goals and emergencies cannot limit. States must always recognize absolute rights, regardless of the circumstances. Article 1 guarantees a
people’s right to self-determination, including determining their political status and their economic, social and cultural development. It also provides that people have a right to dispose freely of their natural wealth and resources. Article 2 of the ICCPR echoes the Declaration’s commitment to non-discrimination. Article 2 mandates that the treaty’s provisions be guaranteed to all peoples, without distinction to race, color, sex, language, religion, political or other opinion, national or social origin, property, birth, or other status. Article 3 pledges states to ensuring that both men and women fully enjoy all of the civil and political rights guaranteed in the treaty. Other absolute rights include the right to be free from torture and other forms of serious ill treatment (Article 7) and the right to be free from slavery, servitude and forced and compulsory labor (Article 8). Similar provisions are found in the UDHR.

The ICCPR also contains some qualified rights. Qualified rights are rights that can only be interfered with (for example, by a local government) if they are in the interest of the wider community, or to protect other people’s rights. It is different from an absolute right, which the state can never withhold or take away. For example, the right to liberty and security of the person is qualified in Article 9(1): “Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law” (emphasis added). The right to freedom of religion is also subject to “limitations as are prescribed by law and are necessary to protect public safety, order, health or morals, or the fundamental rights and freedom of others” (Article 18).

Certain rights established in the ICCPR are subject to derogation in times of national emergency. Derogation is when a country partially repeals a law, so that it no longer has to follow it fully. It is different from annulling a law, which is also known as abrogation. Article 4 allows states to derogate these rights, but only in certain limited situations:

In time of public emergency which threatens the life of the nation . . . to the extent strictly required by the exigency of the situation, provided such measures are not inconsistent with their obligations under international law and do not involve discrimination solely on the grounds of race, colour, sex, religion or national origin.

However, the absolute rights, discussed above, such as the right to life and the right to not be tortured or enslaved, can never be derogated. It is important to look closely at the language of Article 4: it states “threatens the life of the nation” not “threatens the life of the government.” These words have different meanings. What is an example of an event that could be a threat to the government but not a threat to the nation? Could a peaceful coup d’etat be a threat to a government, but not to a nation?

The ICCPR also extends protection to political freedoms. These rights include the right to peaceful assembly (Article 21) and association (Article 22), and the rights to freedom of thought, conscience and religion (Article 18). Article 25 includes some protections for political
democracy; its language states that “every citizen shall have the right . . . to take part in the conduct of public affairs, directly or through freely chosen representatives” and “to vote and be elected at genuine periodic elections.” But some countries that are parties to the ICCPR are not democracies and do not have periodic elections.

The ICCPR is monitored by the United Nations Human Rights Committee. This committee reviews regular reports from state parties on how the rights in the treaty are being implemented. States have to make a report one year after acceding to the Covenant, and then whenever the Committee requests a report, usually once every four years. The Committee meets in Geneva and has three sessions each year.

Application Exercises

1. Legalstan is currently experiencing its worst draught in 500 years. Crops are failing and livestock are dying. The Government ratified the ICCPR in 1990 but now it is passing new legislation that critics say is violating its legal obligations under the ICCPR. Two of the controversial provisions are:

(A) The Government has provided social security for the past fifty years. However with the draught, the government is now eliminating its pension. Elderly residents will not receive any benefits from the government.

(B) In need of individuals to build a new dam, the Government has passed a resolution adding 2 years to the sentences of all convicted thieves. During those two years they will be forced to construct a dam.

Do you think that these new measures violate Article 4 or Article 8 of the ICCPR (below). Do these new measures violate absolute rights or qualified rights?

Article 4 states “In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.”

Article 8.3 states

(a) No one shall be required to perform forced or compulsory labour;

(b) Paragraph 3 (a) shall not be held to preclude, in countries where imprisonment with hard labour may be imposed as a punishment for a crime, the performance of hard labour in pursuance of a sentence to such punishment by a competent court;
(c) For the purpose of this paragraph the term "forced or compulsory labour" shall not include:

(i) Any work or service, not referred to in subparagraph (b), normally required of a person who is under detention in consequence of a lawful order of a court, or of a person during conditional release from such detention;

(ii) Any service of a military character and, in countries where conscientious objection is recognized, any national service required by law of conscientious objectors;

(iii) Any service exacted in cases of emergency or calamity threatening the life or well-being of the community;

(iv) Any work or service which forms part of normal civil obligations.

Answer

1. Provision (B) violates an absolute right – the right to be free from forced and compulsory labor (Article 8). This right cannot be derogated, even in times of emergency. However, the right to social security is not an absolute right under the ICCPR. As long as everyone lost their benefits and there was not any discrimination based on race, color, sex, religion, or national origin, this measure would be allowed because a public emergency threatens the life of the nation (Article 4).

2.1.3. International Covenant for Economic, Social and Cultural Rights

The International Covenant for Economic, Social and Cultural Rights is the second major international treaty, along with the ICCPR, that underlies much of today’s human rights law. It is also a multilateral treaty. Like the ICCPR, the ICESCR was adopted by the United Nations General Assembly in 1966 and has been in force from 1976. The ICESCR commits parties to the treaty to the granting of economic, social, and cultural rights, including labor rights, the right to health, the right to education, and the right to an adequate standard of living. As of January 2015, the Covenant has 70 signatories and 163 parties. Six countries, including the United States, have signed but not yet ratified the Covenant. Iraq ratified the ICESCR in 1971.

The ICESCR is legally binding, but it is different from the ICCPR. Compare the language of the two Covenants below:

<table>
<thead>
<tr>
<th>International Covenant on Civil and Political Rights</th>
</tr>
</thead>
<tbody>
<tr>
<td>Article 2</td>
</tr>
<tr>
<td>1. Each State Party to the present Covenant undertakes to respect to 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.</td>
</tr>
</tbody>
</table>
2. Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant.

International Covenant for Economic, Social and Cultural Rights

Article 2

1. 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.

The ICESCR describes states’ obligations as less firm and less immediate than the ICCPR’s statement of states’ obligations. Article 2 of the ICESCR imposes a duty on all parties for progressive realization, which means that countries do not have to implement the rights immediately; they can take the steps necessary for the right to eventually be fully recognized. Progressive realization recognizes that some of the rights in the ICESCR (for example, the right to health, or the right to social security) may be difficult for some countries to achieve. These rights are particularly difficult to implement in countries that have less infrastructure and resources. The ICESCR acknowledges that countries face resource contraints, but requires them to act as best they can within their means. This is different from the ICCPR which creates immediate, binding legal obligations. However, the ICESCR’s requirement to take steps imposes a continuing obligation to work towards the realization of the rights in the ICESCR. Furthermore, the ICESCR has a minimum core of rights that must be provided: essential foodstuffs, essential primary healthcare, basic shelter and housing, and basic education.

The rights in the ICESCR are considered “new” rights. These rights are different from the rights in the ICCPR, which has been viewed as enshrining recognized rights, such as the right to life or the right to be free from torture. These “new” rights often require positive steps by the State, as well as significant financial commitment. We call rights requiring action from the state positive rights. Positive rights are different from negative rights, which are rights to be free from government interference or harm. For example, Article 13 recognizes the right of everyone to free education (free for the primary level and “the progressive introduction of free education” for the secondary and higher levels”). Article 9 recognizes the right of everyone to social security, including social insurance. Free education and social security programs can be very expensive for a country, and many countries cannot afford to provide these programs. What happens to a country that wants to ratify the ICESCR, but that does not have the resources to provide social security? It can still ratify the Covenant, even if it does not have the programs currently – but it must “take steps” towards fulfilling the rights in the ICESCR’s articles.
The ICESCR has been ratified by fewer states than the ICCPR because it includes these “new” rights that place affirmative obligations on governments. Governments are sometimes wary of taking on internationally-imposed obligations. For example, the United States signed the ICESCR in 1979 but it has not yet ratified it, and therefore is not fully bound by it. A legislative body in the United States (called the Senate) must give its “advice and consent” before the United States ratifies ICESCR, and it has not done so yet. A large number of countries have alternatively ratified the ICESCR, but made reservations and interpretative declarations to their application of the ICESCR. Critics argue that these reservations make the ICESCR ineffective.

The ICESCR is monitored by the UN Committee on Economic, Social and Cultural Rights. This committee does not have an inter-state or individual complaints mechanism. It conducts on-site missions and general monitoring activities, as well as oversees periodic reporting.

### Application Exercises

1. The ICESCR protects economic, social, and cultural rights, while the ICCPR protects civil and political rights. Briefly describe the differences between these two broad categories of rights.

2. Legalstan has just ratified a new treaty, the Convention on Universities. It includes the following 3 provisions:
   (1) All institutions of higher learning must provide students with a computer on which to complete their work assignments.
   (2) Requiring students to write papers that are longer than 25 pages is cruel and inhumane. Universities cannot force students to write papers that are longer than 25 pages.
   (3) All students may freely choose their classes, without any restrictions or requirements.

Which of these provisions are positive rights? Which of these provisions are negative rights? Say whether each provision is more similar to the rights in the ICCPR or the ICESCR.

### Answer

1. Civil and political rights establish prohibitions, for example prohibiting slavery or torture. Economic, social, and cultural rights are affirmative rights that require the state to act. They go beyond the scope of civil and political rights. Examples include the right to access education, or the right to fair labor conditions.

2. Provisions (1) and (3) are positive rights, while provision (2) is a negative right. Provision (2) is more similar to the rights in the ICCPR. Provisions (1) and (3) are more similar to the rights in the ICESCR.
The following chart provides a summary of some of the key similarities and differences among the UDHR, ICCPR, and the ICESCR:

<table>
<thead>
<tr>
<th></th>
<th>UDHR</th>
<th>ICCPR</th>
<th>ICESCR</th>
</tr>
</thead>
<tbody>
<tr>
<td>Signatories</td>
<td>200</td>
<td>74</td>
<td>70</td>
</tr>
<tr>
<td>Is the treaty legally binding?</td>
<td>No</td>
<td>Yes</td>
<td>Yes</td>
</tr>
<tr>
<td>Discretion for how to achieve its goals</td>
<td>High</td>
<td>Low</td>
<td>Medium</td>
</tr>
<tr>
<td>Procedures for legal remedies</td>
<td>No</td>
<td>Yes</td>
<td>No</td>
</tr>
</tbody>
</table>

### 2.1.4. Other Global Instruments

There are other international human rights treaties that have been negotiated and ratified by states. These treaties can be divided into two broad groups. First are anti-discriminatory treaties, which afford special human rights protections to vulnerable groups. An example is the Convention on the Rights of the Child (CRC). The CRC was adopted by the United Nations General Assembly in 1989 and has been ratified by more countries than any other human rights treaty. The CRC requires the special application of many civil, political, economic, social, and cultural rights to minors. It has not been ratified by Iraq.

Another example of an anti-discriminatory treaty is the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW). This treaty was adopted by the United Nations General Assembly in 1979 and came into force in 1981. As of January 2015 it has been ratified by 188 states. It has also not been ratified by Iraq.

CEDAW imposes broad positive obligations on states to ensure the “practical realization” of sex equality. It defines what constitutes discrimination against women as “… any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.” States that are parties to CEDAW agree to take all appropriate measures, including legislation and temporary special measures, so that women can enjoy all their human rights and fundamental freedoms.

CEDAW is legally binding. Parties to CEDAW are also committed to submit national reports, at least every four years, on measures they have taken to comply with their treaty obligations. However, many countries have ratified the treaty subject to certain declarations, reservations, and objections. The most common rejection is of Article 29. Article 29 states that any dispute concerning the interpretation of application of CEDAW that is not settled by negotiation should be submitted to arbitration. If the dispute is not resolved within six months, Article 29 provides that it can be referred to the International Court of Justice (ICJ) for adjudication. However, many
States have avoided this process of adjudication by attaching reservations to their accession. We will discuss why states are wary of adjudication in the next section.

The Convention Relating to the Status of Refugees and the International Convention on the Elimination of All Forms of Racial Discrimination are two more anti-discriminatory agreements. The chart below summarizes the major United Nations human rights instruments discussed in this chapter. As shown in the chart, the Universal Declaration of Human Rights is the broadest, overarching agreement.

**Chart of the Principal United Nations Human Rights Instruments**

<table>
<thead>
<tr>
<th>Universal Declaration of Human Rights (UDHR), 1948</th>
<th>International Covenant on Civil and Political Rights (ICCPR), 1966</th>
<th>International Covenant on Economic, Social and Cultural Rights (ICESCR), 1966</th>
</tr>
</thead>
<tbody>
<tr>
<td>Convention Relating to the Status of Refugees, 1951</td>
<td>Convention on the Elimination of All Forms of Racial Discrimination, 1966</td>
<td>Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1984</td>
</tr>
</tbody>
</table>

### 2.1.5. Monitoring Global Instruments

Earlier in this chapter we discussed how international human rights agreements must balance (1) state sovereignty and (2) compliance with international standards. Monitoring mechanisms are institutions whose job it is to assess how states comply with global human rights agreements. International adjudication in the courts is a stronger way of ensuring that states comply with human rights treaties, since the time and cost of litigation of going to court are strong deterrents. However, many states oppose international litigation because they can potentially have a domestic policy or domestic law overruled. The process of adjudication is also often lengthy and expensive; the state has to pay for lawyers to defend its actions or policies. This is why many states attached reservations to their accession to CEDAW; they did not want to have to adjudicate. Monitoring mechanisms can be thought of as a compromise. Monitoring mechanisms track how well states comply with international human rights, but respect state sovereignty.

The UDHR, ICCPR, and ICESCR established four kinds of supervisory procedures to monitor whether states are following their commitments: ¹¹

1. **Procedure for periodic reports submitted by the states themselves.**

All major human rights treaties establish a mandatory reporting system under which states parties submit periodic reports regarding the measures they have taken to meet the treaty’s requirements. These reports are usually required at 2-5 year intervals. States are expected to make these reports widely available to the public.

2. **Procedure for the investigation of systematic violence.**
   Only CEDAW and the Optional Protocol to the Torture Convention provide unique in-country investigative powers to their respective treaty bodies.

3. **Procedure for examining inter-state complaints.**
   Examining inter-state complaints requires reciprocal accusations. As of January 2015, no state has filed an inter-state complaint with a treaty body. This is likely due to several factors: fear of a negative effect on diplomatic relations, concern about retaliation by another state, and doubt that the procedures are effective.

4. **Procedure operating at the request of individuals or groups against a state.**
   States have to choose to initiate this procedure. It has proven more effective than inter-state complaints.\(^\text{12}\) The Human Rights Committee has received the most individual petitions. However, the majority of states have never been the subject of an individual complaint under any of the relevant treaty body procedures. Where complaints are made, treaty bodies often have insufficient cooperation from the state party to proceed.

The United Nations Human Rights Council, a subsidiary body of the United Nations General Assembly, is the main intergovernmental body within the UN responsible for promoting international human rights. The Human Rights Council serves as a forum for dialogue on human rights issues, but its activities do not have legally binding force. It is smaller and more transparent than the UN General Assembly. It meets regularly and also conducts periodic reviews of all member states. The United Nations High Commissioner for Human Rights coordinates human rights activities throughout the UN system and supervises the Human Rights Council.

The Commissioner does not have strong legal power or a large budget. However, the position is powerful because the Commissioner can have a strong voice and can “name and shame” countries that are violating international human rights standards. This means that the Commissioner can give a speech or release a statement criticizing a country that is committing human rights abuses, which can result in negative international publicity and news coverage, and can result in pressure from other countries to stop the violation.

Monitoring mechanisms can also be created by United Nations resolutions. For example, in the 1990s the Commission on Human Rights created a system of country and thematic special rapporteurs to investigate human rights abuses. Special rapporteurs receive information about individual cases, communicate with governments, conduct in-country investigations, and then issue reports. Two additional reporting mechanisms are working groups and independent experts.

\(^{12}\) Cassese at 387.
2.1.6. Enforcing Global Instruments

There is no fully comprehensive enforcement system for international agreements as discussed fully in The Working Paper on Treaties and International Organizations. However, the UN Security Council has the ability to use moral imperative rhetoric to compel governments to follow international human rights standards. It also can impose sanctions on travel, communication, and trade, and, if those measures are ineffective, it can provide a peacekeeping force. Many are critical of this approach, and find it too lenient on human rights abusers. Critics find monitoring and enforcement efforts to be non-confrontational and overly reliant on public exposure and pressure, and not action.

But where can international agreements be enforced? When states sign an international human rights agreement, they are obligated to respect their human right commitments not only on their own territory, but also abroad. They also have to respect their commitments whether or not the individuals’ subject to the authority are citizens or foreigners. However, international human rights agreements are increasingly being enforced extra-territorially: outside a country’s borders.

The case Delia Saldias de Lopez v. Uruguay is an example of the UN Human Rights Committee enforcing an international agreement outside of the borders of the country that signed the agreement. The facts of the case were that Uruguayan security forces abducted and tortured a Uruguayan citizen when he was living in Argentina. The forces had to cross the border between Uruguay and Argentina in order to capture the man, a leader of the trade union movement, in the city of Buenos Aires, Argentina. He was held for several months, beaten, tortured, and forced to sign false statements. His wife brought an action before the UN Human Rights Committee, claiming that Uruguay had violated the ICCPR (which it had signed) because it had committed torture (in violation of Article 7) and arbitrary arrest and detention (in violation of Article 9), and well as restricted her husband’s right to free movement (Article 12.1) and did not provide minimum guarantees when charged with a crime, in violation of Article 14.3. The question for the UN Human Rights Committee was whether the ICCPR applied when Uruguay violated its provisions in another country (Argentina).

UN Human Rights Committee ruled that Uruguay did violate the ICCPR. Article 2(1) of the ICCPR requires state parties “to respect and ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant...” (emphasis added). However, the abduction and torture both occurred in Argentina, before the citizen was transported back to Uruguay. The Committee held that under the ICCPR, states are responsible for actions that their agents (like security forces) commit in another state. According to the Commission it would be “unconscionable” to interpret the ICCPR to allow a state to torture or commit acts in another state that it cannot do on its own soil. This is an example of the expanding territorial scope of human rights obligations.
However, some states (such as the United States) argue that the ICCPR applies only to individuals who are within a state’s territory and under its jurisdiction. These states argue that the ICCPR would not include the phrase “within its territory” if it was meant to apply outside of a state’s own territory.

2.2. Regional Humans Rights Regimes

In addition to global human rights regimes, there are regional human rights regimes. As discussed earlier in this Chapter, by regime we mean the relationship among different rules, principles, and organizations that make up a system. When the Inter-American regime was established in 1978, the Secretariat of the Inter-American Commission prepared a study to compare the proposed regional Convention with existing international agreements. The Secretariat concluded that both international and regional systems could coexist and be coordinated. It then stated why it was important to have a regional perspective on human rights:

The need for, and the desirability of, a regional convention for the Americas are based on the existence of a body of American international law built up in accordance with the specific requirements of the countries of the hemisphere. That need and desirability also followed from the close relationship that exists between human rights and regional development and integration. Consequently, the Inter-American Convention on the Protection of Human Rights should be autonomous rather than complementary to the United Nations covenants.  

This quote illustrates some of the arguments for having regional human rights regimes. First, regional regimes can be tailored to the “specific requirements” of the countries in that region. Countries in Africa may have different human rights priorities than countries in Europe. Second, countries may be more willing to ratify regional treaties with robust enforcement mechanisms because they have more familiarity with the culture and legal system, and they have more control over the system because there are fewer members. Third, a country is a member of a regional agreement with ten other states it will have more power to affect the drafting of the agreement and its processes than if the country is one of the 200 countries that signed the UDHR.

Critics of regional regimes argue, however, that regional mechanisms may undermine movement towards universality. If human rights are rights inherent in every human being, how can human beings living in one part of the world have different rights than humans living in a different part of the world?

The four major regional human rights regimes we will focus on in this Chapter are Islamic human rights regimes, the European human rights regime, the Inter-American human rights

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regime, and the African human rights regime. The European regime is the most expansive, while the African regime is the most recently established.

2.2.1. Islamic Human Rights Regimes

Unlike Europe, Africa, and the Americas, there is no one single, cohesive regional human rights system for the Middle East. However, there are a number of Islamic instruments dedicated to the protection of human rights.

It is important to first note that Islamic international human rights instruments have a different starting point than the international agreements that we have already discussed, or the European, American, and African systems that we will consider. In global instruments (like the UDHR) and other regional instruments, religion and the state are separate. In these agreements law is secular, or unrelated to religion, not of divine origin, and thus is amenable to change. However, the religion of Islam includes a legal system (Shari’a). Some of the rules established by Shari’a could be considered human rights norms because of their focus on human dignity and freedom from harm. You can refer to the primary texts of Islamic law to see how these sources address human rights.

However, in Kurdistan Shari’a is not a formally enacted legal code like the Iraqi Civil Code or the Iraqi Criminal Code. Instead, Shari’a is comprised of individual jurists’ interpretations of the Qur’an and Sunnah. As a result, there is a diversity of interpretation among different schools and even within each school. Shari’a has more legitimacy in many Muslim countries than the United Nations and international agreements. While we will not explore the human rights-related provisions of Shari’a here, as it is beyond the scope of this chapter, we note that Shari’a has been incorporated by reference into Islamic human rights instruments. There are two major international instruments through which states with majority Muslim populations have articulated a view on international human rights: The Cairo Declaration on Human Rights in Islam (1990) and the Arab Charter on Human Rights (2004).

2.2.1.1. The Cairo Declaration of Human Rights

The Cairo Declaration of Human Rights in Islam (CDHRI) has been viewed as an Islamic response to the United Nations’ Universal Declaration of Human Rights (UDHR). Many Muslim-majority countries, including Egypt, Iran, and Pakistan, signed the UDHR in 1948. However, Saudi Arabia abstained, arguing that the UDHR violated Islamic law. Saudi Arabia criticized the UDHR for not taking into consideration the cultural and religious context of non-Western countries. In response, the Organization of Islamic Cooperation (OIC) adopted the Cairo Declaration in 1990. The OIC was founded in 1969 and regards itself as the “collective voice of

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the Muslim world.” It works to “safeguard and protect the interests of the Muslim world in the spirit of promoting international peace and harmony.” Iraq is a member state of the OIC.

The Cairo Declaration begins with “All men are equal in terms of basic human dignity.” Note that the phrase is equal “human dignity” not equal “human rights.” This is an important difference from the UDHR which guarantees “human rights.” The Cairo Declaration goes on to state “True faith is the guarantee for enhancing such dignity along the path to human perfection.” This has been interpreted by some scholars to mean that all human beings are equal, but those who earn proper religious belief gain more dignity and thus have more acquired dignity.

The Cairo Declaration guarantees many of the same rights as the UDHR. For example, it prohibits arbitrary arrest and torture (Article 20) and enslavement (Article 11). However it is different from the UDHR because it emphasizes the Islamic religion. References to religion begin in the Preamble, which references the “civilizing and historical role of the Islamic Ummah which Allah made as the best community and which gave humanity a universal and well-balanced civilization, in which harmony is established between hereunder and hereafter.”

The following twenty-five articles repeatedly reference the importance of the Islamic religion. Article 1 contains a prohibition of discrimination “on the basis of race, colour, language, belief, sex, religion, political affiliation, social status or other considerations”–similar to the language of the UDHR–but adds “true religion is the guarantee for enhancing such dignity along the path to human integrity.” Article 22 states that “Everyone shall have the right to express his opinion freely in such manner as would not be contrary to principles of Shari’ah.” Article 12 states that every man has the right to free movement, but only within the framework of Shariah.

Compare Article 10 of the Cairo Declaration with Article 18 of the UDHR, below. Both articles address freedom of religion. Are these two articles compatible? Or do they directly contradict each other? Why?

<table>
<thead>
<tr>
<th>Universal Declaration of Human Rights</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Article 18</strong></td>
</tr>
<tr>
<td>Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance.</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Cairo Declaration of Human Rights</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Article 10</strong></td>
</tr>
</tbody>
</table>

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15 OIC website, Art. 1, OIC Charter.
Islam is the religion of true unspoiled nature. It is prohibited to exercise any form of pressure on man or to exploit his poverty or ignorance in order to force him to change his religion to another religion or to atheism.

It is significant that Article 24 of the CDHRI states that it is “subject to the Islamic sharia,” and Article 25 confirms that Shari’a “is the only source of reference for the explanation or clarification of this Declaration.” This is the only guidance in the CDHRI for interpreting its provisions. Articles 24 and 25 establish that Shari’a law is supreme, and therefore the CDHRI has primacy over other universal instruments, such as the UDHR. This means that if there is a conflict between the CDHRI and the UDHR, a country that has ratified both agreements should follow the CDHRI. Articles 24 and 25 therefore contradict the UDHR.

The CDHRI has been criticized regarding its treatment of women. Article 6 maintains that a woman “is equal to man in human dignity, and has her own rights to enjoy as well as duties to perform, and has her own civil name and entity and financial independence, and the right to retain her name and lineage.” However, Article 6 goes on to state that the “husband is responsible for the maintenance and welfare of the family.” Do you find these two provisions to contradict each other? Can a woman be equal to a man in human dignity, but only the man be responsible for maintaining the family? Do you think that women should also be responsible for the maintenance and welfare of the family?

The OIC Independent Permanent Human Rights Commission was created in 2011. It consists of 18 members, nominated by the OIC member states’ governments, who have expertise in the area of human rights. Turkey played the driving role in founding this body. The Commission will have an advisory capacity and will base its work on the Cairo Declaration. However, its mandate is not limited to OIC member states; it encompasses monitoring and evaluating human rights conditions worldwide.

The Commission’s monitoring and enforcement capacity has been heavily criticized. It currently does not have the power to investigate alleged human rights abuses in its member states. It has also been criticized because its members have not been human rights experts, and because nearly all of its members as of 2015 had been male. However, the Commission is a newly created body, so its monitoring and enforcement power remains to be seen.

Application Exercises

1. Some human rights agreements, such as the UDHR, are completely separate from religion. Others, like the Cairo Declaration of Human Rights in Islam are closely tied to religion, and qualify all international human rights by saying that they are “subject to the Islamic Shari’a” (Article 24).
Do you think religion and international human rights law should be separate? Or should states, if they want to, build human rights regimes that are based on a religion? Why?

2.2.1.2. Arab Charter on Human Rights

The Arab Charter on Human Rights (ACHR) was adopted by the League of Arab States, which was established in 1945 and currently has 22 member states. Its membership is limited to Arab States, and so it excludes Turkey and Iran, but does include Iraq. The Charter was first drafted in 1994 but was updated in 2004. It has been ratified by seven member states: Algeria, Bahrain, Iraq, Jordan, Kuwait, Lebanon, Libya, Palestine, Qatar, Saudi Arabia, Syria, the UAE, and Yemen.

The ACHR provides for a number of traditional human rights principles that are also included in the UDHR, ICCPR, and ICESCR. It includes the right to liberty and security of persons (Article 1), equality of persons before the law (Article 11), protection of persons from torture (Article 8), the right to own private property (Article 31), and freedom of peaceful assembly and association (Article 24).

Unlike the Cairo Declaration, the Arab Charter provides for the freedom to practice religious observance (see Articles 25 and 30, below). However, it reflects Islamic influences stemming from the state religion of all of its member states. For example, Article 3 provides for “positive discrimination established in favor of women by Islamic Shariah, other divine laws and by applicable laws and legal instruments.” However, this provision is countered by Article 2(1) which contains a provision that prohibits discrimination on the basis of race, color, sex, language, religious belief, opinion, thought, notional or social origin, wealth, birth or physical or mental disability that is not qualified by a general reference to Islamic Shari’a.

### Arab Charter on Human Rights

**Article 25**

Persons belonging to minorities shall not be denied the right to enjoy their own culture, to use their own language, and to practice their own religion. The exercise of these rights shall be governed by law.

**Article 30**

1. Everyone has the right to freedom of through, conscience and religion and no restrictions may be imposed on the exercise of such freedoms except as provided for by law.

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16 *Vienna Manual* at 264.
2. The freedom to manifest one’s religion or beliefs or to perform religious observances, either alone or in community with others, shall be subject only to such limitations as are prescribed by law and are necessary in a tolerant society that respects human rights and freedoms for the protection of public safety, public order, public health or morals or the fundamental rights and freedoms of others.

3. Parents or guardians have the freedom to provide for the religious and moral education of their children.

There have been three common criticisms of the Arab Charter. First, it has been criticized because it identifies Zionism as a form of racism and condemns it as a “violation of human rights and a threat to international peace and security.” Zionism is the national movement for the return of the Jewish people to their homeland in the territory defined as the historic land of Israel. The condemnation of Zionism directly conflicts with United Nations General Assembly Resolution 46/86, which revoked the idea that Zionism was a form of racism or racial discrimination.

Second, the Arab Charter has been criticized because it leaves many important rights to national legislation. For example, it allows for the imposition of the death penalty against children if national law allows it. It also leaves the regulation of rights and responsibilities of men and women in marriage and divorce to national law. Broad derogation is allowed for national security, the economy, public order, health, and morals. Non-derogation is only established for torture, nationality, asylum, and criminal trials.

Third, the Arab Charter does not include several important human rights from the UDHR and other international human rights agreements. It does not prohibit cruel, inhuman, or degrading punishments. Furthermore, it does not extend rights to non-citizens in many areas. It also allows for the imposition of restrictions on the exercise of freedom of thought, conscience, and religion far beyond international human rights law, which allows for restrictions only on the manifestations of a religion or belief, but not on the freedom to hold a religion or belief.

A seven-member Arab Human Rights Committee was established in 2011 to consider states’ human rights reports. In accordance with Article 48 of the Arab Charter, parties to the ACHR undertake to submit reports on the measures they have taken to give effect to the rights and freedoms recognized in the Charter, and on the progress made towards their realization. The committee may request additional information relating to how the Charter has been implemented. It then issues final comments and recommendations that will be included in the annual report to the Council of the League of Arab States. It has received some country reports, which allows it to undertake monitory actions. Since there is not yet an enforcement mechanism like an Arab Court on Human Rights, however, the Committee has limited measures it can take if it determines that a state is committing human rights violations.
2.2.2. European Human Rights Regime

Much like how the United Nations is the primary body in the international human rights regime, the Council of Europe (not the European Union) is the primary body for the European human rights regime. The European human rights regime is founded on the European Convention on Human Rights.\(^\text{17}\) The European Convention on Human Rights (ECHR) is a regional treaty to protect human rights and fundamental freedoms in Europe. It was drafted in 1950 and entered into force in 1953. All states that are members of the Council of Europe are party to the ECHR.

The European Convention has seventeen articles relating to rights and freedoms. These rights include the right to life, the prohibition of torture, the prohibition of slavery and forced labor, the right to liberty and security, the right to a fair trial, freedom of thought, conscience, and religion, and freedom of expression. It also has a strong anti-discrimination clause. It provides for the right to effective remedy before a national authority.

In general, regional supervisory mechanisms are more advanced than global mechanisms. Regional judicial bodies include the European Court of Human Rights (ECtHR) and the Inter-American Court of Human Rights (IACHR). Europe has particularly strong supervisory mechanisms. Of these bodies, the ECtHR is the most advanced.

The ECtHR was established by the European Convention. Each of the 45 states that are a party to the ECtHR can refer any alleged violation of the Convention and its protocols by any other member state. Individuals, groups or NGOs within any of the contract states can also petition the court claiming to be a victim of a violation of the Convention or the Protocols. This means that individuals, groups, and states all have standing (the right to bring a case in front of the court). This is a very important difference from other courts; the ECtHR is the only international human rights tribunal in the world that permits individuals to make direct claims against member states.\(^\text{18}\) The right of petition is automatic; the Court does not have the discretion to deny cases.

The establishment of a court to protect individuals from human rights violations gives individuals a more active role in the international arena; traditionally only states were considered actors in international law.

The ECtHR has two limitations it applies to interpreting the universal provisions in the ECHR. First, it recognizes that certain provisions have derogations, or exemptions to when the law applies. For example, the free speech clause allows exercise of the freedoms to be limited by the state as necessary in the interest of public safety, and protection of health and morals. Second, it applies a principle called the margin of appreciation to all provisions. The idea of the “margin

\(^{17}\) The European Union is not a party to the Convention and has no role in the administration of the European Court of Human Rights. The European Union does not have an associated human rights treaty, although the European Court of Justice has developed its own human rights common law.

\(^{18}\) Currie at 682.
of appreciation” is that some provisions in the ECHR should have a wider range of possible interpretations. In determining the norms conveyed in the Convention, the Court allows a margin of permissible interpretation according to the country’s own historical and cultural background. In these cases, the court defers more to the country’s interpretation of its international obligations. This practice has been criticized for not enforcing international standards and allowing for human rights abuses. The case of Leyla Sahin v. Turkey, below, provides more information on how the ECtHR applies the principle of the “margin of appreciation.”

Case Study: Margin of Appreciation

Leyla Şahin v. Turkey was a 2004 European Court of Human Rights case brought against Turkey by a medical student. The student challenged a Turkish law that bans wearing the Islamic headscarf at universities and other educational and state institutions. The student claimed that the headscarf ban violated the right to freedom of thought, conscience and religion (Article 9) and the prohibition of discrimination (Article 14) from the European Convention on Human Rights. She also relied on the right to privacy (Article 8) and the right to freedom of expression (Article 10). The university stated that the ban furthered its interest in maintaining order and defending the principle of secularism.

The Court upheld the Turkish law. The ECHR treated the case as only an issue of free speech. It held that the ban was within Turkey’s margin of appreciation because different countries have taken many different approaches to secularism. It considered secularism to be consistent with the values underpinning the Convention. The Court noted that secularism in Turkey was the guarantor of: democratic values; the principle that freedom of religion was inviolable, to the extent that it stemmed from individual conscience; and, the principle that citizens were equal before the law. Restrictions could be placed on freedom to manifest one's religion in order to defend those values and principles. The Court then found that there was a reasonable relationship between the university’s interest in maintaining peace and its focus on secularism, and the ban.

For more information on this case, see Leyla Şahin v. Turkey, No. 44774/98 (Eur. Ct. H.R. June 29, 2004).

Jurisdiction is compulsory for all ECHR parties. This means that as of 2015 the Court monitors the rights of 800 million people in the 45 countries that have signed the European Convention. However, judgments are not binding within the national legal system of the state concerned. They are only binding at the international level. Scholars have generally viewed the ECtHR positively. It has been credited with harmonizing human rights in different legal systems. Harmonizing means making rights in different countries standardized, or similar to each other. Its jurisprudence has had a powerful effect on European states. Furthermore, even though the ECtHR lacks a formal mechanism for the enforcement of its decisions, to date states have

19 Currie at 682.
complied with its judgments. The Court’s decisions have caused states to compensate victims, change their statutes, and change their administrative practices. As of 2013, the Court had issued 916 judgments. However, the Court has nearly 100,000 pending cases.

2.2.3. Inter-American Human Rights Regime

The main body for the Inter-American system the Organization of American States (OAS). The purpose of the OAS is to strengthen peace and security, ensure peaceful settlements of disputes, provide for common action in the case of aggression, and promote economic, social, and cultural development. The system is built on two agreements: the American Convention on Human Rights and the American Declaration of the Rights and Duties of Man.

The American Declaration was the world’s first general, international human rights instrument. It was adopted six months before the Universal Declaration of Human Rights. Its purpose was to list the basic rights that the newly formed OAS would recognize and protect. Chapter One of the Declaration sets forth the civil and political rights to be enjoyed by the citizens of the signatory nations, as well as additional economic, social, and cultural rights due to them. Its second chapter contains a list of corresponding duties.

The American Declaration was adopted by OAS member states as a resolution, and it is not a legally binding treaty. However, both the Inter-American Court of Human Rights and the Inter-American Commission on Human Rights have held that it is a source of binding international obligations for OAS member states. However, it has been largely superseded by the more extensive provision of the American Convention of Human Rights.

The American Convention on Human Rights (also known as the Pact of San Jose) is a regional human rights agreement that was adopted in 1969 and came into force in 1978. As of January 2015, 25 countries have ratified the American Convention, though two countries subsequently renounced the treaty. Therefore, there are currently 23 active member states. Both Canada and the United States have signed the agreement but have not yet ratified it.

According to its preamble, the purpose of the American 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.” Its twenty-three articles enumerate individual civil and political rights including the right to life (Article 4), to a fair trial (Article 8), to privacy (Article 11), and to freedom of conscience and religion (Article 12).

The American Convention has more advanced protections for free speech than any other international or regional instruments. Article 13 specifically prohibits prior censorship and it specifies that freedom of thought and expression include the freedom to seek, receive, and impart

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20 Currie at 683.
information and ideas. However, under Article 13 derogation is permissible for free speech in view of public safety and morality.

Unlike the Declaration, the Convention does not enumerate economic, social and cultural rights. Instead, it includes a general provision (Article 26) that encourages state parties to adopt progressive measures toward the full realization of the rights *implicit* in the economic, social, educational, scientific and cultural standards set forth in the OAS Charter. Like the ICESCR it encourages progressive realization of these rights.

The Inter-American regime has a two-tiered human rights monitoring and enforcement system. The bodies responsible for monitoring and enforcing compliance in the Inter-American system are the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights. Both the Commission and the Court are part of the OAS. Both bodies can decide individual complaints concerning alleged human rights violations and may issue emergency protective measures when an individual or the subject of a complaint is in immediate risk of irreparable harm. The Commission also engages in a range of human rights monitoring and promotion activities, while the Court may issue advisory opinions on issues pertaining to the interpretation of the Inter-American instruments at the request of an OAS organ or member state. The Inter-American Court of Human Rights has the power to issue fairly broad remedies, including monetary damages, provisional measures, attorney’s fees and costs, and symbolic reparations (for example, putting up a monument or making a public apology).

The Court has no formal method for compliance but it has effectively used political pressure to force states to comply. NGOs have also played an important role in applying political pressure to compel compliance. Money damages are often paid, and the release of prisoners is often effectuated. However, the Court has had less success with prosecuting individual human rights violators. It has also not been very successful at changing domestic laws to come into compliance with treaties.

**2.2.4. African Human Rights Regime**

The main body for the African human rights regime is the African Union. The African human rights regime was founded with African Charter on Human and Peoples’ Rights (also known as the Banjul Charter). The African Charter is an international human rights instrument that is intended to promote and protect human rights and basic freedoms in the African continent. Oversight and interpretation of the Charter is the task of the African Commission on Human and Peoples’ Rights, which was set up in 1987 and is now headquartered in Banjul, Gambia. A protocol to the Charter was subsequently adopted in 1998 whereby an African Court on Human and Peoples’ Rights was to be created. The protocol came into effect in 2005. As of January 2015, 53 states have ratified the Charter.
The African Charter is unique because it aims to protect the entire range of human rights including civil, political, social, cultural, and economic rights, in one treaty. It recognizes most of the universally accepted civil and political rights enshrined in the ICCPR. It emphasizes economic, social, and cultural rights more than other regional human rights agreements. It recognizes the right to work (Article 15), the right to health (Article 16), and the right to education (Article 17).

The African Charter is also unique because it supplements individual human rights with wider societal rights (referred to as “peoples’ rights” in the Charter). Traditional human rights focus on the individual. In the African Charter, the focus is also on the community’s collective, legally actionable rights. These wider societal rights include the “right to national and international peace and security in Article 23 and the “right to a generally satisfactory environment” in Article 24. Importantly, the Charter gives groups sovereignty over natural resources. The African Charter recognizes group rights more than the Islamic, European, or Inter-American human rights instruments. The African Charter also places greater emphasis on development, decolonization, and racial discrimination than other regional instruments.

A major criticism of the African Charter is that it, like the Cairo Declaration, commits to the elimination of Zionism, which its Preamble groups with colonialism and apartheid. As a result, when South Africa acceded to the treaty in 1996 it included a reservation rejecting the Charter’s view “regarding the character of Zionism.”

A second criticism is that the African Charter inadequately protects civil and political right. For example, unlike the ICCPR, the African Charter does not explicitly recognize a right to privacy, or a right against forced or compulsory labor. It does not have a specific provision addressing the right to vote in periodic elections (established in Article 25 of the ICCPR).

The African Charter permits states to breach the Charter as long as the breaches are “within the [national] law.” This provision has been criticized as too broad, too discretionary, and too often used by states when they do not want to follow the Charter’s provisions. Some argue that the provision appears to make domestic law superior to the Charter. However, the Charter also emphasizes international law: it states that the Commission (that enforces the Charter) must “draw inspiration” from international instruments when it interprets the Charter. Therefore, domestic laws can restrictively interpret the Charter (for example, by having restrictions on free speech in certain circumstances), but those domestic laws cannot violate other international law agreements such as the UDHR or the ICCPR because those agreements provide a baseline for interpreting the Charter.

A third major criticism of the African Charter is that it is too aspirational. Some of the rights that the Charter recognizes are very different from the rights that its member states are currently

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23 Currie at 607.
Some of the rights in the Charter are very difficult for a state to meaningfully protect, especially if it has limited resources.

Article 30 of the African Charter states “An African Commission on Human and Peoples’ Rights, hereinafter called “the Commission”, shall be established within the Organisation of African Unity to promote human and peoples’ rights and ensure their protection in Africa.” This 11-member body is elected by heads of state and has broad jurisdiction over international law.

The Commission has been criticized because states have failed to submit reports to the Commission, but have not faced any consequences for this failure. Many states have not submitted a single report since the reporting obligation became due. The Commission has very limited enforcement powers, and as a result there has been little compliance with its reports.

The African Court on Human and Peoples’ Rights is a regional court established in 2004 to make judgments on African Union states’ compliance with the African Charter. It is optional for members of the African Union, and as of January 2015 just 27 of the African Union’s 54 member states have ratified and are parties to the Court. The Court has jurisdiction over all cases and disputes submitted to it concerning the interpretation and application of the African Charter and any other relevant instruments ratified by the states concerned. Court decisions have expanded the rights set forth in the African Charter. In other words, when courts have interpreted the text of the African Charter to determine whether a party has violated its terms, that have erred on the side of more strongly protecting alleged victims’ rights.

Application Exercises

1. Article 15 of the African Charter states “Every individual shall have the right to work under equitable and satisfactory conditions, and shall receive equal pay for equal work.” Compare this to Article 3(a) of the ICCPR which states “No one shall be required to perform forced or compulsory labor.”

Does the African Charter provide less protection against forced labor than the ICCPR? Why or why not?

2. National Human Rights Regimes

So far we have discussed both global and regional human rights regimes. But how does international human rights law affect laws at the national level? There are two ways in which international law becomes binding at the national level. The first way is by legislative incorporation. In some countries, international law is not directly applicable domestically. In other words, signing an international agreement that protects certain rights does not mean that

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those rights are automatically now protected in the country. The country first has to pass legislation, or adapt its constitution, in order for the treaty to take effect.

However, in some states the act of ratifying an international human rights treaty immediately incorporates that international law into national law. There are different ways in which a state can incorporate human rights provisions from international treaties. In states with **auto- incorporation**, the treaty takes immediate effect and can be judicially applied without new laws being passed.

Some states require implementing legislation. The Netherlands is an example. When it signs an international human rights agreement, it then translates the relevant provisions into national law. This brings the national law in line with the international agreement’s requirements.

Some states **constitutionalize** human rights. International human rights norms are included in many national constitutions to greater or lesser degrees. Some countries incorporate core rights from international human rights agreements but fail to make the rights as robust as they are in international agreements. Other countries include more detailed and nuanced international treaty-based rights in their constitutions.

Argentina’s constitution is unique because it internalizes existing international human rights treaties. When Argentina’s constitution was modified in 1994, new provisions specified that all international treaties (currently ratified, as well as those that Argentina may ratify in the future) are superior to domestic laws and that several human rights treaties (including the UDHR, the American Convention on Human Rights, the American Declaration, the ICESCR, the ICCPR, the Convention Against Torture, and CEDAW). The new provisions also established that other human rights agreements could have precedence, if they had the vote of two-thirds of the members of both chambers of Argentina’s Congress. This was a unique, verbatim replica of existing multilateral treaties. As of 2015 Argentina was the only country to grant human rights treaties constitutional standing. This reform was particularly important because the American Convention on Human Rights (ACHR) was one of the international agreements that was made superior to domestic laws. This had an important effect on the Argentine Supreme Court’s jurisprudence because the ACHR is the only international instrument that establishes the jurisdiction of an international court with the power to issue binding rulings.

What is the importance of granting human rights treaties international standing? We can see the significance in a 1994 case from the Argentina Supreme Court, **The Prosecutor v. Horacio David Giroldi**. In this case, the Court looked at the constitutionality of appellate procedures in

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Argentina’s criminal courts. The Court held that the procedures were unconstitutional because they violated Article 8 of the American Convention on Human Rights (discussed earlier in this Chapter) which mandates that convicted criminal defendants have the right to an appeal. This is important because it established that international jurisprudence (specifically the Inter-American Court of Human Right’s opinions) “should serve as a guide for interpretation of the American Convention’s provisions.” The Court went on to make the following important argument:

This Supreme Court, as a supreme body of one of the branches of the federal government, is required –as far as its jurisdiction is concerned- to apply the international treaties to which Argentina is a state party in the manner previously described . . . failure to do so might endanger international responsibility of the Nation vis-à-vis the community of states.²⁸

In Giroldi the Argentinian Supreme Court not only looked at the text of an international human rights treaty to determine that a provision was illegal, it also looked at international human rights jurisprudence to guide its interpretation.²⁹ In later cases the Supreme Court did not rely so heavily on international human rights agreements and jurisprudence. It has still cited provisions of international conventions, but it has not interpreted their meanings or relied on international law to reach its conclusions. Remember our discussion about state sovereignty earlier in this Chapter. Does the Giroldi decision weaken or strengthen a state’s sovereign power?

If you live in a country that has not constitutionalized certain human rights norms, you still have a means of bringing a claim in court if the country has passed domestic legislation and courts are obligated to interpret this legislation in accordance with the state’s international law provisions. Earlier in this chapter we discussed how the ECtHR has a high compliance rate: even though the court has no powerful means of enforcement, European nations have consistently followed its rulings. This is in part because the court has been integrated into countries’ domestic legal systems. Many states treat the European Convention as the highest law, or treat it as below the state’s constitution but above its statutes.

Other countries have not constitutionalized international human rights treaties or passed domestic legislation, but they still follow the treaties either because of self-obligation or pressure from the regional system.

In addition to domestic litigation, a national mechanism for enforcing international human rights is domestic truth and reconciliation commissions (TRCs). The mandate for TRCs depends by the Commission, but it generally involves investigation and recommendations for further activities. TRCs sometimes grant amnesty in exchange for testimony. This encourages perpetrators to disclose what human rights abuses occurred. Domestic truth and reconciliation commissions

²⁹ This paragraph draws heavily from Levit at 324-27.
have several important advantages over court cases. They are faster, less expensive, and provide victim-centered justice. They are also politically useful because they can restore a sense of community and common history, and avoid the political nature of domestic trials. However, TRCs are criticized because they do not deliver the form of justice called for by the victims, and they can be used strategically as a shield against prosecution. Two prominent TRCs were in South Africa from 1995-1998, at the end of apartheid, and El Salvador in 1992, after the end of its civil war.

2.4. Customary International Human Rights Law

In any group or society, rules—often unwritten—develop about what behavior is permitted and what is not. Group members enforce these rules through social pressure. These rules and practices are known as customs. At its most basic, a custom is a “traditional and widely accepted way of behaving or doing something that is specific to a particular society, place, or time.” A “practice that by its common adoption and long, unvarying habit has come to have the force of law” is called customary law. Where states have developed a habit of observing certain human rights norms, and believe themselves obligated to do so, we say that the norm has become customary international human rights law.

Therefore, if a country follows a practice out of general courtesy to another country, and not because it believes it is a legal obligation, then that practice is not customary law. The practice must be consistent and uniform, and many states must follow the practice. Consistency does not have to be absolute, but inconsistent practice should be treated as a breach. Evidence of consistent legal practice includes statements by officials, diplomatic acts, and domestic court decisions.

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32 Custom Definition, Black’s Law Dictionary (9th ed. 2009).
In international human rights law, there are four situations when a state would use customary laws:

1. When there is not an international treaty that addresses the issue.
2. When a treaty does address the issue, but a state has not signed it.
3. When there is litigation in a state’s courts, and the court does not recognize the treaty as applicable law.
4. When an event occurs before a state becomes party to a treaty.

While the UDHR was adopted as a non-binding resolution, many of its provisions now have the status of customary international law. Some examples of human rights that are protected by customary law are the rights to be free from slavery, genocide, systematic racial discrimination, torture and cruel, inhumane, or degrading punishment. Therefore, if the country of Legalstan has not signed the UDHR or the Torture Convention, its citizens still have the customary law right to be free from torture and cruel, inhumane, or degrading punishment.

Treaties can codify customary law, or modify customary law. If a treaty gains wide enough acceptance, it may become customary law that is binding even for states that were not parties to the agreement.

### Application Exercises

1. The Convention to Eliminate All Forms of Discrimination Against Women (CEDAW) was discussed earlier in this chapter. Over 180 countries have ratified this treaty. However, many states that have ratified the treaty have added reservations. These reservations are often based on religion or on providing autonomous rights for religious communities. Is CEDAW customary international law?

**Answer**

1. There is no right answer. Many think that CEDAW is customary international law because it is so widely accepted. However, the prevalence and extent of reservations calls this into question.

### 3. CONCLUSION

This Chapter examined three different regimes of international human rights law: global, regional, and national. Each regime was comprised of different instruments (treaties,
declarations, covenants, and non-binding resolutions), as well as organizations and rules for implementation, monitoring and enforcement. We looked at agreements like the Universal Declaration of Human Rights and the Cairo Accord separately, and analyzed their substantive provisions. We analyzed how these different agreements interact with each other. We also recognized that these agreements require a balance between respecting state sovereignty and respecting international norms. We looked at how these regimes affect parties that have had their human rights violated, what methods of recourse they provide, and the effectiveness of existing systems for the redress and prevention of human rights violations.

International human rights law is the combination of all of these different systems and organizations. Together, they create increasingly strong legal protections for states, individuals, and groups. Fifty years ago, none of these formal agreements or international regimes existed. It remains to be seen how national, domestic, and international regimes change over the next fifty years. However, if current trends continue, international law will continue to cross borders more frequently, resulting in extra-territorial applications and increasingly causing nations around the world to modify their laws to meet international human right standards.
Glossary

Abrogation – the annulment of a law.

Absolute rights – rights that state must always recognize, regardless of the circumstances.

Adjudication – the process of making a formal judgment or decision about a disputed legal matter.

Advisory opinions – interpretations by a court of a general issue or definition of law not connected to a specific dispute.

Alien – a person in a country who is not a national of that country.

Auto-incorporation – automatic incorporation without further legal action.

Binding – an agreement by two or more parties that is often written and enforceable by law.

Breach – the violation of an enforceable agreement.

Claim – the assertion of a legal right or remedy.

Codification – the process of putting laws together as a formal code or system.

Constitution – a documented body of laws and principles by which a state will be self-governed.

Constitutionalize – to incorporate into a constitution.

Customary law - exists where: a certain legal practice is observed and the relevant actors consider it to be law (opinio juris).

Derogation – the partial revocation of a law.

Discrimination – when lines are established that not only separate groups but suggest that one group is superior or inferior simply because of race, color, sex, language, religion, political opinion or national or social origin.

Disenfranchisement – the revocation of the right to vote of a person or group of people.

Genocide - the deliberate killing of a large group of people, especially those of a particular ethnic group or nation.

Harmonize – the process of creating common standards (across different legal systems).

Human rights - entitlements or freedoms believed to belong justifiably to every human simply by virtue of being human.
**International criminal law** - a body of international law designed to prohibit certain categories of conduct commonly viewed as serious atrocities and to make perpetrators of such conduct criminally accountable for their perpetration.

**International customary law** – legal obligations arising from established state practice as opposed to formal agreement.

**International humanitarian law** – a body of international law designed to limit the effects of armed conflict.

**Judiciary** – the branch of government responsible for interpreting the laws and administering justice; the person or persons who constitute this branch.

**Legislature** – the branch of government responsible for making state law; the person or persons who constitute this branch.

**Legislative incorporation** - providing in a legislative text that material expressed elsewhere is part of the text, even though it is not reproduced in the text itself.

**Margin of appreciation** – concept developed by the European Court of Human Rights that allows the court to take into account the fact that the European Convention on Human Rights will be interpreted differently in different member states.

**Multilateral treaty** - treaty to which three or more sovereign states are parties; each party owes the same obligations to all other parties unless the parties have stated reservations.

**Norm** – a standard of judgment that should be accepted widely by society.

**Opinio juris** - a subjective obligation, a sense on behalf of a state that it is bound to the law in question.

**Preamble** - introductory section to a legal document.

**Progressive realization** – the ability to fulfill obligations subject to the availability of resources.

**Qualified right** - rights that can only be interfered with (for example, by a local government) if they are in the interest of the wider community, or to protect other people’s rights.

**Ratify** – to give formal consent to a treaty, making it officially valid and legally binding.

**Recommendation** – suggestion or proposal as to the best course of action that is not legally binding.

**Regime** – a system of principles and rules governing something, which is created by law.
Remedy – the means by which a court of law enforces a right, imposes a penalty, or makes another court order to impose its will.

Renounce – to formally refuse to recognize and abide by (a treaty) any longer.

Reservations – a unilateral statement, made by a state when signing, ratifying, accepting, or acceding to a treaty, where it seeks to exclude the legal effect of certain provisions of a treaty.

Right – a power, privilege or immunity guaranteed by law.

Right (Negative) – a right that only requires forbearance of others.

Right (Positive, Affirmative) – a right that requires others to provide goods, services or opportunities.

Secular – having no relationship or basis in religion.

Shari’a – Islamic religious law.

Soft law - quasi-legal instruments which do not have any legally binding force, or whose binding force is somewhat "weaker" than the binding force of traditional law.

Special rapporteur – an independent expert appointed by the Human Rights Council to examine and report back on a country situation or a specific human rights theme.

Standing - the ability of a party to bring a suit in court.

State – a defined population, living in a defined territory, under a single government with exclusive authority.

Sovereignty – the capacity to exercise supreme authority within a territory.

Treaty – a formal agreement between states.

Universal – applying to all, regardless of nationality or country of residence.

Zionism - nationalist and political movement of Jews and Jewish culture that supports the reestablishment of a Jewish homeland in the territory defined as the historic Land of Israel.