



AN INTRODUCTION TO

# Human Rights in Southeast Asia



**FIRST EDITION**

**Edited by**

Azmi Sharom   Hadi Rahmat Purnama   Matthew Mullen   Melizel Asuncion   Michael Hayes



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# Preface

When the Southeast Asian Human Rights Studies Network (SEAHRN) was formed in 2009 one of its first activities was the development of a textbook for Southeast Asia students. This was in response to its objective of improving teaching on human rights in Southeast Asian universities. Given that education on human rights is a human right itself, and that few students graduate from university with any knowledge of human rights, there is much work to do.

Many lecturers at Southeast Asian universities spoke of the frustration of not having textbooks appropriate for their courses. While there are many excellent human rights textbooks available, they do not always suit the needs of students in Southeast Asian universities. Translation is a big problem, as nearly all undergraduate students study in their national language. The cost of a textbook is another challenge, as they can cost the equivalent of a month's living allowance for the average undergraduate student. Further, most textbooks do not mention Southeast Asia and do not focus on the concerns which are relevant for students.

## Principles of the Textbook

To address these needs SEAHRN began drafting a human rights textbook for undergraduate students in Southeast Asia. Early on a number of principles were established:

- The textbook must be open source and freely available to all students. There would be no limitations to the distribution through copyright or control by an international publisher.
- The chapters and the text would be available through the web in PDF format.
- The textbook will have an accessible format which is easy to print and photocopy.
- The target audience is undergraduate students who study human rights as a general studies or elective course. The student does not need extensive background knowledge in law, politics, development, or sociology, but the textbook should supplement students studying these majors.
- The text examines the status of human rights in Southeast Asia, and all topics will be in this context.
- The textbook will be translated into major Southeast Asian languages in the future.
- While the aim was to produce a high quality textbook, priority was given to producing translation friendly material. Easing translation was one way to ensure that the textbook is widely accessible, locally specific, and participatory.
- The textbook only refers to relevant writing that is accessible to the students. Given the limited library resources and the cost of international journals, the textbook favors referring to work which is freely available on the internet.

Work on the textbook has been slower than originally anticipated, and the task is now greater. The increasing attacks on academic freedom in many Southeast Asian countries, and the demands placed upon academics have hindered the development of the textbook. Regardless, the large team of writers, researchers and reviewers have pooled their energy to create this first edition and they have made significant steps towards chapters in the second edition.

Even when the full edition of the textbook arrives, it will be a huge challenge to get it taught in universities throughout the region. Not only are governments reluctant to place human rights in a core curriculum, many students do not have an interest or see no relevance in studying human rights. The discussion of some human rights topics, such as historical events or current political conflicts, can be sensitive within a country. Yet, even given this climate an increasing number of students and lecturers want to gain knowledge on human rights.

## Features of the textbook

The first edition was a collaborative activity involving lecturers and students across the region. While it challenging working collaboratively with many lecturers and students from different countries, the diversity has added much content to the textbook. The features of the textbook to assist students are:

- List of definitions: Helps students to catch up with human rights terminology
- Discussion and Debate points: These boxes can be used to increase discussion and debate with students on the challenges to human rights.
- Southeast Asian examples: Where relevant, human rights are described in action in the eleven Southeast Asian countries.
- Example questions section to help lecturers structure exam and essay questions.

At the end of each chapter is a short summary and details of where a student can look for further material. Knowing the limited resources of most students, the further work focuses on useful websites and organizations which have research freely available. Given all students have a competency in searching the internet there is no need to write complex URLs, and rather this section gives useful search terms for internet searches, and names of authors which can be searched to find publications and journal articles.

A note on the use of Southeast Asia: The textbook uses Southeast Asia rather than ASEAN because it includes the eleven countries of Southeast Asia, that is the ASEAN countries and East Timor, as it is likely East Timor will join ASEAN in the near future. .

## Looking Forward to the Second edition

The first edition is an initial step towards a much expanded Second Edition, detailed below. Due to time and resource constraints the publication of the second edition has been held back and this first edition is the collection of chapters which have completed the review and proofreading process. The second edition will feature chapters focusing on a Southeast Asian history of human rights, and addressing current human rights issues. A breakdown of the working table of contents for the Second Edition can be found below

Chapter 1	The Fundamentals of Human Rights
Chapter 2	The History of Human Rights in Southeast Asia
Chapter 3	Current issues in Southeast Asia
Chapter 4	International Human Rights Standards
Chapter 5	International Human Rights Treaties: ICCPR and ICESCR
Chapter 6	Protecting human rights in Southeast Asia: National and Regional Protection Mechanisms
Chapter 7	Protection: The International System
Chapter 8	Sex And Gender Diversity
Chapter 9	Children
Chapter 10	Disability
Chapter 11	The Rights of Non-Citizens: Refugees and Stateless
Chapter 12	The Rights of Non-Citizens: Migrant Workers and Trafficked persons
Chapter 13	Indigenous, Minorities, and Cultural Rights
Chapter 14	Development, business, environment and human rights
Chapter 15	Human Rights, Democratization and the Media
Chapter 16	Peace, Conflict and HR (IHL)
Chapter 17	Transitional justice, ICC (CAH, Rome statute)
Chapter 18	Torture and Disappearances
Chapter 19	Researching Human Rights

We welcome all input into the structure, content, uses and ideas for the second edition.





# 1

## The Fundamentals of Human Rights

What are human rights? What difference can they make to a person? Both are common questions when first trying to understand the concept of human rights, and both can be understood by examining two different situations about human rights in Southeast Asia.

# International Human Rights Laws

1948	<b>UDHR</b>   1948 Universal Declaration of Human Rights	
	<b>ICERD</b>   21 December 1965 International Convention on the Elimination of All Forms of Racial Discrimination Monitored by CERD	1965
1966	<b>ICCPR</b>   16 December 1966 International Covenant on Civil and Political Rights Monitored by CCPR  <b>ICESCR</b>   16 December 1966 International Covenant on Economic, Social and Cultural Rights Monitored by CESR	
	<b>CEDAW</b>   18 December 1979 Convention on the Elimination of All Forms of Discrimination against Women Monitored by CEDAW	1979
1984	<b>CAT</b>   10 December 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment Monitored by CAT	
	<b>CRC</b>   20 November 1989 Convention on the Rights of the Child Monitored by CRC	1989
1990	<b>ICMW</b>   18 December 1990 International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families Monitored by CMW	
	<b>CRPD</b>   13 December 2006 Convention on the Rights of Persons with Disabilities Monitored by CRPD  <b>CPED</b>   20 December 2006 International Convention for the Protection of All Persons from Enforced Disappearance Monitored by CPED	2006

## Situation 1

The day begins normally. There is a commotion outside but at first you disregard it, until you hear gun shots and a man yelling. You and your family race outside to find armed men and women in the streets. They tell you to quickly grab anything important and leave the house. When you do, your family and neighbors are herded through the streets. Word starts to spread that the entire city is being evacuated. You knew of the turmoil ravaging your country, but you never thought the fighting would reach your doorstep. Then, the news breaks; the Khmer Rouge is evacuating all major Cambodian cities claiming they are trying to protect people from American bombs. They tell your family and friends you'll be able return home in a couple of days, after the bombing has ceased. Dressed in black and heavily armed, the soldiers—many of them look like sixteen year old kids—insist they will take care of everything. However, in the coming days, you slowly begin to realize you will never return home.

You later learn evacuation day (17 April 1975) was the start of what the international media has called 'Year Zero.' As the weeks and months pass, your new way of life becomes evident. The Khmer Rouge tells you to stop thinking of yourself as an individual; that your new purpose in life is to serve 'Democratic Kampuchea,' and submit to 'Angkar,' a higher ruling power. You are also advised not to question this new state of affairs, or talk about life before the Khmer Rouge. Furthermore, you are ordered to entirely forget your old life because Angkar knows what's best for you and your society. Your house and possessions no longer belong to you. They now belong to the Democratic Kampuchea. Personal possessions of any kind are prohibited. Any signs of foreign influence are systematically destroyed. Hospitals, factories, and schools are shut down. Religion is now outlawed, and marriage is no longer a matter of personal choice. The educated are separated from your group and simply disappear, never to be seen again. Regardless of your actual occupation, you are forced to work in the rice fields all day, only occasionally receiving your daily ration of two small bowls of rice and some fish paste. Helplessly, you watch as people around you die from starvation and disease. Why, you ask yourself, is this death and destruction happening? Why are Cambodians killing other Cambodians?

## Situation 2

On your way to university you pass a young mother and her child begging on the street. A policeman approaches and asks her to move along. The woman tries to protest but is unable to speak the policeman's language. Eventually, he physically pushes her off the pavement forcing the pair to walk away, empty-handed. The woman is begging on the street with her child because she and her family came to the city in search of a better life. But because her husband couldn't find work, his frustration turned to anger, leading him to drink heavily and beat her. Eventually, for her own safety and that of her child, she fled, leaving her little choice but to sleep on the streets and beg for a living.

As the woman and her child walk away, you think if this setback will be the worst of her troubles today. There are stories of local gangs offering 'protection' to beggars—a 'service' which usually includes taking over half their daily earnings—and you wonder if the woman will face some type of retribution for failing to earn enough today. What if her child falls ill and she can't afford to pay his medical bills? After all, she barely earns enough to buy him milk every day and it's likely that the limited and poor quality food she feeds him will eventually make the boy sick. She hopes to return home soon but you question whether her family will accept her back now she's left her husband.

These cases illustrate the two extremes of human rights work. The Khmer Rouge's wholesale destruction of Cambodian society is a rare and very disturbing account of what happens when there is a total absence of human rights in a society, and raises several important questions: How could this happen? What went wrong? What can be done to stop future abuses like this? Can this ever happen again? Unfortunately, the level of inhumanity displayed during the Khmer Rouge period in Cambodia occurred at a time when the world was not prepared to enforce human rights— a mistake that many say will never be repeated again, though it has.

The second scenario of the woman and child facing extreme hardship is an almost daily occurrence in most Southeast Asian cities. However, the question here is not why it happens, but how can human rights be used to help and protect these people? An important question is whether extreme poverty driving the poor to beg on the streets is about human rights—or is it a problem of development, the economy, and welfare? Can human rights help to solve these problems, or will human rights just show the troubles that exist in society and nothing else? This textbook contends that is important to see human rights in both these situations because the protection of human rights is a daily event in most people's lives. Human rights should not cover only the worst cases, but also how a society treats and respects its vulnerable populations, whether they are poor, disabled, or children. As this textbook will detail, human rights protect and support human dignity and allow people to control their own lives without coercion or discrimination, whether from governments, armed gangs, or the otherwise powerful in society.

At the present time, governments and societies have had a mixed record in upholding human rights: Elections are now increasingly 'free and fair.' Poverty has been reduced (although not eliminated). Girls increasingly go to school and on to higher education. Health services are now available to many. At the same time, violations of these basic rights are in the news every day: People being evicted from their land; soldiers or policemen threatening local communities; migrant workers being exploited on construction sites; women being mistreated; people living in slums and dying in fires; children whom are unable to attend school. The ability to fix these situations, and what ensures that the kind of atrocities that happened during the Khmer Rouge period will never be repeated rely significantly on human rights—people knowing their rights; governments ensuring those rights are kept; and an international society that will hold governments to their commitments.

## **1.1 What are Human Rights?**

There is both a simple and a complex answer to the question of what are human rights, but both must be mentioned to understand the concept of human rights. The simple answer supposes that the term is self-explanatory: human rights are rights a person has because they are human. In other words, human beings deserve certain levels of freedoms or standards of living simply because they are human.

The complex answer is that human rights entail an internationally recognized standard of how all humans should be treated, regardless of situation, or where they live. Under this definition, human rights are legal in basis, and they ensure governments and other parties do not limit freedoms or impose unnecessary suffering on people. If these rights are upheld, people should be able to live a life of dignity. The number of internationally recognized human rights is still expanding in on-going debates at the United Nations (UN) and other organizations.

Human rights can be described by what they provide for humans:

- Freedom to do certain activities (for example travel, express themselves, or practice a religion).
- Freedom from certain conditions (for example torture and slavery).
- Rights to services (for example education, health, a fair legal system, and the ability to work).
- Protection for groups of vulnerable people such as the disabled, children, women, and refugees.

To summarize, human rights ensure people have the ability to participate fully in society and live a life of dignity. Human rights also ensure our human worth is recognized and protected. The next section asks how a person acquires their human rights, and who decides what those rights are?

### **1.1.1 Being Human**

The only criteria necessary to acquire human rights is to be human—no other condition, qualification, or knowledge is necessary. In everyday life there is little difficulty distinguishing humans from animals or plants: an obvious biological makeup defines people as human. However, it is less easy to designate when someone becomes human and when they stop being human.

#### **When does someone become human?**

Around the world there is no universal consensus on when human life begins. Some societies contend that life begins at birth, others regard conception as the crucial moment, and others define it as when a child can survive without its mother. While one person may look at a pregnant woman and see only one life (the woman), someone else may see two lives (the woman and her child). The impact on human rights is twofold. First, the legal definition will determine the legality of the termination of pregnancies. Second, this definition has significant implications on reproductive health and women's rights around the issue of the pregnant woman's rights to decide what to do with the unborn child, as will be detailed in coming chapters. However, once born people automatically acquire human rights, regardless of where they are born or whether they even know what human rights are.

#### **When does someone stop being human?**

The question of when someone's human rights cease demonstrates another feature of what it is to be human. Death is an obvious state and few people have trouble distinguishing a dead person from a live one. However, what happens if someone is diagnosed as brain dead, or they have a severe mental illness, or they have brain damage? At what point can the wisdom of keeping a person alive after they suffer severe injuries or are mentally incapacitated be considered reasonable?

Answering these questions illustrates the essential features of being human. It is commonly thought a person must possess conscious and rational thoughts to be fully human. Only when a person is considered brain dead or unable to think are life support systems generally switched off. While different States have different processes to make this decision (often involving negotiations between medical advice, the family's wishes, and the cost of medical treatment), the decision to do so often takes into account whether or not the patient can function as a human.

Further, being human assumes that people should be able to rationally participate

in society. Once someone has lost their rationality—perhaps due to mental illness or brain damage—the government or their guardian usually assumes some of their rights and responsibilities. Governments should, therefore, have a method to determine this, as well as having an appointed authority to make the decisions. So when this situation occurs, those affected in a sense do not lose their rights, but rather these rights pass on to their guardians or care givers. Again, it is expected that governments will have laws in place to both protect the basic rights of these people whilst also acknowledging that they do not have the necessary capacity to function in society. Under the concept of human rights, people are treated as rational beings as detailed under Article 1 of the Universal Declaration of Human Rights (UDHR).



## Discussion and Debate

### Taking Away Human Rights

Difficult questions arise in cases where a person suffers severe brain damage, or has a severe mental illness resulting in them being unable to function rationally in society: they may hurt themselves or others. Across the world, serious crimes are usually punished by incarceration.

***If such a person is sent to prison, or locked away because they are deemed mentally insane, don't these people lose their human rights? Does this therefore mean that human rights are not universal?***

However, even in jail, people still retain many of their rights. Importantly, they keep their fundamental rights (such as the right to life, freedom from torture and slavery, and non-discriminatory treatment).

### 1.1.2 The Rights of Humans

Rights are recognized as such because they are considered to be 'correct' or 'just.' In the English language the two meanings of right relate: you have a 'right' to something because it is considered 'right' or correct. A right is something owed to a person (which they deserve), or it can also apply to a condition they should be free from. Thus, the concept of a right can be both simple and complex. Put simply, a right is something a person is rightly entitled to, free to do, or protected by. There are a wide variety rights: consumer rights, passenger rights, citizen rights, viewer rights, property rights, student rights, academic rights, visiting rights, and so on. Each one implies a person's right to do something.

The complex response involves understanding the components of the legal concept of a right, which includes a number of features. First, a right must relate to an object; that is, the particular thing a right provides, allows, or ensures. This is the content of the right, and for human rights these objects are detailed in laws and treaties. For each type of right there are specific privileges: for instance, a student has a right to ask questions in a classroom, borrow books from a library, and have a fair opportunity to graduate. A driver has a right to use the roads, a passenger to ride a public bus, and so on.

Second, a right must relate to someone or something which has a duty to provide that right. If no such person or body exists, there is no need to have the right. This means a right can only be deemed as such if a second party (whether the State, a company, or

a university) can be called upon to respect and uphold that right. There is no need to give someone the right to breathe air because there is plenty of air to breathe. However, if air becomes polluted and difficult to breathe, then some duty bearer is needed to ensure people's rights to breathe fresh air. This is called the correlative duty to a right, which is further explained in a later section.

Rights do not only apply to humans: corporations also have rights and obligations, as do animals. This does not mean that they get equivalent rights to humans, but it does mean that there are duty bearers who are obligated to provide rights to animals or corporations. It would be nonsensical to give animals the same rights as humans as they hardly need to vote or hold citizenship, but they do need rights to ensure their fair treatment and to protect them from human abuse. In this way animal rights are similar to human rights: as human rights protect humans from abuse by State or society, animal rights protect creatures from abuse by humans.

### **1.1.3 The Foundations of Human Rights**

Human rights are formed at the intersection of legal, moral, and social rights. These three types of rights (legal, moral, and social), need to be examined. First, human rights should be considered a right by law. There are many legal rights (for example, the right of someone to marry or to legally own property) which are protected under the law. Governments should respect human rights not merely because it is 'right' or 'moral,' but because they are legally bound to uphold them. By agreeing to international human rights, or by joining the UN, governments agree their subjects have human rights and that these rights have a legal basis. This legal basis is critical both for the justification of human rights, and also for their enforcement. Being based in law, governments and other parties are bound by the law to respect human rights. Chapters Four and Five will examine how these legal obligations evolved, and how States are bound to uphold them.

Second, human rights are also moral rights: they exist because they are considered moral or proper. However, not all moral rights are based on the law; there are many acts that are seen as immoral but not illegal (for example, cheating on a partner). Some moral rights have become protected in the law; for example, the banning of media classified as pornography in some countries. People usually recognize when a moral right has been violated because within a society people tend to have similar beliefs as to what's right or wrong. Though morals are often culturally specific—for example, the notion of 'appropriate' beach wear is based partially on cultural values, and that is why some Southeast Asian countries find the rather brief swimming costumes of Europeans to be inappropriate—in general, most societies share similar moral values concerning what is 'proper' and 'respectful.' Though the idea of a shared moral basis is a highly contested one, it does form part of the philosophical foundation of human rights. Shared moral views does not imply morals never change, as values on romance, marriage, and sexuality have all changed much in the past decades. It does assume that the respect of people and what they do is basically the same around the world, particularly for important things like their safety and their treatment by the government.

## CONCEPT

### The Ethic of Reciprocity

The ethic of reciprocity declares we should treat others as we would like to be treated. This ethic has deep historical roots, and links our feelings and emotions to those we interact with. For example:

- “Never impose on others what you would not choose for yourself.” – Confucius
- “Regard your neighbor’s gain as your own gain, and your neighbor’s loss as your own loss.” – Laozi (Taoism)
- “Treat others as you treat yourself.” – Mahabharata Shanti-Parva (Hindu)
- “Hurt not others in ways that you yourself would find hurtful.” – Udanavarga (Buddhism)
- “Do to no one what you yourself dislike.” – Tobit (Christianity)
- “Do unto others as you would have others do unto you.” – Matthew 7:12 (Christianity)
- “No one of you truly believes until he loves for his brother that which he loves for himself.” – Hadith 13 (Islam)
- “Love your neighbor as yourself.” – Leviticus (Judaism)
- “The truly enlightened ones are those who neither incite fear in others nor fear anyone themselves.” – Var Sarang (Sikhism)

Third, human rights are social rights which ensure people live safely and happily together in society. Again, not all social rights are protected by law (nor are they necessarily moral), but they do ensure the smooth running of society. For example, queuing at the bank or giving up a seat on a bus are not actions mandated by law, so they are not human rights, but people are expected to follow these unwritten rules for society to function politely. Social rights comprise what any person can expect from their government (for example, education and health), but they also cover expectations arising from living in a community. Social rights are the patterns of politeness, friendly assistance, tolerance, even cheerfulness, that make life easier and more pleasant for all of us. Social rights designate that people should be safe and secure, and have their needs met by society or State.





## Discussion and Debate

### Classifying Types of Rights

1. In your country, are people obligated to follow the actions listed below because they violate (a) a legal right, (b) a moral right, (c) a social right, or (d) a mix of the above?
2. How far do you think your answers will apply to other ASEAN countries?
3. Do you think these actions should be protected through human rights?
  - Being faithful to a wife/husband
  - Not secretly taking a photograph of someone getting dressed in a changing room
  - Not littering
  - Returning a lost wallet intact to its owners
  - Telling your friend that his/her expensive new haircut looks ugly
  - Giving directions to a lost person
  - Standing so an old person can take your seat on the bus
  - Repaying a financial debt to a friend

One theory about the foundation of human rights is that they flow from ‘natural law.’ This suggests rights and obligations are as universal and widespread as nature itself, and that the logic and rationale of law may be found within human nature. Natural law focuses on ideas such as human dignity and fundamental rights which supposedly arise from an innate moral order (that is, a moral order a person is born with) that all humans are born into. For example, in this theory people do not kill each other because this goes against our nature. That is people have in their innate morals a belief that killing is bad, or desire for self-preservation, or an in-born sense of what is good and bad. Natural law is therefore seen as a set of rights and obligations that respect and support these essentially human characteristics.

The idea of natural law has been controversial. First, the idea of what is ‘natural’ has changed over time. For example: racial discrimination and slavery were long considered justified by natural law thinkers. By nature, women were considered inferior to men, a viewpoint that is now widely dismissed. If an idea changes over time and differs between societies, perhaps it cannot be considered a natural concept but a social one. Second, natural law has morally often been associated with religious thinking, and particularly with Roman Catholicism. For this reason it has not been viewed as ‘natural’ by all. Homosexual acts were seen as ‘unnatural’ under nineteenth century laws, but that view has now been broadly rejected. In addition, certain religious or philosophical principles are often cited as the background justification for such rights, for example that rights are ‘God given’, which leads to the question of which God, or did each God individually list their rights? Because of these discrepancies, it is more common to find that human rights researchers, organizations like the UN, and human rights activists take a ‘positivist’ view whereby human rights exist in a specific and detailed form: human rights are what are in the human right treaties.

Arguments on what are human rights may have some connections to natural law, for example ideas like dignity, justice, and equality are assumed to be desired in every society, but today the legal positivist view is argued more often. Legal positivism views human rights as a social construct; that human rights were invented by humans to give people special rights and duties. They are open to development, modification, and rethinking. Proponents of legal positivism further realize the need to draft laws to limit the power of the State, on the one hand, and direct State actions in positive ways on the other. Human rights are products of contemporary society and reflect the issues and concerns of societies today.



## Discussion and Debate

### Natural Law versus Legal Positivism

Natural law assumes some laws reflect human nature. On the other hand, legal positivism assumes laws exist only because humans draft and force populations to obey them; for example, we don't kill each other because we have laws telling us not to.

#### ***Which of these views do you think is more realistic?***

If we view law as positivist, does this mean we only do good because the law tells us so? Are ideas like equality and justice invented to keep societies in order? Or if law derives from nature, why do we have laws on tax, divorce, and driving, given that none of these activities occur in nature?

The foundations of human rights needed widespread support to become universal and there were a number of important forces which drove this. One must also accept that over the years, religious leaders, moral philosophers, and jurists helped develop moral standards. Indeed, all cultures comprise values as to right and wrong regarding the treatment of others, whether concerning violence, relationships, honesty in one's transactions, or forcing others to do something they do not want to do. There are additional factors which made these standards become universal: (1) human rights are written into international law, (2) the universal participation of States in the UN system which enforces international law, and (3) States following the standards of human rights. Human rights and the values they advocate are the product of international agreements. They are not merely ideas from the UN and governments, but exist today as the product of a centuries-old struggle to determine standards of humane treatment towards fellow human beings.

A significant factor which transformed human rights from a mainly domestic issue to a universal legal standard is a response to the horrors of World War II. Before then, rights did exist in many countries, but they varied according to religion, constitutions, and cultures, and were thus far from universal. Further, in many cases these rights were only for certain people in that country; human rights did not give everyone rights (so that often indigenous groups, non-citizens or women were not given rights), neither could these rights cross a country's border (the Bills of rights in England or United States were only used within those countries). During World War II, governments, in particular Germany under National Socialism, ignored the notion that all people

have rights and treated some groups (the Jews, Gypsies, political opposition groups, and homosexuals) as if they were not human at all. Their rights were taken away and millions lost their lives. Legally, there was little the rest of the world could do; worse, there was even less interest to react. In the long term though, the horror of the Holocaust did provide an incentive to make human rights legally binding on all States as a universal standard, which means that if this kind of atrocity should happen again it is breaking the law and should result in action from the international community.

## 1.2 Fundamental Features and Concepts in Human Rights

Human rights have a small number of features which distinguishes them from other rights, and also which are necessary to protect and empower people. The features give human rights a special and unique status, setting them apart from other types of rights.

### 1.2.1 Universality

In general, rights are limited as to where and when they apply. However, human rights do not have this limitation—they are universal. The mere fact of being human on this earth is enough to gain human rights. Human rights are not dependent on citizenship, or living in a territory that recognizes such rights. This distinguishes them from most other rights which are limited in some way by, for example, being old enough to attend school for student rights, or being a citizen for voting rights. **Universality** ensures that each person has human rights which are always available to them everywhere.

The notion of universal human rights does not necessarily mean everyone has the same rights. Rather, everyone has human rights and can claim them, but the precise composition of such claims depends on (1) where the person is, (2) who they are, and (3) what rights they should possess. In other words, while fundamental human rights are the same for everyone, the actual rights a person enjoys depends on a number of factors. Further, a person's ability to access their rights depends on which country they are in (as not all governments have agreed to the same rights), and citizens have slightly different rights to non-citizens. It may also depend on the age and gender of the person (as women, children, minorities, and people with disabilities have access to rights relevant to them). Finally, it may depend on the situation (for example, rights change when there is a conflict).

#### Universality

Human rights are universal means that everyone is entitled to human rights. Human rights should be available to any human being, anywhere.

## Discussion and Debate

### Universality

A woman faces violence and abuse regularly from her husband, but this is typical of her society and considered part of the culture. She does not complain. Besides, there is no one to turn to in the community as everyone accepts domestic violence as normal. Culturally, the wife also believes her husband is allowed to hit her and so does not report him to the police.

***Does this mean the act of the husband hitting the wife should be allowed? Is it a crime? Is it a human rights violation?***

The assumption of universal human rights means that the woman has human rights even if she does not know, or even if she does not agree. The woman's right to protection from violence is universal and inalienable, and cannot be denied. The only reason she is not protected is because people told her to accept such treatment. Even though it may not be a crime because she has not reported it to the police, the abuse is still a violation of her rights. In other words, whether she agrees to it or not, the act of violence against her person is considered a violation.

***Isn't this imposing foreign values on her beliefs? Do outsiders have the right to enter communities such as these and tell them their culture is wrong, and that they need to change their beliefs and practices to conform to a new international standard?***

Some people argue human rights impose foreign morals and system of ethics over other cultures. Perhaps this is true in the sense that a social custom agreed to by everyone in a society may be considered wrong and a violation of human rights (for example girls are prevented from going to school). However, the universality of human rights may override some culturally specific values. There are reasons for this view. If human rights are contingent upon cultural values then they would not be universal but rather culturally specific rules. The right of a child not to be discriminated against when going to school is universal. Further, one of the tasks of human rights is to inform everyone of their rights. A cultural value cannot be used as an excuse to not inform people of their human rights. On the whole, most cultural values support people's rights, and the main issue here is when culture is used as an excuse for human rights violations. In most cases where people consent to violations (for example, a girl agreeing not to attend school), often they are unaware of their rights and are thus not consenting in a fully informed way. The universality of rights, therefore, allows people, communities and cultures to make decisions about culturally practices in a fully informed way.

### 1.2.2 Inherent

Human rights are special because they come into effect when a person is born. Individuals do not need to earn human rights. Unlike a university student or driver, who both need to pass exams to earn their entitlements, human rights are gained merely by being born human. In other words, human rights are **inherent** to people with no other qualification necessary. It isn't even necessary for people to know they have human rights to possess them—these rights exist even if a person is unaware their rights have been violated. If knowledge was a criteria for the possession of

#### Inherent

Inherent refers to something being a permanent or inseparable part of something else. Human rights are inherent to humans. They are permanent and inseparable; they are always with a human, no matter the situation.

rights, States could easily avoid compliance by simply not informing them of their rights (and some States are still guilty of this). Making human rights inherent bypasses this potential problem.

### 1.2.4 Inalienable

It is impossible for anyone to lose their human rights (unless they die, of course). Many rights, such as the right to property or student rights, terminate at some point; that is, once you sell your bicycle, you lose rights to it, or once you graduate, you are no longer a student. People cannot lose their rights as a result of doing something, regardless of how terrible their act was—even Pol Pot or Adolf Hitler would still be entitled to their human rights. It is not possible for a State to decide that human rights do not exist anymore, or to decide that their rights once recognized are no longer relevant. Even when a new State is formed, for example, when East Timor gained independence from Indonesia, it is expected that citizens would still retain whatever human rights they were entitled to when they were part of the previous State (in this case Indonesia). However, it is important to note, **inalienable** does not mean a person can never lose any rights, as often the number of rights a person is entitled to can change; for example, when a person turns 18, they lose their children’s rights and their status will change. In these cases, subjects would still retain their human rights, but not their rights as a child

#### Inalienable

Anything deemed inalienable cannot be removed, surrendered, or transferred. Furthermore, they cannot be bought, sold, or negotiated with. Thus, even if considered a burden, inalienable rights are always in existence.

### 1.2.5 Dignity

One of the main objectives of human rights is to ensure people can live with **dignity**: in other words, that they are respected, treated well, and have a sense of worth. If a person has their human rights, then they can lead a life of dignity. If a person’s rights are taken away, then they are not treated with dignity.

#### Dignity

Human rights are designed to support and sustain the dignity of individuals, including their self-confidence, sense of worth, and their ability to use their skills. Dignity means that human feel respected and worthy.

Dignity is not only about making sure laws are not broken, but it is about treating people in such a way that they are respected as humans, like any other human. For example, the right to food is not merely a matter of quantity, of having the necessary 2,200 calories a day. The number of calories means little if a person is forced to eat scraps off the floor, or if a Muslim is given pork at each meal. The nutritional value alone does not ensure dignity. Dignity means the person can eat food like a dignified human, and this is by respecting the social and cultural values around food, such as eating food with friends and family in what is considered a normal way.

### 1.2.6 Equality

Human rights exist to ensure **equality**. Indeed, this concept is featured in all human rights documents, emphasizing the equal enjoyment of rights without discrimination. The first article of the UDHR states “All human beings are born free and equal in dignity and rights.” Compare this to the opening of the United States Declaration of Independence where it is stated (1776): “We hold these truths to be self-evident, that all men are created equal,” or the first article of the French Declaration of the Rights of Man and of the Citizen (1789): “Men are born and remain free and equal in rights.”

#### Equality

In a society all people should be treated the same way, especially regarding their rights. Equality means that people are not treated differently because their sex, wealth, language, political views, and so on. While there may be some special cases for different treatment (such as special scholarships so poor children can go to school), these should be used only to increase the level of equality in a society.

Clearly each of these documents supports the notion that human rights are inherent (that is, people are born with them) that people are born free, and they are born equal. But true equality is difficult to achieve. It is important to note that the gendered language of early human rights texts show that true equality between the sexes had not yet been reached; men were equal to other men but it would take some time before women were similarly regarded. In much the same way colonized people would fight for their equality during the twentieth century.

Equality ensures people receive the same treatment, whether before the law, at work, or in a marriage. However, no society is entirely equal in every respect. In some cases, the expectation is not equality but fairness. For example, not everyone has equal access to a university education. Though higher education is a human right, certain requirements—for example, the passing of tests, high school diplomas, knowledge of a language—are often required before admittance. Rather than equal access, it is fair that university admittance be based on non-discrimination. Discrimination refers to someone being treated differently, penalized, or punished because of a particular feature about them. The most common and obvious form of discrimination is against women. In many societies, it is believed that women are not as strong or capable as their male counterparts and thus do not deserve to be paid equally. Other common forms of discrimination include race, religion, minority groups, or non-citizens.

## **1.3 Human Rights Law: Rights and Duties**

The power of human rights stems from the fact they are backed up by law. The idea that human rights are universal and morally good are not enough to enforce them. Many rights merely rely on social values to enforce them: not jumping the queue at a bank is enforced by the possible anger of other customers. This is not the most effective way to enforce a right. Human rights, on the other hand, are understood as laws which are protected by legal bodies, and it is this status that deters people and organizations from breaking them. The section below details the important features of human rights as law.

### **1.3.1 The Rule of Law**

Human rights are legal rights in that they are bound by the law, but also they ensure that there is a fair, working legal system. The existence of a fair legal system can only occur if the society is based on the idea of the rule of law. In order to enforce human rights, systems need to be in place allowing subjects to seek justice. The main constructs behind the rule of law are summarized in the following example: Imagine you are playing a game like chess with someone but you don't know the rules and the other person does. You move a piece and they take one of your pieces, but when you try to do the same move, they claim it's against the rules. There is no sense to the moves they are making, and all of your moves are penalized in some way. When you ask to have the rules explained they refuse to tell you what are in the rules. Obviously, it is impossible to win in this kind of situation because there is no rule of law. When your opponent is allowed to change the rules so any move can be done, you will never win.

Unfortunately, some societies function like this: for example, in some countries, the police may arrest random pedestrians for no stated reason; convicted criminals may receive vastly different punishments for similar crimes; a rich person may avoid punishment altogether for a crime; some organizations may hold public meetings,

whilst others cannot.

Living in a society which is based on the rule of law means that:

- Everyone will be judged and protected by the same law.
- Everyone will be equal before the law.
- Everyone will have the same protection before the law.
- Legal rules will be public knowledge without 'secret' understandings known only to a selected few.
- Individuals will have the right to find assistance to understand the law.

The rule of law ensures a just and fair system which protects people and their property, keeping them safe. The main elements of the rule of law are that everyone is equal before the law and nobody should be able to escape the effects of the law. However, in some cases certain people do appear to escape legal punishment; for example, the wealthy, politicians, and senior government officials may avoid punishment for crimes or corruption. The law should not exist to protect or benefit a select group of people.

Equality before the law also means equal protection under the law for everyone. Unfortunately, there are many who not only aren't protected by the police, but in some cases actually suffer abuse and victimization from them, such as migrant workers, or women who have reported domestic violence. In some countries if a teacher hits a young student this may not be against the law and the student is not protected from this violence. However, in all Southeast Asian countries if a student hits a teacher this would be considered a crime and the police would protect the teacher. It seems unfair that if a teacher hits a student the police may do nothing, but if a student hits a teacher they may be punished by the law. The law here is not equally protecting the student, as it only protects the teacher. This different treatment is unfair, as the law should protect both teacher and pupil equally.

Another feature of the rule of law is that all people should have access to the legal system and be provided with an understanding of how that system works and what it can and cannot do. This may be achieved through legal assistance or legal aid, or ensuring the information is freely available. However, some countries have deliberately vague laws which the government then uses to its advantage. Laws defining treason, insulting leaders, and pornography, are often not clearly defined leading to uncertainty which can in some cases result in selective enforcement. For example, the idea of 'anti-government' activity varies greatly across Southeast Asia. In some places this may be as little as possessing 'illegal' documents (for example, the works of Karl Marx or human rights treaties); in others, it may be holding a protest rally. Both are examples of situations where the rule of law is not fairly upheld by governments.





## Discussion and Debate

**Do you live in a State where rule of law is respected?**

***What are some signs that the rule of law is not being upheld? Who suffers when the rule of law is not respected?***

Many Southeast Asian countries suffer from a lack of the rule of law. The rich or politicians often escape legal punishment whilst the poor face harsher penalties under the law. For example, a policeman charged with kidnapping a lawyer activist in Thailand was only sentenced to 18 months in jail, whereas a civilian charged with a similar crime would have been sentenced to 20 years. Similarly, sons of politicians involved in drunken fights may escape punishment, just as senior government officials who have stolen money, harassed women, or hit their co-workers regularly avoid prosecution.

Many blame the lack of the rule of law on the police or politicians, but others must share the blame too. For example, a driver paying a bribe to a policeman to avoid paying a larger fine, a parent paying a school money to enroll their child, a person paying a fee to the government to get permission to open a food stall on the pavement even though such permission would be illegal.

***Who is at fault when people avoid the rule of law for their own self-interest by paying a bribe?*** Do societies behave like this because governments are not serious about upholding the rule of law, or is it individuals who do not wish to obey the law?

### 1.3.2 Human Rights Duties

For every human right there is a second party (the duty bearer) who has a duty to ensure that right is respected; duty bearers have duties and obligations towards the rights holder. Duty bearers can include the government, people, corporations, universities, hospitals, and so on. The duty bearer and the rights holder are in a relationship, for the action of claiming a right calls on the duty bearer to act in some way.

It is vital that individuals themselves realize their role as duty bearers; parents have obligations to their children, teachers to their students, and friends to each other. Many of these duties are merely social or moral in nature, as discussed above. However, important duties, especially human rights duties of individuals, are detailed in criminal law. If a person violates another's right to property, right to practice religion, right to privacy, or freedom of movement, the duty bearer is committing a crime. In reality, these human rights obligations are already strongly enforced. The role of the duty bearer can be less clearly defined for other groups (for example, companies, armed groups, or religions). If a company does not allow its workers to travel freely, or if an armed group recruits children to become soldiers, in some cases these violations may not face sanction. The problem of protecting people from violations by these duty bears is addressed under the concept of vertical protection, as discussed below.

The most important duty bearer is the State; the organization legally bound to uphold rights in treaties. States' duties are outlined in various human rights treaties. That said, States also commonly emphasize the individual's duty to society as clearly stated in the new ASEAN Human Rights Declaration. This asserts that human rights



“must be balanced with the performance of corresponding duties as every person has responsibilities to all other individuals, the community, and the society where one lives.” The Declaration emphasizes that human rights should not only be considered as freedoms, but also as obligations. Though there is a basis to this argument, and it is expected that people treat each other in a way that does not violate their rights, human rights are primarily about ensuring that governments fulfill their obligations. An individual’s duties are clearly detailed in a country’s national laws and the emphasis on duties may be obscuring that it is States and other large-scale power holders who pose the more significant problem when it comes to defying human rights obligations.

The legally binding nature of human rights generally positions the State as the correlative duty bearer. The duty can be defined in two ways. Firstly, many rights require someone or something to provide a good, service, or other activity. Examples of this include building schools and hospitals so that children receive their right to education or healthcare. This is called a positive duty: a duty to do something. Secondly, the duty may be to simply not interfere, or to ensure individuals are free from something—for example, there is a right not to be tortured or to speak freely without government interference—which requires the State to refrain from a particular action. This is called a **negative duty**. Negative duties limit the power and activity of the State and call on it to be passive when, for example, someone is trying to express their opinions or religious beliefs.

#### Negative Duties

A negative duty requires a party to refrain from an action, or to not interfere with someone. Negative duties stop the party from doing something.

However, it is important not to simplify all rights into either positive or negative rights, for they can contain a mixture of positive and negative duties. For example, freedom of movement requires both negative duties to ensure the State does not prevent individuals moving about the country, but also **positive duties** requiring it to make the movement possible in the first place—by providing public transport, maintaining roads, or building ramps so wheelchair users get access to buildings.

#### Positive Duties

Positive duties refer to an obligation to take a certain course of action or provide a service. Positive duties cannot be fulfilled by inaction or neutral behavior.

Once a treaty has been signed, human rights obligations will be legally binding on States and their governments. This should not be considered a burden, for if a government that has the ability to be elected to run a country, it must also have the required competence to fulfill its human rights duties. Individuals have a duty to uphold human rights—for example, to refrain from discrimination—which the States have a duty to enforce through national laws.

### 1.3.3 Vertical and Horizontal Protection

States have legal obligations not to violate a person’s right as is clear from human rights standards. However, what if a non State party violates a right? For example if a company takes someone’s land from them, a factory pollutes a river, or a husband hits his wife. The above cases do not concern the State but involve an individual seeking protection from, or requiring a service from, other people, corporations, or groups. This is called **horizontal protection**. There is a difference between being protected from, or requiring a service from, the State – which is called vertical protection – and being protected from, or requiring a service from, other people or corporations, or other groups – which is called horizontal protection. Human rights primarily are about **vertical protection**, that is protecting the person from the power of the State, but recently there is an awareness that horizontal protection is increasing in its importance. The concerns about protecting women and children from violence, or stopping abuses in the workplace, are responded to by addressing weaknesses in horizontal protection.

#### Horizontal Protection

Protection, given by human rights, from the power of non State actors such as other people, companies, hospitals, media, and so on. This protection is horizontal, because these actors are on the same legal level. Horizontal protection should be ensured through the State writing laws against the actors violating other’s human rights, and having bodies who protect people’s rights, such as the police, welfare organizations, and the media.

#### Vertical Protection

This refers to protection from the power of the State given by human rights. The State is limited in its powers, and it must ensure that it respects the rights of the people under its power.

A weakness in horizontal protection is ensuring the duties of non State actors. Human rights obligations are not simply about managing a States relationship to a person, but also about ensuring individual's rights are protected from violation by anyone or anything. As human rights protection developed it became clear that other actors such as corporations, non-State armed groups, or institutions like hospitals and the media, also have obligations towards people. While these bodies are not legally bound to human rights treaties, they must still conform to these standards because the State has obligations to ensure people are protected from third parties. When non-State actors violate human rights the State has the duty to provide remedies, such as compensation or punishment of perpetrators. The duties and obligations of transnational corporations will be addressed in coming chapters

### **1.3.4 State Duties: 'Respect, Protect, Fulfill,' and 'Promote, Protect, and Prevent'**

There have been attempts to more clearly define what States should do to ensure people get their human rights. This has been detailed in two related, but different, statements from the UN. Both are intended to help explain what States should be doing to support human rights. First, it was declared that States should 'respect, protect, and fulfill' rights:

- Respect: States should ensure human rights are taken seriously, and recognize those rights.
- Protect: States should ensure there is a working legal structure and protection mechanism to safeguard individuals from violations by non-State actors (horizontal protection).
- Fulfill: States should ensure that individuals who have so far not attained all their rights—for example, children not yet attending school—will in future have these rights fulfilled.

This set of duties was written firstly for economic, social, and cultural rights as these rights can be fulfilled rather than met immediately such as civil and political rights; this distinction is discussed in more detail later. It was later realized these activities could be better designed to ensure States are doing all they can to ensure their citizens are getting human rights. So, during the 1990s, a new list was introduced with 'promote, protect, and prevent.'

- Promote: Realizing the duty to 'respect' does not ask the States to do much. Respect is more of an attitude than an action. The new action to 'promote' human rights requires States to actively reach out and plan human rights education, including building awareness, introducing rights to improve the legislature, mainstreaming initiatives, and teaching human rights in universities.
- Protect: (same as above)
- Prevention: States should ensure they do more than merely respond to violations after they occur. Rather, they should have policies and plans in place to avoid such violations occurring in the first place; for example, human rights education, better trained police, or publicizing laws.

Both 'respect, protect, fulfill,' and 'promote, protect, prevent,' provide useful summaries of what is expected of States, and also what human rights actors should be working on.

## 1.4 Categories of Rights

Predominantly, human rights arise from international treaties which have defined a number of categories of rights. It is important to describe these categories because the rights and duties differ slightly for each category. A useful method to detail these rights is to examine how they appeared in the first universal human rights document, the UDHR. This declaration, which was adopted by the UN in 1948 is comprised of 30 articles, each one describing a right or a duty. The list of rights in the UDHR has a specific order, which helps to illustrate the categories of rights. The declaration is described in more detail in a later chapter, but here it will be briefly examined as to how it categorizes different types of rights.

Rights are placed into categories because some categories have different features. However, they should not be ranked against each other as each category is an important part of an individual's human rights. Nevertheless, as history shows (detailed more in the next section) some States prefer certain categories over others, leading towards a division in the protection of human rights.

### Fundamental rights

The first rights in the UDHR deal with what are considered the most important rights, freedom from slavery and torture, the right to life, non-discrimination, and the idea that everyone is born equal. Regardless of the situation, no State can ignore or violate these rights. As detailed in a later chapter, in certain circumstances, a State can temporarily halt other rights, or interpret them in a particular ways, but States can never give any reason for the violation of fundamental rights.

### Rights in the legal system

Legal rights are in place to ensure individuals enjoy an equal legal identity. In addition, the legal system must be based on the idea of true justice, an idea which covers access to a court and the court being fair, competent, and impartial. Justice also includes equality of treatment, and if arrested, that individuals be treated well. Other rights include freedom from arbitrary arrest and detention, and the presumption of innocence. In Southeast Asia, these rights pose many challenges because in many countries the court systems are underfunded and overworked causing justice to move slowly. Also, policing can be of a lower standard leading to false arrests or criminals not being convicted. Finally, some courts are not impartial and corruption is rife resulting in cases where judges are open to bribery.

### Rights in society

**Civil rights** focus on an individual's ability to participate in society and live with dignity on a daily basis. Most of these civil freedoms can be found in early human rights documents such as the United States Bill of Rights (1788) and the French Declaration of the Rights of Man and of the Citizen (1789). They focus on limiting the power of States to interfere with individual freedoms in a society. These freedoms ensure privacy, freedom of movement within a country, the right to marry and have children, to practice religion, and freedom of expression. Other civil rights include the right to a nationality, the right to seek asylum, and the right to property.

### Political rights

**Political rights** are rights allowing people to participate in politics, and they also ensure a fair political system. Political rights related to participation include the right to vote and the right to be a politician or government officer. There are also rights to associate, to form a political party, or simply to be a member of a group. Groups may

### Political Rights

Political rights allow individuals to participate in politics, and ensure a fair political system which includes the right to vote, the right to be a politician, and the right to join a political party.

### Civil Rights

Civil rights protect an individual's personal liberty and ensure liberties such as freedom of expression, conscience, speech, religion, expression, and movement.

be political parties, trade unions, or even fan clubs. The right to assemble—that is, to meet together—publicly or privately is also a human right and can cover meetings to protest a government or work conditions, to raise awareness for an issue, or to take part in a cultural activity.

## Economic Rights

**Economic Rights**  
Economic rights ensure an individual's economic welfare. The main economic rights include the right to work, the right to get welfare, and leisure rights.

**Economic rights** are rights which ensure individuals have enough money or resources to live with dignity in their community. For most people this also includes the right to work, that their employer pays them fairly, and provides them with a safe and healthy work environment. Protection is also offered to those unable to work in the form of government welfare. Article 22 of the UDHR outlines the right to social security, that is, the right to be given the necessary resources for survival such as welfare payments or access to cheap food. Most countries in Southeast Asia have weak or non-existent social security systems, and is therefore an area requiring much more development. The other main economic right is the right to rest and leisure. Like the right to social security, it is often downplayed because many see it merely as a child's right. However, the right to leisure is linked to the right to work. Maximum hours and required days off are a part of the right to work.

## Social rights

**Social rights** are rights a person should expect from living in a society, such as the right to healthcare and education, food, water, and housing. Sometimes called livelihood rights, it can be argued that these rights stem from the idea of a social contract: a contract between individuals and their government which assumes that if a person lives peacefully and lawfully, governments will provide certain services, and protect other services people provide for themselves.

The services expected from governments include an education and healthcare system. How it gets its citizens to pay for such services will vary between countries; but the government must provide them. For example, governments must provide compulsory free primary education for every child regardless of ethnicity, nationality, citizenship, or language. The rights to education, health, food, water, and housing are particularly important in Southeast Asian countries. While some countries such as Singapore have done very well here with food, water, housing, health and education all of a high standard, others such as Myanmar, still struggle to provide these basic rights.

## Cultural rights

The final category is cultural rights; that is, the rights for a person to participate in their culture. These can be broken down into three elements: rights to language, religion, and cultural activities. The human right to use a language prevents States from barring people speaking their language. It does not necessarily mean a State must provide services for those people in that language (although it is expected that essential government services such as law and health would be available in their language). Rights to religion allow individuals to choose their religion and to practice this as a group; for example, to pray together.

Cultural rights encompass many activities such as the right to eat, wear clothes, marry, hold a funeral, and celebrate events, according to the culture. Across Southeast Asia, there are many tensions surrounding this right, such as the right to wear certain clothes (for example, the hijab or veil worn by Islamic women), or the rights of indigenous groups to live and hunt in their customary land which may be made into a national park by the State.

## Social Rights

Social Rights are the rights to government services such as health and education. They are also rights to basic necessities such as food, water, housing, and clothing. They are social because they ensure people can live in a society with dignity. They are often thought of as part of the social contract between people and the State: by obeying the laws people are rewarded with by the government giving these services.

### 1.4.1 The Separation and Unification of the Categories of Rights

Dividing rights into these categories is useful because each category varies slightly in the nature of the rights and the duties. For example fundamental rights have the power of international law to enforce them, which civil freedoms mostly do not; social rights detail government services and are not immediate like civil rights, and cultural rights will mainly target minority groups. However, there is also a danger in separating these rights into categories because some governments may favor some categories and ignore others, or they may selectively choose which to support.

For much of the period between 1950 and 1990, the major division has been between those countries which support civil and political rights against those supporting economic and social rights. As a result, these categories have been seen as separate and distinct. The split coincides with the Cold War, when the world was divided ideologically between western countries supporting liberal capitalism, and communist countries (such as China, the Soviet Union, and Vietnam), who supported communist political systems. There was a tendency, although this was not true in all cases, for western countries to support civil and political rights, and for communist countries to support economic and social rights. In general, western countries tend to favor civil and politics rights because these already exist in their bills of rights. Further, as rich and developed countries, they saw little need to address economic rights as they had very few starving or homeless people, or they saw social rights as services their citizens should pay for. This division was supported by the major western non-governmental organizations (NGOs), such as Amnesty International and Human Rights Watch, both of which worked exclusively on civil and political rights until the late 1990s, before they also began to take note of economic and social rights.

Communist countries saw the role of government as providing services such as education, health, and free economic welfare, but they did not support political rights such as the right to vote. Similarly, some Southeast Asian countries decided development should come before civil freedoms. Many countries, including Singapore and Malaysia, promoted economic and social rights over civil and political rights. They argued that only after health, education, and wealth had been dealt with could civil and political rights (such as the freedom of expression and the right to assemble) be recognized. They claimed granting individuals civil and political rights before their country was fully developed would lead to conflict and confusion, as people would protest and fight rather than concentrate on working towards development. So people's civil rights were traded off for economic and social ones. While in Chapter Three, it will be shown that the separation of rights was not solely a political decision, it still influences how States relate to human rights.

The division between categories was also enforced by concepts such as the "three generations" theory, which assumes different categories of rights emerged at different times. The theory assumes that human rights have three separate and chronological groups.



## Concept

### The “Three Generations” Theory

The “three generations” theory was proposed by a Czech lawyer, Karel Vasak in the 1970s, and states that rights emerged at different times in different contexts. The theory defines the three generations as follows:

- **First Generation:** The first human rights were civil and political in nature and occurred during the enlightenment, from around the late 1700s to the mid-1800s. Examples can be seen in the United States Bill of Rights, and the French Declaration of the Rights of Man and of the Citizen.
- **Second Generation:** The second generation of rights came as a response to the harsh conditions of the industrial revolution. These rights protected the worker and forced States to provide services like education and healthcare. This period began in the late 1800s and continued until World War II. During this period, the ILO emerged to protect workers, the first welfare States appeared, and the first universal education systems were introduced.
- **Third Generation:** The third generation of rights were most vital to developing countries, and included the rights to self-determination, minority, and cultural rights. They were important in the 1960s and 1970s, when they began to arise in various international human rights treaties.

Whilst the three generations theory does help to distinguish the different types of rights, it creates more problems than it solves. The problems are that detailing three generations implies civil and political rights were the first and original rights, with all other rights following later. This reinforces the assumption that civil and political rights are primary and fundamental, whereas economic, social, and cultural rights come second. It also implies civil and political rights are the most developed because they have been around the longest, which is not the case as many cultures have long histories of respecting cultural differences, and supporting the poor. Finally, it implies that each generation is distinct and can work independently which assumes that the categories can be separated. However, contemporary thinking around rights argues that this is not the case.

### 1.4.2 VDPA: Vienna Declaration and Programme of Action

The problems of western disinterest in economic rights, or reduced importance given to civil and political rights in Asia, were seen as a major hurdle to the human rights movement. At the end of the Cold War and following the dissolution of political divisions, an opportunity arose to fix these divisions at the Second World Conference on Human Rights (1993) in Vienna. The conference and its outcome document, the Vienna Declaration and Programme of Action (VDPA), mark an important evolution in human rights. It was agreed to by all existing 171 States, demonstrating its universal acceptance.

The VDPA revolutionized the understanding of human rights in many ways: it was an attempt to codify the concept of “***all human rights for all***.” The VDPA put an end to the idea that human rights change according to cultural particularities; it declared that



the protection of human rights should be a legitimate concern of the international community, and that protection of these rights was not exclusively a national matter. It also linked human rights to democracy and development, stating that each was interdependent and mutually reinforced the other. In other words, *there cannot be rights without democracy, democracy without development, and development without human rights*.

The VDPA moved human rights from the divisive structure of the Cold War separation of rights into a far more integrated and encompassing view. A major concept proposed by the VDPA was that human rights are indivisible, interdependent, and inter-related.

These three terms together argue that human rights do not exist as separate categories, but form one single group of inter-related categories of human rights.

- **Indivisible** means that a government cannot divide up rights and only choose specific categories. A government must take human rights as a whole, and not just address separate categories.
- **Inter-dependent** means each category of rights does not work independently: civil rights often depend on social rights, which may depend on political rights, which may depend on economic rights. For example, the right to education (a social right) depends on freedom of movement to reach school (a civil right), but movement depends on having enough money, say, for a bus ticket (an economic right), but to ride the bus, one needs to be healthy (a social right), but being healthy may depend on demanding a government that ensures people's right to healthcare (a political right).
- **Inter-related** means many rights are related to each other across categories. For example, the right to assemble (a political right) also includes the right to join a trade union (an economic right), and a right to be part of a minority group (a cultural and civil right). Similarly, the right to have children is both a civil and a social right (as is the right to healthcare). This inter-relationship clearly shows that rights are not mutually exclusive, but a network which relate and re-enforce each other.

This chapter has so far introduced a range of concepts, theories, and arguments to show how human rights work. These concepts form a necessary foundation to understand just why human rights are important, and how they should be promoted and protected. Many of the concepts covered here will be returned to in the following chapters of this textbook.

## 1.5 Why Study Human Rights?

The study of human rights is important today for a number of reasons. This first chapter introduced the theoretical, political, and philosophical basis for rights and explained some of the central concepts. Still, the question needs to be asked, why study this, and, is this a useful or even legitimate topic for university research? The answer to all these questions is a resounding yes. To understand why some people do not receive the same protection and freedoms as others, there needs to be a greater understanding of how human rights work. This knowledge relies on a better understanding of how society works, the values and beliefs in a society, and the political and economic context to demanding and receiving rights. Universities are tasked with contributing

to national development, and skilled people are required to resolve the problems in development. The study of human rights can contribute to the effectiveness of many professions, whether they be lawyers, teachers, anthropologists, political scientists, or social workers.

There are many reasons for the study of human rights at university level, and they are summarized below:

### **1.5.1 Human Rights Education is a Human Right**

Education on human rights is a human right in itself. Governments are expected to educate their citizens on these rights; in fact, a number of treaties ratified by Southeast Asian governments (including the ICESCR and CRC) define it as a duty. Such rights work most effectively only when individuals know their rights, thus enabling them to claim them. As will be detailed throughout this textbook, a significant weakness in the protection of human rights is the lack of awareness people have about their rights. As an example, very few university students graduate with any sense of what human rights are. Even fewer high school students are exposed to them. Here, the university student can play an important role for when he or she graduates and starts working, they may need to make decisions based on human rights. When students engage with governments and government officers (from voting to meeting with local representatives), they should note whether human rights are being respected. The education of students in this field forms an important contribution to the civil functioning of society.

### **1.5.2 Protecting the Vulnerable**

Most people in society live relatively safe lives. Their homes are protected from people breaking and entering. They rarely face threats or violence. They have enough to eat, drink, and a place to live. This is especially true of most university students. But not everybody lives like this. There are groups of people within Southeast Asian societies who do not have this kind of protection such as refugees or migrant workers, or other minority groups facing discrimination. Each person has human rights which they are born with, and no one can take them away. Nonetheless, people who live fairly safe well-off lives may not see the need to study human rights because their rights are not violated. People often do not recognize the protection they receive because it is invisible, and they assume everyone gets it or is entitled to it. A common perception is that this protection is normal, but the reality is that protection is only normal for some, in certain situations. It may only be when a crisis arises—for example, a natural disaster or a political conflict—that people may become interested in human rights because their safety (and their rights) may suddenly be at stake.

Important questions to ask are why do some people get protection and others do not? How can those who are threatened be protected? In most wealthy societies, it can be a challenge to get people to consider why others go hungry, don't have a roof over their heads, or have access to clean water.

People may not receive protection for a variety of reasons. Perhaps they are discriminated against or it is considered too difficult to help them because they live a long distance from government, or they are not considered citizens. However, in many cases it is unclear why some people do not get the same protection and the same freedoms as others, nor why some people are more vulnerable to losing them.



If students are to understand this, and also have a better knowledge of how society should protect these individuals, they need to understand how human rights work. We can all take action to promote human rights for everyone, including ourselves. No one can be sure when our human rights will be threatened. Granted, a greater knowledge of human rights does not guarantee protection, but it does significantly help. Knowledge about such rights results in a student being less likely to violate those rights. It could also mean they will be less tolerant of those who do violate rights, and will be more likely to support governments which respect their commitment to human rights.

### **1.5.3 Human Rights Provides a Regional Understanding**

Countries in Southeast Asia, under the regional organization ASEAN, have begun to develop a regional level response to human rights concerns. Many human rights issues happen across borders in Southeast Asia, for example, migrant workers and human trafficking. The strongest response to such concerns tends to come from within the region, with civil society being supported by other groups in the region. This textbook will look at human rights on a regional level, and show connections and comparisons of rights issues across the ten countries of ASEAN. This textbook will provide the student with a foundation on the idea of human rights, and how to respond to critical human rights issues in the region today.

In Southeast Asia today, people face many challenges. Hill tribes face relocation because of dam projects, young children are forced to work, women face discrimination and violence, disabled children do not get access to education, political opponents are jailed, and migrant workers face exploitation in their workplaces. This list shows that every country in Southeast Asia has significant, though varied, human rights concerns. Typically, universities have not dealt with these problems as human rights issues because there is a lack of knowledge about other countries in Southeast Asia, or they are considered too 'political' or sensitive.

Changes are occurring in South East Asia, and human rights are becoming more mainstream. ASEAN has reaffirmed its commitment to human rights in various documents. Recently, ASEAN set up a regional body which agreed to a regional level declaration on human rights. The Declaration and the AICHR body enforce the idea that human rights must also be examined at a regional level.

### **1.5.4 Human Rights Education Adds Value to Other Knowledge**

The study of human rights is multidisciplinary and provides students with a basic knowledge in a number of university disciplines.

- **Law:** Human rights concern the legal protection of people. Human rights come from international law and relate to the national laws of Southeast Asian countries.
- **Political Science:** Human rights describe how States should work, and what kind of duties they have, and the activities they should be doing in order to be effective governments.
- **Sociology:** Human rights help to understand the dynamics of a society which is necessary to both protect communities and work against discrimination by changing values and beliefs (such as the inferiority of women).

- **Philosophy:** Human rights arise from ideas about what is moral and good. There is no scientific proof that the current human rights are the correct ones, but the various philosophical ideas about justice, ethics, and morals give reasons why they are correct and why people should treat each other with respect.
- Human rights also involve international relations, peace studies, psychology, and anthropology.

By studying human rights the student will gain a greater understanding of how people relate to governments and communities. The student will also gain a greater understanding of the members in their society and the challenges some of these people face. Lastly, the student will gain the understanding necessary to analyze and contribute to the evolution of human rights in the region.

## A. Chapter Summary and Key Points

### What are Human Rights?

Human rights are the rights a person has just by being human. These rights start from birth and cannot be taken away. Other rights, like student rights or citizen's rights, need to be earned or can be lost, so they differ from human rights.

Human rights are enforced by law, so they are legal rights. They are also seen as moral, and help a society work better, so they are both moral and social rights. Human rights place duties on States to protect people inside their country. However, people, businesses, universities, and armies also have obligations to not violate other people's rights.

Religions, cultures, and societies all have rights-based values about the treatment of human beings.

For some cultures it was seen to be part of a 'natural law,' but mostly human rights are now seen as a rights written into law.

### Fundamental Concepts

Human rights are in a special category because these rights are universal (everyone has them), inalienable (they can't be lost), and inherent (someone gets them from being born human).

Human rights are about ensuring people lead a life of dignity, so they are respected and treated well, especially by the State. Also, they assure people are treated equally, so that people are not treated differently.

### Human Rights Law

The aim of human rights is to ensure people can live in a society that obeys the rule of law. In order to achieve this, individuals must know the law, and the State must ensure these laws are respected and protected by the police and judges, and that the law regards everyone as equal. These are some of the duties a State must do to ensure people get their rights. Most involve protecting people from the power of the State (vertical protection), but people must also be protected from having

their rights violated by other individuals, or organizations (horizontal protection). To do this States must ‘respect, protect, fulfill,’ and ‘promote, protect and prevent’ human rights.

### Categories of Rights

Rights fall into a number of different categories. The most important are often called fundamental rights, and these include the right to life or freedom from slavery. There are legal rights in the legal system, and rights in society which are also called civil rights. Humans also have political rights, such as the right to vote, economic rights that mostly cover work issues, social rights that encourage governments to provide important services like healthcare and education, and cultural rights.

For much of the modern history of rights, countries have tended to favor one category over another, and there have been many arguments as to which category is more important. This was caused in part by the Cold War, but also human rights theorists themselves considered rights were different in nature. However, since the Vienna Declaration and Programme of Action in 1993, it has been accepted by both States and human rights actors that all the categories are indivisible (a category cannot be forgotten or ignored), inter-related (categories are connected), and interdependent (categories rely on all other categories).

### Why Study Human Rights?

Human rights are important to study because it is a person’s right to know what rights they have. Studying rights will help protect the most vulnerable groups in society such as children or the disabled, plus the study of human rights is a great way to get to know the ASEAN region. Human rights education adds value to other knowledge, and can help a student better understand the law, politics, sociology, or even history.

## B. Questions

### Typical Exam or Essay Questions

- If countries do not obey human rights, is there any point in having them?
- What are the differences between human rights and other types of rights such as citizen rights or student rights?
- Should different communities and cultures have different rights, or are all people’s rights the same?
- If human rights are universal, is it a contradiction that only women get women’s rights?
- How do positive duties differ from negative duties?
- What is horizontal and vertical protection, and why is horizontal protection needed?
- What are examples of human rights being indivisible, interdependent, and inter-related?

## C. Further Reading

### Texts in English

There are a number of similar text books available, some for free. A simple internet search using key words will find the texts listed below.

#### General textbooks

##### Available Free on the internet:

Benedek, W (ed.) 2008, *Understanding Human Rights: Manual on Human Rights Education*, European Training and Research Centre for Human Rights and Democracy, Graz.

Sepulveda, M & Gudmundsdóttir, GD 2004, *Human Rights Reference Book*, University for Peace, Costa Rica.

OHCHR. (2001). *Human Rights: A Basic Handbook for UN Staff*. Geneva: OHCHR.

##### Available through purchase

Alston, P & Ryan Goodman 2013, *International Human Rights*. Oxford: Oxford University Press..

Clapham, A. 2007, *Human Rights: A Very Short Introduction*. Oxford University Press, Oxford.

Ishay, MR (ed.) 1997, *The Human Rights Reader: Major Political Essays, Speeches, and Documents from the Bible to the Present*. Routledge, New York.

Ishay, MR 2004, *The History of Human Rights*, University of California Press, Berkeley.

Novak, M 2004, *Introduction to the International Human Rights Regime*, Martinus, Boston.

Rahman, J 2003, *International Human Rights Law: A Practical Approach*, Longman, London.

Smith, Rhona 2007. *International Human Rights*, Oxford University Press, Oxford.

### Websites

#### [www.ohchr.org](http://www.ohchr.org).

Useful websites include the Office of the High Commissioner for Human Rights (OHCHR) which has a number useful texts and documents, although it does tend to use many official UN documents which are not always easy to read.

#### [www.hrea.org](http://www.hrea.org).

Another useful source is Human Rights Education Association (HREA) which has a huge online library of texts on human rights issues.

#### <http://www1.umn.edu/humanrts>

All the major treaties mentioned in this chapter are available online. A Google search will find them, though the major databases are at the OHCHR and at the University of Minnesota Human Rights Library.



# 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 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.

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).

### 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

### 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.

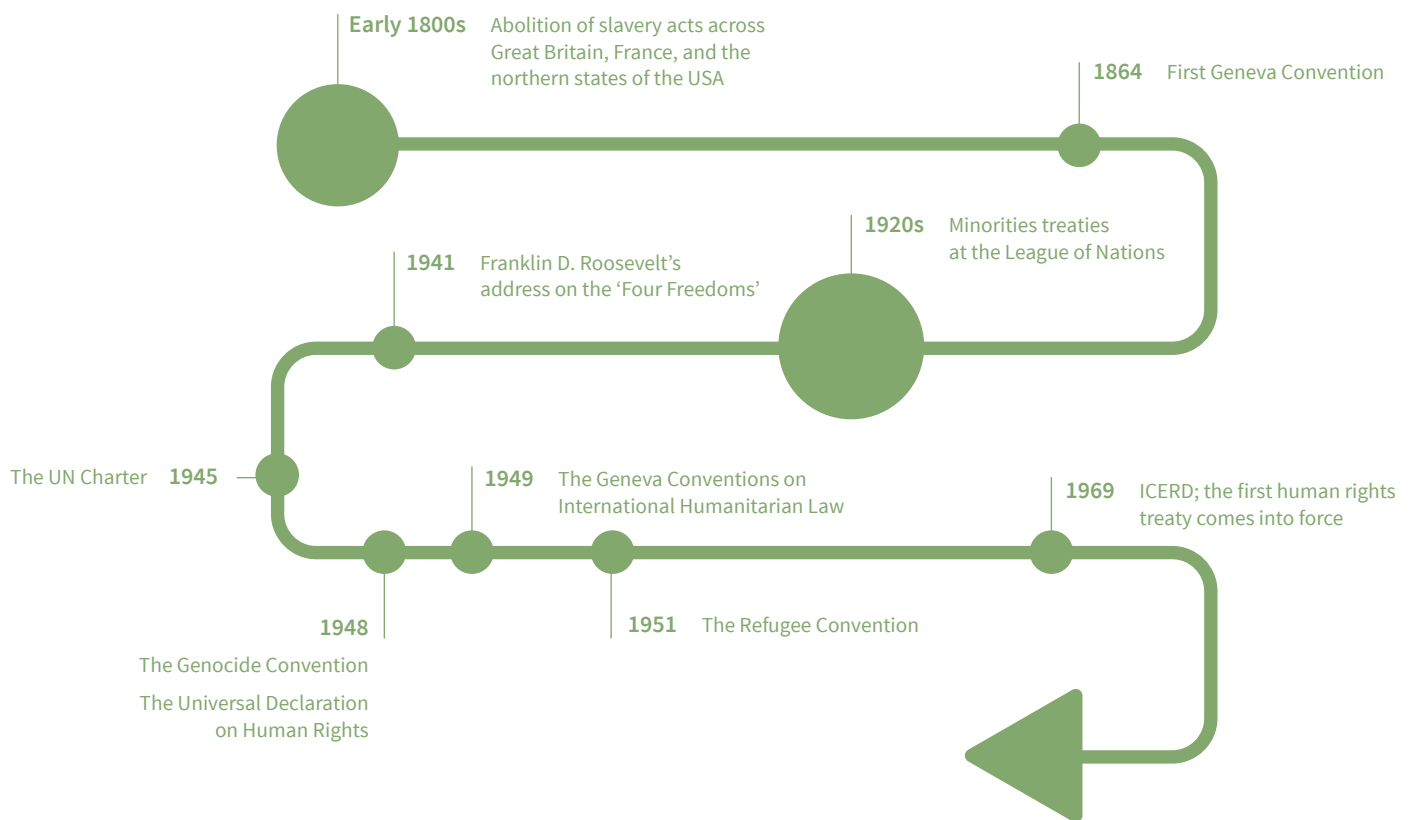
***Who should be given more power to interpret human rights: the State or the international community?*** If interpretation is left up to States, they could weaken their commitment and duties by using excuses such as culture or the economy. On the other hand, a universal interpretation from the international 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.



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.

## 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.

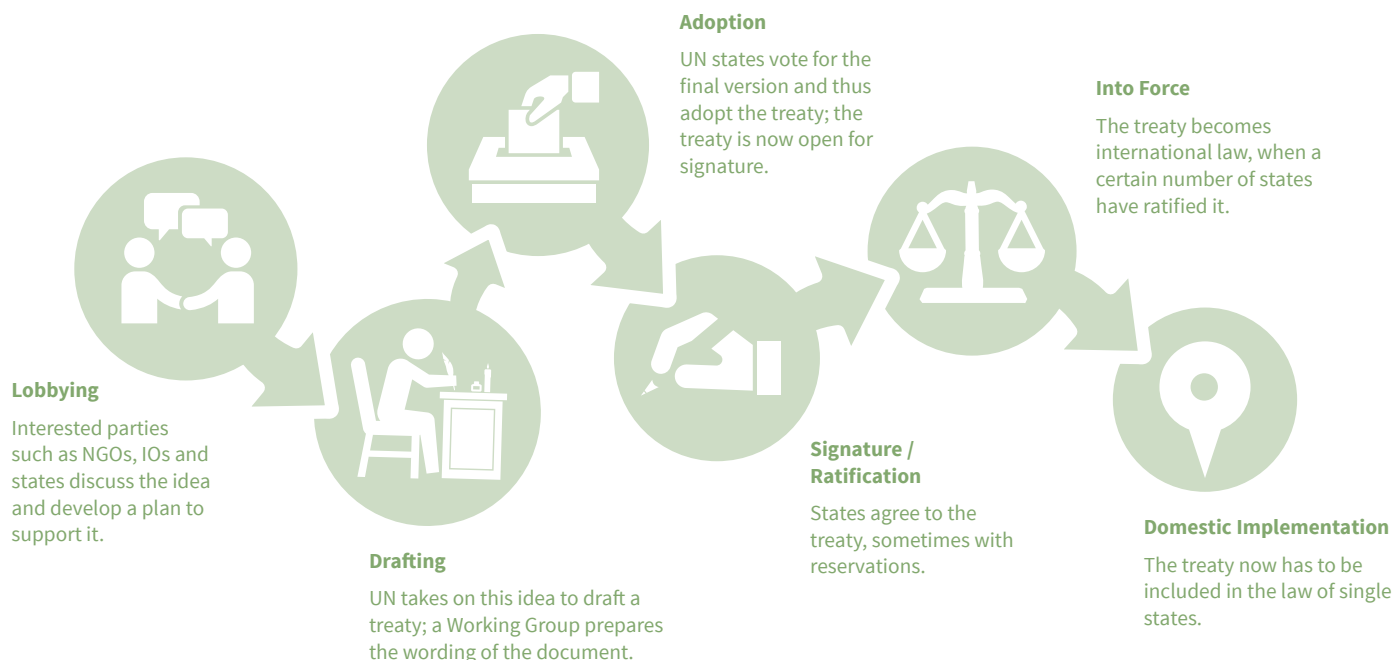
The treaty-making process culminates when it is adopted by the General Assembly, and countries vote to accept the final wording of the document. However, this adoption stage does not actually turn the document into an international law. Rather, it approves the final version of a treaty to which States 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.

## 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





# 3

## International Human Rights Treaties

Recognizing that the UDHR was not binding, the world community began the second phase of incorporating human rights at the international level by codifying it into a treaty. Drafting started soon after the adoption of the UDHR in 1948. The original intention of converting the UDHR into a single treaty was soon abandoned and rather two treaties were planned, although it was not till eighteen years later in 1966, that the two treaties were presented at the UN General Assembly (UNGA) for signature and ratification.

There were many reasons for deciding on having two treaties rather than one: the emerging political divisions caused by the Cold War; the entry of numerous decolonizing States from Asia and Africa into the UN who brought with them other perspectives on human rights; and the fact there were several options on how to legally enforce different rights.

While the Cold War is considered by some to be the main contributor to the delay, other reasons also proved significant. States were cautious about the notion of legally binding rights as opposed to a broader declaration; therefore, the drafting needed to be more precise in the duties and obligations it placed on them. In addition, during this period (1948-1966), the UN was a rapidly evolving organization with about 60 members joining in this period (doubling its size), many of whom also wanted input into the international treaties. Finally, there were major differences in the theory of human rights between the democratic capitalist states of the west, the socialist countries of the Soviet Union, and later, the decolonizing states of the developing world. As far as the latter was concerned, the right to be free from colonialism (self-determination) and the right of non-discrimination were of the utmost importance. For many western states (predominantly capitalist democracies), political rights and freedom of expression were considered vital. For communist countries, State duties regarding health, education, and the rights of workers were considered very important. Thus, these competing interests had the effect of slowing down the negotiations around the treaty drafting process.

Early on, it was realized that keeping the two different types of rights (civil and political versus economic and social) in one treaty would be challenging because compliance to each type of right differs. These differences also drove the division between civil and political rights, on the one hand, and economic and social rights on the other. It was eventually decided that the two sets of rights should be enforced through different procedures. For civil and political rights, compliance in most cases is now enforced from the moment the treaty comes into force. For example, States should not gradually introduce changes to stop torture, rather they must immediately cease the practice. However, poorer and developing States may need to work gradually towards giving its citizens full economic and social rights such as access to healthcare, or ensuring the wide availability of high schools. Upon agreeing to a treaty, it was decided that it would be unrealistic to expect developing nations to immediately provide rights to healthcare, education, and housing. Finally, how rights in the treaties would be protected was a concern for many governments. Who would ensure governments complied with the treaties? And if they did not comply, could governments be sanctioned? It was decided that civil and political rights have clear legal obligations, and these can be assessed through a treaty body. The ICCPR treaty sets out the working details of this body. However, there was no treaty body initially planned for ICESCR because it was considered that these rights are much harder to assess if a violation has occurred, and so the treaty itself does not establish a treaty body (though, these ideas changed and a body was established at the same time as the ICCPR treaty body, but not by the ICESCR treaty itself).

In the end, a system emerged which enforced the rights in the ICCPR immediately upon coming into force. The only exception is that some rights are derogable, which means that under special circumstances, States do not have a duty to enforce them. In a sense, ICCPR rights are either on or off (much like turning on a light, it is either on or off), though some rights (the non-derogable ones) must be on all the time. In contrast, rights in the ICESCR are somewhat different in nature. It was realized that as a State cannot instantaneously build a health or education system, it must be given the time to do this gradually, under a process called the 'progress realization.' As will

be detailed below, the State has an obligation to progressively move towards fulfilling everyone's economic and social rights. As a result of these differences, two treaties were drafted separately but simultaneously adopted at the UNGA, and entered into force at nearly the same time (the ICESCR came into force three months before the ICCPR on 3 January 1976). As an indication of their importance, these two treaties are titled 'covenants' as opposed to conventions, because the term covenant implies a more important or serious contract.

### 3.1 The ICCPR

The International Covenant on Civil and Political Rights entered into force on 23 March 1976. To date nearly 170 countries have ratified this covenant. The ICCPR was ratified in Southeast Asia first by Vietnam (1982), followed by the Philippines (1986), Cambodia (1992), Thailand (1996), Laos PDR (2000), and Indonesia (2006). It has not been ratified by Brunei, Malaysia, Myanmar, or Singapore.

While it is not possible to give the exact reasons why a government refuses to ratify a treaty, Singapore has said within UN venues (in this case during its reporting within the Universal Periodic Review of 2011), that "The Singapore Government takes its treaty obligations very seriously and prefers not to sign Conventions until it is sure it can comply fully with all their obligations." While the government did not detail exactly which obligations it cannot meet, it is common knowledge that Singapore does not allow full freedom of expression, the right to assemble, and the right to associate. These limitations were not mentioned by the government of Singapore, but rather they noted that, "As a young city-state with a multi-racial, multi-religious and multi-lingual population, Singapore has no margin for error," implying that too much freedom could lead to racial instability. Finally, the Singapore government also referred to its position that human rights must comply with their national standards, and not the reverse when it comments, "The manner in which all rights are attained and implemented must nevertheless take cognizance of specific national circumstances and aspirations." Here, the Singapore government is referring to the debate between universal rights and 'national and regional particularities', which occurred around the adoption of the Vienna Declaration and Plan of Action in 1993.

The ICCPR makes civil and political rights in the UDHR legally binding. It is not identical to the UDHR in that the ICCPR also adds rights which are not in the UDHR, such as self-determination and the prohibition of expulsion and hate speech, and it also drops some rights which are in the UDHR, such as the right to property and asylum, which does not appear in the ICCPR.



## FOCUS ON

### ICCPR Optional Protocols

There are two Optional Protocols to the ICCPR. The first allows individuals to make complaints to the Human Rights Committee, a process which will be discussed more in coming chapters. The Second Optional Protocol outlines a commitment to abolish the death penalty which is discussed below.

**Jurisdiction**  
Jurisdiction basically  
means where the law  
(juris) speaks (diction).  
In other words,  
jurisdiction is where the  
law is in operation.

State parties to the ICCPR are immediately obliged to “respect and to ensure” the rights in the treaty for all people within the territory of the State, and under its power. The **jurisdiction** of human rights treaties is territorial, meaning that people acquire their rights not through citizenship but through physically being in the country. This is detailed in Art 2.1 which states that “all individuals within its territory and subject to its jurisdiction” will have ICCPR rights, although there are two rights in the ICCPR which are exclusive to citizens only, that of political rights to vote in that country, and the freedom of movement. This jurisdiction also includes territory under the power of the state; for example, colonies or protectorates. While there are presently few of these, examples of territories outside a state’s jurisdiction where ICCPR rights apply, do exist, such as the French Pacific Islands of Tahiti (part of French Polynesia). In Southeast Asia, no territories have such jurisdiction. More recently, there has been some debate over jurisdiction. An example is the USA which claims that the ICCPR does not extend to their detention facility at Guantanamo Bay.

Human rights treaties are mainly based on territorial jurisdiction, meaning they operate in the territory of a state but end at its borders. There are other types of jurisdiction, such as universal jurisdiction and jurisdiction over citizens. While defining territorial jurisdiction is mostly simple as State borders are clearly marked, it may be complex in situations where one state occupies another, or on boats in international waters, or on airplanes. *For example, when the US occupied Iraq from about 2003-2008 which laws are in power? In these cases, do human rights obligations come with the occupying force, because the occupied State is now under the jurisdiction of the invading force?*

A similar issue concerns the turning away of refugee boats, which has happens in Southeast Asia. After the Vietnam conflict of the 1970s, a number of boats containing Vietnamese refugees were turned away by the Singaporean and Malaysian navies. More recently, the Australian navy also turned away refugee boats and the Thai navy has been heavily criticized when it refuses entry to boats containing Rohingyas. As the ICCPR Committee has recently suggested, when naval forces turn a refugee boat around, that boat should be considered under their power and jurisdiction of the navy and therefore the ICCPR rights of the people in the boat should be recognized. In a recent case under the Convention Against Torture (*Sonko vs Spain*, 2011), when the Spanish Civil Guard failed to rescue a drowning migrant in Moroccan waters trying to enter Spain, even though the migrant was not actually in Spain, the committee “observes that the Civil Guard officers exercised control over the persons on board the vessel and were therefore responsible for their safety.” Hence, jurisdiction is not purely territorial, but also includes areas where the government exercises effective control.

## **3.2 Rights in the ICCPR**

This section briefly lists some of the important articles in the Covenant. Many of these rights will be discussed in depth in later chapters of this textbook, but here only the main elements will be outlined.

### **3.2.1 Self-Determination (Article 1)**

The first article in the ICCPR on self-determination is identical to the first article of the ICESCR. This concerns the rights for political groups to choose their own political system, and to use their own resources as they wish. Self-determination in the ICCPR and the ICESCR essentially refer to a freedom from colonialism. They were not intended to also allow freedom to indigenous, cultural, or ethnic groups to start their own countries, although this article does give some rights to ethnic and cultural groups. This right is relevant to the context of Southeast Asian countries movements for self determination.

### **3.2.2 Non-Discrimination (Article 2)**

All human rights treaties recognize rights to equality and non-discrimination (Art. 2 in the ICCPR). As was covered in Chapter One, it is never justified nor permitted to discriminate on the grounds of race, sex, language, political opinion, and so on. The ICCPR provides a list of possible grounds of discrimination, but also contains an important 'catch all' ending — "or any other status," meaning that discrimination can arise from any categorization. An important development in this area is discrimination based on sexuality. Sex is listed in the article, but not sexuality.

### **3.2.3 Right to Life (Article 6)**

A significant development from right to life in the UDHR rights is the inclusion in the ICCPR of limitations to the use of the death penalty. The right to life must be protected by law; though, in reality, all States have already criminalized murder or other actions which lead to a person's death. The ICCPR requires States to have conditions on the use of the death penalty. The ICCPR requires States to insert conditions on their use of the death penalty: thus, it can only be used for the most serious crimes, the sentence must be open for appeal, and a death sentence cannot be given to certain people such as pregnant women, children, mentally disabled and the elderly. While the article does not ban the death penalty, States can agree to the Second Optional Protocol, which deals with the abolition of the death penalty. The Optional Protocol has been agreed to by 75 states, and has been in force since 1991. However, in Southeast Asia, only the Philippines and Timor Leste have ratified it. The Optional Protocol requires States to abolish the death penalty for ever. This has already been done in Europe, and a majority of Latin American countries have also abolished it, though both these regions have achieved this mainly through regional agreements and treaties.

## DISCUSSION AND DEBATE

### The Death Penalty

Around the world, countries have abandoned the death penalty. Over 100 countries have now banned it. A further 50 countries have not used the death penalty for more than 10 years. Currently, only about 42 countries still regularly use it.

Many argue that the death penalty is an important crime fighting tool, and a necessary means to punish the most severe of crimes. For example, Singapore, Malaysia, and Indonesia argue that the only effective way to combat drug trafficking is through the death penalty. In these countries, executions usually involve drug smugglers.

Others argue that the death penalty should be abolished because it can be wrongly given to an innocent person, that it does not reduce crime, and that people who face this punishment are mostly poor and discriminated against. A further problem in the region concerns the use of mandatory death penalty sentences in Singapore and Malaysia. A mandatory sentence means that, for example, anyone found with a certain amount of drugs will automatically be sentenced to death, regardless of the circumstances.

***Is the death penalty necessary?*** Surely, if a person commits a heinous crime (such as rape or murder), they deserve to face the most severe of punishments? But, who is to say death is a worse punishment than life in prison?

***Does the death penalty actually deter people from committing crimes?*** Admittedly, the problem of drugs in Malaysia and Singapore has been reduced compared to other countries. However, people are still regularly convicted and awarded the death penalty, which means drug smuggling still occurs despite the deterrent.

***Shouldn't an aggrieved family member be given the right to see a killer sentenced to death? It will give a much greater sense of justice for that person.*** But shouldn't justice be determined by a fair trial, and not an emotional and aggrieved family member?





## FOCUS ON

### Death Penalty in Southeast Asia (as of 2013)

Country	Death Penalty in Use?	Use of the Death Penalty
Brunei	Yes	Last execution in 1957 when a British Protectorate
Cambodia	No	No law on death penalty; last execution in 1989
Indonesia	Yes	Last execution in 2008
Laos	Yes	Last execution in 1988
Malaysia	Yes	Mandatory death penalty, yearly executions
Myanmar	No	Last Execution in 1993
Philippines	No	Abolished from 1987-1993, and 2006 onwards
Thailand	Yes	Last execution in 2009
Singapore	Yes	Mandatory death penalty recently limited, yearly executions
Vietnam	Yes	Yearly executions

### 3.2.4 Legal Rights (Articles 9, 10, 14, 26)

A number of articles in the ICCPR ensure that legal systems are just, fair, and effective. These rights cover such concepts as equality before the law (Art 26), unjust imprisonment (such as arbitrary arrest in Art 9 and humane imprisonment in Art 10), and the right to competent, unbiased, and fair courts (outlined in Art 14, the largest article in the treaty). There are three main areas of legal rights: (1) rights upon arrest and detention, (2) rights in the courtroom, and (3) rights when imprisoned. Looking very briefly at the main rights in these areas:

- **Arrest:** A person cannot be arrested without reason (that is, they cannot be arrested arbitrarily); they must understand why they are being arrested; have access to a court; and be presumed innocent until the court decides their innocence or guilt.



- Trial: Judges in the court must be qualified and unbiased. Individuals should have access to a lawyer, be able to cross-examine witnesses, and be brought to trial within a reasonable period of time. The accused should also have the right to challenge or appeal a finding of the court. There should be a different trial system for children. The punishment should suit the severity of the crime.
- Detention: Individuals cannot be detained without reason. The reasons for their detention should be made known to them. They cannot be detained for a long period without being taken before a court. The conditions of the detention should be humane.

### 3.2.5 Freedom of Movement (Article 12)

The freedom to move addresses both movement inside a country and movement between countries. However, both have many limitations. A person has the right to leave any country, but only the right to enter their own country. A State, for whatever reason, can refuse a non-citizen entry into their country, and even act completely arbitrarily in making this decision. For example, a condition of entrance may be hair length (Singapore in the 1960s and 70s regularly refused entrance to males with long hair, and as a result the rock band, Led Zeppelin, cancelled shows after refusing to cut their hair).

People are also free to move inside a country, although the ICCPR limits this right to people who are “lawfully within the territory.” There are obvious limitations to the freedom of movement: people cannot enter other people’s houses, and women cannot enter male toilets. These limitations, as will be detailed below, must be in law, and be regarded as necessary for reasons such as morality or the rights of others.

### 3.2.6 Freedom of Religion (Article 18)

People have the right to believe and practice their religion. This freedom overlaps with the minority and cultural rights outlined in Art. 27. The freedom of religion protects individuals who want to express or practice their faith. This may be done individually or collectively. The freedom of religion can extend to the workplace and place of education. The right also protects people from being forced to believe a religion. As detailed, there are always complex debates around religious freedoms and human rights. While the article allows the right to change religions, this is not always accepted by many religions. Further, some Southeast Asia States have a State religion, making it challenging for those not of that faith to be free from discrimination. Finally, some religious practices, such as the selection of religious leaders, discriminate against women. Some religious practices can be limited by law, for example polygamy, but like limitations to freedom of expression or movement, it must be in the law and demonstrated necessary for specific reason such as morals or security.

### 3.2.7 Freedom of Expression (Article 19)

Laws in Southeast Asia that limit freedom of expression include: (a) libel and slander, (b) insulting people in authority, (c) treason, (d) pornography, and (e) intellectual property laws protecting authors’ rights. However, the limitations imposed by some countries in Southeast Asia may violate Art 19. For example, certain books on the monarchy cannot be sold in Thailand, and the novel, *The Satanic Verses*, has been banned in Malaysia and Indonesia.

### **3.2.8 Right to Marry and to Have Children (Article 23)**

The right to marry includes the right for anyone to marry, and insists that both partners have equal status within the marriage. Anyone can marry once they have reached a 'marriageable age,' though this is not specified in the treaty. In Southeast Asia, the minimum legal age to marry is generally eighteen, which is the most common standard around the world, though there are some allowances for people under eighteen to marry with parental consent. Some States want their citizens to marry later, so they impose a higher marrying age; for example the age to marry in China is 21 for females and 24 for males. Further, people must marry with free and full consent: nobody can be forced to marry. An arranged marriage is not necessarily a violation of this right as people can give full consent to an arranged marriage.

It is expected that men and women enter and leave marriages equally. Unfortunately, this has not always been the case in many Southeast Asia countries. Divorce laws in certain Southeast Asia countries often favor the male over the female, but this is now changing. For example, previous divorce laws in Thailand required a woman to prove her husband's infidelity, whereas the husband did not need to prove anything. Similarly in Indonesia, under the old system, women divorcing under Islamic law were treated differently. Divorce is not allowed in the Philippines, the only state in the world to maintain this law, and as yet same sex marriage is not recognized anywhere in Southeast Asia.

### **3.2.9 Right to Associate and Assemble (Articles 21, 22)**

While these were included as a single article in the UDHR, the two rights were separated in the ICCPR. Both the right to assemble (to hold a peaceful public meeting), and to associate (to form groups) can be limited by laws. These ensure the right to have a political life by both forming organizations and meeting, although not only political groups are protected by the covenant. Across the world in 2011 and 2012, the right to assemble was tested to its limits; for example, the mass gatherings of people in Arab countries, the protests in Bangkok, and the Bersih movement in Malaysia. However, there are limitations to this right as the long term occupation of an area may severely impact the rights of other people; for example, the occupation of the airport and central shopping district by two separate groups in Bangkok severely impacted the rights of others to use those facilities.

### **3.2.10 Right to Vote (Article 25)**

Political human rights cover a number of different elements. It includes the right to participate in politics, to be a politician, to be a public servant or a government officer, and the right to vote.

While the covenants do not explicitly mention democracy, political rights assume that people should have the right to participate in the political process through elections, or the right to vote. Voting alone does not constitute a democracy, as some countries not considered democracies do hold elections; for example, Vietnam and Laos. However, given that democracies are the only political system that requires voting as a necessary component, one can hardly deny a strong connection between the two.

Essentially, the right to vote focuses on the process of voting: thus, voting shall take place at a genuine periodic election, by universal and equal suffrage, and by secret

ballot. All of these elements, have the objective of ensuring that the election process is fair and equal. Nearly all Southeast Asia countries claim they are democracies, although one could argue the quality of their democratic procedures are debatable. Across Southeast Asia, nearly all citizens can vote in some kind of election, and all people are allowed to become politicians. However, whether the governments that result from these elections represent the “will of the people” is again open to debate.

### **3.3 Limits to Civil and Political Rights**

Some ICCPR rights can be legitimately limited in specific circumstances. There are different types of limitations. These categories are: (1) limits to all rights, (2) limits to specific rights made by governments, and (3) limitations through derogation.

#### **3.3.1 Limits to All Rights**

It is important to remember that human rights do not allow individuals ultimate freedom to do whatever they wish. Rather, all human rights are limited because individuals cannot use their rights to violate the rights of others. For example, a person cannot use their right to freedom of expression if it violates another’s rights. This is detailed in Art. 5 of the ICCPR.

#### **3.3.2 Limits to Specific Rights Made by Governments**

Limitations to specific rights in the ICCPR are explicitly detailed in the treaty. In these cases, governments can make laws to limit the scope of a right. A common example is limiting the freedom of expression through censorship. Similarly, the rights of movement, religion, expression, assembly, and association are also limited. However, they can only be limited if the following criteria are met:

1. The limitation must be authorized by a written law. This is to ensure the rule of law which prevents States from arbitrarily making rules to limit rights. A State cannot limit a right based only on moral attitudes or economy efficiency, for these views must be backed up by a written law. Examples of laws limiting rights include those concerning the right to demonstrate (for example, not being allowed to block roads), laws regarding religious practices (thus, groups are prohibited from taking illegal drugs for religious purposes), or laws on private property (which limit people’s freedom of movement to public areas).
2. The government must demonstrate these laws are necessary to ensure human rights. Just because a law exists does not necessarily mean it is correct. As an example, a government would have great difficulty defending a law to ban people from reading a book on human rights simply because they claim it threatens national security. Such cases have previously occurred in Myanmar where people have been jailed for carrying a copy of the UDHR (though there is strictly no law which bans the reading of human rights books).
3. The limitation can only exist for a specific reason. The specific reasons given in the ICCPR are public order, upholding the rights of others, public health, national security, or morality. The limitation can only occur for these reasons

and no other. States cannot limit rights because of economic efficiency or cultural practice, say, because this is not included. Public order refers to the government's duty to ensure people in public are not disturbed by others who are also exercising their rights (for instance, by blocking streets and airports, or denying access to public facilities). Public health can be used to limit rights; for example, when attempting to stop the spread of a disease the State limits freedom of movement. National security can be used to limit freedom to assemble, and morals are frequently used as a basis of censorship. While some of these limitations make sense, there will always be room for governments to exploit these definitions. Examples include the definition of public morality (for example, to limit the rights of sexual minorities), and national security (for example, to ban or limit political opposition).

### 3.3.3 Derogations in Public Emergencies

Certain rights can be limited in very specific situations such as public emergencies. A public emergency (also commonly known as a 'state of emergency') is something which according to the ICCPR "threatens the life of the nation:" this could be a natural disaster, a conflict, or a coup d'état. In these situations, States are permitted to break free, ignore, or derogate some of their obligations towards civil and political rights for a limited time. Derogation is a legal term which means a temporary repeal of a law. The ICCPR distinguishes between these two types of rights: those which can be **derogated** from, and those which are non-derogable (meaning that regardless of the circumstances, such rights must be upheld). Non-derogable rights include freedom from torture and slavery, the right to religion, non-discrimination, and the right to be recognized as a person before the law.

The process of derogating rights starts when a State believes a situation has arisen which demand the declaration of a state of emergency. Recent examples in the region include Bangkok during the red shirt protests of 2010, the Philippines after various cyclones, and various Vietnamese provinces upon the outbreak of bird flu in 2009. There are also states of emergency in regions where there is conflict, such as the three southern Thai provinces or on the island of Mindanao in the Philippines. In each of these cases, the government was allowed to derogate from some rights: for instance, people were not allowed to assemble, or their movement was limited, or they could be arbitrarily arrested and detained for longer periods of time. Upon declaring an emergency, the government should also detail what rights it is derogating from, such as limiting the freedom of movement, expanding police powers to prevent looting, or allowing suspects to be detained longer. Public emergencies do grant States more power, and there are often complaints that they sometimes abuse this power by arresting political opposition groups or detaining suspects for months without charging them.

#### Derogable Rights

Under extreme conditions, a government may declare a state of emergency which allows it to avoid complying with some rights (or derogate from these rights). In other words, for this short period, some rights will no longer be binding. In a state of emergency, the right to freedom of movement is frequently withdrawn to allow governments to introduce curfews. However, other rights are binding regardless of the situation. These are called non-derogable rights, and include freedom from torture and slavery, the right to life, and freedom of thought, conscience, and religion.



## Discussion and Debate

### States of Emergency.

At the beginning of 2014 the Thai Government announced a State of Emergency for Bangkok and surrounding areas in response to increasing political protests which were blocking roads, government offices, and transportation. The Emergency Decree was for a period of 60 days. The Emergency decree gives authorized officials extra powers. Looking at the following powers, do you think these derogations are justified to maintain public order? (Note: this is not the full list of derogations)

1. To arrest and detain persons suspected of having a role in causing the emergency situation: derogating the freedom from arbitrary arrest and detention
2. To inspect letters, books, printed matters, telephone communications or any other means of communication: derogating the right to privacy.
3. To prohibit the obstruction and closure of transportation routes: derogating the right to assemble
4. To prohibit anyone from leaving the kingdom where there are reasonable grounds to believe that they are supporters in causing the emergency situation: derogating the right for people to leave any country.
5. To order to aliens to leave the Kingdom where there are reasonable grounds to believe that they are supporters in causing the emergency situation: derogation the freedom from expulsion

### 3.4 The ICESCR

The International Covenant on Economic, Social and Cultural Rights came into force on 3 January 1976. As of January 2012, the ICESCR has 160 member States, which is slightly less than the 168 States which have ratified ICCPR. In Southeast Asia, States parties to the treaty include Cambodia, Laos, Indonesia, Philippines, Thailand, Timor Leste and Vietnam. As yet Brunei, Malaysia, Myanmar and Singapore have not ratified. The first State to ratify the treaty was the Philippines, which was one of the very first States to ratify in 1976. More recently Indonesia and Laos ratified the treaty in 2006 and 2007 respectively. This section will cover the main concepts of economic, social, and cultural rights (ESCR), detail important rights in the treaty, and also examine livelihood rights.

As Chapter one details, the three categories of rights - economic, social, and cultural - are related but different categories. As such, different bodies within the UN system work on their promotion and protection. For example, economic rights predominantly concern rights around work, and these are closely documented and defined by the ILO. This body, which predates the UN, has produced nearly 200 conventions on workers standards, covering topics such as equal pay, work conditions, maternity leave, and safety for fishing boats.

Social rights, which include rights to healthcare, education, food, water and housing, are protected and promoted by specific UN organizations alongside other human rights bodies. The rights to health are promoted and protected by the World Health Organization (WHO) which has standards on minimum health requirements. Education and culture is also addressed by the United Nations Education, Scientific and Cultural Organization (UNESCO). Food rights are taken up by the Food and Agricultural Organization (FAO). Thus in some cases there are theories and concepts on these rights emerging from different parts of the UN system

The division between civil and political rights (CPR), and ESCR, still influences human rights protection today. Some consider ESCR more important, because they guarantee life: one needs food, water, and health to survive. Others argue that because of their different nature, ESCR are not really rights at all, but aspirations or wishes. These arguments concentrate on two aspects of ESCR. First, it is argued that economic and social rights are not immediate, but rights which will be met at some point in the future. As such, they are more akin to aspirations or wishes than immediately available rights such as CPR. This argument centers on how rights are progressively realized, and how to determine a right and a violation within this concept. The second argument concerns how to protect and enforce human rights, as some have argued that it is difficult to prove a violation of ESCR. If a person is homeless, is the government responsible for finding that person housing? Can they do it through a court of law? This is the argument about the justiciability (or ability to determine rights and duties in the justice system). Both these concepts of progressive realization and justiciability are discussed next.

### **3.4.1 Progressive Realization**

When a country becomes a State party to the ICESCR, they must protect and uphold some rights immediately upon ratification. These rights are called the minimum core rights. Minimum core rights, like primary education or non-discriminatory access to high school, are legally binding once the treaty is in force. Other rights, however, do not create immediate obligations on the State. Many rights in the ESCR fall under this category of progressive realization, which means that rather than immediately realizing these rights, States have a duty to work towards fulfilling them in the near future. The obligation is for the States to show progress towards fulfilling these rights. For example, poor and developing States which cannot immediately provide adequate healthcare, social welfare, or high schools for everyone must demonstrate policies and plans that work towards these goals. The details of progressive realization are found in Art. 2 of the treaty. The wording of Art. 2 initially seems very complex, repetitive, and confusing but there is method to its madness. In particular, it details the actions States must undertake.

Simply stated, progressive realization requires States to always advance, or progress towards meeting their duties to provide healthcare, education, work, food, and so on. While the exact measurement of what progress means is flexible, there are some recognized standards. Two documents clarify the obligations of progressive realization. These are called the Limburg Principles and the Maastricht Guidelines. While both of these documents are not treaties and are therefore not legally binding, they can, however, be considered as general principles of international law. These documents explain that ESCR are measured on obligations of results, not obligations of action. That is, the measurement of ESCR asks how many people have access to water or education and not how hard the government tried to provide water or

education. Further, States are duty bound not to take away anyone's ESCR (known as the principle of non-regression). If someone's right is being met (for instance, their right to housing), this cannot be removed under any circumstances, even if they are living in illegal dwellings or they lack any documents or lease agreements to give them legal tenure to live in the dwelling. If a government wanted to evict these people, it could only do so if they are provided with alternative housing. In other words, if someone is living in a house, they cannot be evicted if it means they will be left homeless. Such is the principle of non-regression at work. It would be a violation for a State to cause an individual's homelessness or hunger, regardless of the situation. However, the duty of the State and the individual is a little more complex than this. It is the individual's duty to meet ESCR themselves, and it is only if they cannot do this, say they are disabled, they live in poverty, or they live in a conflict zone, that the State must assist them.

### 3.4.2 Justiciability

A common criticism of ESCR is that it is difficult to prove either a State's obligations, or its violations, or specific rights. This is the problem of justiciability, or the ability to take violations of ESCR through a justice system. There are many elements which influence how an ESCR can be brought before a court. First, there must be a law on the ESCR, and one which the courts recognize and use. As noted above, some Southeast Asia countries lack basic laws protecting rights to food and water. Rights protecting housing or access to healthcare may be very weak. Further, most constitutions in Southeast Asia only offer limited protection of ESCR. In most of Southeast Asia, a person's access to food or water is only protected in policy, not in law.

Second, from the discussion on progressive realization, it can be seen that legally enforcing a State's progress proves very difficult in some areas and questions abound: Is the State progressing fast enough? Is it using its maximum resources? Has it taken steps? Can the State produce results to show people are getting their rights met?

Further complications arise because many elements of ESCR place the rights holder as the initial duty bearer. That is, it is first up to the individual concerned to meet their rights to work, food, housing, and so on. A person cannot claim all their food, water, and housing from the government unless it becomes clear they are unable to access these things themselves.



## DISCUSSION AND DEBATE

### **Who is Responsible for Ensuring ESCR: the Government or the Person?**

As detailed above, it is first up to individuals to meet their own ESCR.

Question: But what happens if someone is about to become homeless because of their gambling debts? What obligations does the State have to this unfortunate person? Ordinarily, the government cannot allow someone to become homeless as this amounts to not progressively realizing their rights. However, should the government also be responsible for someone losing their home by their own mistakes? What about people who want to give up smoking? Should the government provide services to help them quit? In these cases, it seems fairly obvious that the individuals themselves ultimately caused their own problems (by smoking or gambling), but does the government (by allowing smoking and gambling), share some of the responsibility?

A further complexity asks which part of government should manage these duties. Rights around work, food, housing, water, and education are managed mostly by government departments (such as the Ministries of Labor, Health, or Education). But having legislation in this area implies that the courts will decide if the policies are effective, potentially leading to conflicts between ministries and the courts. As an example, a person with cancer requires expensive treatment, but the government hospital insists this treatment is too expensive to provide to everyone. Who should determine this: health officials who have an idea of budgets, illnesses, and the capacity of hospitals, or the courts who ensures people have their rights to healthcare?

Enough examples exist now to show that ESCR are justiciable. This is particularly true in the area of work, as most Southeast Asian countries now have effective labour laws and labour courts. The same can also be said for housing, as all Southeast Asian countries now have laws of property rights and rental laws. These laws and courts do not guarantee people's rights are met, but they do show their justiciability.





## CASE STUDY

### Adjudicating Housing Rights

There is much conflict over land and housing rights in throughout Southeast Asia. For developing States there is a need to take land so that roads, industries, and services can be provided. However, how this has been done in many countries is unfair: there is little compensation for the land owners, often business interests profit significantly, and displaced people have nowhere to go.

Land disputes in Cambodia have created much news. The reasons date back to the Khmer Rouge period when all housing records were destroyed and many people do not possess legal documents showing ownership to their property. As a result, cases abound where the government or private companies have moved in to seize such properties. A recent example of this includes the Boeung Kak Lake community in Cambodia, who filed a complaint with the World Bank Inspection Panel in September of 2009 which led to an investigation into a project the World Bank itself had with the Cambodian government. In March 2011, the World Bank agreed with a housing rights NGO, The Centre on Housing Rights and Evictions (COHRE), that the Boeung Kak Lake residents were excluded from properly registering their land, and agreed to take steps to mitigate the ongoing impact of the project on these people. In August 2011, the World Bank announced they would suspend lending to the Cambodian government until it resolved a dispute over mass evictions of families from the Beoung Kak Lake community in Phnom Penh.

There are many cases similar to this throughout Southeast Asia, with developments displacing people in Vietnam, Myanmar, Indonesia, and Thailand. A related concern is the pollution from developments which make people's dwellings uninhabitable.

## 3.5 Rights in the ICESCR

The rights in the ESCR can be summarized into three groups: economic, social, and cultural rights.

### FOCUS ON

#### ESCR Summary



Article 1	Right to self-determination
Article 2	Right to progressive realization
Article 3	Equal rights of men and women
Article 4 & 5	Limitations only when necessary
Article 6	Right to work
Article 7	Right to good work conditions
Article 8	Right to trade unions
Article 9	Right to social security
Article 10	Family protection, especially for mothers and children
Article 11	Livelihood rights, including food, clothing, housing
Article 12	Right to physical and mental health
Article 13	Right to education
Article 14	Right to compulsory and free primary education
Article 15	Right to culture

### 3.5.1 Economic Rights

Economic rights help to ensure a person's economic security. This is achieved in three ways. First, they cover the right to work, and rights at the workplace. Many workplace standards are determined by the ILO, which has promoted such ideas as minimum age, minimum wage, and maximum hours in a working week. Other key rights include non-discrimination in the workplace, leisure time, and the provision of safe and healthy work conditions. Second, the right to work includes the right to access welfare or social security; that is, if a person is unable to work or find their

economic livelihood, the government must provide them with some form of welfare. Third, economic rights include the right to form a trade union which would set up organizations to protect their rights should a worker be mistreated.

### 3.5.2 Social Rights

Social rights include rights to health, education, food, water, and housing. A main objective of these rights is to ensure an adequate standard of living. The rights to food, water, and housing (livelihood rights) are not directly provided by the government. Nor is it expected that governments should provide everyone with a house and a meal. However, when people are unable to provide these necessities for themselves (because of war, disaster, or because they are sick, disabled, or otherwise unable to work), it is expected that the government will provide for them. The rights to education and health have been extensively researched by UNESCO and WHO respectively.

#### Livelihood Rights

Livelihood rights are literally rights to a minimum standard of living. These ensure that people have access to adequate nutrition, including hydration, adequate clothing, and housing. Livelihood rights are thus about assuring the most minimum standards of human existence are met.

**Livelihood rights** are normally classified as food, water, and shelter. However, the ICESCR lists them as food, clothing and housing. There are reasons for this distinction. First, there are very few people whose right to clothing is threatened. It is rare to find situations where people do not have access to clothes although it may occur in some cold countries where poor people may not have access to warm clothing during winter. But, mostly governments and NGOs have been able to deal with this. Admittedly, there are homeless people or people in abject poverty who may not be dressed with dignity, but the much larger problem here is not clothing, but housing, food, water, and health.

Water has only become a rights issue more recently because, for a long period of time water was a free and widely available resource, and few people had trouble accessing clean water. However, as cities and industries grew generating more need for water while also polluting water systems, water itself became limited resource. As a response governments began charging for water use, and many people lost their free access to water. The status of water in the covenant was not clear. Although, it was not written in the covenant, some argued the right to water existed as a part of the right to food. To clarify the situation, a General Comment was released which confirmed that the right to water is included in the ICESCR, and is described as the right to sufficient, safe, acceptable, physically accessible, and economically affordable water.

## FOCUS ON

### Ensuring the Standard of Livelihood Rights

For a person to get their livelihood is not just providing a certain number of calories, or liters of drinking water per day. Livelihood must also ensure that the person's rights and dignity are secure. To help States ensure these standards, the General Comments to the treaty show the elements that a State must consider ensuring ICESCR compliance. The most common four elements that occur across health, education, food, water, and housing are:

- **Available:** There must be a sufficient supply of these goods for everyone. For example, there must be enough schools to provide all children with a place, enough food for everyone to eat a sufficient amount, enough water for personal and domestic use (such as drinking, cleaning, and preparing food), and enough health clinics so all people can have access to a medical officer.



- **Accessible:** Even if the supply is sufficient, people must also have access to it. It is not uncommon for there to be enough food, but people are still malnourished. For example, they may be prevented from accessing services because they are too poor, discriminated against, or it is too dangerous for them to travel to get the service. There are generally three dimensions to accessibility: physical accessibility (is the service close enough and safe enough to travel to?); economic accessibility (can the person afford it?); and non-discrimination (is access blocked because of gender, ethnicity, or other status?). Food may be too expensive, girls may not be allowed to attend school, or some Castes of people are not allowed to use the local water well.
- **Acceptable:** The goods need to be of a certain quality. Attending school is not enough; the school also needs to teach children what they need to know. Food and water need to be of an acceptable level of cleanliness and free from contaminants. Housing cannot be considered a cardboard box under a bridge, as it should also ensure the person is safe, protected from the environment, and is located near other services.
- **Appropriate.** Goods should also be appropriate to the person's specific needs. This can be cultural appropriateness, of suitability for disabled people. The right to food is not met by delivering the necessary 2,200 calories of food as mush in a bucket; the right to food also ensures individuals eat like human beings. This may mean the food should fit their cultural values (for instance, if they are vegetarian), and be eaten in a normal human way, (for example, with family and friends).

Full details of these elements to livelihood rights can be found in several specific general comments in the following documents:

- Food: General Comment 12
- Water: General Comment 15
- Housing: General Comment 4, 7
- Education: General Comment 13
- Health: General Comments 14

## 3.6 Culture and Human Rights

Cultural rights remain one of the more contentious human rights. Cultural rights in ESCR are close to minority rights in Art. 27 of the ICCPR. There are some obvious distinctions as not all cultures are minorities. However, both articles face the difficulty of defining precisely what 'cultural life' is. As no clear standard of culture exists, the protection of such rights has become a source of much debate. It may be assumed cultural life incorporates cultural events surrounding births, deaths, and marriages. Cultural rights also include those relating to food, education, marriage, and traditional law. There is still much debate as to whether clothes, social events, media, entertainment, and non-religious spirituality can also be included. In particular, the issue of clothes, exemplified by the Islamic veil, has been heavily debated across the world. There has been some development of the concept of cultural economies

through various state, regional, and international legal mechanisms. In these cases cultural economies, such as herding, hunting, or agriculture (for example, Maori fishing rights in New Zealand, or reindeer herding of the Sámi in Finland and Sweden, and hunting rights of Native Canadians) have all been protected as a cultural right. However, no Southeast Asian State has recognized these rights.

There may be political reasons for the lack of clarity around cultural rights. Some governments strive to ensure the dominant culture remains dominant, or that minority cultures do not gain too much power. There may also be clashes between cultural rights and government cultural policy, as some States in the region have a very conservative idea of their culture – that it is only traditional dances and traditional songs – and any forms of contemporary culture, such as modern art, are not given the same promotion and protection. The basis of cultural rights should be more related to ideas of multiculturalism, or that States should allow many cultures and not support only one dominant culture. However, across Southeast Asia, most governments favor, both directly and indirectly, a majority culture and religion.

## CASE STUDY

### The Chinese Lion Dance in Indonesia

The Lion Dance came to Indonesia in the 1900s when Tiong Hoa Hwe Koan (or the organization of Indonesian Chinese) was founded. However, former President Suharto (ruling from 1965 to 1998) applied a unified policy on State ideology, culture, society, and politics, and applied the idea to all aspects of Indonesian society. One of the policies prohibited all kinds of ‘foreign culture.’ Chinese culture was one of the prohibited cultures as stated in Presidential Instruction Number 14 (1967). Based on this, Confucianism or Khonghucu was not recognized as religion; resulting in many building bans on Confucian temples, bans on using Chinese names which forced the Chinese to use Java or Malay names, and showing the lion dance in public.

This situation changed after the downfall of Suharto in 1998. Abdurrahman Wahid (the Indonesian President from 1999 to 2002) withdrew Presidential Instruction Number 14 and introduced Presidential Decree Number 19 (2001) to recognize ‘Imlek’ (Chinese New Year) as a statutory holiday (for those who wished to celebrate it). In 2002, President Megawati Soekarnoputri announced further that ‘Imlek’ would be recognized as a national public holiday. In effect, Presidential Decree Number 19 (2001) erased the terminology of ‘native’ and ‘non-native’ Indonesian peoples and cultures. Proclaiming ‘Imlek’ as an Indonesian national holiday acknowledged Confucianism as a religion, permitted the construction of temples, and allowed the lion dance to be shown in public again for the first time in decades.

A second issue asks whether cultural rights are collective or individual. A collective right belongs to a group or community (as opposed to the right of an individual). For some, this amounts to an automatic exclusion of cultural rights from human rights, because it revolves around protecting a set of social values or social institutions, rather than a human. However, a close examination of how these rights are written in the treaties reveals they were articulated as primarily individual rights, that is, as the rights of individuals to participate in a culture, and not the right of the culture itself.



All three documents, the UDHR, the ICCPR, and the ICESCR, state that cultural rights are the rights of an individual or of everybody, to practice culture, or to “not be denied the right ... to enjoy their culture.”

In promoting and protecting cultural rights, human rights defenders do not rely on ESCR alone, but often use non discrimination, minority rights in the ICESCR, the freedom of expression of cultural practices, and freedom of religion, showing that cultural rights are heavily interdependent and inter-related between the two treaties

## A. Chapter Summary and Key Points

### Introduction

The process of changing the rights in the UDHR into an international treaty resulted in two conventions: the ICCPR (covering basically articles 1-21 of the UDHR) and the ICESCR (covering articles 1-2, and 22-27 of the UDHR). The reason for dividing the UDHR into separate treaties was the result of legal distinctions (between derogable CPR and progressively realized ESCR); and also some argue political differences (western States favoring CPR and Communists States favoring ESCR). When both treaties came into force in 1976 much of the UDHR became legally binding to those countries who ratified the treaties. Rights protected by the ICCPR and the ICESCR apply to all people in the jurisdiction of the State, regardless of their citizenship.

### The International Covenant on Civil and Political Rights

The ICCPR protects fundamental rights; for example, the right to self-determination, the right to non-discrimination, and the right to life. A feature of the right to life is limits upon the use of the death penalty. Other important rights include those in the legal system, such as rights under arrest, detention, and in the court. CPR also includes human rights in the political arena and life in civil society, such as freedom of religion, freedom of expression and the right to vote.

The ICCPR allows the limitation of these rights in three ways: first, all rights are limited in that they cannot be used to violate the rights of others; second, specific rights may be limited by law if this is necessary to provide public order, public health, national security, or for moral reasons. Thirdly, States can be allowed to derogate from a right for a limited time under specific circumstances of a public emergency. There are a number of rights which are non-derogable and they must be observed at all times regardless of the situation.

## The International Covenant on Economic, Social and Cultural Rights

Like the ICCPR, the ICESCR protects fundamental rights such as the right to self-determination and equality for men and women. Furthermore, the ICESCR includes rights concerning work, education, family protection, health, education and housing. Rights in the ICESCR are sometimes defined and researched by related UN bodies such as the WHO for health and ILO for labour.

ESCR differs from CPR in that some rights are *progressively realized*, or where the State does not have immediate obligations but rather obligations to work towards achieving the right. States must have policies and plans which are put into action and use the *maximum available resources* available to them. Some argue that ESCR are not real rights like CPR because they are rather *goals or ambitions* rather than rights. Also, because it is difficult to define State obligations towards progressive realization it is difficult to *define a violation of ESCR*. For many rights such as work, health, and food the *person is primarily responsible* for meeting their ESCR, but in some cases the State has a duty to fulfill the right if that person is unable to meet the right themselves. For this reason it is argued that ESCR are *non-justiciable*, or they are difficult to put through the justice system. An important category of ESCR is *livelihood rights*, or the rights to food, water, housing, education and health. States must ensure these rights are *available, accessible, of an acceptable standard and appropriate* to people's needs.

## Culture and Human Rights

Cultural rights are much debated in the field of human rights protection. The definition of a culture is unclear, and culture is often politicized by States. Cultural rights occur in many parts of the ICESCR and ICCPR, for example in religious rights, minority rights, and freedom from discrimination.

## B. Typical exam or essay questions

- When did your country ratify the ICCPR and the ICESCR? Can you find reasons why it chose to ratify the conventions?

OR

- Why has your country not ratified the ICCPR and/or ICESCR? What arguments are given by the government, and how valid do you think are its reasons?
- Look for reservations or understandings that your government might have imposed on the ICCPR or ICESCR. Are these reservations necessary? Have there been reservations which have been dropped by your country?
- What are the situations or issues of most concern to people's civil and political and/or Economic and Social rights in your country?
- Considering the case of death penalty, is there any public debate about this topic in your home country? What are the reasons that your country has chosen to use or abolish the death penalty, and do you think these reasons are strong?

- Has there been a Public Emergency in your country ever? Examine a period when it was used and detail what rights were derogated, and were these derogations necessary to restore order?
- Detail examples in your home country where the government is working strongly towards the progressive realization of a ESCR. What policy, plans, and results has the government achieved?
- Are there examples of cultural rights in your country which are not being respected? What are the reasons for this violation?

## C.1 Further Reading

### ICCPR and ICESCR

All introductory textbooks on human rights should overview the ICCPR and the ICESCR. The texts given at the end of Chapter One are good starting points. You should be able to find some of these in a University library.

### The International Covenant on Civil and Political Rights

The main textbooks on ICCPR include:

- Sarah Joseph, Jenny Schultz, Melissa Castan. *International covenant on civil & political rights: Cases, commentary & materials*. (Oxford: Oxford University Press).
- Manfred Novak. *UN Covenant on Civil and Political Rights: CCPR Commentary*. NP Engel, 2005.

The death penalty has been a subject of research for Amnesty International, which puts out an annual report, which can be found by searching the Amnesty International site. There are other organizations working against the death penalty such as:

- The World Coalition Against the Death Penalty,
- Anti-Death Penalty Asia Network,
- International Commission Against Death Penalty.

Information on States of Emergency can be found in General Comment 29 (2001) from the Human Rights Committee, which is available from the OHCHR website.

### The International Covenant on Economic, Social and Cultural Rights

The NGO ESCR-Net provides a useful page with numerous links to important issues on economic, social, and cultural rights.

The most useful resource on Economic Social and Cultural rights (because it is freely available on the internet and can be found with a simple internet search):

- *Circle of Rights: economic, social & cultural rights activism: a training resource*.



Other textbooks include:

- Asbjørn Eide, Catarina Krause, and Allan Rosas, eds. *Economic, Social and Cultural Rights: A Textbook*. Dordrecht: Martinus Nijhoff, 2001.
- Manisuli Ssenyonjo. *Economic, Social and Cultural Rights in International Law*. Hart Publishing 2009.
- Olivier de Schutter. *Economic, Social and Cultural Rights as Human Rights*. Edward Elgar, 2013

For more information on the justiciability of ESCR, there is a resource guide at ESCR-Net. Also, publications have been done by:

- International Commission of Jurists. *The Justiciability of Economic, Social and Cultural Rights: National, Regional and International Experiences* (2008),
- OHCHR. *Economic, Social and Cultural Rights. Handbook for National Human Rights Institutions*. United Nations: New York and Geneva, 2005.

For studies on specific livelihood rights, the following organizations have resources available on their websites:

#### **Food**

- The Food and Agricultural Organization (FAO) has many resources
- The Special Rapporteur on the Right to Food, Olivier de Schutter, has a web page with United Nations related documents

#### **Water**

- Peter Gleick has many articles on the right to water
- Special Rapporteur on the human right to safe drinking water and sanitation, has a web page with United Nations related documents
- The World Health Organization (WHO) has resources on Water Sanitation and Health

#### **Housing**

- The Special Rapporteur on adequate housing has a website titled “Housing is a Human Right”
- UN-Habitat has resources on its website.
- The NGO COHRE (Centre for Housing Rights and Evictions) was once the main international NGO working in this area, but it has been closed now for a number of years. Its website is still accessible, and it has many legal and advocacy resources.



# 4

## Protecting human rights in Southeast Asia

The previous chapter reviewed the main human rights treaties and their content; it also examined how these standards are understood in Southeast Asia. This chapter assesses how these rights are protected and enforced in Southeast Asia countries.

To protect human rights is to ensure that anyone who is entitled to a right is actually able to get those rights. For example, a child who has a right to attend school can indeed go to school, or a journalist can freely write the news. Protecting human rights is done by various organizations in a number of different ways. At the national level police, judges, courts, and lawyers work to enforce human rights, as do civil society organizations and government officers. They can protect human rights by enforcing laws, promoting tolerance, educating people, providing services, and so on. In a similar way, institutions at the regional level also work to protect human rights. Protection means more than just ensuring a government does not violate human rights; it can also mean ensuring that a company or a school follows the law so that individuals rights are protected from any violation.

Another way to think about protection is to consider why most people in Southeast do not face human rights violations in their daily lives? Whether going to school or work, their rights remain intact. Most readers of this textbook do not face severe human rights violations. They were not abused, insulted, mistreated, forced into slavery or tortured. Why? Because human rights protection is working. For these people, the government's protection system of police (who keep law and order) is working; people in that society have values which uphold human rights and individuals do not violate one another's rights. In addition, people know their rights and do not allow violations to occur. In order to ensure a situation like this, both the government and its people have many tasks to complete. They need to: have laws which make violations illegal; educate people so they know their rights; train government officials (such as police officers) so they do not violate human rights; and put in place a system to monitor and identify violations and fix the problems.

This chapter discusses protection at the national level, where human rights should be protected by the police, court systems, government bodies, and by people living in the society, and the regional level where ASEAN is developing a mechanism to protect human rights. Finally, this chapter examines human rights NGOs which are, for this region at least, one of the most widespread and successful mechanisms to protect human rights.

## **4.1 Status of Human Rights Protection in Southeast Asia**

In order to determine how effective protection is, it is necessary to discuss the current status of human rights protection in the region. However, this question poses difficulties. How is it possible to determine if a country has a good human rights record or a bad one? This is challenging because there is no simple way to measure human rights. A country's wealth or development can be measured relatively easily; for example, the World Bank or the UNDP releases the ranking of countries by wealth or development every year. But trying to determine the status of human rights is complex. Whereas some rights like crime and hunger can be measured, other rights such as freedom of expression or political participation are much harder to determine. There is the problem of which rights to measure (given that there are hundreds of rights), how they can be measured, how the severity of the violation is measured, and who will do the measuring?

It is more common to examine each country separately, which is done by organizations such as Amnesty International, Human Rights Watch, and the US State Department. All

of these reports are available on the internet. These studies are called annual country reports, and they view each country uniquely and do not make much comparison between the countries. However, some organizations do try to grade human rights standards. For example, Freedom House, a US based INGO, gives an annual grading to the level of democracy and political freedom in a country; countries are graded from 1 (the most free) to 7 (the least free), in terms of their civil and political freedoms. Article 19, an NGO examining freedom of expression, also ranks worldwide media freedom. By examining the rankings, and also by looking at the comments made in the country reports, it is possible to get an idea of how human rights compares between ASEAN countries, and how responsive ASEAN states are to human rights. The following table brings together some of the rankings done of ASEAN states.

**Table 4-1 - Status of Human Rights Protection**

Country	Freedom Ranking*	Human Development Index**	Press Freedom Ranking***	Human Rights Ratifications#
Brunei	Not Free	Very High	Difficult	3/22
Cambodia	Not Free	Medium	Difficult	11/22
East Timor	Partly Free	Medium	Satisfactory	11/22
Indonesia	Partly Free	Medium	Difficult	11/22
Laos	Not Free	Medium	Very Serious	9/22
Malaysia	Partly Free	High	Difficult	5/22
Myanmar	Not Free	Low	Difficult	4/22
Philippines	Partly Free	Medium	Difficult	14/22
Singapore	Partly Free	Very High	Difficult	3/22
Thailand	Partly Free	High	Difficult	11/22
Vietnam	Not Free	Medium	Very Serious	7/22

\* Freedom House's 2014 ranking of Freedom in the World. Three rankings are awarded: Free, Partly Free or Not Free.

\*\* From the UNDP's 2014 Human Development Index, States can have very high, high, medium or low human development.

\*\*\* From Reporters Without Borders' 2014 World Press Freedom Index. The situation can be good, satisfactory, noticeable problems, difficult, or very serious.

# How many of the nine human right treaties, nine optional protocols, and four complaints procedures the state has ratified or agreed to. The full list can be found in the appendix.

From the above table, the status of human rights protection is mixed. For example: ASEAN's richest country has the worst treaty ratification record; countries with high ratifications also have many concerns; countries with poor civil freedom have good development; low corruption does not mean a good human rights record. Most countries in ASEAN may have areas where human rights are good, and other areas with significant shortcomings. Some issues are common to most Southeast Asia countries, such as migrant workers and indigenous rights. Other issues like poverty, freedom of expression, education, and health, vary greatly across the region. What a region-wide overview does show, is that human rights status is often specific to a country, and it is difficult and not very useful to attempt to rank or rate countries by their human rights standards. Each country's unique economy, ethnic make-up, geography, political history, and so on, all contribute to the status of human rights in that country.



## Discussion and Debate

### Are human rights, development, and democracy connected?

By looking at the table, are there connections between high development, good democracy, and the protection of human rights? There are two potential arguments:

#### 1. Human rights, Democracy, and development all support each other:

It is assumed that rich countries should find it easier to protect human rights as they have better trained police and lawyers, and more money for government services. Is this connection true from the table above? Is it true in your country?

#### 2. There is no connection, and human rights protection depends on the State.

Rich countries and poor countries, or democracies and non democracies, all have the same ability to protect human rights. The investment in human rights protection is a choice the State makes. Also civil society can often determine its commitment to human rights. Is this seen in the table? Is it true in your country?

***What are the reasons for the very mixed record of human rights protection in Southeast Asia?***

## 4.2 Domestic Implementation of Human Rights

In order to understand how human rights are protected within States, this chapter will first look at what human rights exist in the country as law. There are three main ways human rights appear in domestic laws:

- Firstly, many human rights are automatically a part of domestic law. Laws protecting people from violence and theft, or laws for providing education for example, occur in most Southeast Asian countries. This chapter is not going to detail where all the laws related to human rights can be found, rather it focuses on the most important laws, and how they are protected.
- Secondly, human rights treaties can be incorporated into law. The treaties are important because they keep a country's laws up to date with human rights, and they expand the protection of people. For example, laws giving women equal rights at work and marriage, or protecting children from violence were not common in Southeast Asia twenty years ago. But as countries have agreed to women and children's rights, they can be found in nearly all Southeast Asian countries.
- Thirdly, human rights commonly (but not always) appear in the constitution. Because constitutions are the fundamental legal document of a country, this gives human rights the highest order of protection.

The section firstly looks at these methods of incorporating human rights in Southeast Asia countries. Next, this section will examine National Human Rights Commissions, which are bodies whose main task is to ensure that States are protecting the human rights which they have agreed to.

#### **4.2.1 International Standards into Domestic Laws**

The first step in examining if a government is implementing human rights is to see how the international standards have been agreed to, in law, by the country. The number of human rights treaties which Southeast Asia countries have ratified range from nearly all the treaties for some countries, to only three for others. Yet ratifications alone are not a good indicator if a country is meeting its human rights commitments. Human rights should be available to the people in the country to use. This occurs in a process called the domestic implementation of rights which occurs after the ratification process. Implementation includes modifications to national laws, and the writing of new laws to ensure human rights are legal in the country. The implementation process itself is often specific to both the country and the type of rights. The challenge in Southeast Asia is that many countries do not have clear rules and regulations about how treaties are implemented. For some (like Cambodia, Thailand and Vietnam) the rules may exist in the constitution. For others it is a process of the government. However, there tends to be three main ways rights are implemented as domestic law:

1. A country may incorporate the treaty as a whole, and the treaty itself becomes law in the country. This occurs in few, mainly European, countries; no Southeast Asian State follows this system. In this process the treaty itself becomes the new law
2. The treaty may become domestic law by introducing a bill (or a set of bills) which reproduces the standards in the treaty. The treaty can be re-written as a Act of national law, which can be presented as one bill: for example, the People With Disability treaty has become a single bill in the Philippines (the Republic Act No. 7277, otherwise known as the “Magna Carta for Disabled Persons”).

Rights in the treaty can be broken into separate bills, for example children’s rights in the Philippines are divided into such bills as the Juvenile Justice and Welfare Act, child education laws, and children’s labor laws, all of which put Philippines national laws in compliance with CRC standards. Similarly, Thailand has divided the ICPRD treaty into three acts: the Persons with Disabilities Empowerment Act, the Persons with Disabilities’ Quality of Life Promotion Act, and the Persons with Disabilities Education Act.

3. The country may undertake legal modifications. In this case, laws relating to the treaty (which may come from many different areas of the law) are updated to reach the standard of the treaty. This may be the case, for example, in CEDAW, where family laws (such as divorce), labor laws (such as equal pay), and citizenship laws are all changed to comply with CEDAW.

Regarding the above methods, one is not necessarily better than the other. There are advantages to having a separate act because all the laws are found in one place making it easy for people to know about these laws. However, introducing modifications across different areas of the law ensures that the national laws are up to date and there will be no conflict between different sections of the law. Of course the existence

of laws does not mean the laws are upheld. There are still many challenges to ensure the protection of human rights. It needs to be enforced by the relevant authorities. People need to know about the law so they can follow it. Judges need to understand the law so they can make decisions based on it. And governments may need to develop national action plans or national policies so that people who should be protected by the law are protected.

#### 4.2.2 Human Rights in Southeast Asian Constitutions

International human rights standards can appear in many places within a State's legal system apart from national laws and policies (as has just been discussed). They can also occur as part of the country's constitution. Constitutional rights are considered strong and fundamental, and all Southeast Asia constitutions do have elements of rights in them (though Brunei's constitution does not have a human rights section it does acknowledge that people have rights).

A constitution is a document that outlines how a government must govern a country. It details how the government is structured, how laws are made, how politicians are elected, and what they must do. Further, it outlines the duties of the State towards its people, and the duties of people towards their state. This section looks at the current constitutions of Southeast Asian States to detail their human rights content. However, even though a constitution may have human rights in it, it is not common for people in Southeast Asia to discuss their 'constitutional rights' because not many people know of them or whether their constitutional rights are effectively protected. There are many reasons for this: some countries' constitutional rights are often weaker than the international standards, so it is better to use the international treaty for protection; the constitution may have changed recently so people may not be aware of rights in the latest version and schools may not have started teaching it; or there may be a greater awareness of international human rights. However, the main reason is that frequently, people simply do not know what is in their constitution because it was not taught in schools and they are not made publicly aware. Southeast Asian States are poor in teaching people their constitutional rights.



### Discussion and debate

#### Knowledge of your constitution

Do you know what rights you get from your constitution? Have you ever had a class on your constitution? Do any of your friends and family know about the constitution?

For most students in Southeast Asia the answers to these questions will be no. Why do you think this is? Why doesn't the government more actively teach people about their constitution? Maybe it is because teachers and parents think that math, science, and writing are more important. Maybe there is no class to teach them. Or perhaps governments are not that active in teaching their citizens what their rights are.





## CASE STUDY

### Philippine Supreme Court use of the UDHR and ICCPR

The Philippines incorporated customary international law by virtue of Article II, Section 2 of their constitution, entitled “Declaration of Principles and State Policies,” and also by Article VII, Section 21, which says every treaty or international agreement the Philippines ratifies is transformed into a law of the land, with the same force and effect as a statute.

The application of the UDHR and other ratified international treaties is found in several cases decided by the Philippines Supreme Court. In the case, *Kant Kwong and Yim Kam Shing v Presidential Commission on Good Government* (GR No L-79484, December 7, 1987), which is about the right to travel and move freely, the Supreme Court stated: “...the right to travel and to freedom of movement is a fundamental right guaranteed by the 1987 Constitution and the Universal Declaration of Human Rights,” and “everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the Constitution or by law.”

In another case (*Ferdinand E Marcos, et al v Raul Manlapus, et al*, GR No 88211, September 15, 1989), the Supreme Court cited both the UDHR and the ICCPR underlining that even if the right to return to one’s country is not among the rights specifically guaranteed in the Philippines Bill of Rights, this right should be considered as a generally accepted principle of international law and, under the Philippines Constitution as part of the law of the land.

As can be seen from the Table on constitutions, most postcolonial constitutions in Southeast Asia have incorporated a variety of human rights norms and principles. Over time, constitutions have been altered or re-written to keep them in line with international human rights standards. As was detailed above, when States become parties to human rights instruments, they are required to alter existing legal frameworks and systems to be in line with those standards. In some cases, if possible, this means making adjustments to constitutions. The adjustment may be an amendment (for example, amendments were made to the Indonesian constitution to support political rights); or it may also be done by changing the interpretation of the constitution to comply with international standards. This may be achieved by incorporating some existing human rights standards into a new constitution (as Thailand did for both their 1998 and 2007 constitutions). The Philippines 1987 constitution already identifies various human rights and says that ratified treaties must be incorporated into domestic law. This is a good example showing how a constitution defines how treaties can be implemented at the domestic level. The result is that the Philippines Supreme Court has applied the UDHR as part of the Philippine legal system. Unfortunately, however, the Philippines application of international human rights law is the exception, rather than the rule of using international law in Southeast Asia.

**Table 4-2: Constitutions in Southeast Asia**

Country	First Constitution	Number of Constitutions	Current Constitution	HR Section and Example of HR Laws
Brunei DS	1959	1 (with amendments)	2008	No section on human rights
Cambodia	1993	1 (with amendments)	1999	Chapter 3: The rights and obligations of Khmer citizens (Arts 31-50)
Laos PDR	1991	1 (with amendments)	2003	Chapter 4: Fundamental rights and obligations of citizens (Arts 34-51)
Indonesia	1945	Amended 4 times 1955 temporary constitution	1945/2002	Chapter X(A): On the right to work, religion, education and social security (Arts 28-28(J); Arts 27, 28, 31, 32, 34)
Malaysia	1957	1	1957	Part 2: Fundamental liberties (equality, movement, speech, assembly)
Myanmar	1948	3	2008	Chapter 8: Citizen, fundamental rights and duties of the citizen
Philippines	1935/1987	4	1987	Art. 3: Bill of Rights on Art. 13: Social justice and human rights
Singapore	1965/1963	1 (3 amendments)	1991	Part IV: Fundamental liberties (Arts 9-16)
Thailand*	1932	19	2007	Chapter 3: Rights and liberties of Thai people
Vietnam	1946	5 (1 amendment)	2013	Chapter II: Human Rights, Basic Civil Rights and Civic Duties (Arts 14-49)
East Timor	2002	1	2002	Part II: Fundamental rights, duties, liberties and guarantees (Arts 16-28)

\* The current Thai constitution was annulled after a military coup in 2014. A new constitution is being drafted.

The incorporation of human rights into constitutions is a relatively recent event. Most countries' original constitutions did not have human rights. Rights were incorporated later as amendments or they appeared in re-written constitutions. And what could be considered human rights equivalent to international standards are even more recent. For Indonesia it was in 2002, Thailand was in 1997, and 2008 for Myanmar. In Southeast Asia, there are many cases where constitutions limit rather than ensure rights. Constitutions tend to focus more on the sovereignty and development of the State, rather than the rights of its people. Examples exist where a right is guaranteed

but only with qualifications and other limitations. Most commonly, this is done by referring to citizen's duties which is seen in nearly all the constitutions. By considering only rights that come with duties goes against the fundamental principles that rights are inherent and inalienable. There should be no duty necessary to deserve a right. Another common limitation is the right is limited by domestic laws. This is a curious move as it implies that the constitution, the highest law of the country, must obey domestic law. Finally, rights are limited by criminalizing anything that is seen to be against the integrity of the State. So the State has a power to limit or refuse a right if it is considered a threat to the State (and a threat could be interpreted very broadly). Obvious examples are the Internal Security Acts (ISA) of Singapore and Malaysia, which give both governments rights to arrest and preventively detain individuals without trial (in Singapore for up to two years, under s 8(1)(a)).

Southeast Asian constitutions are also notable for giving priority to certain religious or ethnic groups. For instance, Art 29 of the Indonesian constitution declares that the State should be based upon the belief in the one and only God. In the Brunei, Myanmar and Malaysian constitutions only a limited number of religions are recognized, thus limiting religious freedom.

## Discuss and Debate

### Myanmar Constitution

Look at the following two articles from the English version of the Myanmar Constitution.

351. Mothers, children and expectant women shall enjoy equal rights as prescribed by law.
352. The Union shall, upon specified qualifications being fulfilled, in appointing or assigning duties to civil service personnel, not discriminate for or against any citizen of the Republic of the Union of Myanmar, based on race, birth, religion, and sex. However, nothing in this Section shall prevent appointment of men to the positions that are suitable for men only.

What are the limitations to rights in these articles? Do you think they fully respect the rights of equality between men and women? There are a number of problems:

1. According to Art 351 equal rights are only those which are "prescribed by law." So if there is no law giving women equal rights in divorce, for example, then they don't get equality.
2. Notice how the Art 351 is for any mother, child, and expectant women, but Art 352 is only for citizens. So workplaces can discriminate against non-citizens?
3. There are jobs reserved only for men in Art 352. What could these be? What is a job that only a male could do? The article is vague enough to allow the government to discriminate against women by arbitrarily deciding what is 'unsuitable' for women.



## 4.3 National Human Rights Institutions

A national human rights institution (NHRI) is an official State institution that is established by law to promote and protect human rights in a country. The NHRI serves to complement other government institutions such as the courts, but it is unique in that it acts as an important bridge between the government and the community, and between its country and the UN human rights system. Another feature of the NHRI is that it is autonomous from government. Its independence is critical to the effective performance of its functions.

### 4.3.1 The Birth of NHRIs

The first NHRIs were established in the 1970s and 1980s mainly in Commonwealth countries such as Canada, Australia, and New Zealand. However, 1993 was the watershed year for the NHRI movement when the Vienna Declaration and Programme of Action gave the first global endorsement of NHRIs. It reaffirmed the “important and constructive role played by national institutions for the promotion and protection of human rights,” and it encouraged each state to establish a NHRI (in Part I, para 36 of the Declaration). Second, the UN General Assembly adopted the “Principles relating to the Status of National Institutions for the Promotion and Protection of Human Rights” (commonly referred to as the Paris Principles) as the international minimum standards for NHRIs. Third, 1993 also saw the establishment of the International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights (ICC – not to be confused with the International Criminal Court, also called the ICC) as the international NHRI network. Since 1993, there has been a rapid growth in the number of NHRIs. In 1990, there were fewer than 10 NHRIs worldwide. There are now over 100, close to 70 of which meet the standards set out in the Paris Principles. As of 2014, six Southeast Asian countries had a NHRI: Indonesia, Malaysia, Myanmar, the Philippines, Thailand and Timor-Leste.

### 4.3.2 Types of NHRIs and Their Functions

While a country can only have one official NHRI, it is free to decide on the particular roles it should play. This decision will be informed by a number of considerations, including the country’s existing human rights protection framework, the legal, political, and cultural systems, and the availability of human and financial resources. Further, the particular roles that a country decides to give its NHRI will determine the type of NHRI that is most appropriate. There are four main types of NHRI:

#### **Human rights commissions**

Human Rights Commissions are the most expansive type of NHRI, both in terms of size and function. Their structure comprises of having a number of Commissioners (and the number varies from five in Philippines to fifteen in Myanmar), who are experts that have a number of duties around the protection and promotion of human rights. The Commission on Human Rights of the Philippines is the largest NHRI in Southeast Asia, with over 600 staff members.

Human rights commissions are generally headed by one or more full time commissioners who are appointed for a fixed term. Commissioners are the public face and voice of the NHRIs. The appointment of commissioners should be a transparent process that involves community consultation. It is equally important to ensure

diversity in the appointment of commissioners; as a group, they should reflect the different segments of society as well as its gender balance and this means including lawyers, academics, civil society activists, government officers, and so on.

### **Advisory and consultative bodies**

Advisory and consultative bodies are NHRIs that provide in-depth advice and recommendations to governments on a range of human rights issues. Advisory and consultative bodies also contribute to the work of regional and international human rights mechanisms. They do not investigate complaints or assist in court procedures. They are more common in Europe and are not found in Southeast Asia.

### **Research bodies**

Research bodies are human rights “think tanks.” They often have an academic focus, which enables them to make expert contributions to the study of particular human rights issues. Like advisory and consultative bodies, research bodies generally lack the ability to receive human rights-related complaints from individuals. There is no research body NHRI in Southeast Asia

### **Hybrid institutions**

Some NHRIs combine different types of roles and do not therefore fall neatly into a single category. These are known as hybrid institutions. Some combine an ombudsman-like mandate (where a person can arbitrate or investigate a dispute about human rights, for example discrimination at the workplace) with some or all of the functions of a human rights commission. The Timor-Leste Office of the Provedor for Human Rights and Justice is an example of a hybrid NHRI. Its roles include investigating and resolving complaints from individuals, providing human rights advice to its government, visiting places of detention, and appearing before the courts, arbitration tribunal, and administrative inquiry commission. As the UN points out, hybrid institutions can provide a “one-stop” service. They also allow resources to be concentrated into a single institution rather than spread across multiple ones.

As can be seen from the table below, most NHRIs in Southeast Asia are commissions.

**Table 4-3: NHRIs in Southeast Asia**

Country	Name	Type	Year Established
Indonesia	Indonesian National Commission on Human Rights (Komnas HAM)	Human Rights Commission	1993
Malaysia	Human Rights Commission of Malaysia (SUHAKAM)	Human Rights Commission	1999
Myanmar	Myanmar National Human Rights Commission	Human Rights Commission	2011
The Philippines	Commission on Human Rights of the Philippines	Human Rights Commission	1987
Thailand	National Human Rights Commission of Thailand	Human Rights Commission	1999
Timor-Leste	Provedoria for Human Rights and Justice	Hybrid institution	2004

### 4.3.3 NHRIs Activities:

The objective of an NHRI is the promotion and protection of human rights at the national level. They should have the powers to undertake this in the law which establishes them. In order to promote and protect rights the NHRI will have a broad range of roles, which may include:

- Working with the government and the community to promote human rights education and awareness;
- Working with the government to help develop human rights policies and programs;
- Working with the legislature to help ensure drafts, existing laws, and regulations are compatible with the country's human rights obligations;
- Contributing to court proceedings that raise human rights questions (*amicus curiae*);
- Undertaking investigations or inquiries into systemic human rights issues;
- Receiving and resolving human rights-related complaints from individuals, including through mediation and conciliation;
- Observing and monitoring places of detention; and
- Contributing to the work of the UN's human rights mechanisms.

Each NHRI has a specific list of what activities it can do. These are detailed in the Act which establishes it, which is sometimes part of the Constitution and sometimes an independent Act. The activities which can be done by the NHRI can be limited by its resources and by the demands upon it. If the NHRI is small and underfunded, it will be difficult to achieve its objectives. Or if it works in a country where there are many human rights issues to address, it will be overworked. From the table below it can be seen that all NHRIs are involved in human rights education, research, investigations, and receiving complaints. Some NHRIs have special powers to enter prisons or work on court cases.

**Table 4-4: Powers of Southeast Asian NHRIs**

	<b>Komnas HAM</b> National Commission on Human Rights (Indonesia)	<b>SUHAKAM</b> The Human Rights Commission of Malaysia	<b>Myanmar National Human Rights Commission</b>	<b>Commission on Human Rights of the Philippines</b>	<b>National Human Rights Commission of Thailand</b>	<b>Provedoria for Human Rights and Justice Timor-Leste</b>
Receive complaints	✓	✓	✓	✓	✓	✓
Conduct investigations/ inquiries	✓	✓	✓	✓	✓	✓
Call witnesses	✓	✓	✓		✓	✓
Enter prisons		✓	✓	✓		✓
Mediation	✓			✓	✓	✓
Assist in court proceedings				✓		✓
Advise government	✓	✓	✓	✓	✓	✓
Conduct research	✓	✓	✓	✓	✓	✓
Human rights education	✓	✓	✓	✓	✓	✓

In addition to their domestic responsibilities, NHRIs also act as an important bridge between their countries and the UN human rights system. NHRIs enjoy observer status and participation privileges with a number of UN human rights mechanisms, including the Human Rights Council and the UN's human rights treaty monitoring bodies (discussed in the next chapter). Importantly, most of these participation opportunities, which include the ability to attend and address UN meetings, are restricted to "A" status (or Paris Principles-compliant, which is outlined in the next section) NHRIs. As independent bodies with national-level expertise, NHRIs transmit important information and perspectives to the UN's work and to its decision-making processes. By promoting awareness and implementation of UN decisions in their societies, NHRIs also help to translate UN decisions into positive change.

### 4.3.4 Monitoring NHRI Standards

Despite the flexibility associated with NHRI roles, they must all comply with the minimum international standards contained in the Paris Principles which address the status, structure, mandate, composition, powers, and methods of operation of NHRIs. They require NHRIs to:

- Have a broad and clearly defined mandate based on universal human rights standards;
- Be independent from and autonomous of their government;
- Be pluralistic, with a membership that broadly reflects the different groups in society;

- Have adequate resources provided by their government
- Have adequate powers of investigation.
- Be accessible to the people and should cooperate with civil society.

Each NHRI is periodically assessed by a committee in the ICC, with support from the OHCHR, against the requirements of the Paris Principles and given an accreditation status. Civil society organizations are invited to submit reports and information toward the accreditation reviews of NHRIs. Southeast Asian human rights organizations have been particularly active in submitting information toward reviews, particularly under the leadership of the Asian NGO Network on NHRIs (ANNI).

NHRIs compliant with the Paris Principles are granted an “A” status. NHRIs assessed as “not fully compliant” with the Paris Principles are granted a “B” status. Non-compliant NHRIs are granted a “C” status. At the time of publication, five of the six Southeast Asia NHRIs had an “A” status; the exception being the Myanmar National Human Rights Commission, which as a relatively new NHRI had yet to be assessed (as of 2014). An important secondary role in this process is the development of “General Observations” which are interpretive statements of the Paris Principles. General observations provide clarity and detail on each principle. Through the inclusion of good practice examples they also provide guidance to NHRIs and States on the substance of NHRI roles and functions, thereby ensuring the Paris Principles remain a dynamic, living document.

In addition to the ICC, there are four regional NHRI coordinating bodies, covering Africa, the Americas, Asia and the Pacific, and Europe. The Asia Pacific Forum of National Human Rights Institutions (APF) is the Asia Pacific’s regional coordinating body. The APF provides its member NHRIs with a wide range of training and capacity building services to support and strengthen their work. It also serves as a regional network for cooperation on human rights issues, and works with governments and civil society in the region to support the establishment of NHRIs in countries where they do not yet exist.

### 4.3.5 Limitations of NHRIs

NHRIs play a very important role in ensuring that international standards are promoted and protected within countries. They can often be the first point of contact for people in addressing a human rights situation. However, NHRIs also have a range of limitations, including the following:

- Legal mandate: NHRIs are established by law and must therefore operate within the confines of their legal mandate. The legal mandates of the Southeast Asian NHRIs vary. For example, some are able to examine a wide range of human rights issues from a variety of treaties, while others are restricted to a smaller set of human rights standards. The powers provided to each NHRI to perform their mandate also vary, with some facing restrictions in what they can and cannot do. As a general rule, however, NHRIs are not courts and they do not have the power to make legally binding decisions. Rather, they have the power to make recommendations about actions that need to be taken. Regarding



recommendations made to governments, these may be rejected or ignored.

- **Independence:** The independence of a NHRI is critical for its effective operation. Governments can negatively impact a NHRI's independence in two key areas: appointments and budgets. In terms of appointments, it is important that the head of the NHRI and its commissioners are appointed in a transparent manner and act impartially. Some NHRIs have been criticized because the head of State personally appoints commissioners, and they are not independent from the government. In terms of a NHRI's budget, there are examples in the Asia Pacific region of NHRIs having their budgets reduced by governments as a way of hampering their independence and effectiveness.
- **Resources:** NHRIs are not generally well-resourced institutions in terms of either staff or finances especially when compared against the roles they are expected to perform. A lack of resources restricts the ability of a NHRI to be proactive. This also impacts its reactive work, particularly in responding to complaints of human rights violations, often resulting in a backlog of cases. This is the case for the Myanmar NHRI, which has received a huge number of complaints but as yet does not have the time or resources to investigate them all.

## 4.4 Regional Mechanisms

### **Regional Human Rights Regimes: Europe, Americas, and Africa**

The UN has supported regional organizations working in development, security, and human rights since its inception in 1945. The belief is that the UN cannot respond to all the human rights concerns around the world, and it is better if they are dealt with at a national level (through NHRIs), or at the regional level. Regional organizations make sense because they better address the common concerns of human rights in that region. For example, Europe is wealthy and developed and its human rights concerns are going to be very different to the concerns in poorer and less developed Africa. The regional mechanisms can then develop special tools to respond to the local situations. Many features of human rights promotion and protection first emerged through regional systems. Currently, there are three developed human rights regional organizations, and a number of smaller sub-regional organizations. Each of these regions has developed their own sets of standards, and also their own protection mechanism. This section will briefly detail the standards and how they are protected, before turning to discuss the developing ASEAN standards and protection mechanisms. The three main regional organizations are:

### **Europe**

Europe's standards began with the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) that came into force in 1953, which has been working for twenty years more than the ICCPR. The ECHR mainly covers civil and political rights. Europe has added a number of other standards including 15 protocols to the ECHR (some of which give additional rights), economic, social, and cultural rights in the European Social Charter (1961), as well as treaties on torture and minority rights.

The rights in these treaties are now protected through the European Court of Human Rights (ECtHR). The ECtHR was established in 1959 and went full time in 1998. It makes judgments on individual and inter-state complaints of alleged violations of the rights set by the ECHR. These complaints are filed directly to the court. The court covers 47 countries in Europe, and has recently become very busy as it receives around 100,000

cases a year – but it can only hear a small proportion of these. Many of these cases are declared inadmissible (that is, the court will not hear them), because they are not considered serious enough. This can be the case for someone complaining about a parking ticket or poor local government services.

The European system is managed by the Council of Europe (which is bigger and separate to the European Union), although the European Union and the Organization for Security and Cooperation in Europe (OSCE) have their own related human rights standards and protection mechanisms.

### **The Americas**

The Organization of American States (OAS) is the intergovernmental organization which manages the regional human rights system of the Americas. These rights are based on the 1948 American Declaration on the Rights and Duties of Man and the legally binding American Convention of Human Rights (ACHR) which came into force in 1978. There are also treaties on refugees, torture, disappearances, violence against women, economic, social and cultural rights, persons with disability, indigenous people, and the environment. The rights in these treaties can be protected through either the Inter-American Commission on Human Rights (IACHR) or the Inter-American Court on Human Rights (IACtHR). The IACHR works to strengthen regional laws and institutions, and hear complaints, and the IACtHR develops jurisprudence on human rights. They cover about 19 countries in North and South America and the Caribbean.

The system in the Americas differs in many ways from the European system. Firstly, all complaints against the State must first go through the Commission (a body of seven people). The Commission is considered a ‘quasi-judicial’ body; that is, it is like a court but does not have the same legally binding power of a court. Assuming the State has ratified the necessary treaties, the Commission will attempt to find a ‘friendly settlement’ for both parties. Only once this has been completed can the case go to the Court if one of the parties is not happy with the outcome. Also, the case only reaches the court if the State gives permission. An obvious difference is that the IACtHR is much less busy than the European court. Rather than tens of thousands of cases, it has heard a couple of hundred (it has given 280 decisions as of 2014, but may have heard more cases).

### **Africa**

The most recent regional system to be constructed was the African regional human rights system. This regional system is based on the 1981 African Charter on Human and Peoples’ Rights. The main mechanisms for the African Union are the African Commission on Human and Peoples’ Rights, established in 1986, with eleven members. It is very similar to the Inter Americas Commission in that it is a quasi judicial body with duties of promoting human rights, and also the powers to hear and investigate human rights violations. It has special rapporteurs and working groups (much like the UN). The African Commission also prepares cases for the newly established African Court on Human and Peoples’ Rights, which started in 2004 and completed its first case in 2009. The Court can make legally binding rulings on regional human rights violation complaints, though to date it has completed few cases (around thirty), compared to the Commission which has given around 170 findings. What makes the African system different is that it gives greater access for civil society to engage with the court by allowing NGOs to petition the court for advisory opinions, meaning that an NGO may ask the Court if a State’s policy or activities are in compliance with the

African Charter.

## Overview of the regional Systems

Each regional human rights system is unique in terms of structure and substance. These three systems share some common features. First, all the regional systems include a court, conventions, and commissions or committees. In some regions, such as Europe, the court has been very active and has delivered verdicts on thousands of cases. Others, such as the African court, are very new and have only made a handful of decisions. The European treaty is strongly based on civil and political rights with its economic and social treaty (the European Social Charter) is not nearly as strong. This stands in contrast to the African treaty, which acknowledges “peoples” rights (note its title which includes the phrase, “human and peoples’ rights”). People’s rights include self-determination, peace and security, and development. Each region also differs in terms of the dominant human rights concerns. Because of Europe’s relative wealth and widespread democracy, there are many human rights cases about government administration or discrimination. The Americas, on the other hand, whose most common political system was once military dictatorship, has significant concerns with disappearances, arbitrary detention, and torture. Africa, the poorest region in the world, has many issues around poverty and development, but because the regional system is both young and weak, there have been few developments in this mechanism.

An obvious gap in regional mechanisms is Asia. There are many arguments why Asia has not developed a regional mechanism and most commonly the diversity of the countries making up Asia, its size, and the lack of a regional identity all contribute. There are a number of sub-regional initiatives, including ASEAN, which are a step towards creating human rights protection at the regional level. These include the Arab Charter on Human Rights, which is used by the League of Arab States (made up of 22 countries), but this has no organization to insure its protection. There are also treaties by the South Asian Association for Regional Cooperation (SAARC) such as the SAARC Convention on Combating and Prevention of Trafficking in Women and Children for Prostitution, and the Convention on Promotion of Welfare of Children. However, like the Arab charter there is no body specifically to ensure compliance with these treaties. The biggest development towards a regional mechanism in Asia is the ASEAN Intergovernmental Commission on Human Rights (AICHR).

## Discussion and debate

### What should an ASEAN system look like?

After reading through the basics of the European, Americas, and African system, what lessons can be learned from them in developing an ASEAN system? Should ASEAN take a more European approach and have a strong court which can hear all the cases but risks being swamped in a huge number of complaints? Or should it take an approach similar to Africa and the Americas where a commission first hears the dispute and tries to negotiate a settlement, and perhaps avoids having a court at all? The commission system may be easier and more favourable to States, but it may be weak and unable to make States comply to their human rights obligations.

What kind of violations should the body protect people from? Can these be addressed by a court, or is there a need for special investigators? A court can be too late to help if the violation has already occurred, it can do little to bring back someone who has lost their life. An investigator may be very helpful in bringing to light poor government



institutions (say prisons that torture or schools that don't work), but they have less power to enforce States to change their ways.

## 4.5 ASEAN Human Rights Mechanisms

There has been a push to establish a sub regional mechanism for human rights in Southeast Asia since the early 1990s. There was a renewed interest in human rights after the end of the cold war which was clearly articulated at the World Conference on Human Rights in Vienna, 1993. In the context of this world conference, ASEAN stated it would look into creating an intergovernmental body. It did, however, move very slowly towards this goal. As a response civil society founded the Working Group for an ASEAN Human Rights Mechanism in 1995, which was recognized by ASEAN in 1998. Over the next decade meetings and consultations were held by the Working Group with ASEAN, civil society groups, and international organizations. The interest from these civil society organizations and help from States sympathetic to the idea of a regional body eventually led to the establishment of a regional human rights body called the ASEAN Inter-governmental Human Rights Commission (AICHR) in 2009. This is the first governmental regional human rights body in Asia. The number of regional bodies across the world has slowly grown in the past fifty years. Most of these bodies start off relatively weak and develop their protection mechanisms as States and civil society invest more power and interest in them. In these early years there is much concern about the relative weak powers of ASEAN, while others claim there is much potential for growth for AICHR.

AICHR was established when its terms of reference (TOR) were agreed to by the Governments who are members of ASEAN. The reasons the governments agreed to its establishment partially comes from commitments made in the ASEAN Political-Security Community (APSC) Blueprint, which is a policy document about the future governance of ASEAN, but importantly because ASEAN citizens, through civil society, have called for a human rights body. Much of the AICHR TOR is standard for a regional commission in that it will undertake activities such as consult with governments, create human rights standards for ASEAN countries, and promote human rights in the region. Among the list of purposes of AICHR are to:

- To promote and protect human rights and fundamental freedoms of the peoples of ASEAN;
- To uphold the right of the peoples of ASEAN to live in peace, dignity and prosperity;
- To promote stability, harmony, friendship and cooperation among ASEAN Members
- To promote human rights within the regional context,
- To enhance regional cooperation; and
- To uphold international human rights standards

AICHR is made up of one appointed representative per government (making a body of ten representatives). These representatives serve for three years, and their appointment can be renewed once. The representatives themselves come from a

variety of backgrounds. Some are academics, others diplomats, and others from NGOs. One early task of the commissioners was to organize the drafting of an ASEAN Declaration of Human Rights. To do this they appointed an independent drafting body which delivered the Declaration in November 2012 when ASEAN members unanimously adopted the Declaration.

For some the development of AICHR is a significant step forward for human rights in the region. For others, though, there are still many weaknesses to overcome. There have been criticisms of the TOR. In particular, AICHR is to respect the principle of “non-interference in the internal affairs of ASEAN Member States,” which calls for the respect of sovereignty over international standards. The TOR reinforces this with the statement that AICHR should respect “the right of every Member State to lead its national existence free from external interference, subversion and coercion.” Another criticism is that inter-governmental human rights bodies are subjected to politicization. The independence of representatives is important. Non-independent Commissioners may be more interested in protecting their State from criticisms about their human rights record. The worst case scenario is that governments may use the regional body to protect themselves from scrutiny regarding human rights concerns. The release of the draft declaration also received a mixed response. To some it was a step towards greater protection at the regional level. The Declaration recognizes the rights of migrant workers, establishes voting as a right, and the right to peace, which expand people’s protection in many ASEAN States. To others it was a weakening of international standards. The draft declaration asked for a balancing of rights and duties, which goes against the core principles of human rights, and it gave more power to national laws to modify human rights, which weakens the international standards. Obviously there is much debate about how effective AICHR will be.



## Discussion and Debate

### How strong is the AICHR TOR?

The TOR for AICHR states that one of its purposes is:

1.4 To promote human rights within the regional context, bearing in mind national and regional particularities and mutual respect for different historical, cultural and religious backgrounds, and taking into account the balance between rights and responsibilities;

Will this protect human rights? By saying AICHR must consider national particularities, and respect historical backgrounds, implies that human rights are not universal, but specific to each country. For example, will this article allow states to excuse themselves from protecting human rights because they were colonized? Or because they are poor? Further, what does the balance between rights and responsibilities mean? If human rights are inherent and inalienable people do not need to earn their human rights. Though, people must respect the rights of other and this can include obeying the laws of the country.

Promoting and protecting human rights requires a range of abilities, an important one being the ability to receive complaints from individuals who have had their

rights violated. AICHR currently is tasked with promoting human rights, but not their protection. It is not yet allowed to receive complaints. Without complaints, Commissioners cannot respond to violations by addressing systemic problems that leave people unprotected. The absence of such capabilities has led many to coin AICHR a 'toothless tiger.' Purely advisory bodies may or may not deter offenders and have a direct influence on human rights. However, nearly all human rights bodies, from those at the UN to other regional bodies, mostly start with promotion and work their way towards the protection of rights. As it is still young, AICHR may prove the skeptics wrong.

## **4.6 The Role of Non-Government Organizations (NGOs)**

Perhaps the most internationally recognized organizations working on human rights are NGOs. All regions in the world have active NGOs, and they are often the first place people will go to when facing human rights violations. NGOs work at all levels, from international with large organizations like Amnesty International (AI) and Human Rights Watch (HRW), to grass roots organizations working inside communities. This section will overview the types of human rights NGOs and discusses what kind of work they do. The nature of civil society organizations (CSO) means that the things NGOs do are going to be diverse and difficult to categorize. They also vary a lot in structure. Regardless, human rights NGOs all have similar activities in the promotion and protection of human rights.

Firstly, it is important to distinguish an NGO from a CSO. All NGOs are CSOs, but many CSOs are not NGOs. A CSO is an organization which has these features:

- it is not part of the government,
- it is non-profit (hence, not a company or a business)
- its task is to contribute to society, civil, and social order (hence, not a criminal organization).

What makes NGOs distinct from other CSOs is that they work in areas of government interest. CSOs can be fan clubs, sports associations, art societies, or student groups which are doing work not related to the government. However, NGOs do work on government related issues such as providing services like health or education, protecting the environment, or assisting in community development. These are activities which the government has an interest or a role in.

There are no international standards on what constitutes an NGO or what requirements it must meet to be regarded as one. Some organizations claim to be NGOs when there is a lot of debate if this is true. For example, governments can set up bodies which they claim are NGOs, but are really part of the government. The same is true for businesses, which may have a lobby group to support them (say a tobacco smokers group), but they are part of the business and not civil society. Some organizations are difficult to categorize: is a church, an opposition party, or a trade union an NGO or a government



organization, or something else? Organizations like the UN have criteria for NGOs who want to gain recognition at the UN (and hence be able to participate in forums and discussions). While it is considered that an NGO must have some form of permanent structure and office, there is a debate about the level of regulation an NGO must have, how independent they must be from government, and how they are funded.

## Discussion and Debate

### How should NGOs be regulated?

Many countries in Southeast Asia are now introducing laws requiring NGOs to be registered with the government. There is some logic to this idea: Governments can keep track of how many NGOs are working in their country, and registration will stop unregulated and criminal activities. However, registration can act as a barrier to stop NGOs from undertaking their work, and the increased government scrutiny of NGOs can be used to prevent NGOs working in a country. Critics say this is one way for governments to control NGOs and stop them protecting people from the abuses of governments.

An example is Cambodia, which has around 3,500 NGOs working in the country. The large number pushes up salaries (as International NGOs can pay well). The NGOs can raise funds from their own country to run activities in Cambodia, but most of this money could go to pay their own salaries. On the other hand much valuable work in development and rights is done by the NGO sector. The Government developed a draft law on NGO registration which requires organizations to sign an agreement with the government in order to work in the country. NGOs are concerned that the law will be used to stop NGOs who help people in actions against the government, say in land disputes.

Is registration necessary? Will it help sort out the problems of an unmanaged NGO sector?

The key feature of an NGO is the sector or issue it works on. Some NGOs have broad mandates which cover all rights, for example HRW and Amnesty International, or they may work in specific areas, such as disability rights or indigenous rights. NGOs frequently are parts of larger networks where they are connected to similar organizations on a national or international level.

There are some common structural features of human rights NGOs working in Southeast Asia. Most tend to be organized around “programs” or focus areas of their work. A program is a connected set of activities with a specific objective. Programs





can be around an issue or a theme (say human rights education, torture, women and the law), or it can be on a country (for example HRW has country programs – it also works on thematic issues too). Aside from these programs of activity, NGOs will have administrative sections, such as media and communications, where they release their findings or coordinate their advocacy with the media. Other sections may include finance, network outreach, and research.

## CASE STUDY

### FORUM-ASIA

FORUM-ASIA is a membership based regional human rights organization committed to the promotion and protection of all human rights through collaboration and cooperation among human rights organizations and defenders in Asia.

FORUM-ASIA was founded in 1991 in Manila, partially as a response to growing civil society interest in human rights, the increasing international coordination of human rights activities, and the need to support civil society working in undemocratic countries as Southeast Asia at the time there were few full democracies (perhaps only the Philippines which had recently ousted the Marcos dictatorship).

FORUM-ASIA is composed of 46 member organizations across Asia who are all NGOs in themselves. These are: Bangladesh (4), Burma (1), Cambodia (2), India (8), Indonesia (7), Japan (1), Malaysia (2), Mongolia (2), Nepal (3), Pakistan (3), Philippines (6), Singapore (1), South Korea (2), Sri Lanka (3), Taiwan (1), Thailand (1), Timor Leste (2).

The program structure at FORUM ASIA has

**Thematic programs:** ASEAN Advocacy Program; SAARC Advocacy; Human Rights Defenders Program; Human Rights Training Program; UN Advocacy Program

**Country Programs:** East Asia Country Program; South Asia Country Program.

## 4.6.1 NGO Activities

Human rights NGOs can undertake a number of activities. The ones listed below are not the only activities which are done by NGOs as they can be involved in advising on policy, monitoring legal systems, developing networks, and so on. Below are some of the more common activities:

### Human rights education

Though States have taken on the task of human rights education (according to their commitments in ICCPR and CRC), knowledge of rights in the region is still basic. Because of this, many NGOs have education campaigns to make people aware of human rights; these could cover human rights in general, or involve specific rights for specific people (for example, women's rights or disability rights). Universities also play an important role in this activity although they cannot be called NGOs as they are part of the government. As an example, the Labour Protection Network (LPN) in



Thailand has activities which provides education to children of migrant works, and also educates migrant workers in their human rights.

### **Human rights advocacy**

The term advocacy literally means to add a voice to, or to speak about something. NGOs can speak on behalf of a group who may not have the power or the resources to challenge the government. NGOs may also advocate for greater recognition or understanding about a right. An example of this is advocacy for refugee rights in Southeast Asia. Refugee organizations want the public and the government to be aware of the poor conditions of refugees who may be locked in detention, hiding in city centres in fear of being deported back to their country. By using advocacy they can change public opinions about refugees from being seen as a burden to people who need security and rights. They can advocate to government to stop detaining children, as having children behind bars looks bad for the government. Advocacy often uses the media, but it can be done through education, street theatre, social media such as Facebook campaigns, or making documentary films.

### **Monitoring and investigation**

Some people are more vulnerable to human rights violations than others because traditional State protection mechanisms are either not present, or are not doing their job properly. This is the case for prisoners in jail, or indigenous groups living far away from city centers. Human rights NGOs can monitor and report on these situations, and ask for action to be taken to stop violations. NGOs doing this kind of work typically release reports and press releases to update the media and other interested parties on the situation. A widely known example of this is HRW, which annually releases around 50 reports on Asia. Some recent reports that have gained interest are:

- ‘Tell them that I want to kill them’: Two decades of impunity in Hun Sen’s Cambodia,
- Ad hoc and inadequate: Thailand’s treatment of refugees and asylum seekers,
- The government could have stopped this: Sectarian violence and ensuing abuses in Burma’s Arakan state,
- Torture in the name of treatment: human rights abuses in Vietnam, China, Cambodia, and Lao PDR.



## **FOCUS ON**

### **HRW on Vietnam**

#### ***Human Rights Watch Annual Reports***

Established in 1978, HRW has monitored the situation around the world through its annual reports which comprise of analyses of the relevant events of the year related to human rights in each country of the world. The annual reports complement the numerous reports on specific events.

As an example the 2012 Annual Report covered many human rights violations in Vietnam including: the suppression of freedom of expression, association and peaceful assembly; intimidation, harassment and detention of protesters; government restriction of religious practices through legislation, registration requirement, or

surveillance. In particular, political and religious detainees frequently face police brutality including torture during interrogations, being held incommunicado prior to trial, the denial of family visits, access to lawyers, and fatal beatings.

Governments often dispute the findings of these annual reports and claim the NGO has not used accurate information or is biased against the government. While in some cases there may be elements of truth to these government accusations, they should allow people to read these reports and make up their minds themselves.

### **HR documentation**

Victims of violations seeking justice must be able to prove that a violation has taken place. The process of collecting evidence of a violation is called documentation. This specific task entails collecting data accurately so it can be used in either advocacy or a court of law. Documents can be witness statements, medical reports, photographs of scenes, accounts of events, and so on. The documents collected need to be accurate and must show a clear violation has occurred. Many victims may not have any other recourse to a protection mechanism as their state may not have ratified the necessary treaties, agreed to individual complaints, or no regional body yet exists to listen to these complaints. In this case the documentation may not help in a court case, but can help in advocating for changing government practice, or for advocacy at the international level. Further, collecting a lot of documents can be useful to show patterns of violations. If the NGO can prove that a violation is occurring frequently by having many documents all showing a similar violation, say people are abused in prison or government services are not given to a minority, then they may be able to prove the violation is widespread and systematic, which can be used to encourage UN bodies to become involved.



## **CASE STUDY**

### **Documenting systematic rape.**

During the civil wars in Myanmar, many NGOs were concerned with the violence faced by women. Different organizations arranged reports, based on documentation, to prove that the Myanmar military was systematically raping women. Proving the rape was systematic could have significant importance to the protection of women. Systematic rape is an international crime. It also can justify the intervention of the UN Security Council, or the International Criminal Court (though in this case neither body got involved).

There are many reports on this violence including *School for Rape* (1998) by EarthRights international, and *License to Rape* in 2003 by the Shan Women's Action Network (SWAN) which documented 173 incidents. The documentation is proof that the rape of women in conflict situations is systematic and needs to urgently be addressed.

### **Complaints and litigation**

NGOs can play a role in the legal process. Examples of these are NGOs who work in the area of access to justice, as public defenders, or providers of legal aid. NGOs have assisted individuals in making complaints against a government, and initiated what is known as 'strategic litigation' or winning a case which can be used to change laws and

government practice. A recent example of this involved a housing rights NGO called COHRE (which closed down in 2012), which initiated a number of cases on behalf of forcibly evicted people in Cambodia and the Philippines. The objective of the litigation was to ensure that it was illegal to force people out of their houses. Other famous cases include the UNOCAL case where Burmese villages displaced by a pipeline built by UNOCAL took the company to court in the US under the Aliens Claims Tort Act (which allows foreigners to make a civil complaint if they consider an American has violated their rights). The case was settled out of court and an undisclosed sum of money awarded to the displaced villagers.

#### **4.6.2 NGOs in the Field**

NGOs vary in terms of size and where they work. Small and local NGOs are often called “grassroots” NGOs, implying they work directly with people in their local environments.

Grassroots NGOs are largely made up of local people, speaking the local language, and familiar with the local context. They rarely deal with governments, but are more likely to interact with government officers in the local environment.

National NGOs may run programs in different locations, but may be headquartered in one of the main cities. It is likely these NGOs will also have a relationship with the government or government ministries in their area of expertise. However, a national NGO may undertake grass roots activity, or may be networked with a number of smaller grassroots NGOs.

Regional level NGOs tend to work across a number of countries and may run programs or advocate in more than one country. Within Southeast Asia, regional NGOs work on issues such as migrant workers or women’s rights. While they will have a central office, they may have offices in other countries as well. The usefulness of regional NGOs is that they can address human rights problems which are not specific to a location (such as issues around migration or refugees), and they can advocate more strongly at the regional and international level. Within Southeast Asia, a number of regional NGOs have taken on advocacy at ASEAN venues.

International level human rights NGOs undertake advocacy across different regions: they are active at the UN level, but also support grassroots and national level NGOs by assisting in their advocacy, or developing their capacities and can undertake work in numerous countries at the same time. The largest two are HRW (based in New York), and Amnesty International (based in London), although the FIDH, Article 19, Human Rights First, and Witness are also well known, and there are many more international NGOs than the few mentioned here. Governments in particular, often complain about these NGOs, saying they are western orientated and foreign, and insist they should not be allowed to work in the country. These criticisms are often misdirected and it is more likely that States are reluctant to have well-organized NGOs closely monitoring their human rights duties.

#### **Human Rights Defenders**

People who work at NGOs can be considered human rights defenders (HRD). A HRD

is defined as someone working on the promotion and protection of human rights which is a broad definition that includes human rights educators, government officers working in human rights, and human rights NGO workers. The work of a HRD, particularly in the Southeast Asia region, can be dangerous. Over the past five years, a number of HRDs have lost their lives or been jailed because of their work in human rights. Famous examples include the death of Munir, an Indonesia HRD, who was poisoned with arsenic on an airline flight on the way to Amsterdam in 2004. Three people linked to the government have been jailed for this murder. The Philippines has a particularly poor record of protecting HRDs with many being killed in recent years, particularly for protecting villages and indigenous groups from having their land taken by business interests.

The increased risk in this work has led to the UN adopting the Declaration on Human Rights Defenders. This declaration, while not binding, does set a standard that activities by HRD are protected by the freedom of expression and association. The declaration which was adopted in 1998 has been followed up in 2000 by a Special Rapporteur on HRDs. Regardless of this protection HRDs in Southeast Asia continue to be attacked, killed, jailed, and threatened by court cases for undertaking work on the protection of human rights.

## A. Chapter Summary and Key Points

Human rights protection is done by a wide range of bodies, people, and other organizations who can protect people from violations. These may include police, courts, civil society, and international organizations. It is difficult to determine the status of a country's human rights performance as it may depend on the level of development, the political system, and how many human rights the State has recognized. In Southeast Asia most states have a mixed status, good in some areas and not in others.

Protection can be examined by seeing if the international standard of human rights exists within the country. This will occur as rights being a part of the law, or rights existing in the constitution. Currently all Southeast Asian States have human rights in their constitution, with the exception of Brunei. The legal systems of Southeast Asia will have human rights in them, but these are spread across numerous laws and acts.

An NHRI is an organization devoted to the protection of human rights at the domestic level. There are currently six NHRIs in Southeast Asia. These are based on the Commission model (except East Timor's hybrid model), which gives them a broad mandate to promote, protect, investigate, and monitor human rights situations. NHRIs can face challenges because they do not receive adequate funding or they are not independent from the government and these may limit their functions. NHRIs are assessed by a UN body, and those who meet the standards of an NHRI, based on the Paris Principles (a document outlining the function and activities of an NHRI) will be given access to UN activities. All Southeast Asian NHRIs (Except Myanmar) have an A status which recognizes them as compliant with the Paris Principles.

Regional mechanisms protect human rights in countries within the geographic region. There are three regional bodies, based in Europe, Africa, and the Americas. ASEAN

established a sub-regional body called AICHR in 2009 to promote and protect human rights. AICHR has overseen the drafting of a declaration, and works with ASEAN governments to promote and protect human rights. There is still much debate among civil society and governments about its strength and effectiveness.

NGOs are often seen as one of the main organizations working for the promotion and protection of human rights. Their numbers have constantly increased in the region. NGOs undertake activities such as human rights education, human rights advocacy, monitoring and investigation activities, human rights documentation, complaints and litigation, input into developing laws and policy. A recent concern is the protection of NGO workers, and other human right defenders from violence and attacks.

## B. Questions

- What are the difficulties in measuring the human rights protection status in one country? Is it possible to measure how good or bad human rights are in a country?
- States can ratify a lot of treaties but have poor human rights protection, also States can ratify few treaties but have good protection. How is this so?
- Are there any specific human rights missing in the constitution of your country?
- What are the activities done by the NHRI in your country? Have they made a difference to the promotion and protection of human rights?
- How does the UN assess the effectiveness of a NHRIs? Is the process accurate and fair?
- Why is Asia the only region without a human rights regional system?
- Is AICHR a toothless tiger, or will it develop into a strong body like the European human rights bodies?
- What are the strengths and weaknesses of NGOs doing human rights promotion and protection?
- Find an example of an NGO activity or program in your country which promotes and protects human rights. Is this program successful? Why or why not?

## C.1 Further Reading

### Status of Human Rights

Information on the status of Southeast Asian countries can be found in:

- UNDP has an annual Human Development Report, listing countries in order of development.
- Freedom house has an annual report Freedom in the World

- Transparency International has its Corruption Perception Index.
- The OHCHR has a treaty body database which has up to date information on the status of ratifications.

All these reports can be found with a simple internet search, and are free on the internet.

All state's constitutions are available on the internet, all in English and the national language.

It can be difficult to search for information on the legal system of a country. It may not all be in English, and it may not all be on the internet. It is useful to look at non-governmental reports on the laws and their assessment on how they function.

### **NHRIs**

For more information on NHRIs, including the UN body that manages accreditation search for:

- Asia Pacific Forum of National Human Rights Institutions,
- The International Coordinating Committee for National Human Rights Institutions (ICC)
- The Paris Principles: The United Nations General Assembly resolution 48/134, 20 December 1993

Each of these bodies has detailed reports on Southeast Asian NHRIs.

Authors to search for who write on NHRIs include:

- Brian Burdekin
- Catherine Renshaw
- Sonia Cardenas

### **ASEAN**

The European, African, and Americas regional body have extensive web pages with information. For information on ASEAN human rights protection initiatives, start by searching for:

- ASEAN Inter-Governmental Commission on Human Rights
- Working Group on an ASEAN Human Rights Mechanism
- ASEAN Human Rights Declaration

- ASEAN Socio-Cultural Community (ASCC) Blueprint

Authors to search for whom write on the ASEAN mechanism include:

- Yuyun Wahyuningrum
- Dr. Sriprapha Petcharamesree
- Hsien-Li Tan

### **Southeast Asian Civil Society**

There are many regional level NGOs in Southeast Asia. For a start you can look at the following to get an idea of their scope and activities:

- ASEAN People's Forum: APF
- Asia Indigenous Peoples Pact: AIPP
- Asia Pacific Forum on Women, Law and Development
- ASEAN Civil Society Conference
- ASEAN Youth Forum
- Asian Network for Free Elections: ANFREL
- FORUM-ASIA





# 5

## Human Rights Protection: The United Nations and the International System

The most significant international body protecting human rights is the United Nations (UN). The UN's mandate is to promote and protect universal human rights. The UN is large, complex, and its duties and activities sometimes overlap, which means there is no simple way of summarizing all it does to promote and protect human rights.

This chapter examines human rights at the UN in three areas. The first section will examine how its organs and programs and other non-specific human rights sections promote and protect human rights. The second section will look at the Human Rights Council, the main political body managing human rights at the UN. The third section will examine the treaty bodies, which are committees that manage individual human rights treaties.

Before looking at the UN, it is useful to consider its importance to Southeast Asian countries. Even though the UN is the predominant international organization managing relations between States, some people have claimed that it is weak and has little influence over State activities. This is true in the sense that it may be difficult for the UN to force States to act in a particular way; and it is especially true in the case of making States comply with their human rights obligations. However, States do take their participation in the UN very seriously. Some Southeast Asian countries have had a long and active role in many parts of the UN, especially the Philippines, Thailand, and Indonesia. The Philippines is the only Southeast Asian nation which is a founding member of the UN, although Thailand and Myanmar joined soon after. Southeast Asian countries have played an active role in many parts of the UN, whether this is by receiving assistance, undertaking diplomatic roles, being members of commissions or organs, or agreeing to UN treaties and resolutions. A summary of these can be seen in the table 7.1 below.

Membership of the United Nations is a State's first crucial step towards recognizing human rights because by signing the UN Charter, the State agrees to promote human rights, and abide by international law. Further, the UN is a venue where States can contribute to the development of human rights, as can be seen, for example, in the introduction of rights around sexuality. The UN is also a venue where Southeast Asian States must defend their human rights record. For these reasons, the argument that the UN has little power or influence is contestable.

**Table 5-1: Southeast Asian Countries at the UN**

Country	Joined	Interesting History
Philippines	1945	<ul style="list-style-type: none"> <li>Has been a member of the Commission on Human Rights.</li> <li>Member of the UN Security Council 2004-2005</li> </ul>
Thailand	1946	<ul style="list-style-type: none"> <li>Member of the UN Security Council (1985-86).</li> <li>Hosts UNESCAP (a regional commission for the Asia Pacific)</li> <li>Chair of the Human Rights Council (2010-2012).</li> </ul>
Myanmar	1948	<ul style="list-style-type: none"> <li>The UN Secretary General from 1961-1971 was U Thant, a Burmese diplomat.</li> </ul>
Indonesia	1950	<ul style="list-style-type: none"> <li>Withdrew briefly from UN in 1965</li> <li>Chair of the Commission on Human Rights (2005)</li> <li>Member of the UN Security Council (2007-2008)</li> </ul>
Cambodia	1955	<ul style="list-style-type: none"> <li>Was represented by the Khmer Rouge in the early 1980s</li> <li>One of the largest UN peacekeeping programs (UNTAC) was carried out in Cambodia from 1992-1993</li> <li>The first presence of the OHCHR was an office in Cambodia in 1993.</li> </ul>
Laos	1955	<ul style="list-style-type: none"> <li>Has around 11 UN programs resident in the country, including UNDP, UNFPA, UNICEF, UNODC</li> <li>Active in the Land-Locked Developing Countries (LLDCs)</li> </ul>
Malaysia	1957	<ul style="list-style-type: none"> <li>Chairperson to Commission on Human Rights (1995)</li> <li>State member of the Commission on Human Rights (2005)</li> </ul>
Singapore	1965	<ul style="list-style-type: none"> <li>Was a member of the UN Security Council from 2001-2002</li> <li>Is active in UN reform</li> <li>Helped form the Global Governance Group (3G), comprising 30 small and medium-sized States, which ensures the voices of small States are heard at the UN</li> </ul>
Vietnam	1977	<ul style="list-style-type: none"> <li>Joined UN after the American war</li> <li>Member of the UN Security Council (2008-2009)</li> <li>Has around 15 UN agencies working in the country</li> </ul>
Brunei	1984	<ul style="list-style-type: none"> <li>Is a member of the OIC at the UN</li> <li>Has not been on the UN Security Council or Human Rights Commission</li> </ul>
Timor-Leste	2002	<ul style="list-style-type: none"> <li>Joined as the 192nd member (there are now 193 members)</li> <li>Was managed by the UN through UNTAET (1999-2002)</li> </ul>

## 5.1 Human Rights in the Broader United Nations System

Human rights are promoted and protected in many parts of the UN. While the UN structure is huge and complex, there is a hierarchy to the system. The most important bodies are the six 'organs.' Though none of these organs have a human rights specific mandate they all deal with human rights issues on a regular basis. Five UN organs will be addressed here, (since the last trusteeship territory became a country in the 1990s, the sixth organ, the Trusteeship Council, is no longer active):

- The Security Council (UNSC)
- The General Assembly (UNGA)
- The International Court of Justice (ICJ)
- The UN Secretariat led by the UN Secretary General (UNSG)
- The Economic and Social Council (ECOSOC)

### The Security Council

The UNSC consists of fifteen Members: five permanent members (China, France, the Russian Federation, the United Kingdom, and the United States of America), and ten non-permanent members elected for a two-year term by the General Assembly. The UNSC's function is to ensure international peace and security, and it can only become involved in situations which are considered a "threat to international peace and security." It is a powerful organ because it can make legally binding resolutions, and it has powers to punish States which do not comply with its resolutions. These powers include putting sanctions on States, the use of peacekeepers, and the use of force. While most of these resolutions concern matters of peace and conflict, the UNSC does contribute to the promotion and protection of human rights. No other organ has this kind of power.

Given that conflict always involves threats to people's human rights, the UNSC has always been addressing human rights concerns. Early actions on human rights include sanctions on the white regimes of Rhodesia in 1966 and South Africa in the 1970s because of their use of apartheid laws which discriminated against the majority black population. The UNSC was active in peacekeeping (in countries like the Congo, Cyprus, and the India-Pakistan border) from the 1950-1970s, but it was not till after 1990 that the UNSC began to include addressing human rights violations in its decisions. It has done this by considering that any "gross and systematic human rights violations" are threats to international peace and security, thereby empowering it to act. This change in definition meant the UNSC could enter countries without their approval, if gross and systematic violations were occurring. Examples of this include actions on Iraq, Somalia, and the Former Yugoslavia (all in the early 1990s), where the UNSC authorized the use of military force. The change in UNSC activity came as a result of the end of the Cold War which lifted the paralysis in decision making because the Soviet Union or USA would veto initiatives of other countries. The change was so dramatic that the UNSC was more active in the five years after the Cold War (from 1991-1996), than in the entire 45 years of the Cold War itself. However, this increased activity has not always been successful, with missions to Yugoslavia and Somalia failing to create peace and protect civilians, and respond to the genocide in Rwanda was too late to save people's lives. Currently, the UNSC has been less active in permitting military responses to widespread human rights violations, as exemplified by the lack of response to the ongoing civil war in Syria.



## DISCUSSION AND DEBATE

### Do Politics Stop the Protection of Human Rights by the UNSC?

It is well known that the five permanent members have the right to veto any resolution. Resolutions on Israel are regularly vetoed by the USA, as are resolutions on Syria by Russia and China. A veto allows these countries to help their allies, or avoid difficult human rights questions themselves. In addition, the knowledge of a likely veto means that many issues such as Chechnya or Uyghurs will not even be discussed. There is much debate about the veto power. On the one hand it may seem unfair that the permanent members only gained the right to veto because they were the victors of World War II, and other powerful States do not have this privilege. On the other, the permanent members are strong regional powers and are involved in more conflict and peacekeeping than most States.

Nevertheless, vetoes have been used very infrequently: only fourteen in the past ten years, and nine of these have either concerned Palestine or Syria. This compares to around 700 resolutions passed without a veto in that same time period, meaning vetoes only made up about 2% of all resolutions. Further, as a rule, States do not like to veto resolutions and try to avoid it, as it implies they are forced to do so as a last resort and without widespread support.

#### ***Do vetoes prevent the UNSC from having an impact on protecting human rights?***

The UNSC can respond to human rights violations in conflict situations by providing peacekeepers, authorizing the use of force, or establishing transitional authorities to manage a country's passage from conflict to peace. The UNSC can also protect human rights by referring cases to the International Criminal Court (ICC) which can try people who have committed serious crimes such as genocide, war crimes, or crimes against humanity. As will be detailed in a later Chapter, the UNSC has the power to order the ICC to investigate serious crimes during a conflict. Ideally, this should limit how an individual, the military, or a State conducts armed conflict. The UNSC responds to violations by producing resolutions which recognize or improve the protection of vulnerable groups. Examples include resolutions on protecting women in conflict (detailed in the box below), on child soldiers (among the many resolutions on this topic are resolution 1261 on child soldiers and 1612 on reporting mechanisms), and civilians caught in a conflict situation (among the many resolutions on this topic are 1265 on protecting civilians and 1674 on preventing conflict through democracy).



## FOCUS ON

### The United Nation Security Council Resolution 1325 and the License to Rape Report

UNSC Resolution 1325 was adopted unanimously on 31 October 2000 and it calls upon “all parties to armed conflict to respect fully international law applicable to the rights and protection of women and girls, especially as civilians, in particular the obligations applicable to them under the Geneva Conventions of 1949.”

The four main issues addressed by 1325 are: (1) the increased participation and representation of women in decision-making; (2) attention to the specific protection needs of women; (3) the importance of having a gender perspective on post conflict negotiation; and (4) the importance of gender sensitivity training.

On the surface, it appears that the resolution has not been a success as women continue to face violence in conflict, and they remain marginalized in post-conflict development. Though, women’s security is now a central topic on the UNSC agenda. There is still a long way to go before women protected in conflict situations, but Resolution 1325 and its follow-up resolutions which address issues such as the use of rape as a weapon of war (Resolution 1820), shows there are developments in this area.

Example: Despite the fact that Burma is a member of the UN and signatory to the 1949 Geneva Conventions, the 2003 report “License to Rape,” by The Shan Human Rights Foundation and the Shan Women’s Action Network, has shown that the regime has not enforced these laws amongst its army. The report details systematic and widespread rapes perpetrated by the Burmese military between 1996 and 2001. These crimes remain unpunished even though the report claims they were committed to subjugate and terrorize the Shan State’s ethnic minority. The report clearly demonstrates that the protection of women (as outlined in Resolutions 1325 and 1820) has not been met by the Myanmar military.

### General Assembly

The UNGA is the main representative organ of the UN and acts as a venue where all members of the UN (193 countries as of 2014) can meet. Members come together in September every year for a three to four month period of discussion on all issues relevant to the UN. The topics which can be discussed range from the environment, to the economy, education, and other UN activities. The UNGA can influence human rights in a number of ways. The UNGA may authorize resolutions on human rights, but because it does not have the same power as the UNSC to pass legally binding resolutions, they are regarded more as recommendations. These resolutions may propose how human rights will be promoted and protected by the UN, and can vary greatly from such topics as blood diamonds, and mercenaries, to ending capital punishment. Resolutions are passed more commonly by unanimous support, but some resolutions on sensitive issues go through a vote where two thirds of those present and voting need to approve the resolution. The UNGA can shame countries with bad human rights records by passing resolutions to criticize them. Similarly, it can call on the UNSC or other bodies in the UN to conduct more research or activities on those countries with poor human rights records. Finally, the UNGA is the arena where human rights treaties are approved and where they become open for signature by State members. Thus, while the UNGA may not appear as powerful as the UNSC, it is able to influence and direct human rights policy at the international level.

## **International Court of Justice**

The ICJ, sometimes called the world court, has the duty of managing international law and is central in deciding how international law is understood and arbitrated. It mainly does this in two ways: Firstly by issuing advisory opinions, commonly in response to a question given to it by a body in the UN (for example, the General Assembly of the UNSC); and secondly by settling a dispute between countries. Over its long history of about 90 years (the ICJ was originally the Permanent Court of International Justice in the League of Nations), it has made few decisions on human rights. Since World War II, it has decided around 160 cases, and only somewhere around a third of these (depending on how they are counted) have looked at human rights issues. However, like the UNSC, it has recently become more active in this area. This is not to say it has been irrelevant, as many of its findings (for example, on the legality of reservations) have had direct implications on how human rights are understood and protected.

The ICJ has contributed to the understanding of human rights by its decisions on self-determination. In one such case which reached a decision in 1995, Portugal (the colonial administrator of Timor Leste), brought a case against Australia for entering into an agreement with Indonesia regarding its rights to gas fields in Timor Leste's territory. Portugal argued that the people of Timor Leste (and Portugal) should be the ones to benefit from the gas fields, not Australia. Another case relating to human rights concerned the legality of Israel's wall around the Palestinian territory. The ICJ found the wall a violation of various international obligations, including freedom of movement, among other rights. There have been important cases on genocide in Yugoslavia, war crimes in the Congo, and the legality of nuclear weapons. The ICJ has been active in Southeast Asia on territorial claims, such as the temple on the border of Thailand and Cambodia (Pravihan to Thailand, Preah Vihear to Cambodia), and on the disputed sovereignty over islands between Malaysia and Indonesia, and between Malaysia and Singapore.

## **The UN Secretariat**

The UN Secretariat is the body which administers the UN; it enables the UN to function smoothly from overseeing basic duties such as the cleaning of rooms to the more challenging task of putting together peacekeeping forces. The UN Secretariat is managed by the UN Secretary General (UNSG), the person elected to head the UN. The current UNSG is Ban Ki Moon, a South Korean. One past UNSG has been from Southeast Asia; U Thant (Burma) who was the Secretary General from 1961-1971. The role of the UNSG in human rights issues can vary greatly. Some UNSGs have had a significant impact: for example, Kofi Annan undertook wide reforms in the UN which have had a positive impact on the role of human rights. He was instrumental in the change from the Human Rights Commission to the Human Rights Council (detailed in the next section). Annan was also a strong advocate of human rights to be a cross cutting issue within the UN leading to it now being mainstreamed in sectors such as humanitarian affairs, development, and peace and security. Previous UNSGs were more passive in their support for human rights.

One power possessed by the UN Secretariat relative to human rights is the appointment of special representatives, who are appointed to report to the UNSG on human rights concerns. These representatives can focus on thematic or geographic human rights issues, depending on their mandate and can facilitate negotiations and investigate human rights violations on behalf of the UN Secretariat. There has been a special representative appointed to report on Myanmar.

## The Economic and Social Council

While its main area of ECOSOC's concerns is economic and social development, it can establish institutions to manage human rights, the most important of which is the Human Rights Commission. Alongside this commission are the Commission on Women, and the Permanent Forum on Indigenous Issues, which also work on human rights. The Human Rights Commission (replaced by the Human Rights Council in 2006) will be discussed in the next section.

## Other Bodies

The UN has many funds and programs which work on human rights issues. The list is too large to give here, but some of the more important include:

- UNICEF: The United Nations International Children's Emergency Fund (UNICEF) is a UN agency founded in 1946 and is based in New York. Initially aimed to help children in the aftermath of World War II, its activities have diversified to health, education, and child rights.
- UN-Women: The UN-Women (United Nations Entity for Gender Equality and the Empowerment of Women) is a new organization that emerged from a number of UN women's organizations such as UNIFEM (UN Development Fund for Women) and DAW (the Division for the Advancement of Women). It promotes women's empowerment through areas of action such as violence against women, peace, leadership, and economic empowerment.
- UNHCR: The Office of the High Commissioner for Refugees was founded in 1950 by the UNGA to protect and safeguard refugees' rights worldwide. The UNHCR has many activities in the promotion and protection of refugee rights.

## FOCUS ON

### Keeping up with UN Activities

As this chapter will make obvious, the machinery around human rights at the UN is constantly evolving and updating. The information in this chapter looks at the UN up to 2015, but even around that time there were significant developments with the establishment of new communication and complaints procedures for children, elections at the Human Right Council, the Migrant Workers treaty body hearing its first complaint, and arguments on religion, traditional culture, sexuality, and commercial sex work being debated by UN human rights bodies.

The task of protecting human rights internationally has only occurred recently, and much development is still going on. This chapter highlights some of what has occurred so far, but students must be aware that information changes quickly and to keep up with UN activities, they are advised to keep in touch through organizations reporting on events at the UN whether through the UN media, NGOs reporting on human rights at the UN (such as ISHR), or regularly monitoring the OHCHR website for updated information.





## 5.2 The UN Human Rights Bodies

UN bodies are most commonly categorized into two groups: (1) charter bodies (those bodies set up by the UN Charter), and (2) treaty bodies (those bodies attached to human rights treaties). The distinction is necessary because these two categories have very different compositions and purposes. An important difference is that charter bodies receive their power from the UN Charter, and thus have relevance to all State members of the UN who must follow the Charter. Treaty bodies are only relevant to those States which have ratified the treaty. Each treaty has its own body, and these work separately. This chapter will first look at the main charter bodies, before turning to treaty bodies.

**Table 5-2: Major Differences between Charter Bodies and Treaty Bodies**

	Charter Body	Treaty Bodies
Established by	UN Charter	Human rights treaty
Scope	Human rights according to the UN Charter	Human rights as outlined in the treaty
States in compliance	Members of the UN	States which have ratified the treaty
Mechanisms to examine States	Special procedures: special rapporteurs, universal periodic reviews, complaints procedures	State party reports, individual complaints, site visits
Composed of	Representatives from State members of the UN	Individual experts nominated by State parties

### 5.2.1 Charter Bodies: The Human Rights Council

The UN organs detailed above are, in a sense, charter bodies. However, the organs have a wide variety of activities and do not deal only with human rights. The main charter body dealing specifically with human rights is the HRC. Originally founded as the Human Rights Commission in 1946, it became the Council in 2006. At this venue, States meet and discuss human rights, pass resolutions, and initiate a number of activities to protect human rights. Currently, they meet at least three times a year. There are usually many issues on the agenda, including: discussing the protection of human rights (covered below); special human rights concerns (such as older persons or genocide); and listening to reports from experts appointed by the HRC.

The HRC is a political body because the 47 people who sit in it represent their State, and do not make personal assessments. This differs from the individuals on expert bodies as they make decisions based on their expertise and not because of the State they represent. Since the HRC is political, there will be both limitations and benefits. It is important for States to give their views on human rights as they are duty-bound by the treaties they have ratified, and are the principle group with obligations towards people's rights. Ideally, States will gather to discuss how to promote human rights, to engage with States that have violated human rights, and to enforce human rights standards. However, some States can be skilled at avoiding human rights concerns and can let politics influence their attitude to human rights. For example, States often avoid criticizing each other on their human rights record, knowing if they do so, they may also be criticized in turn. Similarly, a State's politics may often influence decisions on human rights, especially around politically sensitive concerns, such as the issue of Palestine, or the rights of lesbians and gays.

Many of these problems occurred in the Human Rights Commission, which was replaced by the Council. The previous UNSG, Kofi Annan, said that the Commission was dysfunctional and highly politicized, as evidenced by Libya's role as chair of the Commission, and its subsequent lack of response to violations in Zimbabwe, Chechnya, and Sudan. These situations all had gross and systematic human rights violations, but none were responded to seriously by the Commission. Senior experts at the UN, including Kofi Annan suggested replacing it with a new body which would have a different structure and activities. The reformed Council attempts to avoid the failures of the Commission by introducing the following changes:

1. Voting: Members must be voted into the Council by the General Assembly by secret ballot. A secret ballot was necessary to enable other countries from the same region to not vote for countries with poor human rights records despite being regional 'friends.' Secret ballots have been successful in preventing countries with poor human rights records (such as Sudan, Syria, Iran, Belarus, Sri Lanka, and Azerbaijan) from being elected due to insufficient support from their regions.
2. Review of human rights record: The Council has started the process of reviewing the human rights records of all its members called the Universal Periodic Review (detailed below). Previously, States could avoid any criticism on their human rights record, but this is now impossible.
3. Number of members: There were different models and strategies proposed for the new Council. Some wanted a universal council, containing all members of the UN. Others wanted a much smaller (and some say higher quality) of membership of as little as 15 members. In the end, the size was reduced from 53 to 47; a slight reduction which in reality has made little difference.
4. Status of the Council: It was argued that the Council should have a higher position in the UN structure. Rather than being under the ECOSOC organ, the Council now directly reports to the UNGA making it more accountable as the UNGA represents all members of the UN, rather than ECOSOC which only includes 54 members.

### **Membership of the Council**

The HRC is made up of 47 countries, appointed for three year terms, with about one third (16 countries) being elected each year. Each region is given a set number of places to fill:

- Asia and Africa: 13 each
- Latin America: 9
- Western Europe: 8
- Eastern Europe: 7

Many Southeast Asian countries have taken turns on the HRC.



## CONCEPT

### United Nations Regional Blocks

Political bodies at the UN often appoint countries based on regional quotas. For this purpose, the world is divided into five geographic regions of differing sizes: Africa (54 countries), Asia Pacific (53 countries), Latin America and the Caribbean (33 countries), Western Europe (28 countries), and Eastern Europe (23 countries). The Western Europe group includes Australia, Canada, USA, and New Zealand.

Political cohesion of the groups varies. African countries frequently vote the same way, and may form a powerful regional block. Asia, on the other hand, is less cohesive. The Pacific Islands, which forms about 20% of the group, frequently disagrees with other Asian countries. South, Central, and East Asia also often take different positions on issues. Other voting blocks, such as the OIC (Organization of Islamic Cooperation) are more cohesive than regional groups.

### 5.2.2 Human Rights Council Actions to Promote and Protect Human Rights

The HRC has a number of tools it can use for the promotion and protection of human rights. For example, 'special procedures,' or people who can report on human rights concerns, are often used to monitor human rights. Other mechanisms include the Universal Periodic Review, and a complaints procedure against States which systematically violate human rights. These activities are detailed below.

#### Universal Periodic Review

The Universal Periodic Review (UPR), is perhaps the largest review mechanism in terms of scope (it examines every country), and in terms of mandate (it reviews all core areas of human rights). The UPR is a mandatory review process in which each UN member State must have their human rights record examined every four years. The review covers human rights as outlined in the Universal Declaration of Human Rights, human rights treaties agreed to by the State, and other voluntary pledges and commitments. The UPR began in April 2008, with the second cycle starting in 2012. To date, every country has had at least one review, and as of 2014, over 100 countries have been reviewed twice. During the review, the State publicly discusses the status of human rights in its country, and responds to comments and criticisms from other States. The review process begins with the submission of three documents:

1. UN information: A ten page compilation of UN information, prepared by the OHCHR, which outlines the country's human rights situation from the UN's perspective. This may include information from special rapporteurs, human rights treaty bodies, and other UN entities such as UNICEF or UN-Women.
2. Stakeholder report: A ten page report from civil society (and in some cases NHRIs) which is mainly done by NGOs and other similar bodies. Often, NGOs will meet to plan the content of the report and decide the key issues to be included in the ten page summary. This will then be sent to the OHCHR which will put together the final report. Smaller countries may not have too much difficulty organizing civil society to submit the report, large and diverse countries (such as India) may find it extremely challenging to condense the views of thousands of NGOs into one ten page document.
3. State report: A twenty page report prepared by the State under review, which can take the form of a 'national report'.

The actual review process takes place at the Human Rights Council in Geneva. The State under review first sends a delegation to Geneva, where the national report is presented. The State will give a presentation on its human rights situation as discussed in the report, and will also receive a number of questions and statements from other States in a three hour session called an ‘interactive dialogue.’ This term implies the review is not meant to criticize or punish States, but rather constructively discuss how to improve human rights. It is not uncommon for up to 50 countries to request to question some countries. After the dialogue, an outcome document is written which gives recommendations to the State. The recommendations are not binding, but may carry political weight. The State may also choose to either accept or reject (called ‘noting’) the recommendation. Though civil society members may attend, they are not permitted to ask questions. However, they may participate by advocating with sympathetic States to take on their ideas and requests.

## FOCUS ON

### The UPR in Action – A Study of Indonesia’s First Review in April 2008

Indonesia was one of the first countries to be reviewed. In its ‘national report’ Indonesia said it considered religious freedom an important and protected human right under the ICCPR (which they were a party to) and whose constitution guarantees the promotion and protection of this right. Yet, in the report from the UN bodies, including the special rapporteur on the freedom of religion or belief, a number of concerns was noted, such as:

- banning adoptions between religions;
- having a law that places of worship could be established only with the permission of the government;
- the difficulties faced by men and women of different religions in registering marriages;
- children of inter-religious marriages are not provided with birth certificates; and
- attacks and threats against Ahmadiyah families.

Further, the NGO report, which was written by 17 groups including NGOs from Indonesia, international NGOs, and the NHRI of Indonesia, noted preferential treatment given to official religions, the Blasphemy law (which criminalized some religious activity), and attacks on the Ahmadiyahs. Thus, there were clear differences on the status of religious rights between the three reports. During questioning from States, this disparity was picked up by Italy who asked whether Indonesia would be willing to change its laws on religions to bring it in line with ICCPR standards. In addition, the United Kingdom asked Indonesia to comment on the attacks against the Ahmadiyahs.

In the outcome document there was no specific recommendation on religious freedom. Instead, one recommendation said in brief: “While acknowledging the efforts made by the Government of Indonesia, it was recommended that such efforts continue to ensure the promotion and protection of all the components of the Indonesian people.”



From this brief outline of the process, it can be seen that the UPR does allow for the identification and discussion of human rights issues, and it does provide an incentive for governments to address these concerns. But the response can be weak and does not require direct action because the process is non-binding. However, during the second country review (2012), Indonesia had to return to this issue and demonstrate its progress towards achieving freedom of religion.

The effectiveness of the UPR process has been much debated. There are some obvious strengths: (1) every State is reviewed and they cannot hide their human rights record; (2) the process includes the views of civil society organizations, ensuring issues cannot get buried; (3) the process covers a very broad area of human rights and is not made irrelevant by only looking at a small number of rights. However, there are also weaknesses: (1) the process is a review of States by States, which means the level of criticism is often soft, polite, and not particularly challenging; and (2) the process is not binding in any way, so even if a review is highly critical, States can ignore or reject the responses. For example, Myanmar received 190 recommendations when it was reviewed in 2011, and rejected 46 of these, claiming they infringed upon their sovereign rights. Examples of rejected recommendations included permitting special rapporteurs to visit (as suggested by Argentina), releasing political prisoners (as suggested by Belgium), and finding a solution to the number of Myanmar refugees in the region (as suggested by Malaysia).

There are advantages and developments outside of this process. The UPR provides an excellent tool to help civil society organizations meet and coordinate human rights promotion and protection. It is a forum where a strategy can be developed on priorities, and advocacy coordinated. Furthermore, many civil society organizations use the UPR as a platform to organize their views on human rights, thus giving them legitimacy at the UN. Even if prevented from speaking, they can at least talk to sympathetic States or the media on these issues.

### **Special Procedures**

Special Procedures is a name given to a set of protection mechanisms used for monitoring and reporting on human rights. Special Procedures can take a number of forms, but they all involve the appointment of a person, or group of people to investigate specific human rights concerns. This can occur as an investigation of a specific country, or an investigation of a specific type of right violation. The investigation may be done by a single person (an individual expert or special rapporteur), or it may involve a group of people (a working group).



## FOCUS ON Special Procedures

### Special Rapporteurs

Special Rapporteurs are individuals with a mandate to investigate a specific human rights concern, either a theme or a country. There are around 40 rapporteurs, including:

*Thematic rapporteurs who investigate:* adequate housing; the right to education; extrajudicial, summary or arbitrary executions; the right to food; freedom of opinion and expression; freedom of religion or belief; health; the rights of indigenous people.

*Countries with their own rapporteur or expert include:* Belarus, Cambodia, Eritrea, Haiti, Iran, Myanmar, North Korea, Palestinian Territories, Somalia, Sudan, and Syria.

### Independent Experts

An independent expert is similar to a special rapporteur, but they tend to focus on research rather than monitoring and site visits. These include experts on: the question of human rights and extreme poverty; minority issues; human rights and international solidarity; the effects of economic reform policies and foreign debt on the full enjoyment of human rights; the promotion of a democratic and equitable international order.

### Working Groups

Working groups are made up of five experts, one for each region, and they report on global human rights concerns, such as: enforced or involuntary disappearances; arbitrary detention; the use of mercenaries; discrimination against women in law and in practice; transnational corporations.

**Note:** Special representatives represent the UNSG. They may also be special experts or high representatives. Many of their mandates are similar to special rapporteurs but not all work in human rights, nor report to a human rights body.

Special rapporteurs, experts, and working groups of the HRC, are independent and do not represent any country, an autonomy which brings both credibility and challenges. Their reports are considered highly because the experts are known to be independent and free from political considerations. However, this very independence of special procedure holders can make it difficult for them to obtain invitations to visit countries they wish to investigate. Typically, a written request is made to the State, and if the State agrees, an invitation is issued. The drawbacks of this procedure can be viewed in the cases of North Korea and Myanmar whose rapporteurs were granted few (or no) chances to visit the country in the previous decade. On the other hand, nearly 100 countries have issued 'standing invitations,' showing their openness to receive a visit from any thematic special procedure mandate holders.

Like reporters or researchers, special rapporteurs collect information and develop reports by visiting countries for further investigation. In addition, they may assess and offer advice on the status of human rights. Their mandate allows for the examination, monitoring, advising, and public reporting of the situation in question. They may respond to individual complaints, conduct studies, start promotion and awareness activities, and provide any technical assistance which may be needed.

In practice, special procedures are usually used for responding to urgent appeals as they are the quickest way to respond to urgent rights issues such as a disappeared person or threats to someone's life. Special procedures are often considered the global authority on a human rights situation or theme, and as such, their statements receive attention. These special procedures are relatively new, with the first one, the Working Group on Disappearances, starting in 1980 and growing steadily from less than ten in the early 1990s to about forty currently.

In Southeast Asian a special representative exists for Cambodia, although this is not strictly a special procedure but a representative of the UNSG but in reality both positions are quite similar. Myanmar has both a special rapporteur (since 1993), and a Special Adviser to the Secretary-General (since 2000). Special rapporteur selection is based on regional balance, so a certain number come from Asia. Experts from Thailand, Indonesia, Malaysia and the Philippines have all been special rapporteurs.

Some thematic special rapporteurs have made assessments of Southeast Asian countries which have gained interest in the media. When the Special Rapporteur for Extrajudicial, Summary or Arbitrary Executions, Philip Alston, visited the Philippines in 2007, his report gained much attention in the region. In it, he noted that "the military is in a state of denial concerning the numerous extrajudicial executions in which its soldiers are implicated;" a comment which was very critical of the Philippines military and which caused much debate.

## FOCUS ON

### Alston's Visit to the Philippines as the Special Rapporteur on Extrajudicial Killings

Philip Alston has been the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions since 2004. In 2007, he conducted a mission to the Philippines. In his report a year later, he noted that since 2001 around 800 people, mainly leftist activists, have been killed including land reform advocates and human rights defenders. Many of these deaths can be attributed to military figures.

The government responded that most of these deaths were done by the Communists as part of a 'purge' or an elimination of spies, which Alston called "a cynical attempt [by the government] to displace responsibility." Alston also noted that the courts were "focused on prosecuting civil society leaders rather than their killers." As a result there was a high level of impunity. After the report appeared in 2008, the number of extra-judicial killings dropped from over 200 to 68. Though 68 killings is still high, the drastic reduction does show the ability of special procedures to change the standard of human rights in some situations.



## Complaints Procedure

The HRC can also use other procedures to investigate countries with poor human rights records. Since 2007, in cases where it is considered that there are “gross and reliably attested violations of human rights and fundamental freedoms”, the HRC will take individual complaints and then may make a confidential investigation. This procedure has been around for decades as it was previously known as the 1503 procedure. In the transition from the Commission to the Council it was reviewed and slightly restructured and renamed as the Complaints Procedure. This investigation only applies to ‘gross’ violations, which means the violation must be severe. The HRC will not investigate individual violations, or situations where it is unclear the State has played a role in them. Further, this process is confidential, meaning the HRC is required to investigate behind closed doors and the discussion is not released to the public. There has been no investigation of a Southeast Asian country by this mechanism, though the Maldives from neighboring South Asia was investigated in 2008. Under the previous mechanism, known as the 1503 procedure (because it was formed by the ECOSOC’s Resolution 1503), many Southeast Asian Countries have been investigated as the table below shows:

**Table 5-3: Investigation of States by the Human Rights Commission Complaint Procedure**

Country	When Examined Under Resolution 1503
Brunei DS	Never
Cambodia	1979 (as Kampuchea)
Laos PDR	1995
Indonesia	1978-1981 1983-1985
Malaysia	1984
Myanmar	1979-1980 1990-1992
Philippines	1984-1986
Singapore	Never
Thailand	1995, 1996
Vietnam	1994
East Timor	Not as an independent country, but as part of Indonesia

The HRC plays a vital role in promoting and protecting human rights within the UN system. While a body composing only of States monitoring the human rights standards of other States will doubtless be cautious and limited politically, the activities the HRC can undertake, such as special procedures, the UPR, and the complaints procedure, have started to show a difference in human rights standards. Human rights obligations cannot now be avoided by States. The special rapporteurs continue to do an important job in responding to violations around the world, and acting quickly on claims of gross violations of human rights.



## 5.3 The Office of the High Commissioner for Human Rights

The task of managing human rights activities at the UN, and of assisting States to comply with their obligations at the UN, is undertaken by the OHCHR. Originally called the Human Rights Centre, the OHCHR was formed after various groups in the early 1990s lobbied for a more senior body to manage human rights at the UN. The idea was accepted at the World Conference on Human Rights in 1993, and a resolution passed to establish the OHCHR.

Many ongoing activities take place at the OHCHR including movements to mainstream human rights within the UN system and to provide a strong voice to protect human rights. In addition, it provides assistance to governments, such as expertise and technical training, to enable them to meet their human rights obligations. It also coordinates human rights activities within the UN, and supports human rights bodies, for example, by coordinating the UPR. The OHCHR also carries out education activities, public information, and advocacy on behalf of the UN. Unlike the HRC, it is not comprised of State representatives, but is rather made up of individuals with expertise in human rights.

The OHCHR is notable for its field presence, with 25 country and regional offices around the world. In Southeast Asia, the regional office is based in Bangkok at the ESCAP headquarters. In the early 1990s, the OHCHR struggled to gain acceptance as infighting and UN bureaucracy resulted in a weak and ineffectual OHCHR. However, with a mixture of strong commissioners and an acceptance of the broader mandate of human rights throughout the UN, the OHCHR has since gained prominence in its work. The OHCHR is headed by the High Commissioner who is appointed by the Secretary General. Initiated in 1994, the position requires commissioners to take up four year terms. As of 2014, there have been seven commissioners coming from Europe, Latin America, and Africa, but not Asia.

## 5.4 Treaty Bodies

As compared to charter bodies, treaty bodies are an entirely separate type of human rights body. Treaty bodies are created from human rights treaties, and their formation, mandate, and rules are detailed within the treaties themselves. Each human rights treaty (and the optional protocol to Torture) has its own treaty body, making for ten bodies as of 2014. When the treaty comes into force, one of the main results is the creation of a committee, made up of around 10-23 people (depending on the treaty) whose job it is to oversee State party compliance. Whereas Charter bodies are often composed of State representatives, treaty bodies are made up of more independent individual experts. Normally, members of a treaty body are human rights experts, whether they be lawyers, diplomats, or NGO workers. They are nominated by State parties to the treaty, but their position is independent of the State (thus ensuring governments cannot control them). These bodies meet 3-4 times a year in Geneva. Treaty bodies carry out a number of activities which vary from treaty to treaty and is summarized in the table below.

**Table 5-4: Summary of Treaty Bodies**

Treaty Body	No on Committee	State Party Report	Individual Complaint	Report Period*	Inquiries and/or Missions
CCPR	18	Yes	Yes, OP	2 and request	No
CESCR	18	Yes	Yes, OP	2 and 5	Yes, OP**
CEDAW	23	Yes	Yes, OP	1 and 4	Yes, OP
CRC***	18	Yes	Yes, OP	2 and 5	Yes, OP**
ICERD	18	Yes	Yes, Art 14	1 and 2	No
CAT+	10	Yes	Yes, Art 22	1 and 4	Yes, Art 20
CMW	14	Yes	Yes, Art 77	1 and 5 request	No
CRPD	18	Yes	Yes, OP	2 and 4	Yes, OP
ICED	10	Yes	Yes, Art 31	2 ++	Yes, Art 33

OP = Optional Protocol

\* Number of years till initial report/number of years between subsequent reports

\*\* Upon OP coming into force

\*\*\*The two optional protocols to CRC also need State party reports, initially in two years, then every 5 years after that

+ Under CAT, there is also the *Subcommittee on Prevention of Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (SPT)*

++ Not yet decided

Each treaty body varies slightly in its mandate and powers. The rest of this section will detail treaty body activities and discuss how they protect human rights.

## State Party Report

When a State agrees to a treaty, it also commits to writing a periodic report (the exact time depends on the treaty, but around four to five years is normal), in which the State details how it is meeting its treaty obligations. States must describe the steps, such as legislative, judicial, policy and other measures, which they have taken to ensure the rights from the treaty are protected. The State party report is usually a large document, sometimes nearly two hundred pages long, which responds to the treaty, article by article. The report should explain how rights in the treaty have been put into domestic law, how many people enjoy the right in that country, and other activities it has done to ensure the protection of the right.

Typically, States are expected to submit an initial report one or two years after ratification, after which the reporting becomes periodic (usually every four or five years). However, this is a laborious task, and unsurprisingly, many States are reluctant to do the research and admit their lack of compliance to the treaties. The result is that many States are overdue in their reports. Within Southeast Asia, there are many overdue reports. Most States have at least one overdue report, and many States, two or more. Brunei has never submitted a report to CEDAW since its ratification in 2007, Indonesia has three overdue reports to CERD, and Laos DPR has overdue reports to five treaty bodies. This does not mean Southeast Asia is especially bad at reporting as most countries have overdue reports; at some estimates, there are over 1,000 overdue reports to all the treaty bodies.



## DISCUSSION AND DEBATE

### Are State Party Reports a Useful Way to Determine the Status of Human Rights in a Country?

Many criticisms are aimed at the State reporting system. The only Southeast Asia country that does not have an overdue report is Singapore (though it has only ratified two treaties). In addition, the process is useless for States who don't ratify treaties. For those owing overdue reports, treaty bodies can only offer encouragement, but given their size and scope, and the demand on government resources, there is little treaty bodies can do to ensure compliance. Even when submitted, many reports give only the State view and omit more important human rights issues.

Because of these concerns a consultation process was initiated by the OHCHR called the 'Treaty body strengthening process.' It highlighted the "significant backlog of State reports and individual communications, chronic under-resourcing of the treaty bodies, and insufficient compliance by States parties with their reporting obligations." The consultation also gave a number of possible solutions, including a single report covering all treaties, or only requesting reports for States with a poor record.

*What can be done to fix this problem? Is it realistic to expect States to report objectively on their human rights situation or is this best left to civil society organizations?*

*Is there a need to report every 4-5 years for each treaty which means some countries must produce nearly two reports a year? The obligations for this are significant as they must research and write these reports, fly the delegation to Geneva, and then follow up on the outcomes.*

*Isn't it better to use the UPR process? (but the UPR does not cover as many rights as are outlined in the various treaties)*

Once a report is submitted, it is read by the treaty body members who will meet with the State to discuss its progress. Given that reports are a form of self-assessment, States often omit information of human rights violations or make claims about high standards which may not reflect the situation on the ground. Because of this, treaty bodies allow independent bodies, such as NGOs, to submit their own reports (called 'shadow reports') to give an independent view. The actual review will occur as a session in which the treaty body will meet representatives from the State party at the OHCHR office in Geneva, and the State delegation will answer questions from the treaty body in a 'constructive dialogue.' Often the treaty body will raise issues arising from the shadow reports, and the State may be requested to give further information on violations occurring in its country. A typical procedure is (importantly, each step of this procedure is documented and publicly available):

1. Submission of 'State Report' (a large document of over 100 pages);
2. The treaty body puts together a 'List of Issues' which it wants the State to discuss, some of which may have been raised by shadow reports (normally around 10-20 issues);
3. The State party replies to this list of issues;

4. The treaty body releases a ‘Summary Record’ which details the meeting);
5. The treaty body releases its “Concluding Observations’ which may also include recommendations to the State.



## DISCUSSION AND DEBATE

### Do Countries Change Because of the State Report Procedure?

It may appear that State reports have a limited effect on compliance to human rights. However, they may be used in a number of ways to improve human rights, and many such examples can be found within the region itself. For example, Thailand changed its divorce laws for women as a result of its compliance to both the ICCPR and the CEDAW. The CEDAW treaty body noted that Thailand’s divorce laws discriminated against women: it was harder for women to divorce men as they had to prove either adultery or that the male had disappeared for two years; while men had the option of a no-fault divorce. Further, women had to change their surnames to that of their husband. In 2005 Thailand changed these laws.

### Individual Communications

In addition to receiving State reports, some treaty bodies may also accept complaints from individuals and State parties. While four of the treaty bodies accept inter-State complaints, there has never been a single case of such a complaint, and so this procedure will not be discussed. It is enough to note that like the HRC, States are often politically reluctant to initiate direct complaints against other States for fear of repercussions, which means it is usually left to individuals and civil society to take on the task of complaining about specific human rights violations. On the other hand, individual complaints are used far more often with around 2,500 complaints being made to the treaty bodies so far. All treaties have a mechanism for complaints, however:

- CMW: The Migrant Workers Convention needs ten States to ratify Art 77 of the convention for a complaint process to start. As of 2014, only two States have ratified this.
- CRC: The complaints procedure for the CRC was initiated in early 2014 when the third optional protocol received its ten necessary ratifications. As of 2014, no complaints have been entered.
- ICESCR: The complaints procedure for ICESCR was initiated in May 2013 when the optional protocol received its ten necessary ratifications. As yet, no individual communications have been heard.
- ICED: The enforced disappearances treaty requires States to declare under Art 31 that they allow complaints. So far, sixteen State parties have made this declaration. There is not a minimum number necessary for the treaty body to take individual complaints, no complaints have been entered as of 2014.

### Individual Communication

When an individual considers their human rights have been violated, in some circumstances they can complain to the UN. There are many conditions: (1) the State must have ratified the treaty, (2) allowed individuals to complain, and (3) the person must have gone through the State’s legal system or equivalent.

The remaining five treaty bodies have complaints procedures in use, though an individual complaint must be voluntarily agreed to by the State. Examining the record of Southeast Asian countries, few allow individual complaints: Thailand and the Philippines allow individuals to complain to two treaty bodies; and Timor Leste allows complaints to the CEDAW. In some ways, this is not a bad record, as generally most countries do not allow individual complaints, although it does mean the procedure is rarely, if ever, used in the region. The exception has been cases brought to the ICCPR treaty body against the Philippines (16 cases), and a single case of an individual complaint to the CEDAW from the Philippines. Thailand and Timor Leste have never faced an individual complaint.

**Table 5-5: Southeast Asian Countries Allowing Individual Complaints**

Treaty	Allows Complaint	Signed But Not Ratified
ICERD	None	
ICESCR	None	Timor-Leste
ICCPR	Philippines	Cambodia
CEDAW	Philippines Thailand Timor Leste	Indonesia
CAT	None	Laos PDR
CRC	Thailand	None
CMW	None	Cambodia
ICED	None	Indonesia Laos Thailand
CRPD	None	Cambodia

### **The procedure for making a complaint**

The individual complaints procedure is a quasi-legal process in which the treaty body gathers information from a person who considers their rights have been violated. A detailed and technical process needs to be followed to make the complaint. The process may vary slightly between treaty bodies but basically follows this process:

1. The author (or someone representing him/her) submits the facts of the event, other relevant information, and outlines the reasons why they could not get justice in their own country, in writing to the treaty body. The rights violated and the failure to get justice must be detailed in the first submission.
2. The committee decides if it has the authority to accept this complaint; this is called the admissibility decision. In order for a treaty body to consider a complaint (that is, in order for the complaint to be admissible), a number of criteria must be reached:
  - a. The treaty needs to be ratified, and the State party must have agreed to allow complaints.
  - b. The complaint is not anonymous, so the person whose rights are violated must be clearly identified.

- c. There is a violation of an article of the treaty, and this must be stated.
  - d. The person has complained to the State without result. This is known as 'exhausting domestic remedies.' In other words, there is no other way the person can seek justice from the State. The treaty bodies will only consider a complaint if all other processes have been exhausted.
3. The treaty body sends the complaint to the State party
  4. The State party responds to the allegations
  5. The State response is sent to the authors to allow them to respond. In some cases, this may be done twice.
  6. Once all this information has been gathered, the committee then meets to examine the merits of the case, to decide if there is a violation, and what should be the outcome. If they find that a violation has occurred, they may ask the State to deal with the problem, compensate the person, and change laws or practices to prevent it happening again.



## CONCEPT

### Exhausting Domestic Remedies

The exhaustion rule gives States (in particular, courts) the possibility to address alleged violations and solve the problem thus avoiding treaty body involvement. Specifically, this means the victim is obliged to first claim his/her rights in the national justice system (civil, criminal, and/or administrative national courts). If the person cannot access the system, or if it is the judicial system itself which is violating their rights, or if the remedies provided are insufficient, the person may then be able to use the treaty body mechanism. Exhausting domestic remedies ensures individuals do not resort to the UN as a first response to violations.

The process itself is rather slow, and it may take over a year before a conclusion is reached. Emergency complaints are often channeled through other procedures (such as special rapporteurs), where an action may be taken in days rather than years. The process is slow because sometimes States do not respond which may result in complaints being made without its input. Also, the treaty body only meets for a limited time each year (somewhere between six to ten weeks a year). Because the committee has no binding power, it cannot enforce the outcome of its findings. In many cases, treaty bodies may find a violation has occurred and ask a State to offer compensation, only to have the State ignore its suggestion.

While these limitations may imply that the complaints procedure is weak and ineffectual, it has some important contributions to offer. Treaty body findings can lead to amendments in the law to ensure human rights are protected (for example, one body found that laws criminalizing homosexuality were a violation of rights in *Toonen v. Australia* (1992)). It can halt the process to execute someone on death row until a proper investigation has been completed (for example, *Piandiong v. Philippines*).

1999, and other cases in Jamaica, Belarus, and Kyrgyzstan). Moreover, treaty bodies can introduce a new human rights standard to assist States in the understanding and interpretation of human rights (for example, a recent case clarified situations where access to an abortion was considered a right under *Llantoy Huaman v. Peru* 2003-5).

Overall, most complaints have been made to ICCPR because it is the most ratified, oldest, and broadest treaty allowing for complaints. The small number of complaints made to CEDAW is surprising given its almost universal ratification, and no country has reached full equality for women. However, the lack of cases may be due to the fact that other mechanisms are seen to be more effective. Many complaints are made to CAT because it can be used by individuals claiming refugee status, as the treaty will not allow individuals to be deported if they may face torture; hence most cases originate in countries with a refugee population. Such is not the case in countries like Sweden and Switzerland where torture is unlikely to occur.

**Table 5-6: Commitment to Complaint Procedures**

	ICCPR	ICERD	CAT	CEDAW
<b>State parties</b>	113	58	64	106
<b>No of cases</b>	2034	45	462	27
<b>Cases showing violations</b>	718	10	60	6
<b>Country with most complaints</b>	Jamaica (177) Canada (158) Spain (117) Korea (125)		Sweden (108) Switzerland (118) Canada (73) Australia (30)	

### General Comments

Another activity of treaty bodies is to assist States in their understanding of the treaty. This is done by written comments, mostly on specific rights in the treaty. Every treaty has released a number of general comments, with the newer treaties only having one or two comments, the ICCPR having 32 and the ICESCR having 21. General comments allow for clarification on the exact nature of a State's obligation to the treaty. As an example, the treaty body for the ICESCR has made very useful general comments on the standard of livelihood rights such as food, water, and housing (detailed in Chapter 3 on the ESCR). General comments have also provided specific elements to livelihood rights such as availability, accessibility, and acceptability. Further, as regards the right to housing, additional elements such as security of tenure, affordability, and location have been added. Some general comments about specific articles, such as comments on Art 19 (freedom of expression) of the ICCPR or Art 24 on children's health in the CRC have been made. Other comments have also been made about thematic issues such as children in juvenile justice, disabled children, the role of NHRIs, and legal obligations of the State.

Significantly, general comments can expand the scope of a right. For example, water as a human right was included in a general comment as it was not written explicitly in the treaty. General comments also include the internet within freedom of expression treaties. However, these modifications to rights in a treaty can lead to arguments among State parties. In particular, the question most asked is: is the general comment legally binding? A main objective of the general comment is to assist the State in understanding rights, and hence its duties and obligations, when it comes time to reporting to the treaty body.



## DISCUSSION AND DEBATE

### Are General Comments Legally Binding?

When a State ratifies a treaty, it agrees to be duty-bound by the rights in the treaty. If the treaty body then expands those rights to include a new element such as the right to water, must States be legally bound to that duty as well? The State did not agree to the general comment when it ratified the treaty, and shouldn't it be able to interpret its understanding of the treaty?

On the other hand, general comments do not invent new rights, but simply clarify the scope of particular rights, so that water is considered a part of food, and wouldn't it therefore be illogical to consider rights to food without including rights to water? Treaty bodies ensure State parties have the same (or at least very similar) interpretations of what particular rights mean.

General comments are halfway between a binding document and an opinion. Some States do not regard comments as binding and treat them differently to the treaties themselves, believing they are only bound by the treaty they ratified. Yet most bodies do give general comments considerable legal weight because they define what the treaty means, and what is legally binding in it. So while they are not binding as such, they comprise the authoritative interpretation of the treaty, and hence determine what the State is duty-bound to.

### Other Procedures

A small number of other activities can be undertaken by treaty bodies to promote and protect human rights. Four treaty bodies (the CAT, the CRPD, the CEDAW, and the ICED when the protocol is in force) can initiate inquiries into gross and widespread human rights violations in a country. This process is confidential and requires State acceptance, which will obviously limit its powers to investigate. The chapter on women gives details of some inquiries made under CEDAW. The CAT has undertaken eight confidential inquiries (including two Asian countries; Nepal in 2012 and Sri Lanka in 2002), while CRPD and CED are yet to undertake an inquiry. The only States in Southeast Asia which permits this process is the Philippines and Singapore for CEDAW, and Cambodia for the People with Disabilities Treaty (although it has only signed but not ratified the protocol to this process).

It is important to note treaty bodies will only investigate situations of serious or systematic rights violations. It will not investigate single events. Further, high levels of proof are required. This is mostly fulfilled by reviewing reports and accounts at a treaty body session. If invited, they may visit the country. Outcomes of the process in the form of a report will be given to the State party, and eventually published on the treaty body web site.

Other mechanisms include 'early warning and urgent action' procedures. Early warnings and urgent actions are used by treaty bodies to eliminate racial discrimination. The objective is to intervene to stop serious violations which may occur as a result of increased racial tension (such as genocide, communal violence, or ethnic cleansing). There have been around 18 reports through this procedure, and around 40 countries have received letters as an early warning. From Southeast Asia, Thailand has received a letter concerning the treatment of a Karen minority group; Indonesia has received letters about indigenous groups in West Papua; Laos PDR on the Hmong; and the Philippines on the Subanon indigenous group.



## A. Chapter Summary and Key Points

### **The United Nations and Human Rights**

The UN is the most significant body at the international level which protects human rights. It has formalized a system of promotion and protection of universal human rights. States commit to human rights upon becoming a UN member, though the protection of rights in some cases are difficult to enforce.

### **Human Rights in the Broader UN System**

As an international political body, the UN can be highly technical and multilayered. Human rights are protected by the UN organs, which are the most important parts of the UN. The UNSC plays an important enforcement role, particularly related to “gross and systematic human rights violations.”

The UNGA gives equal voice to all UN member States on human rights issues, and it is where human rights treaties are adopted and signed by member States. The ICJ gives opinions and interpretations on international law, including human rights law, and it also makes State to State rulings on issues of international law. The UN Secretary General plays an administrative role relative to human rights, and can appoint special representatives. The Economic and Social Council promotes human rights through the UN Charter, primarily by creating human rights bodies. All Southeast Asian countries have been active in the UN and taken roles in many of the organs.

### **UN Human Rights Charter bodies**

The Charter Bodies gain their legitimacy through the UN Charter. One body is the Human Rights Council, which replaced the Human Rights Commission in 2006 because it was considered to have become incompetent and controversial. The HRC is comprised of 47 States who meet regularly to discuss human rights concerns, and implement special procedures. This includes mechanisms to report on human rights issues, such as special rapporteurs and working groups. Another very important mechanism is the Universal Periodic Review, where every State in the UN has its human rights record reviewed by the Council.

The other main charter body is The Office of the High Commissioner for Human Rights, which works on the promotion of human rights through education, human rights research, awareness raising, advocacy, and technical support and expertise to governments.

### **UN Human Rights Treaty bodies**

The treaty bodies are established when the treaty comes into force. The body is made up of around 10-23 people, depending on the treaty, who give expert advice to the State on how to comply with the treaty. It does this in a number of ways, including reviewing reports made by the State party on implementation of the treaty, clarifying the meaning and function of the treaty by writing general recommendations, and in some cases hearing complaints from individuals or conducting investigations.

## B. Typical exam or essay questions

- Have there been significant changes in how a specific UN organ has responded to human rights violations? Why has this change taken place and what were the consequences for the promotion and protection of human rights?
- Why was the Human Rights Commission replaced by the Council? What does this say about some States attitude towards protection of human rights at the UN level?
- Is the Universal Periodic Review a strong mechanism for the promotion and protection of human rights? Will it be stronger than the reporting procedure at a treaty body? Can you give any recommendations to make the UPR process stronger?
- What are the main differences between charter bodies and treaty bodies?
- When an individual complains to a treaty body, what must they show in order for their complaint to be accepted?
- If a treaty body expands or changes a definition of the right in a treaty, for example including the right to water, do you think the States should be legally bound by this interpretation? Or should States have the full freedom to interpret the treaty as they see fit?

## C. Further Reading:

There is a massive amount of information on the UN system. The key websites are:

- The OHCHR has a number of simple guides on the process which are very useful.
- The OHCHR website also has information and reports on the Council, Special Procedures, and treaty bodies.
- For treaty body material look for the “treaty body database” which documents all the reports from the treaty body. Every document can be searched by country and by type of document, for example State reports are listed, and individual complaints can be found under ‘jurisprudence.’
- Documents on the treaty body strengthening process are at a special page at the OHCHR which can be found by a simple internet search for ‘treaty body strengthening process.’
- For the UPR, use the “UPR info” site. All the documents, including the three reports (State, UN, and Stakeholder), and the list of recommendations, can be found here.
- It is more difficult to find UNGA, UNSC, and ICJ documents on human rights, as they are listed by their UN number and not categorized. Each of these organs has their own website listing the documents, but the student will need to know the specific document before they visit the site.

Regular updates on the UN can be found at the 'International Service for Human Rights' which has weekly and monthly accounts of all human rights activities including Council meetings, treaty body meetings, and human rights in the broader system.

Authors to consult who write on the politics of the UN system include:

- Julie Mertus
- Bertrand Ramcharan
- Philip Alston
- Thomas Weiss
- David Forsythe



# 6

## The Rights of Non-Citizens: Refugees and the Stateless

People are particularly vulnerable to human rights violations when they are outside their State of citizenship, or they cannot be recognized as a citizen by any State, in the case of stateless people.

Individuals residing inside their State often receive government services, are protected by law, and usually speak the local language, all of which gives them greater protection. However, if that person is not recognized as a citizen (and especially if they are not legally in that country), they become much more vulnerable to abuse. The vulnerability of these people has led to the introduction of human rights standards to increase their protection. Coming chapters will examine how people living outside their State, people travelling between States, and stateless individuals should be protected by examining the main categories of non citizens: in this chapter stateless people and refugees, and migrant workers and trafficked persons in the next chapter. This is by no means all the types of non citizens, but they are the most vulnerable.

If someone does not hold citizenship documents, is migrating irregularly, or is undocumented (that is, without paperwork such as visas or passports), they are vulnerable to mistreatment, discrimination, exploitation, crime, and a range of other threats. They are vulnerable to abuse, for example most migrant workers do not get the same treatment as national workers. They do not get the services they may need, say access to health or education. The reasons are that they may not be adequately protected by national laws, and in some cases, may not even be protected by their consulates (consulate services are provided by embassies to help their citizens in another country), leaving them without any form of protection at all, unless they can access their human rights. In some cases their human rights are the only legal protection they can access, though there are great challenges to recognizing the human rights of these non citizens.

International standards, mechanisms, and organizations dedicated specifically to the protection of non-citizens, do exist. All non-citizens should still be able to enjoy their human rights simply because they are human, but most countries in Southeast Asia tend to ignore, or at least hide, the violations and threats faced by migrants, refugees, and migrant workers. In response to these vulnerabilities, migrant workers, refugees and asylum seekers, trafficked and stateless persons, have special rights to help protect them, because the international community recognizes the need for their protection.

## DISCUSSION AND DEBATE

### How to protect non-citizens from discrimination and exploitation

Discrimination and exploitation of non-citizens may take many forms. For example, it can take the form of verbal insults, physical threats and abuse, or a less obvious forms of discrimination such as unfavorable treatment or increased difficulty to access services. You may hear people talk poorly about migrants or refugees as if they are a burden on your society. You may also have seen exploitation of non-citizens yourself, although it often takes place behind the closed doors of factories, on isolated hillsides in plantations, or in the kitchens of a local restaurant. Alternatively, you may have seen workers on a construction site and wondered if they are being paid enough, if they have a safe place to sleep, or if they are able to leave the work site.



However, citizens may be exploited alongside non-citizens, so it is not always clear if the non-citizen is being singled out. You may not know if a person is a citizen or a non-citizen until you see their identification cards. Thus, the discrimination and exploitation of non-citizens is often able to hide in plain sight.

*What can be done to give better protection, and better respect, for the rights of non citizens? What information should people know so they will stop discriminating them?*

## 6.1 Migration in Southeast Asia

### 6.1.1 Terminology

Before examining the human rights context, it is first useful to look at some of main migration concepts and terminologies. These may appear confusing and problematic, but there is often an important reason why these terms are used. This textbook uses the term ‘non-citizens’ to refer to people who are in a State where they are not a citizen. This includes such people as refugees and asylum seekers (and this distinction will be detailed below), immigrants, migrant workers, tourists, diplomats, expatriates, stateless and trafficked persons (though it is possible that a trafficked person can be a citizen of the State where they are trafficked, though this tends not to happen). The term ‘non-citizens’ is used because it is broader and encompasses all of the above, and it is the status of being a non citizen which leads to vulnerability and threats to a person’s security.

Migration itself (that is the process of moving from one country to another) can be termed irregular, regular, forced, or voluntary. Regular implies the migrant reached the country in a regular way which is recognized by the States and is legal, such as coming through an airport and having a passport and visa. An irregular arrival applies to someone who bypassed the proper channels and therefore may not have the necessary documentation, such as an arrival stamp in their passport or a valid visa, or they may have not gone through an immigration checkpoint when they arrived. Forced migration occurs when someone is compelled to leave their country because they were forced out by conflict or the threat of violence, which is commonly the case for refugees.

Migrants themselves may be termed regular or irregular, documented or undocumented, and legal or illegal. Each of these terms implies the same thing: whether individuals have the proper documentation to be inside a country. If migrants possess such documents as passports and visas, they are considered to be regular, documented, or legally in a country. There is an important politics behind these terms as they give distinctions between different types of non-citizens. Those without the proper documents are deemed to have committed a crime and will be treated as illegal migrants. All States in Southeast Asia use the term ‘illegal migrants’ to term those people in their country who do not have the proper documentation. Calling someone ‘illegal’ suggests they are involved in some kind of criminal activity, and that they can be arrested. But can a one year old child of undocumented migrant workers be considered a criminal? The preferred term in this situation is “undocumented” as it takes away the presumption of criminality. Further, legal status can be blurred. For example, if someone accidentally overstays their visa, do they automatically become a criminal? However, States have tended to use the distinction between illegal and legal migration to better control non-citizens: in other words, labeling undocumented people as illegal gives the State an excuse to arrest and expel any individuals who cannot produce the correct documentation.

A major concern is that by strictly policing people's opportunities to legally enter a country will result in people being forced to illegally enter the country. Trends favoring restrictive migration policies in the region do not have the desired results of less migrants and higher numbers of documented migrants, but instead may change documented migrants into undocumented ones. Another impact of restricting migration is the growth of organizations involved in the informal smuggling of people for labor. Smuggling, forged documentation, and bribery of officials, are all methods employed to cross borders illegally. By increasing illegal or irregular entry into a country will also increase the vulnerability of people to human rights abuses. High rates of irregular migration in the region have severe implications. Irregular migration combined with flawed identification and documentation systems, and increases in criminal enterprises, result in insecurity. For individuals migrating in an irregular way, there is a vulnerability to human rights violations, exploitation, and trafficking.

## CONCEPT

### Calling a person illegal

Human rights defenders prefer the term 'irregular' or 'undocumented' to 'illegal.' Calling a person illegal has many negative connotations. It implies that the person has knowingly committed a crime. It represents them as bad, or evil. However, an undocumented status commonly occurs because governments often make legal documentation very difficult or expensive, forcing migrants to take on an undocumented status. When it comes to migration, few people break the law because they want to break the law, rather they do it because they lack the means (such as documents or money) to comply with regulations.



### 6.1.1 Historical and Economic Context to Migration in Southeast Asia

Through migration, people have been able to escape persecution. Millions of migrating workers have improved their livelihoods and the livelihoods of their families. People regularly migrate for their education and migrants have traveled to establish new communities in distant countries. In fact, there is a long history of migration within the Southeast Asia region, and also to the region from outside. For instance, people from India and China have migrated to countries in Southeast Asia for centuries. Migration has always been the norm and not the exception of the way people live in this region.

Porous borders, armed conflicts, mixed economic growth, inconsistent legal infrastructures, long-standing historical migration patterns, demographic transitions, and limited formal channels for migration, have combined to result in high levels of undocumented migration and strained relationships between governments and migrants in Southeast Asia. The movement of people is highly dynamic, resulting in complex flows between countries. Much migration in the 1970s and 1980s occurred as a result of large-scale conflicts, such as the American war in Vietnam (which also split across borders in Laos and Cambodia), and the ongoing conflicts in Myanmar. Likewise, the "Asian Miracle" of the 1980s, when manufacturing and banking sectors in the region developed rapidly, has also led to significant migration to find work.



The huge demand for labor from developing countries such as Thailand, Malaysia, and Singapore encouraged many men, women, and even whole families to migrate. The regional economy contributes to large scale migration in two ways. First, there are relatively poor nations bordering rich ones (Myanmar and Thailand, for example), where large numbers of workers will move to meet the demand for workers. Second, periods of rapid economic development often require large working populations which cannot be met by natural population growth alone. Recent studies, by organizations such as ILO and IOM, note that migration is a result of the rapid growth in demand for skilled and less skilled migrants, the high proportion of women entering the migrant workforce, and a commercialized recruitment industry.

Migrant workers take many routes. Workers migrating out of the region tend to be from Indonesia, the Philippines, and Thailand, to the Middle East and East Asia. As to the actual work involved, men mainly work in construction while women are found in domestic work and factories. Most migrant workers leaving the region are documented. Within the region, the majority of documented and undocumented migrant workers tend to migrate to bordering countries. The largest flows are from the Philippines, Indonesia, and Burma to the more developed countries of Singapore, Thailand, and Malaysia. There are also smaller, but significant, flows of people from Laos and Cambodia into these three countries. However, one problem often encountered when studying migration is that data is difficult to collect because of the large number of undocumented migrants. A further complexity to understanding migration is that paths are often mixed, with workers, refugees, trafficked people, and even tourists all being part of the same flow, and often being mixed together. Distinguishing between forced or unforced migration is difficult: the law assumes those who leave their country directly due to political reasons are forced migrants, whereas others who move because the conflict indirectly caused their poverty (for example, if the army confiscated their food crops) are not necessarily considered forced. Some movement occurs clearly for economic reasons (such as Philippine domestic laborers into Singapore), and some movement is clearly forced (such as political refugees from Myanmar). However, the dynamics of migration are much more complex on the ground. Refugees may start as economic migrants, economic migrants may become trafficked, and victims of trafficking may seek refugee status, and so on. In some situations, it is problematic to assume that economic problems can be distinguished from political problems, as a person's reasons for seeking economic security are often connected to their political vulnerability.

For decades, migration has taken place without any regional protection mechanisms. Migration policies in the region remain fragmented, underdeveloped, and unenforceable, as government efforts to manage migration have either been ineffective, or co-opted by private sector demand. Early efforts such as the Bangkok Declaration on Irregular Migration (1999), which recognized the existence of irregular migrants and the need for States to act on this, were useful in terms of highlighting actual problems, but were ultimately unenforceable and therefore could not protect migrant workers. Recently, there has been a growth in regional migration regulations with more formal agreements, such as the bilateral migrant worker agreements signed between Thailand and Cambodia, Laos and Myanmar; there are also regional level meetings, such as the Bali Process on People Smuggling, Trafficking in Persons and Related Transnational Crime, which has the objective of increasing awareness and coordination in counter trafficking activities between States and international organizations such as the UNHCR and IOM. However, the growth in regulation has only had a moderate impact on the protection of non-citizens.

Governments often favor migration policies which attempt to dictate the number and types of migrants, but these policies are not realistic as migration is heavily dependent on social, cultural, and economic factors. For example, migration in the region significantly altered after the terrorist attacks on 11 September 2001. Governments began to see migration as a security concern, and using emerging laws around trafficking and smuggling, attempted to reduce irregular migration. Some countries have largely been ignorant of their migrant population. For much of the 1990s and 2000s, Myanmar established a policy for its few workers in the Middle East, but it went for decades without a policy (or even recognition) that an estimated 2 million Myanmar citizens were working in Thailand.

Compounding the vulnerability associated with migration in Southeast Asia is the increase in discrimination against migrants by citizens. People fear that migrants cause an increase in crime. The domestic workforce may see migrant labor as a potential threat to their jobs and wages. Further, Southeast Asia governments tend to treat migration as a security issue, comparing it to transitional crime. Not surprisingly, this creates a situation where migrants are seen as threats to local communities, social harmony, and national security. In addition, States may focus only on profiting from migration, rather than protecting it. Thus, in some cases, migrants may become victims of corruption and exploitation even before they leave their country. Then, upon arrival in their country of work, they may also face discriminatory laws and law enforcement, hate crimes, trafficking, and a range of other violations.

## DISCUSSION AND DEBATE

### How accurate are people's fears of migrants?

What are the most common ways migrants are criticized in your country? How accurate are these criticisms? These are some common criticisms made:

- Migrants bring crime
- If we treat migrants too well they will flood into the country and take it over
- Migrants are taking our jobs
- Migrants bring disease
- Migrants use all our social services like health
- Migrants do not respect our culture

How should you respond to these statements? While there is not a lot of research on these issues, it appears that most of these claims are incorrect. For example migrants tend to have lower rates of criminal activity. Migrants tend to contribute much more to the economy through their work than they take with social services. Migrants have never flooded into a country and taken it over, at most they become a large minority after generations of living in the country. Further, most people's family history (including most students reading this textbook), are the product of migration.

*Say you meet someone in the street who expresses the above views, what are the best ways to respond to their fears of migration? How can you convince someone that migration is good, rather than bad, for a country?*



## 6.2 The Four Categories of Non-Citizen Rights: An Overview

There are four categories of non-citizen rights which this textbook will discuss. These are: (1) refugees, (2) statelessness, (3) migrant workers, and (4) trafficked persons. Each category has a particular status, a specific set of human rights, and protection concerns. Each of these categories will be understood by examining firstly international law and treaties relevant to protecting people of this status, and then looking at the challenges to their protection. Before going into detail, it is useful to provide an overview of the relevant treaties and definitions of the four categories of non-citizens.

### **Refugees**

Refugee status is defined by the 1951 United Nations Convention Relating to the Status of Refugees (revised by the 1967 Protocol Relating to the Status of Refugees). A refugee is a person who:

owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country.

As the definition shows, refugee status applies to people who are being persecuted in their home country and cannot return. These rights ensure such individuals are able to live safely and humanely outside their country until they desire to return home.

### **Statelessness**

Statelessness is defined in the 1954 Convention Relating to the Status of Stateless Persons as:

a person who is not considered as a national by any State under the operation of its law.

Even though most stateless people live in the country where they were born, they often lack the privileges, services, and protection that are reserved for citizens or nationals. The laws protecting stateless persons ensure they will get legal recognition and protection.

### **Migrant workers and their family members**

A migrant worker is defined in the 1990 UN International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families as:

a person who is to be engaged, is engaged, or has been engaged in a remunerated activity in a State of which he or she is not a national.

Migrant workers live outside their home State for the purpose of work. Migrant workers regularly do not get the same rights and protections as national workers, and they are vulnerable to exploitation both at the workplace and in the community where they live if they do not have the correct documentation.

**Trafficked persons**

Human trafficking is defined by the 2003 Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children (The Palermo Protocol), and refers to:

the [actions of] recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs.

Unlike the conventions above, the Palermo Protocol defines a crime, rather than a status. Trafficked persons are victims of the crime described above. Individuals who are trafficked have specific rights to prevent further victimization and to assist them in rehabilitation.

It should be noted that the four treaties mentioned here come from different historical periods which means that they see human rights differently, and they address the problems in a different way. The Refugee and Statelessness Conventions are post World War II treaties, both adopted in the early 1950s. The human rights protection offered by these treaties are not strong because the International human rights framework was not developed. It was not till later in the 1960s that the first human rights treaties were adopted. The Migrant Worker Convention, being drafted in the 1980s, adopted in 1990, but not coming into force till 2003 is a more expansive treaty and is the biggest of the four treaties. It is also the only treaty that is considered a human rights treaty within the United Nations system. The long duration between its drafting and entering into force is reflected in its low ratification rate, and it is the least ratified treaty of the four. Finally, the Trafficking Protocol emerges in the 2000s, as a response to global migration movements, and is a response to rising criminal activities. This treaty protects the rights of trafficked persons, but importantly also defines trafficking as an international crime. Because it empowers States by criminalizing this activity, it is widely ratified.

**6.2.1 Gaps and Overlaps in Legal Protection**

The above four categories of non-citizens should not be seen as distinct and unrelated; yet neither do they nicely fit together and complement each other. Rather, it should be recognized that people can move between these categories quickly, or inhabit more than one category. It is possible (though unlikely) that a stateless person could wake up in the morning as a migrant worker, be forced into a trafficked situation, and end up with refugee status that evening. The result is that non-citizen protection is full of gaps, overlaps, and grey which can make identification and protection difficult. One case of this in Southeast Asia concerns the Rohingya people of Myanmar who can inhabit all four categories.



## FOCUS ON

### The Rohingya

The story of the Rohingyas in Myanmar reveals the vulnerability of stateless populations. The Rohingyas had their citizenship taken away when the Myanmar government introduced new citizenship rules under its 1982 citizenship law. These laws excluded the group from one of Myanmar's 135 officially recognized ethnic groups. To the Myanmar government the Rohingyas are actually Bangladeshis (and often called Bengalis in official documents and the media), even though historical records show them having lived in the region for at least 300 years.

Myanmar law severely limits the rights of the Rohingyas. Because they are stateless they cannot access education or health services. They need special registration and approval to get married or freely move in the country. Recent civil disturbances have resulted in many Rohingya being killed in mob violence. If they try to move from the systemic discrimination they face in their own country, they can be exploited as migrant workers, and they are regularly trafficked.

Because of these conditions many Rohingya leave Myanmar to look for work. There are hundreds of thousands of Rohingya living as refugees in Bangladesh. Many Rohingya travel to Thailand and Malaysia to work as undocumented migrant workers. When they are on route, there have been multiple cases of Rohingya being trafficked, or sold as labour between Malaysia and Thailand. .

State officials in Myanmar and neighbouring countries have used their undetermined status as a way of avoiding any responsibility for them. Myanmar claims they are Bangladeshi, Bangladesh says they are from Myanmar, and Thailand and Malaysia see them as illegal migrants. Some Rohingyas claim refugee status in countries such as Australia, but getting there to claim refugee status is a long and dangerous voyage.

Many gaps exist in the protection of non-citizens. On a daily basis, migrant workers, many of whom are indebted to some sort of agent or employer, are transported to a work site and paid a small fee to do difficult or dangerous tasks; whether or not they are exploited is a matter of context and perception. If a person should be considered a forced migrant, a migrant worker, or a victim of trafficking may be unclear. In addition, refugees who assert their right to work are also vulnerable to exploitation which may amount to trafficking. Partially, these problems are caused because there are no clear rules on how to identify and categorize non-citizens which need protection. Governments may prefer to identify all undocumented people as illegal and who should be deported. States would also prefer to consider someone a victim of trafficking rather than a refugee, because States should repatriate victims of trafficking but cannot return refugees to a place where they may face persecution.

## 6.3 The Refugee Convention

Individuals seeking protection from their own States by escaping their country and travelling elsewhere have been receiving protection for thousands of years, though it is only recently that this protection occurs in international law. The UDHR was the

first international document to recognize the right to seek and enjoy asylum from persecution, although, previously, the League Of Nations did offer legal protection for some groups fleeing persecution (for example, from Russia and Germany). While the UDHR was universal in its protection, and based refugee protection on the individual and not the group, it did so in a rather vague way, stating, “Everyone has the right to seek and to enjoy in other countries asylum from persecution.” This statement does not specifically mention refugees (rather it talks of “those seeking asylum”), and it is soft in wording its protection. For example, it makes no clear mention of State obligations or duties; rather individuals have a right to “seek and enjoy” protection. At the time, in the late 1940s, refugees were a significant concern as there was a huge movement of populations at the end of World War II, creating a refugee population of a size that the world had never seen since. Action was needed, so in 1950 the UN High Commissioner for Refugees (UNHCR) was established. Following that, in 1951 the UN Convention Relating to the Status of Refugees (commonly called the Refugee Convention) was adopted. The Refugee Convention defines the term “refugee” and this definition is still the most commonly used one today. The definition is a very important because it outlines certain requirements that must be met before a person can claim refugee status. In order to gain the protection of refugee rights from the convention it is necessary for all people to fit the definition.

### 6.3.1 Definition of a Refugee

A refugee, according to the Refugee Convention, is a person who:

owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country.

In order for a person to be considered a refugee they must fit all the elements of this definition. The process of doing so is called Refugee Status Determination (RSD). When a State, or an organization such as the UNHCR, wants to recognize someone as a refugee they will need to see if each of these elements is met. The key elements of the definition are:

- **Well founded fear:** The person must be in fear of persecution, and this fear must be legitimate; that is, there must be a “real chance” of persecution supported by evidence. In many cases, the person is persecuted by the State, but this may be done by non state actors as well.

The fear is made up of two elements: the subjective element, or if that person has a genuine fear; and objective element, or if there is a strong reason to believe the person has something to fear. Both must be proven. Generally, claiming refugee status is considered evidence enough that the person has a subjective fear of persecution. To determine if the person’s fear is objective may need an investigation, commonly done by UNHCR, to see if there is a real risk of persecution, which can generally be determined by asking credible NGOs or experts, by consulting reliable country of origin information such as those provided by Human Rights reports or credible media coverage, and by determining whether there has already been past persecution or persecution of similarly situated persons.

- **Persecution:** The persecution should be at the level of a serious human rights violation (forms of discrimination, denial of basic services like food, water or healthcare, or arbitrary arrest may be persecution depending on their severity; threat to life, torture, and detention are persecution). While there is no agreed definition of what is persecution, something like having to travel too far to a hospital is not serious, but a law which forbids access to healthcare because of a person's religion could be considered persecution.
- **Five Grounds:** The risk of persecution must be on account of:
  - a. race,
  - b. religion,
  - c. nationality,
  - d. political belief,
  - e. or 'member of a particular social group.' This refers to a group of persons who share some characteristic that is fundamental to them, such as being a woman, a homosexual, or a member of a caste. Defining the social group can be difficult, at least one court has ruled that being a taxi driver, for example, is not a social group because the person can change their job and it is not fundamental to their character, but others have ruled that being a journalist or a human rights defender may be a valid social group. A woman or a trafficked person cannot change this status (a woman cannot just become a man, nor can a trafficked person become 'untrafficked'). This category is more general and flexible than the others, and has been used more recently to protect women facing persecution (of forced abortions, violence, or honor killing). It must be noted, however, that the social group must be "particular," not general. For example, "women" is often too general to be considered a social group and must be qualified to something more specific like, "young women of a tribe who have not been subjected to female genital mutilation and who oppose the practice."
- **Nexus:** It is important that the persecution is because the person is in at least one of these categories, though it is common for people to fit into more than one category and for the motivations of the persecutor to be mixed. This is called the nexus requirement: the persecution relates to the category.
- **Alienage:** The person needs to be outside their country to claim refugee status. This requirement, called 'alienage,' is necessary because a refugee needs to ask for protection from another State. Asking for refugee status at an embassy in the person's own country is not enough, though there may be other forms of protection the embassy can offer.
- **No State protection available:** The person has to flee the State because they cannot access or, due to fear of persecution, are unwilling to seek protection within their State. If their own government can protect them, they do not need to claim refugee status. Most commonly, people seek refugee protection because it is the State which is persecuting them in the first place; for example a government jailing political opponents, but even if the persecutor is a non-state actor, where the State cannot or will not protect the person from that actor, the person is eligible for refugee protection.





## DISCUSSION AND DEBATE

### Refugee Status Determination

*Can a woman fleeing her country because she faces domestic violence get refugee status?*

The first point to address is whether the country she fled to has ratified the Refugee Convention. If it has, the country will first make the decision based on the above criteria. If it has not, she may need to ask for help from the UNHCR. Once it can be established that the country has agreed to the Convention and there is enough evidence of the violence she faces (for example, hospital records or statements from her family), then one can accept that she does face persecution. Further, she can also be considered a member of a social group (being a woman, or a married woman). However, it must be asked if she seeks protection from the State she is fleeing from. If the State does offer such protection (for example, legal protection, women's shelters or trained police), there is no reason for her to seek asylum. If her State cannot offer protection (for example, there is no law against domestic violence, or the police do not try to protect her from this violence), then there are reasonable grounds for her to be considered a refugee. It is clear that the subjective nature of assessing the main elements will mean that different States can give different findings on the same case.

On an individual level, the process of being identified as a refugee begins when the person seeking refugee status seeks protection. From that moment, they should be given the protection by the Refugee Convention until the State determines whether they fit the definition or not. There is a trend for States to call people who are in the process of having their status recognized as 'asylum seekers.' The Refugee Convention does not use the term 'asylum seeker,' it is a term which only appeared in the 1970s though it is now commonly used. In a sense, the term 'asylum seeker' is used to deny refugees their full refugee rights by not calling them a refugee. If the claim is not recognized by the State, the State may then decide to return the refugee to their country of origin, or ask them to leave the country. Although the recognition of the claim is technical in basis, the decision may also be influenced by political or social factors (although it should not be). States each have their own processes and standards for recognizing refugees. Some countries have set a very difficult standard. Japan, for example, consistently recognizes less than 1% of the asylum claims made each year. In 2013, Japan granted refugee status in only 6 cases, although there were more than 3,000 applicants, and many, many more people in Japan who should be considered a refugee but did not undertake the process because there is little chance they would be recognized. Sometimes States will quickly accept refugees from opposition countries (the USA was quick to recognize Soviet and Chinese refugees during the cold war, and vice versa). Many States have established independent refugee tribunals to assess claims.

Another category of protection involves displaced people; that is, people who are displaced by war or natural disaster. Although these two events are not part of the Refugee Convention, often refugee bodies (such as UNHCR) have considered they have a duty to protect these victims as well. Of most concern here are internally displaced people (IDPs), which are people who have been forced to move from their homes but have not crossed an international border. Some IDPs may actually be refugees if they could reach a border, but they remain displaced within their own



country. Thus, because no borders are crossed, they cannot seek protection under the 1951 Convention. Around the world in 2014, there are an estimated 33 million persons who have been internally displaced. In Southeast Asia, there are countries which have large IDP populations. These include Myanmar, with people displaced by the ethnic conflicts in the Kachin, Karen, Arakan and Shan States. The Philippines has an IDP population in the southern island of Mindanao. There are displaced Hmong in Laos and also people displaced in the three southern provinces in Thailand.

There are 147 State parties to the Refugee Convention, although in Southeast Asia only the Philippines, Cambodia, and Timor Leste have ratified it. Even across Asia, few countries are party to the treaty. There is only one country in South Asia, Afghanistan, which has signed the convention, though this country is the largest refugee producing country in the region. The low number of ratifying States is partially due to the original wording of the 1951 treaty, which gave geographic and time limits: basically, a refugee in this convention was limited to people displaced in Europe because of World War II. Obviously, these refugees have little relationship to Asia and for countries like India, there was little incentive to agree to such a treaty. In order to remedy this, the 1967 Protocol Relating to the Status of Refugees widened the definition by removing geographical and time limitations, making a refugee simply anyone who fitted the definition. However, Asian states generally have very conservative and cautious attitudes to refugees, perhaps because some countries face huge refugee inflows – Pakistan, Iran, and Thailand have received hundreds of thousands, and in some cases millions of refugees.

There are several regional refugee protection mechanisms such as the one offered by the African Union. This has a wider definition than the Refugee Convention because it includes people fleeing from “events seriously disturbing public disorder.” In addition, the Organization of American States’ (OAS) Cartagena Declaration on Refugees built upon the African Union’s refugee definition by including threats of generalized violence, foreign aggression, internal conflicts, and massive violations of human rights, as reasons for awarding refugee status.

## DISCUSSION AND DEBATE

### Environmental Refugees

Although the term “environmental refugee” does not yet have a legal definition, it generally refers to a person who has been displaced by environmental changes. While not a common occurrence, it is becoming more so. For example, the floods in Bangkok (2011), Manila (2012), and Jakarta (2013) displaced possibly millions of people for short periods of time. It is now recognized that as the climate changes and sea levels rise, millions of people will be forced to move out of low lying areas such as the Mekong and Irrawaddy Delta, and Bangkok. But where will they go?

*Would you consider these people refugees and give them the rights to seek protection in neighboring countries? If not, what protection and services can these people get?*

*Are people displaced by environmental disasters refugees? Should they be covered by the refugee convention, or is another convention needed for them?*



### 6.3.2 Refugee Convention Standards

The Refugee Convention offers very strong protection in terms of a person's security within the receiving State. Even though it was drafted before livelihood and basic economic, social and cultural rights were established as human rights, the Convention still offers substantial protection. These include basic needs (food and housing), legal protection (including rights in detention), and even rights to work. However, these rights are based more on the basic needs (giving enough for someone to survive) and not on human rights which ensures a person's dignity. A particular area of concern involves the protection of refugees' economic rights, such as work. States fear some refugees' claims are solely economic; that is, they only flee their country in order to work in another for economic benefit alone. For these reasons it is rare for a refugee to be given full working rights.

A fundamental refugee standard is found in Art 33 or the principle of non-refoulement which is not returning a person (refouling them) to the country they are seeking protection from. This principle can now be considered customary law meaning that even if States have not ratified the Refugee Convention outlining this principle, they must still obey it. However, the State can send asylum seekers or refugees to a third country where their lives and liberties will be secure. Further, States cannot reject, or disallow entry to persons who may be seeking asylum. States are not obligated to grant asylum, but they cannot deny access to seek it.

#### FOCUS ON

##### Article 33 Prohibition of Expulsion or Return ("Refoulement")

- No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.
- The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country.

Non-refoulement ensures that a person will not be forcibly returned to their country where they will face persecution regardless of the legal status of refugee protection where they are. Even if a State has not signed the Refugee Convention, or any other human rights treaty, they must still refrain from deporting that person back to his or her country. This does not mean that refoulement does not happen. Within Southeast Asia there have been cases of Hmong being sent back to Laos, Ugiyars to China, and North Koreans to North Korea, even though it is suspected that these people will face persecution.



## 6.4 Refugees populations and protection in Southeast Asia

There are two main populations of refugees in Southeast Asia. Firstly there are refugees who come from outside the region, from places like Sri Lanka, Afghanistan, Pakistan, and Somalia. They seek refuge in Southeast Asia before attempting to find resettlement elsewhere. It is very difficult to estimate the size of this population because many of them are in an undocumented status and are urban refugees, hiding in large cities such as Bangkok, Jakarta, and Kuala Lumpur. Countries in the region with significant populations of refugees from outside the region include Thailand, where it is estimated there are more than 10,000 urban refugees in Bangkok, mainly from Afghanistan, Sri Lanka, Pakistan, and conflicts zones in Africa such as Somalia and Sudan. There are larger numbers in Indonesia, where people from Afghanistan, Sri Lanka, and Pakistan may be looking to enter Australia or find resettlement in Western Europe. Malaysia also hosts a number of refugees from these countries.

The second major population of refugees are those from within the region. Southeast Asia has a long history of refugee flows, with the American War in Vietnam and other communist insurgencies throughout the 1960s and 70s resulting in large refugee populations from Vietnam and Cambodia to Thailand, Hong Kong, and most other Southeast Asia States. Currently the largest refugee flow is that of Myanmar people to Malaysia and Thailand, though there are many smaller flows of people as well, such as the Hmong (from Laos), Montangards (from Vietnam), and Papuans (from Indonesia).

Refugees live in two situations, that of camp refugees and urban refugees. Camp refugees reside in a camp where it is expected they will stay until the conditions change and they can re-enter their country. The main examples of these are Burmese refugees who reside in camps along the Thai-Burma border, and also in camps in Bangladesh and India. These are the only refugee camps in Southeast Asia. Since the Thai Government has not ratified the Refugee Convention and does not recognize refugee rights, it does not call these places 'Refugee Camps', but rather uses the term 'Temporary Shelter,' implying that sometime soon the camps will close and the refugees return to their country. As can be seen by the age of these camps (most camps in Thailand are around 30 years old), these have not proved to be temporary solutions. There are families who have lived in the camps for three generations, with children being born, growing up, getting married and having children within the camp.

In the camps most people have their basic needs met by humanitarian organizations, but a variety of rights are denied to them such as freedom of movement and the right to work, making their economic livelihood difficult as they must rely on charity from whatever organizations provide for their basic needs. Camp refugees who do leave the camp to find work do so without documentation and are at risk of deportation if caught. On the other hand, even if they do find jobs, they are at risk of exploitation or even trafficking, because whatever work they find will be in the informal sector. Once children graduate from primary school (which is available), there may not be access to a high school or university. However, refugees themselves have been actively responding to these concerns. Most camps now have committees and youth groups who are active in education and training. There are many small cottage industries and informal education programs to improve the dignity of their daily lives. The Thai government is restrictive towards the camps because it believes if the conditions are too good, it will attract more refugees to enter. Further, the government is concerned that the camp populations will stay in Thailand rather than resettle in or repatriate to Myanmar.

The second refugee group comprises of urban refugees. These are people more commonly from outside the region who live in city centers. Because few Southeast Asia States have ratified the Refugee Convention, most urban refugees are waiting for recognition from the UNHCR in hope of third country resettlement, though this process often takes years. While they are waiting the refugees often live in a legal limbo and could be expelled from the country at any time. Urban refugees encounter a range of human rights violations. They often face significant security threats (for example, of arrest and detention by local officials because they are undocumented). Even if they possess a “person of concern” card from the UNHCR, this does not guarantee their freedom from detention. Further, their families may not get access to healthcare or education. While they may find jobs, these are likely to be in the informal sector with low wages and increased risks.



## FOCUS ON

### The Thailand Border Consortium (TBC)

The TBC is a humanitarian organization which works for refugee rights protection and promotion on the Thai-Burmese border. The Thai-Myanmar border is home to 92,000 registered refugees from Myanmar, as well as tens of thousands more unregistered displaced people and asylum-seekers who also receive services from the TBC.

Formed in response to the influx of Burmese refugees fleeing to Thailand in 1984, the TBC is a consortium of 12 international organizations from 10 different countries. The TBC primarily works to support an adequate standard of living in camps by providing services and food, coordinating health and education services, assisting community development, working with refugee agencies in the resettlement of refugees, whilst also engaging in research. The TBC's presence on the ground and international network allows it to act as a line of communication into and out of the camps.

### 6.4.1 Refugee Organizations: The UNHCR

The UNHCR was established with a mandate to protect, assist, and find solutions for refugees. The mandate was originally written in 1950 and has been gradually expanded over the decades, for example, to include the stateless and to provide humanitarian assistance. The UNHCR engages in activities ranging from State engagement and advocacy, to training and capacity building, to providing food and shelter to people of concern. Under the current mandate, these are some of the more common activities of the UNHCR:

- Finding durable solutions to refugee situations: finding a way for a person to move from a refugee status to some other form of protection. According to the UNHCR, this is done in one of three ways:
  - **Local Integration:** The person is integrated and becomes a citizen of the country where they claimed refugee status. For example, a Pakistani Armadiyya family claims refugee status in Australia which is granted by the government; they then become citizens of Australia, ending their refugee status. In reality this is the least common durable solution. Local integration is probably the least used durable solution as no Southeast Asian countries support this.

- **Resettlement:** The person is resettled in a third country. For example, many Burmese refugees in Thailand have resettled in the USA, Sweden, or Norway, and have become citizens there.
- **Repatriation:** A person is resettled back into their own country after the threat of persecution ends. For example, this occurred at the end of the conflict in Cambodia in the early 1990s, and refugees living in camps in Thailand were repatriated. If Myanmar is considered politically stable, it is quite possible that in the next decade the Burmese living in camps in Thailand will be repatriated to Myanmar once it is ensured that the conditions are safe enough.
- **Emergency response and humanitarian assistance:** the UNHCR is well known for its work in helping people who have been displaced by conflict or natural disaster. During disasters in Southeast Asia (for example, the tsunami of 2004), the UNHCR provided food and shelter to many people.
- **Protection of refugees:** the UNHCR works to protect refugees no matter where they are. It is common for the organization to work in countries which have not ratified the Refugee Convention because it has a mandate which allows it to recognize refugee status. These refugees are called 'Mandate Refugees,' as opposed to convention refugees who are protected by the Refugee Convention. However, UNHCR recognition does not mean governments must also recognize this status. Rather, it means these people will be deemed "persons of concern" and will thus receive UNCHR assistance and be available for a durable solution.

The UNHCR's mandate and activities can be limited by the State it is in, which may reduce it to a supervisory or service provider role. Further, the UNHCR is unable to receive individual complaints, nor is there a State reporting procedure for refugee protection. However, over the years, the UNHCR has expanded its mandate to include persons in refugee-like situations, internally displaced persons, stateless persons, returnees, and other people of concern.

#### 6.4.2. Refugee Organizations: Civil Society Organizations

Governments in the region are not meeting their responsibility to provide for the protection and needs of refugees. As most States have not ratified the refugee convention they are reluctant to recognize refugee rights and are cautious in showing too much support in the belief that this may attract more refugees, or be considered as a waste of money by citizens. As a result, much of the support services for refugees fall to civil society actors, such as local NGOs. There is much to be done in the areas of service delivery, protection, and the promotion of refugee rights in the region. Some of the significant work done by these civil society actors includes:

- **Providing for livelihoods:** Refugees mostly are not allowed to work and they will need food, housing, and economic security. Some NGOs work in this area of providing services through having food parcels, or shelters where refugees can stay. For camp refugees in Thailand, the TBC is involved in providing livelihoods to over 100,000 people every day.
- **Legal assistance:** Claiming refugee status is a legal process, and refugees need assistance in making their claim by collecting information to demonstrate that they fit the convention definition. Even though most Southeast Asian countries have not ratified the refugee convention, the refugees still need to collect

documentation for their claim so they are recognized by a third country (such as Australia or Canada), or UNHCR. Further, they may need legal assistance to ensure they do not get deported from the country they are in, or if they face detention because of their undocumented status.

- **Advocacy:** Some NGOs work on advocating for the respect of refugees and recognition of their rights. This may involve pressuring government to respect the rights of refugees in their country, and to not refool them. It also means talking to local communities so they support refugee rights and do not discriminate against them.
- **Health:** Apart from general health concerns involved with people living in insecure environments, many refugees have faced trauma. They have fled their country because they faced persecution and they may have faced abuse and threats. Because of this some refugees need mental health assistance.
- **Education and Training:** For refugee families, it can be challenging to find education for the children. It may be unsafe for the children to travel, the education will be in a different language, and the subjects taught may be different. Some NGOs provide childcare or basic lessons to children. They may also look at working with local schools to provide special places and assistance for the refugee children.

These organizations work in a challenging context. They are working with people of an undocumented status and thus may be considered to be engaging with criminals by some governments. Many governments and citizens discriminate against refugees and may dislike the fact that organizations are spending money on them. Refugee organizations have limited resources to address often huge tasks.

## CASE STUDY

### Responding to Urban Refugees in Thailand

The difficulties faced by urban refugees are often different from those faced by refugees in camps, but are no less serious. Urban refugees have a range of needs. There are basic livelihood needs of food and housing. Some organizations can arrange shelters for refugees and their families, or provide them with food, though in most cases the needs of the community overwhelms the small resources available to refugee organizations.

Refugee children have education needs. They should be provided with free and compulsory primary education, but this is not always the case. The education is likely to be in a language they do not understand, and travelling to and from the school may be dangerous if the child's parents are undocumented. Urban refugees often need legal assistance, especially with preparing their claim for refugee status. A number of organizations provide legal aid to refugees and assist them with their claim. Further, these organizations may be able to help refugees who have been detained and face deportation.

Mental health is another area where there can be great needs. Given that refugees have often left traumatic situations, post-traumatic stress disorder is common, resulting in heightened mental health risks. Organizations can provide counseling and in some cases access to healthcare to assist people in dealing with their traumas.



## 6.5 Stateless Persons

To be 'stateless' means that no State considers you to be a citizen under their laws. Citizenship and a nationality are fundamental in ensuring that a person is able to exercise their human rights. Not being a citizen means that a person may miss out on services a State must provide, such as healthcare, education, documentation like passports, driving licenses, and so on. Such individuals may also miss out on legal protection because they cannot go to the police for help for fear of being arrested. Stateless people face difficulties in travel because they do not have the necessary documents and identification. Even after death, they may be refused a death certificate, so it is entirely possible there will be no records of their life. As these examples show, stateless people can face violations throughout their lives in many ways.

The right to citizenship is found in the UDHR, Art 15, which says: "everyone has the right to a nationality" and "no one shall be arbitrarily deprived of his nationality." However, even after the adoption of the UDHR, the world has not taken the problem of statelessness very seriously. While there was a large number of stateless people directly after WWII, once these concerns were resolved there was little activity in this area. For example, the conventions on statelessness are routinely ignored, and few States ratify them. Until recently, few organizations addressed this problem and more attention has been given to refugees and trafficking. The reason is simple; statelessness is hard to see and therefore easy to ignore. Most stateless people live on the margins, for example, when affected persons live in border areas which States may govern only partially, or they hide within society because they do not want their undocumented status to be known to the authorities. For these reasons it is difficult to count the exact numbers of stateless people. There are currently an estimated 12 million stateless people in the world according to UNHCR; in Southeast Asia, this number could be in the region of hundreds of thousands, and maybe as high as over a million. Only recently has there been a renewed interest and increased activity on protecting the rights of stateless people.

### FOCUS ON

#### Examples of Statelessness in Southeast Asia

**Brunei:** Statelessness is found amongst permanent Chinese residents in Brunei. Families who have lived in Brunei for generations are still not given nationality, because Brunei nationality is dependent on either blood ties, or the ability to pass a difficult citizenship test about culture, customs, and language. Many of Brunei's Chinese residents will remain stateless unless there is legislative change.

**Myanmar:** The Rohingya population were citizens of Myanmar until the Citizenship law changed in 1982, which has taken their citizenship away. There are around 600,000 stateless Rohingya now in the country.

**Indonesia:** Previously, if an Indonesian lived outside the country without returning for a period of five years, they would lose their citizenship. Many thousands of Indonesian migrant workers living abroad became stateless because of this law. This law has changed because of concerns raised about stateless Indonesians.





Laos, Myanmar, Thailand: Hill tribe communities along the borders between Thai, Laos and Myanmar border may not be recognized as a citizen of any of these countries, though they may have lived there, for generations. Previously, in Thailand some hill tribe people could only be recognized as citizens if they could prove that they have were in the country for the 1956 census. If they do not have this documentation they would become stateless. This law has changed because of concerns raised about statelessness.

Thailand: Children of undocumented migrant workers who do not receive birth registration have difficulty and sometimes cannot claim their citizenship from Myanmar because of the lack of their birth certificate.

Vietnam: Vietnamese women who marry foreigners and take up their nationality would need to renounce, or give up, her Vietnamese nationality (as Vietnam allowed only a single nationality). However, if the marriage failed, she would lose her husband's nationality but would not automatically regain her Vietnamese nationality. This occurred a number of times to Vietnamese women who married with a Taiwanese man, and become Taiwanese nationals. Vietnam previously does not allow its citizens dual nationality, and nor did it allow people who have lost their citizenship to take it up again. This situation only changed in 2008 with the introduction of new nationality laws because of concerns raised about stateless Vietnamese women.

### 6.5.1 Defining Statelessness

Statelessness is defined in the first article of the 1954 Convention Relating to the Status of Stateless Persons as:

A person who is not considered as a national by any State under the operation of its law.

This definition appears relatively simple, though there are some important elements which need to be understood. The definition is considered part of customary law, so no State can deny the existence of Stateless people, or have an opposing definition. The key elements are:

First, only States can confer nationality. People living in regions not considered a State, or in a newly emerged State, may face difficulties being recognized as a citizen. To determine if someone is stateless it is not necessary to check all 193 States to see if they recognize the person. Rather, each State which a person may have a link to through birth, parents, residence, or marriage may be considered for nationality. Also, important here is how a State confers recognition, that is what department or what documents are necessary to be recognized as a citizen. Governments may be underfunded and not have the resources to provide the documentation like passports or birth registration, or decide not to provide them because of some kind of discrimination.





## CONCEPT

### Nationality

The terms, 'national,' 'citizen,' and, 'subject' are similar concepts that mean the same thing: they form a link, both political and legal, between a person and a State. Nationality allows a person to get protection from the State, and they may also have duties towards that State. Some differences may exist within a State between a citizen and a national; there may even be different categories of nationality with differing rights, privileges, and duties. For example, in some countries, permanent residents or naturalized citizens may not get the same voting or welfare rights. These distinctions, however, should not stop a national from attaining their human rights.

Second, The State decides who is a national through its laws. This is a more complex question as it entails determining how a State considers someone a national. Individuals acquire nationality through a limited number of ways outlined below:

1. Descent: nationality comes from one's mother or father
2. Place of birth: nationality is given because you were born in a particular country
3. Marriage: nationality is gained from a husband or wife
4. Residence: nationality is given by living somewhere
5. Naturalization: a person applies to a country to become a national and the country gives them nationality

The most common way now of getting a nationality is through descent, as this is recognized in every Southeast Asia State. No Southeast Asia State recognizes place of birth, and only a small number (for example the USA) award nationality this way. While some countries Southeast Asia allow nationality through marriage and naturalization, the conditions can be difficult and expensive. People may need to pass an examination on language and culture, live for long periods in the country, and have a job. Some countries have been known to sell their citizenship by allowing easy naturalization for those willing to pay. Sometimes nationality is considered automatic, especially descent and place of birth, whereas the other ways of getting nationality tend not to be automatic, and individuals must apply to the State to get their nationality recognized. A person is stateless if they cannot get citizenship through any of the above.



## DISCUSSION AND DEBATE

### Your Laws of Nationality

Nationality laws can be complex. They may be found in the constitution, in citizenship laws, and in laws of marriage. Many countries in Southeast Asia have updated their laws of citizenship in the past decade. Search for these laws which may be found on the website of your Department of Immigration or equivalent government ministry, or in a section of the constitution. After you read through the laws, answer the following questions:

*How did you get your nationality? Was it because you were born in a particular country, or was it due to your parent's nationality? How did your parents get their nationality? What about your grandparents?*

*Are you allowed to have dual nationality? If you marry a foreigner, can you give them your nationality? What about your children?*

*Are there gaps in the laws? Can you think of situations where someone, say someone married to, or born to, a citizen of your country, can become stateless because the laws in your country do not recognize them?*

The convention only recognizes those who are stateless because the law does not recognize them. These people are *de jure* stateless, stateless by the law. If someone is stateless because they have not undergone the necessary documentation (say they are a child born outside their country and have not yet applied for nationality), and the law would recognize them as a citizen, then the convention would not consider them stateless even though in fact they are. These people are called *de facto* stateless, or stateless in fact but not in law.



## FOCUS ON

### *De Jure vs. De Facto Statelessness*

*De jure* and *de facto* statelessness are distinct. *De jure* statelessness means a person has no legal nationality. *De facto* statelessness refers to a person in fact has no nationality, but should qualify through law to have a nationality. *De jure* and *de facto* stateless persons face the same vulnerabilities, because neither receives protection, services, or benefits from a state. A problem in the statelessness conventions is that they tend to recognize *de jure* but not *de facto* stateless persons, leading to *de facto* stateless persons being granted less protection, despite having the same needs and vulnerabilities as *de jure* stateless persons.

### 6.5.2 Stateless Rights Violations

Stateless persons face a range of human rights violations. Two of the more common relate to discrimination and detention. Discrimination can take many forms. For example, they may be systematically excluded from goods and services, or lack access to healthcare, education, and other public services. They probably cannot participate in politics. They lack access to police protection or courts, leaving them vulnerable when harmed, exploited, or otherwise wronged. This often leaves stateless persons unable to challenge contracts, wages, or living conditions. In addition, the lack of access to the justice system leaves stateless persons perpetually vulnerable to exploitation and crime. Likewise, their lands and resources will often be unprotected, making it possible for the State or corporations to simply claim or seize their property. To protect themselves, stateless persons may be forced to pay bribes or engage in damaging and dangerous activities. And finally, to add insult to injury, the media may portray these groups as backwards or inferior, thereby dehumanizing them and often creating hatred towards groups that already lack protection. Perhaps the worst case scenario is when stateless persons are treated as criminals.

Discrimination against stateless persons often results in detention, particularly immigration detention. Stateless persons may be stopped while traveling within the State they have always lived and put into a detention facility. The use of indefinite detention against the stateless is a particularly severe violation of human rights, and is experienced by individuals who are held until they can prove where they are from, which is a difficult if not impossible task without documentation. Such an example illustrates the importance of due diligence procedures in immigration systems because stateless persons have a right to special protection. When immigration systems do not adequately account for statelessness, those who should receive greater protection often lose out the most.

### 6.5.3 The Statelessness Conventions

There are two stateless conventions: the Convention Relating to the Status of Stateless Persons (1954) and the Convention on the Reduction of Statelessness (1961). The first was intended to be a protocol to the Refugee Convention, as the Refugee Convention does also protect stateless people. However, a decision was made to treat the problem of statelessness as a separate problem with its own convention. The first Convention acted as a foundation for defining statelessness, and it also outlined the protection stateless persons should receive. The 1954 Convention's main objective was to allow stateless people to enjoy as many of their human rights as possible. The treaty sets out a number of rights which it is expected stateless people should enjoy. These include:

- Treatment and rights like other aliens
- Access to documents or certifications normally delivered to aliens
- No exceptional measures to be taken against stateless persons because of their previous nationality
- Recognition of marital status
- Right to be treated like nationals with respect to religion, elementary education, housing, access to justice, rationing of goods, labor laws, and public relief

- Rights to property like other aliens
- Economic right like to work, associate, like other aliens
- No expulsion, except on grounds of national security and public order

As can be seen there are a number of weaknesses in the 1954 Convention. Stateless people do not get their full rights, as many of their rights as equivalent to other non-citizens (who are called aliens in the convention). Even if they are born and grew up in the country, they are still considered alien. The convention also only recognizes *de jure* stateless people. Finally, there is no protection mechanism linked to the convention which could in some way caution the State if they violate the rights of stateless people.

The 1961 Convention attempts to reduce statelessness by providing a number of practices which should ensure no one becomes stateless:

- A child born without access to any nationality will be given the nationality of the State in which she or he is born.
- A child born on a ship will get the nationality of the ship
- Both the mother and father can pass their nationality to their children
- Loss of nationality is only possible if the person has another nationality
- Nationality cannot be determined on racial, ethnic, or religious grounds

These two conventions form an important part of the legal framework to protect stateless people. Unfortunately they are not widely ratified, and their ratification in Southeast Asia is very low. The Philippines is the only State in Southeast Asia to ratify the Convention Relating to the Status of Statelessness, and this was only done recently, in 2011. No country in the region has ratified the Convention on the Reduction of Statelessness.

Statelessness is also recognized in other treaties. The Refugee Convention covers both refugees and stateless people. However, some stateless people (especially those still in the country where they are denied citizenship) cannot claim refugee protection, hence they must turn to the 1954 Convention to protect their rights. Protection from statelessness also appears in the CRC (Arts 7 and 8), the CEDAW (Art 9), the ICCPR (Art 24) and the ICERD (Art 5), the ICRMW and the CRPD.

## FOCUS ON

### Effective Nationality

Nationality is not merely the possession of documents which prove a person is a citizen, but it should also include the rights and protections which a citizen should expect. If a person does not have these rights, then nationality is ineffective. The concept of effective nationality has been proposed by The Equal Rights Trust, an independent international organization, as an alternative to the categories of *de jure* and *de facto* citizenship as a better measure of the rights of citizenship. The Equal Rights Trust offers a five-pronged test to determine whether a person has an effective nationality or not:



1. Recognition as a national: does the person enjoy a legal nationality (that is, is he or she *de jure* stateless)?
2. Protection of the State: does the person enjoy the protection of his/her State, particularly when outside his/her country?
3. Ability to establish nationality: does the person have access to documentation (either held by the State or issued by it) to establish nationality? This access may be through a consulate or through State officials within the country of presumed nationality.
4. Guarantee of safe return: is there a guarantee of safe return to the country of nationality or habitual residence, or is there a risk of “irreparable harm”? Is return practicable?
5. Enjoyment of human rights: does a person’s lack of documentation, nationality, or recognition as a national have a significant negative impact on the enjoyment of his or her human rights?

#### 6.5.4 Causes of Stateless

In Southeast Asia, there are a variety of ways someone becomes stateless.

##### **Border and marginal communities**

Most commonly, statelessness occurs when an individual lives in a border region which the State only governs from a distance, and where there is little regular contact with the State. This is true for a large number of hill tribe groups along the borders between Myanmar, Thailand, Laos, Cambodia, and Vietnam. It is also true for many communities in the Philippines who live on the border with Malaysia on the island of Borneo. In many such cases, people simply do not possess birth certificates or other documentation to show where they live or their parent’s status. As a result, their children often inherit their statelessness.

##### **Migration**

Problems can arise if people travel for long periods of time, or have children outside their home country. For example, Indonesia previously had a law revoking the citizenship of anyone living outside the country for more than 5 years of their citizenship. This was repealed in 2006 allowing over 100,000 Indonesians in Malaysia to reclaim their nationality.

In many cases, parents who live outside their home country may be unable to pass nationality on to their children. For example, if a child born to undocumented migrant workers is not registered at birth, the child may face difficulties acquiring citizenship because when they return to their country they will lack documentation to show the name, date, or place of birth of the child. This has often been the case for the children of Myanmar workers in Malaysia and Thailand. Further, the children may not be able to return to their country because of security or cost, meaning they are *de facto* stateless

##### **Transferring or losing nationality**

On occasion, individuals are forced to give up their nationality, or may attempt to change nationality which can result in statelessness. For example, some countries force wives to renounce their citizenship upon marriage to a foreigner, but such women cannot retrieve this nationality if the marriage fails.

Some States have laws on the automatic renunciation of citizenship if the person votes in a foreign election or joins a foreign army, which can make them stateless. Some countries in Southeast Asia, including Vietnam, Singapore, Indonesia, and Malaysia, only allow one nationality. Therefore, if an individual were to acquire nationality from another country, he or she would be forced to give up their original nationality. Indeed, in some cases, persons may lose their original nationality before they obtain a new one.

### **Unequal descent**

In some countries, women do not have the same rights to pass on nationality to their children as men. Currently, only Malaysia does not allow women to pass on their nationality if a child is born out of wedlock. However, as little as ten years ago, this unequal conferral of nationality was present in many other countries as well. Statelessness can result if a child's mother cannot pass on nationality, and cannot claim its father's nationality, either because the father was not present to confer it, or his country prevented him from doing so.

### **Other reasons**

Statelessness can occur in many other ways, including the change of status of a State, changing nationality laws, or through human trafficking. A particularly disturbing method occurs through discrimination. In these cases, the State often removes the nationality of a group because of their ethnicity or religion. This can be seen in the case of the Rohingya (discussed above); an ethnic Muslim minority in Western Myanmar, whose nationality was taken away essentially because of their religion and ethnicity.

## **6.5.5 Actions to Eliminate Statelessness**

There are four responses to resolve the problem of statelessness which have been identified by experts and organizations, such as the UNHCR, working on issues of statelessness. These are identification, prevention, reduction, and protection. Each of these responses involve many possible activities for States and NGOs to undertake to reduce the vulnerabilities of stateless people.

### **Identification**

These are activities to locate people who are stateless, and to determine the numbers of stateless people. Most States do not know how many stateless people reside in their territory, and given that many stateless people try to hide their lack of nationality, they can be difficult to locate and count. When surveys were first conducted over a decade ago, low numbers of stateless people were found in those Southeast Asia States which tried to identify their stateless populations. However, it was discovered that many people did not tell the truth and reveal their status to the people giving the survey for fear of being detained. Many NGOs and government departments are working to resolve this problem by holding surveys and meetings to raise awareness about the right to nationality. When the content of the survey was changed (by asking, for example, if they would register for nationality if the government offered the service for free and with no threat of detention, rather than 'are you stateless'), the number of stateless people increased significantly. In Southeast Asia, Lao PDR and Vietnam have recognized stateless persons in their nationality laws and endeavour to provide them citizenship. Formalizing the status of statelessness may help ease identification and formalize subsequent protection.

## Prevention

These are actions to prevent statelessness in the first place, and can include changing laws, registering children, or granting nationality to ensure people do not become stateless. Most Southeast Asia countries have been active in this area by in particular changing nationality laws. Examples include recent changes to nationality law in Indonesia, Vietnam, and Thailand (all between 2006-2009) to ensure rights such as universal birth registration and gender equality in nationality through descent. Nationality law reform in Vietnam (2008) allowed for some Vietnamese to be granted their nationality even if they had previously renounced it, which restored citizenship to those Vietnamese women who had to renounce their Vietnamese citizenship when marrying foreigners. Changes to nationality laws in Indonesia (2006) recognized indigenous group previously not given citizenship, and restored nationality to those workers who had lived outside of the country long enough to lose their citizenship. Malaysian laws now give citizenship to a child born to a Malaysian mother who has access to no other citizenship. All countries in the region have universal birth registration for a child born in their country, no matter what the child's or parent's documented status.

Awareness is an important aspect of prevention. Thus, governments, NGOs, and academia in Southeast Asia work to disseminate information about statelessness in the region. This entails not only informing the public, but also seeking a better understanding of the concept.

## CASE STUDY

### Surveying Hill Tribe Communities in Thailand

In a report by UNHCR titled *Good Practices Addressing Statelessness in Southeast Asia*, they discuss a survey of Hill Tribes in Thailand, conducted in 2005-2006 by the Thai Ministry of Social Development and Human Security and UNESCO. The survey was of 65,000 individuals, from 12,000 households in 192 villages in Chiang Mai, Chiang Rai, and Mae Hong Son. As the report notes:

The survey confirmed the extent of non-citizenship among hill tribe members, with 38% of respondents lacking Thai nationality. In addition to legal restrictions—non-citizens may not, for instance, vote in government elections—the survey pointed to persistent problems non-citizens face when trying to access basic services. The survey showed that, compared to Thai nationals, non-citizens were 99% less likely to access public healthcare and 25% less likely to access financial credit. Regarding education, non-citizens were 73% less likely to enter primary school and 98% less likely to progress to higher education. However, despite this, education rates among hill tribe members has steadily improved across generations.

## Reduction

These activities aim to give stateless individuals nationality. This can be achieved through mobile registration units to ensure children in remote areas get birth registration, or people nationality documentation. It can also include changing laws to restore nationality to those who have previously lost it. Cambodia's campaign for universal birth registration is a good example of an effort to reduce the number of stateless persons through simplifying procedures and outreach.



## Protection

Stateless people should get their full human rights, and this can be achieved by ensuring that a State's protection bodies (such as NHRIs, police, and government ministries) recognize and work with stateless people. The protection of stateless people's rights include ensuring their access to health and education, and that they have some form of identification so they can travel or get basic services. While protection of the rights of stateless people remains weak in many areas, there have been some significant improvements over the past decade as States have realized that stateless people do not create a burden, and rather by recognizing them as citizens they can contribute productively to the State.

## A. Chapter Summary and Key Points

### Non Citizens and rights

People are particularly vulnerable to human rights violations when they are outside their State of citizenship, or if they are not recognized as a citizen by any State, in the case of stateless people. In some cases their human rights are the only legal protection they can access, though there are great challenges to recognizing their human rights. Most countries in Southeast Asia tend to ignore, or at least hide, the violations and threats faced by migrants, refugees, stateless and migrant workers. In response to these vulnerabilities non citizens have special rights to help protect them.

### Terminology

The term non-citizen refers to people who are in a State where they are not a citizen, and is used because it encompasses all categories of people who cannot access rights and protection from their State. Migration may be regular, meaning travel through approved channels with the proper documentation, irregular meaning those who bypass the proper channels and therefore may not have the necessary documentation, or forced migration when someone is compelled to leave their country because of conflict or the threat of violence. Migrants may be documented, meaning they carry the correct documents, or undocumented, meaning they do not have the necessary documents. States can refer to migrants as legal, meaning they have not broken the laws to enter the country, or illegal, meaning the governments considers them to have broken the law. When States use the term illegal migrants it suggests they are involved in some kind of criminal activity and that they can be arrested. But sometimes governments often make legal documentation very difficult or expensive, forcing migrants to take on an undocumented status.

### Migration

There is a long history of migration within the Southeast Asia region. The movement of people in Southeast Asia is highly dynamic because of open borders unequal economic growth, and people fleeing armed conflicts. There are large flows within the region, and from the region to outside countries in the Middle East and East Asia. The protection of migrants is weak, as there are no regional laws, and discrimination



of non citizens is present in all countries in Southeast Asia. There are also gaps in the international laws which provide protection for non citizens because there are no clear rules on how to identify and categorize non-citizens which need protection and the tendency for governments to identify all undocumented people as illegal

## Refugees

Refugees are individuals seeking protection from their State who are recognized under the 1951 Refugee Convention. To be a refugee they must fit the definition which includes being persecuted by a State because of their race, religion, political opinion, nationality or member of a social group. When a person seeking refugee status declares themselves a refugee they should be accorded the protection afforded by the Refugee Convention until the State determines if they fit the definition or not in a process called Refugee Status Determination. The rights include basic needs, legal protection, and rights to work. A fundamental protection is not returning a person (refouling them) to the country they are seeking to escape from. A person who fits the definition but has not been able to get to another country may be an Internally Displaced Person (IDP).

There are two main populations of refugees in Southeast Asia: refugees who come from outside the region, who are mainly urban refugees from South Asia and Africa, and those from within the region, who are mainly Burmese people in Malaysia and Thailand. Refugees live in two situations, that of camp refugees, which are found along the Thai-Myanmar border, and urban refugees who are people more commonly from outside the region who live in cities like Bangkok, Jakarta and Kuala Lumpur while waiting recognition from the UNHCR in hope of third country resettlement

## Refugee Organizations

The UNHCR is the United Nations agency dealing with refugees. It is mandated to protect, assist and find solutions for refugees. It is also authorized to assist persons in refugee-like situations, internally displaced persons, stateless persons, returnees, and other people of concern. It looks for durable solutions such as repatriation or resettlement for these people. There are many civil society actors, such as local NGOs, who provide a range of services, legal assistance, and advocacy for refugees.

## Statelessness

To be 'stateless' means that no State considers a person to be a citizen under their laws. Stateless people face violations throughout their lives in many ways, such as lack of access to government services and threats to security. The problem of statelessness was ignored until recently. A person may get nationality through descent, place of birth, marriage, residence, and naturalization. While most countries in Southeast Asia allow nationality through marriage and naturalization, the conditions can be difficult and expensive. *De jure* statelessness means a person has no legal nationality. *De facto* statelessness refers to a person in fact has no nationality, but should qualify through law to have a nationality.

## Stateless Conventions

The two stateless conventions are Convention Relating to the Status of Stateless Persons (1954) which gives the definition of statelessness, and the Convention on the Reduction of Statelessness (1961) which provides numerous ways States can reduce the occurrence of statelessness. Statelessness is also recognized in other treaties such as the Refugee Convention, CRC, CEDAW, and ICCPR.

## Causes and Solutions to Statelessness

People can become stateless because they live in a border region which the State only governs from a distance, and where there is little regular contact with the State. They can become stateless when people travel for long periods of time or have children outside their home country. Or they can lose nationality when transferring from one nationality to another. Unequal descent is when a mother cannot pass her nationality to her child, can also cause statelessness. Finally, people can lose their citizenship through discrimination, where governments choose not to recognize a minority group as citizens.

There are four responses to resolve the problem of statelessness: identification, or locating people who are stateless, in order to provide them citizenship; prevention, or changing laws and registering children to stop statelessness occurring, reduction, or providing nationality to people who should have citizenship, and protection, or ensuring stateless people's human rights are recognized.

## B. Typical exam or essay questions

- In your country research the significant populations (if any) of stateless people, refugees, migrant workers, and trafficked victims. Why does your country have these populations?
- What vulnerabilities and threats do non citizens face in your country? Consider forms of discrimination against non citizens, and what is being done to protect the rights of these non-citizens?
- Which of the four treaties mentioned in section 4.2 has your government ratified? For the treaties it has ratified, why do you think it has done this? For those that it has not ratified, what is stopping the government from this?
- How can a refugee claim his or her rights in your country? If the person is a refugee, what services and protection will they get?
- What is the nationality law in your country, and does it provide nationality equally to women, children, and minority groups?
- How has your country contributed to the reduction in statelessness? Have there been recent modification of the laws, or change in policy around awarding nationality?

## C. Further Reading:

### Overviews of migration, non-citizens and rights Southeast Asia.

- Surveys of the current status and history of migration in the region can be found in research reports from The International Organization for Migration (IOM)
- The International Labor Organization (ILO).
- The *Asian and Pacific Migration Journal* from Philippines also regularly produces research in the area.

There are very few texts addressing non citizens rights in general, apart from the work of David Weissbrodt, the Special Rapporteur for Non Citizens which can be found on the internet.

### Refugees

The following authors have written textbooks on refugee law and rights (and their work can be found through internet searches):

- Guy Goodwin-Gill and Jane McAdam
- BS Chimni.
- James Hathaway
- Vitit Muntarbhorn has a 1992 book called the *Status of refugees in Asia*

The *Refugee Law Reader* is a free, online textbook on refugee law and it has a section of refugee protection in Asia.

For research on refugee issues and refugee rights, the UNHCR websites is very useful, in particular their *Global Report*, *New Issues in Refugee Research* series, *Refugees Magazine* and their *Handbooks*.

Most documents on refugees and statelessness can be found on their Refworld site.

The *Forced Migration Review* is a very useful magazine which is freely available on the internet

### Statelessness

Other guides and texts include:

- Equal Rights Trust. This organization produces a number of reports, including the recent *Unravelling Anomaly*
- Refugees International has a program on statelessness with research reports
- Refworld has numerous documents on the international law context to statelessness
- The UNHCR homepage on statelessness has many guides, research, and links to the conventions.



# 7

## The Rights of Non-Citizens: Migrant Workers and Trafficked Persons

This chapter focuses on the non-citizen groups of migrant workers and their families, and trafficked persons. These categories of non-citizens are very much interrelated, and at times the two groups are not even clearly distinguishable.

These categories of non-citizens are very much interrelated, and at times the two groups are not even clearly distinguishable. For instance, many people who are trafficked have started out as a migrant worker. When a migrant worker is exploited and unable to move freely, that person may be considered to have been trafficked. However, determining when a person has been exploited or is unable to move freely can be difficult. This is especially true in Southeast Asia, where many migrant workers live in fear of being trafficked, so it is useful to place the rights of migrant workers alongside the standards and activities that address human trafficking.

## 7.1 Migrant Workers

Throughout history, people have left their homes and travelled for work. Records show that Chinese and Indian people have migrated to Southeast Asia for hundreds of years. This may have been as manual labourers for the British Empire's plantations during the eighteenth and nineteenth century, or through family connects to countries like Indonesia and Thailand. Nowadays people moving for work are common. Every country in Southeast Asia is involved in the migration process as either sending countries, or receiving countries, or both. According to the ILO, half of the approximately 175 million migrants around the world are workers. However, it is only recently that the protection of migrant workers has been addressed as a human rights issue. Workers' rights predate World War II through the ILO which was established in 1919, though it was not until after World War II that a convention for migrant workers was introduced. By the 1970s, the increase in irregular migrant workers (originally called guest workers) was a growing concern in Europe. Many people from Turkey, Lebanon, and other Middle Eastern countries were moving to West Germany, France and other developed European countries for work. Because many of these migrants were irregular, there was a growing need to prevent clandestine, dangerous, and illegal labor migration. In the media were stories of people working in slave like conditions, or being killed on the way to Europe when their boat sunk or as they suffocated in closed containers (similar to stories that are still in the media nowadays). Not only was reducing these threats to life important, it was also necessary to simply improve the livelihood of such workers. For example, the mass expulsion of Asians from Uganda in the early 1970s prompted calls for a "right for non-citizens" (though similar expulsions of Indians from Myanmar in the early 1960s did not receive that much attention).

Discrimination, exploitation, and victimization were a concern for both sending and receiving countries. There were two fundamental problems - the abuse of migrant labor and trafficking - which needed to be addressed, but the question was if they should be considered a single problem, or treated as separate issues. The response was to keep the two problems separate; thus, migrant worker protection has tended to come through rights-based conventions and the ILO, whereas trafficking was responded to more commonly through criminal laws. Whether this has led to a strong protection system is still open to debate. The reasons are that these problems differ in a range of ways, including both the degree and the nature of violations. Further, as detailed below, it was decided that migrant worker rights would be considered a human rights issue, and later trafficking was considered a criminal issue. The result of the division is different treaties, managed by different sections of the UN, and also different levels of support from member nations of the UN, with the treaty on trafficking receiving widespread attention, and the migrant worker treaty struggling for recognition with low numbers of ratifications.



## FOCUS ON

### Introduction to the International Labour Organization (ILO)

The ILO was founded during the Paris Peace Conference as part of the League of Nations in 1919. Its main duty is to promote and protect international labor standards, which it achieves by adopting conventions (189 by 2014) and recommendations (202 by 2014). It has a unique structure consisting of three types of organizations: (1) workers' associations or unions, (2) employers' associations, and (3) States. It has 185 state members, including all Southeast Asia countries (though Myanmar's membership was restricted from 1998 to 2012 because it was not doing enough to eliminate forced labor). The ILO has established many standards in labor rights, including maternity leave, limitations on child labor, workplace safety standards, and minimum wage standards. In addition, the ILO has reporting procedures much like the UN, complete with complaints mechanisms. To be a member of the ILO, States must agree to the eight core conventions. These conventions cover four issues which are considered fundamental to protect workers: protection from slavery, right to a trade union, equality in the workplace (which is important for women), and protecting children.

1. Convention 29 on Forced Labour (1930)
2. Convention 87 on Freedom of Association and Protection of the Right to Organize (1948)
3. Convention 98 on the Right to Organize and Collective Bargaining (1949)
4. Convention 100 on Equal Remuneration (1951)
5. Convention 105 on the Abolition of Forced Labour (1957)
6. Convention 111 on Discrimination (Employment and Occupation) (1958)
7. Convention 138 on Minimum Age (1973)
8. Convention 182 on the Elimination of the Worst Forms of Child Labour (1999)

Providing standardized protection was recognized long before the adoption of the UN International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICRMW) in 1990. While the UN did not start to address migrant worker issues till the 1970s—mainly because of a deal struck with the ILO in the 1940s that the ILO would protect migrants as workers and the UN would do the same for migrants as aliens—the ILO had already begun to adopt conventions on the subject.

The first ILO convention was Convention 66 concerning migration for employment; but as no State ever ratified it, it never came into force. Two migrant conventions were adopted in the post war years: Convention 97 (previously Convention 66) and Convention 143 (concerning migrations in abusive conditions and the promotion of equality of opportunity and treatment of migrant workers). Convention 143 is generally known as the ILO's Migrant Workers Convention, but this convention also suffers from low ratification (24 states as of 2013, and only the Philippines from Southeast Asia). Growing violations in the 1970s finally forced the UN to become involved, but it was not until the late 1970s that there was enough political will to start a treaty protecting migrant workers.

A discussion ensued between the UN and ILO as to who should manage migrant worker rights, but in the end, the UN was seen as the better host. There were a few reasons for this. First, the ILO has a poor record of State ratification which it was hoped the UN could improve on (although this is debatable for the Migrant Workers Convention). Second, the UN is more conducive to developing country interests as the General Assembly is seen as a venue for developing countries because they hold the majority of the vote (with something like 140 of the 193 votes). Finally, a human rights treaty is more expansive in terms of protection than an ILO treaty which focuses on workers' rights alone. This is clear from the title of the treaty, which includes the rights of the worker's family as well.



## FOCUS ON

### The ILO Conventions and Recommendations Related to Migrant Workers

The main ILO conventions which protect migrant workers are:

- Convention concerning Migration for Employment (No. 97)
- Convention concerning Migrations in Abusive Conditions and the Promotion of Equality of Opportunity and Treatment of Migrant Workers (No. 143)
- Recommendation concerning Migration for Employment (No. 86)
- Recommendation concerning Migrant Workers (No. 151)
- Convention concerning Forced or Compulsory Labour (No. 29)
- Convention concerning Abolition of Forced Labour (No. 105)
- Domestic workers convention (No. 189)

## 7.2 The International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (ICRMW)

While drafting of the ICRMW may have started in the late 1970s, it was not until over a decade later that it was completed, and the treaty was adopted by the General Assembly on 8 December 1990. It took a further thirteen years for the ICRMW to gain the twenty ratifications necessary to come into force on 1 July 2003. The Philippines and Indonesia are the only Southeast Asia State parties to the ICRMW. Receiving States, or those States which have large migrant worker populations such as Thailand, Malaysia, and Singapore, are reluctant to ratify the Convention. This is unfortunate because it undermines the Convention's universality and implementation. Migrant worker human rights are weaker in the places where the most violations occur.

There are many reasons for low ratification worldwide. Nearly all current ratifications come from countries that send migrant workers overseas. The exceptions are countries which have both an inflow and outflow of migrant workers, or act as transit countries,



such as Mexico, Egypt, and Argentina. Generally, governments are reluctant to ratify because of concern about the obligations the Convention will put on administering the sometimes huge migrant worker sector. For example, countries such as USA, Russia, Germany, and Saudi Arabia, each have over five million migrant workers. In countries such as Singapore and Kuwait, the migrant worker population makes up nearly 50% of the working population. Changes to the conditions for migrant workers may have an impact on their economies. The exact nature of the impact is open to debate as there would be positive benefits from increased worker protection, alongside some economic costs.

The Migrant Workers Convention has expanded the protection from previous standards in important ways. One of the main contributions is the inclusion of undocumented migrant workers in the definition of a migrant worker.

### **7.2.1 Definition of a Migrant Worker**

The definition of migrant worker in the ICRMW is notable for being inclusive: A migrant worker refers to “a person who is to be engaged, is engaged, or has been engaged in a remunerated activity in a State of which he or she is not a national.”

The main elements of this definition are:

1. A migrant worker is entitled to their rights before, during, and after work. The rights of a worker do not stop when they finish working (otherwise, it would be easy to deprive a worker of their rights by simply dismissing them). Further, it should also protect migrant workers from abuse when they are recruited and travelling to their work.
2. Workers only need to be paid to be seen as a worker. In other words, the work does not need to be legal or a specific kind of labor (although the treaty does distinguish some special categories of work which will be discussed below).
3. There is no distinction between documented and undocumented workers; migrant workers merely refer to people working outside their state of citizenship. Therefore, all migrant workers are entitled to such rights (although documented workers are also entitled to an additional set of rights).

Further, as the treaty emphasizes in its title and in the first article, migrant workers and members of their families should get access to all these rights. So the treaty covers protection for the worker, their wives/husbands, and children. However, in the ICRMW certain categories of people are not considered as migrant workers, and these include development workers, people working at an international organization like the UN, students, refugees, the stateless, and investors. For these people other mechanisms exist for their protection, for example consular protection through their Embassy, or other treaties that cover their situation (especially refugees and the stateless).

### **7.2.2 Migrant worker rights in the ICRMW**

In the ICRMW, there are three types of human rights for Migrant workers. Firstly, there are existing human rights which the worker is entitled to, but some governments try to ignore this. Second, there are new rights specific to migrant workers. Third, there are rights for specific types of migrant workers. Examining these in order, the ICRMW restates many existing human rights such as non-discrimination and the right to life. Freedoms in the ICCPR are also present, such as the freedom of expression and religion, and freedom from torture and slavery. The Convention also contains

legal rights such as the right to a fair trial, and freedom from arbitrary arrest. While it may seem redundant because these rights already exist in many other treaties, it is important they are explicitly given to migrant workers to ensure governments do not invent laws or practices to remove such rights. For example, a government may have a policy stating that illegal immigrants cannot make complaints to the police; this is clearly against the human rights standard of equal protection under the law. Further, in restating these rights, elements which may be of specific relevance to migrant workers are made even clearer. For example, verification of identity must be made within the law, and collective detentions are considered violations (although both these violations are common in Thailand and Malaysia).

## FOCUS ON

### **Rights All Migrant Workers and Their Families Have Access to, Regardless of Documentation Status**

- Non-discrimination
- Freedom to leave any country and to enter their country of origin
- Right to life
- Freedom from torture and ill-treatment
- Freedom from slavery or forced labor
- Freedom of thought, conscience, and religion
- Freedom of opinion and expression
- Freedom from arbitrary or unlawful interference with privacy, family, home, correspondence, and other communications
- Property rights
- Right to liberty and security of person
- Right to be treated with humanity under lawful arrest and detention
- Right to a fair and public hearing by a competent, independent, and impartial tribunal
- Prohibits retroactive application of criminal laws
- Prohibits imprisonment for failure to fulfill a contract
- Prohibits destruction of travel or identity documents
- Prohibits expulsion on a collective basis or without fair procedures
- Right to diplomatic assistance
- Right to recognition as a person before the law
- Equality of treatment between nationals and migrant workers for some work conditions and pay
- Right to participate in trade unions
- Equal access to social security
- Right to emergency medical care
- Right of a child to a name, birth registration, and nationality



- Equality of access to public education

The ICRMW also provides rights specific to migrant workers. For example, there can be no confiscation or destruction of identity cards (Art 21). A common practice with migrant workers is for the factories to keep or confiscate migrant workers' identity cards or passports making it difficult for them to leave and find other jobs. Such violations also make the migrant worker more vulnerable to police harassment as they may need to pay bribes because they no longer possess identification as required by the law. Another right is for migrants to have equal treatment and working conditions to nationals. There are rights about being able to stay in the country for a period of time once they finish work – this will stop a State from expelling workers immediately once their job has finished. Additional rights are: freedom from collective expulsion (Art 22), the right to access consular services if arrested (Art 23), and the right for children of migrant workers to have access to education (Art 30). Another important right is the ability to transfer earnings or remittances back to the migrant worker's home country.

The main objective of the treaty is to establish humane conditions for migrant workers. These are detailed in Part Six of the convention and include better services such as consular activities, ensuring the easy return of migrants to their home country, working toward the elimination of illegal and clandestine movement, and the recruitment of migrants.

## CONCEPT

### Remittances

Remittances are the money and goods which migrant workers and other people living outside their states, send home. Remittances have an important impact on communities, and in some cases on the national economy. Remittances form a large part of the Philippine's economy, and improve the conditions of many communities in Myanmar. Migrants can be a source of economic empowerment and the driving force behind new opportunities, despite being in another State or another region. Remittances are an important pull factor (something appealing which motivates people to migrate) in Southeast Asian migration. The protection of remittances and the ability to send remittances home is vital to such workers and amounts to a human right.

The rights of migrant workers are divided according to three separate categories: (1) the rights of all migrant workers (detailed above), (2) the extra rights given to documented migrant workers, and (3) rights for special categories of migrant workers.

Documented migrant workers are entitled to a further set of rights in 20 articles. These include the rights to form trade unions (Art 40), access to housing and social services (Art 43), and the integration of migrant worker children into local education institutions (Art 45). These extra rights for documented workers in regular situations can be seen as an attempt to encourage migrants to undertake documentation and regular migration.

Special categories of migrant workers include: frontier workers (people who work



across borders; for example, they live in one country and work in another), seasonal workers (people who work for a set number of months a year in another country), or project-tied workers (someone whose work in another country is for a specified time and ends once the project is completed). These workers are entitled to all the standard rights but their access to social services and children's education may be limited as they do not reside full-time in their country of work.

### 7.2.3 Challenges to the ICRMW

While the Convention takes significant steps forward in the protection of migrant workers, there are some weaknesses concerning emerging categories of migrant workers. For example, there is no specific provision for women migrant workers, thus making the treaty gender blind – it assumes women and men will need the same protection of rights. With the globalization of work and changing work practices which has been named the 'feminization of labour,' women now comprise the fastest growing labour sector. Many of the violations women could face, for example, sexual discrimination in the workplace, or unequal pay, are not directly addressed. It could be argued such issues may fall under non-discrimination in the workplace, but often these laws do not do enough to protect female migrant workers. This weakness is particularly apparent for domestic workers who are almost exclusively women. Because domestic work is often unregulated and the women work in private homes, it is much more difficult for them to raise complaints, organize themselves, claim overtime, and other work standards. In this region, some of the most well-known abuses have been of domestic workers (which in some cases has even led to the breaking of diplomatic ties; for example, the Flor Contemplacion case between Singapore and the Philippines). Other areas of rights not considered are youth workers (people under 18 seeking work) who may need special protection. The Minimum Age Convention (ILO 138) does protect people who are under the minimum age for the country they are working in (and this may be between 12-15 years old), but there is no recognition that people between 15-18 who are working may need special protection. Also, the second generation migrant workers, that is, adult children of migrant workers who are themselves migrant workers, are not mentioned in the treaty either. In most Southeast Asian countries with a history of migrant work have two and sometimes three generations of workers.

## CASE STUDY

### The Flor Contemplacion Case

Flor Contemplacion was a Philippine maid working in Singapore who was charged and found guilty of murder. She was executed on 17 March 1995. However, many argue the facts of the case are still open to debate. A maid was found strangled, and the four year old boy she looked after was found drowned in a bath. Flor Contemplacion became a suspect after police read the murdered maid's diary and Flor confessed to the crime. Claims of mental instability on Flor's part and also that the boy's father strangled the maid after he discovered she had drowned his son, were ignored.

This case became a rallying point for many organizations advocating for greater migrant worker rights, particularly domestic workers in Singapore. People were especially concerned that her guilt was established too quickly, and that the police



did not pursue other avenues of investigation. The Philippines government offered little, if any, consular advice or protection to the maid; although belatedly sensing that people in the Philippines were very upset, they did protest her death sentence and later withdrew their ambassador from Singapore and abandoned some bilateral treaties.

Following this, Singapore gradually improved the legal protection of domestic workers, by introducing a “Maid Abuse” law (section 73 of the Penal Code) in 1998. Further, Singapore’s Manpower Ministry in 2012 announced a weekly day of rest for foreign domestic workers. However, this obligation only applies to new contracts made from January 2013 onwards. This is not the only case of a domestic worker being given the death penalty. More recently Sri Lankan and Indonesian Maids have received the death penalty in Saudi Arabia which has led to the sending countries adopting laws increasing the protection of domestic workers. For example, Indonesia banned migration of domestic workers to Saudi Arabia in 2011, but has recently signed an agreement with the Saudi government to allow travel under certain protective conditions (for example monthly wages, limited work hours, and non confiscation of their passports).

#### **7.2.4. Reasons for Low Ratification.**

There are many reasons for the low ratification of this treaty. As was mentioned, there is no State party to the treaty from a country which has received many migrant workers. Further, no developed country has ratified this treaty. However, many of the reasons given for not ratifying are often inaccurate. For example many developed countries consider the treaty will give migrant workers too many rights. However, the rights often exist within the domestic laws anyway, and there will be no extra burden. Some States consider if the conditions for work are too good, migrants will ‘flood’ into the country, and put huge strains on the welfare system, police, and local communities. This flood, however, has never occurred. Migrants go to where the work is, and they will not migrate to be unemployed. Thus migrant numbers reflect the demand for labour and not how good a country is.

States may consider some of the rights controversial. For example, that migrant workers should be treated the same as local workers in terms of pay, overtime, holidays, and termination of employment (Art 25). Indeed, some companies use migrant labor specifically because they are cheaper and can be paid below minimum wage. The business sector may pressure the government not to introduce laws which give workers too many rights. Other rights, such as citizenship rights for children, are often not agreed to.

There is also a concern that the ICRMW also recognizes undocumented workers. Most States simply called undocumented workers illegal migrants, and they can be easily arrested and deported. However, by recognizing the worker as rights holders changes this process. They should be able to legally challenge their deportation, or even their workplace if the law has been broken.

States often neglect the benefits of the treaty. As many countries in the world rely on migrant work to keep their industries growing, the mistreatment of migrant workers can be bad for the economy. If conditions are too bad migrant workers will not travel to

work in these places, or if a better work situation is found, they may leave for another country. Recently, with the democratic changes in Myanmar, the business sectors, which rely on Myanmar migrant workers in Malaysia and Thailand, are concerned that migrant workers would start returning home. Some factories are increasing wages and improving conditions as incentives for the migrant workers to stay.

### **7.3 Violations of Migrant Worker Rights**

Migrant workers face a range of threats and violations starting from recruitment through to the termination of their work. Migrant workers who are undocumented and in irregular situations are particularly vulnerable. Migrant workers face threats because they live outside of their State, and because they are portrayed as burdens to society and bad for the economy. Many migrant workers may be hesitant to report threats or violations because they see that the police or justice system does little to protect them. If the protection mechanisms are missing they must resort to their human rights to ensure their safety and fair treatment.

#### **Fraud**

Fraud committed against migrant workers is prevalent in the region. In such cases, companies or individuals promise lucrative work contracts (often upon payment of a fee), and only later does the worker discover there is no work, or if the job exists, that the conditions are not as promised. Contract substitution, where the original contract is changed for another, occurs widely, with the worker being passed on to another employer and doing entirely different work from what was promised, upon arriving in the country of destination. The worst example of this is kind of fraud is trafficking, where the worker often ends up in a slave-like situation. Forced labor can likewise exist in this situation, where the worker cannot leave the job even when the working conditions are unbearable, because of lack of identity papers and inability to repay the debt from the recruitment. Other violations include excessive fees and deductions included in the contract, so the wage is not nearly as much as promised.

#### **Bad workplace conditions**

At the workplace, migrant workers (particularly undocumented workers) can be at the mercy of their employers and local officials because they cannot get access to equal and fair protection of the law. More common violations include non-payment of wages, dirty, dangerous and unsanitary working conditions, and extended working hours. Sometimes domestic workers find they are required to work from 6 am (in order to get children to school) to midnight when they clean up after dinner. The average working week, which varies throughout Southeast Asia (but should be somewhere around 45 hours), can be as much as 72 hours.

However, the worst cases of abuse have been found on fishing boats. Frequently, fishermen are expected to work eighteen to twenty hours of hard manual labor per day, seven days a week. Sleeping and eating is possible only when the nets are down and recently caught fish have been sorted. Fishermen live in terribly cramped quarters, face shortages of fresh water, and they must work even when fatigued or ill, thereby risking injury to themselves and others.

#### **Violations outside the workplace**

Even outside the workplace, migrant workers can face discrimination in the form of police interference, constant surveillance, inability to send children to school, and inability to practice cultural activities such as weddings, religious practices, or national

days. Migrant workers can face violations upon termination of their employment. For most countries in Southeast Asia, an undocumented worker is considered a criminal and immediately expelled. Cases exist where factory owners do not want to pay their workers and instead call the police to pick up their undocumented workers and expel them from the country (where they cannot sue for lost wages). Given the weak standards surrounding expulsion in many countries, migrant workers know if they attempt to claim their rights from the wrong person they may be sent home, arrested or harmed. Malaysia has a law that allows the caning of undocumented migrant workers, and between 2005-2010, caned nearly 30,000 foreigners. All of these obstacles have a paralyzing impact on migrant workers and their ability to exercise their rights.



## CASE STUDY

### The Fear of Non-Citizens

In Chiang Mai, a city in Northern Thailand, a young female university student was tragically raped and murdered in her dormitory. The suspects, two ethnic Shan construction workers, were arrested. After the arrest, students started to rally and, supported by the police, asked for the expulsion of all migrant construction workers in Chiang Mai. A number of raids and forced expulsions occurred over the following days with several hundred people being expelled to Burma. The expulsions were illegal, and in some cases, Thai citizens caught up in the raids were expelled from their own country in Myanmar.

Malaysia has conducted mass expulsions of migrant workers, where tens of thousands of workers have been arrested and expelled in a short period of time (although this has not been done on a large scale since 2004). Mass expulsions are a rare yet dangerous violation of human rights, and an action clearly in contravention of a number of human rights and national laws. Yet people's fears of the non-citizen criminal remain high; and as a result victimization of innocent non-citizens often receives inadequate attention.

### Forced labor

Forced labour is one of the worst forms of labor violation. The ILO Convention 29 on Forced Labour (1930) defined it as:

“All work or service which is extracted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily.”



## CASE STUDY

### Forced Labor

This case study is from interview notes taken during a recent research project on migrant workers in Malaysia.

Note: all names used in this example, including people and company names, are pseudonyms.

In order to meet its company policy, a manufacturing company (Cyber) using migrant labour requested the labour agent to upgrade the working conditions to meet the legal minimum wage and the living conditions of the workers. Rather than do what Cyber asked, the labour agent negotiated the wage rate with the workers. The agent offered to pay them 41.50 Ringgit (about \$USD 13 per day), without holiday pay but without deducting anything except the recruitment levy which they were expected to pay. The workers verbally agreed to this arrangement.

A contract was then made in English and Malay languages that none of the workers understood, but they signed anyway trusting the word of the agent. The workers noted that the deductions were written in English and when they got back to their hostel, they tried to translate them using a dictionary. Unknown to the workers, the agent had already gone back to Cyber Company to report that the workers agreed to the new rate, but the Cyber management insisted that this was unacceptable even if the workers agreed since the terms still did not meet the minimum legal requirements.

The agent decided to pull the workers out of the company. While waiting to be assigned to a new company, the workers did not work and therefore they were not paid any wage. They were brought to a housing area, about 50 km away from their original hostel. They described the living area as being too small with 10 men in one room and 30 women staying in another single room.

Eventually, after 10 days, the workers were asked to report to the new company. The workers heard that working conditions in this company were very bad. They objected to the new assignment and requested to be assigned to another company. Instead of responding, the agent kept threatening to denounce them to authorities if they kept complaining. The workers then asked for their passports back so that they can look for another employer-agent, but the agent refused to give them their passports. They then requested to return to Myanmar but the agent refused to let them go. The agent kept threatening to have them arrested and at some point the agent did come to the hostel with some police officers. After that visit, the workers were scared so badly that they ran away from the employer, without their passports and without money except what little they have saved. They are still in Malaysia, trapped until they are apprehended, detained and eventually deported.



Forced labor has two key elements. First, that the work is involuntary, it is done against the will of the person. This can be forced recruitment, living under duress, and the impossibility of leaving the employer. The second, is that the work is done under the menace of penalty. In most cases this penalty is the threat of physical abuse, but it can be threats to family members, or threatened punishment if the person escapes. In cases of trafficking, forced labor commonly occurs in contexts where a person is not paid, the work is oppressive (for example, sexual services), and the person does not have freedom of movement to leave their place of work. Forced labor is at the extreme end of work place violations. Some violations at work may be minor; for example, poor work conditions (too hot, cold, dirty or insanitary conditions). Some conditions may be severe without being criminal; for example, verbal abuse or unauthorized reduction of wages. Other work place violations may become criminal without actually amounting to forced labor; for example, physical abuse, stealing wages, or child labour.

## CASE STUDY

### Protecting Child Migrant Workers

A publication by the Mahidol Migration Centre called *Invisible Victims of Trafficking in Thailand* gives the following account of a child looking for work in Thailand.

The boat left for sea and Khin had no idea where he was or where the fishing boat was headed. He was told to lift boxes of fish and pull fishing nets from dusk till dawn. He received some food but was not paid for his work. The person who controlled the workers neglected Khin as he was underage. Khin worked on the boat for seven days and when the boat docked at the pier, he was cast off with his friend.

Eventually, he fell into the hands of a Thai lady who locked the two boys in a room for three days before they were taken to another fishing boat. On seeing them, the new boat owner only accepted Khin's friend for work as he was 19 years old. Considered too young to work, Khin was left on the street alone, unable to speak any Thai and not knowing where he was and who he could ask for help. In the end, he just started wandering around. After three days, Khin was walking on an overpass when a car stopped and took him to a police station. The police station was in the Klong Toey district of Bangkok.

Having not eaten or drunk properly for three days, Khin was then sent to the Immigration Detention Center at Suan Plu in Bangkok where he was detained for three months. People from Myanmar and Thailand shared the cell with him. Later, Khin was deported to Mae Sot on the Thai-Myanmar border. Upon arrival, the immigration police handed him over to the Democratic Karen Buddhist Army (DKBA) in Myawaddy. As someone had to pay for his release, an aid worker eventually bought Khin from them and he was taken back to Mae Sot where he was brought to the safe house of a Myanmar aid organization. He then moved to a boarding school where he learnt Thai, English, and Myanmar. There, he made some friends and was happy. Khin is currently seeking regular education and care but he still does not have the legal documents to stay in Thailand and remains at risk of arrest, deportation, or re-trafficking.



### Exercise: Locating rights violations

For the two cases described here, forced labour in Malaysia and child workers in Thailand, detail the main violations to the people involved. Are these also human rights violations?

Examples of violations may be:

- Breaking contracts
- Excessive fees
- Underpayment or non payment of wages
- Long working hours
- Poor living conditions
- Poor access to health
- Seizure of documents
- Threats to security
- No freedom to move

### 7.3.1 Government Actions that can Protect Migrant Worker Rights

The Convention calls on States to prevent “illegal or clandestine movements and employment of migrant workers in an irregular situation,” and declares that states should ensure “sound, equitable, humane and lawful conditions.” Partly, this can be achieved through the increased regularization of migrant work, which allows all undocumented workers to eventually become documented. Legalizing migrant labor will reduce the scope and the need for a criminal economy in migration, leading towards less occurrences of trafficking. While this obligates the government to protect migrants from violations, it can also be used by governments as an excuse to target migrant workers by doing things such as increased policing along borders, raiding workplaces, and deporting undocumented workers. Further, it does not ask governments to improve the access to documented migration nor does it ask companies to assist in the regularization of their work force. The ICRMW states that the government should “take appropriate measures to ensure that [irregular situations] do not persist,” but it does not call for changes to immigration laws or policies, which may include many obstacles to regular documented entry.

Though the ICRMW prevents arbitrary expulsion, legal expulsion is allowed within the Convention. Indeed, expulsion is a right of the government, although it must be done through legal mechanisms. The migrant worker does have rights around expulsion, including the right to appeal and rights against collective expulsion. However, there is much room for interpretation surrounding the notions of lawful as opposed to arbitrary expulsion.

There are some activities governments can do which do not limit the rights of workers. This includes regulating the types of jobs migrant workers undertake. In countries such as Thailand and Malaysia, migrant workers are limited to specific

fields of employment (for example, Thailand's migrant workers are limited to the fishery industry, manufacturing, domestic work, farming, shipping and construction). Generally, the type of work migrant workers do tends to fall into the category of the "Three Ds;" work that is dirty, dangerous and degrading. For example, work in the fishery industry may include dirty work such as gutting fish (a rather smelly job). An example of dangerous work is working on a fishing boat in the middle of the ocean. Degrading work may include being a commercial sex worker for sailors (although this is not a legal form of employment).

## CASE STUDY

### One Domestic Worker in Singapore Speaks Out

A Human Rights Watch report on domestic workers in Singapore, called *Maid to Order*, gives the following statement from an Indonesian maid working in Singapore:

"I was not allowed to go outside. I never went outside, not even to dump the garbage. I was always inside; I didn't even go to the market. I felt like I was in jail. It was truly imprisonment. I was not allowed to turn the radio on either. I could only see the outside world when I hung clothes to dry. My employer said, 'Don't speak to anyone. Don't speak to friends or to the neighbors.' I wasn't allowed to contact my relatives. I worked for three years. I had nobody to talk to. I asked my employers if I could return to Indonesia, and they said no. I was not happy or comfortable, and I wanted to go back. They said, 'You have to finish your contract. You have to make sure you finish your contract before you go back.'"

Domestic workers are particularly vulnerable because they are isolated from friends and family. This problem is changing with the introduction of mobile phones and countries such as Singapore and Hong Kong introduced laws giving domestic workers a day off. However, protection is still not guaranteed. The day off in Singapore is not compulsory; employers can confiscate phones, and domestic workers may feel too threatened to make complaints.

### 7.3.2 Migrant Worker Organizations

Migrant worker organizations vary in terms of their size and activities. There are three types of organizations which work on protecting the rights of migrant workers.

#### **International organizations**

Apart from the UN, which has a treaty body for the ICRMW and special rapporteurs on non-citizen rights, the other main international organizations managing migrant workers' rights are the ILO (International Labour Organization) and the IOM (International Organization for Migration). While limited to giving technical advice and research, they do serve as important standard setting bodies.

#### **Local specialized NGOs**

These provide services to migrant workers such as legal advice, protection, and education. The two most prominent migrant worker NGOs in the region are the Migrant Workers Forum (based in the Philippines), and the ASEAN Migrant Workers Taskforce.



Both these organizations are heavily involved in advocacy and standard setting. In addition, grass roots organizations can also provide services (such as the Labour Rights Protection Network (LPN) based in Thailand or Tenaganita Women's Force in Malaysia). These groups offer such services as legal services, education for children of migrant workers, programs on health, shelter, advocacy on migrant worker rights, and the provision of humanitarian assistance for workers and their families. Some of these organizations get support from the ILO and IOM, thereby creating a situation where grass roots activities are able to gain international support.

### **Worker's unions**

These provide a means of mobilizing migrant workers whose individual voices often go unheard. Through union participation, migrants and their families gain representation, protection, and access to justice. However, given that migrant workers frequently do not have the right to join unions, nor can gain access to such organizations, their influence is as yet limited. Internationally, the United States based trade union, the AFL-CIO, works toward immigration reform, full foreign worker rights, supervision of child migrant workers, improved workplace standards, and legal representation for migrant workers and their families.

As can be seen, there are a number of ways that migrant workers get protected by these organizations. Protecting workers at the workplace is important, so they are not mistreated or abused. Organizations respond to this by informing police or labour ministry officials about workplace abuses. There is need to advocate for workers rights from the government and business sector, and to change attitudes of the public who may dislike migrant workers. The family of migrant workers need assistance, as well. Many children of migrant workers do not get access to basic services such as health and education, which can be provided by NGOs.

While there is a long way to go before migrant workers rights are protected, there have been improvements in the region over the past decades. With the coming into force of the ICRMW in 2003, and the establishment of many NGOs to protect migrant workers, there is more action in this area. However, problems still persist, and this is the case for the worst form of violations to migrant workers, that of trafficking.

## **7.4 Trafficked Persons**

The crime of human trafficking is most commonly considered a type of slavery. It occurs when someone is taken away from their home or residence and put into a situation where they are exploited; such exploitation can be forced labour or sex work. Human trafficking is a serious problem that has expanded greatly in the last twenty years for a number of reasons, mainly associated with globalization:

- Rise in transnational organized crime: Globalization has led to criminal activities and networks crossing borders because of changes in communication, technology, and travel. Human trafficking is now a very profitable illegal industry.
- Globalization of the economy: With more countries opening their economies and increased movement for labor and leisure, trafficking has become a profitable source of labor. Also, a global economy means moving money around the world to repatriate profits from illegal activities has become much easier.
- Easier travel: Large movements of people usually involve irregular movements of people and goods. Many trafficked persons travel legally to other countries, only

to find themselves in a trafficked situation.

- Changing labor markets: Rapidly industrializing countries in Southeast Asia often need large numbers of cheap workers. With more people willing to travel to find work outside their country, the possibility for trafficking increases. Further, large numbers of single male migrants may lead to a rising demand in commercial sex work, which can rely on trafficked women.

Laws on trafficking emerge from anti slavery laws, though trafficking itself has become in many ways a different crime to slavery. The prevention of slavery has a history dating from the first half of the 1800s, and the protection from slavery is now seen as a customary international law. Anti-trafficking laws date from the beginning of the 1900s, and the first anti-trafficking laws were commonly called “White Slavery Laws.” These laws were intended to protect white women and children from being sold into slavery, particularly in Africa and the Middle East. The white woman slave is now considered to be largely a myth that was invented to both control women and to represent Africans and people from the Middle East as evil. Even though this threat was never proven, a number of laws were introduced to stop this supposed trade including: the International Agreement for the Suppression of the White Slave Traffic (1904), the International Convention for the Suppression of the White Slave Traffic (1910), and the International Convention for the Suppression of Traffic in Women and Children (1921). An important legacy was set by these laws as they led trafficking laws to focus closely on women and on trafficking for sexual slavery. These are indeed serious problems, but this has meant that until fairly recently, the trafficking of men and labour trafficking has been overlooked by many organizations.

## CASE STUDY

### Trafficked onto a Fishing Boat

The following excerpt is from an October, 2011 *Myanmar Times* article entitled Migrants tell of slavery at sea on Thai fishing boats:

The day Hla Myint [not his real name] saw the sea for the first time was when traffickers delivered him, after a week’s trek through the jungle from Myanmar, to a ship on Thailand’s coast.

He said it was the beginning of seven months of “hell”, during which there were beatings “every day, every hour”.

Hla Myint decided to escape – throwing himself into choppy waters and clinging to a life buoy for five hours before reaching land – after seeing his captain kill a crewmate.

The man, who had been caught trying to escape, was savagely beaten and tortured in front of the rest of the fishermen.

“Later they took him to the back of the ship, stood him on the edge and shot him in the head. My heart pounded so hard when I saw that,” said Hla Myint.

His is one of a multitude of stories of slavery in Thailand’s multi-million dollar fishing industry, which campaigners say relies on forced labour to provide seafood for restaurants and supermarkets around the world.



#### **7.4.1 The Protocol to Prevent, Suppress, and Punish Trafficking in Persons Especially Women and Children, 2003(The Palermo Protocol)**

Up until the 1990s, it was mainly human rights organizations (including the OHCHR) which managed responses to trafficking. However, within the UN, there was a move to criminalize trafficking, and this was eventually undertaken by the UN Crime Commission, which is now known as the UN Office on Drugs and Crime (UNODC). The Trafficking Protocol is one of three protocols to the United Nations Convention Against Transnational Organized Crime (2000). The other two protocols cover people smuggling and weapons. It is sometimes also called the Palermo Protocol, named after the city of Palermo in Southern Italy where the treaty drafting was completed. An important feature of the Protocol is that it criminalized the actions at an international level, as previously, it had been possible for recruiters to traffic someone to another country and not be guilty of a crime, because the actual exploitation occurred in another country, and the criminal was outside of the jurisdiction where the crime had occurred.

The first problem addressed by the protocol is finding a definition of trafficking, as none existed in international law. Once defined, there was also a need to criminalize it, and protect the rights of trafficked victims. Given this mixture of objectives, it is important to note that the Trafficking Protocol is not a human rights treaty as such, although it does have human rights elements and its objective is to protect human rights. The Trafficking Protocol is different from other non-citizen treaties, such as the migrant worker and refugee treaties, in that it has a clear objective to criminalize the activities associated with trafficking. When States ratify the Protocol, they are expected to prevent and combat trafficking in persons, protect and assist the victims of trafficking, and cooperate with other member states.

Trafficking appears in two other human rights treaties: in the CEDAW (Art 6), which seeks to “suppress all forms of traffic in women” and in the CRC Optional Protocol 2 on the sale of children, child prostitution, and child pornography. Both these treaties have their limitations: CEDAW does not define nor criminalize trafficking, while the CRC Optional Protocol criminalizes child prostitution but does not address the movement of children or the forced labor of children.

#### **7.4.2 Definition of Trafficking**

Much debate ensued during the drafting of the Trafficking Protocol, with states and NGOs arguing about the requirement that a person be coerced into exploitation, the role of prostitution, and the meaning of exploitation to name but a few. The definition in the Palermo Protocol states:

Trafficking in persons shall mean the [actions of] recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs.

There are three key elements to this definition. For a situation to be trafficking, all three elements must exist (although for children, only the ‘action’ and ‘exploitation’ element are necessary).

**The “action”element**

The action element is what someone has to do to commit the crime of trafficking. The actions are listed as: recruitment, transportation, transfer, harboring, or receipt of persons. This list covers the full spectrum of the migration movement, from the initial recruitment till the person is received at the other end. The importance of this element is that it criminalizes the entire process. Trafficking is not merely the exploitation of a person, but also the selling or recruiting of someone into a trafficked situation. Because the protocol is a criminal treaty, it means that anyone conducting one of these acts is committing a crime.

**The “means”element**

The means element is what the trafficker does to ensure the person ends up in a trafficked situation, such as coerce, abduct, or deceive someone. In a sense, this is what turns the action above into a crime. If a taxi driver takes someone to a workplace where they become trafficked, that taxi driver has not committed a crime (assuming the driver knows nothing about this), but woman selling a child to a fishing boat captain (as the case earlier in the chapter) is clearly committing trafficking. The definition provides a wide range of “means” from physical threats such as abduction, to lying or deceiving someone, and also includes the abuse of power, and getting paid to assist in trafficking.

**The “purpose” element**

The purpose indicates what compels one person to traffic another, and based on the Protocol, it is for the purpose of exploitation. The definition gives some examples of exploitation, but it does not actually define exploitation. Instead, the Protocol sees the common purposes of trafficking to be sexual exploitation (where a woman is forced to be a sex worker) or forced labor (where a person is made to work against their will, is not paid or is underpaid, and does not have the freedom to leave a job). It is accepted that exploitation can be defined by the convention on Forced Labour, detailed above as: “All work or service which is extracted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily.” The definition also notes the removal of organs, or organ trafficking as a purpose. This is not a very common crime, especially in Southeast Asia, although individual cases have been documented in Nepal, China and India.

The above definition applies to adults only. An exploited child only needs to prove the action and purpose elements for trafficking to occur. The Trafficking Protocol does not specify a gender or age, anyone can be trafficked. It does not specify that borders must be crossed, so people can be trafficked even within their own country. It does not specify the situations that people can be trafficked into, so trafficking situations can occur in factories, homes (for a domestic worker), brothels, streets (for child beggars), or on fishing boats. The Protocol also clearly states that the consent of the victim is irrelevant if any of the means were used.



## DISCUSSION AND DEBATE

### Which of These Cases Amount to Trafficking?\*

There are many areas where the definition of trafficking can be unclear. For example:

- a. If a recruiter thinks they are sending someone to a good job, but it actually turns out to be a trafficked situation, is the recruiter guilty of trafficking?
- b. If a manager refuses to pay a migrant worker after a month's work, is this trafficking?
- c. If a migrant worker is continually sexually harassed at her workplace, is this trafficking?
- d. An 8 year old from a neighboring country is brought to the city to be a child beggar. The child is happy to work as a beggar as she gets fed and is able to work with friends, although she does not get paid. Has the child been trafficked?
- e. A woman meets and marries a foreigner through the internet. When she travels to his home, she finds that he expects her to work all day at his business and he also hits her. The husband considered this is what all wives should do for their husbands. Has the wife been trafficked?

\*Answers in the box below

### The Answers

- a. This is not trafficking as the recruiter did not set out to deceive the person. However, one must also bear in mind that this is the most common excuse given by recruiters.
- b. This is not trafficking as the level of exploitation is not high enough. Exploitation must involve a lack of freedom, e.g., if the person is prevented from leaving the job or place of work. While these cases may not be trafficking they are still crimes (either a violation of workers' rights or assault). However, if it can be proven that the migrant worker was recruited for the purpose of being exploited then it can be labor trafficking.
- c. This is not trafficking for the reasons stated in (b) above.
- d. This is trafficking. There is no need to prove "means" where a child is involved.
- e. This is debatable, and would only amount to trafficking if the husband deliberately used the marriage to get unpaid work from the woman (that is, he deceived her which proves the "means"), and he prevented her from leaving the house (thereby proving the "purpose"). If not, then his behavior could amount to assault or domestic violence.



### **7.4.3 Human Rights Elements in the Trafficking Protocol**

The Protocol does offer protection to victims of trafficking. This is achieved in a variety of ways such as by protecting the victim's privacy, providing them with the necessary physical and psychological assistance, and repatriating them (or helping them to return home). Importantly, it states that victims of trafficking should not be criminalized or jailed. A common response of the police when they discover an undocumented person is to immediately detain them so they can be expelled from the country. Even upon their return, a victim may be jailed by his or her own government for immigration related offenses. Unfortunately this concern is not directly addressed in the Protocol. However, since coming into force, guidelines and resolutions have been passed declaring that this should be considered a standard of State practice.

To understand how trafficking victims right can be protected, it is important to discuss how people end up in a trafficked situation. While the media and some organizations talk mainly about young women who are tricked or coerced into sex trafficking, this is not the only form of trafficking, and it is probably not a very common form of trafficking though it is likely one of the worse kinds. Recent studies done in Southeast Asia have highlighted the large number of males who are trafficked into work on fishing boats or agriculture. Frequently the workers think they are starting a legitimate job but soon realize the conditions of employment has taken away their freedom. This is also the same for female domestic workers who find themselves trapped in the houses of their employers. It is far more common for non-citizens to be trafficked than nationals, for nationals can simply escape to the police for protection, whereas non-citizens may be afraid to report to the police, and if they did they do they may not have the language skills necessary. While there is trafficking into the sex industry, particularly brothels whose main clientele are migrant workers themselves, trafficking for labour is much larger and less policed in the region. Because of this, a key to protecting the rights of trafficked persons is by providing more protection at the workplace. But as the previous section has detailed, governments of countries with large migrant worker populations are reluctant to do this, meaning that trafficking for labour will continue.

The patterns of trafficking in Southeast Asia differ from other regions. In South Asia it is more common to find women trafficked into commercial sex work in India from neighboring Nepal and Bangladesh. South Asians may find themselves in a trafficked situation in the gulf States and large numbers of workers travel to work in UAE, Kuwait, and Saudi Arabia. There is trafficking from Eastern Europe into Western Europe, and Africa into Europe, for labour and commercial sex work as well.



## CASE STUDY

### Who is trafficked? Underserved Victims

Determining the prevalence of trafficking is complicated. Many victims of human trafficking are never identified. The same person may be trafficked multiple times. Some authorities and organizations may over or under report trafficking numbers. Hence, human trafficking statistics can be unreliable and misleading. Assumptions about what people may be most vulnerable to trafficking can result in underserved populations. The United Nations Inter-Agency Project on Human Trafficking (UNIAP), which works in six countries across the Greater Mekong Sub-Region (Cambodia, China, Lao PDR, Myanmar, Thailand, and Vietnam) recognized the prevalence of underserved victims and launched an initiative. This Support to Underserved Victims initiative aims activities at groups that are regularly overlooked or denied services. UNIAP explains:

“One group of trafficking victims that is often underserved is male victims of labour exploitation, forced to work on boats or in plantations or factories. While laws and policies have been revised across much of the Greater Mekong Sub-region recognizing male victims of trafficking, there remains a lack of provision of services. Further populations include those recruited through formal channels into unpaid and forced domestic work, or sex workers who entered the sector willingly and were then exploited, but not regarded as trafficked and cannot therefore access appropriate assistance. Often they are instead treated as criminals, or forced to return home in considerable debt.”



## FOCUS ON

### The Difference between Human Trafficking and Smuggling

Human trafficking differs from people smuggling in several ways. The government view is that trafficked people are victims, whereas smuggled people break immigration laws intentionally to enter a country illegally. When smuggling people, the smugglers and the people being smuggled attempt to covertly transport themselves from one country to another because they are not allowed to legally enter. In other words, this act is voluntary and the people involved are considered free before, during, and after the transport. Trafficking differs as these victims are often deceived, coerced, and are not free to make the choice (that is, they are usually forced into some sort of bondage).

In practice, the distinction is rarely this clear cut because it is often difficult to measure levels of voluntariness; for example, smuggled people may also be subject to coercion (whether for more money, threats against family members, or threats to their security). A person may start out being smuggled but may soon find themselves in a trafficked situation. For example, they may be forced to work somewhere after discovering they need to pay extra money to their “smuggler.” Thus, a person need not be trafficked out of the country (but could have left voluntarily) to end up in a situation of trafficking.

## **Repatriation**

In some cases, it is in the best interests of victims to be returned to their country of origin. Repatriation is a right, and when done properly, requires a consultation process to ensure that the trafficked person is ready and willing to return. Proper repatriation allows time for rehabilitation and legal redress. It also ensures the person is able to make a safe and dignified return home. In Southeast Asia, however, there is still much to be learned about best practices in this area as governments often forcibly repatriate trafficked persons.

The repatriation of a victim of trafficking may often seem the easiest and best solution. In some situations, though, a trafficked victim may not want to be deported back home. For example, they may prefer to be a migrant worker, stay in the country and find a job, rather than arrive home, penniless. Indeed, they may have debts from traveling to the other country, and may need to work to pay the debt off. Finally, victims are often deeply embarrassed about being trafficked into sex work, and may face discrimination in their home villages.

## **7.5 Challenges to Identifying Trafficked Persons**

Identifying a trafficked victim can be a challenging component of ensuring that trafficked persons are protected. Correct identification will mean that a victim gets many protections such as access to legal assistance or NGO help, shelter, the right to not be returned to an insecure situation, protections from being prosecuted, and not being arrested, detained, or expelled from the country. The identification of a trafficked person in the Palermo Protocol is limited because it does not outline who or how a person is declared trafficked. It may be assumed that this will fall primarily to the State which the person was trafficked to, although the State of nationality has the additional responsibility to accept that person as a victim of trafficking upon their return.

Ideally, the trafficked person will be regarded as a victim and the State should have adequate policing and protection to find and help them. This works well in cases of raids and rescues from brothels or factories. In such situations, the police or other authorities usually determine if the person has been trafficked. But in cases where an undocumented person approaches local authorities with stories about their exploitation, they may be treated as a trafficked person (assuming the local authorities are aware of the law), but they may also be considered an illegal migrant (and deported from the country) if the authorities are either unaware or unable to identify the person as trafficked. What is worse, in such cases, the traffickers often escape justice.



## CASE STUDY

### Thailand (April 2008)

A truck driver smuggling 121 Myanmar migrant workers, locked them in the back of his truck but did not ensure adequate ventilation. As a result, 54 Burmese migrants died of suffocation. Many of the surviving women were considered trafficked and given assistance. However, the surviving men were defined as “illegal aliens” and deported. This was because the law in Thailand at the time only recognised women as victims of trafficking. The law has since changed and now all victims would receive the same treatment. Four years later, the truck driver, the truck owner, and those who assisted the smuggling, were sentenced to between 6 to 10 years in jail.

A further challenge is that not all countries in Southeast Asia have a law which criminalizes trafficking. A serious problem was that many States only recognized women who were trafficked, and not males. Though, this has been changed with the ratification of the protocol or changes to domestic laws. Throughout Southeast Asia most States have introduced or updated their trafficking laws to comply with the Palermo Protocol. Table 12-1 shows the local laws and the compliance of the laws to the Palermo Protocol.

**Table 7-1: Anti-Trafficking Laws in Southeast Asia**

	Palermo Ratification	Domestic Trafficking Law	Features
<b>Brunei DS</b>	No	The Trafficking and Smuggling Persons Order (2004)	The Order prohibits sex and labor trafficking. Sex trafficking has penalties for up to 30 years whereas labor trafficking only prescribes penalties of up to three years imprisonment.
<b>Cambodia</b>	Yes	The Law on Suppression of Human Trafficking and Sexual Exploitation (2007)	Domestic law similar to Palermo Protocol.
<b>Indonesia</b>	Yes	Anti-Trafficking Law (2007)	Domestic law similar to Palermo Protocol. Criminalizes debt bondage, labor exploitation, sexual exploitation, and transnational and internal trafficking.
<b>Laos</b>	Yes	No specific law	Laos has laws criminalizing trafficking, although they only apply to women and children, not men.

<b>Malaysia</b>	Yes	Anti-Trafficking Law (2007) Amended in 2010	Domestic law similar to Palermo Protocol, except that it treats prostitution as a form of exploitation. The 2010 amendment broadens the definition of trafficking to include all actions involved in acquiring or maintaining the labor or services of a person through coercion.
<b>Myanmar</b>	Yes	The Anti-Trafficking In Persons Law (2005)	Domestic law similar to Palermo Protocol.
<b>Philippines</b>	Yes	The Anti-Trafficking Persons Act (2003)	Domestic law similar to Palermo Protocol. The law allows private prosecutors, including NGOs, to file lawsuits against traffickers.
<b>Singapore</b>	No	No specific law	The Penal Code criminalizes most forms of trafficking, but does not criminalize the use of 16 and 17 year old children for prostitution.
<b>Thailand</b>	Yes	The Anti-Trafficking In Persons Act, B.E. 2551 (2008)	Domestic law similar to Palermo Protocol.
<b>Vietnam</b>	Yes	No specific law	No clear definition of trafficking, and only covers women and children.
<b>Timor</b>	Yes	No specific law	Does not have a penal code that comprehensively criminalizes human trafficking. However, the Immigration and Asylum Act (2003) prohibits trafficking in women and children for prostitution and forced labor.

### 7.5.1 NGO Responses

In Southeast Asia, one of the major organizations working to combat trafficking is the United Nations Inter Agency Project on Human Trafficking (UNIAP). Established in 2000, UNIAP is a coordinating body within the UN, bringing together the various UN agencies working in this area (UNDP, UN Women, UNICEF, OHCHR, and UNODC). UNIAP is also a coordinating body within the region which organizes responses in the Greater Mekong Sub-Region.

NGOs working on trafficking include the Global Alliance Against Trafficking in Children and Women (GAATW), an alliance of more than 100 NGOs from across the world which is based in Bangkok. In addition, Ending Child Prostitution and Trafficking (ECPAT) focuses on child trafficking. Other international organizations include Anti-Slavery, the SOLD Project, the Coalition Against Trafficking in Women (CATW), the Polaris Project, and the International Rescue Committee (IRC).

### Responses: the four P's

The Protocol provides a range of measures which States should undertake to prevent trafficking, such as information exchange, training police to identify trafficking, strengthening border controls, imposing criminal penalties on traffickers, and introducing domestic criminal laws on trafficking. These are often described as the “Four P’s” (note that it was the “Three P’s” before Policy and Cooperation were added). The four P’s are:

1. Policy and Cooperation: governments need to have policies in place to strengthen cooperation and training to combat trafficking.
2. Prevention: active policing and education will prevent people from the risk of trafficking.
3. Prosecution: ensuring laws are policed and used so suspected traffickers are put on trial.
4. Protection: ensuring victims of trafficking have their rights respected, and they are given opportunities to recover and be reintegrated into their communities if necessary.

Many activities are undertaken by civil society to contribute to the four P’s. Education is important as rather simple actions can be done to reduce trafficking, including travelling with family members, keeping in telephone contact with family, and being more cautious about accepting promising work offers without some background checking.

## A. Chapter Summary and Key Points

### Migrant Workers

#### Migrant Workers

Migrating for work has been happening for centuries, though the numbers now are much greater. There are two fundamental problems, the abuse of migrant labour and trafficking, which are protected in separate treaties. For migrant workers the ILO began working on this issue after World War II, and the UN adopted the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICRMW) in 1990. The ICRMW is a human rights treaty, so it has a broader protection of rights including the family and rights outside of the workplace. The treaty is not widely ratified and no developed country, or country with a large migrant worker population has ratified it. A migrant worker refers to “a person who is to be engaged, is engaged, or has been engaged in a remunerated activity in a State of which he or she is not a national.” This definition protects migrant workers before, during, and after work; it means the worker only need to be paid to be seen as a migrant worker, and there is no distinction between documented and undocumented workers. The treaty covers protection for the worker, their wives/husbands, and children.

## **Migrant Worker Rights**

There are three types of human rights for migrant workers. Firstly, there are existing human rights which the worker should be getting anyway, but some governments try to ignore this. Examples of this include access to a court, freedom of expression, and freedom from arbitrary arrest. Second, there are rights specific to migrant workers which include no confiscation or destruction of identity cards, equal treatment and working conditions to nationals, and rights about being able to stay in the country for a period of time once they finish work. There are also special rights for some types of workers. Documented migrant workers are entitled to rights to form trade unions and access to housing and social services. Some special categories of migrant workers such as frontier workers or seasonal workers are entitled to all the standard rights but their access to social services and children's education may be limited as they do not reside full-time in their country of work.

## **Challenges to the ICRMW**

The Convention has some weaknesses such as no specific protection for women, who may face sexual discrimination in the workplace or unequal pay. Another weakness is protecting domestic workers who are almost exclusively women and youth workers (people under 18 seeking work). One challenge is the low ratification of the treaty. Developed countries may consider the treaty gives migrant workers too many rights, and if the conditions for work are too good, migrants will 'flood' into the country. States may consider some of the rights controversial such as treating migrant workers the same as local workers in terms of pay, overtime, holidays, and termination of employment. There is also a concern that the ICRMW recognizes undocumented workers, as most States simply called undocumented workers illegal migrants, and they can be easily arrested and deported.

## **Violations of Migrant Worker Rights**

Migrant workers face threats because they live outside of their state and because they are portrayed as burdens to society and bad for the economy. Many migrant workers may be hesitant to report threats or violations because they see that the police or justice system does little to protect them. They face fraud as companies or individuals promise lucrative work contacts (often upon payment of a fee), and only later does the worker discover there is no work, or if the job exists, that the conditions are not as promised. There are bad workplace conditions, and workers may face non-payment of wages, dirty, dangerous and unsanitary working conditions, and extended working hours. Even outside the workplace, migrant workers can face discrimination in the form of police interference, constant surveillance, inability to send children to school, and inability to practice cultural activities such as weddings, religious practices, or national days. Forced labour is one of the worst forms of labor violation.

## **Government Actions that can Protect Migrant Worker Rights**

States must promote humane and lawful conditions for work. They should be stopping illegal migration and protecting people from violations that occur when people are transported illegally into a country. States are allowed to legally expel people, although it must be done through legal mechanisms. Another action governments can do is regulate the types of jobs migrant workers undertake. Though the type of work migrant workers do tends to fall into the category of the "Three Ds" or work that is dirty, dangerous and degrading.

## **Migrant Worker Organizations**

Migrant worker organizations include International Organizations like the UN, ILO and IOM. There are local specialized NGOs providing services to migrant workers such as legal advice, protection, and education. And there are Worker's unions which work toward immigration reform, full foreign worker rights, supervision of child migrant workers, improved workplace standards, and legal representation for migrant workers and their families.

### **Trafficked Persons**

Trafficking has increased recently because of a rise in transnational organized crime, and the globalization of the economy, labour market, and travel. Anti-slavery laws start in the early 1800s, and anti trafficking laws date from the beginning of the 1900s. These laws were intended to protect white women and children from being sold into slavery, particularly in Africa and the Middle East, which is now considered to be largely a myth.

### **The Trafficking Protocol**

The Trafficking Protocol is one of three protocols to the United Nations Convention Against Transnational Organized Crime (2000). It criminalized trafficking at an international level. Importantly it gives a definition of trafficking, as none previously existed in international law. Trafficking is made up of three elements: the actions of recruitment, transportation, or receipt of persons; by means of threat, force, coercion, abduction, or deception, and for the purpose of exploitation. An exploited child only needs to prove the action element and the exploitation element for trafficking to occur. The Protocol protects victims of trafficking by providing them with the necessary physical and psychological assistance, repatriating them, and giving them access to a court. The best interests of victims may be to return them to their country of origin, but this requires a consultation process to ensure that the trafficked person is ready and willing to return.

### **Challenges to Identifying Trafficked Persons**

Identifying a trafficked victim can be a challenging as it is assumed that this will be done by the State which the person was trafficked to. Ideally, the trafficked person should be considered a victim and the State should have adequate policing and protection to find and help them. A challenge is that not all countries in Southeast Asia have a law which criminalizes trafficking. Some States only recognized women as victims of trafficking, and not males.

### **NGO Responses**

There are many organizations such as UNIAP and GAATW who protect the rights of trafficked victims. They are may be considered to be responding to the four P's of counter trafficking activities: Policy and Cooperation, Prevention, Prosecution, and Protection

## **B. Typical exam or essay questions**

- What are some of the negative things people say about migrant workers in your country and what are accurate criticisms of these views? How do migrant workers contribute to the economy, workforce, and community in your country?
- Discuss the laws regulating migrant labour in your country. Do the laws force



people into undocumented situations or do they protect the rights of workers?

- If you live in a sending country, what preparation and protection does your government offer to migrants who are travelling overseas to work?
- Is the law on trafficking in your country in compliance with the Palermo protocol? Does it have the same definition, and does it provide the same rights as Palermo? Are there any major weaknesses in the domestic law?
- Find a case of trafficking that has occurred in your country. How was the situation identified, and how was the victim protected? Do you consider the initiatives by the government enough to combat trafficking?
- List the four categories of non-citizens rights. Alongside each category, name the main international bodies that work on these non-citizen rights, the institutions and organizations that actively protect the rights of non-citizens in your country, and the relevant domestic laws which protect these people.

## C. Further Reading

### Migrant Workers

The most used textbooks on migrants workers are

- Aris Ananta
- Evi Nurvidya Arifin
- Ryzard Chuzwelxyzol

Much research on migrant workers can be found on the ILO website:

Reports on migrant works in Southeast Asia have been done by

- Human Rights Watch, *Maid to order: ending abuses against migrant domestic workers in Singapore*.
- Human Rights Watch, *From the Crocodile to the Tiger: Abuse of Migrant Workers in Thailand*.
- ILO, *Employment practices and working conditions in Thailand's fishing sector*.

### Trafficking

The most detailed book on the protocol is Anne Gallagher's *The international law of human trafficking*, New York: Cambridge University Press, (2010).

Useful websites on trafficking include:

- The Nexus Institute Publications
- United Nations Inter-Agency Project on Human Trafficking (now called UN ACT)
- United Nations Office on Drugs and Crime





The Southeast Asian Human Rights Studies Network (SEAHRN) was born out of a common dream to enhance and deepen the knowledge and understanding of students and educators as well as other individuals and institutions from Southeast Asia in human rights and peace & conflict. It seeks necessary regional academic and civil society cooperation to sustain the effective promotion and protection of human rights in the region.

SEAHRN currently has more than 20 member-institutions in seven Southeast Asian countries (Cambodia, Indonesia, Lao PDR, Malaysia, The Philippines, Thailand and Vietnam). It desires to open its doors to interested institutions and individuals who share its vision for human rights and peace in Southeast Asia.

SEAHRN is committed to achieve the main objectives:

- To strengthen higher education devoted to the study of human rights and peace in Southeast Asia through faculty and course development;
- To develop deeper understanding and enhancement of human rights and peace knowledge through collaborative research;
- To achieve excellent regional academic and civil society cooperation in realizing human rights and peace in Southeast Asia; and
- To conduct public advocacy through critical engagement with civil society actors, including inter-governmental bodies, in Southeast Asia

## **Conferences and Publications**

- The Third International Conference on Human Rights and Peace & Conflict in Southeast Asia (Kuala Lumpur, Malaysia- October 15-17, 2014)
- Human Rights and Peace in Southeast Asia Series 2: Defying the Impasse (September, 2013)
- Human Rights and Peace in Southeast Asia Series 3: Amplifying the Voices (September, 2013)
- The Second International Conference on Human Rights and Peace & Conflict in Southeast Asia (Jakarta, Indonesia- October 2012)
- Human Rights in Southeast Asia Series 1: Breaking the Silence (September, 2011)
- The First International Conference on Human Rights in Southeast Asia (Bangkok, Thailand- October 2010)

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