

2

Introduction to International Human Rights Standards*

Human rights outline a specific standard of treatment for human beings. The right itself may be vague in setting the standard (for example, the freedom from slavery does not define the term “slavery”), or it may be specific (for example, all children have a right to free and compulsory primary education). These standards are outlined mainly in international human rights treaties and corresponding domestic laws, where the meaning and scope of each human right is detailed.

* The Chapter was prepared by Azmi Sharon, Faculty of Law, University of Malaya and Eko Riyadi, Faculty of Law, Universitas Islam, Indonesia

The coming chapters will outline a number of these standards, and provide an understanding of both the standards, and how to interpret or measure them. The objective is to provide the reader with a basic overview of some of the more important standards of treatment humans should expect from their governments and societies.

Human Rights Standards

The term “human rights standard” refers to the level or quality of life that must be met under these laws. For example, “standard of living” refers to the level at which people have a quality of life; human rights standards of living are the necessary things (such as food, water, housing, and so on) which people need to have their human rights met.

The term **standard** dates back to the first human rights document (the UDHR) which states in the preamble that human rights are the “common standard of achievement for all people and all nations” and that every individual and every organ of society “shall strive ... to secure their universal and effective recognition and observance.”

Human rights standards should be seen then as a minimum required level which States should not go below. Human rights are about ensuring minimum standards. As it is sometimes expressed, human rights are like a floor, and not a ceiling: they define the bottom level and not the top.

The creation of international human rights laws in the form of **international treaties** was one response to this unchecked power. International treaties established rules and standards for how States should treat people, and how people should treat one another. However, the international treaties cannot be forced upon a State. The act of agreeing to a treaty is almost always voluntary (although some would argue that defeated or weakened States are occasionally forced to sign treaties). In other words, a State must willingly consent and assume the obligations of a treaty. Once a State agrees, they are called a “State Party” to the treaty and they are bound to any consequences which may result from failing to fulfill the obligations of the treaty. It is in these treaties where human rights are defined and detailed. Four different names will appear throughout the textbook - **Covenant, Convention, Charter, and Protocol** - all of which are treaties. All treaties, regardless of their name, have the same legal obligations and authority.

Covenant

This refers to binding agreements or promises between people, and implies an historic agreement. When the two major human rights treaties (the ICESCR and the ICCPR) were drafted, they were called covenants and not treaties or conventions because of their perceived special importance. Very few treaties have been named covenants

There are other types of international documents signed by nations. These are not treaties because they do not have binding legal force. For example a “pact,” “accord,” “agreement,” or “communiqué” may or may not be binding, depending on the wording of the document. As has been detailed, the UDHR is a declaration, not a treaty. A declaration can resemble a treaty, but it does not have the same legally binding obligations. Other famous declarations in human rights include the Vienna Declaration and Programme of Action (1993).

Resolutions and conference outcome documents consistently expand the body of international human rights law. The UN produces many resolutions on a wide range of issues. Those coming from the General Assembly are non-binding and are more a statement of intent. Thus, breaking such a resolution will not result in consequences for the State. However, a resolution from the Security Council can be binding and can call on States to act, or to halt certain activities. Commonly, international conferences involving States (such as those on the environment or the World Conference to End Racism) produce outcome documents that are not legally binding but are useful in proposing agendas or defining concepts.

When the international human rights system was started by the UN, it set in motion a number of activities which have been expanding over time: a developing set of laws defining human rights; a growing number of bodies to monitor human rights; and an increasing number of ways to respond to States which violate those rights. Coming chapters will examine this set of laws at the international level, and will examine how these laws are protected by international bodies (such as the UN), regional bodies (such as the ASEAN human rights body, AICHR), and national bodies (such as national human rights commissions).

Convention

This is perhaps the most common name for a treaty. Seven of the human rights treaties are conventions.

Charter

This is normally used for the establishment of international bodies; for example, the United Nations Charter (1945). Similar terms are “articles of agreement” (for example, the World Bank and the IMF were founded on articles of agreement between States).

Protocol

This is normally an addendum to another treaty. Protocols can add supplementary articles or rights (such as the protocol on child soldiers; a protocol to the Convention on the Rights of the Child, which adds various rights and duties to States aimed at preventing the recruitment of child soldiers). In most cases, a State must agree to the main treaty first before agreeing to a protocol.



Discussion and Debate

How do Human Rights Conflict with State Sovereignty?

Prior to the development of international human rights law, international law mostly regulated relations between sovereign States. This principle is still strong in international politics, and can be found in the UN Charter (article 2.7) which states, “Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any State.”

But where does this leave human rights? Does this mean that the UN should not intervene in human rights issues of a domestic nature? For example, it could be argued that how a country runs its hospitals or schools can be considered a purely domestic question, so could the UN or any other State be allowed to criticize or make suggestions? If a country passes a law forbidding girls from going to school, can other States intervene? On the one hand, if a government is democratically elected by its people to govern, it should have the authority and legitimacy to decide domestic policy. On the other, by agreeing to a human rights treaty, a State has voluntarily chosen to comply with the legal standards set in the treaty.

The dividing line between domestic issues under a State’s sovereignty and international human rights standards is an area of much debate in human rights. Frequently States will claim an action is their sovereign right, while the international community will argue that international standards must be met regardless of sovereignty.

2.1 Public International Law: The Basics

Human rights are part of both national level laws (also called municipal or domestic law), for example, in constitutions, bills of rights, or other legislation, and also in international law, for example in treaties. At the international level human rights laws occur as a part of Public International Law (PIL), which concerns the structure and conduct of sovereign States and international organizations. Though much development of human rights standards occurs at the international level, they tend to be enforced at the national level. While international law and domestic law are quite different, they do share similar principles. It is necessary to address the differences between domestic and international law to explain how human rights are created and enforced.

A main distinction between national- and international- level laws concerns how the laws are written and how they are protected. Domestic laws are written by the legislative body, accepted by the executive body, and implemented by the judiciary. A simple example would be as follows: a parliament makes a law; the police apprehend anyone who breaks the law, and the courts determine a person’s guilt or innocence, punishing the person if found guilty. Significantly, citizens of a country who are subject to these laws have limited input into their drafting and enforcement. This differs in international law. States write the law themselves, and they are the main subjects of it. However, if a State wants no part of the law, there is little anyone can do to force them to agree to it (although there are exceptions, such as customary law which is detailed below). Therefore, the international legal system is predominantly voluntary in nature. Further, there is no equivalent to an international police force

which protects the law and ensures compliance (again, there are exceptions such as the UN Security Council, but its ability to police States is weak). In general, States draft laws they wish to be bound to, and also determine how any disputes are to be settled. The consequence is that while domestic law can work through powerful institutions (such as the police and the courts), international law is more open to interpretation and negotiation. Generally speaking, in international law there is no single law-making body (like a parliament), neither is there a powerful enforcer of the law (like a policeman), or a court where all disputes must be referred to.

Though these two systems of law do differ significantly, they do not operate independently. Domestic laws can influence international laws. Many human rights standards first appeared as domestic laws. For example, the international law on freedom of expression which first appeared in the UDHR, was basically copied from the United States Constitution. Also, many of the rights for disabled people first appeared in national disability acts in a variety of countries. The reverse is more common: international law influences domestic law. For example, human rights standards can be converted to domestic laws, and in some countries, international laws are even considered equivalent to domestic laws. This is known as a monist system: mono means 'one,' hence, there is only one legal system which includes both domestic and international law. A dualist system occurs where the two legal systems are treated separately; thus, international law cannot be used in domestic systems without first being converted to a domestic law.

So far, the discussion has concentrated on treaties as the main source of international law. However, there are other sources; the use of treaties to define international law is a recent, particularly post World War II phenomena.

2.2 The Sources of International Law

Treaties

Treaties are agreements between States. They usually occur in written form and are created after negotiations between the relevant States. Once a State has agreed to be a party to a treaty they must obey the rules within it. However, only parties to a treaty are bound by its rules. A bilateral treaty occurs between two States. A multilateral treaty occurs between more than two States. International organizations, such as the United Nations (UN), the International Labour Organization (ILO), the World Trade Organization (WTO) and the European Union (EU) were all established by multilateral treaties. A major role of the UN has been to draft such treaties, which individual States are then invited to sign. Treaties are the most important source of international law today because they are better defined than other sources. In addition, States that have had a hand in drafting a law will be much happier to comply with it, and will have a more accurate knowledge of it.

Custom

Customary international law or "custom" is an unwritten form of law which is created after years of State practice. States may create a practice amongst themselves, and after a period of time, may believe it is legally binding. When this happens a customary international law is created. One example of custom is how States treat visiting leaders from other countries. States do not arrest visiting Presidents or Prime Ministers. It is assumed that heads of State have a level of immunity. There is no existing international law or treaty protecting heads of State, but this has been the

Treaty
A treaty is an agreement governed by international law between States, which creates legal obligations on those States who voluntarily agree to be bound by it. The law of treaty interpretation is governed by the Vienna Convention on the Law of Treaties (1969). This convention defines a treaty as "an international agreement concluded between States in written form and governed by international law."

practice for centuries. Some human rights laws can also be considered customary, such as not sending back a refugee to the country he or she is fleeing, the prohibition of slavery, and the right to life.

Custom is a very important source of law. However, because it is unwritten and the procedure to determine whether a custom exists is complex, customary law is less popular than treaties. Customs have a stronger effect than treaties in that once a custom has been established and confirmed, it becomes binding on all the States (and it is rare for a State not to practice a custom), unlike treaties which are only binding on its parties. The only way to avoid a custom is for a State to object to it from its very inception.

General Principles of Law

International law also includes general principles of law, which are parts of the law so commonly used in national systems that they are expected to be part of international law as well (such as idea of a fair trial). Some principles have garnered so much support, no State can breach them. Such principles include the right to self-determination and also acts which are completely forbidden such as genocide. These principles are also called peremptory norms, which are standards that cannot be broken under any circumstance. Peremptory norms exist because some fundamental rights do not yet have a history of customary practice (for example, self-determination), but regardless, the international community recognizes these as fundamental rights. Related to this concept of peremptory norms is the principle of *jus cogens*, which is a rule that states no international law can be made if it violates a peremptory norm. For example a treaty between two countries to sell slaves from one country to another will be void because it goes against the rule of *jus cogens*.

Custom and general principles ensure that even if a State has not agreed to any human rights treaty, or if a person falls outside any jurisdiction (for example, they are in the middle of the ocean), such practices as slavery, torture, or murder would still be deemed illegal. Custom and general principles are also important for human rights defenders in States which have agreed to very few human rights treaties. Human rights defenders cannot ask a State to meet treaty standards, but they can instead ensure that human rights which are part of customary law and peremptory norms are protected.

CONCEPT

The importance of Customary law, *Jus Cogens*, and peremptory norms in Southeast Asia

Custom, *jus cogens*, and peremptory norms are important sources of law in relation to human rights because some States in Southeast Asia have ratified very few human rights conventions. This does not mean that those States are allowed to violate rights in those conventions, because many important human rights are protected through these sources of law. Standards of non-discrimination, freedom from torture and slavery, the right to life, fair trial, and access to justice should all be respected by States because of their existence as custom, *jus cogens*, or as a peremptory norm.



For human rights defenders, especially in Myanmar, Singapore, Malaysia, and Brunei DS, it will mean that instead of using domestic laws or ratified treaties to argue for human rights, they can rather argue for complying with international custom or norms.

Judicial Decisions and Teachings of International Law

A final source of international law stems from judicial decisions and the teachings of international law. Judicial bodies can include international courts (such as the International Court of Justice and the International Criminal Court), tribunals (such as the Tribunal on the Law of the Sea), and international arbitrators. It can also include national courts, whose decisions may be used in international law, such as the lawsuits against Pinochet (a Chilean Dictator arrested in London in 1998 and accused of torture) and Adolf Eichmann (a Nazi captured in Argentina in 1960 and secretly taken to Israel to face charges of being part of the Nazi genocide).

It must be noted here that judicial bodies in international law differ greatly from those in domestic law. If a person is accused of violating a domestic law, he/she will be taken to court and face judgment there. International courts, however, are voluntary in nature; States have to agree to be bound by a court's rulings before a court can even have jurisdiction over them. Be that as it may, judicial decisions have played a vital role in the development of human rights law, because they can lay down interpretations of treaty provisions, establish the existence of customs, declare what is *jus cogens*, and settle disputes between States.

Writings of international law by prominent international jurists are perhaps the least used source of international law. Writings on international law can provide guidance on particular legal issues. For example, the Maastricht Guidelines and Limburg Principles on the implementation of ICESCR (which will be looked at in the section on Progressive Realization), are expert opinions which are used to assist bodies in determining whether economic, social, or cultural rights had been violated.

The emergence of international human rights law has changed the landscape of international law. Before, international law basically comprised of the rules that States placed on one another. However, human rights law introduced some important elements. It placed the individual within international law, so that the law was no longer just about the State, but about people as well. It also regulated State behavior inside its own borders, an issue which was barely touched upon before human rights law. Finally, it introduced a new set of principles and standards for States. An example is non-discrimination, which now ensures that throughout the world treating people differently because of their sex or ethnicity will go against acceptable standards of State behavior.



Discussion and Debate

Who interprets human rights standards?

The exact interpretation of some human rights is open to argument. On one hand, the legal system expects the interpretation of rights to be determined by treaties and international legal mechanisms, such as the International Court of Justice (ICJ) or the UN human rights treaty bodies. Moreover, how a State interprets say, freedom of expression, is in practice largely determined by the State itself. Standards of freedom of expression vary greatly even throughout Southeast Asia, especially on expression of a political nature.

Who should be given more power to interpret human rights: the State or the international community? If interpretation is left up to States, they could weaken their commitment and duties by using excuses such as culture or the economy. On the other hand, a universal interpretation from the international system may not capture the social, cultural, and economic variations of different States. Should one body be given the power of interpretation, or can there be a balance between a State and the international bodies?

2.3 Background to the Development of International Human Rights Standards

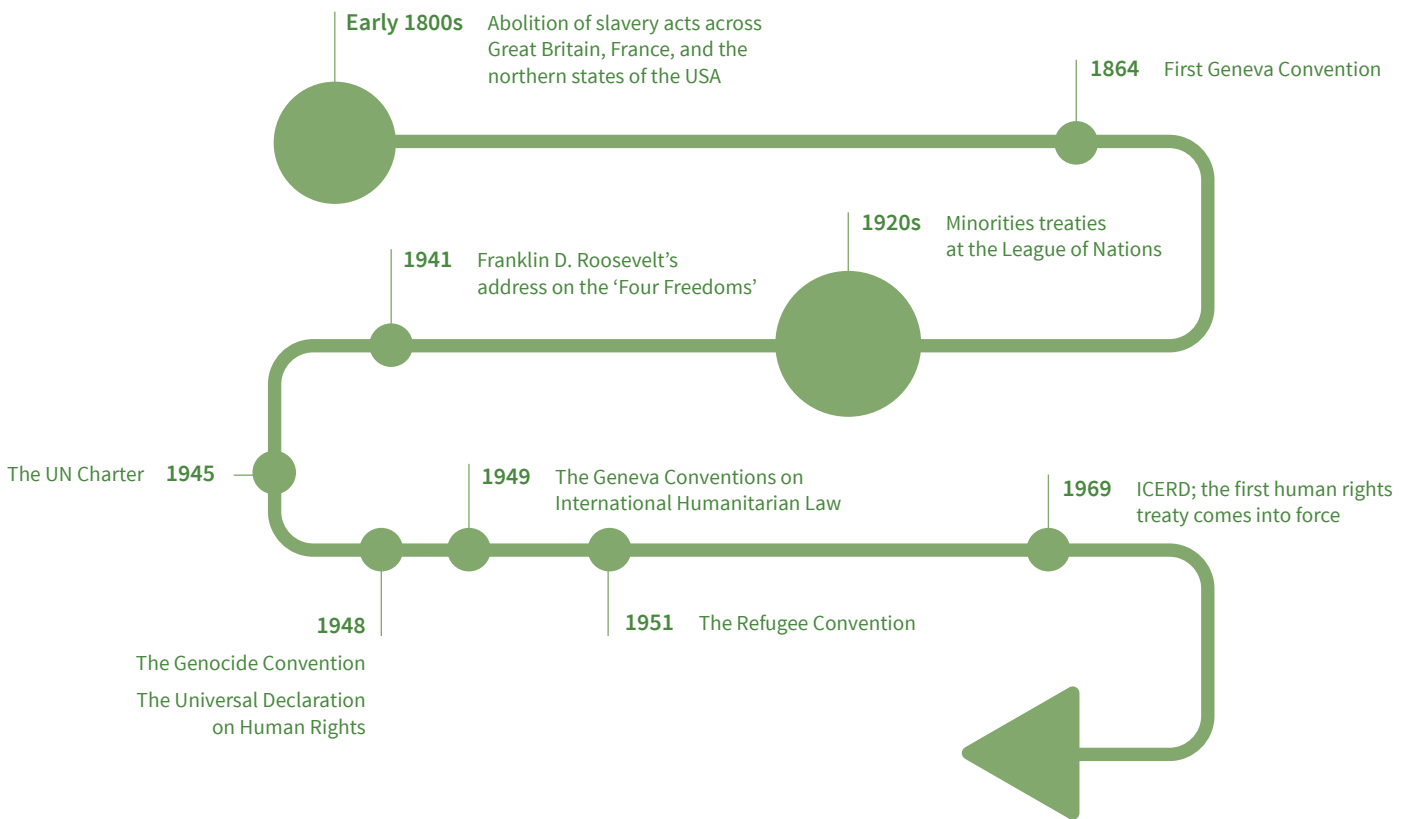
Before the emergence of the UN, people's rights existed mostly at the national level where States, for example, the USA, USSR, France, Brazil, and the United Kingdom, protected people's rights at the national level. This was mostly done through constitutional rights. There were some protections of rights at the international level, but this was much less developed than the domestic laws. The international human rights standards which exist today were developed over time by:

- Treaties on the slave trade and slavery dating from the early 1800s.
- Humanitarian provisions in the Geneva Conventions and laws of armed conflict dating from the 1860s.
- Provisions on specific minority rights in peace treaties that ended World War I in Europe.
- Workers rights developed by the ILO starting from the 1920 ILO Constitution.

One of the earliest objectives of the UN when it was founded immediately after World War II (1945) was to establish a basis for international human rights. To do this they would use both existing rights found in national constitutions, and international standards found in custom and international treaties.

Key Events:

Timeline of the Establishment of International of Human Rights Law



The UN Charter (1945) states that “to save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind,” the UN must strive to ensure world peace through the establishment of conditions where States can maintain friendly relations. To ensure these conditions the UN would undertake important work in responding to threats to international peace and security, ensuring the economic and social development of member States, and establish human rights and fundamental freedoms. The Charter also gave other duties to the UN, such as the management of international law, the promotion of regionalism, and the management of trustee territories. While human rights appear a limited number of times in the UN Charter (there are about eight references to human rights in over one hundred articles), they do play an important role because the establishment of human rights is one of its primary goals. Human rights are first mentioned in the preamble, and then again in the very first article as a purpose of the UN. Later, in Articles 55 and 56, the Charter details that for social and economic development to occur, States must respect human rights. Article 55 calls on members to “promote ... universal respect for, and observance of, human rights and fundamental freedoms.” Article 56 urges States to work together and with the UN, to ensure this goal. Because human rights were no longer seen as simply a domestic issue, the UN internationalized the promotion and protection of human rights.

2.3.1 The Universal Declaration of Human Rights (UDHR)

While the Charter does not specifically define human rights, the UN gave itself this task by appointing the then Commission of Human Rights to draft the UDHR. To do this, the Commission, led by Eleanor Roosevelt, met over a period of about two years to draft the document which later became the UDHR. These drafters were appointed to the Human Rights Commission by member States. The drafting itself was done by first compiling a set of rights from national constitutions, laws, declarations, religious and philosophical commentary, and other expert input from around the world. This compilation was then discussed and modified by the 15 country members of the Commission on Human Rights. The UDHR was adopted by the General Assembly on 10 December 1948, which has since become known as Human Rights Day. There are debates about whether the final document is a western view of human rights, or a universal view as its title implies. Current research does consider that non-western members from China, the Soviet Union, Lebanon, the Philippines, and even Arab States, did have significant input, but whether their input could be considered 'western' or non-western' is still open to debate.

The final document that was presented as a declaration to the UN General Assembly contains 30 articles which form the backbone of human rights today. The Declaration, however, is not a treaty which is binding on States (although many have argued that it has gained a status equivalent to a treaty). Thus, with the adoption of the UDHR, a universally accepted list of rights which States must recognize as universal human rights, was introduced.

Discussion and Debate

Legal Status of the UDHR

There has been much debate over the legal status of the UDHR. Generally, declarations from the General Assembly (the origin of the UDHR), do not create legal obligations on States. Yet, many consider the UDHR, or parts of it, to be legally binding. Given that most countries have now ratified the covenants derived from the UDHR - that is, the ICCPR and the ICESCR - the legal status of the UDHR is becoming less relevant. Still, in many situations, and this includes the status of rights in countries which have ratified neither the ICCPR, nor the ICESCR, such as Singapore, Malaysia, and Myanmar, this debate has importance. In summary, the main issues and debates on its legal status are:

1. Legally binding: States which join the UN and ratify the UN Charter agree that they will protect human rights, and the UN's definition of human rights is the UDHR. Therefore, by agreeing to the UN Charter, States agree to uphold the UDHR.
2. Legally binding: Many mechanisms in the UN call on States to respect the UDHR; for example when States are reviewed as part of the universal periodic review, their commitment to the rights in the UDHR will be assessed.



3. Partially legally binding: Some States recognize the UDHR as law anyway. For example, the UDHR was used in adjudication in the Philippines as early as 1952.
4. Partially legally binding: Some rights in the UDHR are considered customary or *jus cogens*: for example, freedom from slavery and torture, and the right to practice religion, are legally protected regardless of the UDHR's status. So part, but not all of the UDHR is binding.
5. Not binding: The UDHR has not been signed and ratified by all States which goes against the principle that treaties should be voluntary in nature. Further, the articles in the UDHR do not clearly define rights enough to be considered a codification of rights. Rather, States should refer to specific treaties for the codification of a right.

As the very first universal human rights document, the UDHR has an important place in human rights law for a number of reasons. To begin with, it was the first 'universal' statement on human rights; previously, nearly all rights were formulated at the national level. It provides details on the fundamental rights that all States must agree to if they wish to be considered part of the international community under the UN. Second, the UDHR is expansive; previously, most human rights documents were specific to a type of right such as anti-slavery or minority rights. Finally, the UDHR set in motion a movement towards an international legal standard of rights; it was envisioned that the UDHR would constitute the first stage of defining standards, leading to an international treaty, and finally to the establishment of monitoring bodies. This strategy included a three step plan: first, make a non-binding declaration which will not threaten States because it does not create any legal obligation; second, make a legally binding convention; and finally, create mechanisms to protect these rights. The UDHR is also considered part of the International Bill of Human Rights, a term used for the three main human rights documents: the UDHR, the ICCPR, and the ICESCR.

An examination of the UDHR shows how rights are categorized and ordered. As Chapter 1.4 has explained, the rights and freedoms presented in the UDHR follow a progression: from fundamental rights, through civil and political rights, to economic, social, and cultural rights. The important context to understanding how these rights are understood is given in the Declaration's preamble. The preamble establishes the purpose and function of the UDHR. In general, the purpose of a preamble is to provide background on the drafting and the reasons why the document is needed. These then assist to interpret the treaty by offering an understanding of its **object and purpose**. Preambles are also used to outline the international laws which a document relates to. The preamble in the UDHR details many of the concepts outlined in Chapter One, such as dignity, equality, and inalienable rights. Furthermore, it states that a UDHR was needed as a response to the atrocities in World War II, where "barbarous acts ... outraged the conscience of mankind." The preamble also gives the legal context by mentioning the UN Charter and the role of member States of the UN in promoting respect for human rights.

Object and Purpose of a Human Rights Treaty

When a country agrees to a treaty, they are expected not to act against its "object and purpose." So States cannot interpret a treaty in a way that goes against its object and purpose. For example, a State cannot deport all children from its jurisdiction as a means of ensuring that children's rights are protected in its territories. While there is no specific part of the treaty that prohibits States from deporting children, this action obviously goes against the object and purpose of child rights, which is to respect the rights of children.

FOCUS ON

List of Rights in the UDHR

Article 1	Everyone is born equal
Article 2	Freedom from discrimination
Article 3	Right to life, liberty, personal security
Article 4	Freedom from slavery
Article 5	Freedom from torture and degrading treatment
Article 6	Right to recognition as a person before the law
Article 7	Right to equality before the law
Article 8	Right to remedy by competent tribunal
Article 9	Freedom from arbitrary arrest, detention and exile
Article 10	Right to a fair public hearing
Article 11	Right to be considered innocent until proven guilty
Article 12	Freedom from interference with privacy, or reputation
Article 13	Right to free movement
Article 14	Right to asylum
Article 15	Right to a nationality and the freedom to change it
Article 16	Right to marriage and family
Article 17	Right to own property
Article 18	Freedom of belief and religion
Article 19	Freedom of expression and information
Article 20	Right of peaceful assembly and association
Article 21	Right to participate in government and in free elections
Article 22	Right to social security
Article 23	Right to work and to join trade unions
Article 24	Right to rest and leisure
Article 25	Right to adequate living standards, including healthcare, food, housing.
Article 26	Right to education
Article 27	Right to participate in the cultural life of a community
Article 28	Right to a world where human rights are protected
Article 29	Community duties essential to free and full development
Article 30	Duty not to use rights to interfere with others

2.4 Creating Treaties: An Overview

Treaties create legally binding obligations on States under international law. Yet these obligations are decided mainly by the States themselves. So, how does a human rights treaty come about? The first stage is the lobbying process where interested parties (often a mixture of States, international organizations, and civil society) gather to plan and lobby for a set of rights. For example, before the treaty on children's human rights was introduced, various States that supported the idea, alongside such organizations as Save the Children and UNICEF, began to lobby for broader support. The next stage occurs when the UN agrees to take on this project of creating a treaty; then begins the process of deciding what rights should be included in the treaty, and how these rights or standards should be defined. This is when the drafting process actually begins. How UN bodies go about drafting treaties depends on the type of treaty and the organizations involved.

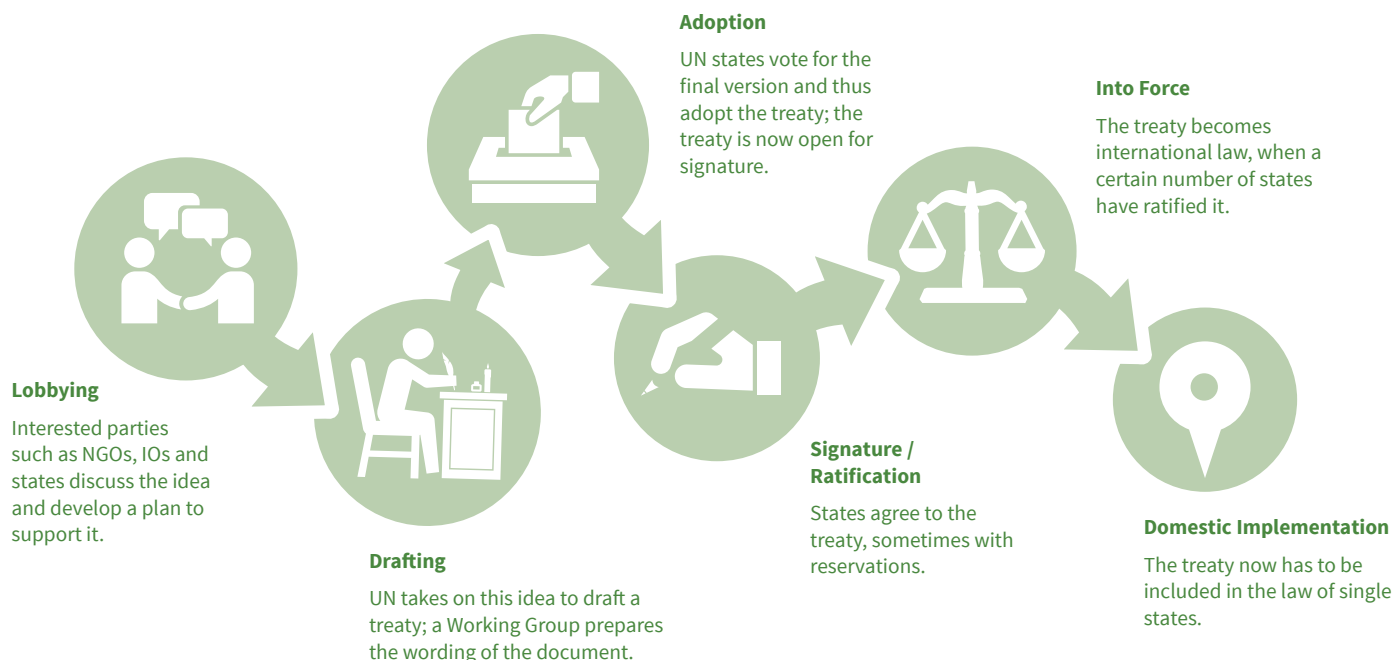
Human rights treaties are now mostly taken on by the Human Rights Council (previously known as the Human Rights Commission), the UN body that manages human rights issues. The Council may then set up a body (commonly called a working group) consisting of State representatives and international lawyers from the UN (commonly from the International Law Commission or ILC), to write the treaty. It is becoming more common now to allow input from non-State actors such as NGOs in drafting the treaty. The document may go through various phases: first, there may be a declaration or resolution that States support; if enough support is gained this document may be redrafted as a treaty. States have good reason to participate in the drafting of such a document because they may one day be legally bound to the treaty. It should be noted that not all treaties must go through the United Nations. Some treaties, like the Ottawa treaty which bans the use of anti-personnel mines, avoided going through the UN system so the large weapons producing countries could not stop or stall the drafting process.

The treaty-making process culminates when it is adopted by the General Assembly, and countries vote to accept the final wording of the document. However, this adoption stage does not actually turn the document into an international law. Rather, it approves the final version of a treaty to which States may voluntarily agree to. The treaty is then open for signature, which allows any member State of the UN, by signing the treaty, to initiate the process by which it will become law in that country. By ratifying a treaty, States agree to the object and purpose of the treaty, while they begin the process of turning the treaty into a law in their country. The State is only properly legally bound to the treaty when it goes through a process called ratification (though if they do this process after the treaty is in force this is called 'Accession'). The process of ratification varies greatly between States. Most States in Southeast Asia require the treaty to be approved by a majority of legislative assembly. Some States detail this process in the constitution, others have a established process which is not in the constitution. For countries like Indonesia, Malaysia, Singapore and Thailand the treaty will not become a law till the ratification is completed and the treaty comes 'into force.'

The treaty only becomes international law, or comes ‘into force’ as a law, once a certain number of States have ratified it. All treaties need a certain number of States to ratify them before they can be considered international law. For example, the ICCPR and the ICESCR required 35 State Parties, whereas CRC, CAT and PWD only needed 20. Once the necessary number of States have ratified a treaty, and the ratifications are given to the UN (in a process called ‘depositing the instruments of ratification’), the treaty is now considered ‘in force’ and becomes international law. It should be remembered however that the treaty is in force only on countries that have ratified it. It is possible therefore to have a treaty in force with some countries bound by its rules and others (who have not ratified) only bound to not act in a way that goes against the objectives and purposes of that treaty.

When a human rights treaty is in force some changes occur. A group of experts called a ‘treaty body’, is established to manage the treaty. State parties are now considered to be bound by their treaty obligations. States agreeing to the treaty after it is in force are said to have ‘acceded’ to that treaty. States that become parties to a treaty because of a change to the nation State itself (for example, Timor Leste where a new country emerged), or an existing country splits in two (for example, Czechoslovakia into Czech Republic and Slovakia), are said to have ‘succeeded’ to a treaty.

FOCUS ON From Lobbying to Implementation



After ratification, States can begin implementing the treaty; that is, the process of making a treaty law in a country. Like ratification, implementation varies greatly depending on the State. For some States, ratification is the same as implementation, so the treaty will automatically become law. For others, governments will study how the rights in the treaty fit with their existing laws and values in order to decide how to modify their domestic laws (or modify the treaty through reservations) to make the two equivalent. Other countries may introduce their own equivalent law or act (for example, a ‘Persons With Disabilities Act’), or they may make the treaty itself a law (and perhaps translate it and give it a different name). They may go through a process of updating all their existing laws to the standard of the treaty, which may mean getting rid of laws that do not agree with the treaty, or writing new laws to fit in with it, or modifying existing laws. Whatever method the government uses, the end result should be that the standards in the treaty are enforced by law in the country itself.

2.4.1 Reservations and Understandings

Sometimes, governments find it too challenging to implement specific human rights because they go against certain beliefs in their society, or they might be too expensive, or they may conflict with widely supported existing laws. In these cases, governments can modify the treaty by either making a **reservation** (not incorporating the article or right into law, and announcing they do not intend to comply with it), or making an **understanding** which outlines how they will interpret the right. Sometimes States use reservations to fundamentally weaken a treaty. This should not occur as reservations cannot undermine the object and purpose of a treaty. As an example, some States in Southeast Asia have made reservations to CEDAW (as discussed later) which have been widely criticized because they allow discrimination against women in the areas of marriage, citizenship, and legal rights. Some may argue that these reservations go against the object and purpose of the treaty, but even if they do what can others States do? States protest these reservations at the United Nations, but they still recognized the States as parties to the convention. When monitoring a State’s human rights record these reservations are often discussed, and the State is urged to drop the reservations. Reservations should not be considered a weakness in the treaty system, as they may give confidence to States to become State Parties before they are ready, and give time for them to work on legal and social changes so they can eventually drop the reservations and comply with all the rights.

Reservations and Understandings

A “reservation” modifies the legal effect of an article or provision of a treaty only in the country that makes the reservation.

An “understanding” (or an “interpretative declaration”) is a statement made by a State party that clarifies or elaborates how the State interprets the right in a treaty.

There are currently nine international human rights treaties which have passed through the entire treaty process. Examining the adoption and into force dates of treaties, it can be seen that some treaties are ratified very quickly (less than two years for CEDAW and CRC); while others took much longer (ten years for the ICCPR and ICESCR, and thirteen years for ICRMW). Further, six of the nine treaties have optional protocols, which are separate but linked treaties that add something to the original treaty; either additional rights or a mechanism to help protect these rights, such as those allowing investigation or complaints.

FOCUS ON

NINE CORE INTERNATIONAL TREATIES in order of when they came into force

ICERD: International Convention on the Elimination of All Forms of Racial Discrimination.
Adopted 1965. Into force 1969.

ICESCR: International Covenant on Economic, Social, and Cultural Rights.
Adopted 1966. Into force 1976.
Optional protocol (OP): Individual complaints. Adopted 2008 (not yet in force).

ICCPR: International Covenant on Civil and Political Rights.
Adopted 1966. Into force 1976.
OP: Individual complaints. Adopted 1966. Into force 1976.
OP: Death penalty. Adopted 1989. Into force 1991.

CEDAW: Convention on the Elimination of All Forms of Discrimination against Women.
Adopted 1979. Into force 1981.
OP: Individual complaints. Adopted 1999. Into force 2000.

CAT: Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.
Adopted 1984. Into force 1987.
OP: Investigation and visits. Adopted 2002. Into force 2006.

CRC: Convention on the Rights of the Child.
Adopted 1989. Into force 1990.
OP: Children in armed conflict. Adopted 2000. Into force 2002.
OP: Sale of children, child prostitution, pornography. Adopted 2000. Into force 2002.
OP: Communications Procedure. Adopted 2011. Into force 2014.

ICRMW: International Convention on the Protection of the Rights of All Migrant Workers and Members Of Their Families.
Adopted 1990. Into force 2003.

CRPD: Convention on the Rights of Persons with Disabilities.
Adopted 2006. Into force 2008.
OP: Individual complaints. Adopted 2006. Into force 2008.

ICED: International Convention for the Protection of All Persons from Enforced Disappearance.
Adopted 2006. Into force December 2010.

2.5 Why Do States Ratify Treaties That Burden Them With Legal Obligations?

It may seem odd that a State would voluntarily agree to a treaty that may limit its power. An obvious question arises; why would they do this? There are a number of reasons.

1. States consist of people who prefer to have their rights protected. It is frequently forgotten that States are run by humans who enjoy their rights, or they rely on civil society for their support be to in government. Civil society pressure is a significant force in persuading States to agree to treaties. Indeed, civil society organizations in many countries have organized events to encourage or pressure States to sign on to international conventions.
2. States already agree with the treaty's object and purpose. In some cases the treaty creates little extra commitment for the State because they may already have much of the rights in their domestic law. This may be the case for disability rights, as many States already recognize the rights of disabled persons. Or for European States, by agreeing the their regional convention (the 1950 European Convention on Human Rights), they are already legally bound to most of the rights in ICCPR or CEDAW.
3. States are concerned about their global image. Reputation matters in the international arena, and States that oppose human rights, or are human rights violators, are often named and shamed for their record. Thus, even states that one would assume would disagree with human rights, still sign human rights treaties. For example, even North Korea, which is considered to be one of the worst violators of human rights, has agreed to four human rights treaties (ICCPR, ICESCR, CRC, CEDAW).
4. International pressure. States can be encouraged (or even forced) to agree to human rights treaties by other States, or by international organizations. For example, it may be in a State's best interests to agree to some treaties in order to receive aid, or to become a member of an organization such as the World Trade Organization (WTO).
5. No intention to comply anyway. Some States may be insincere when agreeing to a treaty: they have no intention to comply, but think it will improve their image so they sign on. However, as research has shown, a false agreement in the long term often results in the State complying anyway, for when people learn of their rights, they may force the State to comply .
6. Following the herd. Many States agree to, or reject, treaties to stay in line with their regional and political partners. For example, most States in the European Union have agreed to the same treaties; in South Asia, no State has agreed to the Refugee Convention. However, Southeast Asia countries do not appear to subscribe to this regional collective view of human rights treaties as the number of ratifications varies greatly. Another type of "following the herd" occurs when treaties have near universal support, such as women's rights (with only seven countries not agreeing) and children's rights (only two haven't ratified): States will agree to these treaties because they do not wish to be part of a very small group of non-complying countries. The Convention on the Rights of Persons with Disabilities is following such a path with over 75% of the world already agreeing to this convention.

A. Chapter Summary and Key Points

Human Rights Standards

Human rights establish a specific standard of treatment for all human beings. Standards are found in both Public International Law (PIL) and domestic laws. The development of these standards started recently as a reaction to the atrocities of World War II. International human rights standards are upheld through treaties which are legally binding agreements. Human rights standards were initially more common in domestic law, but now human rights standards are an important part of PIL.

Public International Law: The Basics

International law and domestic law differ in many ways. Domestic law is made by the government and enforced by courts. The subjects of domestic law are the country's citizens, who are not directly involved in making or enforcing the law, but are subject to that law. PIL concerns the structure and conduct of sovereign States and international organizations. It is written by States to manage their own conduct. Public international law comes from four sources: (1) treaties, (2) customs, (3) general principles, (4) judicial decisions and writings on international law. Treaties are agreements between States and usually occur in written form which States volunteer to agree to. Once a country has agreed to be legally bound to a treaty they become a State Party to it. Customary international law is an unwritten form of law that is a result of long established practices of States. General Principles are parts of law which are so common in domestic law that they are expected to be part PIL as well. Customary law, *jus cogens* and peremptory norm are parts of PIL that do not need treaty ratification to be considered a law to a State, and examples include freedom from torture and slavery, and right to life.

Background to the Development of International Human Rights Standards

The present-day international human rights standards are mainly post World War II, but they are preceded by earlier agreements and treaties on subjects such as slavery, the conduct of war, and the protection of minorities. A crucial event for the development of international human rights standards was the foundation of the United Nations, which defined human rights as a primary goal. The first universal document is the UDHR, which was completed after two years of drafting by the Human Rights Commission. The UDHR is a declaration without official legally binding status, though it is argued that the Declaration, or parts of it, does have legally binding obligations on member States of the UN. The UDHR laid the foundation for the development of legally binding human rights treaties.

The Creation of Treaties: An Overview

Treaties start when the international community sees the need for some group to be protected by an international law. The momentum may be created by interested groups such as States, International Organizations, and civil society. Human rights treaties are normally drafted by a UN body which, when completed, is opened for signature to member States. Once a State signs a treaty they agree not to break the objects and purposes of the treaty, but they are not yet legally bound to the treaty. States become legally bound to a treaty when they have ratified it and it comes into force by either making a reservation, which means they choose not to be legally bound to the reserved article, or making an understanding that details how they will interpret the article or right. International human rights treaties are legally binding, but only on those States that ratify it.

Why do States Ratify Treaties?

States volunteer to become State Parties to a treaty for a range of reasons. They may respond to the advocacy of civil society or people within the government, or the government may already agree to the rights in the convention. Also, States may agree to treaties because it identifies them as good, law-abiding States, or they could be following the actions of other States which have agreed to the treaty. Some States may be strongly encouraged to sign so they can get access to international organizations or access to international aid or trade. Even if States agree with no intention of complying with the standards, in the long term they tend to comply with the treaty obligations.

B. Typical exam or essay questions

- What are examples of rights which existed in domestic laws before the UDHR. Does your country have rights which pre-date the UDHR?
- What are the major differences to protecting human rights in the Public International Law system and the domestic law system? What are the strengths and weaknesses of each system's protection?
- Examine a human right which exists as custom (for example freedom from slavery and/or torture), and describe its history.
- What role did non-western countries have in the drafting of the UDHR? Does this mean that the UDHR is a universal document, or is it largely western?
- Why has the country you lived in chosen to ratify, or not ratify, human rights treaties? By examining the history of ratification in your country, discuss why treaties were ratified in that time in history.

C. Further Reading

Human Rights and Public International Law:

There are a wide range of introductory textbooks on Public International Law, which should be available from a university library. The texts given at the end of Chapter One are a good start.

Development of Human Rights

For the history of the drafting and adoption of the UDHR, and the development of human rights, you can do an internet search for the following authors who have published articles and books on this topic:

- Johannes Morsink,
- Mary Ann Glendon,
- Paul Gordon Lauren,

- Samuel Moyn,
- Mark Mazower,
- Susan Waltz

States and Ratification

There are a small number of interesting studies on why States ratify (or do not ratify) treaties. For further reading an internet search can be made of the following authors:

- Beth Simmons
- Oona Hathaway
- Ryan Goodman
- Derek Jinks
- Harold Koh

