INTERNATIONAL HUMAN RIGHTS CAN DEBORAH ARNOLD SPRING 2013

1. HISTORY AND THEORY OF HUMAN RIGHTS

# HISTORY OF INTERNATIONAL HUMAN RIGHTS

**Traditional understanding of HR is that they are rights than inhere in individuals against the state.**

* Why is the basic unit of protection all human beings? Why not all living things?
* Reason & conscience as the basis for HR? Why?
* Problem is that there are many entities other than the state that can violate your HR (e.g. corps).
* Corresponding duty to respect the social order necessary for those rights?

**The Development of HR**

* Amnesty International has a list of things apparently key to the development of HR, starting with 27BC-476 Roman Empire develops natural law; rights of citizens. It is questionable how much they actually relate to the development of HR. E.g.Martin Luther King winning the Nobel Peace Prize in 1964 – Positive in the social order yes, but critical to the development of HR?

Perhaps though HR really started to develop with the end of WWII. There was a determination to never go back to that

1. **1945: Origins of modern IHRL generally traced to the adoption of the *U.N. Charter***
   1. *UN Charter* proclaims as one of the purposes of the Organization the achievement of international cooperation in “promoting and encouraging respect for human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.” [***Article 1(3)***]
      1. UN proclaims respect for HR to be one of its purposes but does not define!
2. **1948: UN General Assembly adopted the *Universal Declaration of Human Rights (UDHR)*** –
   1. …purporting to set forth “a common standard of achievement for all peoples and all nations,” and thus elaborate upon the norms in the *UN Charter*.
   2. *UDHR* is the quintessential example of a non-legally binding document that has had enormous impact. It was seen as the first attempt to flesh out and articulate what it is the *Charter* was going on about when it said the protection of HR was one of the primary purposes of the UN itself.
3. 1948: Genocide Convention
4. 1949: Geneva Conventions (real determination to never go back to WWII)
5. **1966: Two covenants embodying human rights norms opened for signature (entered into force in 1977)**
   1. *International Covenant on Civil and Political Rights* (ICCPR)
   2. *International Covenant on Economic, Social and Cultural Rights* (ICESCR)
6. **International human rights law has also developed** through the conclusion of a large number of international agreements dealing either with:
   1. **Specific rights**, e.g.:

i. *Convention on the Elimination of All Forms of Racial Discrimination* (CERD) (1965).

ii. *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (CAT) (1984).

iii. *International Convention for the Protection of All Persons from Enforced Disappearance* (2006).

b. **Rights of specific groups**, e.g.:

i. *Convention on the Elimination of All Forms of Discrimination Against Women* (CEDAW) (1979).

ii. *Convention on the Rights of the Child* (CRC) (1989).

iii. *Convention on the Rights of Persons with Disabilities* (2006)

5. In addition to agreements of global scope, number of **regional human rights instruments** have been concluded. (been very active in articulating / carving out a way of thinking about HR that is particular to certain regions)

a. Europe: *The European Convention for the Protection of Human Rights and Fundamental Freedoms* (1950).

b. The Americas: *The American Convention on Human Rights* (1969). – Some people in the region saying it is too activist. What happens when a regional institution starts pushing the envelope too far and the state starts pushing back?

c. Africa: *The African Charter of Human and People's Rights* (1981)

* + - Specifically recognizes “peoples” rights. Right to self-determination very fundamental between 1945 and 1981 because of decolonization. Problematic already to see HR as just inhering in *individuals.*

6. Begin to have the **establishment of committees and courts to try to enforce HR**

* + - These institutions / enforcement mechanisms have to be weak so as not to reach too far into sovereignty.
    - Commission on HR (1946)
    - ECtHR and European Commission created (1953)
    - Intra-American Commission on HR (1960)
    - Committee on Economic, Social and Cultural Rights established (UN) (1985)
    - **UNSC establishes the ICTY (1993)**
      * Now that Cold War over, new enforcement mechanisms happening because not every move seen as benefiting either the US or Soviet Union. SC can take action.
    - **New Permanent ICC (2003)** – criminal jurisdiction over massive HR violations
      * Amazing development - Conceptually a very powerful tool that changes much of how HR function in this history

## Samuel Moyne – criticism of the linear history of human rights

* **The idea of rights are old.** 
  + The idea of “revolution” = natural rights to replace the state with a new one. But not really HR in the strictest sense – Prior to HR, if you claimed rights it was outside the legal system
    - The ***rights of man***in the **French Revolution.** But these were not the original source of human rights!
    - No appeal to any robust international law in the **American Revolution**. – There was a powerful ***rights of man*** movement but it was chiefly liberal individual rights.
  + **[Cmiel includes all this in the history of the development of HR]**
* **But human rights are only really born in 1977**
  + HR became widespread in the mid 1970s – became attractive because they were in a sense the last Utopia. Other utopias / powerful ideologies had failed (nationalism and communism)
  + Only in the late 1990s that historians began to think about the history of human rights
  + **[Buergenthal also focuses on the professionalization of HR in laying out their development]**

## Two Sensibilities to Human Rights: Cmiel v Buergenthal

* **Buergenthal**: **Professional approach to the development of HR: when they became legally enforceable**
  + [Was child at Auschwitz then became lawyer, became very ensconced in IL, became J at ICJ, but writes as legal professional]
  + **The internationalization of human rights and the humanization of IL begins with the establishment of the UN.**
  + The end fo the Cold War has de-ideologized the struggle for HR and reinforced the IHR movement. Today violators can no longer count on one or the other superpower to shield them. Increasing accountability to international community
  + STAGE 1: NORMATIVE FOUNDATIONS Charter given rise to a vast body of intl and regional HR law and establishment of institutions and mechanisms to promote and supervise its implementation
    - *Charter* universalized concept of HR
    - Obligation of Member State to cooperate with UN in promotion of HR provided UN with requisite legal authority to undertake a massive effort to define and codify these rights – foundation laid by 1948 UDHR – designed to provide a “common understanding” of HR
  + STAGE 2: INSTITUTION BUILDING from late 1960s for next 15/20 years
  + STAGE 3: IMPLEMENTATION IN THE POST COLD WAR ERA – liberated intl efforts to promote HR from the debilitating ideological conflicts and political sloganeering of the past. – allowed UN to focus increasingly on implementing HR
  + STAGE 4: INDIVIDUAL CRIMINAL RESPONSIBILITY, MINORITY RIGHTS AND COLLECTIVE HUMANITARIAN INTERVENTION
  + **In the past 50 years, human beings have become to the extent of HR subjects of IL in their own right.** Also the IL concept of domestic jurisdiction that in the past shielded oppressive govs is now devoid of legal significance as far as the promotion of HR is concerned.
* **Cmiel**: **Historical approach to the development of HR: expansion of rights talk in the last 3 Cs**
  + For both historians and anthropologists, the renewed interest in the subject of HR has left a strain between their traditional respect for the *local* and renewed interest in the *global*.
  + **Seems unduly restricting to limit oneself to analyzing claims made in the name of the “rights of man” or “human rights”** – should social justice activism be excluded because done in name of “social justice” rather than “human rights”
  + **On the other hand, the expansive approach can wind up equating “human rights” with anything “good”**.
  + No definite answers on the right approach – but historians should be clear to readers about the choices they are making
  + Historians can help with “cultural imperialism” versus “cultural relativism” defences divide by **refusing to see the particularist/universal divide as the last word.**
  + Claims about natural rights, the rights of man, or human rights were but one aspect of the larger expansion of rights-talk in in the last three centuries. Also a gradual shift from duties to rights.
  + The linking of the civil and political is relatively new. Distinction was crucial in the 18th and 19th Cs, with real consequences: women would get right to own property in the 1800s but no right to vote.- The divide between “civil and political” and “economic, social and cultural” rights now written into conventions itself betrays the Western origins of the contemporary human rights movement.
  + Need **attention to political discourse and its impact on the way rights are clustered.** But this will no doubt destroy the shibboleth that rights-talk has had no life outside the West. Svensson demolishes the assumption that no one discussed HR in China before the UDHR. Svensson argues that notions of HR have been part of China’s ideological battles for the whole 20th C – it impoverishes these debates to reduce them to Western parasitism. The discussion of rights in China has long been motivated by indigenous concerns rather than imposed from without.
  + *The language of human rights is fluid – the term has meant widely different things at different point in time.*
  + **These historians refuse to be tripped up by the universal / local divide.** Rather, they are writing the local histories of universal claims. Such claims have become one way that peoples around the world now interact with each other. In this sense, human rights talk communicates across cultures in ways similar to money, statistics, pidgin English, or a discussion of soccer. **But if HR have become of the *linguae francae* of a globalized world, this certainly does not mean that local cultures are irrelevant. It gathers thicker meaning with cultures.** It is the careful and constant interplay between local and global, between specific political settings and grand political claims that promises to contribute to knowledge.
  + **The RECENT WORK** (about the 1940s to the present) has more to do with **international activism in the name of some shared basic rights.** Until the 1940s (when IL against genocide was written and it was proclaimed that the world community needed to monitor basic HR in the *UDHR*), the presumption that nations could do what they wanted in their own borders was not challenged. **[this is the area Buergenthal focuses on]**

# THEORY OF HUMAN RIGHTS

## 4 components: I/HR/L: None of them are inevitable

* Human Rights – an ideological project - *Emphasis on HR perhaps the most distinctive feature of IL since end of WWII*
  + *Human* – why human?
  + *Rights* – content; status of rights
* International – an environment, a political set up, an idea
  + Transplantation in the intl arena raises issues about what it means for human rights to become intl and for the intl to become more dominated by the idea of rights
* Law – a tool and a project
  + idea of legalization of HR creates challenges for both HR (which may suffer distortions) & IL
  + IL: *HR represents a departure from the “state-centricity” of the traditional system – Redefining of the sovereign – the apex of this new idea of sovereignty is humanitarian intervention* (Kennedy)

## IHRL - reaching beyond positive law / moral and political project (Megret)

* HR are not always codified. **“Domestic and IHRL is always tempted to reach beyond positive law, especially at times when rights are arguably needed most”**
* HR are **“partly domestic, partly legal, and yet in very crucial ways, moral and political**”
  + **Partly Domestic**: **Symbiotic relationship with the international**
    - IHRL is party about DOMESTIC law, & partly about the level of state-to-state relations
    - IL purports to be superior, and so it is seen as a downward effect into domestic law
  + **Partly Legal**: **Sometimes they are codified legally, but sometimes they are not.**
    - **Claims of universality** (this right is basic to the human condition) **to reach beyond what is written down:**  A tension in HR between what the law says it is, and saying we want the law to be more than just what is written down – because there are a whole range of rights that inhere in human beings that are not written down here (e.g. sexual orientation)
    - *Eg. UN Special Rapporteur report on housing in Vancouver – partly legal but carries very political and moral messages.*
    - Upsets the thinking of positivism (the law is what it is) – Idea of rights fundamental to the human condition upset this thinking, because racist laws are not okay.

## Why rights vest in being Human (Megret)

**The search for a foundation of rights…**

* People do not agree on the answer to this question. (the foundation for privileging humans)
  + **1. The attempt to ground human rights involves difficult exercises about what makes humans human…**
    - “Possible foundation of rights thus include human beings’ **rationality**, their autonomy, their aspirations to **happiness**, their fundamental social nature, their inherent freedom, etc. An alternative to looking at what human beings are, is to look at what they ***want***.” (Megret, p 4)
    - What is goal in IHR? Human **dignity**? *(Preamble to UDHR; The Covenants* provide that HR derive from the inherent dignity of the human person)
      * Idea that HR norms both flow from and are intended to safeguard human dignity. What does dignity mean?
    - Biology / Emotion / **Rationality**? Is it because we can empathize with humans?
    - Problem with focusing on what people ***want*** as basis for rights:
      * Human beings to want very different things; and utilitarianism tends not to take their autonomy very seriously” (Dworkin, Megret 4)
      * We have become skeptical of ever fully determining what the good life might be. If we’re not sure what the good life is for everyone, the human rights still seem vague in its origins. (Megret p 4)
  + **2.** Some of the search for foundations is oriented towards seeing HR as a basic requirement of a global theory of justice – social contract theory; **good society**
  + **3.** Some scholars are **deeply skeptical of both of the above, arguing that the foundational question is passé.** 🡪 skeptical of any notion of objectivity and with the decline of a faith in Reason and truth comes a decline in the belief in rights as fundamentally “rational” or “true”.
    - **Do not ask whether rights exist, but acknowledge their constructed and even localized character, to better understand them as an ongoing struggle informed by a mix of faith and politics.** (e.g. **Richard Rorty**)

## Internationalization of HR / Universality

B. **Are human rights universal, or** is the concept (and content) of human rights **culturally specific?**

1. Some have argued that the concept of human rights is of Western origin, and cannot be applied outside of that unique cultural and philosophical context.

* + Claims about universality are problematically rooted in at least 2,500 years of Western thinking about the reality and possibility of universal concepts of the good, the true and justice. (5)

2. Frequently invoked along with traditional doctrines regarding state sovereignty and the doctrine of non-interference in the internal affairs of states; controversial for that very reason.

C. Notion of **universality is seen as critical to the existence and legitimacy of the IHR system**; at the same time, there has been an incr’sd appreciation & understanding of the need to **contextualize** rights in order to give them coherence/meaning w/in partic contexts.

* **The internationalization of rights is born from taking seriously the idea of rights’ universality, but paradoxically internationalization has also put the Q of universality in sharp focus and led to a crisis of claims made about rights** (Megret, 5)
  + Deb: I don’t think the concept of universal human rights is a denial of cultural diversity. (e.g. female genital mutilation)
* Universality has caused CONCERNS ABOUT CULTURAL IMPERIALISM 🡪 relativism
* VERSUS concerns about CULTURAL RELATIVISM GOING SO FAR THAT RACIST LAWS AND HARMFUL PRACTICES ARE ALLOWED.
* **Margin of appreciation and flexibility** 
  + Some say it is a GOOD THING because it allows for cultural relativity within the internationalization of rights
  + Others say is UNDERMINES the very function of HR. – idea of core principles of human dignity that inhere in every human.

**Divisions between types of rights**

“perhaps the most famous debate in that respect has opposed negative, ‘freedom from’, ‘liberty’, ‘security’ rights, to positive, ‘right to’, ‘entitlement’, ‘subsistence’ rights. This closely matches the distinction between civil and political rights on the one hand, and economic and social on the other.” (Megret, p 9)

1. civil and political rights
2. economic, social and cultural rights
3. “Third generation” = **collective rights**

* e.g. **Right to Self-determination** – very much part and parcel of the process of *de-colonization* –
  + **challenge** to notion that HR are a purely Western construct
  + also a **challenge** to the “human” aspect of IHRL, because inhere not in individuals but in “peoples”

**What role does state sovereignty play in the theory of HR?**

* The project of IHR is fundamentally different in ambition and inspiration from that of IL. IL emerged from peace of Westphalia to secure order between equal and sovereign entities rather than to ensure justice for all. (Megret, 12)
* **Interested in individuals as well:** Up until IHRL, IL about rights in states.
* **Recreating what sovereignty means**: IHRL attempts to create rights within circle of protected sovereignty. IHRL creates opportunity for individuals to appeal themselves where states have violated a treaty. Not so much about a trade, but mostly about a transmission of values.

**Why would states sign onto HR treaties? (State Behaviour and International Relations)**

**1. REALIST: Compliance with HR norms shaped by “ideas” or “ideals” such as “national interest” –** understood as power (military economic, political)

* + Difficult to fit HR norms into realist theory
  + Some schools of thought have sough to transcend the paradox by finding ways to “reconcile interest and values”
  + Others have emphasized the extent to which in intl politics, power also includes “diffuse reputational advantages”
* **Superpower’s interest** in having HR in the world
  + Correlation between HR & democracy: markets operating in stable environment
  + Competitive disadvantage if spend more on improving standard of living relative to other countries
  + HR are a justification for war / interventions under the rubric of humanitarian intervention
* **Developing Country’s interest** in HR
  + Opportunity to progress solidarity with the international community (don’t become an outlier)
  + To become viable candidate for funding from IMF / WB etc – these sorts of incentives undermine HR
    - NOTE: Those who are very quick to sign a HR treaty may be the countries with the least respect for HR, whereas those who pore over each clause are those most likely to take HR more seriously (Megret)

Other IR scholars go beyond realist assumptions – seeing the **nature of certain political regimes as a fairly accurate predictor** **of whether states will abide by IHR standards**. (whether/not signed)

* + Liberal democracies tend to respect HR more than states that are neither liberal nor democracies
  + Critique: There is plenty of evidence that liberal democracies are capable of rights violations; and this sort of reasoning is quite dependent on assumptions about what “complying” with HR means.

**2. versus CONSTRUCTIVIST** **explanation: ideas such as HR help construct the world** in which we live, including notions of the national interest and sovereignty, rather than being shaped by them.

## Relationship between HR & IL

**Difficulties of placing HR in IL** – PIL & IHRL are different:

1. While IL is seen as more positivist, “IHRL is often the site of unorthodox normative practices, from POV of classical IL” (Megret, 19)
2. HR a departure from the “state-centricity” of the traditional IL system - allows individuals to be subjects in IL.
3. Goal of IL is to secure order between sovereign equals, rather than to ensure justice for all (Megret, 12)

**Relationship between IHRL and other branches of IL**

* Larger discussion about the fragmentation of IL and the competing pull of other significant & potentially hegemonizing branches of IL
  + E.g.considerable attn to the frontier between IHL & IHRL, specifically as a problem of fragmentation. 🡪 fund’l value conflicts
  + Another significant fault line between IHRL and international trade law: One scholar has argued for the integration of HR in world trade law.
  + Intl security law (action by SC) and ICL raise periodic issues about how seriously they should take HR. Same with refugee law, development law.

“In short IHRL is at once potentially hegemonic, vigorously challenged by the dominance of other agendas and, quite possibly, harbors the ambition to be in a position to arbitrate value conflicts with all the above, from the POV of the best interest of human beings.” (Megret, 27)

# CRITICISMS OF HUMAN RIGHTS DISCOURSE

## Kennedy –On a balance (cost/benefit analysis), human rights may be part of the problem rather than part of the solution.

* **(1) HR Particularizes too much – focus is too narrow:**
  + **Focuses too much on the state**
    - Not enough focus on other actors such as corporations
      * *Possible response*: States the most responsible and have the power to pass law.
        + *Possible response:* Too formalistic – corps may have more power
    - Ignores questions about the distribution of wealth within society (imbalance between C/P and S/E/C rights is structural to the philosophy of HR)
    - Strengthens the state, since rights are enforced, granted, recognized, implemented, & remedied by it.
  + **Focuses too much on the individual:** Blunts articulation of a shared life; blunts awareness of diversity; continuity of human experience; overlapping identities
* (2) **HR generalizes too much:** **doesn’t nec reflect values of the global community** or diversity among communities.
  + The person/group imagined is abstract & gen’l in ways that reduce the possibility for particularity & variation.
  + Alienation – HR crushes human possibility to imagine alternative futures under the weight of moral condemnation, legal adjudication, textual certainty and political power.
  + The HR vocab makes us think of innocent victims, evil violators, & heroic HR professionals (see *Mutua*)
    - Excludes a more articulate understanding of the broader political culture/more complex grp of actors.
    - Arrogant model - can demobilize advocates as political beings in the world.
  + Cultural relativism argument: HR is more of a 20th C enlightenment and post-enlightenment ideal – rationalist, secular, Western, modern, capitalist
    - Loss of more diverse and local experiences and conceptions of emancipation
    - Down sides of West: e.g. alienation, loss of faith, environmental degradation, immorality, false dichotomies between public and private, politics and law, etc.
* (3) HR is **hegemonic** (seen as the one and only way in which you can argue for improved social well-being in a globalized community) – **occupies the field of emancipatory possibility:**
  + **Professionalizes the field** and emphasizes the role of lawyers; steals lawyers from other perhaps more effective roles
    - The professionalization of HR creates a system where some are “representatives” for others – can reinforce a global divide of wealth, mobility, information, and access to audience.
    - Can lead to irresponsible intervention, as the people who work in HR have no incentive to take responsibility for the changes they bring about.
  + Swoops up the scarce resources not leaving much to other options.
  + Crowds the field, excluding other movements (incl grassroots and local movements)
* (4) **Creates idea of “neutral” intervention**: HR vocab promises a politics-neutral & universalist mode of emancipatory intervention elsewhere in the world, causing **unwarranted faith in the neutral/universal nature of a HR presence.**
  + **Justifies use of force** and other interventions by foreign states
* (5) **PROMOTES BAD FAITH LAWYERING** – lawyers make arguments they know to be less persuasive than they claim in order for the law to cover new problems / focus on “legal” rather than “political”
* (6) **Places social justice issues under the governance of the least effective institutional forms available.**
  + Using HR as a measure of authenticity and university of claims binds our professional feet and places social justice issues under international governance
  + Clean hands + HR movement offers well-intentioned intervenor the illusion of affecting conditions both at home and abroad w/o being politically implicated in the distribution of stakes that results
  + Strengthens habit of understanding intl gov’ce in legal, rather than political terms, & conflates the law with the good (conflating understanding of intl governance that is systematically blind to bad conseqs of its own action
  + In some contexts, can strengthen repressive regimes and anti-progressive intl initiatives

**POSSIBLE RESPONSE**

We shouldn’t treat HR as hegemonic, but as one tool in a basket of tools. There are other mechanisms for emancipation. (A lot of Kennedy’s criticisms fall away if you don’t ascribe to hegemony idea)

* Deb: Criticism of this response: It could take away from the power of HR.

## Makau Mutua – “Savages, Victims, and Saviors: The Metaphor of Human Rights”

**Mutua is part of the TWAIL II** (Third World Analysis of IL) movement, which seeks to develop an understanding of how IL perpetuates the subordination of third world nations to the West through international legal norms:

* TWAIL I – Argues that IL has always been indifferent to the plight of third world nations / always been hegemonic. Aims to reconfigure IL to be more receptive to plight and interests of third world.
* TWAIL II – Aims to create third world approaches to IL, since IL is structurally incapable of vindicating rights and claims of third world nations. IL is part of the problem.
  + Anthony Angie & Makau Mutua are part of this generation of TWAIL

**Central theme to Mutua’s project is to draw PARALLEL BETWEEN COLONIALISM AND IHR.**

HYPOCRISY is the core of his argument. His message to HR lawyers is to stop feeling superior because their history is dark too:

* + - 1. Western societies are responsible themselves for terrible atrocities
      2. IHR project is enormously condescending – reflects racist and imperialist ideals.

COLONIALISM:

* Aspect of EMPIRE, acquisition of resources
* Heartfelt condescension – many people in Europe really genuinely felt themselves superior and felt that they were doing a great service to the world by taking over their countries
* Mutua describes colonialism as SAVAGERY and BRUTUAL ATROCITIES that were required to achieve colonialism in so many parts of the world.

**Continuity between colonialism and HR (his critiques of IHR) / Metaphor of savage, victim & savior**

* (1) This SUPERIORITY AND CONDESCENSION SURVIVES INTO IHR: **Both HR and colonialism have civilizing overtones and both suffer from arrogance and superiority complex from the West, which itself is not innocent of HR violations.**
* (2) Irony: Took massive atrocities in Europe to create IHR by Europeans (Nazi treatment of Jews), but prior atrocities such as slavery were not adequate to generate IHR; and then as soon as IHR generated by the Europeans, they were deployed everywhere else, as a means to appease the “White Man’s Burden” as some emancipatory discourse, but in reality that is just a continuation of the old.
* (3) IHR is just forced upon developing countries as part of an imperialist project. IHR are not universal. Describing HR as fundamental closes the discussion: For them to be genuinely universal, other cultures should be engaged in conversation rather than other’ed or left on the periphery.
  + *Response*: But other countries sign these HR treaties!
  + *Response to that:* 
    - The levers of power at the UN and other intl-law making for a have traditionally been out of the reach of the third world. Third world states just sign these things to try and hold out some degree of legitimacy or appease western powers for a bunch of reasons, even though they may be cynical of the values and the treaties. Thus can be oppressive to them rather than emancipatory. (Mutua, 216)
    - Even if the for a were within reach of Third World states, it is doubtful that most Third World states actually represent their peoples and cultures (Mutua, 216)
* (4) The role of race in the development of the HR narrative: In the colonial narrative, “savages and victims are generally non-white and non-Western, while the saviors are white. This old truism has found new life in the metaphor of human rights.”
* (5) HR are a continuity of European values and histories – the zeal to save others is steeped in Western and Eur. history (Mutua, 219)

**In order ultimately to prevail, the HR movement must be moored in the cultures of all peoples.**

**POSSIBLE RESPONSE**

This history is important and disquieting. Part of the solution is to stop thinking about IHR as mechanisms for only foreign peoples, but as emancipatory discourse for ourselves too – Canada, DTES, treatment of indigenous peoples. This undermines argument that it is necessarily an imperialistic project. All the authors seem to agree that there has to be dignity globally – after that we can debate what the content should be.

## Radhika Coomaraswamy: Cultural relativity problem in IHR, particularly from women’s perspective

* *She is from the Global South’s hyper-elite. This plays a big role in the value and message that this particular articles relays*
* **SHE IS PRO- IHR.** **But:**
  + **Colonial heritage of IHR**
  + Says that anytime you attempt to draw on IHR as a discourse/means of improving women’s rights in the third world, you immediately face the criticism that you are again engaged in an **imperialist project – drawing on imperialist architecture to bring about change in a post-colonial state.**
* Attempts to seek solutions whereas the other articles are content with just criticizing.

**2 factors undermining the values of Human Rights discourse.**

* 1. The arrogant gaze has to be put in check
  + **IHR is top-down:** Intl community coming in and using HR discourse to tell states what to do
  + **Potential solution: Engaging at the grassroots**
* 2. Debate between group identity and individual rights
  + Interplay between these two sets of standards.
  + **Pushing hard for individual rights can actually undermine the sense of well-being and the sense of the good life, where people identify themselves as part of a community.**

**POSSIBLE RESPONSE**

* + - 1. Greater sensitivity to the dynamic between individual and group rights, and to see how that plays out in this context.
    - 2. See that IHR is not always the best mechanism for dealing with particular problems

SUBSTANCE AND ENFORCEMENT

# SOURCES OF IHRL

#### ICJ Statute Art 38 stipulates the sources of IL:

a. **international conventions**, whether general or particular, establishing rules expressly recognized by the contesting states;

b. **international custom,** as evidence of a general practice accepted as law;

c. the **general principles of law** recognized by civilized nations;

d. subject to the provisions of Article 59, **judicial decisions and the teachings of the most highly qualified publicists** of the various nations, as subsidiary means for the determination of rules of law.

Some arguments against Art 38 being all the sources of IL *(Think critically about sources)*

* 1. ICJ is not a court of compulsory jurisdiction, and since we are not subject to that court, we do not accept that its decisions as influential
* 2. This is the set of sources that applies at the ICJ, but there are other sources that apply in other fora
* There are a set of other sources outside of Art 38 (art 38 just has the core): e.g. promissory estoppel

#### Other sources outside of Art 38 (may be claimed even at ICJ)

* **Soft law** – non-binding but influential legal instruments: *UN Decl on Rights Indig Peoples*
* ***Jus cogens*** – VCLT Art 53 – Peremptory norms of IL
* **Law-making through international organizations**
  + ILC (law-determining and recommendatory functions, sometimes highly influential)
  + Resolutions of the GA (evidentiary value for determining what the law is)
    - **Why doesn’t UNGA make law?** 🡪 POWER: In 1945, there were around 60 countries in the UNGA. Now 193 countries after de-colonization. Allowing UNGA to make law would be handing over power to third world countries.
      * League of Nations was seen as being a spectacular failure is because it did nothing – and did not prevent WWII.
        + Under L of N one of the core problems was

(1) Equality of power between tiny/large states – 1 vote for both Nauru and China: The reality of this was that IL became divorced from the economic and political realities of the world. And so political powers just ignored it.

(2) All decisions had to be made by consensus of all states, which gave veto power to every single state.

* + Security Council resolutions – binding on Member States of UN
* **Promises** (ICJ recognized promissory estoppel)

## Treaties

A treaty is an agreement between states. For most states, there is a two-phase process:

* 1. **Signature** – generally a member of the executive signs the treaty
  + not bound at that point
* 2. **Ratification** – in some countries, it has to be implemented by the provincial legislatures and passed by Parliament in order to ratify. In other countries, it is just the executive who ratifies.
  + Becomes binding when it is ratified by the state
  + In *Canada*, ratification exercised by executive (no requirement for Parliamentary approval)
  + **IL obligations not precluded just because national law precludes compliance.**

***Medellin: Mexico v US, 2004 ICJ***

* + - **F**: US & Mexico are parties to Vienna Convention on Diplomatic Relations. One provision provides for right to seek consular advice from own country if arrested for a crime in the US. Medellin and another person caught and alleged to have raped and killed 5 people, but not given right to seek consular advice. Tried, convicted, & sentenced to death.Mexico takes it to the ICJ; and ICJ agrees with them and says USA should stay the execution. George Bush issues decree to Governor of Texas not to execute them because would be in violation of IL obligation. Texas disagrees, and executes them. Bush takes case to American Supreme Court, who says Bush did not have power to tell Texas what to do in the form that he chose. He should have passed legislation, not just the decree. So Texas’ act was const.
    - ***US has still violated Mexico’s rights in IL, even though Texas acted in compliance with national law.***

## Customary International Law

**Some have used CIL to try and push for obligation on states that haven’t signed multilateral treaties**

**CRITIQUES OF USING CIL TO BIND STATES TO HR OBLIGATIONS**

1. **Customary law is open to abuse:** “Sloppy lawyering” – Progressive, streamlined theory of CIL is more or less stripped of the traditional practice requirement, and through this dubious operation is able to find a customary law of human rights wherever it is needed. *(Simma & Alston)*
   1. *Jus cogens:* Law making through intl acceptance of gen’l principles appears to be much better suited than CIL to meeting the requirements of the formation of *jus cogens*, since this would require general acceptance of states rather than *opinion juris* PLUS state practice, which is difficult to get for rules of abstention.
   2. Encourages the “bad faith lawyering” *Kennedy* talks about
2. **Problem of how to measure state practice**
3. **Problem of how to get into the mind of the state to determine belief that they are bound**

***Simma & Alston*** suggest **two alternative approaches for *consensual* IL-making**:

1. Treating *UDHR* and body of soft law following up and building upon it as an authoritative interpretation of the HR provisions of the *UN Charter*
2. Regarding GA resolutions etc as a modern method of articulating and accepting “general principles of law” (38(c))

**CIL has 2 ingredients when arguing treaty is binding on non-parties because it has become CIL:**

1. State practice must be “virtually uniform”
   1. Regular requirement of state practice is: “consistent and general practice among states”
2. *Opinio juris* – practicing it because you believe you are bound by IL

**Treaty and custom can overlap and generate each other.**

(The reason we know the use of force is a part of CIL is because Art 2(4) generated state practice)

*Nicaragua*:

* **F:** Nicaragua says US is flowing weapons to N and undertaking military ops to de-stabilize gov.
* In signing onto jurisdiction of ICJ, US had reservation that they cannot be sued for any violation of the UN Charter, including use of force article 2(4) in UN Charter. (Reserved treaty only) [note reservations cannot do something that undermines the object and purpose of the treaty]
* Nicaragua sues them anyway for use of force issues. Argument: You may have reserved from the treaty, but you breached the customary rule.

## Koskiennimi – critical of sources discourse

**Koskenniemi’s response: It is morality driving this whole thing – not an investigation of sources (esp in IHRL).**

* Criticizes the way in which Theodore Meron (was at NYU, now Pres of ICTY) relies on sources to est. IHRL principles
  + Meron uses custom as vehicle in trying to define HR as universal and binding
  + “In his wish to look for irreproachable legal methods…. Tried to rely on traditional 2 element theory of custom… His hope was that these would provide a non-controversial litmus test that would convince everyone of the certainty of his conclusions… This test is in fact hopeless… because (1) state will is [ambiguous and you could argue either way] and (2) useless because we do not wish to condone anything that states may do or say – [it is really our certainty that genocide is illegal that allows us to accept or reject its legal message; not state behavior itself that allows us to understand that these practices are prohibited by law]. It seems to me that if we are uncertain of the latter fact [ie that genocide is prohibited in the world], then there is really little in this world we can feel confident about.
    - What is really driving this process is what we believe to be right or wrong, not this processing of sources. Especially in the context of IHR.
  + Koskiennimi is pushing interesting relationship between reality and law.
    - IL has this interesting relationship between wanting to be codified and not codified.

A. There is consensus that certain human rights have passed into customary international law.

B. Human Rights Committee set up pursuant to the Optional Protocol to the ICCPR has identified a number of customary norms (see p. 885, Note 1), including:

1. Prohibition against slavery

2. Prohibition against torture or cruel, inhuman, or degrading treatment or punishment.

3. Right not to be arbitrarily deprived of life

4. Right not to be arbitrarily arrested and detained

5. Presumption of innocence

6. Freedom of thought, conscience and religion

# A HIERARCHY OF HUMAN RIGHTS?

## Division into 2 types of rights: (1) Civil & Political; (2) Economic, social and cultural

Reflects Cold War polarity… ICCPR no distributive agenda; ICESCR about distribution of wealth and denial of individual property

|  |  |
| --- | --- |
| **ICCPR –civil and political rights** | **ICESCR – economic, social, and cultural rights** |
| **USA**  “freedom from”  political participation  **Property**: Right to ownership  **Said to create obligations of ends**   * In ***ICCPR***, there is an attempt to create standards that the state immediately under no circumstances can violate (e.g. state cannot torture somebody),   **Civil and political rights tend to be the subject of litigation more frequently** | **USSR**  “entitlement to”  state assistance  **Property**: focused on distribution of wealth, and denies ownership of property  **Creates obligations of means**   * *ICESCR Art 2* – Duty to take steps towards “achiev-ing **progressively** the full realization of rights” * recognition that, particularly for third world countries, there must be a progressive realization of these basic distributive rights and states should do their best to achieve these standards. * Points to international cooperation   Litigating what constitutes progressive and allocation of state resources is much more difficult than litigating whether some prohibited thing occurred (e.g. torture) |

\*\*The stark division between CP & ESC are not convincing. There are overlaps – they are more aligned that at first glance.

## The overlaps – The distinction between the two is to some extent artificial

1. **BOTH ARE POSITIVE RIGHTS.** 
   1. Conceptual: The distinction between negative and positive rights.
      1. Some argue that the ICCPR provisions are negative and ESC rights are positive (because they are couched in negative and positive terminology)
      2. Some argue that negative rights are easier to establish because the state has an obligation not to do something. ESC rights are more difficult because the state has a duty to do something and failed to perform that duty.
      3. The negative rights do not exist – All rights are positive because all rights require the state to create systems in order to ensure that the rights are respected.
2. **Both recognize collective entities**
   1. *ICESCR*
      1. Art 6 – SPs recognize the right to work
      2. Art 8 – undertake to ensure right to form trade unions
   2. *ICCPR*– collective rights or rights that at least presuppose a collectivity
      1. Art 1 – peoples’ right to self-determination & to freely dispose of own natural wealth and resources
      2. Art 18 – Right to freedom of thought, conscience, and religion
      3. Art 22 – Right to freedom of association
      4. Art 27 – Minorities not to be denied right to enjoy their own culture, profess and practice their own religion, and use their own language
3. **CP and ESC rights overlap so far as they have common purposes and achieve similar ends.** 
   1. **Preambles of both:** in accordance with the principles proclaimed in the Charter of the United Nations, recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world
   2. in accordance with the Universal Declaration of Human Rights, the ideal of free human beings enjoying civil and political freedom and freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his civil and political rights, as well as his economic, social and cultural rights
   3. Considering the obligation of States under the Charter of the United Nations to promote universal respect for, and observance of, human rights and freedoms

## Engle – IHR emerged in 3 generations:

1. **First generation: Liberty -** comprises civil and political rights, which protect the individual against state interference
   1. Said to be framed in negative terms (“right against” or “freedom from”) – imposing on the state a duty to refrain from acting in an injurious manner
   2. Includes those listed in *UDHR arts 2-21*, such as the right to life, the right to be free from torture, the right not to be the object of discrimination, liberty, due process, etc.
   3. Most directly inspired by Western philosophy – were presented as fundamental by Western states during the drafting of the UDHR and the two Covenants. Grounded in the idea of individual liberty – human rights acting as a shield against abusive intrusions of the state.
2. **Second generation: Equality** - comprises ESC rights – claims for equitable share of economic and social resources.
   1. Said to be framed in positive terms (“right to”) – imposing active duties on the state
   2. Includes those listed in *UDHR arts 22-27*, such as right to social security, right to work, and right to education
   3. Were promoted mainly by the East Bloc and developing countries, as elements needed to stem the excesses of free-market economies and capitalism and to ensure equality of all participants.
3. **Third generation: Fraternity** – comprises collective or universal solidarity human rights
   1. They represent collective claims to the sharing of global power and wealth
   2. *UDHR* allude to such a right when it entrenches a right to a social and international legal order in which other rights can be realized (*art 28*
   3. Put forward most forcefully by developing states
   4. Was the subject of debate in the 1970s and 80s.
      1. **Right to environment**
      2. Right to peace - *GA Res 39/51 (1984)*
      3. Right to development – *UN Declaration of Right to Dev, GA Res 41/128 (1986)*
      4. Right to democracy
   5. *ICCPR*– collective rights or rights that at least presuppose a collectivity
      1. Art 1 – peoples’ right to self-determination & to freely dispose of own natural wealth and resources
      2. Art 18 – Right to freedom of thought, conscience, and religion
      3. Art 22 – Right to freedom of association
      4. Art 27 – Minorities not to be denied right to enjoy their own culture, profess and practice their own religion, and use their own language
   6. *ICESCR*
      1. Art 6 – SPs recognize the right to work
      2. 8 – undertake to ensure right to form trade unions and join the trade union of choice

## Engle – Criticisms of 3 generations of rights

1. Focus on shifts in time, good only as a rough guide for content of rights, no more
2. The focus on how the content of rights have evolved have ignored the evolution of who is entitled to claim a right. Holders of rights have expanded to include non-whites, women, non-citizens, children, and collectives.
   1. Women’s rights arose well after basic civil rights in American and French Revolutions
   2. Whites of non-whites were much later than this period too.
3. Gloss over conflicts in conceptions of poverty.
4. The usual generational perspective, by focusing on the content of the right rather than who holds the right, ignores the fact that rights discourse is either a reflection of, or reflect in, political theory – different conceptions contain the potential for challenging the political-social systems with which certain conceptions of rights are associated.

**In addition, the ordering of rights hotly debated because:**

1. Seems to imply a priority of first- over second-, and second- over third- generation rights
2. Different conceptions of rights contain the potential for challenging the legitimacy and supremacy not only of other conceptions, but of the political-social systems with which they are associated.
3. First generation rights are presented as negative, cost-free, immediate, apolitical, and justiciable, whereas second- and third-generation rights would be positive, resource-driven, progressive, political, and non-justiciable.

There has been a **widespread rejection of a “hierarchy of rights**” in favour of the **“indivisibility and interdependence”** of all human rights (*Vienna Declaration and Programme of Action*) – all HR contribute to a life of dignity. The ESC rights are necessary to protect the C&P rights, and vice versa.

* The idea that some human rights ought to be considered as *superior* to others is at odds with the general structure of IL where, as a rule, no set priority exists among norms.
* Meron: Rather than grapple with rationalizing HR law making and distinguishing between rights and claims, some commentators are resorting increasingly to superior rights in the hope that no state will dare ignore them. Thus, hierarchical terms contribute to the unnecessary mystification of HRs, rather than their greater clarity.
* **There is officially no hierarchy, but people do tend to do so without using explicit terms.**

**Other** **hierarchies that have been suggested:**

1. Frequently overlaps with notion of generations.

* Debate goes back to the very origins of IHRL.
  + In its early origins, the East-West debate: with the Western states asserting the primacy of civil and political rights while the socialist states upheld the priority of economic and social rights. In each case, states appeared to emphasize sets of rights that were closely tied in with their political and philosophical traditions.
  + East-West divided followed by North-South divide, focusing on the tension between human rights and the imperatives of the development process.
* Existence of two separate covenants appeared to reflect an inability on the part of the international community to articulate a unified and indivisible set of rights pertaining to the human person.

1. Another basis for hierarchy: privileging non-derogable rights in times of emergency

* However, there are wide variations in the lists of non-derogable rights in different treaties, and some rights that would otherwise be seen as basic, such as due process, are not included in the list of some treaties, including the ICCPR. The *travaux preparatoires* of HR treaties do not reveal that any priority was to be given to non-derogable rights.

1. The one explicit ranking of norms in IL is the concept of *jus cogens* (incorporated into *Art. 53 of the VCLT*):

* but there is no consensus on which norms ought to be considered *jus cogens*.

1. ICJ in *Barcelona Traction* referred to “*basic* rights of the human person” as generating *erga omnes* obligations;
2. ILC in DARSWIA refers to “*fundamental* human rights” as a limit to countermeasures;

# MARGIN OF APPRECIATION

**Reason for MOA: It responds to the problematic relationship between IHR, the insts that are meant to enforce those HR, & cultural variation:**

***Handyside – wide MOA to states***

* **F:** Mr H convicted for publishing book that “tended to deprave & corrupt”. Mr H said the law violated his HR because he has a right to publish material that calls for a political rev – relationship btwn freedom of expression & democracy.
* *ECHR* allows for restrictions of rights for the protection of morals!
* **I:** Is it the ECtHR or the British gov that gets to decide about morals?
* **ECtHR deferring to the British gov to make the best judgment: MOA**
  + - “The court points out that the machinery of protection est’d by the Convention is subsidiary to the national systems safeguarding HRs”
    - “State auths are in principle in a better position than the intl J to give an opinion on the exact content of these reqs as well as on the “necessity” of a “restriction” or “penalty” intended to meet them”
    - “Consequently, Art 10 para 2 leaves to the Contracting States **a margin of appreciation”**
    - “It follows from this that it is in no way the Court’s task to take the place of the competent national courts but rather to review under Art 10 the decisions they delivered in the exercise of their power of appreciation”

Three factors the court generally looks to in assessing MOA decisions:

1. Substantial degree of consensus between member states
2. Nature of the right (freedom of expression v property)
3. Aim the limitation is meant to pursue (national security)

**BENEFITS of the flexibility provided by MOA:**

* Defers to culture: Cultural relativism – allows state to marry IHR to the cultural specificities of each state where it means something different in that cultural context – trying to give some ground to the fact that cultures are different in different places.
* Pro-democratic: the government that is elected through a democratic process should be the primary actor in trying to generate solutions to local problems. ECHR is there as an auxiliary if the state steps out of line and goes too far.
* Dynamics of IL - Court gains credibility: They realize they are in a long-term relationship with each gov in Europe, and so they need to remain salient and relevant (by giving some deference) in order to continue the dialogue that has influence. (*Hutchison*)

**SHORTCOMINGS / Criticisms of the MOA (*Hutchison)***

* **Arbitrary decisions**
* **Inaccurate**
* **Unpredictable outcomes**
* **Politically unequal** - The margin will be greater when the court doesn’t want to offend a particular gov, & less when it involves a smaller less powerful gov – that plays out because the court is always concerned with its political relevance.
* It is a **smokescreen / pretext for deference**

Other

* If HR are core basic rights because we are human, MOA is incongruent with that idea.
* Necessary to massage the politics and cultural differences – but is it just a great deal of politics that overshadows arguments that in reality, all human beings have these rights? (The MOA has real implications for applicants to the ECtHR who are applying in order to have their HR respected)
* “necessary in a democratic society” – “necessary” becomes like the word “moral” – who gets to decide?

Hutchison offers unconvincing solution: Scrap margin of appreciation and go back to minimum standards

* (1) The Court has to decide whether a State has violated the Convention or not, then
* (2) Court decides whether the restrictions imposed on the Convention rights were necessary in a democratic society.
  + (The court should guarantee a minimum standard, but not go beyond that and take the place of the national authorities in deciding whether the State should in fact offer more than the very minimum)

**Whether to use MOA or ‘minimum standards’**

* If you set the minimum standard too high, the court becomes politically irrelevant because states don’t care, and if you set the standard too low, the court makes no difference to the people anymore
* “necessary in a democratic society” – “necessary” becomes like the word “moral” – who gets to decide?
* The problem with MOA (see above)
  + Also, what are the implications for HR outside of Europe where there are more significant cultural differences. If HR are core basic rights because we are human, why MOA?
* The problem with minimum standards:
  + They are insensitive to culture
  + Political suicide – if standard set too high, states no longer care about what court has to say

# LIMITATIONS, EXCEPTIONS AND DEROGATIONS

1. **LIMITATIONS** are restrictions incorporated into the language of a particular treaty provision.
   1. If the right doesn’t set out a limitation, there isn’t one! (*ICCPR Art 5(1)*)
      1. E.g. ***art 18(3) of ICCPR*** – “Freedom to manifest one’s religion or beliefs may be subject only to such limitations *as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.”*
         1. ***as are prescribed by law*** – Domestic law
            1. Aiming to eliminate the danger of executive power by choosing the legislature over the executive
            2. This is not a total solution, because

Many legislature are not representative, and

HR exists at intl level in order to limit national level restricting HR, and yet this concept appeals back to national law. However, it still provides some check on executive influence.

* + - 1. ***are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others*** –
         1. Problem - wide breadth of things that can limit freedom of religion
         2. **Paradox**: IHR is supposed to serve as a constraint on cultural developments that undermine basic human values. And yet limitations are an example of how IHR are also supposed to evolve with changing cultural values.
         3. **HR though fundamental are also dynamic:** What constitutes a legitimate limitation is a dynamic question - it moves with societal values & judicial processes

1. **RESTRICTIONS** – same function as limitations
   1. e.g.
      1. *12(3) –* “The above-mentioned rights [**right to liberty of movement**] shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order (ordre public), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant.”
      2. *19(3)* - “The exercise of the rights provided for in paragraph 2 [**freedom of expression**] of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary”
      3. *21* – right of peaceful assembly
      4. *22* – *freedom of association*
   2. **\*\*Restrictions have important consequences on rights.** Limitations on one right can have a chilling effect on a range of other rights, and any particular limitation can be taken to an extreme that undermines core HR beliefs.Without IL, it would be left to the state to define the terms in the restrictions. **Taking place in IHRL is an interesting dialogue between the international and the state in articulating what each of the broad propositions means.** We expect some fluidity in how these provisions are defined – the dialogue is infinitely better than leaving states to define the provisions themselves.

3. **DEROGATIONS** – allows curtailment of rights with no specific reference to limitation or restriction

1. apply to civil & political rights
2. ***ICCPR***
   1. **Requirements - *4(1)*** “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.**”

* Key trigger is “public emergency”
* State of emergency has to be officially proclaimed
  + HR Committee says the rationale for this is that it is essential for the maintenance of the principles of legality and ROL at times when they are most needed. (***HR Committee, General Comment 29, article 2***)
* Derogate “to the extent strictly required by the exigencies of the situation”
  + HR Committee says “This requirement relates to the duration, geographical coverage and material scope of the state of emergency and any measures of derogation resorted to because of the emergency.” (*Gnl Comment 29, art 4*)
    - Must be some close relationship between reasons for emerg. and the above
  1. **A core from which no derogation is allowed - *Art 4(2):* No derogation** from articles 6, 7, 8 (paragraphs I and 2), 11, 15, 16 and 18 may be made under this provision (**right to life; torture, cruel inhuman degrading treatment; slavery; imprisonment for debts; retrospective criminal law; right to recognition before law; freedom of thought, conscience, religion**.).
* **HR Committee adds to list of rights that cannot be derogated from:** “In those provisions of the Covenant that are not listed in article 4, paragraph 2, there are elements that in the Committee’s opinion cannot be made subject to lawful derogation under article 4. Some illustrative examples are presented below…[persons deprived of liberty to be treated with dignity; prohibition on taking hostages; minorities; deportations; propaganda for war]” (***HR Committee, General Comment 29, article 29***). Also finds no justification for derogation from the right to a fair trial because guaranteed under IHL during war-time. (*General Comment 29, Art 16*)
  + **“Bad faith lawyering”** referred to by Kennedy, and Simma & Alston- may be good for the world, but not a solid legal argument.
    - * + Great illustration of how **IHRL** **simultaneously attempts to be positive, codified, and strict, but at the same time is always attempting to reach beyond itself**, to drag in more and more things that are important to human dignity but simply haven’t been codified.
        + *Deb: HR Committee’s reasoning is not entirely convincing because (1) not listed in ICCPR and (2) no hierarchies of norms – all rights are indivisible and inter-related. But the point about a fair trial makes sense because takes into consideration the context of other areas of IL that may affect treaty provisions.*
  1. **Must declare derogations -** *Art 4(3).* Any State Party to the present Covenant availing itself of the right of derogation shall immediately inform the other States Parties to the present Covenant, through the intermediary of the Secretary-General of the United Nations, of the provisions from which it has derogated and of the reasons by which it was actuated. A further communication shall be made, through the same intermediary, on the date on which it terminates such derogation.

1. **Rationale for derogations**
   1. Recognition that during states of emergency, there may be a need to detract certain HR (makes for a very complicated relationship between IHRL & IHL)
   2. The requirements laid down are to stop states from derogating for other reasons
2. **Relationship between IHRL and IHL** 
   1. ***General Comment 29, art 9 –*** “article 4, paragraph 1, requires that no measure derogating from the provisions of the Covenant may be inconsistent with the State party’s other obligations under international law, particularly the rules of international humanitarian law.”
3. States parties to several HR instruments are bound to comply with the highest common denominator of non-derogable rights.
   1. E.g. ***Art. 15 of ECHR*** – “In time of war or other public emergency threatening the life of the nation…”
   2. E.g. ***Art 27 of the ACHR*** – allows for derogation in “time of war, public danger, or other emergencythat threatens the independence or security of a State Party”
   3. ***Implied derogation clauses*** in HR treaties that do not include derogation provisions: e.g. ILO has stated the treaties adopted under its aegis have an implied right to suspend some rights in times of emergency. / on the contrary, the African Commission on Human and Peoples’ Rights refused arguments by Chad that there is an implied derogation clause in the *ACHPR.*
   4. **Test for permissibility:** whether it is consistent with the object and purpose of the treaty.

# SUBJECTS of Human Rights obligations

OTHER NON-STATE SUBJECTS:

1. Human Beings – International Human Rights and Criminal Law
2. Companies – International Centre for the Settlement of Investment Disputes
3. Peoples – Self-Determination, Permanent Sovereignty Over Natural Resources
4. Indigenous Peoples – Territorial Rights
5. Non-Governmental Organizations
6. Jurists

**Subjecthood means any combination of these 3 things: *(1) Creation of IL; (2) Rights; (3) Obligations***

1. **Prior to 1945, only states could be the subjects of HR norms**. This system was ushered in under the Peace of Westphalia – not to be organized any longer under religious empires, but to allow for a system of governance based on *sovereignty of states* (each can do what they like within their jurisdiction – own religion).
   1. **PIL** emerges as the law that regulates only the relationships between states.
   2. **Up until 1950, the answer to all 3 things was states**.
2. 🡪 **After WWII, change of view that only states could be subjects:** 
   1. **Diminution of intense notion of sovereignty:** While up until 1945, PIL did not have anything to say about what a nation did in its own borders, after the atrocities by Germans against their **own** nationals in WWII, it became important to people to figure out how to not allow this to happen again. This led to a dilution of the notion of sovereignty in such intense terms and changed the view that only states can be subjects.
   2. **Creation of the UN**: new sense of PIL and the ways in which orgs (especially the UN) will interact with IL
3. 🡪 ***Court in Injuries Suffered (1950) ICJ* immediately following WWII**
   * Product of post-war era thinking in which notion of sovereignty diluted.
   * Ushered in entirely new way of understanding the role of PIL - from thinking about sovereignty in certain ways and from thinking about PIL as only governing inter-state relations 🡪 to thinking about IL as governing subjects and entities other than states as well
   * moves away from the answer of states being only subject in all circumstances. There are lots of subjects, and their powers vary over the 3 above things.
     + **Advisory Opinion Q**: Is the UN a ‘subject’ of IL such that the UN can claim on behalf of employee?
     + **Court’s definition of personality:** (pp 178-79)
       - The nature of the subjects of law depends on the needs of the community”…
       - “[The UN] was intended to exercise and enjoy, and is in fact exercising and enjoying, functions and rights which can only be explained on the basis of the possession of a large measure of international personality and the capacity to operate on an international plane…”
       - Does not mean its personality and rights are the same as a state
       - “what it does mean is that it is a subject of IL and capable of possessing intl rights and duties”
4. **🡪 Clapham extends human rights obligations to non-state actors:**

* In sum, all of the arguments outlined [below] boil down to two claims:
  + 1. that an application of human rights obligations to non-state actors trivializes, dilutes, and distracts from the great concept of human rights.
  + 2. that such an application bestows inappropriate power and legitimacy on such actors.
* Deb: Another reason not to extend HR obligations to non-state actors: Because it bypasses national procedures – Should we allow HR to embrace all sorts of relationships within a society, or should we try and limit it to the relationship between individuals and their govs?
* The counter-argument
  + We can legitimately reverse the presumption that human rights are inevitably a contract between individuals and the state; we can presume that human rights are entitlements enjoyed by everyone to be respected by everyone. Once we accept that human rights obligations can apply in this way, the idea of legitimizing non-state actors by subjecting them to human rights duties becomes illogical.
* New way of conceptualizing human rights
  + The message is that international human rights obligations can fall on states, individuals, and non-state actors. Different jurisdictions may or may not be able to enforce these obligations, but the obligations exist just the same. With more and more national jurisdictions applying international human rights law as the law of the land, we look set to see an increasing acknowledgement of the relevance of human rights norms for judging the conduct of private actors. (p 58)

**Principle arguments against extending HR obligations to non-state actors & Clapham’s responses**

Arguments against extending HR obligations beyond just states to incorporate corporations.

1. **The Trivialization Argument – Watering Down Rights:** HR would lose their status if applied to everyday things.
   1. Clapham addresses this by saying that
      1. Excludes certain important categories of violence from serious discussion and attention
      2. The victim should not be prejudiced by the ‘private’ nature of the violence
2. **The Legal Impossibility Argument – Treaty Making for the Excluded -** That since treaties are not negotiated and entered into by individuals, they cannot bind those who are not party to them
   1. Clapham responds by saying we should just separate creation from obligation… that is just part of the complexity that we now live in – subjecthood is complex.
      1. We have admitted that non-state parties violate HRs in sitns where armed groups that cannot be compared to govs have been investigated for committing HR abuses.
      2. Intl preoccupation w/ terrorism opened door further to approach which admits terrorists violate HRs.
      3. The term HRs has generated meanings & significance beyond the realm of IL obligs owed by states.
3. **The Policy Tactical Argument – The Smokescreen for Govs –** Allows states to shift blame & avoid concrete obligs.
   1. This arg blinds us to the opps presented by including these grps within the category of those capable of committing HR violations.
4. **The Legitimization of Violence Argument – Permitting Violations -** The concern is that by addressing armed opposition groups as entities with obligations under IL, this may seem to legitimize the use of violence by both sides.
   1. Clapham’s response:
      1. “It is wrong to presume that the application of intl obligations to armed opposition groups, as such, entitles them to use any sort of violence. It simply further limits them with regard to their legal obligations.”
      2. “To suggest that the applic of intl duties to an armed group increases its legitimacy in the eyes of observers has no basis in law & would be hard to demonstrate. There may be a problem of perception, but this arg, like the others, depends more on policy prefs of the objector rather than any inherent legal or practical impossibility with regard to the application of IL to the behavior of non-state actors.
5. **The Rights as Barrier of Social Justice Arguments – Kennedy Revisited**
   1. Questions the utility of HR as a tool for social justice
      1. *Alston* summarizes this critique as follows: ‘it has often been said that the IHR system makes an important contribution to the legitimacy of states, both by enabling them to claim the moral high ground and by giving them the opportunity to take on obligations which, in effect, legitimize a more activist or interventionist role for the government within society’
      2. Maybe HR isn’t the best way of dealing with these sorts of problems, and crowds out other processes that may be more effective in bringing about social justice (sounds like *Kennedy’s* argument)
      3. Could respond that as long as you don’t let one discourse crowd out the others, they can all work together. But for example companies champion CSR because it tends to holds off other discourses.
   2. Clapham’s response:
      1. The trad conception of rights as buffer btwn state & private actor can no longer explain how HR are observed in action today. 21st C needs paradigm shift to recognize HR used against *private* power too.

## But there is still the question of who gets to *make* PIL:

Currently it is only states that create rights, but these other entities play a role

* Custom is a product of state practice (and state belief)
* Some argue that PIL still predominantly about states, excepts where states have wielded that power
* Others point out that **non-state entities are shaping the way that IL norms form in a dynamic process** --- One of those entities are ***judicial organs***

DESIRABILITY OF EXTENDING SUBJECTHOOD TO CREATE HR

* Think critically about some of the entities that could have a role in defining HR norms
  + Intl orgs; Sec Council; corps, NGOs, rebel groups
* **For** other entities also creating norms: [Deb: I agree with this, but there need to be checks on corps defining HR Norms]
  + It is perverse for just states to have the power to create norms that others will be held to account against.
  + States do not always have good intentions with respect to HR.
* **Against** other entities creating HR:
  + States have democratic ideals, whereas these other entities do not have representative capacities
    - This arg is not convincing because if we want states to observe HR, they should not be setting the std.
    - All this arises because in the intl realm there is no legislature – operating on a very horizontal plane.
  + Each of the above entities plays a role in the creation of PIL and that is enough
    - This arg is not convincing because the sources of PIL are almost invariably states.

# IMPLEMENTATION OF IHR NORMS INTO DOMESTIC LEGAL SYSTEMS

## Relationship between international and domestic law

**Implementation of treaties is necessary to translate IL law rights into national law so that:**

* + - 1. The rights will inform local culture culture and
      2. The rights will tie into local institutions functioning on the ground - parties can cite it as law in court

**IHR is silent about the methods states should adopt to implement IL into national law. IL is not received or translated into national law the same way from state to state!**

* E.g. Art 2 of the *ICCPR* **leaves it to the State Parties to choose their method of implementation**. ***UN HRCommittee – General Comment 03: Implementation at the National Level (1981)***
* WHY? So it will inform local culture and tie into local institutions. Also to respect sovereignty in terms of domestic implementation.

**Question of implementation depends on the state**. More complicating than splitting countries into monist and dualist, but here are the basics:

|  |  |  |
| --- | --- | --- |
|  | **MONIST** | **DUALIST** |
| **Who ratifies?** | **Legislature** | **Executive**  *(the dualist nature has to do with a concern for DEMOCRACY)* |
| **What is the effect of ratifying?** | Ratifying makes treaty directly applicable nationally & internationally. | Ratifying is directly applicable internationally  BUT NOT domestically (not directly justiciable in state until second stage for process of translation takes place) |
| **Steps to implement into local law?** | 1 step process for implementation:  ratifying the treaty | 2 step process:  1.Ratification 🡪 at that point, state is bound by the treaty  2. Translate the treaty norms into the normal law-making of that state, usually through Parliament (in order to give individuals a justiciable right under the legislation) |
|  | *Most countries that follow continental European legal tradition are monist.* | *Was a British approach, and was adopted by almost all British colonies. (Canada is dualist – not because of federalism, but because the executive signs international treaties)* |

**Dualism**

Reason for dualist (2-step) process is to preserve DEMOCRACY where it is the executive signing intl treaties.

Pros: Must faster to create IL obligation.

Cons: Sometimes massive delays where a state signs onto a treaty and then doesn’t pass implementing legislation.

**A treaty is binding on a state even if they haven’t implemented it**. (***Medellin, ICJ***)

* To avoid being a position where they have an intl obligation they can’t fulfill, the federal government in Canada has adopted process whereby they consult with the provinces and territories to get consent before signing and ratifying a treaty.

## Customary International Law

**CIL is directly applicable, even in dualist states!** (source: common law – JJs invented this & ran with it)

* CIL is directly applicable to domestic law to the extent that it is consistent with national legislation (JJs may say national legislation prevails because it is designed through the democratic process)
* But cannot use national law as an excuse for violating IL!
  + This means that the domestic law may not require compliance with custom, but IL still does
  + E.g. Scenario like *Medellin* where a state is in violation of IL but no national process is in place to implement that international obligation domestically

**Rationale / Why is CIL directly applicable when it is arguably dangerously anti-democratic,** since the executives of states get to create state practice?

* Because CIL is perpetually in motion (defining itself in relation to state practice, which is always in motion), so states would have to constantly be passing new laws to keep the law consistent with CIL. So it is better to let judges decide what CIL is when the question is relevant.

**\*\***The direct applicability of custom **may result in treaties applying domestically w/o implementation** due to the overlap between treaty & custom (*Nicaragua*)

* E.g. All states except Somalia & US have signed the UN Convention on the Rights of the Child. If those provisions are custom, are they directly applicable in US & Somalia even tho they haven’t signed on?

## The Canadian experience

***Report of the Standing Senate Committee on HR: Promises to Keep: Implementing Canada’s HR Obligs (‘01)***

**Major problems:**

* **Identified in report:** Gap between willingness to participate in HR instruments at the intl level & our commitment to ensuring that the obligs contained in these instruments are fully effective within Canada.
* **Other:** Canada has been very far behind in their reporting to treaty bodies for HR – Canada hasn’t reported in something like 15 years
  + suggests that states haven’t really bought into the objective of holding themselves to account

The report speaks of three phases in the development of HR.

* 1. Recognition of the concept of HR and providing for their legal protection within national society
* 2. The development and bringing into force of international instruments intended to secure the benefits of HR for all the people of the world…
* **3. The third phase of HR on which we are now embarked demands that we actually live by our human rights commitments**

Critiques of the report

* While the 3 **phases may not be very realistic** since it tends to be more of an interaction (and aboriginal rights in Canada were not developed until later), the idea of the three phases certainly brings home the point that we need a turning point in which we take seriously the obligation to implement these rights!
* Some of **the language** in this report sounds like that discussed in Mutua’s article *Savages, Victims and Saviors*: *“We must do it for ourselves and our own people whose rights are at stake, and also for others around the world who need our example and our encouragement.”*
  + On the one hand, maybe we want Canada to play a leading role in human rights
  + On the other hand, maybe there is a bit of a proselytizing value…

Canada’s processes of implementing in legislation

* At the time of writing, proposed legislation was not vetted for compliance with HR norms.
* In Canada, HR treaties are transposed into domestic law by being passed into legislation by Parliament.
  + *Deb: Is this a good process?*
    - Supposed to ensure democracy
    - Problem is that we may have international obligations that we are not complying with. This may create (1) intl sanctions or (2) indifference about IHR norms since we becomes used to being out of line with our international obligations (e.g. housing) (*Report above)*
* To avoid the problem of being internationally accountable for obligations they cannot fulfill due to federalism, the federal government has adopted the practice of consulting with the provinces & territories, and obtaining their consent, before signing and ratifying treaties relating in whole or in part to matters within their jurisdiction.

# TERRITORIAL SCOPE

**In some cases, subjects owe obligations outside their territorial borders**

## Public international law treaty -

#### Case of Bankovic (ECtHR), Grand Chamber, Decision on the Admissibility, 12 Dec 2001 (paras 4-13, 59-82)

* **ECHR** explicitly states scope of application in art 1: “everyone **within their jurisdiction**”
* **F:** 1999 NATO bombing as part of Kosovo campaign hit radio station in Belgrade, killing and injuring ppl
  + Probably illegal under IHL b/c unlikely to be considered military target
  + Also problematic because was not very effectual
* **I:** Meaning of “within their jurisdiction” 🡪 extra-territorial application of ECHR?
  + Args against extra-territorial application: IHL should apply instead of IHRL
    - This argument is too formalistic – Realistically, this would leave a very big enforcement vacuum, because the ECtHR is the most important institution for enforcing IHRL (ICC did not have jurisdxn in 1999; and in any case it is politically not realistic that they would indite all these ppl)
  + Args for extra-territorial application of ECHR: Blurry nature of military ops makes it difficult to determine when IHRL and when IHL governs. Have IHRL apply to avoid a gap.
* **EctHR: ECHR applies extra-territorially where** 
  + **the state has “EFFECTIVE CONTROL” over that territory.**
  + **Or is exercising “PUBLIC POWERS”**

#### Al Skeini v Secretary of State for Defence, [2007] UK House of Lords

* **UK Human Rights Act (1998)** (domestic implementation of ECHR) **silent on extra-territorial applic.**
* **F:** 6 ppl killed by British army in Iraq (5 in combat, 1 in detention)
* **I:** Extent to which the British army owed HR obligations in Iraq
  + Args against HR obligs in Iraq: Perverse consequences of having HR for these kinds of cases – the idea is that we are in war.
  + Args for HR obligs in Iraq: The need for legal accountability of military actions – push for enforcement in response to incredibly impunity and lack of scrutiny.
* **HL: Human Rights Act has no extra-territorial application**. Bankovic is unclear. When you appeal to the EctHR, they can reconsider Bankovic in light of this particular phenomenon.
* **Appealed to EctHR:** Disagree with UK. **Human Rights Act has extra-territorial application!**

#### Canada (Justice) v Khadr, 2008 SCC 28

* **Cdn Charter** says the scope of application in s 32: Parliament and gov of Canada; legislature and government of each provinces.”
  + **Hape** – intl agents are not bound by the Charter because of *comity* – they are bound by foreign laws instead. Exception: the foreign law / action is contrary to Canada’s obligs under IL (IHRL)
* **F**: Khadr detained at Guantanamo since 15, awaiting military trial. CSIS interviewed and handed over fruits of interview to US. Khadr seeking disclosure from Cdn gov.
* **I**: What is the obligation of the Cdn state to a Canadian citizen outside the state
  + Args against extra-territorial applic: Falls under Hape – international comity applies, not Charter
  + Args for extra-territorial applic: Hape exception – Comity cannot be used to justify Canadian participation in activities of a foreign state/its agents that are contrary to Canada’s intl obligs.
* **SCC:** 
  + **Canadian agents are bound by the rules of *that* country rather than the Charter unless that local law is contrary to Canada’s intl law obligations. (Bound to IHRL as a minimum!!)**
  + **STANDARD:** 
    - **1. Did the process at Guantanamo violate Canada’s binding obligations under IL?**
    - **2. Did Canada participate in those activities?**
* *SCC does not go into the questions of “effective control” or “public powers” from Bankovic. Not clear whether these concepts should have played more of a role.*

**Question: Do the rules for extra-territorial effects apply not only to ECHR, but all intl HR acts!!**

* If yes, massive import for rest of world
* **HR Committee** has said it IS also applicable to other HR acts! (note for ***ICCPR***!)

# ENSURING COMPLIANCE

**3 DIFFERENT VIEWS ON HOW BEST TO ENSURE COMPLIANCE WITH HR NORMS:**

## 1. Neumayer’s strategy – BOLSTER CIVIL SOCIETY

**What really matters in HR compliance is not the simple fact of having ratified the treaty, but the existence of a robust civil society, and to some extent democratic participation**.

* Method: Measuring the effect of ratification using the following variables: time, ratification, citizen participation in NGOS, changes in HR performance. Goes through 7 treaties.
* Conclusion: Ratification leads to improved performance in only *democratic societies*. In *autocratic regimes*, IHRL can lead to worse implementation of HR because regime can use ratification as pretext for holding off criticism while they commit more HR violations.
* His conclusion fits with:
  + *Liberal international relations perspective:* IHR regimes can be effective if domestic groups pressure governments – positive effect of ratifying depends on degree of democracy.
  + *Theory of transnational human rights advocacy networks*: Where human rights civil society with *international* linkages is strong, ratifying will have strong effect – positive effect of ratifying depends on strength of human rights civil society with international linkages.

## 2. Collingsworth – LITIGATION

**We need to think about new ways to legally enforce HR to make HR norms concrete and legal.**

* *[Collingsworth comes from civil society and is critical of corporations]*
* Responds to those who have argued that litigation is not the best solution because you need:
  + 1) ACCESS TO COUNSEL AND EDUCATION
    - Response: Could save access & education problems by getting a group of motivated lawyers to go to the places where rights were violated
  + 2) FINANCING – **this one is note easy to solve**
    - Response: But contingency fees and the *ATCA* made litigation very popular in the US

Critique of Collingsworth’s strategy: He focuses on litigation in the US – what about capacity for enforcement in the satellites (national courts)?

But his view is in response to the fact that enforcement is astonishingly under-developed globally! Access to justice for most of the world is virtually non-existent (cannot make claim v company for forced labor!).

## 3. Goodman & Jinks – In addition to coercion and persuasion, USE ACCULTURATION

Traditionally, our thinking about HR compliance is focused on either coercion (political methods: pressure on govs from other states or NGOs) or persuasion (similar but more about meeting with governments and offering to work with them).

* *Deb: Both of the prior authors/ideas focus on coercion or persuasion*
  + *Litigation is harsh and coercive*
  + *NGOs harsh, confrontational, in the face of govs to attempt to change HR performance*

**Goodman and Jinks add the idea of acculturation as a third way to enforce HR:**

* Instead of being so combative, embed human rights as basic aspects of local populations
* States comply because it is part of the normal cultural expectation of how they go about their day to day activities!
* Be gentle – welcome them into the process. Start talking about HR and embrace the idea that what we need to do is have a dialogue

Critique of this strategy:

* Perhaps the gentle-talk think is really just a smokescreen to stall real enforcement! (e.g. CSR)
* JGS: The two should go hand-in-hand: The ingraining of culture is good, but should not serve to avoid legal enforcement.

Deb critiques:

* Suggests other countries culturally have less concern about human rights
* **Corporations ignoring HRs come from the West too.** It is expected that HR are respected here, so they just go elsewhere and do it. **It does not seem to be a problem of acculturation!**

## 4. The role of international courts as supranational entities to ensure compliance.

***Note: There are tensions between the 4 strategies.***

# UN HUMAN RIGHTS SYSTEMS

UN Charter, body, commission, treaty bodies, procedures, etc – **undeveloped and lack teeth in certain ways**

Human Rights are recognized in the ***UN Charter:***

***Preamble:*** “to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of man and women and of nations large and small.”

***Art. 1:*** “The purposes of the UN are: …respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion”

***Art. 55:*** “With a view to the creation of conds of stability & well-being which are nec. for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, 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.”

***Art. 68:*** “The Economic and Social Council shall set up commissions in economic and social fields and for the promotion of human rights, and such other commissions as may be required for the performance of its functions.”

**Role HRs play in the *UN Charter:***

* Minimalist agenda, states can do whatever inside their own borders, Charter is about international peace and security
* UN recognized though that main motivations for war are economic, so UN has to try and deal with global economic and social disparities
* So, Economic and Social Council mandated to address economic problems that may lead to violence
* Post-Holocaust: movement away from intense notions of sovereignty, turned towards international law to protect people from this sort of thing
* As of 1945: HRs nascent, no treaties, no UDHR, references to rights within the Charter are very weak
* Preamble is super-aspirational eg mentions equality between men and women. NOWHERE in the world had gender equality at this stage
* Mentions human rights but these are not enumerated or defined anywhere
* No mention of sexual orientation/economic/social/cultural rights
* **“fundamental freedoms”** : what does this mean? Constitution of the world basically references things that have never been defined. *Remember that* ***Moyne*** *argues HRs don’t exist until 1977*

**Treaty bodies (**Eg CCPR, CAT, CERD, CEDAW, CRC, CMW, CRPD)

* Oversee the working of treaties, ensure compliance, created by the Treaty itself EXCEPT *ICESCR*: treaty body for this created by ECOSOC because the signatories put nothing about enforcement in the Treaty
* Meet irregularly, have imperfect ways of reviewing compliance

**UN Human Rights System**

**Human Rights Council**

a. Established in 2006, replacing the Commission on Human Rights, which had been set up by ECOSOC in 1946.

b. 47 members elected for three-year terms, with “equitable geographical representation.”

c. Council described as being **“responsible for promoting universal respect for the protection of all human rights and fundamental freedoms for all, without distinction of any kind and in a fair and equal manner.”**

d. Council assumed “all mandates, mechanisms, functions and responsibilities” of the Commission. Included “special procedures,” mechanisms to address either:

i. the human rights situation in specific countries, or

ii. specific thematic issues (e.g. disappearances).

e. One noteworthy new mandate: to “undertake a universal periodic review, based on objective and reliable information, of the fulfillment by each State of its human rights obligations and commitments in a manner which ensures universality of coverage and equal treatment with respect to all States; the review shall be a cooperative mechanism, based on an interactive dialogue, with the full involvement of the country concerned and with consideration given to its capacity-building needs; such a mechanism shall complement and not duplicate the work of treaty bodies…”

f. Council has also revised the pre-existing complaints procedure “to address consistent patterns of gross and reliably attested violations of all human rights and all fundamental freedoms occurring in any part of the world and under any circumstances.”

**High Commissioner for Human Rights**

a. One of recommendations emerging from 2nd World Conference on Human Rights, held in Vienna in 1993; supposed to work for protection and promotion of all human rights.

b. High Commissioner “the United Nations official with principal responsibility for United Nations human rights activities under the direction and authority of the Secretary-General.”

1. Procedural aspects
   1. High Commissioner should be “person of high moral standing and personal integrity and shall possess expertise, including in the field of human rights, and the general knowledge and understanding of diverse cultures necessary for impartial, objective, non-selective and effective performance of the duties of the duties of the High Commissioner.”
   2. Appointed by Secretary-General and approved by the General Assembly.
   3. Serves for period of 4 years with possibility of renewal.
   4. Has rank of Under-Secretary-General.

## Specific Treaty Mechanisms

1. **Human rights treaties generally establish committees of independent experts to monitor treaty implementation**; some also allow communications on human rights violations falling within their purview. E.g.:

a. Committee on the Elimination of Racial Discrimination **(CERD)**

b. Committee on the Elimination of Discrimination against Women **(CEDAW)**

c. Committee against Torture **(CAT)**

2. Perhaps the best-known example is the **Human Rights Committee**, set up pursuant to the ***Optional Protocol to the ICCPR.***

a. Permits individuals whose rights enumerated in the Covenant have been violated **and who have exhausted all available domestic remedies** to submit a written communication to the Committee for consideration***. [2]***

b. State alleged to be in breach of its obligations under the Covenant shall be informed of the communication and allowed six months to submit explanations/clarifications or remedy made available. ***[3]***

c. Committee deliberates and then makes its views known to both the individual complainant and the State Party concerned.

3. **ICESCR lacked any kind of committee mechanism until Economic and Social Council established the Committee on Economic, Social and Cultural Rights (CESCR) (1985) to monitor implementation of the ICESCR.**

* + - * 1. Individual complaints procedure established pursuant to an ***Optional Protocol to the ICESCR*** adopted in 2008; required 10 ratifications for entry into force, and received the requisite number on 5 February 2013; will enter into force 5 May 2013.

## HR Council (formerly the Commission)

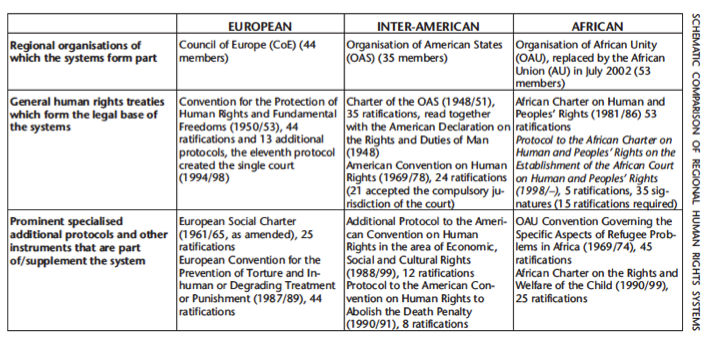
* Big group of state representatives
* Lots of politicking, not very productive
* HR Commission established Special procedures.
* HR Commission and sub-commission established working groups
* Sub-Commission: establishes Special Rapporteurs that are country- or issue-specific – Special Rapporteurs are unpaid! Get basic expenses and tiny staff.
* **Why was UN Commission disbanded?**
  + Israel was investigated every year because developing countries make up the majority of the world and therefore the commission. 1 vote per country majority voting
  + HRs violators got prominent positions in the Commission
  + Kofi Anaan said enough was enough. Had lost its credibility as an institution
* **What’s new about the HR Council (est’d in 2006)**
  + Under the General Assembly, not ECOSOC
  + Permanent
  + States must vote other states in and are supposed to take their HRs record into account
  + Can remove a state by a two-thirds majority vote
  + US wanted any state under sanctions from Security Council to be removed from the HR Council. This bit didn’t pass so the US isn’t involved at all in the Council.
  + When HR Council was established, the UNGA mandated the Council to undertake a universal periodic review **(UPR)** of the human rights records of all 193 UN Member States
    - *Reflects partially the Neumayer and partly the Goodman&Jinks theory of socialization in HR. Acculturation, and gives teeth to civil society. (think housing, UPR 2012 in Canada)*

**Effectiveness of HR enforcement in the UN system:**

* HRs generally seriously under-resourced, hyper-politicised with extremely immature institutional capacities. UN offers toothless largely hortatory politicised mechanisms
* ***Collingwood***: favours litigation, thinks all this UN stuff is pathetic
* BUT if you favour acculturation (*Goodman & Jinks*), then you don’t want any country to be excluded. These institutions should not be about blame or confrontation. It’s not a problem if UN enforcement doesn’t work
  + *Should we exclude violators from the UN? Big strength of UN is bringing countries together to talk on wide variety of issues, so better not to exclude from that forum. But perhaps we need confrontational bodies outside UN? Perhaps we should shame/pressure violators within the UN?*

# REGIONAL HUMAN RIGHTS SYSTEMS

**The regional human rights systems are much more robust / productive in ensuring respect for HR than the UN System**



* + **1. All 3 feature as components of regional organizations (courts established by reg’l orgs)**
    - European - Forms part of Council of Europe (CoE)
    - Inter-American - Forms part of Organization of American States (OAS)
    - African - Forms part of African Union (AU)
  + **2. Applying regional human rights treaties (not applying the ICCPR)** 
    - NOTE the relationship between universal and regional international law:
      * *regionalization* of HR: each region thinks it necessary to codify own version of HR norms
    - One might suspect this undermines the universality of HR norms (replacing ICCPR), BUT:
      * 1. Temporal: European Convention pre-dates the ICCPR (may even be a causal relationship in EC leading to adoption of ICCPR several years later)
      * 2. Also a significant overlap of ICCPR and specificities of HR experience in different places
      * American experience with forced disappearances (particularly South during 60s and 70s)– enormous effect on the way HR mechanisms evolved in the Americas
      * African experience – interested also in peoples’ rights.
        + 1. Self-determination: At a time when many states talking about HR in 1950s, many states were involved in fight for de-colonization - trying to set up rights that inhere in peoples such that they can oppose colonialism
        + 2. Peoples rights – to get at groups of individuals whom are the beneficiaries of HRs, even though they are still operating under the yoke of colonial law. (the drawing up of states in straight lines is arbitrary)
    - Europe – Convention for the Protection of Human Rights and Fundamental Freedoms. 45 ratifications, and 13 additional protocols:
      * AP1: Property, education and elections
      * 4: Civil imprisonment, free movement, expulsion
      * 6: Restriction of death penalty
        + At time of complete abolition, most people really wanted to keep the death penalty. Speaks to how HRs can have important role in shaping values.
      * 7: Crime and family
      * 12: Discrimination
      * 13: Complete abolition of death penalty
      * 11 & 14 change machinery of the court
      * Protocols 2, 3, 5, 8, 9, and 10 superseded by 11.

**To some extent there is a process of cross-fertilization between the regional and global institutions**

* Even though our starting premise was that these rights are fundamental & inhere in us bcos we are human
* That relates to the idea of MOA 🡪 adjusting the standard to local cultures / cultural relativism / flexibility

**Certain regions develop sets of norms that exceed those in the ICCPR, despite that this means handing over sovereignty and ultimate authority with respect to HRs to a regional court**

* The process of handing away sovereignty to a regional court makes for interesting dynamics, yet:
* Europe has embraced HR for itself more than any other region in the world:
  + It is amazing that so many countries gave superior authority to the ECtHR on questions of HRs! However, they still hold political power. The ECtHR is only so strong because of WWII – states willing to do anything to prevent that happening again.
* Americas –
  + There are interesting problems in litigating forced disappearances (can’t be sure it was the state)
  + It features in a separate convention with the Inter-American system because…
    - * Inter-American court says a FD constitutes torture of a family member and the family member has the right to make the case within the system. And this group of states has history of FDs that are not adequately addressed within the context of the ICCPR, and so need to think of ways in which their experience of HRs can be reflected in a regional system of HRs.

**Functions / roles / caseloads**

* **Decision caseloads:** Relationship between commission & court (relates to caseload problem)
  + Commission will typically give the more difficult cases to the court – so it is a feeding process
  + Inter-American: Commission typically 100 cases per year; Court 10-15 judgments per year
  + European
    - Ct decides thousand per year, massive backlog (tens of thousands of cases and growing) – the ECtHR is a victim of its own popularity
    - Did away with the Commission because the decision of whether or not it goes to the Ct is kind of arbitrary– change makes sense but resulting backlog is enormous.
  + African: Court just recently established - seem to have a large number of complaints – may not have taken a case through to its conclusion yet. Very much in its infancy.
    - Commission typically hears 4-6 cases a year.
* **State-to-state referral system**
  + never really worked because states rarely report another state. They don’t want the court poring their own HR record either.
* **Advisory jurisdiction / symbolic leadership roles**
  + Some courts have symbolic leadership role on core HR issues (give advisory opinions, some state to state referrals, and 4-5 cases per year)
  + Others (ECtHR) want to go over every single case
    - Caseload may limit symbolic leadership role
* **How often do they sit?**
  + ECtHR: full time
  + Inter-American Court: 4x2-3 weeks per year; Commission: 2x3 week meetings per year
  + African Commission: 2 regular 2-week meetings per year; Court regularity TBD
    - Investment is insanely small! Resources is an important problem.
  + **Speaks to absence of commitment in African and Inter-American states to HR enforcement!**
  + **Also speaks to how radical ECtHR is!!!** Much more robust than any other HR enforcement mechanism (full time and open to anybody)
  + ICC interesting as well in having judges and people working around the clock with potential jurisdiction over 131 states!

**There are also HR bodies in other regions that can play a role in articulating regional standards:**

1. ASEAN Intergovernmental Commission on Human Rights established in 2009 (and note also ASEAN Human Rights Declaration adopted in November 2012.)

2. New Independent Permanent Human Rights Commission established by Organisation of Islamic Cooperation in June 2011.

# STRATEGIES FOR LITIGATING HUMAN RIGHTS VIOLATIONS

Acutely underdeveloped access to justice for human rights violations globally

* **What REMEDY:** Money; injunction; criminal proceeding; apology; restitution; political / legal change; truth
* INSTITUTION where you can pursue these remedies:
  + HR Committee (ICCPR)
  + Other treaty bodies (treaties they are based on; ILO Tribunal)
  + National courts (criminal / tort / administrative law)
  + Regional courts (regional statutes: ECHR; IACHR; ACHR ASEAN Inter-governmental Commission on HR)
    - ECHR has not found “just satisfaction” to mean financial comp (Tomuschat)
  + International courts – ICJ / ECJ / report violation to ICC
  + TRCs
* WHO to sue
  + GLOBAL problem of STRATEGY – Yahoo example – sued Yahoo instead of China: sends message to China that large corps will be less interested in investing if forking out large amounts of money for HR violations

**1. For large scale violations, BRING GLOBALLY AGAINST INDIVIDUAL PERPETRATORS (Tomuschat)**

* ECHR has not awarded financial comp (despite its mandate to give “just satisfaction” in art 41)
* IACHR has provided financial comp and variety of remedies (but has dealt only with very serious cases to date, so not distinguished between them) – Ch provides discretion to decide whether comp be paid to victim & permits the court to order remedial measures
  + Cannot conclude individual right of reparation – only one person received comp after 200,000 people lost their lives during the internal strife in Guatamala!
* HRCommittee has also created a doctrine of full reparation for any damage caused by a breach of the commitments flowing from the ICCPR (although neither Covenant nor Option Protocol specifically provides for that), including compensation to victim
  + But states often ignore findings bcos Optional Protocol designates them as “views” – non-binding
* Court of Justice of the European Communities – only system of IL where individuals benefit to the same degree as states from state responsibility for breaching Community law and can claim comp.
* Victims of grave breaches of HR rarely receive adequate reparation
* **There is no customary right to individual reparation**
* ECHR and IACHR have large discretion – ECHR has refrained from creating an automatic link between breaches of primary rules and recognition of a secondary right to reparation
* **BY WHO: Suggests bringing global rather than individual claims** (for large scale violations)
  + Individual reparation claims does not result in a balanced solution – the economic capacity of the wrongdoing state must be taken into account.
  + Global reparation claims must be set at a realistic level in order to become effective.
  + Reparation shall not deprive population of its own means of subsistence
* **AGAINST WHO: Suggests bringing claims against individual perpetrators**
  + It may not be the gov that violated the rights, and $ would come out of own pockets
  + The idea of an IL relationship between private persons cannot be ruled out altogether. But
    - Practice is extremely scarce
    - The perpetrator may not have any assets
    - Under circs of large-scale crimes, would need default mech to ensure fair distribution
* **FORUM**
  + The more extreme the HR violations, the less able the national judicial apparatus to do anything about it!
  + US FC: *The ATCA may be viewed as a precursor to future development of IL*
  + The current ICTs do not provide for adjudication of private claims by victims of proven crimes – those must be brought before a national court
  + However, ICC provides for order directing convicted person to specify appropriate reparation to victims

**2. Consider options in NATIONAL CTS OF OTHER STATES, & univ jurisdxn over HR cases (Stephens)**

* In US, due to *ATCA*, possible to bring civil litigation in FC for tort committed abroad against non-nationals. (Revived in *Filartiga*, may be shut down by case currently at USSC questioning its extra-territorial application).
* **The *ATCA* cannot simply be replicated in other national legal systems**.
  + The reasons are mostly procedural: Most countries don’t allow contingency fees, because they are believed to promote litigation and be a burden on defendants.
* **We need to broaden our options by considering the domestic systems and how they provide varied options for accountability and redress.**
* Need international agreements that provide for universal jurisdiction over human rights cases, regardless of whether through criminal prosecutions or civil actions

**3. USE PRAGMATIC LEGAL STRATEGIES TO GET AROUND BARRIERS, such as exhaustion of local remedies (Boyle & Hannum)**

* ECHR – IRA members detained w/o trial, subjected to sleep deprivation, stress positions, etc.
* **BY WHO:** Only victims have standing (floodgates concern), so probably want to bring a severe case.
* **AGAINST WHO:** State – detention and torture by state.
* **FORUM:** In this case, ECHR
* **Need to use pragmatic legal strategies to get around barriers in order to enforce accountability of HR violations**.
  + E.g. The requirement of the **exhaustion of local remedies can be a barrier** 🡪 The ECtHR accepts the argument that **if the treatment was part of an administrative pattern** (was enshrined in local law), there may be **an exception**.

# IMPEDIMENTS TO LITIGATION

*Be creative – don’t just remove impediments but go at them from diff angles.*

*The impediments are there for good reasons, and stem from the way the world is structured:*

*e.g. UNIVERSAL JURISDICTION: The international level and criminal law potentially clash…*

* International Level:
  + Idea that anyone can fight the “war on terror” – by this the US has set HR back 30 years
  + ICTs are structured such that they are very deferential to power structures
  + UN System / Charter structured along lines of deference to military / economic power
  + Intl system constructed by consent – state can argue they didn’t agree to that rule or to a particular system of enforcing that law
  + States have intense notions of sovereignty that go against judicial enforcement at intl level, especially where that enforcement has strong teeth
  + There is no legislature (The GA just makes recommendations; SC deals with intl peace and security but is not representative)
* But criminal law…
  + Applies equally
  + Attempts to be rigid in the face of change (seeks to be executive, universal, consistent, equal in application)

*Practical result: e.g. Belgium decided to take univ jurisdiction seriously, & assert it as part of their criminal code. By this process, loads of people were getting indicted. ICJ said foreign min of the Congo had immunity.*

**1. EXHAUSTION OF LOCAL REMEDIES** (under ICCPR & Optional Protocol) **(Trindade, 1979)**

* Why require exhaustion of local remedies?
  + Basic idea of *sovereignty* – can’t just bypass territorial law
  + Idea that first responsibility lies with states to protect HRs – not just the intl world
  + Prevent floodgates – it is practically impossible for CCPR to deal with all claims
  + Important in order to raise local stds and improve channels of local enforcement over time
* Problem with local remedies – practical realities of enforcement
  + Important to give individuals / groups access to enforcement
  + Exhausting local remedies takes *time*, can be problems of *access* (cost)
  + Oppressors may avoid enforcement by *delaying* local procedures
  + Perverse to send someone to their oppressor for a remedy – in many places, there is no independence of the judiciary
* Suggestions / Approach
  + Deb: There may be exceptions / show impossibility / if treatment part of an *administrative* pattern may not need to exhaust local remedies first (see *Boyle & Hannum*, above)

**2. IMMUNITIES** (to HR suits in US courts)  **(Lininger, 1994)**

* **Immunities are very important structural impediments to HR claims**:
  + State immunity – cannot sue state in foreign jurisdiction where acts did not occur (*Al Adsani*; *Italy v Germany, (2010 ICJ*)
    - On the one hand, practical necessity – avoid jurisdiction shopping
    - On the other, perverse to expect *Al Adsani* to pursue remedy for torture in Iran!
    - Even where violation of *jus cogens*, no state in the world could disband state immunity because it would create bizarre sitn where you could pursue any state in any jurisdxn
  + Individual immunity – **immunity for** **individuals within government seriously shrinking!**
    - ICJ says foreign minister of Congo has immunity and Belgium can’t indict him. But immunities do not represent a bar to prosecution in certain circumstances, and there were dissenting & separate opinions: scope of indiv immunities in IL are shrinking!
    - Lininger: While in recent years the courts have bolstered the immunities of foreign governments, individual immunities have eroded.
* *[US statutes confer jurisdiction on federal district courts to hear lawsuits by aliens seeking damages for HR violations: ATCA and the Torture Victim Protection Act)*
* **If other countries joined the US in asserting domestic jurisdiction over HR violations committed elsewhere, torturers would have nowhere to hide.** Could have signif deterrent effect.
  + Benefits of civil litigation in US against violators of HRs
    - Can provide redress for victims of HR abuses who have no legal recourse in own countries
    - May bring symbolic victories that focus worldwide attention on HR violations
    - The threat of litigation effectively revokes the privilege of torturers to travel/reside in the US

**3. COMPLICITY – ATTACHING LIABILITY TO CORPORATIONS** (*ATCA*)  **(Forcese)**

* **Problem**: Getting around pragmatic problems of enforcing HR against states directly
* **Challenge:** How to hold corps responsible for HR violations carried out by state.
* In most jurisdictions we have looked at, there is a body of law that makes no mention of complicity or of corporate actors.
* But *ATCA* – borrows from IHRL, corporate law, and criminal law notion of complicity (a hybrid)
* **Solution: Hold corps accountable for HR violations carried out by state by using hybrid of IHRL and criminal law concept of complicity.**

CORPORATIONS & Human Rights

# RUGGIE FRAMEWORK

John Ruggie was appointed by the Secretary General to be the Special Representative for Business & Human Rights to see what can be done to encourage businesses to promote HR norms generally. This came after the Commission of Human Rights refused to endorse the *draft Norms* proposed by the Subcommission, that established HR obligations directly applicable to businesses. Instead, they asked the Secretary General to move the work forward. Further back in the history, initial attempts at the UN level in the 1970s to generate rules binding on corporations were unsuccessful. Shortly thereafter, “soft law” instruments such as the OECD Guidelines and ILO Tripartite Declaration (1976) were created.

**Ruggie: Only states owe HR obligs, and states enforce on corps. There is an indirect horizontal effect on corporations by placing obligations on states.** Everything else is just international lawyers like Clapham trying to reach beyond what positive sources allow for IHR.

**\*If corps owe HR obligations, they must be subjects at IL.**

* *Clapham* argues that CIL has emerged since 1945 making corps responsible for HR violations*.*
* *Ruggie* does not engage with this issue a great deal.

**Argument for extending HR obligations to corporations**:

* Companies are powerful
  + Not fully true that states are the repositories of power and economies capable of affecting HR
  + States have little ability to regulate powerful corps - the indirect horizontal effect is unrealistic
  + The other problem is the race to the bottom.
* Power implies responsibility
* The *UDHR* mentions obligations for “every individual and every organ of society”
  + Convincing argument? *UDHR* is not binding. But good arguments that it is custom now.
* Since there are weak governance zones in states where the government no longer has control, the indirect horizontal effect is unrealistic – corps are present in those zones though.

**Ruggie rejected the *Draft Norms* (controversially) because:**

* “ [T]he list included rights that states have not been recognized or are still being debated at the global level, including consumer protection, the “precautionary principle” for envt’l mgmt, and the principle of “free, prior and informed consent” of indigenous peoples and communities.” (825)
  + But: can just delete the rights that don’t apply.
* Alston raises concerns that saddling corps with constraints, restrictions, and obligations that belong to govs could undermine corporate autonomy, risk taking, and entrepreneurship. Could deter investors due to economic and reputational risks. ~Ruggie, p 826
* **Criticizes 2 key concepts in the *draft Norms***
  + “The concept of corporate spheres of influence, though useful as an analytical tool, seems to have no legal pedigree”, and it is ambiguous ~Ruggie, p 825
    - This is true
  + They are insufficient specific about what complicity means and when corps will be responsible through this new device. Complicity comes from criminal law, a lot of grey area.
    - Who cares where it came from – it makes sense conceptually.

**Ruggie’s New Architecture**

* States have the primary obligation for HRs. This is a good thing because
  + 1. Democracy – giving the elected institution the obligation to *ensure* respect
  + 2. To avoid undermining the willingness/ability of the state to do something themselves
* Although states are important, corps should be beside them
  + Ruggie’s view is overly formalistic:
    - 1. Many states are *not* democracies. The question is to what extent we should pretent that states are doing their best to protect HRs.
* Ruggie views **ICL** as by far the most consequential legal structure he has considered for HR, and says there should be more work done in this area.
* Ruggie’s idea is that the process of **acculturation** (think *Goodman & Jinks*) will be more successful: To get win-wins, stop thinking about compliance in just a legal sense, but focus on a broader sociological development that will have better effects in achieving compliance on the part of corps.
  + Theory of compliance: “The human rights community has long urged a move "beyond voluntarism” in the area of business and human rights. Sen's advice suggests that this move be accompanied by willingness on its part also to look "beyond compliance.””
  + Strange to say getting win-win sitns means not focusing on the law. Can get away with anything
* Alternatives for enforcement – forms of corporate regulation
  + Soft law mechanisms
  + Voluntary industry wide regulation
  + Self-regulation - Critique: Does this make sense when the interests of corps are contrary to HRs?
  + The UN Global Compact -Problem is that it is voluntary. Crowds out other opportunities for accountability.

**Ruggie’s approach has insufficient teeth –** it doesn’t change the *status quo* in any meaningful way.

# 1. ILO TRIPARTITE DECLARATION

#### Ernst & Young – private audit of Nike in Vietnam, 1997

* Vietnam stipulating very low stds to begin with (coopted) and Nike not even meeting those
* **Most obvious provisions of declaration violated by Nike factory in Vietnam is article 38 requiring highest standards of safety and health… make hazards known and provide protective products and processes.**
  + The workers trade union is actually being organized by the managers of the company
  + 4 main doors which are not sufficient
  + No adequate water reserve for comfort use of workers
  + Chemicals stored together with flammable fuels near work space
  + Personal protective equipment not daily provided
  + Dust exceeds standard by 10 x
  + Very very hot
  + Between 6 and 177 x higher than accepted standards of acceptable exposure of toluene
  + 128 employees (77.57%) getting respiratory disease, and 7 (4.24%) getting heart disease
  + 73 cases of labor accidents in 7 month period, most due to inadequate understanding of how to operate the machines

**Should IHRL play some role in establishing minimum standards bcos it is a question of dignity?** (or defer to the state?)

* Against IHRL playing a role
  + Putting high restrictions on companies encroaches on their autonomy & entrepreneurship
  + \*People should have autonomy to make own choices – only coercion we should be concerned about, not wages
  + Market dictates what people will be paid and what kind of conditions they will accept 🡪 Therefore not role of IHRL to create false standards that elevate these kinds of things
  + Nike provides employment to people
  + ***Ruggie: This is the responsibility of the state – indirect effect on corps***
* For IHRL playing a role
  + Ethics
  + We need to establish minimum standard in order to avoid a race to the bottom
  + Role of IHRL is to set standards where national states are unable to
  + \*Sure, autonomy is a good point, but where people consent to possibility of diseases for just over $1 a day, must be coercion involved
  + Unions may be unable to deal with the problems that IHRL may need to address, given the globalization of markets and spread of workers all over the world
  + ***Against Ruggie: Vietnam doesn’t have the money to do anything about it***
* Seems like it’s a trap / prisoner’s dilemma – apply universal standard, employees lose opportunity to work in factory. Don’t apply it, employees consenting to very problematic standards.
  + Some argue that if you drive up standards everywhere, there is no anti-competitive element because everywhere. Then people can’t consent to absolutely anything out of desperation.
  + DA: On the other hand, these countries have their competitive advantage *because* they have such low standards. So having same standard everywhere *would* have an anti-competitive element for them.

#### ILO – Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy, 2006

* ILO trying to bring gov, employers, and employees to the table to lift basic work standards x board
* Aims to improve living standards and satisfaction of basic needs (s. 1) – employment promotion, equality of opp & treatment, security of employment, training, work conds, min age, safety & health
* **Significant document in that it** 
  + **(1) establishes linkages between human rights and labor codes; and**
  + **(2) purports to apply to corporations directly**

#### ILO – [Complaints] Procedure, 1986

* **Complaints procedure is tremendously under-developed**
  + Begins in 1986 – called the *Interpretive Process* – will not be questioning national law, won’t be interpreting conventions and recommendations that apply apart from Declaration
  + Ability to take dispute to Office… within the ILO and ask for an interpretation
  + 5 such procedures only since 1986 – astonishingly low – completely under-utilized
  + Surprising the extent to which the Tripartite Decl gets so much play in HR (for the 2 reasons it is significant above), but in terms of enforcement it is one of the weakest mechs imaginable.

**CONCLUSION: THE ILO TRIPARTITE DECLARATION DOES NOT OFFER MUCH ACCOUNTABILITY**

* **The Declaration is very weak and largely inconsequential for corporations like Nike, but it at least references corporate responsibility for HR which is a pushback against Nike**
* It is helpful for conveying obligations, but weak to ground enforcement/litigation (think *Collingsworth*)
* Low value in terms of acculturation

# 2. EXTRACTIVE INDUSTRY & OECD GUIDELINES

**Case against Afrimex – some accountability but by and large ultimate remedy for complicit in HR abuses was to ask Afrimex to create CSR policy document! (seems weak in context of what company was doing)**

Congolese Wars ‘98–present: NATURAL RESOURCES WAR, financed by the companies who get the NRs

#### UN Panel of Experts on the Illegal Exploitation of Natural Resources and Other Forms of Wealth on the DRC – Final Report, 2002

* Panel established in 2000 by the UN
* Super critical report – well-researched and written
  + Rwanda claims it needs to secure its borders by maintaining a military presence in DRC
  + Instead, they are there for cassiterite, coltan, and other resources, raid people – economic exploitation
  + The bulk of coltan exported from eastern DRC has been mined under the direct surveillance of RPA mining detaches nd evacuated by aircraft directly to Kigali of Cyangugu. No taxes paid.
  + **The objective of military activity is to secure access to mining sites or ensure a supply of captive labor**
  + Frequent armed conflict 🡪 pop. displacement 🡪 food insecurity, malnutrition, mortality, drop in school enrolment, abuse of women, children become instruments of war, forced to work in mines and conscripted to the armed forces
  + High mortality rate of children by malnourishment are the direct result of the occupation by Rwanda and Uganda
* What were some of the HR concerns the Panel’s report identified?
  + **Forced labor** - Variety of forced labor regimes at sites managed by RPA mining detaches, for coltan collection, transport, domestic services. Reports of use of prisoners imported from Rwanda to work as indentured labor.
* How did the UN Panel view corporate involvement in the situation?
  + A number of companies have been involved and have fuelled the war directly, trading arms for natural resources. Others have facilitated access to financial resources, which are used to purchase weapons. Companies trading minerals… have prepared the field for illegal mining activities in the country.
* **What does “illegal” mean in the context of natural resource exploitation?**
  + Not illegal!
  + ”No lawyer on the panel - “The Panel is hoping that this report will contribute to a shift in policies — in the light of the recent encouraging political and military developments on the ground — that will bring the exploitation of resources back to a legally acceptable level.”
* **UN Panel denounced 85 companies using OECD Guidelines for Multinational Enterprises as a baseline** (some signatories, some not)

**News report: “Congo’s Tin Soldiers”**

-Global demand for tin is directly link to HR abuses and fight for control over the Bissiay Mine in DRC

-Cassiterite – Bissiay Mine, and Goma, DRC

-Afrimex been exporting Cassiterite from eastern congo for more than 20 years

-Interview with Mr. Kotecha (his business is Afrimex) – said salary structures are low but better miners and porters earn something than nothing. If I didn’t do it, somebody else would. I’m not here to be some sort of moral savior –

-Video’s allegations against Afrimex

* Health and safety
* Child labor
* Benefiting from forced labor
* Absence of due diligence to find out

-Nothing happens to those companies (Afrimex). Ultimately, they say there is no law governing those sit’ns – only OECD Guidelines

#### OECD Guidelines

*Part IV:* Human rights - Recommendations – **not legally binding**

* Enterprises, within the IHR framework & that of domestic laws/regs, should:
  + 1. Respect HR… avoid infringing… and address adverse HR impacts…
  + 2. Avoid causing or contributing to adverse HR impacts, and address when they occur
  + 3. Seek ways to prevent/mitigate adverse HR impacts…
  + 4. Have a policy commitment to respect HR
  + 5. Carry out HR due diligence iaw their size, nature, and context of ops & severity of risk
  + 6. Provide for or co-operate through legitimate processes in the remediation of HR impacts

Super weak: national contact points

If no agreement, nothing could be done, end of matter.

So UN suggests more teeth

**Like ILO Tripartite Declaration, also significant in referring to HR obligations** – indirect effect: hold states responsible for not holding corps responsible. *But what are those obligations!!??*

**What is the best way of creating compliance?**

* *Collingsworth*: We need litigation
* *Ruggie*: Collectively change cultural values
* STRATEGY: Litigation would be counter-productive because (1) somebody else would take over the abuses; and (2) people would lose jobs
  + We need to change the culture! (Carrot)
  + Personal liability is one solution (stick)
  + Robust civil society to stigmatize those things
  + Need accountability / legal framework
  + ICL is one sol
* 2 MODELS FOR SOLUTION
  + 1. International Criminal Law
  + 2. Require companies to list where their resources come from.

#### UK National Contact Pont for OECD Guidelines for Multinational Enterprises - Final Statement, 2008

**Consideration of the Afrimex case brought by the Global Witness**

* **What is a National Contact Point (NCP)?** Institution in each country that reports to the OECD.
  + With respect to the OECD Guidelines, NCP receives complaints, conducts initial desk-based assessment, helps parties to mediate, if mediation fails makes determination of case
  + Because not developed and used, very weak.
* **What were the HR allegations against Afrimex?** Do they capture the significance of the company’s responsibility?
  + Allegations that Afrimex paid taxes to rebel forces in the Democratic Republic of Congo and practiced insufficient due diligence on the supply chain, sourcing minerals from mines that used child and forced labour, who work under unacceptable health and safety practices.
* **What did the National Contact Point conclude?** 
  + Upheld majority of allegations brought by Global Witness. Afrimex initiated the demand for minerals sourced from a conflict zone. Afrimex sourced these minerals from an associated company SOCOMI, and 2 independent comptoirs who paid taxes and mineral licences to RCD-Goma when they occupied the area. These payments contributed to the ongoing conflict. Therefore the NCP concluded that Afrimex failed to contribute to the sustainable development in the region; to respect human rights; **or to influence business partners and suppliers to adhere to the Guidelines**. The NCP concluded that Afrimex did not apply sufficient due diligence to the supply chain and failed to take adequate steps to contribute to the abolition of child and forced labour in the mines or to take steps to influence the conditions of the mines.
* **What orders did they make?**
  + *Recommends* Afrimex formulate a CSR policy document,
    - suggesting it draw upon Ruggie framework of “Protect, Respect, and Remedy” – with detailed guidance in specific functional areas - requiring its suppliers to do no harm: to take credible steps to ensure that military forces do not extract rents along the supply chain; to require a commitment that adequate steps are taken to ensure that minerals are not sourced from mines using forced and child labour, and are not from the most dangerous mines
    - pointing it to OECD Risk Awareness Tool
  + Recommends Afrimex take steps to ensure due diligence.
* What are the strengths and weaknesses of National Contact Points for enforcement of HR norms?
  + Strengths
    - Acculturation
    - Provides some sort of forum for pressuring companies where no legal options exist - better than nothing
  + Weaknesses
    - Very weak! No penalty. No enforcement. Rarely used.
    - Creates a smokescreen

# 3. ATCA CASE AGAINST YAHOO

1. **Alien Tort Claims Act:**

* **ATCA can no longer be applied extra-territorially**. Re Shell & Nigeria (***Kiobel, 2013 USSC****)*. Cannot be applied to conduct outside US. 4 JJs say it should be able to be applied to US companies though.
* Pragmatic regulation, attempt from norm entrepreneurs to generate new mechanisms of accountability in face of tremendous access. 1769 Judiciary Act: district courts have jurisdiction over any civil claim **by an alien** for a **tort only** in violation of **law of nations** or US law. Used twice between 1769 and 1980. Universal CIVIL jurisdiction.
* Case in Florida (*Filartiga*), uses this successfully. Courts assumed this can be applied extra-territorially.
* **Beth Stephens’** article: ATCA Dominant mechanism for holding corporations civilly liable for IHR violations
  + 1. Main signif is procedural: US allows contingency fees! Allows ppl from global S to finance litigation.
  + 2. Gets beyond shortcomings of HRs obligations only applying to states – allows civil liability for breach of *Law of Nations* – interpreted to thus apply Law of Nations to corporations
  + 3. Gets beyond extra-territorial limitations - most states limit jurisdiction to conduct occurring in that state only.

1. **Right to privacy:**

* ICCPR: article 17. Includes prevention of attacks on reputation.
* Privacy can be derogated from. (not in ICCPR article 4)
* What does right to privacy entail (inter alia)?

1. Personal identity, [right to choose your name: *Coerial v Netherlands*]
2. Sexual identity [*Toonen v Australia* 1994. Homosexuality decriminalised on basis of right to privacy]
3. Dwarf tossing [*Wackenheim v France* 1991. Dwarf wanted to be able to have people pay him to be thrown by people and state intervened and said this was too humiliating but no, he has right under privacy]
4. Search and seizure [*Caldas v Uruguay* 1983]
5. Surveillance [*Estrella v Uruguay* 1980]

#### Yahoo! Inc case, (2007) US District Court Northern District of California Oakland Division – SETTLED

ATCA case against Yahoo for being complicit in acts violating freedom of speech, torture, unlawful detention, and other violations of IHR. **ATCA is more effective in generating a remedy than any of the other options.**

* Yahoo discloses info on individual to Ch gov. Solitary confinement, arbitrarily detained for 24 mths, tortured, convicted of crime of hostility towards the state- inciting to subvert state power. Convicted on basis of basic pro-democratic criticisms of China from the list-serve.
* HRs: freedom of expression, torture, privacy, unlawful detention, (24 mths without a trial), democratic participation (arguably a basic human right). There’s a cascade with privacy at the top cos without this violation they would never have found him, so it’s all contingent on Yahoo’s disclosure, direct participant in the violation of privacy and is therefore **complicit** in all the other HRs violations. (Idea of complicity borrowed from criminal law.)
* **\*This case corroborates “spectacularly” Stephens’ argument that these suits are best fought under the ATCA:**
  + Ideally you want to sue Chinese gvt! Can’t under *ATCA* because of state immunity, can’t sue in China because you’ll get killed, by exhausting local remedies you’re putting yourself in danger.
  + Only thing exposed is the corporation, company at top of cascade and then sue for complicity. There is no other option.
  + **C:** Yahoo settles and pays family several million dollars.

**Implementation and Consequences**

* Society in China is more free because of Yahoo!’s presence: yes we’re in bed with China but on the whole China has more access to info now than before. We’re a positive force, back off on the complicity stuff…
* Legal problem: Yahoo! Is complying with Chinese law, hence recourse to intl law. Doing this under ATCA is very powerful because under Chinese domestic law there’s no violation.
* Is there cultural relativity argument here? If as China you want system of governance that’s different from capitalist hegemony shouldn’t you be allowed to?
* Pursuing Yahoo and Google and Bing under ATCA + civil society advocacy campaigns is a viable way of leveraging HRs because there is a big incentive for China to change not to lose foreign investment.
* Yahoo! Knew what was going on when they disclosed names bcos Amnesty and HR Watch told them
* HRs can overlap with other schemes/mechanisms etc. Why is there no criminal prosecution of individual who provided information to China or of Yahoo as a company??? Do these settlements get used to off-set REAL enforcement.

# 4. INTERNATIONAL CRIMINAL LAW

**Possibilities of coupling criminal law with IHRL norms to form a remedy – use indiv. responsibility**

HR has made good contribution to CSR. But should we stop looking at HRs and look at criminal instead? Think about Ruggie / Kennedy generally.

* Ruggie: ICL is effective mechanism. Should look into more. Individuals responsible for *crimes* instead of corps responsible for *HR violations*.
* Kennedy: On a balance, the negatives of HRs may outweigh the positives. 🡪 If we agree with Kennedy, may be good to look to crim law instead.
* But remember that ICL is very deferential to states as well (ICC complementarity)

#### Prosecutor v Van Anraat, (2007) Netherlands – VERY SIGNIFICANT!! – CRIMINAL ENFORCEMENT OF HUMAN RIGHTS VIOLATIONS

* Domestic prosecution of an intl crime (war crimes). Takes place in the Netherlands,
* **\*\*One of the first cases where state prosecutes its own nationals for intl crimes.**
* Dutch gvt says this Dutch businessman is complicit in intl war crimes, sold chemicals to Saddam who then gassed Iraqi Kurds. He’s convicted of war crimes in Dutch courts. Appellate case:…
* Back story: Van Amraat used to be a Dutch spy so that his gvt is now turning on him probably has some serious back story that we don’t know
* (Video: problem of imagination, we can talk about use of chemical weapons but we can’t actually imagine it etc).
* Commercial transaction
* Corporate criminal liability came from US beginning of 20th C so corporate criminal liability invented. Punishments include shutting down company, putting in new directors etc.
* Is this about business and HRs or about something else? He shared responsibility for these crimes based on doctrine of complicity. He’s not a state, he’s just a business so HRs don’t apply - we should go after the Netherlands. But we can’t go after the Netherlands because there’s no extra-territorial application of HRs in this cxt - Dutch gvt doesn’t have effective control over this area in Iraq.
* **Appeal to intl criminal law allows you to get around state actor problem and extra-territoriality of human rights question.**
* What is legal basis for this case? What’s the violation and what relationship does this have with HRs norms? **Basis for his conviction linked to HRs norms. [complicity to war crimes and genocide**]. How is dutch court prosecuting intl war crimes. **Netherlands have transposed intl law.** War crimes are part of customary intl law which is wider than Geneva conventions
* **Controversial use of complicity:** Court applies Dutch standard of complicity. Controversial cos intl law defines complicity too. ICC has standard for complicity based on **purpose**: to be responsible for consequences Van Amraat would have had to supply the chemicals with the *purpose* of those people dying, needed to WANT that result. The purpose standard exonerates indifference! BUT under Dutch law: standard is as low as being aware of a risk that crimes will result and going ahead anyway. Only possible application of the amount he sold was making mustard gas, quantities purchased were huge. So if this happens you share responsibility for that consequence. Ct has choice between intl standard (acquittal) and domestic standard. Ct chose dutch standard!

**Implications for our theory of human rights**

* **Using individual responsibility to ensure HRs**
* Useful to spend $21 million on this? Does the 17 years in prison have a positive effect on respect for HRs by businesses?
* But we won’t commit of genocide on this standard cos you can’t just *risk* genocide, you need a purpose to destroy racial ethnic religious group.
* **When we take doctrine of complicity away from broad discussions and apply it in criminal cxt it’s actually very inconsistent from 1 jurisdiction to the next!!** Think *Ruggie’s* criticism of draft Norms*.* JGS: should have single def.
* 10 countries involved in the investigation: Jordan, Switzerland, Japan, Iraq, Netherlands, Singapore, Turkey, Belgium, Italy, Iran. Need to trace evidence through all of these countries. **Cost the Dutch $21m to bring this case!!! 🡪 The significant cost of enforcing HRs extra-territorially is a serious barrier to justice**.
* Got 17yrs in prison. Is this the best strategy??