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.....Chapter 1  
**INTERNATIONAL  
HUMAN RIGHTS LAW AND  
THE ROLE OF THE LEGAL  
PROFESSIONS: A GENERAL  
INTRODUCTION .....**

*Learning Objectives*

- *To ensure that participants acquire a basic working knowledge of the origin, purpose and scope of international human rights law;*
- *To familiarize participants with the application of international human rights law at the domestic level and to begin to make them aware of the important role played by the legal professions in this respect.*

*Questions*

- *Why did you want to join the course?*
- *What is a human right?*
- *Why are human rights important in general?*
- *Why are human rights important in the country where you are professionally active?*
- *How do you, as judges, prosecutors and/or lawyers, see your role as promoters and protectors of human rights in the exercise of your professional duties?*
- *What specific problems, if any, do you face with regard to the protection of human rights in the country/countries where you work?*

# 1. Introduction

In recent decades, international human rights law has had an ever-growing impact on domestic legal systems throughout the world, and thereby also on the daily work of domestic judges, prosecutors and lawyers. This evolving legal situation, the true dimensions of which could hardly have been foreseen half a century ago, requires each State concerned, and also the relevant legal professions, carefully to consider ways in which effective implementation of the State's legal human rights obligations can best be secured. This may in many instances constitute a challenge to legal practitioners, owing to the conflicting requirements of different laws, lack of access to information, and the need for further training.

The objective of the present Manual is therefore to convey a basic knowledge of, and skills in, the implementation of international human rights law to judges, prosecutors and lawyers – legal professions without which there can be no truly efficient protection of the rights of the individual at the domestic level. To this end, the present chapter will provide a general introductory survey of the basic notions of international human rights law, whilst the remaining fifteen chapters will contain more detailed information and analyses of human rights standards that are of particular relevance to the administration of justice.

## 2. Origin, Meaning and Scope of International Human Rights Law

### 2.1 The Charter of the United Nations and the Universal Declaration of Human Rights

Humanity's yearning for respect, tolerance and equality goes a long way back in history, but the curious thing to note is that, although our societies have in many respects made great strides in the technological, political, social and economic fields, contemporary grievances remain very much the same as they were hundreds, even thousands of years ago.

As to the protection of the rights and freedoms of the individual at the *international* level, work began in the nineteenth century to outlaw slavery and to improve the situation of the sick and wounded in times of war.<sup>1</sup> At the end of the First World War, several treaties were concluded with the allied or newly created States for the purpose of providing special protection for minorities.<sup>2</sup> At about the same time, in 1919, the International Labour Organization (ILO) was founded for the purpose of improving the conditions of workers. Although the initial motivation of the ILO was humanitarian, there were also, inter alia, political reasons for its creation, it being feared

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<sup>1</sup> A.H. Robertson, *Human Rights in the World* (Manchester, Manchester University Press, 1972), pp. 15-20.

<sup>2</sup> *Ibid.*, pp. 20-22. On the history of human rights, see resource list in Handout No. 1 to Chapter 2 of the Manual.

that, unless the conditions of the ever-increasing number of workers were improved, the workers would create social unrest, even revolution, thereby also imperilling the peace and harmony of the world.<sup>3</sup>

Following the atrocities committed during the Second World War, the acute need to maintain peace and justice for humankind precipitated a search for ways of strengthening international cooperation, including cooperation aimed both at protecting the human person against the arbitrary exercise of State power and at improving standards of living. The foundations of a new international legal order based on certain fundamental purposes and principles were thus laid in San Francisco on 26 June 1945 with the adoption of the Charter of the United Nations. In the Preamble to the Charter, faith is first reaffirmed “in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small”. Secondly, the Preamble also, *inter alia*, expresses the determination “to promote social progress and better standards of life in larger freedom”. Thirdly, one of the four purposes of the United Nations is, according to Article 1(3) of the Charter,

“2. To achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion”.

Other Charter provisions containing references to human rights are: Articles 13(1)(b), 55(c), 62(2), 68, and 76(c). It is of particular significance to point out that, according to Articles 56 and 55(c) read in conjunction, United Nations Member States have a legal obligation “to take joint and separate action in co-operation with the Organization for the achievement of” “universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion”. This important legal duty conditions Member States’ participation throughout the United Nations human rights programme.

With the adoption by the United Nations General Assembly of the Universal Declaration of Human Rights on 10 December 1948, the rather terse references to “human rights and fundamental freedoms” in the Charter acquired an authoritative interpretation. The Universal Declaration recognizes civil, cultural, economic, political and social rights, and, although it is not a legally binding document *per se*, since it was adopted by a resolution of the General Assembly, the principles contained therein are now considered to be legally binding on States either as customary international law, general principles of law, or as fundamental principles of humanity. In its dictum in the case concerning the hostages in Tehran, the International Court of Justice clearly invoked “the fundamental principles enunciated in the ... Declaration” as being legally binding on Iran in particular with regard to the wrongful deprivation of liberty and the imposition of “physical constraint in conditions of hardship”.<sup>4</sup>

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<sup>3</sup>For the history of the ILO, see the ILO web site: [www.ilo.org/public/english/about/history.htm](http://www.ilo.org/public/english/about/history.htm).

<sup>4</sup>See *United States Diplomatic and Consular Staff in Tebran (United States of America v. Iran)*, Judgment, ICJ Reports 1980, p. 42, para. 91.

*The devastating experiences of the First and Second World Wars underscored the imperative need both to protect the human person against the arbitrary exercise of State power and to promote social progress and better living standards in larger freedom.*

## 2.2 The ethical dimension of human rights

The very specificity of the concept of “human rights” is that they belong to the individual in his or her quality as a human being, who cannot be deprived of their *substance* in any circumstances; these rights are thus intrinsic to the human condition. The Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights all give expression to this fundamental ethical basis in their first preambular paragraphs by recognizing “the inherent dignity and ... the equal and inalienable rights of all members of the human family”. Here, then, is an expression of the principle of *universality* of rights, including the right to equal protection before the law and by the law, which, as will be seen in Chapter 13, is a fundamental principle conditioning the entire field of international human rights law.

As to the regional level, the second preambular paragraph to the American Convention on Human Rights also expressly recognizes “that the essential rights of man are not derived from one’s being a national of a certain State, but are based upon attributes of the human personality”. As stated by the Inter-American Court of Human Rights in its Advisory Opinion on *Habeas Corpus in Emergency Situations*, the rights protected by the Convention cannot, per se, be suspended even in emergency situations, because they are “inherent to man”.<sup>5</sup> It follows, in the view of the Court, that “what may only be suspended or limited” under the Convention is the “full and effective exercise” of the rights contained therein.<sup>6</sup> Finally, the African Charter on Human and Peoples’ Rights, in its fifth preambular paragraph, also recognizes “that fundamental human rights stem from the attributes of human beings, which justifies their national and international protection”.

Consequently, human rights are owed by States to all individuals within their jurisdiction and in some situations also to groups of individuals. The principle of *universal and inalienable rights of all human beings* is thus solidly anchored in international human rights law.

*Human rights are inherent in all members of the human family.  
Human rights are thus **universal** and **inalienable** rights of all  
human beings.*

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<sup>5</sup>See I-A Court HR, *Habeas Corpus in Emergency Situations* (arts. 27(2), 25(1) and 7(6), Advisory Opinion OC-8/87 of January 30, 1987, Series A, No. 8, para. 18 at p. 37.

<sup>6</sup>*Ibid.*, loc. cit.

*Human beings cannot be deprived of the **substance** of their rights (**inalienability**). Only the **exercise** of some of these rights can be limited in certain circumstances.*

*The fact that human rights originate in the **unique nature** of the human being means that they should be subjected to effective legal protection at the national and international levels.*

## 2.3 Human rights and their impact on national and international peace, security and development

As already explained, it was the tragedies of the two World Wars that compelled the international community to create a world organization with the purpose of furthering peace and justice, inter alia by encouraging the promotion and protection of human rights and fundamental freedoms. The all-too-evident lesson to be drawn from the Second World War was that, when a State pursues a deliberate policy of denying persons within its territory their fundamental rights, not only is the internal security of that State in jeopardy, but in serious situations there is a spillover effect that imperils the peace and security of other States as well. This hard-won lesson has been confirmed on numerous occasions since in every part of the world. Effective protection of human rights promotes peace and stability at the national level not only by allowing people to enjoy their basic rights and freedoms, but also by providing a basic democratic, cultural, economic, political and social framework within which conflicts can be peacefully resolved. Effective protection of human rights is consequently also an essential precondition for peace and justice at the international level, since it has inbuilt safeguards that offer the population ways of easing social tension at the domestic level before it reaches such proportions as to create a threat on a wider scale.

As a reading of, in particular, Article 1 of the Charter of the United Nations and the first preambular paragraphs of the Universal Declaration and the two International Covenants makes clear, the drafters were well aware of the essential fact that effective human rights protection at the municipal level is the foundation of justice, peace and social and economic development throughout the world.

More recently, the link between, inter alia, the rule of law, effective human rights protection and economic progress has been emphasized by the Secretary-General of the United Nations in his *Millennium Report*, where he emphasized that

“84. It is now widely accepted that economic success depends in considerable measure on the quality of governance a country enjoys. Good governance comprises the rule of law, effective State institutions, transparency and accountability in the management of public affairs, respect for human rights, and the participation of all citizens in the decisions that affect their lives. While there may be debates about the most appropriate forms they should take, there can be no disputing the importance of these principles”.<sup>7</sup>

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<sup>7</sup>UN doc. A/54/2000, *We the Peoples: the Role of the United Nations in the Twenty-First Century, Report of the Secretary-General*, para. 84.

*Effective protection of human rights and fundamental freedoms is conducive to both domestic and international peace and security.*

*Effective protection of human rights provides a basic democratic culture enabling conflicts to be resolved peacefully.*

*Economic progress depends to a large extent on good governance and effective protection of human rights.*

## 2.4 The sources of law

The third preambular paragraph of the Universal Declaration of Human Rights states that

“... it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the *rule of law*” (emphasis added).

This means that, in order to enable the human person fully to enjoy his or her rights, *these rights must be effectively protected by domestic legal systems*. The principle of the rule of law can thus also be described as an overarching principle in the field of human rights protection because, where it does not exist, respect for human rights becomes illusory. It is interesting in this respect to note that, according to article 3 of the Statute of the Council of Europe, “every Member State ... must accept the principle of the rule of law”. This fundamental principle is thus legally binding on the 43 Member States of the organization, a fact that has also influenced the case-law of the European Court of Human Rights.<sup>8</sup>

Consequently, judges, prosecutors and lawyers have a crucial role to fulfil in ensuring that human rights are effectively implemented at the domestic level. This responsibility requires the members of these legal professions to familiarize themselves adequately with both national and international human rights law. Whilst their access to domestic legal sources should pose no major problem, the situation is more complex at the international level, where there are several legal sources and a case-law rich in many respects.

With some modification, the next section will follow the hierarchy of legal sources as they appear in article 38 of the Statute of the International Court of Justice. Although one might disagree with the classification of sources in this provision, it serves as a useful starting point. According to article 38(1) of the Statute, the sources are:

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<sup>8</sup>*Eur. Court HR, Golder case, Judgment of 21 February 1975, Series A, No. 18*, para. 34 at p. 17. The Court stated that one “reason why the signatory Governments decided to ‘take the first steps for the collective enforcement of certain of the Rights stated in the Universal Declaration’ was their profound belief in the rule of law”; it therefore seemed “both natural and in conformity with the principle of good faith ... to bear in mind this widely proclaimed consideration when interpreting the terms of” article 6(1) of the European Convention “according to their context and in the light of the object and purpose of the Convention”. Referring moreover to the references to the rule of law contained in the Statute of the Council of Europe, the Court concluded that “in civil matters one can scarcely conceive of the rule of law without there being a possibility of having access to the courts”. The Council of Europe had 43 Member States as of 22 April 2002.

- ❖ “international conventions”;
- ❖ “international custom, as evidence of a general practice accepted as law”;
- ❖ “general principles of law recognized by” the community of nations;<sup>9</sup>
- ❖ “judicial decisions and the teachings of the most highly qualified publicists ... as subsidiary means for the determination of rules of law”.

Without seeking to be exhaustive, the next section will set forth the essential characteristics of the main sources of international human rights law. However, it should be noted at the outset that in international human rights law, judicial decisions, and also quasi-judicial decisions and general comments adopted by monitoring organs, take on special relevance in understanding the extent of the legal obligations of States.

*Human rights must be effectively protected by domestic legal systems. Judges, prosecutors and lawyers have a crucial role to fulfil in ensuring that human rights are effectively protected at the domestic level.*

*The principal sources of international law are **international conventions, international customary law, and general principles of law.***

### 2.4.1 International treaties

In the human rights field, the most important tool for judges, prosecutors and lawyers to consult, apart from existing domestic law, is no doubt the *treaty obligations* incumbent on the State within whose jurisdiction they are working. A “treaty” is generally a *legally binding, written agreement concluded between States*,<sup>10</sup> but can also be an agreement between, for instance, the United Nations and a State for specific purposes. Treaties may go by different names, such as *convention, covenant, protocol, or pact*, but the legal effects thereof are the same. At the international level, a State establishes its consent to be bound by a treaty principally through *ratification, acceptance, approval, or accession*;<sup>11</sup> only exceptionally is the consent to be bound expressed by *signature*.<sup>12</sup> However, the function of signature of a treaty is often that of authenticating the text, and it creates an obligation on the State concerned “to refrain from acts which would defeat the object and purpose” of the treaty, at least until the moment it has “made its intention clear not to become a party” thereto.<sup>13</sup>

Once a treaty has entered into force and is binding upon the States parties, these must perform the treaty obligations “in good faith” (*pacta sunt servanda*).<sup>14</sup> This implies, inter alia, that a State cannot avoid responsibility under international law by invoking the provisions of its internal laws to justify its failure to perform its international legal obligations. Moreover, in international human rights law, State

<sup>9</sup> Article 38(1)(c) archaically refers to “civilized nations”.

<sup>10</sup> Article 2(1)(a) of the Vienna Convention on the Law of Treaties.

<sup>11</sup> Ibid., article 2(1)(b).

<sup>12</sup> Ibid., article 12.

<sup>13</sup> Ibid., article 18(a).

<sup>14</sup> Ibid., article 26.

responsibility is **strict** in that States are responsible for violations of their treaty obligations ***even where they were not intentional***.

Human rights treaties are law-making treaties of an objective nature in that they create general norms that are the same for all States parties. These norms have to be applied by a State party irrespective of the state of implementation by other States parties. The traditional principle of *reciprocity* does not, in other words, apply to human rights treaties.<sup>15</sup>

The fact that human rights treaties have been concluded for the purpose of ensuring effective protection of the rights of the individual takes on particular importance in the course of the interpretative process. In explaining the meaning of the provisions of a human rights treaty, it is therefore essential for judges to adopt a ***teleological and holistic interpretative approach*** by searching for an interpretation that respects the rights and interests of the individual and is also logical in the context of the treaty as a whole.

Examples of law-making treaties in the human rights field are the two International Covenants on Civil and Political and on Economic, Social and Cultural Rights, which will be considered in further detail below. Suffice it to mention in this regard that the Committees created under the terms of each treaty to monitor its implementation have by now adopted many views and comments which provide valuable interpretative guidance to both national and international lawyers.

*Obligations incurred by States under international treaties must be performed in good faith.*

*In international human rights law State responsibility is **strict** in that States are responsible for violations of their treaty obligations even where they were not intentional.*

*A human rights treaty must be interpreted on the basis of a teleological and holistic approach by searching for an interpretation that respects the rights and interests of the individual and is also logical in the context of the treaty as a whole.*

## 2.4.2 International customary law

To follow the hierarchy of legal sources in article 38(1) of the Statute of the International Court of Justice, judges can in the second place apply “international custom, as evidence of a general practice accepted as law”. International customary legal obligations binding upon States are thus created when there is evidence of both

- ❖ acts amounting to a “settled practice” of States; and
- ❖ a “belief that this practice is rendered obligatory by the existence of a rule of law requiring it” (*opinio juris*).<sup>16</sup>

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<sup>15</sup>*Eur. Comm. HR, Application No. 788/60, Austria v. Italy, decision of 11 January 1961 on the admissibility, 4 Yearbook of the European Convention on Human Rights, p. 140.*

<sup>16</sup>*North Sea Continental Shelf cases, Judgment, ICJ Reports 1969, p. 44, para. 77.*



The judge will thus have to assess the existence of one *objective* element consisting of the general practice, and one *subjective* element, namely, that there is a belief among States as to the legally binding nature of this practice.<sup>17</sup>

With regard to the question of practice, it follows from the ruling of the International Court of Justice in the *North Sea Continental Shelf* cases that, at least with regard to “the formation of a new rule of customary international law on the basis of what was originally a purely conventional rule”, the passage of time can be relatively short, although

“an indispensable requirement would be that within the period in question, short though it might be, State practice, including that of States whose interests are specially affected, should have been both extensive and virtually uniform in the sense of the provision invoked; – and should moreover have occurred in such a way as to show a general recognition that a rule of law or legal obligation is involved”.<sup>18</sup>

In the subsequent case of *Nicaragua v. the United States of America*, the International Court of Justice appears however to have somewhat softened this rather strict interpretation of the objective element of State practice, whilst at the same time placing a correspondingly greater emphasis on the *opinio juris* in the creation of custom. In its reasoning, which related to the use of force, the Court held, in particular:

“186. It is not to be expected that in the practice of States the application of the rules in question should have been perfect, in the sense that States should have refrained, with complete consistency, from the use of force or from intervention in each other’s internal affairs. The Court does not consider that, for a rule to be established as customary, the corresponding practice must be in absolutely rigorous conformity with the rule. In order to deduce the existence of customary rules, the Court deems it sufficient that the conduct of States should, in general, be consistent with such rules, and that instances of State conduct inconsistent with a given rule should generally have been treated as breaches of that rule, not as indications of the recognition of a new rule. If a State acts in a way *prima facie* incompatible with a recognized rule, but defends its conduct by appealing to exceptions or justifications contained within the rule itself, then whether or not the State’s conduct is in fact justifiable on that basis, the significance of that attitude is to confirm rather than to weaken the rule”.<sup>19</sup>

The question now arises as to what legal principles for the protection of the human person might have been considered to form part of customary international law by the International Court of Justice.

In its Advisory Opinion of 1951 on *Reservations to the Convention on Genocide*, the Court importantly held that “the principles underlying the Convention are principles which are recognized ... as binding on States, even without any conventional obligation”.<sup>20</sup> Furthermore, it followed from the Preamble to the Convention that it

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<sup>17</sup>Ibid., loc. cit.

<sup>18</sup>Ibid., p. 43, para. 74.

<sup>19</sup>*Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment, ICJ Reports 1986*, p. 98, para. 186.

<sup>20</sup>*Reservations to the Convention on Genocide, Advisory Opinion, ICJ Reports 1951*, p. 23.

was of “universal character” both with regard to “the condemnation of genocide and ... the co-operation required ‘in order to liberate mankind from such an odious scourge’”.<sup>21</sup> Finally, the Court noted that the Convention had been approved by a resolution which was unanimously adopted by the States.<sup>22</sup> It is thus beyond doubt that in 1951 the *crime of genocide* was already part of customary international law, applicable to all States.

Later, in the *Barcelona Traction* case, the International Court of Justice significantly made “an essential distinction” between “the obligations of a State towards the international community as a whole, and those arising vis-à-vis another State in the field of diplomatic protection”.<sup>23</sup> It added that by “their very nature the former are the concern of all States”, and, in “view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations *erga omnes*”.<sup>24</sup> In the view of the Court, such “obligations derive, for example, in contemporary international law, from the outlawing of acts of aggression, and of genocide, as also from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination”.<sup>25</sup> It added that whilst some “of the corresponding rights of protection have entered into the body of general international law ... ; others are conferred by international instruments of a universal or quasi-universal character”.<sup>26</sup>

Finally, and as already noted above, in its *dictum* in the hostages in Tehran case, the Court stated that:

“Wrongfully to deprive human beings of their freedom and to subject them to physical constraint in conditions of hardship is in itself manifestly incompatible with the principles of the Charter of the United Nations, as well as with the fundamental principles enunciated in the Universal Declaration of Human Rights”.<sup>27</sup>

It is thus beyond doubt that basic human rights obligations form part of customary international law. Whilst the International Court of Justice has expressly mentioned the crimes of genocide and aggression, as well as the prohibition of racial discrimination, slavery, arbitrary detention and physical hardship as forming part of a universally binding *corpus* of law, it has not limited the scope of the law to these elements.

❖ **General Assembly resolutions:** It may not be an easy task to identify international custom, but resolutions adopted by the United Nations General Assembly can in certain circumstances be regarded as having legal value, albeit not legally binding per se. This is, for instance, the case with the Universal Declaration of Human Rights. Thus, although not a source of law in the strict sense, they can provide *evidence* of customary law. However, this will to a large extent depend on their contents, such as

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<sup>21</sup>Ibid., loc. cit.

<sup>22</sup>Ibid.

<sup>23</sup>*Barcelona Traction, Light and Power Company, Limited, Judgment, ICJ Reports 1970*, p. 32, para. 33.

<sup>24</sup>Ibid., loc. cit.

<sup>25</sup>Ibid., p. 32, para. 34.

<sup>26</sup>Ibid., loc. cit.

<sup>27</sup>*ICJ Reports 1980*, p. 42, para. 91.

the degree of precision of the norms and undertakings defined therein, and the means foreseen for the control of their application; it will also depend on the number of countries having voted in favour thereof, and the circumstances of their adoption.<sup>28</sup> A particularly relevant question in this respect would be whether the resolution concerned has been adopted in isolation or whether it forms part of a series of resolutions on the same subject with a consistent and universal content.

- ❖ **Peremptory norms (*jus cogens*):** It should finally be noted that some legal norms, such as the prohibition of slavery, may be considered to be so fundamental that they are called *peremptory norms* of international law. According to article 53 of the Vienna Convention on the Law of Treaties, a treaty is simply “void if, at the time of its conclusion, it conflicts with a peremptory norm of international law”. According to the same article, such a norm is described as “a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character”. However, whenever the notion of peremptory norm is being discussed, disputes arise as to its exact contents, and consequently it will not be further dealt with in this Manual.

### 2.4.3 General principles of law recognized by the community of nations

This third source of law cited by the Statute of the International Court of Justice helps ensure that, in cases where international treaties and customary law might provide an insufficient basis for the Court to take a decision, it will be able to draw on other resources.

A general principle of law, as a source of international human rights law, is a legal proposition so fundamental that it can be found in all major legal systems throughout the world. If there is evidence that, in their domestic law, States adhere to a particular legal principle which provides for a human right or which is essential to the protection thereof, then this illustrates the existence of a *legally binding principle* under international human rights law. Judges and lawyers can thus look to other legal systems to determine whether a particular human rights principle is so often accepted that it can be considered to have become a general principle of international law. Domestic law analogies have thus, for instance, been used in the field of principles governing the judicial process, such as the question of evidence.<sup>29</sup>

### 2.4.4 Subsidiary means for the determination of rules of law

As subsidiary means for the determination of rules of law, article 38 of the Statute mentions “judicial decisions and the teachings of the most highly qualified publicists”. As previously mentioned, in the human rights field, judicial decisions are particularly important for a full understanding of the law, and the wealth of international case-law that now exists in this field must be regarded as authoritative evidence of the state of the law. However, neither the International Court of Justice nor

<sup>28</sup>For some of these elements, see e.g. *Les résolutions dans la formation du droit international du développement*, Colloque des 20 et 21 novembre 1970, L’Institut universitaire de hautes études internationales, Genève, 1971 (Études et travaux, No. 13), pp. 9, 30-31 (intervention by Professor Virally).

<sup>29</sup>Ian Brownlie, *Principles of Public International Law* (Oxford, Clarendon Press, 1979), 3rd edn., 1979, p. 18.

the international monitoring organs in the human rights field are obliged to follow previous judicial decisions.<sup>30</sup> Although this is usually done, it is particularly important for the monitoring organs in the human rights field to retain the flexibility required to adjust earlier decisions to ever-changing social needs, which, at the international level, cannot easily be met through legislation.<sup>31</sup> Suffice it to add in this context that the reference to “judicial decisions” can also mean judicial decisions taken by domestic courts, and that the higher the court, the greater weight the decision will have. However, when international monitoring organs interpret human rights law, they are likely to do so independently of domestic laws.

As to “the teachings of the most highly qualified publicists”, it must be remembered that article 38 was drafted at a time when international jurisprudence on human rights law was non-existent. Whilst the interpretation and application of this law must principally be based on the legal texts and relevant case-law, writings of “the most highly qualified publicists” can of course in some situations contribute to an improved understanding of the law and its practical implementation. Yet it is advisable to exercise considerable care before relying on legal articles and principles and comments adopted by private bodies outside the framework of the officially established treaty organs, since they may not in all respects correctly reflect the status of the law to be interpreted and applied.

## 2.5 International human rights law and international humanitarian law: common concerns and basic differences

Although this Manual is aimed at conveying knowledge and skills in human rights law, rather than in international humanitarian law, it is important to say a few words about the relationship between these two closely linked fields of law.

Whilst both human rights law and international humanitarian law are aimed at protecting the individual, international human rights law provides *non-discriminatory treatment to everybody at all times, whether in peacetime or in times of war or other upheaval*. International humanitarian law, on the other hand, is aimed at ensuring a minimum of protection to victims of armed conflicts, such as the sick, injured, shipwrecked and prisoners of war, *by outlawing excessive human suffering and material destruction in the light of military necessity*.<sup>32</sup> Although the 1949 Geneva Conventions and the two Protocols Additional thereto adopted in 1977 guarantee certain fundamental rights to the individual in the specifically defined situations of international and internal armed conflicts, neither the *personal, temporal* nor *material* fields of applicability of international humanitarian law are as wide as

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<sup>30</sup>As to the International Court of Justice, see article 59 of the Statute.

<sup>31</sup>See e.g. the case in which the European Commission of Human Rights reversed its own earlier decision according to which a legal person, such as a church, could not bring a case under article 9(1) of the European Convention on Human Rights claiming a violation of “the right to freedom of thought, conscience and religion”, *Eur. Comm. HR, Application No. 7805/77, X. and Church of Scientology v. Sweden, decision of 5 May 1979 on the admissibility of the application*, 16 DR, p. 70.

<sup>32</sup>*Seguridad del Estado, Derecho Humanitario y Derechos Humanos, Informe Final*, San José, Costa Rica, Comité Internacional de la Cruz Roja/Instituto Interamericano de Derechos Humanos, 1984, p. 7.

those afforded by international human rights law.<sup>33</sup> In that sense, humanitarian law is also less egalitarian in nature, although the principle of non-discrimination is guaranteed with regard to the enjoyment of the rights afforded by this law.<sup>34</sup>

What it is of primordial importance to stress at this stage is that, in international and non-international armed conflicts, international human rights law and humanitarian law will apply *simultaneously*. As to the modifications to the implementation of human rights guarantees that might be authorized in what is generally called *public emergencies threatening the life of the nation*, these will be briefly referred to in section 2.8 below and in more detail in Chapter 16.

*International human rights law is applicable at all times, that is, both in times of peace and in times of turmoil, including armed conflicts, whether of an internal or international character.*

*This means that there will be situations when international human rights law and international humanitarian law will be applicable **simultaneously**.*

## 2.6 Reservations and interpretative declarations to international human rights treaties

In assessing the exact extent of a given State's legal obligations under a human rights treaty, it is necessary to ascertain whether the State has made a *reservation*, or, possibly, an *interpretative declaration* at the time of ratification or accession. The major human rights treaties dealt with in this Manual allow for reservations to be made, although they have somewhat different ways of regulating the subject. In deciding whether a State party has actually made a true reservation, rather than a mere declaration as to its own understanding of the interpretation of a provision or a statement of policy, the Human Rights Committee set up to monitor the implementation of the International Covenant on Civil and Political Rights has stated, in its General Comment No. 24, that it will have regard "to the *intention* of the State, rather than the form of the instrument".<sup>35</sup> Whilst this Covenant contains no specific article regulating the question of reservations, the Human Rights Committee has stated that the "absence of a prohibition on reservations does not mean that any reservation is permitted", but that the matter "is governed by international law".<sup>36</sup> Basing itself on article 19(3) of the Vienna Convention on the Law of Treaties, the Committee stated

<sup>33</sup>J. Patrnoć and B. Jakovljević, *International Humanitarian Law in the Contemporary World*, Sanremo, Italy, International Institute of Humanitarian Law (Collection of Publications 10), 1991, p. 28.

<sup>34</sup>See e.g. article 3 common to the Four Geneva Conventions of 12 August 1949; article 75 of Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I); and article 2(1) of Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II).

<sup>35</sup>See General Comment No. 24, in UN doc. HRI/GEN/1/Rev.5, *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies* (hereinafter referred to as *United Nations Compilation of General Comments*), p. 150, para. 3; emphasis added.

<sup>36</sup>*Ibid.*, p. 151, para. 6.

that “the matter of interpretation and acceptability of reservations” is governed by the “object and purpose test”.<sup>37</sup> This means, for instance, that reservations “must be specific and transparent, so that the Committee, those under the jurisdiction of the reserving State and other States parties may be clear as to what obligations of human rights compliance have or have not been undertaken”; similarly a reservation must “not be general, but must refer to a particular provision of the Covenant and indicate in precise terms its scope in relation thereto”.<sup>38</sup>

The American Convention on Human Rights expressly stipulates in its article 75, that it “shall be subject to reservations only in conformity with the provisions of the Vienna Convention on the Law of Treaties”. In its Advisory Opinion on *The Effect of Reservations*, the Inter-American Court of Human Rights stated that article 75 “makes sense” only if understood as enabling “States to make whatever reservations they deem appropriate”, provided that they “are not incompatible with the object and purpose of the treaty”.<sup>39</sup> In its Advisory Opinion on *Restrictions to the Death Penalty* it further noted with regard to the rights that cannot be suspended in any circumstances under article 27(2) of the Convention that it “would follow therefrom that a reservation which was designed to enable a State to suspend any of the non-derogable fundamental rights must be deemed to be incompatible with the object and purpose of the Convention and, consequently, not permitted by it”.<sup>40</sup> The Court accepted, however, that the “situation would be different if the reservation sought merely to restrict certain aspects of a non-derogable right without depriving the right as a whole of its basic purpose”.<sup>41</sup>

Like the International Covenant on Civil and Political Rights, the African Charter on Human and Peoples’ Rights is silent on the question of reservations. However, article 64 of the European Convention on Human Rights expressly outlaws reservations of “a general character”, whilst permitting reservations “in respect of any particular provision of the Convention to the extent that any law” in force in the territory of the State at the time of signature or ratification “is not in conformity with the provision” concerned.

In interpreting and applying international treaties, domestic judges, prosecutors and lawyers may thus also have to consider the relevant State’s legal obligations in the light of reservations or interpretative declarations.

*The scope of a State’s legal obligations under an international human rights treaty may have to be considered in the light of any existing reservations or interpretative declarations.*

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<sup>37</sup>Ibid., loc. cit.

<sup>38</sup>Ibid., p. 155, para. 19.

<sup>39</sup>I-A Court HR, *The Effect of Reservations on the Entry Into Force of the American Convention on Human Rights (Arts. 74 and 75)*, Advisory Opinion OC-2/82 of September 24, 1982, Series A, No.2, p. 18, para. 35.

<sup>40</sup>I-A Court HR, *Restrictions to the Death Penalty (Arts. 4(2) and 4(4) American Convention on Human Rights)*, Advisory Opinion OC-3/83 of September 8, 1983, Series A, No. 3, p. 83, para. 61.

<sup>41</sup>Ibid., at p. 84.

*Under the International Covenant on Civil and Political Rights and the American Convention on Human Rights, reservations must be compatible with the object and purpose of the treaty.*

*The European Convention on Human Rights forbids reservations of a general character. Reservations must relate to a specific provision of the Convention.*

## 2.7 Limitations on the exercise of rights

The *exercise* – albeit not the substance per se – of certain rights, such as the right to freedom of expression, the right to freedom of association and assembly, the right to freedom of movement and the right to respect for one’s private and family life and correspondence, is generally accompanied by certain limitations that can be imposed, for instance, in order to protect the rights and freedoms of others, national security, and public health or morals.<sup>42</sup> These limitations are the result of carefully weighed interests. What they show is the balance struck between, on the one hand, *individuals’ interest* in maximizing the enjoyment of the right that belongs to them, and, on the other hand, the interest of society in general, that is, *the general interest*, in imposing certain restrictions on the exercise of this right, provided that they are taken *in accordance with the law* and *are necessary in a democratic society* for certain *specific legitimate purposes*. In interpreting and applying these limitations in any given case, it will therefore be necessary to make a careful examination of the *proportionality of the restrictive measure or measures concerned both in general and as applied in the individual case*. Chapter 12 of this Manual provides numerous examples of how these limitations have been applied in specific cases.

*Limitations on the exercise of human rights are the result of a careful balance between the individual’s interest and the general interest, and must, in order to be lawful:*

- *be defined by law;*
- *be imposed for one or more specific legitimate purposes;*
- *be necessary for one or more of these purposes in a democratic society (proportionality).*

*In order to be necessary the limitation, both in general and as applied in the individual case, must respond to a clearly established social need. It is not sufficient that the limitation is desirable or simply does not harm the functioning of the democratic constitutional order.*

<sup>42</sup>See e.g. articles 12(3), 13, 18(3), 19(3), 21, 22(2) of the International Covenant on Civil and Political Rights; articles 11 and 12(2) of the African Charter on Human and Peoples’ Rights; articles 11(2), 12(3), 13(2), 15 and 16(2) of the American Convention on Human Rights; and articles 8(2)-11(2) of the European Convention on Human Rights.

## 2.8 Derogations from international legal obligations

In interpreting and applying the terms of the three main general human rights treaties in *particularly severe crisis situations when the life of the nation is imperilled*, domestic judges, prosecutors and lawyers will also have to consider the possibility that the State concerned has modified the extent of its international legal obligations by resorting to *temporary* derogations. The question of the administration of criminal justice during states of exception will be dealt with in Chapter 16, and it will therefore suffice in this context to point out that the International Covenant on Civil and Political Rights (art. 4), the American Convention on Human Rights (art. 27) and the European Convention on Human Rights (art. 15) all provide for the possibility for the States parties to resort to derogations in particularly serious emergency situations. However, the African Charter on Human and Peoples' Rights has no corresponding emergency provision, and the absence thereof is seen by the African Commission on Human and Peoples' Rights "as an expression of the principle that the restriction of human rights is not a solution to national difficulties", and that "the legitimate exercise of human rights does not pose dangers to a democratic State governed by the rule of law".<sup>43</sup>

In the treaties where it exists, the right to derogate is subjected to *strict formal and substantive requirements*, and was never intended to provide Governments with unlimited powers to avoid their treaty obligations. In particular, a *qualified principle of proportionality* applies in that, according to all the aforementioned treaties, the limitations resorted to must be "strictly required by the exigencies of the situation". It is noteworthy, furthermore, that some rights, such as the right to life and the right to freedom from torture, may not in any circumstances be derogated from, and that the list of non-derogable rights found in the second paragraphs of the aforesaid articles is *not* exhaustive. In other words, one cannot argue *a contrario* that, because a right is not expressly listed as non-derogable, the States parties can proceed to extraordinary limitations on its enjoyment.

Since the derogation articles provide for extraordinary limitations on the exercise of human rights, judges, both national and international, have to be conscious of their obligation to interpret these articles by construing them strictly so that individuals' rights are not sapped of their substance. By at all times maximizing the enjoyment of human rights, States are more likely than not to overcome their crisis situations in a positive, constructive and sustainable manner.

*Under the International Covenant on Civil and Political Rights and the American and European Conventions on Human Rights, States parties have the right in certain particularly difficult situations to derogate from some of their legal obligations.*

*The right to derogate is subjected to strict formal and substantive legal requirements.*

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<sup>43</sup>See undated decision: ACHPR, *Cases of Amnesty International, Comité Loosli Bachelard, Lawyers Committee for Human Rights, Association of Members of the Episcopal Conference of East Africa v. Sudan*, No. 48/90, 50/91, 52/91 and 89/93, para. 79; the text used is that found at the following web site: [http://www1.umn.edu/humanrts/africa/comcases/48-90\\_50-91\\_52-91\\_89-93.html](http://www1.umn.edu/humanrts/africa/comcases/48-90_50-91_52-91_89-93.html).



*Some fundamental rights may never in any circumstances be derogated from.*

*The right to derogate must be construed so as not to sap the individual rights of their substance.*

*Derogations are not permitted under the African Charter on Human and Peoples' Rights.*

## 2.9 International State responsibility for human rights violations

Under international law, States will incur responsibility for not complying with their legal obligations to **respect** and **ensure**, that is, to **guarantee**, the effective enjoyment of the human rights recognized either in a treaty binding on the State concerned or in any other source of law. As explained by the Inter-American Court of Human Rights in the *Velásquez* case, an “impairment of those rights which can be attributed under the rules of international law to the action or omission of any public authority constitutes an act imputable to the State, which assumes responsibility in the terms provided by” the legal source concerned.<sup>44</sup> Whilst the Court was in this Judgment explaining the meaning of article 1(1) of the American Convention on Human Rights, it indeed merely stated a general rule of law applicable to international human rights law as a whole.

Agents for whom a State is responsible include such groups and individuals as ministerial civil servants, judges, police officers, prison officials, customs officials, teachers, government-controlled business and other similar groups. This means that States are under an obligation to **prevent, investigate, punish**, and, whenever possible, **restore rights** that have been violated and/or to **provide compensation**.<sup>45</sup>

International human rights law also sometimes has an important **third-party effect** in that States may be responsible for not having taken reasonable action to **prevent private individuals or groups** from carrying out acts that violate human rights, or to **provide adequate protection against such violations under domestic law**.<sup>46</sup> As held by the European Court of Human Rights with regard to the right to respect for one’s private and family life in article 8 of the European Convention on Human Rights, for instance, this provision

<sup>44</sup>I-A Court HR, *Velásquez Rodríguez case, Judgment of July 29, 1988, Series C, No. 4*, p. 151, para. 164.

<sup>45</sup>See e.g. *ibid.*, p. 152, para. 166. As to obligations to provide effective protection of the right to life under article 6 of the International Covenant on Civil and Political Rights, see e.g. General Comment No. 6, in *United Nations Compilation of General Comments*, pp. 114-116.

<sup>46</sup>See as to the American Convention on Human Rights, I-A Court HR, *Velásquez Rodríguez Case, Judgment of July 29, 1988, Series C, No. 4*, pp. 155-156, paras. 176-177; and as to the International Covenant on Civil and Political Rights, UN doc. GAOR, A/47/40, Report HRC, p. 201, para. 2. At the European level, see e.g. Eur. Court HR, *Case of A. v. the United Kingdom, Judgment of 23 September 1998, Reports 1998-VI*, at p. 2692 et seq.

“is essentially that of protecting the individual against arbitrary interference by the public authorities, it does not merely compel the State to abstain from such interference: in addition to this primarily negative undertaking, there may be positive obligations inherent in an effective respect for private or family life (...). These obligations may involve the adoption of measures designed to secure respect for private life even in the sphere of the relations of individuals between themselves.”<sup>47</sup>

The States parties to the European Convention will thus have to provide “practical and effective protection” in their domestic law “where fundamental values and essential aspects of private life are at stake”, such as, for instance, in order to protect persons against sexual abuse,<sup>48</sup> or in cases of corporal punishment by family members that constitutes a violation of article 3 of the Convention.<sup>49</sup>

With regard to the duty to *secure* for everyone within its jurisdiction the right to life, the European Court has held that it “involves a primary duty” to put “in place effective criminal-law provisions to deter the commission of offences against the person backed up by law-enforcement machinery for the prevention, suppression and punishment of such provisions”, and, further, that this duty

“also extends in appropriate circumstances to a positive obligation on the authorities to take preventive operational measures to protect an individual or individuals whose life is at risk from the criminal acts of another individual(...)”.<sup>50</sup>

These rulings are significant in that they extend the scope of States’ international legal obligations beyond the strict public sphere into the field of private life, thereby allowing for a more adequate and effective protection against various forms of human rights violations, such as physical and mental abuse of children, women and the mentally handicapped.

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A State will however only incur international responsibility for a human rights violation if it has failed to provide the alleged victim with an adequate and effective remedy through the workings of its own courts or administrative authorities. The requirement at the international level that all *effective* domestic remedies must have been exhausted before an alleged victim’s complaints can be considered by an international monitoring body of a judicial or quasi-judicial character has been introduced precisely in order to allow the State itself to remedy the wrongs committed. This also means that the establishment of the various international machineries for the protection of the human person is in fact “subsidiary” to the available domestic systems for safeguarding the individual, since they “become involved only through contentious proceedings and once all domestic remedies have been exhausted”.<sup>51</sup>

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<sup>47</sup> Eur. Court HR, *Case of X. and Y. v. the Netherlands*, Judgment of 26 September 1985, Series A, No. 91, p. 11, para. 23.

<sup>48</sup> Ibid., p. 14, para. 30 and p. 13, para. 27.

<sup>49</sup> Eur. Court HR, *Case of A. v. the United Kingdom*, Judgment of 23 September 1998, Reports 1998-VI, concerning the responsibility of the United Kingdom for beating of child by stepfather.

<sup>50</sup> Eur. Court HR, *Case of Mahmut Kaya v. Turkey*, Judgment of 28 March 2000, para. 85. The text used is that found on the Court’s web site: <http://hudoc.echr.coe.int/hudoc/>

<sup>51</sup> Statement with regard to the European Convention on Human Rights, Eur. Court HR, *Case of Handyside*, Judgment of 7 December 1976, Series A, Vol. 24, p. 22, para. 48.

States' responsibility to provide protection and redress for victims of abuses of power will be dealt with in some detail in Chapter 15 of this Manual.

*Whenever bound by international human rights law, States have a **strict** legal obligation to guarantee the effective protection of human rights to all persons within their jurisdiction.*

*States' legal duty to protect human rights implies an obligation to **prevent, investigate and punish** human rights violations, as well as to restore rights whenever possible or **provide compensation**.*

*States may also have a legal duty not only to provide protection against human rights violations committed by public authorities, but also to ensure the existence of adequate protection in their domestic law against human rights violations committed between **private individuals**.*

### 3. Business Corporations and Human Rights

In recent years there has been wide discussion of the question whether, and to what extent, entities other than States, such as business corporations, could and should be held legally responsible for not complying with rules of international human rights law in the exercise of their various activities. Whilst it is clear from the preceding sub-section that States themselves may have a duty to ensure that their domestic law also offers adequate remedies against serious human rights violations that may be committed by private individuals, this reasoning would appear to be equally applicable to the activities of business corporations. However, this is not, of course, the same as saying that these corporations are *themselves* incurring international legal responsibility for any wrongful acts.

The discussion at the international level on the legal responsibility of business corporations to guarantee human rights offers a wealth of ideas concerning, inter alia, standards to protect workers from abuses or the environment from unnecessary damage and destruction. However, the development of the law in this important area is still very much in its infancy, and the arguments put forward at this stage belong primarily to the field of *lex ferenda*.

Since the aim of this Manual is to explain the legal duties of States themselves under international law, no further consideration will be devoted to the possible legal responsibilities of business corporations to protect human rights. However, judges, prosecutors and lawyers may well be confronted with these problems in the exercise of their professional duties at the domestic level. In addition to any duties business corporations may have to protect individual rights and the environment under domestic law, it might therefore be useful for members of the legal professions to be aware of the fact that discussions are taking place at the international level and that

there is, as a minimum, an ethical duty under international law for corporations to run their businesses in such a manner as to respect basic human rights.<sup>52</sup>

*States may have an international legal obligation to ensure adequate protection in their domestic law against human rights violations committed by business corporations.*

*Business corporations may themselves have legal obligations in the field of human rights derived from domestic law.*

*At the international level business corporations are considered to have, as a minimum, an ethical responsibility to respect fundamental human rights.*

## 4. International Human Rights Law at the Domestic Level

### 4.1 Incorporating international law into domestic legal systems

As previously noted, and as provided in article 27 of the Vienna Convention on the Law of Treaties, a State “may not invoke the provisions of its internal law as justification for its failure to perform a treaty”. On the other hand, States are free to choose their own modalities for effectively implementing their international legal obligations, and for bringing national law into compliance with these obligations. Since domestic legal systems differ considerably in this respect, albeit also having some similarities, it will be for each domestic judge, prosecutor and lawyer concerned to keep himself or herself informed as to the manner of incorporation of the State’s international legal obligations into national law. Below, a mere general account will be given of the various ways in which a State can modify its municipal law so as to bring it into conformity with its international legal obligations.

- ❖ First, according to the *monist* theory, of which there are in fact several divergent versions,<sup>53</sup> international law and domestic law can in general terms be described as forming one legal system. This means that once a State has ratified a treaty for the protection of the human person, for instance, the terms of that treaty *automatically* become binding rules of domestic law.

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<sup>52</sup>Suggested reading on the question of business corporations and human rights: Michael Addo, *Human Rights Standards and the Responsibility of Transnational Corporations* (The Hague, Kluwer Law International, 1999); and Alan Dignam and David Allen, *Company Law and the Human Rights Act 1998* (London, Butterworth, 2000).

<sup>53</sup>See Ian Brownlie, *Principles of Public International Law* (Oxford, Clarendon Press, 3<sup>rd</sup> edn., 1979), p. 34.

- ❖ Secondly, according to the *dualist* theory, municipal law and international law are different legal systems. Municipal law is supreme, and for municipal judges to be competent to apply international treaty rules, for instance, these have to be *specifically adopted or transposed* into domestic law. It follows that a human rights treaty ratified by the State concerned cannot in principle be invoked by local judges unless the treaty is incorporated into municipal law, a process which normally requires an Act of Parliament.

However, these theories have been criticized for not reflecting the conduct of national and international organs, and they are gradually losing ground. For legal practitioners it is therefore more important to emphasize practice rather than theory.<sup>54</sup> Changes in the role and in domestic perception and understanding of international law in general, and of international human rights law in particular, have led to an increased use of such law in domestic courts. One of the purposes of this Manual is therefore to prepare judges, prosecutors and lawyers to adapt and contribute to these fundamental changes. The following is a list of some of the principal means through which international human rights norms can be contained in municipal law or otherwise applied by domestic courts and other competent authorities:

- ❖ **Constitutions:** Many constitutions actually contain numerous human rights provisions, which may follow the text of, for instance, the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights or the regional human rights conventions. The use of such common language enables judges, prosecutors and lawyers to draw upon the jurisprudence of, in particular, international courts and other monitoring organs in interpreting the meaning of their own constitutional or other provisions;
- ❖ **Other national legislation:** Many States adopt specific legislation either to clarify or elaborate on their constitutional provisions, or in order to adapt their domestic laws to their international legal obligations. When transforming international law into municipal law, the same legal terms are often used, thus allowing the legal professions to draw inspiration from international jurisprudence or the jurisprudence of other States;
- ❖ **Incorporation:** It is also common for States to incorporate international human rights treaties into their domestic law by enacting a national law. This is for instance the case with the European Convention on Human Rights in the United Kingdom, where that Convention was incorporated into British law by virtue of the *Human Rights Act 1998*, which entered into force on 2 October 2000;
- ❖ **Automatic applicability:** In some States treaties take precedence over domestic law and are thus automatically applicable in domestic courts as soon as they have been ratified by the State concerned;
- ❖ **Interpretation of common law:** In interpreting common-law principles, judges may be governed by international human rights law and international jurisprudence interpreting that law;

<sup>54</sup>As to monism and dualism Higgins states that of “course, whichever view you take, there is still the problem of which system prevails when there is a clash between the two”; and that “in the real world the answer often depends upon the tribunal answering it (whether it is a tribunal of international or domestic law) and upon the question asked”; in her view different “courts do address that problem differently”, see Rosalyn Higgins, *Problems and Process: International Law and How We Use It* (Oxford, Clarendon Press, 1994), p. 205.

- ❖ ***When there is a legal vacuum:*** In some countries there may be an absence of national legislation with regard, inter alia, to human rights; but, depending on the circumstances, judges and lawyers may be able to rely on international human rights law as well as relevant international case-law – or domestic case-law from other countries – in order to apply some basic legal principles for the protection of the human person.

Numerous efforts have been made in recent years – both through the technical assistance programmes of the United Nations, and through various training programmes provided by regional organizations such as the Organization of American States, the Council of Europe and the Organization for Security and Cooperation in Europe – to help States adjust their laws to their international legal obligations, and also to train the legal professions so as to enable them to make human rights a living reality within their specific jurisdictions. Numerous independent human rights institutes and non-governmental organizations (NGOs) also have extensive training programmes for the various legal professions.

*States may not invoke their internal law to justify violations of international law, but are free to choose the modalities for implementing that law.*

## 4.2 The application of international human rights law in domestic courts: some practical examples

A growing number of domestic courts in both common-law and civil-law countries now regularly interpret and apply international human rights standards. The following cases show how such standards can influence decisions taken by domestic courts.

**Germany:** In a case involving an American pianist belonging to the Church of Scientology and the Government of Baden-Württemberg, the Administrative Court of Appeal of Baden-Württemberg considered the grounds of appeal of the plaintiff in the light not only of the German Basic Law but also of article 9 of the European Convention on Human Rights and articles 18 and 26 of the International Covenant on Civil and Political Rights.

The complaint originated in negotiations between an agent acting on behalf of the Government and the pianist, regarding the latter's participation in a concert to be held in connection with the presentation to the public of the framework programme for the World Athletics Championship. The negotiations were broken off when it became known that the pianist concerned was a member of the Church of Scientology. In a written reply to a question put by the Parliament of Baden-Württemberg, the Ministry of Culture and Sport, acting in concertation with the Ministry of the Family, Women, Education and Art, explained that the promotion by the State of cultural events must be questioned when the persons performing are active and self-avowed members of the Church of Scientology or other similar groups; for this reason they had declined to engage the pianist as originally envisaged. The pianist argued that his right to freedom

of religion had been violated by the written reply from the Ministries. However, the Administrative Court of Appeal concluded that the protection afforded by article 9 of the European Convention and article 18 of the International Covenant had not been infringed. As to the alleged violation of article 26 of the International Covenant, the Court likewise found that it had not been violated, since the ministerial reply did not result in discriminatory treatment of the pianist on the basis of his beliefs or religious convictions, the reply being limited to the announcement of a specific procedure to be followed in the future with regard to the allocation of grants made available for the organization of events by third persons/agents. For this reason, and considering that the plaintiff in this case was not himself a recipient of any grant, it was not necessary to clarify whether he could base himself *inter alia* on the protection afforded by article 26 of the International Covenant, were an application for a grant to be rejected on the abovementioned ground.<sup>55</sup>

*New Zealand:* The 1994 *Simpson v. Attorney General* case, one of the most famous human rights cases in New Zealand, originated in an allegedly unreasonable search of the plaintiff's home which, it was claimed, violated the New Zealand Bill of Rights Act 1990. In its decision, the Court of Appeal emphasized that the purposes of the Bill of Rights were to

“affirm, protect, and promote human rights and fundamental freedoms in New Zealand and to affirm New Zealand's commitment to the International Covenant on Civil and Political Rights. From these purposes, it was implicit that effective remedies should be available to any person whose Bill of Rights guarantees were alleged to have been violated”.<sup>56</sup>

When there had “been an infringement of the rights of an innocent person”, “monetary compensation was”, in the view of the Court, “an appropriate and proper, indeed the only effective, remedy”.<sup>57</sup> As observed by the Court, that “was consistent with a rights-centred approach to the Bill of Rights and international jurisprudence on remedies for human rights violations”, and reference was in this respect, *inter alia*, made to the jurisprudence on remedies of both the Human Rights Committee and the Inter-American Court of Human Rights.<sup>58</sup>

*United Kingdom:* The most prominent case decided in recent years in which international human rights law played an important role is the case of *Pinochet*, which was decided by the House of Lords on 24 March 1999, and which originated in a request that the Chilean Senator – and former Head of the Chilean State – be extradited from the United Kingdom to Spain to be tried for crimes of torture and conspiracy to torture, hostage-taking and conspiracy to take hostages, as well as conspiracy to commit murder – acts committed whilst he was still in power. The obligations to which the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment gave rise, were incorporated into United Kingdom law by Section 134 of the Criminal Justice Act 1988, which entered into force on 29 September 1988. The

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<sup>55</sup>Urteil vom 15. Oktober 1996, Verwaltungsgerichtshof Baden-Württemberg, 10 S 1765/96, in particular, pp. 11-16: as to article 26 of the International Covenant, see p. 16.

<sup>56</sup>*Simpson v. Attorney General* (1994) 1 HRNZ at 42-43.

<sup>57</sup>*Ibid.*, at 43.

<sup>58</sup>*Ibid.*, loc. cit.

Convention against Torture as such was ratified on 8 December 1988. By virtue of these changes, torture, wherever it takes place in the world, became a triable criminal offence in the United Kingdom. The question before the House of Lords on second appeal turned on whether there were any extraditable offences and, in the affirmative, whether Senator Pinochet was immune from trial for committing those crimes.<sup>59</sup> The question of double criminality became an important issue, with a majority of the Lords being of the view that Senator Pinochet could be extradited only on charges concerning acts which were criminal in the United Kingdom *when they took place*. A majority of the law Lords concluded that State immunity in respect of torture had been excluded by the Convention against Torture, and that the offences of torture and conspiracy to torture committed after 8 December 1988 were extraditable, with a minority of the House of Lords holding that English courts had extraterritorial jurisdiction as from 29 September 1988 when Section 134 of the Criminal Justice Act 1988 entered into force.

This decision allowed the United Kingdom Home Secretary to go ahead with the proceedings relating to the relevant parts of the Spanish request for Senator Pinochet's extradition. However, on 2 March 2000, after medical experts had concluded that the former Head of State of Chile was unfit to stand trial, the Home Secretary decided that he would not be extradited to Spain but was free to leave Britain. In spite of its final outcome, this case is a landmark in the international law of human rights in that it confirmed the erosion of the notion of State immunity for international crimes as a result of the entry into force of the Convention against Torture.

*South Africa:* The example of South Africa is significant in that, after the collapse of the apartheid regime, it drafted a constitution which was heavily influenced by international human rights standards and which contains, in its Chapter 2, a detailed Bill of Rights, which includes a wide range of rights, such as the right to equality, the right to freedom and security of the person, the freedoms of expression, assembly and association, political rights, environmental rights, the right to property, the right of access to adequate housing, the right to health care services, sufficient food and water, social security, the rights of the child, the right to basic education, the right of access to courts and the rights of arrested, detained and accused persons.

*International human rights law has had a considerable impact on the development of law at the domestic level and is now frequently invoked and applied by domestic courts.*

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<sup>59</sup>See definition of question by Lord Brown Wilkinson, *House of Lords, Judgment of 24 March 1999 – Regina v. Bartle and the Commissioner of Police for the Metropolis and Others Ex Parte Pinochet; Regina v. Evans and Another and the Commissioner of Police for the Metropolis and Others Ex Parte Pinochet (On Appeal from a Divisional Court of the Queen's Bench Division)*; this Judgment is found on the following web site: <http://www.publications.parliament.uk>.



## 5. The Role of the Legal Professions in the Implementation of Human Rights

As a consequence of legal developments over the last few decades, human rights have ceased to be a “fringe activity”, instead becoming “an area of law which is fundamental to everyone and which permeates all legal activity, economic and social, in public law and in private”.<sup>60</sup> In a particularly interesting recent development, the “pervasive importance of human rights law” to corporations and business lawyers has also been recognized.<sup>61</sup> Yet, whilst the influence of international human rights law on many dimensions of domestic law is thus steadily gaining ground, its true potential still remains to be explored.<sup>62</sup>

It is the professional role and duty of judges, prosecutors and lawyers throughout the world to explore this potential, and at all times to use their respective competences to ensure that a *just rule of law* prevails, including respect for the rights of the individual. Whilst this entire Manual focuses on providing knowledge and guidance to the legal professions in their daily work, Chapter 4 will focus on the specific rules and principles conditioning the work of judges, prosecutors and lawyers. These rules and principles have to be consistently and meticulously applied, since judges, prosecutors and lawyers perhaps have the single most important role to play in applying national and international human rights law. Their work constitutes the chief pillar of the effective legal protection of human rights, without which the noble principles aimed at protecting the individual against the abuse of power are likely to be sapped of much or even all of their significance.

## 6. Concluding Remarks

The present chapter has provided a synopsis of the modern development of the international protection of the human person, which originated in a devastated world’s yearning for *peaceful*, *secure* and *just* domestic and international legal orders. Further, it has explained some of the basic legal notions relevant to international human rights law and offered a description, however general, of the role to be played by the legal professions within their respective fields of competence in order to be able effectively to use the legal tools available to protect the human person against abuses of power. We shall now turn to a succinct examination of the terms and functioning of the major existing universal and regional human rights conventions.

<sup>60</sup>See editorial of Lord Goldsmith QC and Nicholas R. Cowdery QC, “The Role of the Lawyer in Human Rights”, in *HRI News* (Newsletter of the IBA Human Rights Institute), vol. 4, No. 2, 1999, p. 1.

<sup>61</sup>*Ibid.*, loc. cit. See also Nicholas R. Cowdery QC, “Human Rights in Commercial Practice – an IBA Perspective”, *ibid.*, pp. 16-18, and Stephen Bottomley, “Corporations and Human Rights”, *ibid.*, pp. 19-22.

<sup>62</sup>See reference to speech of Justice Kirby, *ibid.*, p. 10.

