
HUMAN RIGHTS

SECOND EDITION

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Charter art. 1. Under Article 56, "[a]ll Members pledge themselves to take joint and separate action in cooperation with the Organization for the achievement of the purposes" of the United Nations, purposes that include promoting "universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language or religion." *Id.* art. 55.

The Charter does not define human rights, and at one time there was considerable debate as to whether the above articles created a legal obligation for states not to commit gross violations of widely-accepted human rights. See generally Thomas Buergenthal, *The Evolving International Human Rights System*, 100 AM. J. INT'L L. 783, 785-87 (2006). With the elaboration and widespread acceptance of numerous multilateral human rights treaties, see Section (D), *infra*, and with the increasing activity of human rights bodies operating under the auspices of the Charter, see Chapter 7, *infra*, there is less need to determine the precise scope of the Charter's human rights standards. However, for a state that is not a party to a relevant covenant or convention, the Charter remains an additional source of legal obligation. During the 1970s, for example, the U.N. General Assembly declared the practice of apartheid in South Africa to be a violation of the Charter's human rights principles. See G.A. Res. 32/42, 32 U.N. GAOR at 498, U.N. Doc. A/32/L.36 & Add. 1 (1977).

2. "THE INTERNATIONAL BILL OF RIGHTS"

There is no single document entitled the "International Bill of Rights," but that label is now commonly bestowed upon three instruments taken together—the Universal Declaration of Human Rights ("UDHR"), the International Covenant on Civil and Political Rights ("ICCPR"), and the International Covenant on Economic, Social, and Cultural Rights ("ICESCR").

Toward the end of the Second World War, several smaller states and non-governmental organizations proposed that an International Bill of Rights be made a part of, or appended to, the U.N. Charter. Although the Charter did not include such a document, the new U.N. Human Rights Commission considered drafting a Bill of Rights when it began its work in 1946. The members of the Commission quickly concluded, however, that such an exercise would be an extended undertaking and that it would be preferable and more expeditious to produce a declaration of rights while proceeding simultaneously to prepare a legally binding international agreement.

The U.N. General Assembly adopted the UDHR on December 10, 1948. The ICCPR and ICESCR took a further eighteen years to complete (in 1966), and another ten years to come into effect (in 1976). Ratification of the two Covenants proceeded slowly during the 1970s and 1980s, but accelerated following the end of the Cold War. As of January 2009, 164 states were parties to the ICCPR and 160 states were parties to the ICESCR. The United States ratified the ICCPR in 1992 subject to a package of reservations, understandings, and declarations. See Chapter 10(B), *infra*. The United States signed the ICESCR in 1977 but has not ratified it.

C. THE PRINCIPAL INTERNATIONAL HUMAN RIGHTS AGREEMENTS AND INSTRUMENTS

1. THE U.N. CHARTER AS HUMAN RIGHTS LAW

The United Nations Charter, a treaty to which 192 states (virtually every nation now in existence) are parties, declares it to be a purpose of the United Nations "[t]o achieve international co-operation . . . in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion." U.N.

a. THE UNIVERSAL DECLARATION OF HUMAN RIGHTS

The UDHR is the foundational international instrument of the human rights movement. It is widely viewed as authoritative, including by states that came into existence in the years since its adoption in 1948. There has been no serious suggestion that the Declaration be reexamined or amended, despite the fact that the world has changed significantly during the more than six decades of its existence. Among the UDHR's greatest contributions is its influence on the development of constitutionalism and its reference or incorporation in numerous constitutions adopted in the second half of the twentieth century. See Tom Ginsburg, Svitlana Chernykh and Zachary Elkins, *Commitment and Diffusion: How and Why National Constitutions Incorporate International Law*, 2008 U. ILL. L. REV. 201, 208 (comprehensively surveying national constitutions and finding that sixty-nine constitutions mention the UDHR and twenty-four constitutions expressly incorporate its provisions).

The content of the UDHR is a remarkable synthesis of political-civil and economic-social rights, with equality and freedom from discrimination as major themes. Included in the former category are the rights to life, liberty, and security of person, to fair criminal process, to freedom of conscience, thought, expression, association, and privacy, to seek and enjoy asylum, to leave one's country and return to it, to marriage and family, and to property. The UDHR also declares the will of the people to be the basis of the authority of government, and calls for universal suffrage and bona fide elections. Its social and economic provisions include the right to work and to leisure, to health care, and to education. The Declaration does not expressly distinguish between civil and political rights and economic and social rights. But states recognized from its inception that the two categories of rights may have different theoretical justifications, and that each may require different normative elaboration, different types of legal obligations, and different remedies for their violation. We explore these differences briefly below and in more detail in Chapter 13, *infra*, on economic, social, and cultural rights.

Notwithstanding its illustrious pedigree, the formal status of the UDHR in international law remains somewhat unsettled. The General Assembly adopted the UDHR as a nonbinding statement of principles (albeit one that some commentators viewed as an elaboration of the inchoate human rights obligations in the Charter). As such, the Declaration was not eligible for ratification by U.N. member states. Nevertheless, as national executives, legislatures, and courts referenced the UDHR with increasing frequency, a consensus emerged that at least some of its provisions had become binding as a matter of customary international law. Given the large areas of overlap between the Declaration and other human rights treaties, disputes over its legal status arise only infrequently. But the conclusion that a provision of the UDHR has achieved the status of customary law would, for example, be important for states that have not ratified the ICCPR or the ICESCR or have done so with broad reservations.

Following the adoption of the UDHR in 1948, the Human Rights Commission began the task of elaborating a legally binding agreement that contained, in a single instrument, all of the rights that the Declaration

proclaimed. However, Western states insisted upon bifurcating the draft treaty, which eventually resulted in the 1966 adoption of two separate covenants—the ICCPR and the ICESCR. Notwithstanding the formal separation of the two treaties and categories of rights they contain, subsequent U.N. resolutions have repeatedly reaffirmed the equal value, indivisibility, and interdependence of both categories of rights. See, e.g., Vienna Declaration and Programme of Action, World Conference on Human Rights, U.N. Doc. A/Conf. 157/23 (July 12, 1993).

b. THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS ("ICCPR")

The core operative provisions of the ICCPR are contained in Article 2. Article 2.1 provides that "[e]ach State Party to the present covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant...." Article 2.2 further requires each state party to "to take the necessary steps ... to adopt such legislative or other measures as may be necessary to give effect to the rights recognized in the present Covenant." And Article 2.3 specifies "that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy," which shall be "determined by competent judicial, administrative or legislative authorities...." In addition, the ICCPR establishes international mechanisms to monitor the implementation of the treaty by states parties. We discuss these implementation mechanisms in Chapter 7(A), *infra*.

The "rights recognized" in the ICCPR include the civil and political rights in Articles 1–21 of the UDHR, generally with only minor differences.* Civil and political rights are often described as negative liberties. They are freedoms and immunities that a state can respect by abstention, i.e., by leaving the individual alone. In fact, to describe all civil and political rights as negative is misleading. Several of such rights apply in the criminal process, by which a state may legitimately take liberty and property (or even life) in punishment. But in those cases the state is required not merely to leave the individual alone but "positively" to organize its institutions and laws to assure against arbitrary detention, and to provide due process, fair trial, and humane punishment. Moreover, the obligation to "ensure" rights has been interpreted as requiring the state to take steps to protect them against private infringement.

Several civil and political rights protected in the ICCPR are expressed in categorical terms. For example, Article 8.1 provides that "[n]o one shall be held in slavery; slavery and the slave-trade in all their forms shall be prohibited." However, other civil and political liberties in the Covenant (and in other human rights treaties and national constitutions) are not absolute. One person's right may conflict with another's, and one right may

* One important right included in the Declaration but not in the ICCPR is the right to own and not to be arbitrarily deprived of property (UDHR Article 17). Ideological conflicts concerning the expropriation of foreign investment prevented agreement on the

scope of a right to property in the ICCPR. Property rights provisions were, however, included in the European, American, and African human rights instruments. For a more detailed discussion of property rights, see Chapter 13, *infra*.

be limited by another right; in addition, individual rights may impinge on other societal values or public interests.

Rights limitations in the ICCPR generally follow a common pattern. The first sentence or paragraph of an article describes the protected right or freedom, and the second sentence or paragraph enumerates the limitations that states may permissibly impose on that right or freedom. For example, the Covenant describes the right of assembly in the following terms:

The right of peaceful assembly shall be recognized. No restrictions may be placed on the exercise of this right other than those *imposed in conformity with the law* and which are *necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others.*

ICCPR art. 21 (emphasis added).

The words emphasized above reveal that limitations on rights are themselves restricted, and that the articulated purposes of limitations are to be narrowly construed. Some of the highlighted terms have historic meanings in national constitutional jurisprudence. For example, the Covenant's drafters emphasized the special character that "ordre public" had in French jurisprudence, a meaning that was not fully captured by the English words "public order." See Alexandre C. Kiss, *Permissible Limitations on Rights*, in *THE INTERNATIONAL BILL OF RIGHTS* (Louis Henkin ed., 1981). Over time, however, human rights tribunals and treaty bodies have developed a rich and extensive international jurisprudence that elaborates and refines the meaning of each of these key phrases.

Limitations similar to those applicable to the right of assembly are found in the following ICCPR provisions: Article 12.3 (limitations on freedom of movement and residence and the right to leave a country and to return to one's own country); Article 18.3 (limitations on freedom of thought, conscience and religion); Article 19.3 (limitations on freedom of expression); and Article 22.2 (limitations on freedom of association). Former ICJ President Rosalyn Higgins has labeled these limitations provisions as "clawback clauses" because they permit states parties to restrict protected rights and freedoms for a specified list of public reasons. Rosalyn Higgins, *Derogations Under Human Rights Treaties*, 48 *BRIT. Y.B. INT'L L.* 281, 281 (1976-77).

Finally, it is important to distinguish limitations on ICCPR rights and freedoms from "derogations" in times of national emergency (see pp. 207-09). Unlike derogations, limitations are not restricted to emergencies but are permitted at all times under a state party's police power, for such reasons as national security, public order, public health or morals or the rights and freedoms of others.

c. THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL, AND CULTURAL RIGHTS ("ICESCR")

The bifurcation of the Universal Declaration of Human Rights into two legally binding covenants—one addressing civil and political rights and the

other concerning economic, social and cultural rights—highlighted a number of differences between the two categories of rights.* These include the nature and scope of the obligations assumed, the permissible limitations on rights that may be imposed in the public interest, and the procedures for monitoring compliance and implementation by state parties. For a discussion of implementation issues, see Chapter 13, *infra*.

The adoption of a legally binding international agreement to protect economic, social and cultural rights did little to resolve competing conceptions of how to structure the relationship between state values and human values. Although the drafters intended the ICESCR to be acceptable to socialist states, developing nations, and industrialized "free-market" countries, the differences between the two Covenants have been often characterized as reflecting political and ideological divisions between these groups of countries. In addition, some wealthy nations resisted what many poorer states demanded—commitments by the former to provide economic assistance to the latter to help satisfy economic and social needs of their inhabitants.

Compromises concerning these areas of disagreement are reflected in the distinctive phrasing of the ICESCR's text. Consider the obligations of states parties in Article 2:

Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and cooperation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.

In comparing Article 2 of the ICESCR to the quoted provisions of Article 2 of the ICCPR on p. 217 above, several differences are immediately apparent. Note in particular the phrases "to take steps", "through international assistance and cooperation", "to the maximum of its available resources" and "to achieving progressively" in Article 2 of the ICESCR.

Similar language appears in the treaty's rights provisions, which include the right to work (art. 6); to social security (art. 9); to an adequate standard of living, including food, clothing and housing (art. 11); to the highest attainable standard of health (art. 12); the right to education (art. 13); and the right to take part in cultural life (art. 15). For example, Article 11 "recognize[s] the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the realization of this right. . . ."

According to many commentators, these phrases signal that the rights protected in the ICESCR are "programmatic and promotional" in nature, to be achieved incrementally over time. IAN BROWNLIE, *PRINCIPLES OF PUBLIC*

* In some instances, the rationale for allocating a right to one category over another is not always obvious. In others, a right spans both categories. For example, the right to work (ICESCR art. 6) might be treated as a

civil right, and the right to join a trade union (ICESCR art. 8) may also be a component of the right of association protected by ICCPR Article 22.

INTERNATIONAL LAW 576–77 (5th ed. 1998). In addition, what might be described as the “softness” of the undertakings in the ICESCR made it unnecessary for the drafters to add a derogations provision to the treaty or to include limitations clauses to the same extent as in the ICCPR.

It is nevertheless undisputed that the ICESCR imposes legally binding obligations on states parties, and the Committee on Economic Social and Cultural Rights—the counterpart to the Human Rights Committee in the ICCPR—has developed an extensive jurisprudence that interprets and extends ICESCR rights and freedoms in novel and important ways. Most importantly, the ICESCR Committee has developed a tripartite framework of obligations for all states parties—the obligation to respect, the obligation to protect, and the obligation to fulfill.

In the Committee’s distinctive taxonomy, “obligations to respect” entail responsibilities of direct application and effect, “obligations to protect” generally require states to prevent interference by third parties (particularly nonstate actors) in the enjoyment of the right in question, and “obligations to fulfil” involve the duty of states parties to adopt appropriate legislative, administrative, budgetary, judicial, promotional, and other measures aimed at “the full realization” of the rights in question.

Michael J. Dennis & David P. Stewart, *Justiciability of Economic, Social, and Cultural Rights: Should There be an International Complaints Mechanism to Adjudicate the Rights to Food, Water, Housing, and Health?*, 98 AM J. INT’L L. 462, 491 (2004). Chapter 13, *infra*, addresses the interpretation of the ICESCR in greater detail.

D. SELECTED UNITED NATIONS HUMAN RIGHTS AGREEMENTS

Beginning with the Genocide Convention in 1948, the United Nations has sponsored a growing number of conventions on specific human rights issues. These subject-specific conventions elaborate and expand upon the more general obligations in the two covenants. Each convention also establishes a “treaty body” of international experts to monitor the implementation of protected rights and freedoms by states parties. Members of the United Nations have adhered to these specialized treaties in increasing numbers, although sometimes with broad reservations. (When the United States has ratified these conventions, it has always done so subject to a package of reservations, understandings, and declarations.) Also noteworthy are conventions adopted under the auspices of the International Labor Organization (“ILO”), several of which protect the human rights of workers.

We provide a brief overview of several of these subject-specific treaties below, deferring a more detailed analysis to other chapters of the casebook.

The Genocide Convention

The Convention on the Prevention and Punishment of the Crime of Genocide was the first post-war human rights agreement. It was adopted in

response to the horrors of the Holocaust and with the hope of preventing its recurrence. As of January 2009, 140 countries, including the United States, were parties.

Article I of the Genocide Convention confirms that genocide is a crime under international law which states parties undertake to prevent and to punish. Article II defines genocide as the commission of certain violent acts “with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such.” States parties are obligated to try and to punish genocide, as well as conspiracy, incitement, and attempts to commit genocide, either in a national court or by an international tribunal.

Genocide is one of the crimes within the jurisdiction of the International Criminal Court and the ad hoc criminal tribunals for the former Yugoslavia and for Rwanda. See Chapter 7(C), *infra*. In 2007, the International Court of Justice issued an important ruling interpreting and applying the Genocide Convention to the Balkan wars of the 1990s. See *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, 2007 I.C.J. 91 (Feb. 26) (merits). We analyze the ICJ’s judgment in Chapter 7(A) & 7(C), *infra*.

The Convention on Racial Discrimination (“CERD”)

The Convention on the Elimination of all Forms of Racial Discrimination (“CERD” or “Race Convention”), adopted by the U.N. General Assembly in 1965, had been ratified by 173 countries as of January 2009. The United States became a party to the convention in 1994. CERD elaborates and extends the equality and non-discrimination provisions of the two Covenants with regard to racial classifications, and it includes a special condemnation of racial segregation and *apartheid*. Among other obligations, states parties “undertake to prohibit and to eliminate racial discrimination in all its forms.” CERD Article 5. They also agree to engage in affirmative action as a temporary measure until full equality is achieved. CERD Article 2.2.

As with the two covenants and other specialized human rights conventions, CERD creates a “treaty body” to monitor implementation by states parties. The Committee on the Elimination of Racial Discrimination receives periodic reports describing each state’s implementation of the convention and it issues statements of concern and recommendations in “concluding observations” following its review of the reports. The convention also establishes three other mechanisms by which the CERD Committee performs its monitoring functions—an early-warning procedure, an examination of interstate complaints, and a review of individual complaints against states that have accepted an optional complaints clause.

The Convention on the Elimination of Discrimination Against Women (“CEDAW”)

The Convention on the Elimination of all Forms of Discrimination Against Women (“CEDAW”), adopted in 1979, was modeled in many respects on CERD, both with regard to the scope of its substantive obligations and its international monitoring mechanisms. As of January

2009, 185 countries were parties to CEDAW (not yet including the United States, which has held ratification hearings on several occasions since President Jimmy Carter signed the convention in 1980). Notwithstanding this large number of ratifications, the international campaign to eradicate gender discrimination has faced historic obstacles, many deeply rooted in culture, religion, and tradition. This has led many states, in particular Islamic nations, to ratify CEDAW subject to expansive and controversial reservations.

We analyze CEDAW in greater detail in Chapter 8 below in the context of a broader discussion of the human rights of women.

The Convention Against Torture

In 1984, the U.N. General Assembly adopted the Convention against Torture and other Cruel, Inhuman, or Degrading Treatment or Punishment ("UNCAT"). As of January 2009, 146 countries had ratified the convention, including the United States in 1994.

The UNCAT begins with a detailed definition of torture (art. 1) and a categorical ban of the practice even during "a state of war or a threat of war, internal political instability or any other public emergency" (art. 2.2). The obligations in the convention are elaborated with far greater specificity than the simple ban on torture and cruel, inhuman or degrading treatment or punishment in Article 7 of the ICCPR. For example, Article 4 requires states parties to treat "acts of torture . . . attempt[s] to commit torture," and "complicity or participation in torture" as domestic crimes. In addition, Article 5 requires each state to "establish its jurisdiction" over such crimes when the offenses are "committed in any territory under its jurisdiction" and also when the alleged offender "is a national of that state" or "is present in any territory under its jurisdiction." (There is no analogous obligation to criminalize or prosecute cruel, inhuman or degrading treatment or punishment.)

The Convention Against Torture has assumed particular prominence in the context of state responses to international terrorism, including the practice of "extraordinary rendition" (the subject of the introductory case study in Chapter 1), and custodial interrogations (see Chapter 14, *infra*). The convention also has important implications for the human rights of refugees, which we consider in Chapter 5(I) below.

The Convention on the Rights of the Child ("CRC")

The Convention on the Rights of the Child ("CRC") was adopted in 1990. As of January 2009, there were 193 states parties. The United States and Somalia are the only two non-parties, although both countries have signed the convention.

The CRC elaborates rights already protected by the two covenants. For example, ICCPR Article 24.1 provides that "[e]very child shall have . . . the right to such measures of protection as are required by his status as a minor, on the part of his family, society and the State." The ICESCR requires special measures for the health and education of children (arts. 10.3, 12.2, 13). The CRC goes beyond these provisions to provide a compre-

hensive charter of children's rights, in some instances independently of their families and even within and against the family. We provide an analysis of children's rights and the convention in Chapter 5(H), *infra*.

Other Recently-Adopted United Nations Human Rights Conventions

Since the adoption of the Universal Declaration more than sixty years ago, attention to human rights issues has increased dramatically in both intergovernmental organizations and national legal systems. In part due to this high profile, the United Nations has responded to the emergence of new human rights issues and concerns by adopting additional specialized conventions and protocols to existing agreements. Among the recent international instruments adopted by the U.N. General Assembly (together with the number of states parties as of January 2009) are the following:

- * International Convention for the Protection of All Persons from Enforced Disappearance (adopted 2006; not yet in force)
- * Convention on the Rights of Persons with Disabilities and Optional Protocol (adopted 2006; entered into force 2008; 48 states parties to the Convention; 28 to the Optional Protocol)
- * Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (establishing a system of regular visits by independent international and national bodies to places where individuals are deprived of their liberty) (adopted 2003; entered into force 2006; 37 states parties)
- * Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict (adopted 2000; entered into force 2002; 120 states parties), and Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography (adopted 2000; entered into force 2002; 130 states parties)
- * Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women (establishing a procedure for review of individual complaints alleging violations of CEDAW) (adopted 1999; entered into force 2000; 96 states parties)
- * International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (adopted 1990; entered into force 2003; 40 states parties)

1. NOTE: HUMAN RIGHTS AND HUMANITARIAN LAW

The materials in this book include only limited treatment of "international humanitarian law," the law that governs the conduct of war. A body of humanitarian law—including limitations on the use of certain weapons, regulations for the treatment of captured or wounded soldiers, and rules safeguarding civilian populations—originated in custom, and has been developed in treaty form since the mid-Nineteenth Century. These rules concerning the law applicable during war, or *jus in bello*, have traditionally been distinguished from rules concerning when resort to armed force is permissible, or *jus ad bellum*. International humanitarian law includes a