AN INTRODUCTION TO

Human Rights in Southeast Asia

VOLUME 3

SHAPE SEA

ASEAN University Network
Human Rights Education (AUN-HRE)

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An Introduction to Human Rights in Southeast Asia

Volume 3

By

ASEAN University Network–Human Rights Education (AUN-HRE)

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AUN-HRE and SHAPE-SEA Secretariat:
Institute of Human Rights and Peace Studies (IHRP)
Mahidol University, Panyaphipat Building
999 Phuttamonthon Sai 4 Rd, Salaya, Nakhon Pathom 73170, Thailand
Tel: (66) 2-441-0813-5 ext. 3150
Fax: (66) 2-441-0872-3
Email: shape.seasec@gmail.com
Website: http://shapesea.com/

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Acknowledgments

The first volume of the textbook on human rights in Southeast Asia was first initiated by the Southeast Asian Human Rights Studies Network (SEAHRN) in collaboration with the Raoul Wallenberg Institute of Human Rights and Humanitarian Law (RWI). From there, the Textbook project has been further developed by the ASEAN University Network-Human Rights Education (AUN-HRE) as part of the Strengthening Human Rights and Peace Research and Education in ASEAN/ Southeast Asia (SHAPE-SEA). The ultimate goal of the textbook is to inculcate the values of human rights and peace which, in turn, contributes to the promotion of human rights and peace education in Southeast Asia through which human rights and peace in the region will be better promoted and protected.

The writing and production of this volume of the textbook has been funded by the Norwegian Centre for Human Rights (NCHR). We are very thankful for all their support. We would also like to emphasize that production of this textbook would not have been possible without a lot of contributions from many people namely the authors, the reviewers and editors as well as others who have supported behind the scene. Their contributions and continued engagement are highly appreciated.

Preface

When the Southeast Asian Human Rights Studies Network (SEAHRN) was formed in 2009 one of its first initiatives was the development of a textbook for Southeast Asia University students. With an estimate from SEAHRN, only one in a thousand students in the region graduating university having completed a single human rights course. There were few opportunities for students to study this topic. Given the importance of human rights today, alongside the legal obligation of governments to ensure students are taught their rights, much needs to be done to make human rights education available in universities in ASEAN/Southeast Asia. The production of the Textbook on Human Rights and Peace in Southeast Asia was launched in response to concerns voiced by many lecturers that there were no textbooks appropriate for teaching human rights in the region. The first volume of the Textbook was then prepared and produced by SEAHRN in cooperation with RWI.

Written by a team of human rights academics working at universities in the region, this third volume of the textbook is aimed at being a contemporary and engaging reading for students of human rights. This textbook is for undergraduate students who are studying a general education level course on human rights, or students who study human rights as a part of their program in sociology, law, politics, ASEAN studies, development studies and so on. The textbook does not require specialist knowledge of any discipline.

A large team of writers, researchers and reviewers have pooled their energy for this project. 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, students are unaware of its relevance, and but lecturers also do not have the facilities to learn enough about the subject to teach it. 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.

Volume one of the textbook was completed in March 2015, and the second volume was released in October 2016. The third volume was made ready at the end of 2019.

Principles of the Textbook

At the outset a number of principles for a human rights textbook for undergraduate students in Southeast Asia were established. These are:

- 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 using examples and case studies from the region.
- The textbook may be translated into major Southeast Asian languages.
- 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.

Features of the textbook

The textbook has the following features to engage and assist students in understanding human rights:

- Definitions: helps students to understand human rights terminology.
- Concepts: Outlines of concepts important to understanding human rights.
- Focus on: Provides an in-depth look at relevant issues through providing real-life case studies to assist students to understand human rights in action.
- Discussion and Debate boxes: designed to encourage debate and discussion on human rights issues. These can be used to increase discussion and debate between students about human rights challenges.
- Southeast Asian examples: Where relevant, human rights are contextualized in the eleven Southeast Asian countries.
- Typical exam or essay questions: end of chapter section to help lecturers structure exam and essay questions.
- Further Reading: highlighting authors, on line resources, and relevant texts for further study. Please note that the further reading mainly lists texts which are available free on the internet. Because many universities in the region are limited in their access to on-line journals and texts, the authors have decided to note research and authors who have material which is free and available to all.

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 Timor Leste.

Notes for Lecturers

The textbook is designed for undergraduate students but may be used as basic background reading for graduate students. The textbook places human rights in a Southeast Asian context, using Southeast Asian examples, and examining regional laws, policies, and practices around human rights.

Each chapter can work as a stand-alone text with individual pdfs of chapters available from the SHAPE-SEA/AUN websites. The lecturer can select from the list chapters to use as textbook.

Use of the textbook

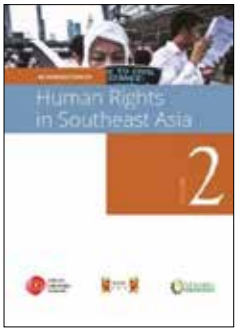
Translations

As of December 2019, the textbook has been translated into a few ASEAN languages namely Cambodian, Myanmar, and Thai. SHAPE-SEA encourages the translation of the Textbook into local SEA languages with permission of AUN-HRE/SHAPE SEA.

List of chapter Textbook Volume 1 to Volume 3

Volume 1

Volume 2



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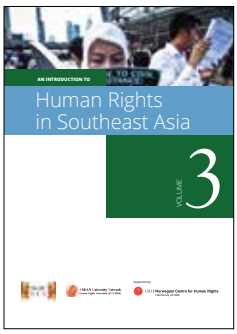

List of Abbreviations

ACSC	ASEAN Civil Society Conference
ACSC/APF	ASEAN Civil Society Conference/ASEAN Peoples' Forum
ACWC	ASEAN Commission on the Promotion and Protection of the Rights of Women and Children
AFRC	Armed Forces Revolutionary Council
AI	Amnesty International
AICHR	ASEAN Intergovernmental Commission on Human Rights
AMM	ASEAN Ministerial Meeting
APA	ASEAN People's Assembly
ASEAN	Association of Southeast Asian Nations
ASEAN-ISIS	ASEAN-Institutes of Strategic and International Studies
CAT	Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
CBOs	Community-Based Organizations
CDF	Civil Defence Forces
CEDAW	Convention on the Elimination of All Forms of Discrimination Against Women
CRC	Convention on the Rights of the Child
CRPD	Convention on the Rights of Persons with Disabilities
CSOs	Civil Society Organizations
ECCC	Extraordinary Chambers in the Courts of Cambodia
EIA	Environmental Impact Assessment
EIP	Ethnic Integration Policy
FGM	Female Genital Mutilation
GONGOs	Government Organized Non-Government Organizations
HDB	Housing Development Board
HRW	Human Rights Watch
IACs	International Armed Conflicts
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICED	International Convention for the Protection of All Persons from Enforced Disappearance
ICERD	International Convention on the Elimination of All Forms of Racial Discrimination
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICJ	International Court of Justice
ICRC	International Committee for the Red Cross
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
IFRC	International Federation of the Red Cross and Red Crescent Societies
IHL	International Humanitarian Law
ILO	International Labour Organization

IMTFE	International Military Tribunal for the Far East
INGO	International Non-Governmental Organizations
IPs	Indigenous Peoples
IYDP	International Year of Disabled Persons
LGBTQI	Lesbian, Gay, Bisexual, Transgender, Queer and Intersex
MICT	Mechanism for International Criminal Tribunal
NEP	New Economic Policy
NGO	Non-Government Organization
NIACs	Non-International Armed Conflicts
NPAs	Non-Profit Associations
NPM	National Preventive Mechanisms
OHCHR	Office of the United Nations High Commissioner for Human Rights
OP-CRC-AC	Optional Protocol to the CRC on the Involvement of Children in Armed Conflict
OP-CRC-SC	Optional Protocol to the CRC Child on the Sale of Children, Child Prostitution and Child Pornography.
PCIJ	Permanent Court of International Justice
POWs	Prisoners of War
RUF	Revolutionary United Front
SCSL	Special Court for Sierra Leone
SCU	Serious Crimes Investigation Unit
SPT	UN Subcommittee on Prevention of Torture and other Cruel, Inhuman or Degrading Treatment or Punishment
UDHR	Universal Declaration of Human Rights
UMNO	United Malays National Organisation
UN	United Nations
UNDRIP	United Nations Declaration on the Rights of Indigenous Peoples
UNGA	United Nations General Assembly
UNSC	United Nations Security Council
UNTAET	United Nations Transitional Administration in East Timor
UPR	Universal Periodic Review
USA	United States of America
UXOs	Unexploded Ordinances
WCAR	World Conference Against Racism, Racial Discrimination, Xenophobia, and Related Intolerance
WGEID	Working Group on Enforced or Involuntary Disappearances
WHO	World Health Organization

Contents

16

Human Rights Debates in Southeast Asia

16.1 Introduction

In preparation for the UN World Conference on Human Rights in Vienna, ministers and other representatives of Asian countries met in Bangkok between 29 March and 2 April 1993. Parallel to the official conference, hundreds of civil society groups also held consultative meetings between 24-29 March 1993. At the end of the Conference, the 'Bangkok Declaration' was adopted by the governments outlining the aspirations and commitments of the Asian region. Concurrently, civil society groups issued the 'Bangkok NGO Declaration' which discussed a number of human rights issues and argued against certain human rights discourses advanced by the governments. Thus, it was in 1993 that the ideas of '**Asian Values**' were first brought to the forefront of human rights debates. These were based not only on the two declarations but also on how the 'East' or Asians (led by China, Singapore, Malaysia and, to certain extent, Thailand) and the 'West' perceived, argued, and debated human rights. Although participating States of the UN World Conference on Human Rights (June 1993) attempted to present balanced views and statements on the issue, decades later, the debate still endures in Asia, especially Southeast Asia. This manifested itself in the drafting process of the ASEAN Human Rights Declaration which was adopted in November 2012.

Asian Values

A discourse focused on a set of values advanced since early 1990s by some Asian political leaders and intellectuals as a conscious alternative to Western political values especially human rights, freedom and democracy. They advocated for harmony, discipline, respect for state sovereignty, obedience to power/ leaders and community values over individual rights. They also asserted social, cultural, historical, economic and political particularities of each society.

Several differences regarding human rights exist between the West and some non-Western (especially Asian) governments. The main issues in this East versus West debate include:

(1) The question of universality versus cultural relativism or whether human rights are universal principles applying to all humanity, or values shaped essentially by the particularities of each region/nation;

(2) The right to intervene versus state sovereignty which argues against "interference" in a country's internal affairs;

(3) Competing priorities (a) amongst different categories of human rights, especially civil and political versus economic, social, and cultural rights, and, (b) individual rights versus collective or group rights; and

(4) The concept of individual rights versus citizen duties.[1]

This chapter attempts to discuss the debates stemming from 1993 and which continue even until today. It also tries to clarify each viewpoint by providing both a conceptual and practical perspective to encourage students to analyse human rights concepts and principles by themselves. It begins with a snapshot of the source of the debates, followed by the debates in detail, and concludes with examples of other arguments.

16.2 Sources of Human Rights Debates

Asia is a huge and extremely diverse region. Composed of diverse ethnicities, cultures, religions, ideologies, politics, and economic situations, Asian societies are therefore enormously heterogeneous. This heterogeneity is reflected in differing perceptions of human rights. However, this chapter focuses only on Southeast Asia and, to certain extent, China, which exerts influence in shaping such debates in the region.

[1] Van Ness, P (ed), *Debating Human Rights* (Asia's Transformations Series), Abingdon: Routledge, 1999, at 8-9.

FOCUS ON
The Western vs Eastern values debate

The focus of this debate centres on questions of universality, state sovereignty, and an understanding of the rights themselves.

West	East
Human rights are universal. The principles anchoring these rights resonate across cultures and geographical borders.	The meaning of human rights should be shaped by the particularities of each region/ nation.
The community of nations can raise questions about human rights violations in other countries.	Human rights should remain internal affairs. The principle of State sovereignty implies non-interference in the internal affairs of other countries.
More priority should be given to civil and political rights.	More priority should be given to economic, social, and cultural rights.
Individuals are rights holders. Therefore, the freedoms and liberties of individuals are sacrosanct.	Nations are built by communities of peoples. Therefore, collective rights are more important than individual liberties. People also hold duties towards their country.

However, it needs to be pointed out that there is no monolithic understanding of West and East. Countries within each group may have different understandings of rights and so West versus East is a false dichotomy.

Even during the drafting process of the Universal Declaration of Human Rights (UDHR), nations continued to debate the very notion of human rights. However, the dialogue became especially heated between liberal and socialist camps with the advent of the Cold War in the early 1950s. Liberals led by the USA and more or less the rest of the West, emphasised individual freedoms including freedom of expression, the media, assembly, and electoral democracy while the socialist/communist camp led by the former Soviet Union and China advocated for social and economic justice, especially rights related to work and working conditions, social security, social welfare, and so on. The differences are rooted in divergent ideological traditions which are, in some ways, reflected in the "three generations theory" of rights:

> *Each generation has emphasised the priorities of a particular grouping of countries. The first generation is comprised of civil and political rights, which seek to protect individual from state … This generation is indeed deeply rooted in the individualistic Western cultural tradition. The second generation, however, which specifies economic, social and cultural rights, reflects priorities of the socialist countries and the Marxist philosophical tradition … Finally, people's rights or group rights constitute a third generation of rights, and respond to the special concerns of the Third World and the history of colonialism, especially in their emphasis on the right to self-determination and the right to development.*[2]

[2] Van Ness (see note 1 above), at 8-9.

It can therefore be seen that the debate can take many forms. In fact, even among Western nations, no one interpretation and/or practice of human rights exists. For example, the notion of the right to life differs widely around the world. Hence, capital punishment has been abolished in Europe whilst in the US, not only is the death penalty legal, it is still practiced by many states.

Human rights debates in Southeast Asia have mainly been advanced by country leaders and a number of personalities in the governments of China, Singapore, and Malaysia. Indeed, the Chinese government's White Paper on Human Rights had been in the pipeline for years, whilst Singaporean criticism of human rights was first initiated by its former prime minister, Lee Kuan Yew, before being elaborated upon by high ranking foreign affairs officials, the best known of whom is Kishore Mahbubani.[3] Some labelled it the 'Singapore School.' It is imperative to note here that the Singapore School does not reject international human rights – it continues to refer to the UDHR, has ratified 3 international human rights treaties (as of 2019 - the Convention on the Rights of the Child, the Convention on the Elimination of All Forms of Discrimination against Women, and the Convention on the Rights of Persons with Disabilities, albeit with reservations), and continues to participate in international and regional human rights systems. Therefore, it does not propose a radical reform of human rights standards but "addresses a strong criticism to the existing human rights system and in particular to the role of the West in that system. They do not contest that human rights are a legitimate issue in interstate relations."[4] In other words, the Singapore School does not contest the principle of the universality of human rights.

But in their eyes:

> *[W]hat is presented as 'universal human rights' is in fact a Western, mainly American, interpretation thereof. Their main claim is one of respect for diversity. Singapore demands the right to determine its own political and social model, including its own view on human rights and democracy. Human rights and democracy are seen as "Values." And, "values are formed out of history and experience of a people." "American or European standards of the late 20th Century cannot be universal".*[5]

In past writings and statements, Singapore has made a point of referring to problems in US society such as an excess of freedoms leading to drugs, crime, broken families, teenage pregnancy, and poverty in the midst of wealth. According to Singapore, all such problems are linked to the American concept of democracy and its overemphasis on individual rights.[6] The West was also targeted for its double standards and for using human rights to further its political and economic agendas.[7] Instead (as will be seen in a later part of this chapter), Singapore advanced economic, vulnerability, cultural, and good governance arguments. The first gives priority to economic development, while the second expounds the vulnerability of the small city-state.

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3 Kishore Mahbubani is a civil servant and career diplomat who has been a member of the Singapore Foreign Services since 1971. He is currently Dean and Professor in the Practice of Public Policy of the Lee Kuan Yew School of Public Policy at the National University of Singapore. One of his books which is relevant to the debate is, Can Asians Think? (1998).

4 Brems, E, *Human Rights: Universality and Diversity*, The Hague, Boston, London: Martinus Nijhoff Publishers, 2001, at 37.

5 Brems (see note 3 above), at 37.

6 Brems (see note 3 above), at 37.

7 Brems (see note 3 above), at 37.

The cultural argument derives from the Confucian tradition emphasising the cultural and ethical differences between Asia and the West. Finally, good governance ties up the other lines of reasoning by emphasising the need for good government to ensure stability, security, and economic development.[8] All these arguments serve as a basis for Asian Values.

FOCUS ON
Asian Values' view of the West

Societal problems in the US such as drug use, a soaring crime rate, broken families, teenage pregnancies, and poverty in the midst of wealth are caused by an excess of freedoms and too much respect for the concepts of democracy and individual rights. Moreover, the West exhibits double standards and uses human rights to further its political and economic agendas.

As regards China, the Beijing White Papers were first published in 1991 as a reaction to the international community's criticisms of its human rights situation after the Tiananmen incident in 1989. This paper not only presented China's position on the issue, but also its actual practice of human rights. In term of China's position, the paper made it clear that:

> *the evolution of the situation in regard to human rights is circumscribed by the historical, social, economic and cultural conditions of various nations, and involves a process of historical development. Owing to tremendous differences in historical backgrounds, social systems, cultural traditions and economic development, countries differ in their understanding and practice of human rights. From their different situations, they have taken different attitudes towards the relevant UN Conventions.*[9]

The White Paper also states that "international human rights activities should be carried on in the spirit of seeking common ground while reserving differences, mutual respect, and promotion of understanding and cooperation." This is linked to the aspect of state sovereignty as it further mentions that "despite its international aspect, the issue of human rights falls by and large within the sovereignty of each country." It also prioritizes the right to development as well as economic, social, and cultural rights. Lastly, it even specified a linkage between rights and duties.[10]

8 Brems (see note 3 above), at 38-49.
9 Brems (see note 3 above), at 52
10 Brems (see note 3 above), at 52

FOCUS ON
Beijing White Papers

The Beijing White Papers were first published by China in 1991 as a response to the international community's criticism of its human rights situation. The paper sought to present China's position on human rights, pointing out that: (1) Human rights evolve according to historical, social, economic, and cultural conditions and thus countries differ in their understanding and practice of human rights; (2) The issue falls within the sovereignty of each country; and (3) Recognition of rights must also be accompanied by the duties of citizens.

It is probably correct to say that the ideas expressed by the Singapore officials and China's government have influenced the discourse of subsequent Asian governments ultimately manifesting itself in the documents adopted and presented during the Vienna World Conference on Human Rights – the Bangkok Declaration. The following sections provide a detailed analysis of the Bangkok Declaration, considers how human rights are deliberated in Southeast Asia, and whether Asian Values merely challenge the West's dominance of the idea, or in fact, whether they contest the very notion of human rights themselves. In so doing, it should be noted that the core group of countries advocating Asian Values consists of several ASEAN countries and China.

16.3 Human Rights Debates in Southeast Asia

Human rights discourse in the region began to take shape soon after the end of the Cold War and culminated at the preparatory meeting for the Vienna World Conference on Human Rights held in Bangkok. The preceding meeting gathered together 34 States including several from the Pacific (including all the Southeast Asian nations except Cambodia and Timor-Leste). In addition, Palestine also participated together with observers from 25 countries (including Canada, France, the Russian Federation, the United Kingdom, and the USA), specialised agencies, intergovernmental organisations, UN organs, national human rights institutions, UN human rights and related bodies, other organisations and institutions such as the International Committee of the Red Cross, and other NGOs.

The final outcome of the meeting was the Bangkok Declaration which was said to contain "the aspirations and commitments of the Asian region." It begins first by reaffirming commitment to the human rights principles recognised by the UN Charter and the UDHR as well as the full realisation of all human rights throughout the world. However, while balanced in some respects, it is controversial in others. For example, it emphasises an "invaluable opportunity to review all aspects of human rights and ensure a just and balanced approach thereto" and points out "the contribution that can be made to the World Conference by Asian countries with their diverse and rich cultures and traditions." These two paragraphs have been interpreted as Asian States bemoaning their lack of input into the human rights discourse thus far. To this day, some in the region still insist human rights are Western in notion and practice and Asia contributed little to the drafting of the UHDR. However, contrary to this belief, the Declaration expresses the need for education and training, increasing the awareness of people, concern for the rights of vulnerable and marginalised groups, and calls for reaffirmation of the right to self-determination and freedom from occupation

and domination. Moreover, it even mentions the possibility of establishing regional human rights arrangements in Asia.

FOCUS ON
Bangkok Declaration by the representatives of Asian States

In preparation for the Vienna World Conference on Human Rights (June 1993), representatives of Asian States gathered in Bangkok to discuss human rights. At the end of this meeting, the Bangkok Declaration was adopted.

The Bangkok Declaration represents the Asian regional stance on human rights as advanced by their governments. Many points have been repeatedly reiterated since then. It reveals several differences between the West and some non-Western (especially Asian) governments as regards their ideas and positions about human rights.

16.3.1 Principles of the Bangkok Declaration

A number of principles were reiterated throughout the Bangkok Declaration, such as:

- The diverse and rich cultures and traditions of the region and the contribution such countries could make to the World Conference;
- Their commitment to the principles contained in the Charter of the United Nations and the UDHR whilst recalling that the question of universal observance and the promotion of human rights and fundamental freedoms in the former had been rightly placed within the context of international cooperation and that it should be encouraged by cooperation and consensus, not through confrontation and the imposition of incompatible values;
- While human rights are universal in nature, they must be considered in the context of a dynamic and evolving process of international norm-setting, bearing in mind the significance of national and regional particularities and various historical, cultural, and religious backgrounds;
- The progress made in the codification of human rights instruments, and in the establishment of international human rights mechanisms, while expressing concern that these mechanisms relate mainly to one category of rights;
- The principles of respect for national sovereignty and territorial integrity as well as non-interference in the internal affairs of States, and avoiding the use of human rights as an instrument of political pressure;
- The universality, objectivity, and non-selectivity of all human rights and the need to avoid politicisation and the application of double standards in their implementation;

- The urgent need to democratise the United Nations system, eliminate selectivity, and improve procedures and mechanisms in order to strengthen international cooperation, based on the principles of equality and mutual respect, and to ensure a positive, balanced, and non-confrontational approach in addressing and realising all aspects of human rights;

- The right to development as a universal and inalienable right and an integral part of fundamental human rights as well as the inherent interrelationship between development, democracy, the universal enjoyment of all human rights, and social justice. In addition, while the interdependence and indivisibility of economic, social, cultural, civil, and political rights was recognised, they should be addressed in an integrated and balanced manner. It also discouraged any attempt to use human rights as a conditionality for extending development assistance;

- The interdependence and indivisibility of economic, social, cultural, civil, and political rights, and the need to give equal emphasis to all categories of human rights;

- The move towards the creation of uniform international human rights norms must go hand-in-hand with endeavours to work towards a just and fair world economic order;

- Economic and social progress facilitates the growing trend towards democracy and the promotion and protection of human rights;

- The main obstacles to the realisation of the right to development lie at the international macroeconomic level, as reflected in the widening gap between the North and the South, the rich and the poor, and that poverty is one of the major obstacles hindering the full enjoyment of human rights;

- The importance of guaranteeing the human rights and fundamental freedoms of vulnerable groups such as ethnic, national, racial, religious and linguistic minorities, migrant workers, disabled persons, indigenous peoples, refugees, and displaced persons;

- The need to explore the possibilities of establishing regional arrangements for the promotion and protection of human rights in Asia; the need to explore ways to generate international cooperation and financial support for education and training in the field of human rights at the national level and for the establishment of national infrastructures to promote and protect human rights if requested by States; and finally that

- Self-determination is a principle of international law and a universal right recognised by the United Nations for peoples under alien or colonial domination and foreign occupation.

The Bangkok Declaration represents the Asian regional stance on human rights advanced as by its governments. Many points have been repeatedly echoed throughout the years. The Declaration reveals several differences between the West and some non-Western (especially Asian) governments' ideas and positions about human rights.

During the same event, participants of 110 NGOs also gathered in Bangkok and on 27 March 1993 adopted the Bangkok NGO Declaration on Human Rights. In it they identified a number of challenges, issues of concern, and proposed a number of recommendations, the key elements of which argue against the governmental positions mentioned above. They are:

- Universal standards are rooted in many cultures and the richness and wisdom of Asian-Pacific cultures have contributed to a new understanding of universalisms (of human rights). As human rights are universal in value, the advocacy of human rights cannot be considered an encroachment upon sovereignty;

- Commitment to the principles of indivisibility and the interdependence of human rights (be they civil, political, economic, social, or cultural rights) using a holistic and integrated approach. One set of rights cannot be used to bargain for another;

- The protection of human rights concerns both individuals and collectivities;

- The enjoyment of human rights implies a degree of social responsibility to the community;

- The need to address human rights of different groups including women, children, workers, persons with disabilities, indigenous peoples, refugees and asylum seekers, and other vulnerable groups;

- The recognition by governments of the right to self-determination especially for people to determine their political status and freely pursue their economic, social, and cultural development;

- An emphasis on the right to development which should be balanced and sustainable, and utilize an integrated approach taking into account civil, political, economic, social and cultural rights, equity and social justice, income distribution as well as a fair allocation of resources. It also called for democratisation of the development process at both the national and international level;

- The ratification of international human rights treaties as well as the improvement of UN human rights mechanisms including existing treaty monitoring bodies; and

- Support for the establishment of effective regional human rights instruments and mechanisms subject to explicit guarantees of their independence and effectiveness and public access, including NGOs.

Thus, the points raised by the Asian (and Pacific) governments and civil society groups expressed both convergence and divergence from the UDHR. Following is a discussion on the main debates mentioned at the beginning of the chapter although it is vital to first conceptually clarify the arguments concerning Asia's contribution to the drafting process of the UDHR and the very concept of Asian Values.

FOCUS ON
Bangkok NGO Declaration on Human Rights

Parallel to the meeting held by Asian ministers in preparation for the Vienna Conference, 110 NGOs also gathered in Bangkok to discuss their human rights aspirations. At its conclusion, they adopted the Bangkok NGO Declaration on Human Rights which articulated their positions on the debate, identified issues of concern to the region, the challenges faced in addressing them, and other recommendations.

16.3.2 Does the UDHR reflect Western values?

A discourse that has remained dominant in Asia (and other regions) concerns the UDHR being a product of the West and which also highlights Asia's minimal contribution during the drafting process. As such, the UDHR is considered a reflection of Western concepts and aspirations.

In 1945, when the UN was established and the United Nations Charter adopted, only 51 States comprised its original members. Of these, Australia, China, Egypt, India, Iran, Iraq, Lebanon, New Zealand, the Philippine Republic, Saudi Arabia, and Syria came from Asia and the Pacific. Thailand joined in 1946. Most countries and territories in Asia-Pacific were still under colonisation. By 1948, when the General Assembly adopted the UDHR, the UN was composed of 58 members including Afghanistan, Burma (Myanmar), and Pakistan. In 1993 at the time of the Bangkok Declarations, it had grown to include 184 members. As of 2020, 193 States have joined the UN.

However, upon examination of the members of the UDHR Drafting Committee, representatives of all regions, religions, cultures, and different political leanings participated in the process. Led by Eleanor Roosevelt, wife of the then late President of the USA, the Committee was composed of eight other members: three from the Asia-Pacific, three from Europe, and two from the Americas. Interestingly, although the Committee lacked African input, complaints or criticisms against the UDHR as a product of the West emanated mainly from Asia despite their representation. Women such as Hansa Mehta from India (a delegate to the UN Commission on Human Rights) and Begum Shaista Ikramullah from Pakistan (a delegate to the UN Third Committee) also made important contributions to the process. For example, Mehta was instrumental in making a significant change to the language of Art 1, by replacing "all men are born free and equal" to "all human beings are born free and equal."

> *It is often argued that the UDHR is predominantly Western in its approach, but the roots of the UDHR spread in many directions. Admittedly, the geographical balance among the delegates was different from today's composition of the world community, and indigenous peoples and minorities were not represented during the drafting and adoption stages, but the drafters' foresight in meeting popular and universal desire and demands has clearly withstood the test of time.*[11]

Fourteen out of the 58 UN members or around 20 % represented the Asian-Pacific region at the time. Only Saudi Arabia from the Asia Pacific abstained and no State objected to the UDHR.

[11] Eide, A, and Alfredsson, G, 'Introduction' in Alfredsson, G, and Eide, A (eds), *The Universal Declaration of Human Rights*, The Hague: Martinus Nijhoff Publishers, 1999, at xxv-xxvi.

DISCUSSION AND DEBATE

Was the Drafting Committee of the UDHR Western?

The UDHR Drafting Committee was composed of the following members:

Dr Charles Malik (Lebanon),
Alexandre Bogomolov (USSR),
Dr Peng-chun Chang (China) – Vice-Chair,
René Cassin (France),
Eleanor Roosevelt (US) – Chair,
Charles Dukes (United Kingdom),
John P Humphrey (Canada),
Hernan Santa Cruz (Chile), and
William Hodgson (Australia).

By then, representatives from Egypt, India, Iran, and the Philippine Republic also comprised part of the Commission on Human Rights.

Seventy years after its adoption, the UDHR remains relevant and is the most cited document by all UN States. Moreover, all countries have expressed their commitment to the human rights enshrined in the Declaration. However, universal adoption does not mean universal consensus about human rights. Indeed, tensions and differences on various points of substance and procedure, including the rights and duties contained in the document, still prevail with debates continuing to endure in some regions. But even in these debates, the UDHR stands as a frame of reference as it includes recognition of civil, political, economic, social, and cultural rights, references to a social and international order in which rights and freedoms can be fully realised, and recognition of individuals' duties to each other and the community in which they live. Accordingly, the UDHR's special place is evidenced by many documents including the constitutions and national legal frameworks of all States in the world.

16.3.3 Asian Values

There is no one set of values in Asia as the region is remarkably diverse in terms of political, economic, cultural, social, and political aspects/affiliations. It is also full of contradictions, which, in some cases, co-exist. One very clear example concerns the economic liberal-capitalistic model and socialist political structures of government. So what are Asian values when applied to human rights? As de Bary put it, "Values ordinarily connote the core or axial elements of a culture, the traditional ground (mostly seen as moral but not exclusively so) on which rest the culture's most characteristic and enduring institutions."[12] However, one could argue there is no 'shared Asian identity,' no common 'Asian Culture,' or 'Asian civilisation,' only "irreducible differences among the major Asian civilisations."[13]

[12] de Bary, WT, *Asian Values and Human Rights: A Confucian Communitarian Perspective*, Cambridge: Harvard University Press, 1998, at 1.

[13] De Bary (see note 16 above), at 2.

The Asian Values argument

The Asian Values discourse is a recent construct, mostly introduced to suit ideological or political purposes. As discussed previously, China and Singapore seemed to be the source of the concept. It is based on a belief that only strong steady leadership can keep communal peace, and only authoritarian governments can provide firm policies and the social stability necessary for economic growth. This concept has been widely accepted by many States in Southeast Asia seeking to emulate the economic success of Singapore (and China). Such models are based on strengthening State authority with social discipline given priority over the development of democratic institutions. In this context, human rights are treated as a matter of law and order and are used to uphold State authority.

Arguments against Asian Values

Amartya Sen[14] advanced an argument against Asian Values as follows:

(1) The high economic growth of China or South Korea (and Singapore) in Asia cannot be taken as positive proof that authoritarianism does better in promoting economic growth. There is little general evidence that authoritarian governance and the suppression of political and civil rights are really beneficial in encouraging economic development. Economic development depends on "helpful policies," among them openness to competition, the use of international markets, a high level of literacy and school education, successful land reforms, and public provision of incentives for investment, exporting, and industrialisation. There is nothing whatsoever to indicate that any of these policies were inconsistent with greater democracy and had to be sustained by the elements of authoritarianism that happened to be present in South Korea (before the democratic changes in 1988), Singapore, or China.

(2) Are freedom-oriented perspectives really absent in Asia? The contemporary authoritarian interpretation of Asian Values concentrates on Confucianism. But, as pointed out, Asia is diverse. Even in China, Confucianism is not the only tradition. Examples of other traditions include Buddhism where great importance is attached to freedom, and much of the early Indian philosophy to which Buddhist thoughts relate encompass volition and free choice. Nobility of conduct must be achieved in freedom, and even ideas of liberation (such as moksha) have this feature. The view that the basic ideas underlying freedom and rights in a tolerant society are "Western" notions and somehow alien to Asia, is hard to comprehend.

In addition to Amartya Sen, former Deputy Prime Minister Anwar Ibrahim, as long ago as December 1994 warned against citing "Asian Values" as an excuse for autocratic practices and denial of basic human rights/civil liberties.[15] Similarly, President Kim Dae Jung of the Republic of Korea stated categorically in 1996 that he found arguments advocating respect for cultural differences in order to justify authoritarian rule in Asian States offensive in the extreme.[16]

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[14] Sen, A, 'Human rights and Asian Values' Sixteenth Annual Morgenthau Memorial Lecture on Ethics and Foreign Policy, 25 May 1997.

[15] Keynote address to the Asian Press Forum in Hong Kong on 2 December 1994, cited by the Department of Foreign Affairs and Trade, Submission, p. 814.

[16] The speech given by President Kim on receiving an honorary doctorate from the University of Sydney, reported in The Australian, 3 September 1996, p. 2.26

16.3.4 Universality versus cultural relativism

Another debate that exists in the region is whether human rights should be understood as **universal principles** applying to all humanity, or as values shaped essentially by the **cultural particularities** of each region/nation.

Universal principles

A central philosophy in human rights propounding a set of shared values, regardless of culture or nationality. These values include equality, dignity of person, respect for the rule of law, and so on.

Cultural particularities

An argument advanced by some States that human rights should be understood as values shaped by particular beliefs and principles specific to different cultures, regions, and nations. It is a criticism of the belief in universal principles.

Cultural relativism should not be ignored

Article 8 of the 1993 Bangkok Declaration on Human Rights adopted by the ministers and representatives of Asian States stipulates:

> *[t]hat while human rights are universal in nature, they must be considered in the context of a dynamic and evolving process of international norm-setting, bearing in mind the significance of national and regional particularities and various historical, cultural and religious backgrounds [author's emphasis].*

In 1993, at the Joint Communiqué of the 26th ASEAN Ministerial Meeting (AMM) in Singapore, the foreign ministers of six ASEAN Member States announced that "human rights should be addressed in a balanced and integrated manner and protected and promoted with due regard for specific cultural, social, economic and political circumstances."[17] In the same year, the foreign minister of Singapore warned that "universal recognition of the ideal of human rights can be harmful if universalism is used to deny or mask the reality of diversity."[18]

Universalism should take precedence over cultural relativism

Amartya Sen has responded to debates on cultural relativism by saying that, in its most general form, the notion of human rights builds on our shared humanity.[19] These rights are not derived from the citizenship of any country or membership of any nation, but are entitlements of every human being. As such, they differ from constitutionally created rights which are guaranteed for specific people only (e.g. American or French citizens). For example, the human right of a person not to be tortured is independent of the country of which he/she is a citizen and thus exists irrespective of the government of that country. A government can, of course, dispute an individual's legal right not to be tortured, but this does not dispute his or her human right not to be tortured.

As mentioned earlier, while no universal consensus of human rights exists, human rights as values are universal in that they belong to all people regardless of who or where they are. This was reiterated in the ASEAN Human Rights Declaration adopted in 2012 which emphasised (in its General Principles) that "All human rights are universal, indivisible, interdependent and interrelated. … At the same time, the realisation of human rights must be considered in the regional and national context bearing in mind different political, economic, legal, social, cultural, historical and religious backgrounds." This could be interpreted to mean that the content of human rights are the same everywhere (e.g. the right to food is enjoyed by all humans

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17 ASEAN, Joint Communique of the Twenty-Sixth ASEAN Ministerial Meeting Singapore, 23-24 July 1993, https://asean.org/?static_post=joint-communique-of-the-twenty-sixth-asean-ministerial-meeting-singapore-23-24-july-1993.

18 Wong, KS, 'The real world of human rights' National Archives of Singapore, 16 June 1993, available at http://www.nas.gov.sg/archivesonline/speeches/record-details/7b65bcf8-115d-11e3-83d5-0050568939ad

19 Sen (see note 14 above).

although the actual food consumed may differ from country to country or culture to culture. However, such differences do not change one's right to be fed). Human rights are, therefore, universal. Therefore, the notion of rights are not dependent on or a reflection of any particular culture.

16.3.5 Non-interference and State sovereignty versus international criticism

Respect for national sovereignty and territorial integrity

The belief that human rights are part of a State's internal affairs. Other nations should therefore respect State sovereignty and not intervene in human rights issues occurring in the territories of other nations.

Debates regarding **national sovereignty and territorial integrity** or international interference in a country's internal affairs are strongest in times of crisis.

State sovereignty should not be ignored

The 1993 Bangkok Declaration emphasised the principles of respect for national sovereignty and territorial integrity as well as non-interference in the internal affairs of other States, and the non-use of human rights as an instrument of political pressure. As well as articulating its purposes and principles to strengthen democracy, enhance good governance and the rule of law, and to promote and protect human rights, fundamental freedoms, and social justice, the ASEAN Charter clearly reiterates respect for the independence, sovereignty, equality, territorial integrity, and national identity of all ASEAN Member States and non-interference in their internal affairs. Thus, human rights are considered the internal affairs of States.

State sovereignty should not be used as an excuse to intervene

The Vienna Declaration and Programme of Action adopted by the World Conference on Human Rights on 25 June 1993 specifies in point 4 that:

> *The promotion and protection of all human rights and fundamental freedoms must be considered as a priority objective of the United Nations in accordance with its purposes and principles, in particular the purpose of international cooperation. In the framework of these purposes and principles,* ***the promotion and protection of all human rights is a legitimate concern of the international community*** *[author's emphasis].*

So, it's considered legitimate for international community to intervene in gross and systematic human rights violations/concerns in other countries and this has been recognised by all other regional human rights systems. In addition, Amartya Sen has argued that since human rights are attributable to individuals as human beings and not as citizens of particular countries, the reach of corresponding duties may also be commensurably wide, irrespective of citizenship.[20] As such, barriers of nationality and citizenship do not preclude people from taking a legitimate interest in the rights of others and even from assuming some duties related to them.

[20] Sen (see note 14 above).

A resolution adopted by the General Assembly in 2005 states that:

(138) Each individual State has the responsibility to protect its populations from genocide, war crimes, ethnic cleansing and crimes against humanity. This responsibility entails the prevention of such crimes, including their incitement, through appropriate and necessary means. […]

(139) The international community, through the United Nations, also has the responsibility to use appropriate diplomatic, humanitarian and other peaceful means, in accordance with Chapters VI and VIII of the Charter, to help protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity. In this context, we are prepared to take collective action, in a timely and decisive manner, through the Security Council, in accordance with the Charter, including Chapter VII, on a case-by-case basis and in cooperation with relevant regional organisations as appropriate, should peaceful means be inadequate and national authorities manifestly fail to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity.[21]

The concept of having a Responsibility to Protect was adopted by all Southeast Asian countries. This constitutes a paradigm shift as it emphasises the responsibility of the international community to take action to address extreme situations where systematic and gross human rights violations have occurred.

CONCEPT
Responsibility to protect

In cases where systematic and gross human rights violations are occurring, it is the responsibility of the international community to take action to address the situation. This is known as the responsibility to protect.

16.3.6 Competing priorities: Civil and political rights versus economic, social, and cultural rights

Throughout the Cold War, human rights were politicised in a polarised world and commonly abused through ideological arguments. While Western States aimed to reduce human rights to the traditional concept of civil and political rights, their socialist counterparts and many developing countries defended the dominance of economic, social, and cultural rights.

Certain rights should be prioritised

Many argue that in developing countries, economic and social rights are more important than political and civil rights; thus, the Western preoccupation with (individual) civil and political rights threatens to undermine the social cohesion of more communitarian traditions. As such, developing countries, including those in Southeast Asia, seem resistant to basic civil and political rights, arguing that:

[21] United Nations General Assembly, 'Resolution adopted by the General Assembly on 16 September 2005: 60/1. 2005 World Summit Outcome' 24 October 2005.

- They hinder economic development and growth
- The poor would invariably choose economic rights over political freedoms
- Democracy and political freedoms are particularly "Western" concepts which contradict "Asian Values" emphasising discipline and order over freedoms.[22]

The opposition to economic and social rights emanates from fears that expansive lists of social and economic rights may result in "rights inflation" and downgrade "genuine" human or civil and political rights. Others claim that securing a minimum income, education, and healthcare, necessarily require a "large" State, or even a system of socialism.[23] In the same vein, a legalistic argument against social and economic rights is that they are not 'justiciable' or not appropriate for adjudication by courts.

At a discursive level, in the Bangkok Declaration, Southeast Asian States reaffirmed the interdependence and indivisibility of economic, social, cultural, civil, and political rights, and the need to give equal emphasis to all categories of human rights. As such, they welcomed the international consensus achieved during the World Conference in Vienna (1993) and reaffirmed ASEAN's commitment to human rights and fundamental freedoms as laid out in the Vienna Declaration and Program of Action. Although claiming the interrelatedness, indivisibility, and equality of all rights, Asians States seem to have contradicted themselves as the Bangkok Declaration expresses that, "economic and social progress facilitates the growing trend towards democracy and the promotion and protection of human rights." This essentially gives priority to one category of rights over another. Many countries still point to poverty and a lack of economic development as a pretext for prioritising human rights in practice.

No right should be given priority over another

Arguments for the equality and interdependence of all categories of rights are found in the preamble (para 3) of the International Covenant on Civil and Political Rights which states:

> *The ideal of free human beings enjoying civil and political freedom and freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his or her civil and political rights, as well as his or her economic social and cultural rights*.

The examples of Brunei and Singapore show that economic progress does not guarantee the enjoyment of civil and political rights. Moreover, it cannot be argued that rights are not interdependent. For example, the rights to free speech and peaceful assembly are crucial to assert claims to social and economic rights. Similarly, the right to vote, participate in elections, or free speech can be undermined if the rights to education or food are not fully realised. Therefore, the discourse on prioritizing human rights does not hold true.

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22 Sen, A, *Development As Freedom*, Oxford: Oxford University Press, 1999, at 149.

23 Gozler Camur, Elif, Civil and Political Rights vs. Social and Economic Rights: A Brief Overview, Journal of Bitlis Eren University, Vol 6, No.1, June 2017,205-214.

16.3.7 Individual rights versus citizen duties

For some States, rights can only be recognised if people perform their duties. Rights stem from social contracts; hence, people may enjoy rights only if they agree to abide by laws and are productive members of society. Those who break laws or fail to contribute should accordingly not benefit from such rights.

DISCUSSION AND DEBATE

Individual rights versus citizen duties

Human beings have rights, but they also have duties towards other society members, as well as to the community as a whole. However, are rights more important than duties or vice versa? Is it possible to have one without the other? This argument forms a central feature of the Asian Values debate. Defenders believe duties should be prioritised over rights, and that rights should be earned. By contrast, universalists point to the inherence and inalienability of human rights. Consequently, each person is entitled to such rights regardless of whether or not they have respected their duties. Is this fair?

- Do those who disregard the rights of others (e.g. criminals) still deserve rights?
- Should a person's human rights depend on how they perform their duties to society?
- Should those undertaking more social duties (e.g. a person volunteering to join the army) be given more rights?

Citizen's duties should be prioritised over human rights

This argument states that a decent society is based on duties and responsibilities. Therefore, rights are not inherent and must be earned by good conduct.[24] Asian societies place a higher value on duty, subordinating the interests of individuals to the higher good of the community.

Human rights are not dependent on duties

The concept of human rights does not deny responsibility or duties. Individuals have duties to others, their families, the community, and to some extent, the State. Individuals also have a reciprocal obligation to respect the rights of others in return for having their own rights respected, and to exercise such rights responsibly. These duties were outlined in Art 29(1) of the UDHR (and other international covenants):

[24] Ghai, Y, 'Human rights and Asian values' *Public Law Review*, 1998, Vol 9, No 3, pp 168-182.

(1) Everyone has duties to the community in which alone the free and full development of his personality is possible.

(2) In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order, and the general welfare in a democratic society.

(3) These rights and freedoms may in no case be exercised contrary to the purposes and principles of the United Nations.

By contrast, international human rights treaties place emphasis on State duties or obligations. Therefore, as parties to international human rights law, States accept the obligations prescribed by the treaties they voluntarily adhere to. Generic obligations include:

> ***Obligation to respect:*** States are required not to take any measures that would prevent individuals from exercising and enjoying their rights. State Parties must refrain from interfering with the enjoyment of individual rights;
>
> ***Obligation to protect:*** States are required to ensure that third parties do not deprive or violate the rights of individuals; and
>
> ***Obligation to fulfil:*** States must take appropriate legislative, administrative, budgetary, judicial, and other actions/measures to enable the full realisation of rights as recognised by the treaties.

It must be noted that whilst economic, social, and (some) cultural rights may be progressively realised, civil and political rights are immediate as this category is not subject to progressive realisation. In addition, non-state actors also have duties or obligations to respect, protect, and provide remedies to victims of human rights violations. As stated in the UDHR, every organ of society has a responsibility to respect, promote, and protect human rights.

A. Chapter Summary and Key Points

In preparation for the Vienna World Conference on Human Rights held in June 1993, representatives of Asian States congregated for a meeting in Bangkok to discuss human rights. At its conclusion, the Bangkok Declaration was adopted.

The Declaration represented Asia's regional stance on human rights as advanced by its governments. It contained some statements on human rights that are still the subject of debate as it tried to draw a distinction between Western and Asian perceptions of human rights. This difference in perception can be summarised as follows.

First, Asian governments believe in respecting national sovereignty and the principle of non-interference in internal State affairs, and human rights should not be used as instruments of political pressure. This principle has been reiterated in the ASEAN Charter (adopted in 2007).

Second, human rights should be understood in the context of national and regional particularities, and historical, cultural, and religious backgrounds. Articulated in the Bangkok Declaration, such arguments have been used by governments to question the idea of the universal application of human rights.

Third, related to the notion of regional particularities, Asian governments have argued that the economic and social well-being of people in Asia have to be given priority before recognition of their civil and political freedoms. This idea has been co-opted by some Asian governments to justify authoritarian styles of governance.

B. Typical Exam or Essay Questions

- What are the arguments against the idea of the universality of human rights?
- Is the Universal Declaration of Human Rights 'Western' in nature?
- Explain the principle of non-interference. What arguments are advanced by those opposing this principle?
- Should civil and political rights be given priority over economic and social rights?

C. Further Reading

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17

Civil Society and Human Rights

17.1 Introduction

Civil society

Distinct from government, civil society refers to those working in formal and informal organizations on social issues.

Civil society has played a significant role in the protection and promotion of human rights and in the democratization of Southeast Asian countries, especially in the last few decades. Not only were these groups major players in creating the demands that led to democratic transition in many countries, they also monitored States and participated in **public policy advocacy** to further the democratic consolidation process and the realization of human rights.

Public policy advocacy

Government plans to tackle such issues as education, health, or the environment. Advocacy refers to people's comments, complaints, or advice in response to the above.

However, in common with the rest of the global community, Southeast Asia is currently witnessing challenges to the existing notion of civil society as an agent for democratization and human rights. In particular, the rise of conservative forces within its ranks has led some sections to pursue decidedly un-democratic and illiberal goals and support non-inclusive society. Accordingly, due to increased State control and a resulting shrinking space for civil society, the need to explore its role in this changing context has become pressing.

CONCEPT
Shrinking space for civil society

A common complaint in recent years, this can refer to either physical space (places where public meetings or demonstrations may be held) or space to talk (in e.g. media outlets). Regardless, many argue such spaces are fast disappearing or are increasingly restricted by law or State controls. Thus, people now lack agency to talk to their governments, complain, or discuss such issues as human rights, democracy, peace, or the environment.

This chapter introduces the debate on civil society's role to protect and promote human rights and democratization in the context of the State and society as a whole. The first section explores the meaning of civil society, with particular emphasis on the liberal concept that views it as an independent sphere whose purpose is to monitor and balance the power of the State and the market. It goes on to discuss the sector's human rights work. Following, the chapter examines civil society development in the Southeast Asian context and how it contributes to such work. The last section provides a brief overview of the space for civil society and the role it plays in ASEAN.

17.1.1 Defining civil society

Despite wide use of the term, civil society is still a contested concept with no clear definition. It is generally perceived from two main standpoints – liberal and communitarian. The liberal perspective sees it as a space independent from the State and the market consisting of actors actively monitoring and counter-balancing the power of both. The communitarian approach, on the other hand, focuses on the values and norms of civility, social cohesion, and active citizen participation. Both believe civil society is a vital element of democracy and both gained momentum from the 1990s onwards when the end of the Cold War led to increasing academic interest and a rise in the number and activities of civil society groups around the world.

Liberal concept of civil society

The liberal approach towards civil society has its roots in the **liberal philosophy** of the European Enlightenment of the 17th and 18th centuries. This viewpoint contends States should not interfere in the private lives of individuals. Thus, civil society should operate as the sphere between the State, family, and the market by exercising its rights and freedoms to counterbalance State power and influence State policies. While interest groups or private sector organizations have their own agendas, civil society uses collective action and acts on a voluntary basis for public non-profit interests. Moreover, civil society, unlike political associations, does not aim to capture State power.

Liberalist philosophy

A school of philosophy during the European Enlightenment. Famous liberal philosophers such as John Locke and Jean Jacques Rousseau supported democracy, human rights, the limitation of governmental powers, and the rule of law. Their influence resulted in the introduction of the first rights-based constitutions across Europe and North America.

This perspective recognizes civil society as a key actor in democratic systems whose main role is to counterbalance the power of the State and/or market forces. Civil society organizations (CSOs) include, for example, trade unions, farmer groups, non-governmental organizations (NGOs), social movements, community-based organizations, and religious associations. Since civil society generally operates within the rule of law using non-violent tactics, groups such as terrorists, armed groups, or extremists are usually excluded from its definition. As a counter balance to government power, civil society is often perceived to be in a hostile relationship with the State. Indeed, that, together with the freedom it enjoys and civil society's levels of activism combine to indicate the strength of a State's democracy. However, this is not always the case. In some instances, it may be advantageous for the State and civil society to collaborate by working together (e.g. when CSOs help deliver services in rural areas) or engage through more formal channels (e.g. in the field of human rights where the State's capacity as duty-bearer may require the help of civil society or when governments require its input to make policy). At this point, it would be useful to note that civil society does not only operate in democracies; such engagement also exists in repressive regimes.

CONCEPT
Is an NGO the same as a CSO?

Sometimes the term NGO is used interchangeably with its counterpart, CSO. However, there are slight differences between these bodies. A non-government organization usually refers to an organization working on a government issue, but which is outside the government. Hence, they are "non-government" entities. Usually, they focus on such issues as human rights, the environment, health, education, and so on. By contrast, a civil society group usually consists of a body of people organized or interested in any social interest issue and can include neighbourhood groups or consumer associations. They too are independent of the State.

Communitarian concept of civil society

Communitarian
The idea that one's community is the main source of an individual's identity and social relationships. Communities encompass those living near or in direct communication with the person.

From a **communitarian** perspective, the liberal view of civil society overemphasizes individualism, at the expense of communities which actually form the basis of its values. Thus, this view focuses less on the independent sphere or interactions between the State and private sectors, and more on the nature of activities within groups. In other words, this perspective emphasizes **civic virtues** (encompassing values such as civility, tolerance, social engagement, and voluntarism) over the State's use of coercion, authoritarian rule, and violence. The communitarian approach therefore regards CSOs as covering, e.g. community associations, charities, or faith-based organizations, which while actively engaging in discussion, consultation, or service delivery for the benefit of their communities, may not necessarily question or counter State power or business sectors.

Civic virtue
Actions people take in a society for the good of that society. For example, not littering or politeness could be considered civic virtues.

As a space of public deliberation, civil society creates a civic culture where people actively engage in political participation by deliberating public policies or social issues. The social capital concept, which shares a common premise with the communitarian approach, sees space for public deliberation as vital capital for democratic development. According to Robert Putnam, social capital comprises networks, norms, and trust. Such are the resources that help to strengthen civic culture – an important foundation for democracy. By networks, Putnam was referring to associations such as neighbourhood groups, friendship networks, sports clubs, and so on. It is through such networks that people develop the values of reciprocity and trust, allowing citizens to cooperate in collective actions for mutual benefit. Some argue it is this civic culture that forms the foundation for democracy.

FOCUS ON
Robert Putnam and social capital

Robert Putnam is a US political scientist, famous for his work on social capital. Capital is a form of wealth or resource, so social capital refers to resources which have value for individuals within society, such as networks, relationships, shared values, education, and communication. For example, in his famous text, Bowling Alone: The Collapse and Revival of American Community, Putnam points out that although the number of people going ten-pin bowling in the US has increased in recent decades, the number of bowling leagues (or groups of people competing against other leagues) has declined. Hence, more people are bowling alone meaning social capital in the US is declining.

Social capital is essential in civil society because communities with higher social capital tend to be safer and happier. Hence, the more networks there are, the greater the trust individuals will have in one another, and the more likely widely held norms such as civic virtues (e.g. keeping the neighbourhood clean) will be practiced.

Both libertarian and communitarian approaches share a common understanding that civil society is a space of voluntary (not mandatory) associations separate from the State, although the level of independence varies between the two. The latter recognizes the potential usefulness of a partnership between government and civil society in order to solve social issues. Accordingly, people in civil society may

associate and act collectively to pursue common interests or values. This differs from other concepts of collective action, for example, social movements which focus on how collective actions are mobilized or organized, or revolutions which aim to capture State power. In both approaches, civil society is seen to play a significant role in democracy, either as actors to promote State accountability or as a space to develop civic culture through deliberation and citizen engagement in public policy. CSOs also help to promote human rights by curtailing State abuse of power and raising human rights awareness of people's rights through deliberations.

17.1.2 Forms of civil society

In this chapter, civil society is broadly defined as a sphere for voluntary non-profit associations to address public affairs. As such, CSOs are often seen to include voluntary organizations of many different kinds ranging from **philanthropic institutions** to political movements. One common form is NGOs or non-profit organizations. Others include community-based organizations (CBOs), trade unions, human rights advocacy groups, the media, voluntary associations, some business associations, charities, human rights organizations, philanthropy groups, and academic institutions. While churches and religious organizations are not usually considered CSOs, faith-based groups campaigning for certain causes or providing services to the public are seen as such. In addition, CSOs may be members of **social movements** related to civil society but may operate outside formal institutional or political channels. The work of civil society can be integrated into a variety of formal structures or State interactions because such engagement comprises a factor of public participation policy-making.

Philanthropic institutions

An organization that raises money for charities and other causes.

Social movements

Collective actions (including protests, meetings, and online activities) designed to engage with States on specific issues. While social movements commonly challenge or resist State power, they are not organizations or bodies but merely groups of people, for example, protesting government corruption online through hashtags.

It should be noted that just as not every non-State actor can be considered part of civil society, not every CSO is independent from the State or the private sector. Indeed, sometimes their objectives may overlap. In particular, the line between government and business can become blurred when governments invest in profit-making endeavours. A government performs like a business when its functions are privatized to make profit whilst still under partial State control, e.g. privatized educational institutions, hospitals, or electricity companies. These bodies have to make a profit to sustain their business of providing the basic necessities while also performing a government service. Sometimes businesses act on behalf of governments, for example, when they receive State concessions to run plantations. Businesses also engage in civil society activities through their philanthropic arms or when engaging in Corporate Social Responsibility activities (see Chapter 13 of this textbook). However, when the philanthropic activity promotes the business, the 'not-for-profit' element is questionable at best. Similarly, some civil society activities such as the provision of micro-financing, the selling of products, or fund-raising can also be akin to private sector activities.

17.1.3 Common challenges to civil society

In some countries, especially in Southeast Asia where democratic space for freedom of expression and association is limited, States can form their own CSOs or NGOs for service delivery or to garner support for policy recommendations under government control. Although sometimes known as **GONGOs** (government organized non-government organizations), such groups are still CSOs as they are not officially connected to government; however, their independence can be questioned. While GONGOs may give the appearance of public participation, they can be used by States to avoid it as approved GONGOs are not genuine public organizations. Further, when States claim civil society participation is permitted in public affairs but those CSOs are actually GONGOs, such claims are again questionable. Another sensitive issue in recent years occurs when CSOs engage in "non-civil" or violent activities, or attack

GONGOs

Bodies established with strong support from States to undertake activities aligning with State aims and objectives. GONGOs can be think-tanks (providing research to support government policies), programs, humanitarian organizations (solely reliant on government funding), or labour organizations (supporting government policies on worker rights).

democratic principles. In recent years, this worldwide phenomena has generated much discussion over 'uncivil society,' i.e. when **civil disobedience** becomes a civil virtue, or when it becomes uncivil.

Civil disobedience

When people disobey rules and potentially break the law to express their opinions or claim their right to assemble. Although civil disobedience movements are many and varied, the tactic was most famously used by Mahatma Gandhi's non-violent resistance movement against British colonial rule.

DISCUSSION AND DEBATE

Uncivil society

With the current rise of conservative values, scepticism towards human rights, and the call for undemocratic changes by some in civil society, the notion of 'uncivil society' has taken hold. Previously used in mainly positive ways to peacefully change society's shortcomings, in recent years, CSOs have sought the exclusion or limitation of minority group rights (e.g. immigrants, LGBTQI groups, or religious minorities). Many have even resorted to violence. Such a situation is mirrored by political developments worldwide which have witnessed the rise of anti-representative, anti-liberal democracy movements. Some CSOs even support political leaders who do not promote or respect human rights. Examples in Southeast Asia include the "Yellow Shirt" protesters in Thailand (mid-2000s to mid-2010s) who demanded a military takeover of a democratically elected government; extremist Buddhist groups attacking Muslims, and in particular the Rohingya, in Myanmar in the late 2010s; popular support for President Rodrigo Duterte of the Philippines who is known for his 'War on Drugs' (which is responsible for countless extrajudicial killings of alleged drug-users) and his suppression of critical voices against the policy; and finally in Indonesia, where extremist Islamic groups recently launched attacks against religious minorities.

The anti-democratic stance of these groups and their use of violence leads us to ask whether they can be considered part of civil society at all, since the term has long been associated with democracy and civic culture. By contrast, uncivil society does not support democracy, not only because it actively works against representative democracy, but also because it does not enhance democratic practices and culture such as tolerance, inclusion, and respect for diversity.

How, then, to understand this development in the context of a discussion on civil society?

- Can we even call these groups civil society? If not, what are they?
- Is uncivil society the same as civil society utilizing civil disobedience but to a greater extent?
- Should these groups be allowed the right to speak and assemble if they deny the rights of non-discrimination and personal security to other groups?
- Should the definition of civil society still focus on the 'civil' nature of their activities?

Although civil society is often seen as an independent sphere, this may not be the case in some countries. In particular, control of civil society may occur indirectly utilizing, for example, laws of registration or legislation governing a CSO's legal status which can prevent such groups from operating freely. Such is the case in Southeast Asia where the use of legal and financial measures to control CSOs is common, e.g.

Cambodia, Lao PDR, Vietnam, and Brunei Darussalam. In addition, activities critical of State authorities or cultural norms may be criminalized.

Another challenge is the mounting competition between genuine civil society and State-led civil society. For example, in Lao PDR and Vietnam, State-formed mass organizations of women and youth groups require affiliation to the State political party (such as the Communist Party), and are much stronger than non-State formed organizations. Some States fund CSOs (e.g. the State-funded Health Promotion Office in Thailand gives financial support to other CSOs) or develop forms of State-civil society partnerships. In other countries, CSOs receive contracts from the government to deliver necessary services including education, healthcare, and other basic public services. These practices put the autonomy of civil society in question, while at the same time increasing State legitimacy to involve civil society in government processes.

DISCUSSION AND DEBATE

Civil society, the State, and the private sector

While civil society is seen as independent from the State and business, the actual nature of this relationship is not always clear. Debate is currently centred around the independence and inter-dependence of civil society from State and States from business; the hostility between civil society, business, and the State; and the strength and weaknesses of civil society in relationship to the private sector and the State.

Since civil society works to monitor, counter-balance, and limit the power of the State and business, it is often assumed civil society should be totally independent, but in reality this relationship is complicated and does not necessarily imply one actor winning over the other, but can entail different levels of collaboration, complementarity, and even co-optation. How independent should civil society be? From the list below, which of these activities indicate a CSO is not independent from government or business?

Is a CSO independent if it:

- receives funding from the government?
- makes a profit by selling vaccination shots?
- promotes government agricultural policy by training farmers?
- supports a political party during an election?
- works with a trade union to support worker's rights?
- advertises and sells free trade coffee whilst giving a profit to the coffee company?

17.2 Roles of Civil Society in Human Rights Protection

Civil society is a crucial actor in the promotion of democracy and human rights. It has played a vital role in democratic change and democratic consolidation in many countries, especially in modern political history by limiting State power and engaging public participation. As will be discussed later, (see also Chapter 8 of this textbook), Southeast Asian civil society has been crucial in the transition from authoritarianism to democracy in the 1980s and 1990s. These experiences in democratization show that civil society does indeed play a role in both democracy and dictatorships, although obviously their roles in each differ. In an open political environment where civil society is active and enjoys independence from the State, its contribution is to monitor and counter-balance State power. According to the liberal view of democratic society, a vibrant civil society is crucial to ensure freedom of expression, and the rights to assemble and participate in political and public affairs. On the other hand, in a closed political context, civil society can provide a place for resistance albeit in less obvious ways to avoid State attention. In this context, the growth of information communication technology has been a boon to civil society enabling it to act covertly within limited political space.

Active civil society contributes to the promotion and protection of human rights. In performing its role to counter-balance State power, CSOs undertake a range of human rights work, for example, monitoring human rights violations, advocating for human rights standards, ensuring policies and laws are rights compatible, giving voice to groups facing violations, and so on. Thus, civil society provides space for rights claims, then defends, publicises, and empowers citizens to pursue such claims. Participating in or merely witnessing civil society activities also helps to raise human rights awareness. As a result, civil society negotiates new understandings of rights, not only in legal terms but also in new social values as regards rights, responsibilities, freedoms, or basic human rights principles, e.g. equality.

FOCUS ON
Human rights activities by civil society

Civil society promotes and protects human rights in many ways including:

- Human rights education
- Policy advocacy to government, e.g. in health, worker rights, migration
- Monitoring vulnerable groups, e.g. children in detention or people with disabilities
- Organizing assemblies to raise public awareness on an issue
- Witnessing events, such as a court case or a protest, to prevent governmental abuse of power
- Providing input to legislators drafting human rights laws
- Provision of services, e.g. shelters, food, or legal advice
- Researching human rights issues (e.g. bullying at school or access to healthy food) to give service providers a greater understanding of the problems

Civil society represents the interest of diverse groups and encompasses the space for such groups to make their voices heard. This includes marginalized groups that would otherwise have difficulty accessing formal politics. Its collective work can empower **grassroots communities** to assert their rights and participate in policy-making. These are the key aspects of a rights-based approach which will be discussed in the next section. Recognizing the importance of civil society, many human rights mechanisms or formal forums provide channels for such engagement to enable people's voices to be heard by the State and international players.

Grassroots communities

Organizations working directly with communities and often based in those communities. For example, an NGO which provides reproductive health advice to women in a village.

17.2.1 Rights-based civil society activities

Despite its significant role in the promotion and protection of human rights and democracy, not all civil society work is human rights-related or based on human rights principles. Many CSOs are actually charities or philanthropic organizations working to deliver services and basic needs to the people or they may merely support the State in those roles. Examples include Chinese diaspora groups in many countries forming their own associations to help local Chinese communities. Other groups are based on religious affiliations and provide services to people in need as part of their religious beliefs. However, some use human rights in the delivery of their services, by using the rights-based approach (discussed in Chapter 12 of this textbook). This approach sees the objective of civil society as the promotion and protection of human rights; as such, an environmental group may provide information about the health impacts of pollution, or a disability support group may educate people about non-discrimination towards people with disabilities. In addition, organizations may also use human rights when they plan and undertake activities.

Organizations following a rights-based approach analyse the human rights aspects of an issue and identify relevant rights holders and duty bearers. Taking poverty as an example, a rights-based approach to poverty eradication would recognize that meeting one's basic needs is a human right and human dignity issue. As such, NGOs working in this area would not only try to feed the poor (a needs based approach) or encourage sympathy and donations (a charity based approach) but also ensure the structural causes of poverty are addressed, for example, the policies, laws or cultural practices leading to the exclusion or deprivation of some groups. They would also seek to encourage the State to provide basic needs and welfare for people living in poverty. One key aspect of the rights-based approach is its focus on empowering people to pursue rights claims. Another is to engender understanding of the interplay between power and politics in order to change power relations between State and society. CSOs help to adjust this power relationship by supporting the poor and marginalized thus increasing their bargaining power and enabling them to exercise their rights and take action against injustice. The rights-based approach also addresses how to do such work, emphasising human rights values and practices, in particular: active participation of the concerned citizen; non-discrimination; and inclusiveness of people, especially vulnerable groups. The rights to information, expression, and association are also to be guaranteed throughout this process. Such understanding of rights-based approaches implies that the primary role of development NGOs and donors should shift from development implementation to partnering with people's organizations and social movements to collectively struggle for change.

17.2.2 Civil society, human rights, and public policy

By seeing issues from a human rights lens, the goal of policy change is to ensure the State, as duty-bearer, is held accountable and the people or the rights-holders are empowered to make rights claims. Holding the State accountable may not necessarily solve the problem as the State may need sufficient capacity development to ensure

it has the ability to meet people's needs. In this case, government can be supported to ensure fulfilment of their obligations to protect, promote, and fulfil those rights. For example, when protecting women from domestic violence, police may need training from civil society to identify and protect such women. Rights-based work is not only about providing services to meet the needs of the people, such as traditional development programs or charity, but also includes supporting State policy changes to provide basic services.

Civil society working at the grassroots or national levels often engage in public policy. Public policies are the processes by which governments turn their political visions into plans of action. Although policy may be written, across many Southeast Asian countries it tends instead to consist of government reaction to particular problems. Civil society activists can engage with governments to change or improve policies in a number of ways including through formal mechanisms, e.g. by changing legislation, or through the formulation of policy documents. As such, they can engage with governments to change their practices, for example, by encouraging government officers to do their duty. As regards access to education, in a number of Southeast Asian countries, children without proper documentation such as a birth certificate (e.g. if parents fail to register a birth, or if they are the children of migrant workers) are not accepted into school. As a result of civil society engagement, this policy changed in many countries. For example, in Thailand, schools are now permitted to accept the children of migrant workers. Consequently, through more grassroots advocacy, some CSOs now offer assistance to individual schools to accept undocumented children. Other active policy engagements in Southeast Asia include environmental issues (resulting in many countries altering their rules around single use plastic), health issues (resulting in policy changes to smoking, alcohol, and drugs, especially pertaining to young people), and gender inequality (several CSOs now monitor the status of women and strive to highlight the issue). All these examples show an active relationship between civil society and public policy in the area of human rights.

FOCUS ON
Human rights education

Human rights education can be defined as education, training, and dissemination of information to build a universal culture of human rights. Civil society plays a significant role in this area in addition to its work on human rights monitoring and promotion. Such education does not simply entail learning about the issue. Instead, the learning process itself should enable students to promote and defend not only their human rights but also the rights of others. Further, such education allows people to appreciate human rights values and to change attitudes and behaviours in their communities to ensure respect for everyone's rights. This can occur in everyday ways such as by recognizing gender equality or non-discrimination on the basis of ethnicity, religion, disability, and so on. Human rights education also emphasizes using human rights as the standard in the classroom. In other words, the learning methods and processes should be based on human rights principles meaning for example, all students should be treated equally and all voices should be respected without discrimination.

In Southeast Asia, most primary education policies already include human rights education, at least at the level of learning 'about' human rights. Graduate and post-graduate programs on human rights also exist in many universities in the region. However, such education need not take place in a formal institution and is not limited to students. Indeed, it is most prominent in grassroots activism where many NGOs have programs targeting groups without access to human rights education, such as indigenous and minority groups, migrant workers, or refugees.

17.2.3 Civil society engagement with UN human rights mechanisms

Civil society participation is at the centre of UN human rights mechanisms (see Chapter 5 of this textbook). This is especially true in Southeast Asia where advocacy through national courts or political processes is not always possible or effective. While civil society uses UN human rights standards and mechanisms in its advocacy, it also engages with UN mechanisms to work inside the system to implement change at the regional or global level. Generally, UN mechanisms involve civil society in three main ways: by providing alternative human rights reports to the various monitoring mechanisms; by submitting or supporting complaints to the mechanisms; and by working with governments to enhance their capacities to submit such reports. Moreover, civil society can also provide input to UN human rights monitoring mechanisms, including the treaty bodies, the Universal Periodic Review (UPR) process, and the special procedures. In the treaty bodies system, civil society can submit information about the situation relevant to the rights found in the treaty. The treaty body will review this alongside the State report, then issue its concluding observations and recommendations to the State. Many CSOs have networks to coordinate the preparation of such written submissions. NGOs may also attend the country report review sessions as observers. Although they cannot speak, they can observe the dialogue between the treaty body and the State under review, and brief the former with further facts. Similarly, NGOs can inform special procedures mandate-holders (such as special rapporteurs or working groups) about relevant human rights situations.

Input from civil society may prompt a treaty body to initiate a **confidential inquiry** if there is well-founded evidence of serious, grave or systematic violations of rights. This mechanism is available for the CAT, CEDAW, CRPD, and ICED provided State Parties have already recognized the competence of such committees (listed in Chapter 5). Most confidential inquiries are initiated based on information submitted by NGOs. CSOs also play a valuable role in supporting individuals wishing to submit complaints of alleged human rights violations to the treaty bodies and UN special procedures mandate-holders. Indeed, having direct and reliable knowledge of such violations, many individual complaints are submitted with the help of NGOs. The information should be reliable and credible and include details about the alleged violations, including identifying the victims and perpetrators. However, the complaint should be submitted with the consent of the alleged victim because this information is submitted to the government. If credible, the special procedures mandate-holders can send communications to governments in the form of urgent appeals or letters of allegation. The mandate-holder can then ask the government to clarify both the situation and the specific case, and request adequate remedial measures. Further, mandate-holders can even ask governments to inform the public of the result of their investigations and any actions taken. Individual complaints to human rights treaty bodies require relevant States to have ratified the treaty in question and to have recognized the competence of the body to consider such complaints.

Confidential inquiry

When a UN body—for human rights complaints, this is usually the Human Rights Council—investigates allegations against a country for widespread violations of human rights. While the State is generally named after completion of the inquiry, the process itself occurs behind closed doors.

The role of civil society is particularly significant during the UPR process which requires States to prepare a national report through a broad consultation process involving all relevant stakeholders. Although civil society may work with States to prepare these national reports, they primarily contribute to stakeholder submissions prepared by the OHCHR. Following submission, civil society may attend the review sessions and follow-up implementation of the UPR's recommendations and conclusions. Public advocacy in relation to the UN human rights mechanisms is also vital. In addition, NGOs can follow up on enforcement of the treaty body's concluding observations. Finally, such recommendations can be used as advocacy tools to ensure improvement on State human rights practices continues.

CASE STUDY

Shadow report to CEDAW by Myanmar civil society on rape by the military

One key area in which civil society makes meaningful use of UN human rights mechanisms to inspire change is by producing shadow reports to offer alternative accounts of a State's human rights situation to UN treaty bodies.

In 2002, the Shan Women's Action Network (SWAN) and the Shan Human Rights Foundation (SHRF) produced License to Rape[1] detailing 173 incidents of rape and other forms of sexual violence against 625 girls and women, committed by Burmese army troops in Shan State between 1996 and 2001. The report was the first of its kind and brought worldwide attention to the armed conflicts in Myanmar and the ensuing violence against women including the systematic rape of ethnic minority women. The report was submitted along with other shadow reports by CSOs to the Committee on the Elimination of Discrimination against Women (CEDAW) when it reviewed Myanmar's combined second and third periodic reports in 2008.

While the Myanmar government denied most of the allegations and admitted only 2 cases of rape by its army officers, the Committee urged the State to take immediate steps to put an end to the violations and to prosecute and punish the perpetrators. The recommendations also included human rights education and gender-sensitization training for all law-enforcement and military personnel. The issue was again brought up when the Committee reviewed Myanmar's combined fourth and fifth reports in 2016.

When similar allegations of sexual violence against Rohingya girls and women was brought to the attention of the Committee a decade later in November 2018, it called on the Myanmar government to submit an "exceptional report" on alleged violence against women and girls in northern Rakhine State by State security forces. Invoking an exceptional report and a swift review thereof allows the Committee to intervene in cases of severe human rights violations. This was due partly to alternative information provided to the Committee by CSOs.

[1] Shan Women's Action Network (SWAN) and the Shan Human Rights Foundation (SHRF), 'License to rape' SWAN, June 2002

17.3 Civil Society in Southeast Asia

The strength of civil society varies across Southeast Asia. In some countries such as Lao PDR, Vietnam, and Brunei, civil society is generally State-led. By contrast, despite recent political challenges, there are places where it is relatively vibrant, such as Myanmar, the Philippines, Indonesia, and Thailand. The nature depends on the political system and the regime in power. Its evolution was also shaped by the leftist struggles of the 1950s to 1970s and democratization in the 1980s. Instead of discussing the status of civil society in every Southeast Asian country, this chapter will provide an overview of the socio-political factors shaping its overall development. In addition, some of the roles played by civil society in human rights will also be highlighted.

In countries with only one political party and where restrictions over the political activities of non-State actors are common, civil society cannot claim independence from the State. Thus, in Vietnam and Lao PDR, States create **mass organizations** to perform some of civil society's functions, for example, providing development support and training to local communities or to manage local budgets. Examples include the Vietnam's Farmers' Association, the Women's Union, and the Youth Union. In Lao PDR, mass organizations include the Federation of Trade Unions (LFTU), the People's Revolutionary Youth Union (LYU), and the Women's Union (LWU). These State-led organizations are not fully independent from the State but nor are they part of it. In Laos, they play a role similar to a government party and although controlled by the authority, are not actually part of government. In Vietnam, membership of mass organizations occurs through public sector employment. Such bodies do not function as civil society in the liberal sense because they do not seek to counter-balance State power. For example, mass worker organizations are not independent from their employer, the State, because they form a part of it; as such, they are not the same as trade unions.

Mass organizations

Commonly used in Communist countries to refer to collectives of workers, civil servants, or villages. Although workplace organizations are generally similar to trade unions, they can also be collectives of women or youth.

Despite the above, independent CSOs do exist and have been allowed to work in these countries since the late 1980s and 1990s. At that time, politics started to open up and more opportunities arose for civil society to operate, such as occurred following Vietnam's **Doi Moi** (renovation) policy in 1986. In the 1990s, international NGOs were allowed to work in Vietnam, though local NGOs were still limited in their activities. As such, only a few NGOs work on policy advocacy or monitor the State; most are limited to development projects and service delivery. Still, with the increasing presence of international NGOs in recent years, CSOs are now beginning to advocate in addition to providing service and technical support to governments. Laos similarly started to open up around the mid-1980s when the government adopted its New Economic Mechanism in 1986. As a result, international NGOs were gradually permitted to work on development and service delivery in the country. In 2009, the government passed a *Decree for the Regulation and Operation of Lao Non-Profit Associations* (NPAs) permitting the creation of CSOs in Laos. However, they do not enjoy full freedom and are controlled by various legal measures, including, for example, the requirement of government approval and registration restrictions.

Doi Moi

A period in Vietnamese history (1980s) when the country moved from a communist economic system of collectivization and a State-led economy to one allowing elements of capitalism such as private ownership of land. Similar changes were made in China and Lao PDR.

Even mixed regime countries (having democratically elected governments but which hold authoritarian control) limit the rights and liberties of civil society. In Singapore and Malaysia, civil society is controlled through laws and policies that restrict freedom of expression and association. As a result, CSOs expressing critical views of the government have been prohibited, banned, harassed, or criminalized. In countries like Thailand, the Philippines, and Indonesia, civil society was seen as a vibrant actor in democratic transition and consolidation. In recent years, however, increased State control has adversely impacted its development.

CASE STUDY
Southeast Asia's first human rights NGOs

Human rights NGOs in Southeast Asian countries began their work on civil and political rights in the 1970s when violations under authoritarian rule were common. Among the oldest in the region is the Task Force Detainees of the Philippines (TFDP) which was established in 1974 (although it was active for years before this) during the authoritarian rule of President Ferdinand Marcos by the Association of Major Religious Superiors of the Philippines (AMRSP), a part of the Roman Catholic Church.

Originally set up to provide moral and material support to political prisoners (mostly jailed under the severe martial law that had been in effect since 1972), TFDP has since expanded to protect and promote civil and political rights in general and continues it work today. Although other organizations were banned by the dictatorship, the TFDP was led by religious figures so managed to provide assistance to political detainees who were tortured during detention. At the same time, it also advocated for fair trials and better prison conditions.

After the Marcos regime was brought to an end in 1986 by mass demonstrations, TFDP continued its civil and political rights work and to this day is still one of the leading human rights organizations in the country specialising in advocacy, documentation of human rights violations, and the provision of human rights education to disseminate human rights knowledge. Later, it expanded its work to economic and social rights, for example, on the impacts of mining.

17.3.1 The role of civil society in democratization in Southeast Asia

Checks and balances

Civil society monitors State power by checking government abuse of authority, while also acting as a constraint to sway the balance of power against State domination, thereby holding it accountable.

As a **check and balance** to State power, civil society plays a significant role in all stages of democratization including as a force to end undemocratic rule and helping to introduce a democratic system. Having achieved this, civil society can then act to consolidate the democratic system, both by opposing undemocratic attempts to gain power, or by monitoring the democratic state. Civil society and social movements have indeed played a valuable role in bringing about democratic change in authoritarian regimes, an experience that has been shared around the world, for example, in Latin America during the 1970s and 1980s, or in the ex-Soviet states of the late 1980s. A similar scenario played out in Southeast Asia with civil society aiding the independence movements of the 1940s-1950s, then campaigning against authoritarian rule in the 1950s to the 1980s. Following independence from colonial rule, most Southeast Asian States struggled towards democratic consolidation, with many countries experiencing a fall back to authoritarian control whether by military or one-party State rule. This was seen in Indonesia in the 1970s and 1980s, Singapore during Lee Kuan Yew's leadership, Malaysia under Mahathir Mohamad, the Philippines under Ferdinand Marcos, Thailand's intervals of military rule from the 1950s to the 1980s, the Khmer Rouge in Cambodia from 1975-1979, and more recently under the leadership of Hun Sen. In many cases, civil society-led movements directed the democratic transition; for example, a popular uprising (the People Power Revolution (also known as the EDSA Revolution)) brought an end to Ferdinand Marcos's 21 year dictatorial rule and paved the way for democratic transition in the Philippines in 1986, while in Thailand, uprisings on 14 October 1973 and May 1992 forced the military government out of power. However, not all popular uprisings

succeeded in bringing about democratic change as can be seen by the failure of the 8 August 1988 protest against military rule in Burma (Myanmar) and the 6 October 1976 protest in Thailand which again was unable to end military rule. The forces of civil society are nevertheless vital to providing a platform to demand political change.

Following a transition to democracy, civil society can also play a key role in democratic consolidation by checking abuses of State power, preventing the resumption of power by authoritarian governments, encouraging wider citizen participation, and by encouraging public scrutiny of the State. In the late 1980s, there was a significant increase in the number of NGOs in the region primarily due to international funding from developed countries. The NGOs were permitted partly because they posed less of a threat than the previously active mass movements and revolutionary forces, and they had connections to developed countries which were able to extend some protection. At this time, international human rights language was appropriated by the NGOs to advocate for change. Also growing were social movements, usually in partnership with NGOs, which campaigned for policy changes or to defend the rights of their members. As a result, almost every State now provides some space for civil society to participate in policy-making, although meaningful participation varies according to the regime and the relationship between the State and civil society.

CASE STUDY
The role of civil society in the Philippines People's Power movement

Following 14 years of repressive martial law under President Ferdinand Marcos, a peaceful mass demonstration on 25 February 1986 finally led the country to freedom. Often called the EDSA People Power's Revolution—named after Epifanio De los Santos Avenue (EDSA) where the demonstration took place—the people's victory holds a remarkable place in the region's democratic history.

As a result, Marcos organized a presidential election on 7 February 1986, that was widely considered to be flawed and inaccurate. Regardless, he proclaimed victory for himself on February 20. Soon after, civil society in the country called for democracy and for Marcos to leave causing people to swarm onto the streets in their millions in a massive act of civil disobedience. The peaceful mass resistance gained support from other powerful actors in the country such as the military, leading senior figures to demand Marcos' resignation, and the Catholic Church to call for Filipinos to join the demonstration in EDSA. When Marcos sent troops to fire on the protesters on the second day of the demonstration, the military resisted the order. Consequently, Marcos fled the country a few weeks after the election, ending 21 years of repressive rule. Thus, the People's Power movement in the Philippines comprises one case in Southeast Asia where civil society-led mass movements brought down a dictatorship.

17.4 Laws on Civil Society in Southeast Asia

Despite the relatively permissive political control that led to the growth of civil society in Southeast Asia in the last few decades, many governments in the region are now trying to control it either directly by arresting or fining civil society actors, or indirectly through legal means. A number of legal tools have been used to limit and control civil society in the region. One way is through indirect legal controls, such as **mandatory registration** and financial regulations, which limit the numbers of CSOs or the work they can do. By contrast, direct legal measures, such as laws on freedom of association and expression, make it difficult for CSOs to meet, talk, or distribute information. An example is the use of **Sedition Act** against activists in Malaysia and Thailand, or the use of emergency and public security provisions against opposition voices in Vietnam and Singapore.

Mandatory registration

Where an organization must register and inform the government of its members and activities. More countries in Southeast Asia now require this of NGOs.

Sedition Act

A law forbidding a person from trying to overthrow the government by conduct or speech. Punishments are usually severe and can include long jail sentences or even the death penalty.

Laws on registration usually define what activities are allowed and can be used to prevent registration, thus limiting CSO numbers. Some countries allow only formally registered organizations (e.g. non-profit organizations, associations, or foundations) to operate. Registration is often difficult and tedious, and may include State monitoring of its work. Even in countries more or less open to civil society, the registration process is increasingly used to control and monitor CSOs. In addition, all Southeast Asian countries have some form of registration for NGOs. In Singapore, the Societies Act 2004 allows groups of ten or more to be registered with the exception of those dealing with race, language, religion, political, and civil rights. Moreover, organizations having foreign links or promoting martial arts, must go through an additional review process before registration. Similarly, the Indonesian 2001 Law Concerning Foundations permits the Ministry of Justice to investigate the activities of NGOs. Equally, in Thailand, unlike registered civil societies, while non-registered organizations are allowed to work, they may lack access to government agencies. Registered organizations fall under the Ministry of the Interior's oversight and may also enjoy benefits such as tax exemption (depending on the type of organizations), the ability to open bank accounts, and to legally employ people.

CASE STUDY
NGO Registration Law in Lao PDR

In Lao PDR, the law governing registration of CSOs, known as Non-Profit Associations or NPAs, was formalized in 2009 with the Decree on Associations. This constituted the first time authorities required central registration of NPAs. While the law meant the government now recognized the role of NPAs in development, it did not give them much power. The registration process is lengthy and complex and involves establishing several committees and undertaking numerous steps of registration with different government agencies at different levels. In addition, the International Non-Governmental Organizations (INGO) Decree passed in 2010 governs international NGOs working in development or humanitarian aid. As such, it requires permits of operation, project approval, approval to run activities beyond the project, and approval to recruit staff. Further, the INGOs must report annually to its government counterparts and to the Department of International Organizations. In other words, the legal registration process and the decrees ensure NGOs are under strict State

control. In 2017, the latest amendment of the Decree on Associations limits the work of even domestic NPAs. The Decree gives the Lao authorities power to control and/or prohibit the formation of associations, inspect the activities of associations, and criminalize unregistered organizations. It also prohibits groups working on political opinion, religion, or social origin issues.

Other legal measures to control civil society include financial regulation laws which seek to control or prohibit international funders from providing support to domestic CSOs for fear of international interference in domestic affairs. In Laos, NPAs are required to seek approval from the Ministry of Foreign Affairs before receiving foreign funds and assets. In Singapore, political associations are prohibited from receiving foreign donations and cannot accept more than SG$5,000 (app USD3,600) in anonymous donations. Foreign involvement in sponsorship or foreign speakers in public associations are also not allowed. At the same time, indirect financial control can be used to monitor such organizations and activists. In Cambodia, the Anti-Corruption Law requires civil society leaders to disclose their assets, even though politicians do not have to. The 2015 Law on Associations and NGOs (LANGO) similarly requires NGOs to submit extensive financial and administrative data to the government. Moreover, the law imposes mandatory registration for all domestic and international associations, which are also required to be neutral in politics. Further, the LANGO is used to prohibit meetings and trainings organized by CSOs. Some governments seek to contain civil society by controlling access to public funding which could negate its independence. For example, the Thai Health Promotion Office is funded by tobacco and alcohol revenue which allocates funding to support local CSOs. After the military coup in Thailand in 2014, it has increasingly fallen under the control of the military junta; thus, the funding it gives to democratic organizations opposing its regime was significantly cut.

17.5 ASEAN and Civil Society

As ASEAN has increasingly become involved with human rights and trans-border human rights issues, some CSOs have started to target their activism at the regional level. This can be done informally through direct contact or public advocacy, or it can occur through two formal channels: the existing ASEAN human rights mechanisms (discussed in Chapter 4 of this textbook), or the ASEAN Civil Society Conference (ACSC) which runs during the ASEAN Summit. Since ASEAN claims to be 'people-oriented,' CSOs have attempted to participate more in its processes. From 2000 to 2009, this participation mainly occurred through the ASEAN People's Assembly (APA) which was organised by ASEAN-Institutes of Strategic and International Studies (ASEAN-ISIS), a network of think-tanks. The APA was first held in 2000 to promote interaction between ASEAN officials and CSOs. Participants comprised of CSO representatives, ASEAN-ISIS, and ASEAN Member States. Attendee numbers ranged from about 200 to 300 participants at each forum. The APA was intended to bring CSO representatives and ASEAN officials to the meeting table. It was decidedly not a forum for independent civil society expression. Because the participation of CSOs was controlled by ASEAN-ISIS which selected participants (by controlling travel grants), many CSOs were critical of its composition. Some complained that important human rights issues were not discussed, and strong CSOs were not invited as a result of being too critical of ASEAN governments.

FOCUS ON
Organizations advocating at the ASEAN level

- Southeast Asian Committee for Advocacy (SEACA): Works to empower civil society through education and training.
- Southeast Asian Women's Caucus on ASEAN: Addresses gender equality and women's participation in public affairs.
- FORUM-ASIA: A regional human rights organization advocating at the ASEAN and UN levels.
- Asia-Pacific Refugee Rights Network (APRRN): A network of refugee organizations advocating for refugee rights.
- Asian Partnership for the Development of Human Resources in Rural Asia (AsiaDHRRA): A regional partnership of 11 social network organizations concerned with peace and development at the grassroots level.
- Focus on the Global South: An organization concerned about the impact of the global economy and trade on people.
- Child Rights Coalition: A network of NGOs working on children's rights.
- Alternative ASEAN Network on Burma (ALTSEAN-Burma): A network of organizations and individuals in Southeast Asia focusing on Myanmar but which also addresses the accountability of ASEAN governments for human rights violations.

The ASEAN Civil Society Conference/ASEAN Peoples' Forum (ACSC/APF) was established in 2005 in Kuala Lumpur at the 11th ASEAN Summit. Organized by a coalition of CSOs called the Solidarity for Asian People's Advocacy (SAPA), this key network engages with ASEAN in an annual meeting of CSOs across the region usually congregating in the country of the current chair (which rotate alphabetically each year). In comparison to the APA, this forum is much more open and participatory, and was organized partially in response to the shrinking space for CSOs in ASEAN, and by a lack of access to ASEAN itself. The ACSC/APF consists of CSOs and representatives from various groups in the region including farmers, workers, women, youth, LGBTQI people, the elderly, and persons with disabilities. The ACSC/APF operates through forums such as consultations, meetings with government, workshops, and parallel meetings with the ASEAN Summit. Significantly, the forum has addressed several regional human rights issues, e.g. free trade agreements, land grabbing, pollution, migration, internal conflicts, and displacement. At the end of each forum, the ACSC drafts a 'People's Statement' addressed to ASEAN leaders followed by interface meetings to enable CSO representatives from each country to meet with ASEAN heads of State. As a consequence, some representatives from civil society have engaged in human rights discussions with ASEAN government representatives.

FOCUS ON
ACSC/APF

In 2019, Thailand was chair of ASEAN and as such, the ACSC/APF arranged to meet in Bangkok in September of that year, under the central theme of "Advancing Peoples' Movements for Justice, Peace, Equality, Sustainability, and Democracy in Southeast Asia." With around a thousand people expected for the three day conference, a city hotel was planned as the original venue. However, the Thai government, who were assisting with hotel costs, first insisted the details of all participants be sent to the government for screening leading the organizers to refuse and switch the venue to Thammasat University. Further, requests, such as dialogue with ASEAN leaders, were also refused.

Focus areas where participants could meet, discuss, and share their expertise included human rights and democracy, trade, migration, work, the environment, and technology, alongside statements by a number of organizations on issues such as indigenous rights and the environment. Concern was also raised about the limited strength of the ASEAN human rights body, the ASEAN Intergovernmental Commission on Human Rights or AICHR, and the impact of extractive industries on the environment and indigenous groups.

Occasionally, the meaningful participation of civil society is not fully supported by ASEAN States. Some States limit the impact of CSO advocacy at the ASEAN level by only agreeing to meet government approved CSOs in such forums. Thus, the State selectively identifies particular CSO representatives to attend the forum who may impede meaningful discussion with pro-government views. This restriction of participation in some ASEAN Summit host countries has resulted in several forums deciding to move venue, as occurred in Thailand's 2019 conference when the location was switched at the last moment because organizers refused to submit participant names for a security check. Moreover, restrictions to freedom of expression have also occurred. For example, forum themes may be changed to non-controversial topics resulting in little meaningful formal interaction between leaders and CSOs. As such, NGOs sympathetic to government may request specific violations not to be named. Consequently, debate in civil society now asks how best to involve ASEAN if CSOs are unable to fully engage. Thus, while some NGOs view involvement with ASEAN as capitulating to government views, others may recognize the benefit of more formal engagements.

Another channel where civil society can formally engage with ASEAN is through existing regional human rights mechanisms, including the ASEAN Intergovernmental Commission on Human Rights or AICHR, the ASEAN Committee on the Promotion and Protection of the Rights of Women and Children (ACWC), and the ASEAN Committee on the Implementation of the ASEAN Declaration on the Promotion and Protection of the Rights of Migrant Workers (see Chapter 4 of this textbook). Despite advocacy

to establish an ASEAN human rights mechanism and develop the AICHR itself, civil society engagement with the AICHR is not that extensive. The AICHR has been criticized from the beginning, including during drafting of its rules, for not being a genuine human rights commission (it lacks independence from government) and because it only promotes rather than protects human rights. This can be contrasted with UN human rights mechanisms where civil society can contribute in meaningful ways. Despite individual AICHR representative initiatives to collaborate more with civil society, the organization mainly engages with NGOs having consultative status (a formal accreditation), currently numbering about 30 organizations.

17.6 Conclusion

Despite all the challenges and limitations in Southeast Asia, civil society remains a key actor in the fight for democracy and human rights. As a crucial element of democracy, the participation of civil society in State policy and human rights mechanisms is accommodated, if not to genuinely allow citizen rights, at least to increase State legitimacy. In the Southeast Asian region, such participation varies according to the political regime and the democratic situation. With different levels of independence from and control by the State, civil society in each country interacts differently with its respective State; some are more provocative and may demand radical changes while others seek to work within permitted parameters. The potential for civil society to liberalize the State depends very much on how it negotiates this available space. In the current context where civil society and the freedoms of expressions and association are increasingly suppressed, the ability of CSOs to work for human rights promotion and protection is, at the very least, challenging.

A. Chapter Summary and Key Points

Civil society has played a significant role in the protection and promotion of human rights and democracy in Southeast Asia. The recent rise of conservative and anti-democratic politics in the region has challenged it both from the outside, though oppressive governments, and from the inside, through 'uncivil' society organizations. The result is a shrinking space for civil society.

Defining Civil Society
Liberal perspectives see civil society as a space independent from the State working to actively balance State power and the private sector. Communitarian approaches view civil society as collective bodies working for the greater good of society. Civil society can be composed of many different types of bodies such as non-governmental organizations (NGOs), social movements, or philanthropic organizations. They should be peaceful, law abiding, voluntary, and independent from the State. However, the distinction between government, the private sector, and civil society can be blurred, for example, in government-run businesses or civil society groups organized by business or governments. Challenges to civil society include competition from government-run CSOs and uncivil or violent civil groups.

Civil Society and Human Rights Protection
Civil society promotes and protects democracy and human rights by advocating for human rights standards, debating laws and policy, and giving voice to groups possibly facing violations. This can be through delivery of services, ensuring development is

rights-based, and empowering people to make rights claims. An important activity is engaging in public policy. Further, much work on human rights is done through the UN human rights mechanisms by, for example, providing alternative reports or submitting complaints. In addition, civil society can work with mandate-holders such as special rapporteurs.

Civil Society in Southeast Asia

While civil society is active across Southeast Asia, its power and influence varies depending on the political system or regime in power. In one-party States, restrictions often exist and civil society is replaced with mass organizations. In other places, civil society acts as a check and balance to State power and plays a role in the democratization process. Following democratic transition, civil society can also play a key role in democratic consolidation by checking abuses of State power and preventing the resumption of power by authoritarian governments.

Legal Restrictions on Civil Society

Many governments in the region try to control civil society by the use of legal controls, such as mandatory registration, financial regulations, and laws on freedom of association and expression. Such laws can be used to prevent organizations registering, meeting, and raising enough finances to undertake activities.

ASEAN and Civil Society

Civil society engages with ASEAN in many ways, for example, on trans-border human rights issues. This can be done through the ASEAN Civil Society Conferences or with the ASEAN human rights mechanisms. Both these avenues are challenged by States unwilling to engage with civil society or which limit meaningful participation by restricting freedom of expression or participation in the forums. While engaging with the existing regional human rights mechanisms is possible, there are concerns that these bodies only work to promote and not protect human rights and democracy.

B. Typical Exam or Essay Questions

- What does 'civil 'mean in terms of civil society organizations? How exactly can it be defined and when do organizations become 'uncivil'?
- Explain the main liberal values underpinning civil society. Why are these values so widespread in Southeast Asia?
- Give one case study of the activities of a civil society organization active in your country and explain how the organization contributes to civil society, and how it maintains its independence from the government.
- What are the laws for registering a non-profit organization in your country? Research the laws and assess how they may restrict civil society activities.
- What role has civil society played in the political history of your country? Examine one case where a social movement has made an impact on public policy, democracy, or rights in your country.

C. Further Reading

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Bello, W, (2002), Deglobalization: Ideas for a New World Economy, London: Zed Books.

Walden Bello, who is from Southeast Asia, has written many books looking at human rights justice, and the role of civil society in Southeast Asia.

Kaldor, M, (2003), Global Civil Society: An Answer to War, Cambridge: Polity.

The author was also was an editor for the Global Civil Society Yearbooks which were published from 2001-2012.

Keane, J, (2003), Global Civil Society?, Cambridge University Press.

Putnam R.D., (1994), Making Democracy Work: Civic Traditions in Modern Italy, Princeton University Press.

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Sandel, Michael J., (2000), Democracy's Discontent: The Procedural Republic, In Don E. Eberly, The Essential Civil Society Reader, Rowman & Littlefield Publishers, Inc.

Sandel, Michael J, (2005), Public Philosophy: Essays on Morality in Politics, Harvard University Press.

Waltzer, M (ed.), (1995), Toward a Global Civil Society, Providence RI: Berghahn Book.

Academic journals and books which regularly discuss civil society include

- Journal of Civil Society
- Development and Practice
- Current Southeast Asia
- Routledge Handbook on Civil Society in Asia

Online Resources

The websites of the United Nations, World Bank and World Economic Forum all have pages on civil society, though there are limited resources.

The Civil Society Academy offers a number of courses and webinars on civil society, though these tend to focus on skills specific for running a civil society organization. https://www.civilsocietyacademy.org/

YouTube hosts a number of online lectures and introductions to civil society, including "Introduction to Civil Society" from the Professor Hellstrom channel, and "Civil Society Theories and Perspectives" from Resources for Democracy channel.

Civicus, a global alliance of civil society organisations and activists, has a website with many resources including guides, toolkits and audio-visual material available from its YouTube channel.
https://www.civicus.org/

18

International Humanitarian Law and Human Rights

18.1 Introduction

International humanitarian law (IHL)

The body of law governing conduct during armed conflicts. It defines which acts are permitted or prohibited by armed groups.

Combatant

A person distinguished from the civilian population who takes part in armed conflict. Combatants are typically soldiers, but can also include members of non-State armed groups.

This chapter examines human rights in times of **armed conflict** as governed by **International Humanitarian Law (IHL)** or the laws of armed conflict. Fighting between armed groups is governed by IHL laws when (1) these groups are seen as soldiers (or **combatants** in legal terms), and (2) arms are used against opposing forces. The relationship between IHL and human rights is significant because many human rights violations occur during conflict, some of which are severe. While IHL provides a measure of protection against these violations, it can also constitute a means to attain peace. As other chapters in this textbook have shown, attaining peace is critical for the realisation of human rights.

Armed conflict

For the purposes of this chapter, armed conflict refers to groups of combatants (commonly soldiers) fighting each other with weapons.

IHL is useful for both human rights and peace practitioners working in armed conflicts as such laws limit certain activities and work to safeguard those caught in conflict situations. As a body of law, IHL is somewhat similar to human rights, i.e. it is an international body of laws focusing on the protection of people. However, the protection it offers differs in that it only operates in times of conflict and is managed by the International Committee for the Red Cross (ICRC), a body separate to the UN. Nevertheless, many now believe this distinction of IHL governing conflict situations and human rights only applying in peacetime is outdated as the latter should protect people at all times. It is also important to note that while IHL may take precedence over human rights in some situations (e.g. the rights and duties of soldiers in battle relate primarily to IHL), human rights do not cease to apply when conflicts begin. Indeed, the two may overlap. However, IHL does focus primarily on soldiers and the conduct of war, although more recently, it now also strengthens the protection offered to civilians and others caught up in conflicts. Regardless of the difference in approach between human rights and IHL, both disciplines operate within the laws on armed conflict.

This chapter details the main features of IHL and outlines their relation to human rights. Further, it examines how IHL is used in Southeast Asia, and looks at some current challenges. The first section considers the links between IHL and human rights law by providing a brief overview of the core concepts and standards of humanitarian law, before examining overlaps between the two. International humanitarian law looms large in many treaties, standards, and scholarship. What follows is a basic introduction of some of its main features.

CONCEPT

Is it war or armed conflict?

The word ‘war’ is more commonly used in the media to describe armed conflict between States and other armed groups. However, under international law, the term ‘armed conflict’ is preferred because ‘war’ may hold different connotations. While ‘war’ can be used by States to identify armed conflicts, such as in a declaration of war, it is now commonly used to describe any action against any enemy, such as a war against drugs or poverty. A second problem is that laws need to govern armed conflict whether or not they reach the level of war. Today, many armed conflicts are small without formal declarations of war. Moreover, many conflicts involve non-State actors who cannot legally declare a war. In other words, combatants using arms to fight each other should be governed by rules regardless of whether or not the conflict is seen as a war.

18.1.1 How do laws work in times of armed conflict?

There appears to be a contradiction at the heart of laws on armed conflict. The act of going to war is a violation of the UN Charter; as such, it is considered a violation of international law and can be an international crime. However, armed conflicts happen every day. How is it possible to have a law governing what is essentially an illegal activity? To answer this, it is first important to distinguish between laws regulating the act of entering into a war from those applying to the battlefield, i.e. the conduct of war. In such cases, two bodies of law are applicable: (1) *jus ad bellum* or laws justifying the use of armed force, and (2) *jus in bello*, or laws governing the conduct of armed conflict on the battlefield. This chapter will focus mostly on the latter because these laws ensure human rights are adhered to during armed conflict.

The *jus ad bellum* laws of entering into conflict are mainly dictated by the United Nations Security Council (UNSC), and relate to the crime of starting a war (or **acts of aggression**), the right to self-defence during a conflict, the right to **collective security**, and the justified use of force by United Nations members (such as the UNSC's **Chapter VII powers**). The UN Charter outlines two general scenarios when the use of military force is permissible: (1) under Art 41, the UNSC can use military force "to maintain or restore international peace and security," and (2) Art 51 gives the "the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations." Also, within *jus ad bellum* is the idea of a '**just war**,' a principle dating back centuries which lists the legitimate reasons for a declaration of war. By contrast, *jus in bello* laws ensure armed conflict is conducted according to law to limit the impact on civilians, ensure soldiers are treated fairly, and to secure the rule of law and a sense of justice and on the battlefield.

Acts of aggression

The action of planning and starting an armed conflict. Aggression is a crime which can be committed by both States or non-State actors.

Collective security

A theory of security whereby if one member of a group is attacked, the other members are entitled to defend the one under assault. Under this principle, to attack one UN Member is to attack them all.

Chapter VII powers

Under Chapter VII of the UN Charter, the Security Council has power to allow the UN to enforce sanctions, raise an army, or authorize the use of force.

Spoils of war

The belief that a victorious army can claim any property (e.g. vehicles, stockpiles of food, land) from the army it defeats including women and children.

Just war

The idea that under certain circumstances a war can be considered legitimate. These include that it is a just cause, there is a reasonable chance of success, and all other ways of solving the problem have been tried first.

Chivalric code

A code of conduct followed mainly by the knights of Medieval Europe, but similar versions were also found in ancient China and India. While the code focused primarily on loyalty and bravery, it also included directives not to attack the weak or unprotected.

18.1.2 History of the rules of combat

The rules of armed combat are not a modern invention. Armed combat has unfortunately been common throughout history and is found in many types of political systems. Moreover, where it does occur, some rules are followed, whether due to cultural or moral standards (e.g. treating people humanely), or more formal agreements. Historically, when kingdoms or tribes went to battle, certain terms were adhered to, e.g. not involving civilians. Likewise, soldiers also followed codes of conduct, e.g. not targeting officers during combat. However, enforcement of such rules was challenging. Soldiers, armies, and even entire empires often broke these norms without punishment. Nonetheless, laws governing armed combat in some situations were generally respected. For example, in ancient societies across Asia, soldiers obeyed a military code of conduct on the battlefield; hence, any barbaric or cruel behaviour was actively prevented by the military. These rules were akin to the European **Chivalric Code**. Further, laws of armed conflict were reciprocal, meaning that opposing forces treated each other as they would expect to be treated. In other words, if one army acts humanely, the other will follow suit, and *vice versa* as regards barbaric battlefield behaviour. However, reciprocity alone cannot determine the rules of conflict because it is the victorious who decide the rules, especially how to punish the losing side. Consequently, opposing leaders were often executed, defeated armies enslaved, and their properties ransacked. Invariably, civilian rights were also violated. Thus, another problem arising from this lack of regulation was that non-combatants, whether civilians or wounded soldiers, were entirely unprotected by law. Indeed, the general recognition that soldiers had special rights (e.g. the **spoils of war**) often led to theft, sexual violence, and enslavement. While attempts were made throughout history to eliminate the more barbaric acts, it was not until the mid-1800s that real advances were made with the establishment of IHL.

The laws of armed conflict changed dramatically in the mid 1800s with the introduction of IHL. It began when Henry Dunant, a Swiss businessman, witnessed massive suffering after the battle of Solferino in present day Italy. Seeing the injustice of thousands of young men dying for want of basic medical treatment, upon his return to Switzerland, Dunant established what is now known as the International Committee of the Red Cross and Red Crescent (ICRC) in 1863, and the first of four Geneva Conventions in 1864 to protect soldier ***hors de combat*** (meaning 'out of combat' in French), i.e. the first Geneva Convention. From that moment, the practice of armed conflict changed substantially. First, the rules of combat would be based on law and no longer depend on winner's justice. Second, a humanitarian sector to help people in distress due to combat (and now also because of natural disasters) was developed. As a result, humanitarian organizations, such as the ICRC, Medicine Sans Frontiers (MSF), and Care were established to provide food, water, and shelter to those displaced by conflict. Third, the laws of combat have grown to include protection for civilians, medical officers, the media, and important locations such as schools, temples, and food storage areas.

Hors de combat

The convention that once a soldier is injured or unable to continue fighting for whatever reason, he should be treated humanely by opposing forces, and this includes allowing access to medical treatment or being given prisoner of war rights. A soldier should not be punished for merely having been a combatant.

Since the first Geneva Convention of 1864, the scope of protection has expanded. As the nature of conflict changes with the advent of new technologies and tactics, laws must be updated or new ones drafted. Issues in the mid 1800s included access to medical aid on the battlefield and the protection of non-combatant soldiers. During the American Civil War, it was found that most soldiers were not killed outright on the battlefield but had actually died of untended war wounds. As a result, safeguards were introduced to protect medical officers; hence, to attack one was deemed a war crime. Also, access to medical assistance on the battlefield was granted regardless of sides. Over time, further changes to military technology (e.g. the machine gun, artillery, and the use of planes for aerial bombing) caused casualties to rise even more dramatically, especially of civilians not involved in the fighting. Thus, more protections were put in place to regulate the conduct of war and to safeguard civilians. Conferences at The Hague in 1899 and 1907, and the 1929 Geneva Convention contributed to these provisions. In addition, certain weapons were banned, e.g. the use of gas and chemical weapons in World War I. As such, the laws limiting the use of weapons are sometimes known as the Hague Conventions. After World War II, the most destructive war in history, new laws were planned to respond to the devastation of aerial bombing (which had killed hundreds of thousands of civilians), the abuse of prisoners of war (POWs), and other atrocities.

CONCEPT

The Geneva Conventions and The Hague Conventions

IHL laws are sometimes referred to as The Hague and Geneva Conventions. The Geneva Conventions aim to reduce the impact of war by giving protection to civilians, minimising conflict, and ensuring the better treatment of prisoners. The Hague Conventions limit conduct on the battlefield by banning certain weapons, e.g. gas, biological weapons, and land mines. However, although this simplification is useful, it is not entirely accurate as both treaties deal with the conduct of armed conflict and the use of weapons. Another point to note is that the Hague laws were not always made in The Hague, for example, the laws on landlines and cluster bombs were drafted in Toronto and Ottawa. Further, some issues such as the use of nuclear weapons, are dealt with by both conventions.

18.2 The 1949 Geneva Conventions

At the conclusion of World War II, four Geneva Conventions were adopted in 1949 to update the previous laws on armed conflict and to introduce new laws on technological changes such as aerial warfare. These conventions run into hundreds of pages and cover many specific concerns, e.g. the provision of food and clothes to POWs. These remain the central IHL treaties despite continuing debates as to their relevance given the changing nature of combat since World War II. Nevertheless, almost all international actors still consider these treaties the central source of law for armed conflict. To further emphasize their importance, they have been ratified by all States in the world.

FOCUS ON
The Four Geneva Conventions of 1949

The First Geneva Convention *for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field* was adopted in 1864. Following revisions in 1906 and 1929, it was revised and replaced with the First Geneva Convention of 1949.

Covers the treatment of wounded and sick soldiers and offers protection to medical personnel, medical facilities, and equipment including transport. It also details proper use of the Red Cross emblem and introduces the concept of *hors de combat* (persons who are incapable of waging war due to being, e.g. sick, wounded, detained) and details how armies should treat the wounded from opposing forces.

The Second Geneva Convention *for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea* was adopted in 1899 and 1906 and revised and replaced with the Second Geneva Convention of 1949.

Introduced standards on the treatment of shipwrecked sailors and their return after conflict. The convention also requires survivors be searched for after an engagement.

The Third Geneva Convention *on the Treatment of Prisoners of War* was first adopted in 1929, and revised and replaced with the Third Geneva Convention of 1949.

Largest convention covering the treatment of prisoners of war (POWs). For example, POWs cannot be interrogated, prosecuted, or physically punished. In addition, they must be kept in humane conditions and their capture must be reported to the relevant authorities.

The Fourth Geneva Convention *relative to the Protection of Civilian Persons in Time of War* was adopted in 1949.

Covers the protection of civilians. While previous conventions touched on this issue, the majority of this treaty details the people and objects deserving of special protection including those living in occupied territories or otherwise affected by the conflict, as well as refugees and non-citizens.

18.2.1 The Three Protocols to the Geneva Conventions

In the 1970s, a number of meetings were held by States which had ratified the Geneva Conventions to discuss additional optional protocols. Major issues had arisen around some wars of national liberation which, many claimed, were not being held to the same standard as other international wars. The need for greater protection of civilians was also reiterated. The wars in Vietnam and Algeria were significant here as both involved significant civilian death tolls. As guerrilla wars fought against colonial occupying forces (and not international conflicts), they were not regulated by existing Geneva Conventions. Because the Protocols grant greater rights to combatants fighting colonial armies, they have not been able to garner the same universal support as the Geneva Conventions with many Southeast Asian countries not ratifying them. A third Protocol was added in 2005 giving the ICRC an additional symbol, the Red Crystal.

FOCUS ON

Protocols to the Geneva Conventions

Protocol I (1977): Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the *Protection of Victims of International Armed Conflicts*.

Offers more protection to civilians in armed conflict and considers wars against colonial occupation to be international armed conflicts, thus making the rules of the Geneva Conventions applicable to them.

Protocol II (1977): Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the *Protection of Victims of Non-International Armed Conflicts*.

Provides protection to civilians in non-international armed conflicts.

Protocol III (2005): Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the *Adoption of an Additional Distinctive Emblem*.

Added the Red Crystal symbol to the Red Cross and Red Crescent. This was partially in response to criticisms that the cross and crescent are religious symbols and the ICRC should have a non-religious symbol.

Table 18-1: Geneva Conventions and Optional Protocols (as of 2019)

Country	Geneva Conventions 1-4	Protocol 1	Protocol 2	Protocol 3
Brunei Darussalam	1991	1991	1991	-
Cambodia	1958	1998	1998	-
Indonesia	1958	-	-	-
Lao PDR	1956	1980	1980	-
Malaysia	1962	-	-	-
Myanmar	1992	-	-	-
Philippines	1952	2012	1986	2006
Singapore	1973	-	-	2008
Thailand	1954	-	-	-
Timor-Leste	2003	2005	2005	2011
Vietnam	1957	1981	-	-

18.2.2 Defining armed combat

The Geneva Conventions have different rules for different types of armed conflict. The conventions identify three categories: international armed conflicts (IACs), non-international armed conflicts (NIACs), and domestic disturbances. Thus, different IHL laws will apply to NIAC and IAC prisoner of wars. Most IHL and the Geneva conventions focus on IACs which normally occur between two States; however, IACs can also count as wars of national liberation or conflicts between States and non-State armed groups if borders are crossed. IACs are covered by the four conventions and the first Optional Protocol. NIACs, such as civil wars or revolutions, are governed by Common Article 3 (discussed below), and the second Optional Protocol. Finally, disturbances such as riots, violent protests, or conflicts between two non-State armed groups, do not qualify as armed conflicts and relevant national laws (e.g. criminal laws) will therefore be applicable.

Unlike human rights which are always relevant, IHL laws only apply when a conflict occurs, although they can continue to apply after the conflict ceases for cases of occupation or other duties of the State as a consequence of conflicts, e.g. returning POWs or refugees. Common Article 2 of the Geneva Conventions defines armed conflict as:

> *[A]ll cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them. The Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance.*

Note that the conflict must be between States which have ratified the conventions, here called 'High Contracting Parties' (known as 'States Parties' under human rights).

Given that all States have ratified the four Geneva conventions, it is therefore relevant everywhere.

NIACs are defined in different parts of the Geneva Conventions. Article 1 of Protocol 2 says an NIAC

> *must take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement.*

According to this definition, NIACs can only occur if a State is involved and the non-State armed group behaves like an army (by utilizing uniforms, chains of command, and weapons) and controls territory. These armed forces must be 'parties to the conflict' suggesting they must be knowingly and willingly participating in hostilities. An NIAC can become international when an international armed force joins the hostilities.

Any other type of armed conflict, such as riots or domestic disturbances utilizing arms, are not covered by IHL. The distinction between an internal armed conflict and a domestic disturbance is an important one with the latter only being regulated by national criminal laws and human rights. Individuals using arms during domestic disturbances are therefore considered criminals. Accordingly, human rights and not IHL protections or principles will apply.

A final element of the definition involves the intensity of conflicts which must reach a certain level to be considered an armed conflict. This is explicitly noted in definitions of NIACs: "hostilities between two or more organized armed forces within a State [must] reach a minimum level of intensity." However, the exact threshold is not defined although it is generally accepted that an exchange of fire between opposing forces will constitute such a threshold. Nevertheless, only one soldier shooting across a border or soldiers wandering accidentally into a bordering State and returning without event, will not reach the requisite level of intensity.

DISCUSSION AND DEBATE

Defining armed conflict

Debate continues to rage over the difference between disturbances and non-international armed conflicts, and the point when a conflict has reached the minimum level of intensity to be called an armed conflict. For example, according to contemporary laws, the American/Vietnam War failed to reach the level of an armed conflict.

Given the above definitions, which recent conflicts in Southeast Asia (listed below) reach the necessary level of intensity to be considered armed conflicts?

The war on drugs in Southeast Asia: Soldiers and police undertake extrajudicial killings and murder thousands of drug suspects.

The Preah Vihear/Phra Wihan temple dispute on the Thai-Cambodian border: A Thai military border patrol engages with a Cambodian patrol, exchanging fire for a couple of minutes.

The death of political protestors in Bangkok (2010): The military violently quashes a political protest, killing around 100 unarmed civilians.

The Kachin State war in Myanmar: In the past 10 years, conflict between the Myanmar Army and the Kachin Independence Army (KIA) has led to around 300 deaths.

ANSWERS

International Armed Conflict (IAC): The Temple dispute is an AIC. Even though very few bullets were fired and the incident lasted only minutes, it still counts as an engagement between soldiers from different States.

Non-International Armed Conflict (NIAC): The Kachin war is a NIAC between the Myanmar State military and the KIA because the latter wear uniforms, occupy territory, and have a command structure.

Domestic Disturbance: The war on drugs and the deaths of the political protestors are most likely domestic disturbances as no combatants occupied territory or followed a command structure opposed to the State. Further, neither drug suspects nor protestors returned fire; thus, the minimal level of intensity cannot be said to have been met. Even if the protestors had occupied part of central Bangkok and were armed (as the military claimed), it is still debatable whether their actions could be said to have reached the level of a non-State armed group.

18.2.3 Protection and the type of conflict

The Geneva Conventions apply primarily during IACs. Only Common Article 3 and Protocol 2 of the Geneva Conventions regulate armed conflict not of an international character. Accordingly, concern has arisen as regards the limitations of IHL. Because nearly all current armed conflicts are non-international in character, most IHL protections are not relevant and only select parts of the four Geneva Conventions will be applicable. However, NIACs are still protected. Common Article 3 (so named because it is common to all four Geneva Conventions) requires the humane treatment of all people not taking an active part in hostilities, such as those considered hors de combat. This prohibits torture, hostage-taking, and extra-judicial executions.

FOCUS ON
Common Article 3

All four Geneva Conventions include the same Article 3 which lays out minimum standards for the treatment of people in conflicts who may not otherwise fall under their purview because the conflicts are not deemed international. Article 3 establishes the basic elements of humane treatment and is important because it is applicable to *all* armed conflict. Significantly, it also protects everyone not directly involved in conflicts, from soldiers *hors de combat* to civilians, with a list of prohibitions.

These prohibitions protect people from: violence, being taken hostage, humiliating and degrading treatment, and being sentenced without due process of the law. The Article also recognizes the right of the sick to be treated.

The protection offered by Common Article 3 appears both broad and limited. For instance, it does not mention freedoms to assemble or move, or freedom from forced labour (among other widely recognized human rights). Similarly, there are no provisions relating to the treatment of detainees or to the means and methods of warfare. While Common Article 3 does protect some civilian rights, only major violations such as torture and mutilation are included. Specific rules on the conduct of hostilities aimed at sparing civilian populations or relief operations during NIAC are noticeably lacking. However, as discussed below, all these elements can be protected either by the key principles of humane treatment or through human rights law, which are applicable regardless.

However, Protocol 2 of the Geneva Conventions helps to fill some of the above protection gaps regarding NIACs. For example, Protocol 2 extends the principle of distinction to persons and objects *hors de combat*. Moreover, it codifies fundamental guarantees for persons outside of combat, specific protections for religious and medical personnel, and protects the emblem of the ICRC. Protocol 2 also regulates the forced movement of civilians and outlines due process rights for those prosecuted as a result of armed conflicts.

18.3 Fundamental Principles of International Humanitarian Law

The fundamental principles of IHL emphasise its main objectives which are to reduce the impact of conflict and to ensure those caught up in it are treated humanely. These principles can be traced back to the Martens Claus found in the 1899 Hague Convention, and which like Common Article 3, states that people should be treated humanely even in non-international conflicts.

FOCUS ON
The Martens Clause

The Martens Claus is found in the Preamble to the 1899 *Hague Convention II: Laws and Customs of War on Land* and declares that, until international laws are drafted, people unprotected by current IHL should still be treated humanely by States at war. Friedrich Martens was a Russian delegate to The Hague conference where the treaty was drafted and where he read out his statement. However, there is debate about the meaning of the clause. Some see it as customary international law regardless of ratification or the existence of IHL. Others see it as merely recognizing that IHL includes elements of customary law.

18.3.1 IHL fundamental principles: Distinction

A main principle of the Geneva Convention is the distinction between combatants and civilians. This ensures civilians are protected and do not get attacked or treated like soldiers. It also enables soldiers to access the protections resulting from being a POW. Combatants (indeed, all military units in the region) must distinguish themselves from civilians by wearing some approximation of a uniform or insignia and carry weapons openly. Armed groups who do not are in violation of the Geneva Conventions. While this may be a deliberate tactic to avoid detection, such combatants may not be entitled to the protections offered to POWs if captured and will instead be treated as criminals.

FOCUS ON
Distinction between combatants and civilians

A combatant is an individual with the right to engage in military conflict, who also receives the privileges of being a combatant (such as POW status if captured). Thus, a combatant must:

- Be part of the military's command structure (either giving or receiving orders)
- Wear a distinctive uniform or other identification showing allegiance to a military
- Bear arms openly
- Obey the rules of armed conflict

This distinction extends to objects as well. Accordingly, it is forbidden to target civilian property or objects citizens depend on, e.g. hospitals, schools, historical and cultural sites, and dams. The consequences for civilians can be catastrophic if water and food sources are compromised during hostilities. Thus, the principle of distinction limits how combatants can pursue military goals. In other words, distinction prohibits the methods and means of fighting which do not adequately distinguish between civilian and military targets.

18.3.2 IHL fundamental principles: Proportionality and necessity

Ideally, distinction alone should eliminate unnecessary suffering during armed conflict but in practice, threats, risk, and hardship are inevitable. IHL deals with this reality through the principle of proportionality which forbids attacks on military targets if the harm to civilians or civilian property exceeds the military advantage gained. This principle arose as a response to the aerial bombing of cites during World War II which killed hundreds of thousands of civilians. However, proportionality does not totally prohibit injuring civilians. Rather, armed forces must assess potential civilian harm against predictable and concrete military advantages. For example, while attacking a military base containing hundreds of soldiers may kill some civilians working there (e.g. in the kitchen or gardens), this may still be allowed. However, attacking a base in the middle of a crowded city potentially leading to thousands of civilian deaths could be considered disproportionate. Thus, Israel has faced complaints on its disproportionate use of force for destroying rows of houses in a street where rockets were fired into Israeli territory. Even though only one house was used as a base and most families were not complicit, all houses were bulldozed.

In other words, distinction and proportionality seem to be sending conflicting messages, and in some ways, this is true. Distinction demands armed parties distinguish between combatants and non-combatants. At the same time, proportionality dictates civilian harm should be proportionate to military gain. While distinction comprises an ideal of planning/execution, proportionality recognizes that distinction may not always eliminate the possibility of civilian deaths. There is a balance here, but no formula for how to determine when damage is disproportionate. Instead, legal experts or courts of law examine the evidence and assess whether civilian harm was excessive and the military gain proportionally beneficial. Distinction and proportionality focus particularly on persons and objects hors de combat. But IHL's scope of protection goes beyond such groups to those taking part in hostilities by regulating the means, methods, and justification for engaging in hostilities.

DISCUSSION AND DEBATE

When is force disproportionate?

Forces have located a housing complex where combatants who use terrorist techniques (e.g. suicide bombers, remotely detonated bombs, and the beheading of kidnapped civilians) live. Although 15 combatants live here, around 50 members of their families who are women and children also share the space. Indeed, the women often help the men to prepare bombs and other tasks such as tending to the injured. It is suspected that in the next few days, many of these civilians will leave for a short period to attend a wedding, but how many and for how long is unknown. All 15 combatants are staying. What number of civilian casualties is proportionate when authorizing an attack on this hideout?

- Should the attack be prohibited if it harms any civilians?
- Should the attack wait until only a few civilians are left in the building (but how many?)
- Should an attack be allowed regardless of the number of civilians present?
- Justify your answers.
- How did you decide what is proportional?
- Is the principle of distinction relevant here?

Necessity is another principle combatants must adhere to. This dictates that military force can only be used to the extent it is necessary to accomplish a military objective. As such, military action which is not about winning the conflict, like those aimed at creating fear or to punish a group, are not justifiable. Examples include attacking a target as a reprisal for supporting opposition groups such as the Myanmar military's 'Four Cuts' policy which destroyed civilian property in communities thought to be connected to non-State armed resistance groups. Ideally, warfare should be limited to actions necessary to obtain a victory. Anything beyond that point is incompatible with IHL.

18.3.3 IHL fundamental principles: Humane treatment

The principle of treating people humanely in conflict is considered customary law and in many ways is similar to the concept of dignity used in human rights. Therefore, those who are either no longer involved in combat and civilians who were never combatants must be treated humanely. While there is no legal definition of 'humane,' it is taken to mean respecting the rights of non-combatants including their health, privacy, and safety. Humane treatment is vital to all aspects of IHL, and as a central core of Common Article 3, remains relevant both during and even after conflicts.

18.4 The Relationship Between IHL and Human Rights

Thus far, it appears IHL and human rights contradict each other in a number of ways and a common misunderstanding prevails that they apply at different times – human rights in peacetime and IHL in times of war. Another misconception states that IHL permits killing while human rights protects the right to life. These views are inaccurate. First, human rights are active at all times, even during conflicts. In such situations, human rights and IHL complement each other. In some cases, as mentioned below, IHL takes precedent under the principle of ***lex specialis***, but these specific instances aside, IHL and human rights operate alongside and complement each other. Next, a soldier killed in combat does not necessarily have his or her human rights violated. Although individuals have a right not to have their life arbitrarily taken, killing a soldier lawfully in combat is not a violation of his/her rights. This distinction is managed by different bodies: the UN is mainly responsible for human rights and the ICRC manages IHL. However, this difference is disappearing as both the UN and ICRC now actively rely on both bodies of laws.

Lex specialis

One law will take precedence over another if specifically written to cover that situation.

Because IHL operates simultaneously with different laws, it is important to determine which law should take precedence. The principle of lex specialis dictates that a specialised law passed to cover a particular situation takes precedence over a more general law. So the laws on armed conflict will take precedence over more general human rights legislation. Thus, armed forces accused of targeting civilians during hostilities will be judged under the auspices of the Geneva Conventions. Although it should be noted that IHL and human rights do not conflict here as they mostly agree on the protection of people and the conduct of activities. But it may be relevant in, for instance, POW rights for which IHL contains specific provisions. Another example can be seen when determining whether the loss of life in conflict was arbitrary with the IHL taking precedence due to its stipulations on the use of weapons and military necessity.

The relationship between these two bodies of law began in the 1960s and stemmed from the realization that IHL and human rights principles were actually quite

similar as evidenced by Common Article 3 of the Geneva Conventions protecting fundamental human rights regardless of the type of conflict. IHL and human rights complement each other in a variety of ways. First, human rights can address many situations not specifically mentioned in IHL, such as rights in the legal system, non-discrimination, and the protection of specific groups such as children or people with disabilities. Another connection lies in the fact that more claims are made through human rights, whether via a constitution, a human rights body, or a National Human Rights Institution. This may be because such bodies exist in many countries whereas IHL bodies are scarce by comparison. Significantly, the practice now is for both bodies of law to cooperate, not compete, and for both to be applied in conflict situations.

18.5 The International Committee of the Red Cross and Red Crescent

The ICRC is the principle governing body of IHL, similar to the way the United Nations governs international human rights law. Founded in 1863 in Geneva where it remains headquartered, its structure is broad with many branches to the organization including the ICRC itself – an international body managing IHL and providing humanitarian assistance in disaster zones across the world. National chapters (such as the Indonesian or Cambodian Red Cross) also operate in particular countries and are adept at collecting blood, raising money for charity, and providing humanitarian aid. An international body (the International Federation of the Red Cross and Red Crescent Societies (IFRC)) manages the national chapters and is tasked with promoting and protecting the Geneva Conventions and Protocols, and working on international humanitarian events. In times of armed conflict, it is known for providing medical assistance to those injured in war, POW services, and helping civilians affected by conflicts. Off the battlefield, the ICRC's humanitarian work for, e.g. victims of natural disasters, is also well known. Additionally, its remit includes education, especially of the military, the laws of armed conflict, working with detainees, or helping societies return to peace after conflict through de-mining and other peacetime activities. All these activities are based on its seven principles for humanitarian conduct.

FOCUS ON
ICRC's seven principles

The seven principles of the ICRC were written in 1965 to describe the shared values of all different parts of the Red Cross from the ICRC itself to its various national societies.

Humanity	To relieve suffering and protect people, and to ensure people are respected.
Impartiality	There should be no discrimination in the offering of assistance.
Neutrality	The ICRC does not pick sides in a conflict and works with anyone.
Independence	The ICRC is independent from government. While it must obey local laws, it does not work for any government.

Voluntary service	The work of the ICRC is voluntary and it will not undertake activities for payment. Also, it encourages volunteers to work in its organization.
Unity	Only one national Red Cross or Crescent society in each country is permitted, and unity should be promoted in those countries by encouraging participation from all sections of society.
Universality	The ICRC works everywhere, and all places have equal duties and responsibilities.

18.6 International Humanitarian Law and Conflict in Southeast Asia

Southeast Asia has seen many conflicts since IHL laws were established in the region. However, despite its history, IHL has not been actively enforced with some conflicts resulting in tremendous loss of life, for example, the Vietnam/American War or Indonesia's suppression of the communist insurgency. However, this is not to say IHL has been irrelevant as it principles still apply. Thus, militaries conducting themselves unlawfully may suffer repercussions. The use of IHL in Southeast Asian conflicts means more than simply defining such confrontations as NIAC or IAC, ensuring Convention standards are met, and that violations are punished (perpetrators should face sanctions). It also entails ensuring combatants are trained in the Conventions, militaries respect their fundamental principles, and any conflicts are limited in their impact regardless of status. These activities are undertaken by the ICRC and other bodies (to be discussed later in this section). However, first, the nature of armed conflict and the application of IHL laws in Southeast Asia is examined.

One of the most serious conflicts of the Cold War, the American (or Vietnam) War was conducted largely without strict adherence to the Geneva conventions. IHL did not apply as both sides considered the conflict a domestic disturbance and the four Geneva conventions did not cover NIACs at the time (this only came about when the two Optional Protocols were adopted soon after the war ended). Regardless, in many cases, both armies did follow IHL laws. However, in many other incidences involving civilians and POWs, they did not. Indeed, the majority of the dead were civilians as a result of military attacks and the deployment of napalm on villages. Additionally, cases of extra-judicial killing, where suspected guerrilla fighters were publicly executed by military officers, were also reported.

Ensuring the appropriate laws are respected has also proved a problem for more contemporary conflicts. Currently, Thailand, Myanmar, and the Philippines are suffering from ongoing conflicts. In terms of its IHL status, the Thai government considers the southern province conflicts to be caused by criminal groups without a command structure and who do not conduct themselves as combatants; thus, it cannot be a NIAC. In the Philippines, however, the government has acknowledged the NIAC status of some conflicts, e.g. those concerning the New People's Army (a communist insurgency) and various groups based in Mindanao province. In Myanmar, several ethnic conflicts (e.g. the Rakhine, Kachin, and Shan States) have been recognised as NIAC. The self-determination conflicts in Southern Thailand

and the Philippines share many features. Both involve: mainly Islamic opposition groups fighting to redress long-standing inequalities; armed groups which are indistinguishable from the civilian population; attacks against civilians perpetrated by government forces and the opposition; and the use of illegal and disproportionate tactics such as torture or arbitrary arrest. However, the armed groups in Southern Thailand have not attempted to distinguish themselves as combatants, and they also clearly do not control territory, unlike in Mindanao. This means IHL operates differently in the two conflicts.

DISCUSSION AND DEBATE

Is regulating armed conflict enough?

Public international law, which includes both humanitarian and human rights law, does not forbid armed conflict, but regulates why and how armed forces can be used. These regulations can therefore be seen as an attempt to limit armed conflict. While the UN Charter, human rights treaties, and IHL certainly contain symbolic statements about the devastation caused by hostilities and the importance of peace, this has not eradicated wars. On the contrary, militaries in the region remain strong and civilians are still killed by armed conflicts. Further, armies are still expanding as is military expenditure. Additionally, IHL is also not relevant when military units interfere with the democratic process to create unrest.

- Are laws regulating armed conflict strong enough or should they be further enhanced?
- Should the technological development of weapons and militaries be limited by law?
- Should government expenditure on the military be limited and the money devoted to education, health, and the environment?
- Or is it better that IHL remain uninvolved in the politics of armed conflict and instead regulate its activities because politics is better managed by human rights and democratic processes?

18.6.1 Protection in Southeast Asian conflicts

Governance of the ICRC extends beyond times of armed conflict to also protect individuals facing internal violence, such as displaced populations, refugees and detainees, and others in need of humanitarian relief. In more recent times, conflict in Southeast Asia has moved away from international armed conflict to civil wars with non-State armed groups playing an increased role. As such, IHL's application and the scope of the ICRC's work is expanding in accordance with these changing dynamics. During conflict situations, soldiers must comply with IHL laws when engaging with enemy combatants, but are also expected to respect human rights when dealing with civilians in or near conflict areas. Accordingly, soldiers must respect civilian rights to access justice and healthcare, and their rights to religion or freedom of movement. Such duties become more complex when enemy combatants and civilians are difficult to distinguish from each other, in other words, when a person is a "farmer by day, guerrilla by night." This phrase was used frequently in the drafting of the Geneva Convention protocols, with Vietnam (at the time, North Vietnam) noting that while

most people resisting colonial domination were weak and poorly armed compared to national armies, they should still be considered combatants and receive the accompanying protections. However, non-compliance in this regard is irrelevant to Southeast Asia given the absence of colonial occupying forces. While the 'guerrilla by night' model could be used during wars of national liberation from colonial powers, it works less well in cases of armed insurrections against States. Further, in contemporary conflict, combatants often deliberately avoid uniforms to hide in the civilian population. This is an illegal tactic in conflict. In Southeast Asia, the majority of non-State armed groups do distinguish themselves as combatants, for example, the Kachin, Shan, and Mindanao-based armed groups wear uniforms.

FOCUS ON
Farmer by day, guerrilla by night

Is it legitimate for a soldier from a poor and weak country ruled by a foreign power to attack occupying solders if he does not have a uniform and is not part of a military force?

During the American/Vietnam War, the Viet Cong were an army based in South Vietnam who fought US forces and the South Vietnamese government, often using guerrilla tactics. Because many lived at home and needed to work, they were not full time soldiers (unlike the US and South Vietnamese forces). As such, they received no training, quality equipment, or uniforms but believed they were fighting a colonial occupation. Accordingly, in many instances, US soldiers were unable to distinguish civilians from combatants and mistakenly (and sometimes deliberately) attacked civilians. Generally, the Viet Cong were also not recognized as POWs, and were therefore interrogated, imprisoned, and even tortured in South Vietnamese jails (although the treatment of POWs on both sides of this conflict fell far short of IHL standards). Other reasons they did not receive protection when hors de combat included the conflict not being recognized as IAC, and the North Vietnamese government not always recognizing soldiers from the South as part of their military.

After the conflict, during negotiations on the Optional Protocols to the Geneva Conventions, the Vietnamese government insisted such soldiers should be recognised as combatants and receive IHL protection. While this was eventually recognized in the protocols, the USA and five Southeast Asian countries have not ratified it.

18.6.2 Protecting vulnerable groups

Throughout Southeast Asian history, civilians have suffered massively during conflicts. Although the principles of proportionality and necessity were designed to limit the impact on civilians, practices like aerial bombing or forced relocations kill and disrupt the lives of thousands of civilians. While bombing has not been systematically used since the American/Vietnam War (where over half a million civilian casualties were estimated), forced relocations in conflict areas are known to have occurred in Myanmar, with internal displacements also taking place in the Philippines and Thailand. Under IHL laws, many objects and groups of people may seek protection from the effects of armed conflict.

Every person in an armed conflict is protected to some extent through Common Article 3's provision that individuals be treated humanely. This includes all civilians, but it is especially directed at those under the power of an armed group of a different nationality. Given that all current conflicts in Southeast Asia do not involve foreign armies, the main objective therefore becomes protecting people from the abuses of their own State. Apart from this, IHL does highlight specific groups of protected people.

FOCUS ON
Protected people and objects under IHL

While everyone should be treated humanely during a conflict including soldiers hors de combat and POWS, IHL also highlights some special categories:

Medical staff: Includes medics working on the battlefield, but also in hospitals, ambulances, and other medical facilities.

Media: Journalists and other media workers should get the same protection as civilians in armed conflict.

Religious persons: Whether working for the military (such as chaplains) or not.

People protecting cultural property: Includes people working at museums, art galleries, or historic sites.

Other categories highlighted include civilian objects and property such as:

Hospitals and medical facilities (e.g. ambulances or hospital ships)

Cultural property (e.g. religious and historical sites, places of education): Such places cannot be used by the military. Thus, the army is prohibited from, e.g. using schools as a place to rest.

Natural environment: No damage should be done to the natural environment. Thus, the starting of forest fires or the destruction of rivers is prohibited.

Works and installations containing dangerous forces: Includes objects such as nuclear power plants or dams, which if attacked, could cause significant damage and destruction to the community.

Despite these protections, throughout its short history, many such objects have not been saved from armed conflict. For example, forests and jungle were severely damaged during the American/Vietnam War by defoliants such as Agent Orange, and schools continue to be damaged in the ongoing conflicts in Myanmar. However, IHL principles and laws are frequently used by national militaries across the region in times of unrest, emergency, and disaster. Whether in response to cyclones or riots, soldiers are expected to ensure the protection of civilians. A major duty of humanitarian organizations like the ICRC is enabling people to return to their homes and work after conflict. A major task can include cleaning up unexploded ordinances (UXOs) and demining areas.

FOCUS ON
Cleaning up after conflicts

The effect of the 1960s and 1970s wars in Southeast Asia is still being felt today. Some areas are among the most devastated regions in the world as a result of bombing. An average of eight bombs a minute were dropped on Laos for nine years during the late 1960s and early 1970s, and decades are expected to pass before they can be cleaned up. Around 100 children and farmers a year are still harmed by these bombs in Cambodia, Lao PDR, and Vietnam, even though the war ended decades ago. In the meantime, UXO programs educate people on what to do upon finding a bomb, teach children not to play with bombs, while also clearing land of UXOs. Estimates are the region will not be free of bombs for another 50-100 years.

A similar program (to clear landmines placed during the civil war and the American/Vietnam War) is also currently taking place in Cambodia. The country has around 40,000 amputees as a result of land mines, and a further 100 people a year are injured or killed by them. Organizations like the ICRC work both to clear the country of landmines and rehabilitate landmine victims by providing prosthetics (artificial limbs) and running activities to encourage the reintegration of amputees into social life.

18.6.3 Responding to IHL violations

A soldier who kills another soldier during hostilities is doing their job; thus, their actions are legal under IHL assuming the necessary restrictions were followed. However, if that same soldier kills a neighbour over a personal disagreement, he or she will have committed a crime and should face legal sanctions including being tried under criminal law in a criminal court. Alleged violations of IHL are treated differently and can be responded to in a number of ways. First, the armed forces could charge the violators and put them on trial, normally in a military court. Such tribunals apply military law in courts reserved solely for military personnel violating military laws. Though this may be the simplest response, problems arise concerning more serious violations as States are unlikely to put their own military leaders on trial. Commonly known as war crimes (many of which are outlined in the first Geneva Convention), the response for such violations may come from international criminal law and include War Crimes, Crimes Against Humanity, or the Crime of Aggression. This international law is used in courts such as the International Criminal Court (ICC) which has jurisdiction over a number of breaches of IHL (which will be discussed in Chapter 20 on international crimes and human rights).

18.7 Challenges to International Humanitarian Law in Modern Conflict

The nature of conflict has changed significantly with technological advances and changing tactics used by different armed groups. This has created uncertainty in the application of IHL. For example, the use of drones and robots in conflict has led to many questions about the distinction between combatants and civilians (e.g. are people who fly drones combatants?), and responsibility (e.g. if a robot kills a civilian, who is responsible – the computer programmers, the robot builders, or those placing the robot in the conflict zone?).

Undoubtedly, modern technology has changed the nature of conflict. Now, a person sitting in an office block in Las Vegas, USA, can fly a drone to identify to combatant on the other side of the world and kill them. In future, this may even be done by a robot operating under an algorithm. Currently, drones are not typically used in Southeast Asia and robots have yet to be deployed in the region.

Concerns have also arisen about the tactics used by some non-State armed groups around the world. In particular, fundamentalist Islamic groups in Southeast Asia such as Jemaah Islamiyah and Abu Sayyaf have been known to use terrorist tactics, e.g. targeting civilians. Such is the case in Southern Thailand where schoolteachers and other government officials have been killed, and roadside bombs kill both soldiers and civilians. Obviously, these groups do not attempt to comply with IHL standards. Accordingly, they do not distinguish themselves as combatants, recognise no distinction between civilian and military targets, and the civilian population is not protected from the impact of war. Thus, a significant challenge for IHL lies in halting this kind of illegal warfare. International law is of no use when armed groups refuse to acknowledge it. An additional problem occurs when States commit additional violations when responding to extremist groups, resulting in civilians being attacked from both sides. In these situations, international criminal law can help to ensure those conducting such violations face justice, although it must be said few people have actually been jailed in Southeast Asia for these crimes.

The significant challenge caused by modern technology and tactics is being met with new policies and practices. In particular, the ICRC is drafting policies on the use of drones in armed conflict including that humans, and not artificial intelligence, remain in control of weapons at all times in warfare. Throughout history, IHL has adapted to new wartime technologies and practices but the current issues facing international communities are especially challenging and some radical changes may be necessary.

A. Chapter Summary and Key Points

International Humanitarian Law (IHL)
IHL is the law of armed conflict. It addresses the conduct of war and the protection of civilians and others caught up in conflicts. It is part of jus in bello (or the laws governing the conduct of armed conflict on the battlefield) and not jus ad bellum (the laws which can justify the use of armed force). It has many connections to human rights, but operates primarily in cases of armed conflict. IHL limits the conduct of warfare to ensure it is humane, by for example, regulating the types of weapons used.

History of IHL
While rules for armed combat have existed throughout history, it was only when Henry Dunant witnessed massive suffering in the aftermath of a battle in the mid 1800s that the Red Cross and IHL were established. The first Geneva Convention was founded in 1864 but has since been supplemented by other conventions updated after World War II, eventually resulting in four conventions and three optional protocols. In addition, IHL has since been modified to keep abreast of changing technologies and tactics in warfare, for example, the use of aeroplanes and drones.

The Geneva Conventions
The four Geneva Conventions of 1949 regulate international armed conflict covering the protection of soldiers *hors de combat*, care for the wounded and sick including shipwrecked sailors, the treatment of prisoners of war, and the protection of civilians. The 1979 protocols added more protection for civilians during non-international armed conflicts. All four conventions, but not all protocols, have been ratified by Southeast Asian States.

Features of IHL
IHL distinguishes between international and non-international armed conflicts. In fact, domestic disturbances are not considered armed conflicts at all under this system. Primarily, IHL makes a distinction between combatants and civilians and seeks to ensure the latter are not targeted, and combatants receive protection when *hors de combat*. In addition, military action in combat must be proportional and necessary to reduce the impact of warfare as much as possible. In the same vein, all people, whether civilians or soldiers, must be treated humanely. While human rights and IHL complement each other, IHL takes precedence in armed conflict under the principle of *lex specialis*. IHL and human rights share many features because both seek to protect humanity from its worst excesses.

The International Committee of the Red Cross (ICRC)
IHL is managed primarily by the ICRC and its national Red Cross societies which promote and protect the Geneva Conventions and provide medical assistance and services for prisoners of war. Most of the ICRC's work is humanitarian in nature, arising as a result of natural disasters or conflict. The organization is based on the seven principles of humanity, impartiality, neutrality, independence, voluntary service, unity, and universality,

IHL in Southeast Asia
Southeast Asia has experienced many violent conflicts and not all have abided by IHL principles including distinguishing civilians from combatants and the use of proportionality and necessity. Such disregard was especially prevalent during the bombing campaigns of the American/Vietnam war. More recently, some countries have seen non-international armed conflicts in their territories affecting many civilians. If particularly severe, violations of IHL can be considered international crimes and perpetrators may be tried at the International Criminal Court where possible. A final concern is how IHL adapts to new technologies, e.g. drones or robots, and how it responds to armed groups deliberately violating its provisions as a tactic, e.g. by targeting civilians.

B. Typical Exam or Essay Questions

- Examine an armed conflict in Southeast Asia and discuss how it should be defined under IHL. What rights should combatants and civilians receive? Has this actually been the case? Was IHL properly applied in the conflict?
- Examine one fundamental principle of IHL, such as necessity or proportionality, and discuss when it should be used in Southeast Asia's conflict situations. Consider the difficulties in applying the principle, and look at some times when it is has, or has not, been properly applied.

- Should IHL support or eliminate autonomous weapons? If future wars are not fought between people but robots, which would be better? Is this likely?
- Is IHL relevant to domestic riots? Examine a case where excessive force was used by a government against civilians during a protest or riot, and discuss whether any IHL standards should have been followed.

C. Further Reading

Melzer, N, (2019), *International Humanitarian Law: A Comprehensive Introduction, Geneva*: ICRC.

International Committee of the Red Cross (ICRC)

Contains extensive resources on IHL, the Geneva conventions, and its humanitarian work. These include the online platforms, 'Case study database: IHL in action' (available at https://casebook.icrc.org/) and 'IHL in action: Respect for the law on the battlefield' (available at https://www.icrc.org/en/document/ihl-action-respect-law-battlefield), both of which are regularly updated.

In addition, the 'Advanced IHL Learning Series' (available at https://www.icrc.org/en/document/advanced-ihl-learning-series) provides a resource to lecturers and trainers wishing to keep abreast of all the latest developments in IHL.

Also, see the following resources:

ICRC, (2019), *International Humanitarian Law and the Challenges of Contemporary Armed Conflicts: Recommitting to Protection in Armed Conflict on the 70th anniversary of the Geneva Conventions*, Geneva: ICRC.

ICRC, 'Treaty body database, State Parties, and commentaries' available at https://ihl-databases.icrc.org/ihl.

ICRC, 'War and law' ICRC, available at https://www.icrc.org/en/war-and-law

Miscellaneous

Class Central, 'International humanitarian law in theory and practice' Leiden University via Coursera, available at https://www.classcentral.com/course/international-humanitarian-law-12277 A free online course by the University of Leiden. The syllabus includes courses on conflict classification, conduct of hostilities, protection of persons, and implementation and enforcement.

Diakonia 'Global IHL centre' available at https://www.diakonia.se/en/ihl Contains a number of resources and guides on IHL.

RULAC/Geneva Academy, 'RULAC: Rule of Law in Armed Conflicts' available at http://www.rulac.org/ Contains studies of ongoing conflicts and relevant IHL standards including information on the Philippines and Myanmar.

19

Ending Torture and Enforced Disappearance

19.1 Introduction

The act of torture is specific and refers to the severe and deliberate abuse of a person to, for example, extract a confession or inflict punishment. 'Disappearance' refers to individuals being secretly taken into State custody and the State refusing to acknowledge his/her fate. Such situations could also involve torture as a person may be abducted by officials and tortured for information. Moreover, disappeared persons may be denied access to the court system or legal assistance. In certain circumstances, they may simply be victims of poor police administration. 'Cruel punishment,' on the other hand, refers to State mistreatment of a person not yet reaching the severity of torture. All these crimes form the focus of this chapter. Despite their gravity and the number of countermeasures being taken at both the international and national levels, such acts are found in all Southeast Asian countries. This chapter analyses these crimes and asks how human rights seeks to prevent such abuses. First, torture, including its history, use, and definition in international human rights law is examined. Next, the distinction between torture, cruel treatment, and punishment is discussed. Finally, the crime of enforced disappearance and the actions being taken to eliminate it are reviewed.

19.1.1 History of torture

Although the use of torture dates back to the earliest of civilisations, it is by no means ubiquitous, nor is it always used for the same reasons. By contrast, cruel punishment has been a part of many societies for most of history and includes such activities as **corporal punishment** (although this practice has been mostly outlawed in Southeast Asia). As such, torture was routinely used in ancient Rome's court system to ensure the 'truthful' testimony of slaves or other persons of 'low class' in the mistaken belief that pain elicits truthfulness. This falsehood is believed even today and is usually the logic justifying torture during interrogation. However, it is far from true. It is likely torture will only elicit whatever information is necessary to make the torture stop. Whether such information is truthful is similarly likely be a matter of chance. As a result, evidence gained under torture is not accepted by any court in the world. The consequences of this will be discussed later in the chapter.

Corporal punishment
A punishment intended to cause physical pain. Common methods include hitting or caning.

Ancient courts systematically used torture. For example, in Europe and the Middle East (where court systems first originated over 2,000 years ago), torture was routinely used until around the 1400s. However, even then, many recognized that confessions obtained under such duress were inaccurate and inhumane. Accordingly, the use of torture was banned from around 1500 in Europe; by 1700, it had been banned in nearly all courts around the world. Nevertheless, it was still used in religious institutions such as the Roman Catholic Church which notoriously tortured people for holding different or threatening beliefs (e.g. the Spanish Inquisition). Other victims included women suspected of witchcraft or persons accused of committing bigamy. By 1700 however, most of these practices had been abolished by the church.

Akin to torture was the use of corporal punishment which can include whipping, beatings, confinement, and its most drastic form, the death penalty. Some methods of the latter were especially brutal with victims routinely burned alive or pulled apart limb from limb. Brutality aside, they all differ from torture as they constitute some form of justice or punishment, often called **retributive justice** in which people are punished in a similar manner to the crime they originally committed. These executions were often carried out in public, with the spectacle used as a deterrent. However, following the introduction of prisons in the early 1700s, public punishment fell out of

Retributive justice
A form of justice where the wrongdoer is forced to undergo a proportionate punishment to that suffered by the victim. Thus, a murderer may face the death penalty, or a thief may have their property taken away.

favour in Europe, although such displays continued in Southeast Asia until the early 1900s. Public punishment disappeared for a variety of reasons including a change in people's attitudes (from viewing it as a morbid form of entertainment to something barbaric and inhumane) and a similar change in government support which began to see prisons as potentially more productive institutions to re-educate criminals or put them to work for the good of society.

In Southeast Asia, torture and corporal punishment were first used by colonial States to defeat the self-determination movement and were a tool of the British in Myanmar, Malaysia, and Singapore, and the French in Indo-China. Ironically, upon gaining independence, many Southeast Asian States went on to use similar methods themselves. Thus, the police tortured suspected criminals to extract confessions—although this could have been the result of poorly trained police forces seeking shortcuts or legal systems doing too little to prevent such illegalities—and the military tortured anyone it saw as a threat to the State, whether anti-government protesters, freedom fighters, or terrorists. Torture was therefore used to extract information about anti-government activities or to prevent people from participating in anti-government activities.

The anti-torture movement grew in strength in the post war era until it was finally disallowed in conflict situations through the Geneva Conventions, Common Article 3 (see Chapter 18 of this textbook). It was also forbidden by the Universal Declaration of Human Rights (UDHR), although at the time of its adoption, no clear definition of torture was given. Similarly, Art 7 of the International Covenant on Civil and Political Rights (ICCPR) outlaws the practice, again without offering a firm definition. It was only in the 1970s that the prohibition of torture gained real traction around the world mostly due to its widespread use in Latin America where right-wing military dictatorships extensively tortured and forcibly disappeared their opponents. Torture also occurred in other parts of the world, e.g. in the Philippines under the Marcos dictatorship and by the British in Northern Ireland. In many cases, its use was criticized by Amnesty International which was particularly active in identifying **prisoners of conscience** and reporting abuse in detention. These movements led to, first, a declaration on torture from the UN General Assembly in 1975, and second, the Convention Against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment (CAT) which was adopted in December 1984.

Prisoner of conscience

A term used by the NGO, Amnesty International, to describe a person who is jailed because of their political beliefs. This definition has since been extended to include detainees imprisoned for their religion, sexuality, and ethnicity.

FOCUS ON
Torture and disappearance in Latin America

Argentina: 30,000 disappeared
Argentina suffered under a military dictatorship between 1976 and 1983 when government opponents were frequently disappeared. As a result, from 2011, over 250 military officials faced trial for these crimes.

Chile: 40-60,000 tortured, 3,200 disappeared
Chile's military dictatorship lasted from 1973-1990 when the use of torture and disappearances was widespread. President at the time, General Augustus Pinochet, later faced trial in England for the crimes. Since then, around 140 State agents have been found guilty, although Pinochet himself was never convicted as he died under house arrest.

El Salvador: 8,000 disappeared
El Salvador endured military dictatorship and civil war between 1979-1982 when enforced disappearances were extensively used by the military. During this time, half a million people were displaced. Currently, 17 military officers are on trial for a massacre involving 800 civilians.

Brazil: 434 disappeared
Although under a military dictatorship between 1965-1985, Brazil was less aggressive than other dictatorships in the region leading to a smaller number of disappeared and torture victims. Under a 1979 Amnesty Law, no one has been punished for these crimes.

Paraguay: 423 disappeared, 18,722 tortured, 3,470 forced into exile
Paraguay's military dictatorship lasted from 1954-1989. Despite a truth commission, no trials have led to the punishment of any military officer.

19.2 Defining Torture and Enforced Disappearance

The United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment or CAT has been ratified by 169 countries (as of 2019). In Southeast Asia, the Philippines was the first country to ratify it, partly in response to the use of torture during the Marcos regime. Most Southeast Asian States only ratified the convention in the past two decades. In 2006, an Optional Protocol was introduced to enable independent experts to visit places where torture was potentially occurring, especially jails and other institutions primarily for the purpose of preventing torture. The Committee against Torture is also allowed to investigate allegations of torture in the institutions of State Parties under Art 20. However, not all States in Southeast Asia allow such investigations.

Table 19-1: State Ratifications of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (as of 2019)

Country	Ratification/ Signature Date	Investigation Allowed under Art 20	Optional Protocol (2006)
Brunei Darussalam	Signed (2015) but not ratified	-	No Action
Cambodia	1992	Yes	2007
Indonesia	1998	No	No Action
Lao PDR	2012	No	No Action
Malaysia	No Action	-	No Action
Myanmar	No Action	-	No Action
Philippines	1986	Yes	2012
Singapore	No Action	-	No Action
Thailand	2007	Yes	No Action
Timor-Leste	2003	Yes	Signed 2005
Vietnam	2015	No	No Action

19.2.1 Concept of torture

The legal definition of torture in human rights law differs significantly from common usage of the term. At present, the internationally agreed legal definition can be found in Art 1 of the CAT. Although there are broader classifications in national laws, the CAT definition is widely applied by international and regional human rights bodies. However, it does not stand alone; the International Criminal Tribunal for the former Yugoslavia (ICTY) notes a difference between its interpretation in customary law and the treaty when it said, "[T]he definition of torture contained in the CAT cannot be regarded as the definition of torture under customary international law, which is binding regardless of the context in which it is applied."[1]

Nevertheless, for countries ratifying the convention, it is the international standard. Article 1 states:

> *Torture means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions*.

[1] See Prosecutor v. Kunarac, Kovac and Vukovic, Case no. IT-9623/1-T, 22 February 2001, para. 482

The definition of torture can be separated into a number of elements. Broadly the above definition contains three cumulative elements:

(1) The infliction of severe mental or physical pain or suffering;

(2) By or with the consent or **acquiescence of public officials**; and

(3) For a specific purpose, such as gaining information, punishment, or intimidation.

Acquiescence of public officials

Occurs when State officials, whether police, military, medical staff, or teachers, know mistreatment is happening but do nothing to stop it. This differs from consenting to mistreatment which implies the official acknowledged and allowed the mistreatment to occur.

CONCEPT

Public official

Torture can only be conducted by a 'public official.' In most cases, this equates to a policeman, soldier, prison guard, or a member of the security sector. However, it can also include members of non-State armed groups. In *Elmi v Australia,* the Committee against Torture found that warring factions operating in Somalia which had set up quasi-governmental institutions and exercised certain prerogatives comparable to those normally exercised by legitimate governments, could fall within the phrase "public officials or other persons acting in an official capacity" contained in Art 1 of the Convention.

Each of these elements needs to be discussed further. First, torture is distinguished from other forms of ill-treatment by the degree of suffering involved. However, no definition of the degree necessary to amount to torture is given for a couple of reasons. Suffering is subjective and may depend on characteristics such as sex, age, religious or cultural beliefs, or health. Threats to mental health, in particular, may differ substantially between people. For example, torture on the basis of a phobia to, e.g. dogs, snakes, or heights, can lead to extreme suffering for some. Likewise, actions deliberately designed to humiliate persons of certain cultures or religions may be tortuous to others, e.g. shaving off a Muslim man's beard. Similarly, the use of rape in the course of detention and interrogation is considered both physical and mental torture as was noted in the ICTY case, *Prosecutor v Delalic:*

> *Rape causes severe pain and suffering, both physical and psychological. The psychological suffering of persons upon whom rape is inflicted may be exacerbated by social and cultural conditions and can be particularly acute and long lasting. Furthermore, it is difficult to envisage circumstances in which rape … could be considered as occurring for a purpose that does not, in some way, involve punishment, coercion, discrimination or intimidation … Accordingly, whenever rape and other forms of sexual violence meet the aforementioned criteria, then they shall constitute torture, in the same manner as any other acts that meet these criteria.*[2]

[2] See Prosecutor v Zejnil Delalic, Case no. IT-96-21-T, 16 November 1998, para. 495

The severity of torture may also be due to the duration of an action. For example, forcing someone to stand for an hour or two may not amount to torture but once extended to over a day, it might. This was noted in the Draft Convention for the Prevention and Suppression of Torture which stated: "The scope of 'severe' encompasses prolonged coercive or abusive conduct which in itself is not severe, but becomes so over a period of time."[3]

The most common acts of torture, according to the Special Rapporteur in a 1986 report, include: beating; extraction of nails, teeth, etc; burns; electric shocks; suspension; suffocation; exposure to excessive light or noise; sexual aggression; administration of drugs in detention or psychiatric institutions; prolonged denial of rest or sleep; prolonged denial of food; prolonged denial of sufficient hygiene; prolonged denial of medical assistance; total isolation and sensory deprivation; being kept in constant uncertainty in terms of space and time; threats to torture or kill relatives; total abandonment; and simulated executions.[4]

While torture is mostly assumed to be physical (e.g. corporal punishment), mental torture can be just as severe and include such actions as mock executions (where someone believes they are about to be killed), sensory deprivation (where a person is deprived of light, sound, and touch for days), or sensory overload (e.g. where someone is subjected to repetitive loud music for days on end). Thus, the notion of severity was deliberately left undefined to prevent States from planning forms of torture to fall just below designated levels. In a sense, this describes the 'enhanced interrogation techniques' used by the United States in Guantanamo Bay where certain acts such as sensory deprivation were not considered torture because they lacked the requisite severity. As such, they were routinely used to extract information from suspected Al Qaeda fighters.

CONCEPT

Enhanced interrogation techniques

Used to describe a range of actions by US government interrogators during its 'War on Terror' (from 2001 to about 2008) on detained people mostly suspected of being involved in the attacks on New York and Washington on 11 September 2001. Around 6-10 techniques were used including water boarding, sensory deprivation, sleep deprivation, stress positions, slapping, and shaking. These techniques were officially endorsed by the US military and the Department of State in the belief that they did not constitute torture and could be used to gain vital information. Notwithstanding, investigations and reports later determined that the techniques were ineffective in gaining any information and had created more pain and suffering than the CIA admitted. Almost all States in the world consider these techniques torture.

[3] See the Draft Convention for the Prevention and Suppression of Torture, submitted by the International Association of Penal Law, UN Doc. E/CN.4/NGO.213 (1978). Ahcene Boulesbaa, "The UN Convention on Torture and the Prospects for Enforcement", Martinus Nijhoff Publishers, 1999.

[4] 'Report by the Special Rapporteur, Mr P Kooijams, appointed pursuant to Commission on Human Rights resolution 1985/33 (E/CN.4/1986/15)' UN Economic and Social Council, 19 February 1986, available at https://ap.ohchr.org/documents/E/CHR/report/E-CN_4-1986-15.pdf, at para 119.

Article 1 only defines torture, not **cruel and inhumane treatment**. In order to draw a clear distinction between the two, the European Court of Human Rights has ruled that an act of ill-treatment must attain a "minimum level of severity," while in order to be classified as torture, the act must cause "serious and cruel suffering." Four aspects are used to assess the threshold of severity:

(1) The duration of the treatment;

(2) The physical effects of the treatment;

(3) The mental effects of the treatment;

(4) The sex, age, and state of health of the victim.

Cruel and inhumane treatment

Treatment which causes intense physical or mental pain but which does not rise to the level of torture in its severity including acts of corporal punishment, e.g. caning at school.

Many acts do not clearly amount to torture or ill-treatment. Examples include:

- Forms of judicial corporal punishment, e.g. whipping;
- Some forms of capital punishment and **death-row phenomenon**;
- Solitary confinement;
- Poor prison conditions such as extreme heat or prolonged incarceration, particularly if experienced in combination;
- Disappearances, including their effect on the close relatives of the disappeared persons; and
- Treatment inflicted on a child which might not be considered torture if inflicted on an adult.

Death-row phenomenon

The psychological stress of a person awaiting execution in death penalty cases.

As defined in CAT and related regional conventions, both physical and mental acts may count as torture. The European Commission on Human Rights defined the latter as: "The infliction of mental suffering through the creation of a state of anguish and stress by means other than bodily assault." Examples of mental torture can be found in the USA's reservations to the CAT, including:

- Prolonged mental harm caused by or resulting from the intentional infliction or threatened infliction of severe physical pain or suffering;
- The administration or application, or threatened administration or application, of mind-altering substances or other procedures calculated to disrupt profoundly the senses or personality of the victim;
- The threat of imminent death; and
- The threat that another person will imminently be subjected to death, severe physical pain or suffering, or giving the person drugs to disrupt their senses or personality.

The next element in the definition is that the conduct of torture must be intentional and for a purpose. Thus, torture cannot be a random or accidental act but one that is done for a purpose. The list of purposes in the definition is not exhaustive; it is 'indicative' rather than all-inclusive. As the definition in Art 1 of CAT shows, the purposes include:

- Obtaining information or a confession;
- Punishment for an act committed;
- Intimidation or coercion; and
- Any reason based on discrimination of any kind.

The above list indicates the more common reasons for torture and covers the police attempting to extract a confession, or the military intimidating or coercing opponents of the State. According to the International Criminal Tribunal for the former Yugoslavia or ICTY, the conduct need not be based solely on the prohibited purpose but must simply form a part of the motivation behind the conduct; it is unnecessary for it to be the predominate or sole purpose. In addition, CAT has distinguished acts of torture from other offences causing physical and mental suffering, such as assaults by a State official. Acts without a prohibited purpose therefore do not reach the level of torture. However, such acts may still constitute the crime of assault under national criminal laws.

CONCEPT

Acts of omission and commission

In this context, an act of omission refers to torture as a result of State inaction. However, does the act of *not* doing something (e.g. withholding food or protection) amount to torture? Article 1 of CAT is unclear as to whether torture can result from an "omission." Nonetheless, in *Denmark et al v Greece*, the European Commission on Human Rights held that the failure of the Greek government to provide food, water, heating in winter, proper washing facilities, clothing, medical and dental care to prisoners does constitute an "act" of torture in violation of Art 3 of the ECHR. Thus, negative acts may inflict as much physical and mental harm as positive acts and *can* amount to torture.

Perpetrators of torture and other forms of ill-treatment have included the police, the military, the judiciary, prison officers, and other government officials, and so on. In addition, public officials directly involved in (or who acquiesce by assuming a passive attitude or who turn a blind eye to torture committed by other persons) may also be perpetrators. However, Art 1 of CAT does not apply to private acts of cruelty because it was assumed such conduct would normally be sanctioned under national laws.

CONCEPT
Lawful sanctions

The definition of torture in Art 1 of CAT explicitly excludes "pain or suffering arising only from, inherent or incidental to lawful sanctions." Accordingly, States are not required to ban corporal punishment if such acts are allowed under national laws. The lawfulness of a sanction should be determined by reference to both national and international standards. The issue of corporal punishment has been raised by some States under the "lawful sanctions" clause. However, it has been established that corporal punishments are prohibited under international law, in general, and the Convention against Torture in particular.

19.3 Ending Torture: International Standards and Mechanisms

Article 2(1) of CAT sets up the basic obligation of State Parties to "take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction." States Parties must therefore ensure all forms of torture are punishable under their criminal law, including attempted torture and any act constituting complicity or participation in torture. This also includes giving an order to torture, for example, a military commander ordering anyone (whether soldiers or otherwise) to torture a prisoner of war to extract information. The punishment for torture under a State Party's domestic law must not be trivial or disproportionate but take into account the grave nature of the offence. In other words, torture must be punishable by severe penalties such as imprisonment. While the character of these measures is left to the discretion of the States concerned, they should include making whatever changes necessary to harmonise the country's internal laws, policies, and education with international standards on the prevention of torture.

The obligation of State Parties under CAT is not absolute; rather, it is to take reasonable steps to prevent torture. This is because no State can prevent absolutely, ensure, or guarantee the prevention of torture. However, prohibition of torture is absolute and non-derogable under Art 2(2):

> *No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, or order from a superior officer or a public authority, may be invoked as a justification of torture*.

Torture is found in customary law and *jus cogens* (see Chapter 2 of this textbook). States cannot derogate from this responsibility nor can they in any way legalize torture. In this regard, "whatsoever" refers to the list of exceptional circumstances which is not exhaustive; thus, a State cannot justify or allow torture in any way. Even following a superior officer or public authority's order may not be invoked as justification for torture – a stipulation found in many international laws such as the Nuremberg Principles (a set of guidelines defining war crimes) and the Rome Statute establishing the International Criminal Court.

States Parties have jurisdiction over offences of torture committed not only in the territory under its jurisdiction, but also when alleged offenders or victims are nationals of the State Party. This is known as personal jurisdiction. Furthermore, State Parties also have universal jurisdiction over the crime as detailed in Art 5. Universal jurisdiction allows States to view torture as a crime no matter where the act is committed. Theoretically, this means a State can put someone on trial for torture even if the crime was committed in a different country, and the victim and torturer are not nationals of the State Party. For this to occur, the alleged offender would need to be present in any territory under its jurisdiction and the State fails to extradite him/her to any territory under its jurisdiction.

CONCEPT

Jurisdiction of CAT

Article 5 of CAT allows States to hold different jurisdictions to the normal territorial jurisdiction found in all human rights treaties. These include:

Territorial jurisdiction: The State Party and courts have authority over cases of torture within its own territory.

Personal jurisdiction: The power of a court over people. In the case of torture, a national court has jurisdiction over its citizens regardless of their location. Under the passive personality principle, courts can also claim jurisdiction to try those outside its territory when one of its citizens has been tortured.

Universal jurisdiction: The court and the State have power to view the crime of torture no matter where it occurred in the world. Torture is one of a number of crimes found in human rights treaties that have universal jurisdiction. Others include human trafficking, child pornography and prostitution (under the Optional Protocol to the CRC); genocide, crimes against humanity, and war crimes (under the ICC); and enforced disappearances (under ICED protecting people from enforced disappearances which will be discussed later in this chapter).

While CAT forms a foundation stone for universal reaction to torture under criminal law, State Parties are not obliged to extend their jurisdiction over cases not falling under Art 5 (covering jurisdiction) where the alleged offender is not present in their territory. In such cases, a State has no obligation to establish jurisdiction and may instead request **extradition**. Extradition gives a State the power to arrest and detain someone suspected of having committed a crime in another State so they can be returned and put on trial. For extradition to work, both countries must already have agreed to an extradition treaty and view the actions committed as a crime. By ratifying CAT, a State Party effectively recognizes torture as a crime, allowing people in its jurisdiction to be moved to other State Parties of CAT. The objective of extradition is to ensure torturers cannot escape justice by leaving the country where the torture occurred. Thus, they can always be arrested and extradited to other States which have ratified CAT.

Extradition

The power of a State to arrest and transfer a suspect to another country where the crime was committed to face trial.

A State which has ratified CAT should not send persons to other countries, whether through deportation, being returned, or extradition, if a strong possibility exists that that person could face torture. Under Art 3(1), this obligation can be invoked when a refugee fears they will be returned to the place where persecution has occurred or could occur. This provision was inspired by case-law of the European Commission of Human Rights with regard to Art 3 of the European Convention and overrides any conflicting provisions in an extradition treaty. Further, it is not necessary for the other State to be a party to CAT. As such, this provision is the equivalent to non-refoulment found in the refugee convention (see Chapter 6 of this textbook). In order to determine whether someone may potentially be subject to torture, the competent authorities should take into account all relevant research and expert opinion, including consistent patterns of mass violations of human rights.

19.3.1 The Committee against Torture and the Sub Committee on the Prevention of Torture

The Committee against Torture was established to supervise implementation of the treaty and consists of ten experts with recognised competence in the field of human rights serving in their personal capacity. Members are elected by States Parties from among nominees proposed by their number, for terms of four years and are eligible for re-election if re-nominated. While similar to the other nine treaty bodies, the Committee does boast some powers and activities not found in most other human rights treaties. Many activities remain the same (covered in Chapter 5 of this textbook) including the State Party report—covering the measures taken to give effect to their undertakings under CAT within one year of ratification for the first report and then every four years—which should be submitted to the Committee through the Secretary-General of the United Nations. Each report is reviewed by the Committee which may make comments and offer advice to the State Party. The purpose of this procedure is to help the Committee gain a clear picture of the extent to which States Parties are respecting their treaty obligations.

The Committee also produces general comments and allows for individual communications (complaints) like most other treaties after which it can receive and consider communications from or on behalf of individuals subject to its jurisdiction who claim to be victims of a violation of the Convention provided the State Party has made a declaration recognizing the competence of the Committee to receive and consider these communications. Such communications can concern specific incidences of torture, including cases involving the imminent expulsion of individuals to a country where they are believed to be at risk of torture, or those denied redress in cases of torture. In fact, one of the most common types of complaint to the treaty body is from refugees worried they will be returned to a State where they may be tortured. The rules governing acceptance of a complaint are the same as the other bodies: an individual complaint is considered inadmissible and will not be read by the Committee if it is anonymous, not a violation of the rights in the treaty, or if the complaint is being examined under another procedure. CAT considers individual complaints in closed meetings where it may also seek information from other sources before sending its views to the State Party concerned and the individual.

In addition, the Committee can conduct a confidential inquiry into allegations of a State Party's systematic practice of torture when reliable information is received containing well-founded indications of such. This power is not found in most human rights treaties (although versions of it exist in the CEDAW and ICED). However, as demonstrated by Indonesia, Laos, and Vietnam, ratifying States can make reservations against Art 20.

If the State Party has agreed to this power, the Committee can initiate an inquiry which may involve a fact-finding visit to the country, often to sites where torture is usually found, i.e. prisons, detention centres, and army bases. The Committee's findings from the inquiry and fact-finding visit is given to the State Party along with any appropriate recommendations. While the proceedings remain confidential, once they have been concluded, the Committee may, following consultation with the State Party, decide to include a summary account of the outcome in its annual report. To date, there have been 10 enquiries, with Sri Lanka (2002) and Nepal (2012) being the only enquiries in Asia.

The Optional Protocol to CAT establishes the UN Subcommittee on Prevention of Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (SPT). The SPT was established in 2006 when the Protocol came into force. Under this treaty, the SPT can visit places of detention in States which have ratified the Protocol. It also requires the State to set up independent National Preventive Mechanisms (NPM) to prevent torture by monitoring the treatment of those in detention and by giving recommendations and directives to government authorities. The NPM should be fully independent from government while also receiving assistance and advice from the SPT. The SPT can visit places such as police stations, prisons, detention centres, mental health facilities, or other social care institutions. Additionally, it may examine the conditions of detention, talk to staff, medical officers, the government, and so on, to ensure standards against torture, cruel, inhumane, or degrading treatment are being met. Since its establishment in 2006, the SPT has made about 80 visits to States investigating a total of around 65 (some countries have been reviewed two or even three times). In Southeast Asia, Cambodia has been investigated twice (in 2009 and 2013) while the Philippines was investigated once in 2015.

19.4 Preventing Enforced Disappearances: International Standards and Mechanisms

Though the practice of enforced disappearance had been known since its widespread use in Nazi Germany before and during World War II, it was first recognized as a human rights problem in the 1970s in Latin America. Chilean human rights lawyer, José Zalaquett, noted that some of the prisoners he was representing had dropped from sight and contact even though supposedly still in the custody of the security forces. In light of the sheer number of disappearances in Latin America, the issue was first discussed at the UN General Assembly in 1978. As a result, the Working Group on Enforced or Involuntary Disappearances (WGEID) was established consisting of five members from each region with a mandate similar to a special rapporteur. The Working Group's main action has been to record cases of disappearance and request information from governments on the disappeared people. As such, it has recorded nearly 60,000 cases of disappearance in its 40 years of activity (around 45,000 of which are still active). It has also undertaken visits, including one to Timor-Leste in 2011 and the Philippines in 1991.

In the meantime, advances in international law were made to define and eliminate disappearances as evidenced by the Declaration on the Protection of all Persons from Enforced Disappearances (1992) and also in an Inter-American Convention on disappearances for use in the Organization of American States in 1994. In 2001, enforced disappearances were recognized as a crime at the International Criminal Court. The International Convention for the Protection of all Persons from Enforced Disappearances (ICED) was adopted on 20 December 2006 by the General Assembly

and entered into force four years later on 23 December 2010. With just over 60 States ratifying the treaty by 2020, and only one ratification in Southeast Asia, it is one of the least ratified human rights treaties. This can partially be explained by its status as the newest treaty – it has only been open for ratification for ten years. However, another reason for this caution could be the international criminal law obligations it creates such as extradition and universal jurisdiction.

FOCUS ON
Disappearance described

The Declaration on the Protection of All Persons from Enforced Disappearance describes disappearance as "an affront to human dignity."

Paragraph 3 of the Preamble of the Inter-American Convention on Forced Disappearance of Persons defines it as a "grave and abominable offense against the inherent dignity of the human being."

"The phenomenon of enforced disappearances [...] is the worst of all violations of human rights. It is certainly a challenge to the very concept of human rights, denial of the right for humans to have an existence, an identity. Enforced disappearance transforms humans into nonbeings. It is the ultimate corruption, abuse of power that allows those responsible to transform law and order into something ridiculous and to commit heinous crimes."

Niall MacDermot, Secretary General of the NGO, International Commission of Jurists (ICJ)

Table 19-2: State Ratifications of the International Convention for the Protection of all Persons from Enforced Disappearances (as of 2019)

Country	Date of Signature or Ratification	Acceptance of Individual Communications	Acceptance of Inquiry Procedure
Brunei Darussalam	No Action	-	-
Cambodia	2013	No	2013
Indonesia	Signed 2010	-	-
Lao PDR	Signed 2008	-	-
Malaysia	No Action	-	-
Myanmar	No Action	-	-
Philippines	No Action	-	-
Singapore	No Action	-	-
Thailand	Signed 2012	-	-
Timor-Leste	No Action	-	-
Vietnam	No Action	-	-

19.4.1 Definition of disappearance

The definition of enforced disappearance was first enshrined in Art 7 of the Rome Statute of the International Criminal Court 1998:

> *"Enforced disappearance of persons" means the arrest, detention or abduction of persons by, or with the authorization, support or acquiescence of, a State or a political organization, followed by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of those persons, with the intention of removing them from the protection of the law for a prolonged period of time.*

A similar definition can be found in Art 2 of ICED, the first universal legally binding instrument to address this complex crime:

> *"Enforced disappearance" is considered to be the arrest, detention, abduction or any other form of deprivation of liberty by agents of the State or by persons or groups of persons acting with the authorization, support or acquiescence of the State, followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person, which place such a person outside the protection of the law.*

Enforced disappearance is a complex crime. It is often categorized as a multiple human rights violation which simultaneously contravenes: the right to security and personal dignity; the right not to be subjected to torture or other cruel, inhuman, or degrading treatment or punishment; the right to humane conditions of detention; the right to legal representation; the right to a fair trial; the right to a family life; and even the right to life (when the abducted person is killed).

Although the two definitions above show some differences in their wording, they are similar in terms of two characteristic behaviours: the deprivation of liberty followed by concealment of the fate and whereabouts of the person concerned. The ICED definition reflects the idea of the Drafting Committee that any act of enforced disappearance should contain at least the following three constitutive elements:

(a) Deprivation of liberty against the will of the person concerned;

(b) Involvement of government officials, at least indirectly by acquiescence; and

(c) Refusal to acknowledge the detention and to disclose the fate and whereabouts of the person concerned, so they are outside the protection of the law.

CONCEPT

A person outside the protection of the law

Such persons cannot access the protection of the law, whether lawyers, police, or the court system, even though the State itself may use officers of the law to detain them. This issue was subject to debate during drafting of the ICED as several government delegations felt it could be difficult to prove a State's intent, or a State could claim the person was being detained by the police or military and therefore could not be not outside the law. However, the Committee on Enforced Disappearance considered that being "outside the protection of the law" was a consequence of the commission of the offence of enforced disappearance.

Enforced disappearance is widely recognised as a grave breach of human rights. This assertion is supported in a number of laws and treaties in international and regional human rights documents, as well as the case law of various international human rights bodies. Even though its definition may vary across different documents, there is general agreement on its nature, danger, and the need to deal with it and to help its victims. Disappearance should be treated with urgency because the sooner efforts are made to locate the person the higher the chance of finding him or her alive. It must also be borne in mind that victims of disappearances include the families and friends of such persons.

CONCEPT
Victim

The ICED takes a broad approach to the term, 'victim.' As such, it can refer to the abducted person (i.e. the direct victim) or any individual suffering harm as a direct result of the enforced disappearance (i.e. an indirect victim). The latter are important as close relatives have an explicit right to know the truth regarding the circumstances of the enforced disappearance, the progress and results of the investigation, and the ultimate fate of the disappeared person.

With the exception of the Philippines, disappearances are not widespread in Southeast Asia as compared to Latin America. A number of well-known cases of disappeared persons include human rights defenders, environmental activists, and critics of Southeast Asian governments, some of which are detailed in the 'Focus on' box below. Across Asia, disappearances were common in certain countries, especially in times of conflict. For example, during Nepal's civil war (1996-2006), it is estimated that around 1,500-3,000 people were forcibly disappeared by both government and opposition Maoists forces. While various investigations and commissions did take place and some offenders did go on trial, few were charged with the crime of enforced disappearance. Similarly, during the civil war in Sri Lanka (1980s), about 65,000 people disappeared, one of the highest rates in the world. In particular, the Sri Lankan government used its famous unmarked 'white van' method to abduct Tamils in Jaffna and Colombo. As a result, accusations were made against senior officers in the government and the military, including the Navy Commander and the Defence Secretary who maintained the white vans were only used to arrest known criminals. However, enforced disappearances were also undertaken by the opposition group, the Tamil Tigers. In Sri Lanka, not one person has gone on trial for such offences.

FOCUS ON
Disappearances in Southeast Asia

Enforced disappearances in the Philippines
In Southeast Asia, the Philippines has the highest number of disappearances. Current estimates dating from the Marcos regime onwards amount to around 2,000 people including 1,165 still missing, 587 found alive, and 244 found dead. Even under President Duterte, there have been 23 documented cases (although 45 were reported). Of these, 9 are still missing, 4 were found alive, and the remaining ten were found dead. The harshest period was under President Marcos, where of 926 cases, 613 are still missing, 190 were found alive, and 123 were found dead.

The case of Karen Activist, Pholachi "Billy" Rakchongcharoen, in Thailand
Billy was an environmental activist and human rights defender for his Karen community in Thailand. He lived around the Kaeng Krachan National Park just south of Bangkok. Billy made complaints against government officials involved in the burning of the houses and property of 20 Karen families by National Park officers. However, while travelling to a meeting about this case, he was taken into custody by National Park staff on 17 April 2014 for illegal possession of a wild bee honeycomb and six bottles of honey. Although the officers claimed he was released after questioning, Billy was not seen again until his remains were discovered in a reservoir five years later. Traces of human blood were found in an official National Park vehicle but it was cleaned before the blood could be tested. Despite an ongoing investigation, as of 2020 no one has yet faced justice.

Billy is one of about 85 cases of unresolved enforced disappearances in Thailand, including trade union president, Thanon Po-Arn, and human rights lawyer and chairman of the Muslim Lawyers Association, Somchai Neelapaijit, who was last seen in 2004 being forced into a car driven by military officers. Somchai Neelapaijit was investigating cases of torture by the Thai military in southern Thailand.

The case of Sombat Somphone in Lao PDR
Sombat was an internationally recognized community development worker in Laos in the areas of food security and sustainable farming. Abducted in Vientiane on the evening of 15 December 2012, he was recorded by security cameras being stopped by police and taken away in a vehicle. The government has denied any responsibility. To date, there has been no investigation, nor any clues to his current whereabouts. This case is disturbing for civil society activists in Laos because Sombat was not known to be politically active, his work primarily being in community development.

19.4.2 Rights and duties of the International Convention for the Protection of all Persons from Enforced Disappearances
Article 4 of the International Convention for the Protection of all Persons from Enforced Disappearances or the ICED requires State Parties to "take necessary measures to ensure that enforced disappearance constitutes an offence under its criminal law." This makes domestic jurisdiction the main way to hold individuals responsible. However, other ways of criminalizing enforced disappearance include expanding a State's jurisdiction (much like the CAT) and requesting States to assert jurisdiction over acts of enforced disappearance where the offence was committed in any territory over which it has jurisdiction; where the alleged perpetrator is one of its nationals; or

where the disappeared person is one of its nationals and the State Party considers it 'appropriate' (Art 9). Prosecuting alleged perpetrators in the domestic jurisdiction where the offence occurred is preferable because domestic trials are more likely to facilitate ready access to evidence, including witnesses. In addition, domestic trials can promote a sense of ownership of the accountability process in societies where disappearances occur. Article 9 of the ICED also provides for mandatory universal jurisdiction by stipulating that:

> *Each State Party shall likewise take such measures as may be necessary to establish its competence to exercise jurisdiction over the offence of enforced disappearance where the alleged offender is present in any territory under its jurisdiction, unless it extradites or surrenders him or her to another State in accordance with its international legal obligations or surrenders him or her to an international criminal tribunal whose jurisdiction it has recognized*.

Mandatory universal jurisdiction is significant because enforced disappearances are considered crimes against humanity under customary international law. As stated by Manfred Nowak, who has held investigative positions at the United Nations in relation to enforced disappearances, during a report to the Human Rights Commission:

> *Universal jurisdiction in clearly defined individual cases of enforced disappearance, with appropriate punishment, will constitute the most effective measure to deter the practice of enforced disappearance in the future.*[5]

The principle of universal jurisdiction codified in the ICED effectively criminalizes enforced disappearance under international law and may lead States to exercise jurisdiction over the perpetrators, an option not otherwise available for acts not constituting a crime against humanity or not amounting to torture.

The ICED imposes a duty on State Parties to either prosecute or extradite alleged perpetrators. Article 11 provides:

> *The State Party in the territory under whose jurisdiction a person alleged to have committed an offence of enforced disappearance is found shall, if it does not extradite that person surrender him or her to another State in accordance with its international obligations or surrender him or her to an international criminal tribunal whose jurisdiction it has recognized, submit the case to its competent authorities for the purpose of prosecution*.

Universal jurisdiction is thus a legal basis for extradition between States Parties in the absence of an existing agreement and effectively removes political immunity for perpetrators of enforced disappearance.

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[5] See. E/CN.4/2002/71, Report submitted by Mr. Manfred Nowak, independent expert charged with examining the existing international criminal and human rights framework for the protection of persons from enforced or involuntary disappearances, pursuant to paragraph 11 of Commission resolution 2001/46.

19.4.3 The Committee on Enforced Disappearances

Similar to CAT and other core international human rights conventions, the ICED establishes a treaty body (the Committee on Enforced Disappearances) to supervise its implementation. The Committee may consider State reports, requests, and communications. In addition to the mandatory reporting procedure and optional individual and interstate complaints procedures, the ICED also includes a tracing procedure which empowers the Committee to communicate requests for urgent action and interim measures to States Parties, which is similar to the practice of the Working Group on Enforced and Involuntary Disappearances. The Committee may consider the request that an abducted person be sought and found, and request the State Party provide it with information on the situation of the persons sought within a time limit set by the Committee. This request may be presented as a matter of urgency by relatives of the abducted person, their legal representatives, or any person authorized by them, as well as any other person having a legitimate interest. However, for the request to be admissible, it should satisfy certain admissibility conditions. Such conditions resemble the admissibility criteria of individual petitions, and are found in Art 30 of the treaty. They include that the request is based on evidence, attempts have been made to contact State officials already, and that no other investigations are underway. For the inquiry procedure, the Convention permits visits of the Committee to the territory of the States Parties only if the respective government agrees (Art 33). However, in the case of widespread or systematic use of enforced disappearances, the Committee may urgently bring the matter to the attention of the General Assembly (Art 34).

A. Chapter Summary and Key Points

Torture is when someone is severely abused for, e.g. punishment or to extract a confession. Disappearance occurs when a person is taken into the custody of the State and their location is unknown to their family and friends. Given the severity of these acts, several provisions have been put in place to prevent such crimes from occurring at the national and international levels.

History of Torture and Punishment

Torture has been used for thousands of years in many societies, particularly in ancient court systems, although the practice was banned in nearly all courts around the world by around 1700. In Southeast Asia, torture was used by colonial powers before being taken up by the independent States themselves. It is mainly used by the police to extract confessions and by the military against anyone threatening the authority of the State.

Corporal punishment has been a part of many societies for most of history as a penalty for crimes. Common forms include whipping, beatings, and various forms of the death penalty. However, with the introduction of prisons in the early 1900s in Asia, public punishments were halted. The movement against torture grew in strength in the post war era through the Geneva Conventions, the work of Amnesty International, and in reaction to its widespread use in Latin America

The Convention Against Torture (CAT)

The CAT has been widely ratified including in Southeast Asia. The definition of torture

in CAT has three main elements: the infliction of severe mental or physical pain or suffering, by or with the consent of State authorities, for a specific purpose such as to gain information, punish, or intimidate. The different actions constituting torture or the definition of 'severe' were purposively left undefined. Ill-treatment differs from torture because it is considered less severe.

Preventing Torture
States must criminalize and prevent torture, and ensure the penalty is not trivial or disproportionate. States have jurisdiction over offences of torture committed in their territory if the offender is a national, and when the victim is a national. States have universal jurisdiction meaning torture is a crime no matter where the offence is committed. The CAT allows for extradition so people in one jurisdiction can be moved to other State Parties for trial.

The Committee against Torture
The Committee is similar to other treaty bodies in that it may consider State Party reports, general comments, and individual communications. In addition, the Committee can carry out confidential inquiries into allegations of systematic practices of torture.

Enforced Disappearances
Enforced disappearance gained global recognition in Latin America in the 1970s and 1980s when it was widely used although it was not until 2006 that a treaty was adopted. The treaty defines disappearance as having three elements: a person must be deprived of their liberty with the involvement of government officials, and the State must refuse to acknowledge the detention or location of the person. While disappearances have occurred in Southeast Asia, many more have been uncovered in South Asia particularly during the conflicts in Nepal and Sri Lanka where the victims are generally government opponents, human rights defenders, and environmental activists.

Rights and Duties in the ICED
The ICED requires States to criminalize enforced disappearance and provides for universal jurisdiction and extradition. The treaty requests States to prosecute perpetrators in their domestic jurisdictions because it allows for better evidence, including witnesses, and may promote a sense of ownership of the accountability process in societies where enforced disappearances occur.

The Committee on Enforced Disappearances
The Committee on Enforced Disappearances is similar to other treaty bodies, having responsibility for State reports, requests, and communications. In addition, a tracing procedure empowers the Committee to communicate requests for urgent action to States Parties, which is similar to the practice of the Working Group on Enforced and Involuntary Disappearances. The Committee may request that an abducted person be sought and found, and for a State to provide information on the situation.

B. Typical Exam or Essay Questions

- The use of corporal punishment as a criminal sanction is found in the history of most Southeast Asian States (and is still used in some). Discuss how this punishment was used throughout history, when it stopped, and why it stopped.
- Has there been a famous case of a person tortured or disappeared in your country? Investigate this case and consider who the culprit(s) might be, and what legal actions, if any, were undertaken.
- Can corporal punishment at school be considered a form of torture or cruel and inhumane treatment? Carefully read the definition of torture and explain its elements. What about the process of conversion therapy, where often invasive and painful procedures are given to an LGBTQI person in the (false) hope they will convert to heterosexuality?
- The most notorious case involving CAT was the attempt to put the ex-leader of Chile, Augustus Pinochet, on trial. Describe the progress of this trial including the argument that heads of state should have immunity, and the final resolution. In your opinion, was justice found for the victims of torture in this case?
- Could more be done at the regional level, through ASEAN, to prevent torture and disappearances? What is ASEAN currently doing? Explain the lack of any legal standards in the region.

C. Further Reading

Key Authors

Academics who have written on torture, and have their work used in university classes include:

Martínez, E. (2019), *Enforced Disappearances in International Law*, Oxford University Press, 10.1093/obo/9780199796953-0181.

Peter, E, (1996), *Torture*, University of Pennsylvania Press.

Pérez, Solla M. F. (2006), Enforced Disappearances in International Human Rights, Jefferson, N.C: McFarland & Company, Inc., Publishers.

Pérez, Solla M. F. (2006), (2006), *Enforced Disappearances in International Human Rights*, McFarland.

Rodley, Nigel S. (2000), *The Treatment of Prisoners Under International Law*, Oxford University Press. Nigel Rodley was once the Special Rapporteur for Torture,

Schutz, W (ed.) (2007), The Phenomenon of Torture: Readings and Commentary, Philadelphia: University of Pennsylvania Press.

Online Resources

The websites of the NGO Association for the Prevention of Torture (APT) contains a lot of resources including publication on legal standards, actions on preventing torture, and bulletins with update on current events. APT also has a number of videos including interviews with people working on preventing torture, and educational resources. https://www.apt.ch/

The Centre for the Victims of Torture (CVT) has pages of resources including publications and research papers. https://www.cvt.org/

The Convention Against Torture Initiative (CTI), an NGO advocating for the ratification of CAT, has toolkits, links to relevant UN pages, and publications. https://www.cti2024.org/

The NGO International Commission of Jurists (ICJ) has a many online resources on their Torture and Ill-Treatment page. These include news stories and reports. https://www.icj.org/

Trial International and World Organisation Against Torture (OMCT) are two other NGOs with some resources and current news on their websites.

https://trialinternational.org/

https://www.omct.org/

The web pages of the Committee Against Torture contain reports, investigations, and more information on the relevant treaties. https://www.ohchr.org/en/hrbodies/cat/pages/catindex.aspx

Online Courses

Amnesty International has an online course, torture, available on their page on education resources on torture. https://www.amnesty.org/en/

The NGO Redress has a free online course on torture, and how this is relevant to Asylum. https://redress.org/

Enforced Disappearances

There are not that many resources on enforced disappearances. The main sites include:

The Asian Federation Against Involuntary Disappearances, based in the Philippines has some research and book publications on disappearances in Asia. https://www.afad-online.org/

The ICRC Casebook page on enforce Disappearances. https://casebook.icrc.org/

The webpage of the UN Bodies of the Working Group on Enforced or Involuntary Disappearances and the Committee on Enforced Disappearances with state party reports, individual communications, video interviews, and reports.

- Working Group on Enforced and Involuntary Disappearances https://www.ohchr.org/en/issues/disappearances/pages/disappearancesindex.aspx
- Committee Against Enforced Disappearances https://www.ohchr.org/en/hrbodies/ced/pages/cedindex.aspx

20

International Crimes and Human Rights

20.1 Introduction

Throughout history, international response to the most severe violations of human rights, such as genocide and crimes against humanity, has been problematic. Since the scale of these crimes is often vast and perpetrated by States or State-like organisations, it can often be difficult to pinpoint particular perpetrators (State leaders or the soldiers who actually committed the crimes), decide which court has jurisdiction to try the criminals (national or international court), or indeed even which law to follow as individual States may lack legislation against such crimes. Accordingly, not one person has been found guilty of some of the worst atrocities in history such as the slave trade, genocide, and the massacre of indigenous groups by colonisers. However, this lamentable state of affairs has recently changed with the development of international law, international courts, and a political will in many States that such crimes should no longer go unpunished. Accordingly, this chapter examines the laws, courts, and actions undertaken to stop such crimes whilst detailing the challenges.

CONCEPT

Naming severe violations of human rights

A number of terms are used to describe the most serious of crimes including international crimes, gross and systematic violations, atrocities, grave breeches of the Geneva Convention, war crimes, crimes against humanity, and crimes against peace. Not all are legal terms. Also, not all countries recognise such acts as crimes under their legal systems.

20.2 Responsibility Mechanisms: A Legal and Historical Overview

No one has ever been found guilty of any offence related to the slave trade that captured and enslaved millions of Africans from the 1500s onwards. Neither has anyone been held liable for more recent mass killings, such as the Armenian genocide or the genocide of indigenous Australians. The main reason for this lack of action is these acts were committed before the crime of genocide was recognised. Throughout history, upon completion of a war, following the convention of **victor's justice,** leaders of the losing side could be imprisoned, exiled, or sentenced to death. As such, attempts were made to try the Germans and Austrians after World War I, but these failed and instead financial reparations were imposed. It was not until the end of World War II that consensus arose to try the leaders of Germany and Japan for crimes committed during the war.

Victor's justice

When the winner of a conflict decides justice for the losing side. A pejorative term, this is often regarded as unjust because the crimes perpetrated by the winning side are treated lightly or not even investigated.

20.2.1 Nuremberg trials and Tokyo War Crimes Tribunal

It was easier to arrive at a consensus after World War II as the crimes committed were so heinous. Also, international law had developed to the extent that it could provide a framework of principles to conduct the trials. Two series of trials were held, one for the ex-leaders of Germany (who were known as the Nazis or National Socialists) which became known as the Nuremberg trials, and another for the leaders of Japan

which became known as the Tokyo War Crimes Tribunal. The Nuremberg and Tokyo trials comprise the first attempts to prosecute people for starting wars or who were complicit in **crimes of aggression** (then known as 'crimes against peace').

Crimes of aggression

The crime of starting an armed conflict. This is now part of international law and can be judged by the International Criminal Court.

Others were also tried for war crimes and crimes against humanity. While people had been tried for war crimes since the American Civil War, no one had faced trial for crimes against humanity, even though it had long been considered an offence. Genocide, as will be discussed later in the chapter, was not recognised as a crime under international law until 1948. Under leadership from the American prosecutor, US Supreme Court Justice Robert Jackson, the Nuremberg trials (and its sister tribunal in the Far East), seemed to represent a triumph of law over power, with the victorious countries of France, England, the USSR, and the USA, bringing the Germans to justice. However, critics noted that the trials could be interpreted as justice imposed by the victorious (victor's justice) as the Allies themselves were not similarly prosecuted for arguably comparable crimes.

FOCUS ON
Nuremberg trials and the Tokyo War Crimes Tribunal

A series of military tribunals held by the Allied Forces after World War II.

The International Military Tribunal for the Far East (IMTFE), also known as the Tokyo Trials or the Tokyo War Crimes Tribunal, was convened on 29 April 1946 to try the leaders of the Empire of Japan for three categories of crimes.

These trials posed a definitional problem. Coined in 1944, the term **genocide** comprised one possibility, but French and Soviet prosecutors were anxious to include persecution of their own populations as well as the Jews. Thus, a new category of offence, "crimes against humanity," was agreed upon that included the persecution and murder of the Jews, Poles, and Roma. Despite inventing the term, the Nuremberg trials left the category relatively undeveloped, and the judgment of the tribunal did not strictly separate crimes against humanity from war crimes, which includes such atrocities as the cruel treatment of civilian populations, the murder of prisoners of war, enforced population exchanges, and pillaging during armed conflict.

Genocide

Defined in the 1948 Genocide Convention, this refers to the crime of trying to destroy a whole group of people. While conceived for the Nuremberg trials to define the Nazi holocaust of the Jews, it is a crime that was perpetrated many times before World War II.

While the trials were not perfect, they played a valuable role in reducing tensions between the victors and the vanquished by substituting a legal process for outright revenge. By focusing the blame on Nazi officials, the trials sought to reduce the risk that the German nation and its population would be assigned a lasting burden of collective guilt.

The victorious allied powers also established a tribunal for the Japanese military after Japan's surrender on 14 August 1945. Acceptance of the Potsdam Declaration placed the Japanese government under control of General Douglas MacArthur. On 19 January 1956, MacArthur issued a proclamation establishing an International Military Tribunal for the Far East, with the intention of assigning individual criminal responsibility to the leaders whilst rejecting the charge of collective responsibility for the Japanese people. Unlike Nuremberg, the proclamation was not a collaborative process. It was largely an American project. MacArthur appointed eleven judges

from among the Allied powers and one American prosecutor. Historians have noted that although the prosecutor's focus was on crimes against peace (i.e. the waging of aggressive and belligerent war), aim was also taken at war crimes and crimes against humanity, including the large-scale atrocities of Nanjing, China, and the Philippines. The successful prosecutions were a product of a multinational team of investigators and prosecution staff. Accordingly, the Tokyo Tribunal created an important precedent about the responsibility of senior government officials for such crimes.

DISCUSSION AND DEBATE

Individual criminal responsibility or collective responsibility

Assigning blame to a State for starting a war involving many atrocities (as happened to the Germans, the Japanese, and their allies during World War II) is complicated and can be achieved by blaming a country's leaders and thereby attributing individual criminal responsibility to such persons for leading their States into war, or it can be done by blaming the nation as a whole for supporting those leaders, its soldiers, or the companies/individuals building weapons of war.

Is one of these responses more just than the other? While leaders do bear a huge responsibility, they could not start wars without popular support. Nevertheless, it is possible to punish leaders which should act as a deterrent to any future persons also considering such acts. It is much more difficult to penalise an entire country. After World War I, Germany was so punished by the imposition of huge fines which triggered an economic crisis eventually leading to the rise of fascism. Obviously, this had the opposite outcome (of leading Europe back to war) to the one intended (of ensuring the German people would never again support a war).

Which is more just – to criminally punish State leaders or to penalise an entire country?

20.2.2 Gross violations of human rights: Legal definition and concepts

It has been a long journey but States eventually came to a consensus that the most serious crimes must not go unpunished and that their effective prosecution must be ensured at the national or international level. This section provides an overview of the major developments of this journey.

FOCUS ON
Timeline of major developments in international criminal law

1945-1949	Nuremberg trials
1946-1948	Tokyo War Crimes Tribunal
1993-2017	International Criminal Tribunal for the Former Yugoslavia
1994-2015	International Criminal Tribunal for Rwanda
2000	International Criminal Court and the Rome Statute
2000-2006	Special Panels for Serious Crimes in East Timor
2001-2019	Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea
2002-2013	Special Court for Sierra Leone

20.2.3 The International Criminal Tribunal for the Former Yugoslavia

Establishment of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia (referred to as the International Criminal Tribunal for the former Yugoslavia or ICTY)[1] and the International Criminal Tribunal for Rwanda (ICTR)[2] were the next significant developments in determining accountability for gross violations of human rights.

Almost two decades after the conclusion of the Nuremberg trials, the UN Security Council unanimously voted to establish the ICTY. At the time, the major powers resisted pressure to intervene militarily in the most destructive European conflict since World War II. Instead, the ICTY was established to prosecute serious crimes committed during the Yugoslav Wars, and to try their perpetrators.

Ethnic cleansing

The removal of people of a particular ethnicity from an area leaving only a single ethnicity by transportation or decimating the population. Ethnic cleansing was carried out during the Yugoslav war and was seen as a crime against humanity. In certain circumstances, it can be considered genocide.

The wars in the former Yugoslavia displaced about 3.5 million people in a campaign of **ethnic cleansing** that began in April 1992. The war involved systematic forced expulsions known as ethnic cleansing and massacres such as the destruction of the Bosnian Muslim community by Serbian forces in Srebrenica on 11 July 1995. The ICTY had primacy over national courts and it undertook prosecution and adjudication of four types of crimes: genocide, war crimes, crimes against humanity, and grave breaches of the Geneva Conventions.

The ICTY ultimately indicted 161 individuals, of whom 90 were convicted and sentenced.[3] A further 19 were acquitted, and 13 were transferred to domestic courts in Bosnia, Serbia, or Croatia. In addition, 37 indictments were later withdrawn or dropped, and 2 cases were submitted for retrial before the UN Mechanism for International Criminal Tribunal (MICT).

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1 For more information, see the ICTY website at https://www.icty.org/.
2 For more information, see the ICTR legacy website at https://unictr.irmct.org/en/tribunal.
3 See, 'Key figures of the cases' United Nations International Criminal Tribunal for the former Yugoslavia, available at https://www.icty.org/en/cases/key-figures-cases.

20.2.4 The International Criminal Tribunal for Rwanda

Between April and July 1994, 800,000 to one million people were massacred by Hutu extremists. The violence was primarily targeted against Tutsi civilians and moderate Hutus.

The international community was acutely aware of the situation on the ground as it developed. Not only did Western States fail to act, they even took affirmative steps to encourage Hutu extremists by removing UN peacekeeping forces before the worst of the killing began. Only the overthrow of the murderous regime by Tutsi rebel forces in the summer of 1994 stopped the slaughter. The Hutu militias fled to neighbouring Democratic Republic of the Congo where they continued to destabilise the Rwandan State for years.

Through Resolution 955 on 8 November 1994, the United Nations Security Council established the International Criminal Tribunal for Rwanda or ICTR to prosecute and punish persons responsible for the genocide and other serious violations of international humanitarian law committed in Rwanda between 1 January 1994 and 31 December 1994. The ICTR was based in Arusha, Tanzania, but shared an appeals chamber with the ICTY in The Hague. It also had offices in Kigali, Rwanda.

93 individuals were indicted by the tribunal, out of which 62 were sentenced, 14 acquitted, and 10 referred to national jurisdictions for trial. A further 2 indictments were withdrawn, 2 of the accused died prior to judgment, and 3 fugitives were referred to the MICT.[4] The tribunal pitted prosecutors against high-ranking military and government officials, politicians, businessmen, as well as religious leaders, militia, and the media.

The ICTR was the first international tribunal to interpret the definition of genocide as recognised in the *Genocide Convention* (1948). It was also the first tribunal to develop a definition of rape as an international crime and which recognised rape as a means of perpetrating genocide. The recognition of sexual violence on a mass scale as an international crime helped to challenge the gendered foundations of international criminal law. It also helped to establish a clear precedent and ended impunity for such crimes. A landmark decision was also reached in the 'Media case' where the ICTR became the first international tribunal to hold members of the media responsible for broadcasts intended to inflame the public to commit acts of genocide.

[4] See, 'The ICTR in brief' UN International Residual Mechanism for Criminal Tribunals, available at https://unictr.irmct.org/en/tribunal.

CONCEPT
Gendered foundation of international criminal law

Rape is one of many crimes committed by militaries against women. Women have long been exploited as forced labour and sex slaves (such as Japan's use of 'comfort women' during World War II). Furthermore, they have suffered forced marriages or had their pregnancies terminated. However, these crimes have either been ignored or not punished severely enough by criminal tribunals, while crimes against soldiers and other men were taken far more seriously. This has led many to claim that war crimes and international criminal law in general is gendered because it sees violence against men as more serious and in need of justice, whereas crimes against women are considered less serious and unfortunate side effects of war. This attitude has changed significantly in recent decades. As a result, rape, sexual slavery, and other attacks on women are now seen as serious crimes in international criminal tribunals.

FOCUS ON
Media case, ICTR[5]

In a landmark case, three media leaders were convicted of genocide, incitement to genocide, conspiracy, and crimes against humanity, extermination, and persecution. All three were given lengthy jail terms. The judges observed that the three leaders had a common purpose – the destruction of the Tutsi population. Towards this end, they coordinated and used the media institutions under their control to spread hatred and violence. Notably, the judges observed that their broadcasts and publications were not protected by freedom of speech.

20.3 Special Tribunals

The ICTY and the ICTR encountered numerous problems including a lack of cooperation from the States concerned (Yugoslavia and Rwanda respectively) to substantiate allegations, obtain evidence, arrest, and try the defendants. Also, both *ad hoc* tribunals faced enormous delays and concluded many years after the crimes had been perpetrated. Further, since both took place far away from the location of the crimes, the proceedings had little impact on the victims.

These shortcomings were addressed through establishment of "hybrid" or "mixed" tribunals in Sierra Leone, Cambodia, Lebanon, Timor-Leste (formerly East Timor), Bosnia, and Kosovo which reflected the international community's dissatisfaction with the Yugoslavia and Rwanda tribunals. It was hoped the hybrid courts, administered jointly by the United Nations and the national governments concerned, would help to shorten the duration of judicial proceedings while respecting due process, include the greater involvement of local societies, and provide better financial efficiency.

[5] UN International Residual Mechanism for Criminal Tribunals (see note 4 above).

CONCEPT
Hybrid tribunals

Hybrid tribunals comprise a mix of international and domestic experts and law. While international tribunals rely almost exclusively on international law and international judges, hybrid tribunals boast a mixed panel of international judges including some from the State concerned. In addition, the applicable law itself can be both international (e.g. using the Genocide Convention) and national (e.g. a national murder law).

Such special tribunals included the Extraordinary Chambers in the Courts of Cambodia (ECCC), the Special Court for Sierra Leone, or the 'Special Court' (SCSL), and the Special Panels of the Dili District Court.

20.3.1 Extraordinary Chambers in the Courts of Cambodia (ECCC)

The Khmer Rouge took power in Cambodia on 17 April 1975 and ruled until it was overthrown on 7 January 1979. In these three years of rule, 1.7 million people died from starvation, torture, execution, and forced labour. Following its downfall, civil war broke out in Cambodia and continued until 1998.

In 1997, the Cambodian government sought assistance from the United Nations to initiate trials to prosecute senior leaders of the Khmer Rouge. Following discussions in 2001, Cambodia finally enacted a law to establish a framework to try the serious crimes committed during its rule. This framework was called the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea (Extraordinary Chambers or ECCC).[6] Under the law, the ECCC was established as part of Cambodia's existing court structure. In addition to the crimes under the Penal Code of Cambodia, the ECCC had jurisdiction over crimes of genocide, crimes against humanity, grave breaches of the Geneva Conventions of 1949, destruction of cultural property, and crimes against international protected persons under the Vienna Convention of 1961.

The ECCC comprised a combination of international and Cambodian judges, prosecutors, and defence lawyers, and applied both national and international law. Nine persons were indicted. The former Chairman of the Khmer Rouge S-21 Security Centre in Phnom Penh, Kaing Guek Eak (also known as Duch) was convicted by the Trial Chamber for crimes against humanity and grave breaches of the Geneva Conventions. He was sentenced to 35 years' imprisonment. The accused filed an appeal with the Supreme Court Chambers which quashed the sentence, instead handing down the maximum sentence of life imprisonment. Proceedings against Ieng Sary were terminated on his death. Similarly, proceedings against his wife, Ieng Thirith, were terminated because of her unfitness to stand trial due to dementia.

The rules of the ECCC gave opportunity to those suffering violations during the Khmer Rouge to participate in the trials. Any person who had suffered physical, psychological, and material harm could apply to the court to become civil parties. Also, the ECCC gave opportunity to Cambodians to attend the trial hearings.

[6] For more information, see the ECCC website at https://www.eccc.gov.kh/en/node/39457.

20.3.2 Special Court for Sierra Leone

The Special Court for Sierra Leone or SCSL,[7] also called the Sierra Leone Tribunal, was a judicial body set up in 2002 by the government of Sierra Leone and the United Nations to prosecute persons bearing the greatest responsibility for serious violations of international humanitarian law in Sierra Leone.

The Special Court was borne out of a June 2000 request by the President of Sierra Leone to the United Nations for assistance in prosecuting the leaders of the Revolutionary United Front, a rebel group notorious for using drug-addicted child soldiers to terrorise civilians for the purposes of controlling the country's diamond resources. Despite an attempted amnesty, the rebels continued fighting eventually taking 500 UN peacekeepers hostage. In March 2002, the parliament of Sierra Leone ratified the proposal establishing the court.

The Special Court had mandate over charges of war crimes, crimes against humanity, other serious violations of international humanitarian law, and serious violations of Sierra Leonean law. The prosecutor brought 13 indictments against leaders of the Revolutionary United Front (RUF), the Armed Forces Revolutionary Council (AFRC), and the Civil Defence Forces (CDF), and then-Liberian President, Charles Taylor. Eventually ten persons were put on trial. However, two died before proceedings could commence, and one fled before he could be indicted. In the end, nine persons were convicted and handed down sentences ranging from 15 to 52 years. One person died during the trial.

The Special Court was remarkable as it was one of the first courts to indict, try, and convict a sitting head of State. Charles Taylor was President of Liberia at the time of his indictment in 2003, following which he stepped down and went into exile in Nigeria. However, the Nigerian authorities arrested him near the Cameroonian border in 2006 and he was transferred to the Special Court in Freetown. His trial was later shifted to The Hague as it was felt that his presence in the region was an impediment to stability, even posing a threat to peace. The Trial Chamber found him guilty and sentenced him to 50 years.

The Special Court was also the first international court to prosecute persons for the use of child soldiers and forced marriages, and for attacks directed at United Nations Peacekeepers.

20.3.3 Timor-Leste Tribunal

By contrast, the Special Panels of the Dili District Court (also called the Timor-Leste Tribunal) suffered from a crisis in funding and a lack of support. The hybrid international Timor-Leste Tribunal was created in 2000 by the United Nations Transitional Administration in East Timor (UNTAET) to try cases of serious criminal offences which took place in East Timor in 1999. It was established within the District Court of Dili, the capital city of Timor-Leste. A Serious Crimes Investigation Unit (SCU) was also established to investigate and prosecute crimes committed in the country. The Special Panels sat from 2000 to 2006 with its main tasks as mandated by the Special Representative of the UN Secretary General, to prosecute genocide, war crimes, crimes against humanity, murder, sexual offences, and torture.

[7] For more information, see the SCSL website at http://www.rscsl.org/.

The Special Panels issued indictments against almost 400 people. However, despite indictments against Indonesian military officers, most trials could not go forward as the Indonesian government refused to recognise the court and extradite the accused.

20.3.4 The International Criminal Court

The tribunals discussed in the previous section were established in response to violations. However, the need for a permanent international court to investigate, prosecute, and try individuals accused of committing such crimes was also recognised. Towards this end, in 1998 UN Member States adopted the Rome Statute establishing a permanent International Criminal Court (ICC). The Rome Statute, amongst other provisions, lays down the jurisdiction of the court and the rules and procedures for its functioning.

The seat of the ICC is located at The Hague in the Netherlands. However, according to the Rome Statute, if the judges think it desirable, the ICC can also sit in other locations. States, by becoming party to the Rome Statute, submit themselves to its jurisdiction. In other words, once a State becomes a party to the Rome Statute, the Court can initiate prosecution against alleged perpetrators for crimes committed in the State's territory, or if the alleged perpetrators are citizens of the State. However, if the Security Council refers a situation to the Office of the Prosecutor of the ICC, action can also be taken with respect to citizens of States not ratifying the ICC.

The ICC is intended to complement, not replace, criminal justice systems at the national level. It can prosecute cases only if national justice systems do not carry out proceedings or when they claim to do so but in reality are unwilling or unable to genuinely carry out such proceedings. This fundamental principle is known as the principle of complementarity.

Several purposes guided establishment of the ICC. First, it was hoped the ICC would have a deterrence effect by ending the **culture of impunity**. A lack of accountability systems can encourage violations as perpetrators believe they will never be punished for their actions. Second, the ICC was convened to provide justice to victims. One of the main aims of restorative justice is to force perpetrators to take responsibility for their actions. It is very difficult for a society witnessing human rights violations to move towards peace if offenders are not made accountable for their actions. Third, it was hoped the ICC would assist in norm building or setting justice standards. Standard setting is important to lay foundations to end the crimes of genocide, crimes against humanity, war crimes, and the crime of aggression.

Culture of impunity

When perpetrators of crimes go unpunished because of systemic failures. This leads to a culture where those in power believe they can do anything because they will not be made to suffer any consequences.

20.4 Legal Definition of Gross Violations of Human Rights

The Rome Statute of the International Criminal Court (1998) provides clear guidelines to assess crimes related to genocide, war crimes, and crimes against humanity. The section below discusses the scope and ambit of these crimes.

20.4.1 Genocide (Article 6)

In 1944, Polish Jewish lawyer Raphael Lemkin coined the term "genocide" in a book documenting the Nazi policy to systematically destroy national and ethnic groups, including the mass murder of European Jews. Lemkin coined the word from *genos* (Latin for family, tribe, or race) and *cide* (Latin for killing).

Two genocides occurred in Europe in the early twentieth century: the Armenian genocide and the Holocaust. The Armenian genocide which began before World War I and continued through it, was part of the drive to transform the plural Ottoman Empire into mono-ethnic Turkey. The genocide resulted in the eviction of many people from their homelands in Eastern Turkey (now named Armenia) and the destruction of their 3,000 year old culture. But changing world events, calculated silence, and active suppression of memories successfully overshadowed the initial global outrage, turning it into "the forgotten genocide" of world history.

The Holocaust (also called *Ha-Shoah* in Hebrew) occurred during World War II and refers to the period from 30 January 1933 (when Adolf Hitler became chancellor of Germany) to 8 May 1945 when the war in Europe officially ended. During this time, Jews in Europe were subjected to brutal persecution ultimately leading to the murder of around six to eight million Jews (1.5 million of which were children) and the destruction of 5,000 Jewish communities. At that time, these deaths represented two-thirds of the European Jewish population. The Jews who died were not casualties of the fighting that ravaged Europe during World War II. Rather, they were the victims of Germany's deliberate and systematic attempt to annihilate the entire Jewish population of Europe, a plan Hitler called the "Final Solution." In response to these systematic killings (and also the murders of persons with disabilities, communists, people of Roma ethnicity, and homosexuals), in 1948, the United Nations General Assembly adopted the Genocide Convention, which for the first time, provided a definition of genocide. The statute of the ICC uses the same definition.

As per these statutes, genocide refers to actions taken with the intent to destroy, wholly or partially, a national, ethnic, racial or religious group. Such actions could be in the nature of killing members of a group and/or causing them serious physical or mental harm. It could also include imposing conditions that would cause a group's physical destruction, or imposing measures intended to prevent births within the group or the forcible transference of their children to other groups.

FOCUS ON
Charges of genocide

In September 1998, the ICTR convicted Jean Paul Akayesu of genocide and crimes against humanity for actions he engaged in and oversaw as mayor of Tara (a town in Rwanda). This comprised the first conviction by an international tribunal of genocide.

Almost twenty years later in November 2017, the ICTY convicted Ratko Mladic, former commander of the Main Staff of the Bosnian Serb Army, of genocide, crimes against humanity and violations of the laws or customs of war. He was sentenced to life imprisonment.

In November 2019, Gambia brought a case against Myanmar in the International Court of Justice (ICJ) for genocide against the Rohingya and violating the 1948 Genocide Convention. Gambia and Myanmar are both parties to the Genocide Convention. Under Art 9, a State which is party to the Convention, can submit disputes between State Parties relating to the interpretation, application, and fulfilment of the Convention to the ICJ for resolution. Using this provision, Gambia filed a case before the ICJ. The ICJ, in its preliminary ruling on 23 January 2020, ordered Myanmar to take immediate

measures to prevent genocide against the stateless Rohingya minority based in the Northern Rakhine State. This ruling of the ICJ, though preliminary in nature, was important to protect the rights of the Rohingya people. As such, other UN bodies can also use the ICJ ruling and call upon Myanmar to take steps to prevent acts of genocide against the group.

20.4.2 Crimes against humanity

Crimes against humanity were considered in the Nuremberg Trials, the ICTY, and the ICTR. It has also been defined under the Rome Statute. Essentially, crimes against humanity involves commission of certain prohibited acts as part of a widespread or systematic attack directed against a civilian population. The prohibited acts include murder, extermination, enslavement, deportation, or the forcible transfer of a population, torture, sexual violence, persecution against a group, enforced disappearances, the crime of apartheid, and other inhumane acts causing great suffering and serious injury to a body, or physical and mental health.

FOCUS ON

Examples of leaders who were found guilty of crimes against humanity

In December 1985, an Argentinian court convicted several former military officials for crimes against humanity. During the 'dirty war' (1976-1983), these military officials were responsible for the mass kidnappings and killings of left-wing activists, political opponents, and sympathisers.

Slobodan Milosevic, former president of Yugoslavia, was tried for war crimes, crimes against humanity, and genocide by the International Tribunal for the Former Yugoslavia. However, in 2006, he died at the UN detention centre before the trial could be concluded.

In 1998, Jean Kambanda, former prime minister of Rwanda, was sentenced to life imprisonment by the International Criminal Tribunal for Rwanda for crimes against humanity committed in 1994. He is the first man to be convicted under the 1948 Geneva Convention.

The Special Court for Sierra Leone found Charles Taylor, former president of Liberia, guilty of war crimes, crimes against humanity, and serious violations of international humanitarian law during the civil war in Sierra Leone.

20.4.3 War crimes (Article 8)

The offence of war crimes is as old as war itself. Even ancient civilisations had codes prohibiting certain kinds of behaviour during and after war. However, it was only at the end of the 19th century that the concept of war crimes was developed with the codification of international humanitarian law.

FOCUS ON
International humanitarian law

Geneva Convention, 1864: Focused on the amelioration of the condition of wounded soldiers in the field.

Hague Conventions, 1899 and 1907: Focused on the prohibition of certain means and methods of warfare.

Geneva Conventions, 1949: Four conventions adopted in 1949 which focused on the protection of wounded and sick soldiers on land and sea during wartime, prisoners of war, and the protection of civilians, including those in occupied territories. These conventions form the core of international humanitarian law.

War crimes is defined in Art 8 of the Rome Statute. Explained in simple terms, it refers to grave breaches of the Geneva Conventions of 1949 and serious violations of laws and customs applicable in international armed conflict. It also refers to serious violations of Common Art 3 of the four Geneva Conventions related to armed conflict not of international character, and other serious violations of laws and customs applicable to armed conflict not of international nature. Thus, war crimes can occur in the context of both international and internal armed conflict. Section 8 of the Rome Statute lists the actions that can be considered war crimes.

FOCUS ON
Examples of the charge of war crimes

US action in Afghanistan: 4-6 December 2019

The ICC Appeals Chamber held a hearing to decide whether or not to open an investigation into alleged war crimes and crimes against humanity committed by the CIA and the US military during the armed conflict in Afghanistan. In November 2017, ICC Prosecutor, Fatou Bensouda, submitted a request seeking authorisation to conduct an investigation into crimes committed by the Taliban, Afghan forces, and US actors in the context of the armed conflict in Afghanistan. The request was refused citing concerns including the relevant political landscape in Afghanistan and other key States, the complexity and volatility of the political climate, and the feasibility of conducting an investigation given the unlikelihood of State cooperation, and the unavailability of evidence and witnesses.

Prosecuting sexual violence as a war crime

In 2016, the ICC convicted Jean-Pierre Bemba, a former president of the Democratic Republic of Congo, of crimes against humanity and war crimes perpetrated by his rebel group, the Congolese Liberation Movement. It was a significant decision that established precedents on two counts: it held high level commanders responsible for the actions of their soldiers even when exerting control from another country, and the prosecution of sexual violence as a war crime. This was the first case before the ICC that focused on the use of sexual violence as a weapon of war. However, in 2018, the ICC appeals chamber acquitted Bemba of the charges due to procedural issues.

20.4.4 Crimes of aggression

The crime of aggression was one of four categories listed in Art 5 of the Rome Statute at the time the treaty was adopted in 1998. However, States were not able to agree upon a definition of the crime, and thus it was decided the ICC would not exercise its jurisdiction over the crime of aggression until negotiations over its definition and other aspects were complete. ICC Member States finally agreed upon a definition at a ICC review conference in Kampala in 2010. It took seven years more for a resolution on the crime of aggression to be adopted (15 December 2017). The resolution entered into force on 17 July 2018 when it was also agreed that the ICC would not have jurisdiction over Member States or their nationals not ratifying the amendments.

Under Art 8, the crime of aggression has three elements. First, the perpetrator must be a leader who is in a position to exercise effective control over the political or military action of a State. Second, the perpetrator must be involved in the planning, preparation, initiation, or execution of an act of aggression by the State. And third, the act of aggression, in terms of its gravity and scale, must constitute a manifest violation of the UN Charter.

An act of aggression has been defined in Art 8 as the use of armed forces by a State against the sovereignty, territorial integrity, or political independence of another State, or in a manner which is inconsistent with the United Nations Charter. Such acts of aggression as listed in Art 8 can include, for example, invasion, bombardment, annexation by the use of force, and the blockading of ports or coasts.

Under this amendment, political or military leaders can be prosecuted before the ICC for initiating and commanding invasions or other major attacks against the territory of another State. However, the amendment would not have retrospective effect and cannot be applied to past actions such as the invasion of Iraq in 2003. Countries such as the United Kingdom and France did not ratify the amendment believing the ICC should not have jurisdiction over the crime of aggression, and that only the Security Council should have the power to respond to such acts.

20.5 Challenges for Southeast Asia

Southeast Asia is a region where numerous gross violations of human rights have occurred, as discussed above in the cases of the Khmer Rouge leading to the establishment of the Extraordinary Chambers in the Courts of Cambodia (ECCC), and the crimes against humanity in Timor-Leste following the referendum of 1999 which led to the establishment of the Timor-Leste Tribunal (East Timor Tribunal).

In the last few decades, ASEAN Member States have demonstrated a growing acceptance of human rights. Establishment of the ASEAN Intergovernmental Commission on Human Rights (AICHR) reflected their commitment to the promotion and protection of human rights and fundamental freedoms. Article 1 of the ASEAN Charter adopted in 2007 specified the purpose of ASEAN includes maintaining and enhancing peace, security, and stability in the region. However, while Art 2 of the Charter states that the guiding principles governing the regional body to be a shared commitment and collective responsibility towards enhancing regional peace, security and prosperity, and reliance on the peaceful settlement of disputes, it also stresses non-interference in the internal affairs of ASEAN Member States. It is this principle of non-interference that often acts to prevent ASEAN from collectively responding to mass violations of human rights.

Nonetheless, there are some signs of change. The ASEAN Political-Security Community Blueprint 2025 envisages a "rules-based … community of shared values and norms"[8] and includes commitments to strengthen criminal justice systems and improve regional cooperation and information-sharing to address transnational crime. Based upon this commitment, international organisations such as the International Commission of Jurists (ICJ) are advocating that the AICHR should be given the mandate to develop an early warning system to prevent gross violations of human rights. Such a mandate would enable the AICHR to respond to situations such as ethnic cleansing in Arakan (the Rohinyas), gross violations of human rights in West Papua, as well as violent conflicts in Southern Thailand.

Ratification of the ICC in Southeast Asia has also been slow. Fifteen years after the Rome Statute came into force, only Cambodia and Timor-Leste have ratified the ICC. Thailand signed it in 2000, but has not yet ratified it. Philippines ratified it in 2011 but decided to withdraw from it in March 2018.

At the same time, ASEAN Member States have enacted national laws to address gross violations of human rights. The Philippine Act on Crimes Against International Humanitarian Law, Genocide and Other Crimes Against Humanity (RA 9851) of December 2009, is an example of legislation that incorporated Rome Statute provisions into national law. Vietnam also has some legislative capacity to prosecute international crime and Singapore's Penal Code includes a crime of genocide (Chapter VIB, Penal Code, Singapore, Chapter 224, 16 September 1872, revised 30 November 2008).

Similarly, Indonesia has a special human rights court to prosecute perpetrators of gross violations of human rights. Law No 26/2000 was adopted to establish the Ad Hoc Human Rights Court. According to Art 5, the court also has jurisdiction to hear cases of gross violations of human rights perpetrated by Indonesian citizens outside the country's territorial boundaries. Further, Art 47 provides that resolution of cases involving gross violations of human rights taking place prior to establishment of the human rights court, can be undertaken by a Truth and Reconciliation Commission. Despite these provisions, the Office of the Attorney General in Indonesia has proved reluctant to act upon the findings of the National Human Rights Commission (Komnas HAM) regarding the violence of 1965-1967 when members of communist parties and their sympathisers (especially the ethnic Chinese and others) were targeted often at the instigation of the armed forces and government.

In the Philippines, since President Rodrigo Duterte assumed office, according to official records, close to 6,000 people have been extra-judicially killed. The majority of the victims have been poor, drug-dependent men, or petty drug peddlers from disadvantaged and impoverished neighbourhoods. The victims have also included women, children, and random bystanders. However, ASEAN and the AICHR has not responded to any of these cases. It has also not been able to respond to the Rohingya crisis in Myanmar.

Hence, the challenge to prevent and protect against gross violations of human rights in Southeast Asia is now immediate and pressing.

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[8] ASEAN, 'ASEAN Political-Security Community Blueprint 2025' ASEAN, 2016, available at https://asean.org/wp-content/uploads/2012/05/ASEAN-APSC-Blueprint-2025.pdf.

A. Chapter Summary and Key Points

Since the Nuremberg and Tokyo tribunals, several *ad hoc* tribunals have been established to initiate prosecutions against those responsible for gross violations of human rights. Examples include the ones established in the former Yugoslavia and Rwanda.

However, the international criminal tribunals in the former Yugoslavia and Rwanda suffered from some handicaps. They were located at The Hague which was far away from the location where the gross violations took place. Also, the tribunals took years to complete their proceedings. Because of these reasons, the trials did not have an impact on the people affected by the violations. As such, they were unable to identify with the process of seeking accountability. In order to correct this, hybrid tribunals were set up in response to violations in Cambodia, Sierra Leone, and Timor-Leste (formerly East Timor).

In 1998, the International Criminal Court (a permanent court) was established. The Court has jurisdiction over the crime of genocide, crimes against humanity, war crimes, and the crime of aggression.

B. Typical Exam or Essay Questions

- Why was the need felt to set up hybrid tribunals in response to gross violations of human rights?
- What is the jurisdiction of the International Criminal Court?
- Explain the crimes of genocide, crimes against humanity, war crimes, and the crime of aggression. Give examples.

C. Further Reading

Key Authors

Three academics who have widely published in the areas of international crimes and the ICC are

Bassiouni, M. Cherif, (2012), Introduction to International Criminal Law, Martinus Nijhoff Publishers.

Cryer, R., Friman, H., Robinson, D. (2010), & Wilmshurst, E., *An Introduction to International Criminal Law and Procedure*, Cambridge University Press.

Schabas, W., (latest edition 2011), *Introduction to the International Criminal Court*, Cambridge: Cambridge University Press.

Schabas, W. (2009 2nd edition), *Genocide in International Law*, Cambridge: Cambridge University Press.

Schabas, W. (2002), *The Abolition of the Death Penalty in International Law*, Cambridge: Grotius Publications.

There are a number of **academic journals** focusing on these issues including

- International Criminal Justice Review
- Journal of International Criminal Justice
- Official Journal of the International Criminal Court
- The Monitor (Bi-annual journal of the Coalition for the International Criminal Court)

Online resources:

There are a number of blogs which regularly cover issues on International criminal justice and these include

- EJIL Talk
- Opinio Juris
- International Law Reporter

The Coalition for the ICC is an international NGO aimed at raising awareness about international crime and the role of the ICC. Its website hosts a number of learning resources including its journal, *The Global Justice Monitor*, and also gives readers ideas on how they can work on advocacy around international crime and justice. http://www.coalitionfortheicc.org

The International Criminal Court webpage hosts a number of learning resources including introductions, case studies, and links, see at https://www.icc-cpi.int/. It also has a YouTube channel at **IntlCriminalCourt** where they have short documentaries and news articles.

International Crimes Database: A database of legal documentation of on international crimes adjudicated by national, as well as international and internationalized courts. But the site also has background information about international crimes, academic articles, news and current affairs, and audiovisual resources. http://www.internationalcrimesdatabase.org/

International Criminal Justice Today is an online news source for the latest development in International Crime. https://www.international-criminal-justice-today.org/

OpenLearn from The Open University based in the United Kingdom has a set of five lecturers available on YouTube on the International Criminal Court. The course is an introduction and suited for undergraduate students. https://www.open.edu/openlearn/

The Peace Palace Library has a research guide on international criminal law and access to a number of databases, monitors, and current affairs sites. https://www.peacepalacelibrary.nl/

21

The Elimination of Racism and Other Forms of Discrimination

21.1 Introduction

It is often forgotten that the first human rights treaty entering into force was the *International Convention on the Elimination of All forms of Racial Discrimination* (ICERD). It was adopted by the United Nations General Assembly (UNGA) in December 1965 and entered into force in January 1969, some seven years before the *International Covenant on Civil and Political Rights* (ICCPR) and the *International Covenant on Economic, Social and Cultural Rights* (ICESCR). In fact, it was the most ratified human rights treaty until it was overtaken by the Child Rights Convention in the early 1990s. In the 1960s, when the ICERD was introduced, **racism** was a significant problem with many countries having laws and policies denying people of certain ethnicities or races the enjoyment of their rights. Racist language was also accepted as normal and a part of everyday speech.

Racism

A set of ideas espousing that certain groups of people have power or superiority over others on the basis of physical and cultural attributes.

Racial discrimination

Actions denying a person their rights based on skin colour, ethnicity, or other cultural or physical characteristics.

While today some progress has been made towards the elimination of **racial discrimination** in our societies, it still exists. This chapter examines the phenomena of racism and its practice throughout history. Next, it assesses the ICERD and the framework of rights and State obligations recognised therein. Finally, it examines some contemporary forms of racism and looks into the UN mechanisms responsible for monitoring implementation of the ICERD.

CONCEPT

Racism or racial discrimination?

While the terms 'racism' and 'racial discrimination' are often used interchangeably, they do differ. Racism is the *belief* that a race is inferior or superior and comprises a person's ideas, views, and values. Racial discrimination is an *action* denying someone their rights because of their race. This distinction is important. The ICERD sets out to eliminate racial discrimination or the action treating people differently such as laws, policies, denial of service, and so on, all acts which can be legislated upon. By contrast, it is difficult to eliminate racism because this concerns an individual's values and beliefs. While beliefs can and do change, education and persuasion are key. In the meantime, the priority is not to change beliefs but to prevent the *actions* denying someone their rights. In other words, only if a person holding racist views participates in racial discrimination can he/she be punished. Obviously, in an ideal society, discrimination as a result of racist views would not be a problem but as the latter are difficult to check on, the decision was made to police the former.

In this chapter, the terms, racial discrimination and racism are sometimes used interchangeably, as acts of racial discrimination are usually committed by persons or even States holding racist views. Nonetheless, it is important to note the distinction between the two.

21.1.1 What is race and racism?

Race

A social construct classifying people into different groups based on characteristics such as physical appearance, skin colour, cultural and ethnic affiliation, ancestral heritage, etc.

Race is a term used to classify groups of people with similar physical characteristics, such as skin colour and facial features. However, the concept of race is rarely used nowadays (except for the word 'racism' itself) because it is both scientifically wrong and socially inappropriate. In particular, one's outward appearance has no bearing on how one's body functions. Thus, for example, a person's skin colour cannot determine his/her intelligence, physical prowess, or business acumen. By contrast, **ethnicity** is a social construct which uses shared language, culture, history, etc, to pigeon-hole individuals or groups and comprises cultural views and values, social practices, and inherited physical characteristics. While some may hesitate to self-identify as to, e.g. skin colour, most of us lay claim to certain ethnicities such as Malay, Timorese, Thai, or Shan. As these examples show, an overlap exists between nationality and ethnicity but they are by no means identical as people may consider themselves as ethnically belonging to one group whilst claiming nationality with another. Racism insists on a hierarchy of races and is manifested through unfair or hostile attitudes towards people of racial or ethnic groups perceived to be inferior.

Ethnicity

The shared identity of a people based on inherited culture, social practices, religion, language, and so on. While ethnicity may include physical characteristics, such similarities are unnecessary for inclusion into an ethnic group.

As previously mentioned, most people admit to having an ethnic identity, and the human right to culture recognizes this; indeed, culture and tradition are commonly linked to ethnicity as demonstrated by parents passing on traditions and beliefs to their children. The problem of racism lies not in the wish to identify oneself as a particular race, but rather the **prejudicial** belief that one race or ethnicity is more deserving of rights than another. Racial discrimination first stemmed from the idea that races were biologically distinct and some were biologically superior. However, when science proved this assertion wrong, racism adapted; thus, current racist values have referred more to social and cultural characteristics. Racists assume certain groups are inferior because their ethnicity leads them to act in certain ways or hold certain beliefs, for example, on marriage, women, science, or politics.

Prejudice

Having discriminatory opinions or beliefs. The view is held without reason or justice; hence, the term prae- (Latin for 'in advance') judicium (Latin for 'judgement') or prejudice.

The elimination of racism has an important role to play in human rights. Racism affects many people in all societies. For example, children may be denied access to school or receive an inferior education because communities, schools, or teachers may hold misperceptions based on their race. Accordingly, people may falsely believe children from indigenous communities lack cognitive abilities and therefore school is either unnecessary or should be simplified for them. Racism can also be based on religion, for example, prejudicial views about people of the Muslim faith. Throughout Southeast Asia and indeed, throughout the world, distrust based on skin or hair colour persists. In all these cases, such distrust often leads to the denial of rights, whether education, work, access to services, or rights to privacy.

21.2 History of Racism

At some stage, almost all groups in history have claimed superiority over their counterparts, or believed that other groups should be treated with suspicion due to perceived differences. However, some societies were more open to diverse groups and tried to respect these differences. In general, differences based on race only result in severe consequences when used by politicians to promote hatred. For example, throughout Southeast Asian history, this lack of trust has triggered violence, slavery, and the mistreatment of people. Often these views are espoused by strong political groups to, for example, mobilize a country for warfare. As racism is often attached to politics, it may develop and change as political structures develop and change. In

particular, the recent rise of nationalism has led to a connection between race and nationhood, further encouraging racism. The following section covers some of these developments by examining colonialism, slavery, and apartheid, all structures which relied on racism to justify their powerbases.

21.2.1 Racism and colonialism

While racism did exist before colonialism, racism as we understand it today, is most connected to colonialism. European nations invented the concept of race and the science surrounding it to justify colonial expansion and the mistreatment of non-Europeans. Thus, the idea of racial inferiority was used to justify racist notions including that colonized people were less intelligent, were neglectful of their resources, or should be rescued from their sinful ways. To see whether such ideas are still in use today, a close examination of how this racism worked and how it was justified becomes necessary. The science of racism is based on three important (and false) ideas: the notion of a racial hierarchy, or that some races are superior to others; the idea that races evolve allowing so-called superior races to naturally take over their inferior counterparts; and the belief that the purity of races can be guaranteed through selective breeding, or the study of **eugenics**.

Eugenics

A set of beliefs and practices that humans can use selective breeding to improve the genetic quality of the species.

Racial hierarchy theories were first promoted in the early 1800s by American physician, Samuel Morton, who, based on a study of their skulls, espoused that people could be divided into a number of races, each having distinct characteristics. Further, the races could be placed into a hierarchy, with the whites or Caucasians at the top (as they were the most intelligent) and Africans at the bottom. Included in the hierarchy were East Asians or Mongolian and Southeast Asians. It was this idea that was used to support slavery and apartheid in South Africa.

CONCEPT
The hierarchy of man

The belief that all races can be placed on a ladder or hierarchy dates back to the 18th century. Examples at the time placed Europeans at the top followed by Chinese and Malays, to indigenous aboriginal groups (e.g. Australian Aborigines) or Africans at the bottom. The hierarchy argued that all races were comparable and evolution had resulted in different rates of development.

The second scientific justification of racism is found in the concept of social Darwinism. In 1859, Charles Darwin published *On the Origin of Species* which introduced the theory of evolution by natural selection. This proposed that organisms adapt to their environment over time, and the ones better able to do so are more likely to reproduce successfully. Thus, natural selection espouses survival of the fittest. In the late 1800s, thinkers such as Herbert Spencer applied Darwin's theory to society and the idea of social Darwinism developed. According to this theory, because the hierarchy of races is natural, it is therefore natural for the fittest races to survive. As such, any intervention to help the weak races would go against evolution by delaying extinction of the 'unfit.' In this way, Social Darwinists rationalised inequality, the separation of races, and justified attempts to destroy other ethnic groups.

CONCEPT
Social Darwinism

The belief that races naturally evolve and compete as groups, with some races winning and others dying out. Social Darwinism dictates that races and societies compete to survive. As a result, the fittest (meaning the fittest or most healthy as opposed to those best suited to the environment) will survive and other races will become extinct. These ideas influenced the Nazi party in Germany and apartheid. Social Darwinist views are still used by racists today despite being rejected as dangerous and unscientific. It should be noted that this theory emerged after Darwin died, and it is widely debated whether he would have agreed with them.

The third idea, eugenics, is mostly attributed to British scholar, Sir Francis Galton, who in 1883 proposed that selective breeding should be practiced to reproduce 'good' genes in order to build a more ideal society. Eugenics was picked up in the United States which even introduced laws to force sterilisation and immigration. For example, the Immigration Registration Act of 1924 restricted the inflow of immigrants from Southeast European nations as they were believed to possess lower grades of intelligence. In 1927, in *Buck v Bell*[1], the US Supreme Court legitimised the forced sterilisation of patients at an institution in Virginia for the mentally ill. In addition, many states enacted laws prohibiting marriages between white people and people of colour such as African Americans or Native Americans. Eugenics also formed the basis of State policies in Nazi Germany where it was believed an Aryan master race could be selectively bred by the German population.

CASE STUDY
Eugenics and the Aryan master race in Nazi Germany

During the Nazi regime in Germany (1933-1945), an extreme variation of eugenics informed State policy. The Nazis believed in the superiority of the Nordic or Aryan race and attempted to create a German community to exclude the racially inferior. As such, it was illegal under the *Nuremberg Race Laws* of 1935 for German girls to procreate with non-Aryans (such as Jews or Asians). These race laws were used to deny citizenship, persecute the Jewish, and to sterilize and execute people with disabilities through the T-4 Euthanasia program which aimed to eliminate those born with 'genetic deficiencies.' This led the Nazis to commit genocide against certain groups, killing millions of Jews, people with disabilities, Romani (sometimes called Gypsies, although this term is also deemed insulting to some), and other groups. There were many problems with this theory, not least that the grandparents of most Germans hailed from a variety of races, and even the leader, Adolf Hitler, did not possess the features expected of an Aryan: blond hair, blue eyes, and an athletic build.

[1] *Carrie Buck v John Hendren Bell, Superintendent of State Colony for Epileptics and Feeble Minded*, 274 US 200 (1927).

21.2.2 Racism in law and policy

The beliefs of racism can be found in numerous laws throughout history. Many are based on racist views, ensuring only certain races can be enslaved (although this may not be the case in Southeast Asia where slavery was widely practiced and not limited to particular races or ethnicities). Racist laws are often complemented by **anti-miscegenation** legislation forbidding people of different races to procreate, immigration laws banning select ethnicities from entering a country (such as those limiting Chinese immigration to many Western countries), followed in later years by **segregation** laws which sought to separate the races.

Anti-miscegenation
Racist beliefs, laws, and policies prohibiting people of different races from reproducing, in the false belief that 'mixed race' children are morally or physically inferior, and that the races should be kept pure.

Apartheid is one of the most well-known racist laws. Practiced most clearly in South Africa until 1989, this system dictates that people of different races live in separate communities, eat, socialize, and work in different areas, and be subject to different laws. Under apartheid, children of different races were educated in separate schools, and people in general were assigned distinct social areas such as different seats on buses, tables in restaurants, public toilets, and even sections of the beach to lie on. Moreover, the laws often differed according to race. In particular, certain races were prohibited from voting or working in specific jobs. Often, they did not hold the same rights, e.g. freedom of movement.

Segregation
Social policy aimed at separating people of different ethnicities, often dictating that people live in separate areas, use separate public services, and which reserve select services to certain groups of people.

FOCUS ON
Apartheid

After the British established the Union of South Africa in 1910, they enacted the Land Act (1913) which introduced territorial segregation. Under this law, black Africans were forced to live on reserves. This was the beginning of apartheid, meaning 'separateness.' A few decades later, the Population Registration Act of 1950 provided the legal framework for apartheid by classifying all South Africans according to their race: white, coloured, and black Africans. Later, a fourth category of 'Asian' was added. As a result, a series of land laws was enacted to reserve 80% of the land for whites (who held political power but were a minority in terms of numbers). In addition, 'pass laws' were introduced requiring non-whites to carry documents permitting their entry into restricted white-only areas. In addition, separate public facilities were established for whites and non-whites in order to further limit contact between the races.

21.2.3 An overview of racism in Southeast Asia

In Southeast Asia, racism did not take such extreme forms as apartheid or eugenics. Rather, it could be said that racism was a fallout of the nation-building process following the collapse of colonialism. This could be due to the propensity of Southeast Asians throughout history to migrate to trade or conduct business, eventually settling down in foreign lands. For example, centuries ago, the port of Malacca in present day Malaysia became a hub for trade between groups from the Indian subcontinent, China, the Mekong delta, and Central Asia.

Many countries are a mix of indigenous groups, ethnic minorities, migrant groups, and a dominant national group. Another significant movement of people during the colonial era occurred through **indentured labour**. In 1833, the British Parliament passed the Slavery Abolition Act, abolishing slavery in the British colonies. This resulted in a shortage of labour in its colonies, including those in Southeast Asia. To fill this gap, indentured labourers from India were brought into such countries as Malaysia to work on plantations and railway construction projects. Trade and opportunities for work across the colonies also resulted in the movement of people creating demographic changes, with many Indian and Chinese settling in Malaysia.

Indentured labour

A contract where a labourer must work without pay for a period of time, commonly to pay off a debt. Indentured labour is therefore a type of slavery.

In Indonesia, during Dutch colonial rule, the Chinese who had earlier migrated there in search of trade opportunities, became mediators between the Dutch colonisers and native Indonesians. Accordingly, society became hierarchical with the Dutch at the top, the Chinese in the middle, and Indonesians at the bottom. While Indonesians were mostly employed in the agricultural sector, the Chinese were given opportunities to engage in trade and business with the Dutch. This bred tension between native Indonesians and the Chinese which has never been fully resolved, resulting in sporadic eruptions of violence against the Chinese minority (the latest one as a result of the economic crisis of the late 1990s).

CASE STUDY

May 1998 riots in Indonesia

These riots occurred as a backdrop to the 1997 Asian financial crisis. The value of the Indonesian rupiah fell drastically and millions of people lost their jobs. As banks collapsed, people lost their savings. A mass movement of students called for reformation and the resignation of President Suharto leading to frequent confrontations between military authorities and the protestors. As the price of basic goods continued to rise, the government announced a crackdown on hoarders. Anti-hoarding messages, instead of helping to explain the financial crisis, put the blame on traders who were mostly ethnic Chinese. A series of riots erupted across the country in May mainly targeting this Chinese minority. As a result, shop houses were burnt down and Chinese women were raped and gang raped. It is estimated around 1,000 people were killed. However, the riots led to the resignation of President Suharto and the fall of the New Order government.

Decolonisation resulted in the birth of new States across Asia. As part of their nation-building process, these States tried to create a national identity. In many cases, however, these identities became intertwined with one race or ethnicity, language, religion, or a combination of these, while those identifying themselves differently became the ‘other’ or outsiders. While some States managed racial relations constructively, others allowed racism to become ingrained and institutionalised in the form of laws and policies, sometimes leading to violence between communities or race riots. The race riots that erupted in Singapore (1964) and Indonesia (May 1998) comprise prime examples of politicians using race as tools to either gain power or deflect attention from lapses in governance.

CASE STUDY
Race riots in Singapore

Singapore joined the Federation of Malaysia in 1963. In 1964, two separate series of race riots broke out in Singapore between the Malays and Chinese. The first started on 21st July during a procession held by Muslims to celebrate the birthday of the Prophet Mohammad. The second broke out on 2nd September after a Malay person was killed in Geylang Sarai, one of the oldest Malay settlements in Singapore.

These riots occurred in the context of rising tensions between the government of the People's Action Party (PAP) in Singapore, mainly comprising people of Chinese ethnicity, and the alliance government in Malaysia led by the United Malays National Organisation (UMNO) who were predominantly Malay. The local branch of UMNO in Singapore, SUMNO, had been unable to win any seats in Singapore's 1963 general election. Subsequently, PAP put up candidates in the Malaysian general election in 1964 but was able to win only one seat. At the end of the elections, the heads of both governments reached an agreement not to intervene in each other's domestic politics. However, political activists in UMNO did not agree with this compromise and tried to regain the support of Malay people in Singapore. To do this, it initiated negative media campaigns accusing PAP of mistreating Malays and abusing their rights. The race riots occurred in this political context.

Laws and policies based on racism, such as apartheid, segregation, and indentured labour mostly disappeared from the world by the 1970s (except for South Africa), in part because of the ICERD and recognition of the human rights of all people. The civil rights movement in the United States also played a part by demonstrating that civil society could combine in peaceful protest to overturn racist laws. The civil rights movement, which started in the USA (based on Gandhi's theory of **non-violent resistance**) spread across the world, and even influenced the women's rights movement a decade later. In addition, the strong self-determination and decolonization movement which significantly influenced United Nations politics eliminated most forms of colonial racism, although elements of race laws could still be found in some post-colonial nations.

Non-violent resistance

A protest strategy used by civil society, normally in opposition to unfair government rule, commonly utilizing peaceful activities such as street marches and civil disobedience.

CASE STUDY
American civil rights movement

From the early 1900s to the mid 1960s, a large social movement supported the idea of equality for African Americans in the USA. In many states, African Americans were unable to vote, were segregated into poorly funded schools, and were subject to abuse and murder by police and white nationalists groups such as the Klu Klux Klan (KKK). Consequently, the civil rights movement used non-violent campaigns including sit-ins and peace marches. The movement is most widely known by one of its leaders, Martin Luther King, and the March on Washington where he gave his famous "I have a dream" speech.

21.2.4 Why is the notion of racism wrong?

There are many problems with the racist theories outlined in this chapter. Addressing them will clearly show why the concept of race and its views and values are scientifically, socially, and morally incorrect. Not all its inaccuracies and falsehoods can be listed here, but the following are some of the more significant. It is vital to touch upon some as they still have relevance to present day racism.

Race itself is not real: Race is an artificial grouping. The homogenous groups known as Caucasian, Chinese, African, or Indian are fallacious because within each group resides a multitude of different groups. Indeed, there is often more variety within an ethnic group than between such groups. The categories of race are often based on arbitrary physical characteristics such as skin colour, which may be determined more by levels of sun exposure than any representation of ethnicity.

Racism is political: These hierarchies were invented by Europeans as a rationale to justify their expansionist aspirations. Seizing a country with no care for its inhabitants seemed barbaric and unchristian even to them, so a moral justification had to be invented. The idea of racial superiority provided just such a justification. Race and racism therefore justified a system where certain races were made to work in colonial plantations, accept European governance, and surrender their resources. Race politics is still used by political groups today to motivate followers or distract voters from other problems.

No basis in biology or genetics: The idea that some races are superior or more intelligent has no basis in science. Individual capability depends on many factors such as adequate nutrition, healthcare, opportunities to learn and exercise one's capabilities, and security of life. While people from certain backgrounds have easy access to these elements enabling them to acquire positions of power, others may struggle to access even the bare necessities. In other words, genes alone do not make a person intelligent as theories of racial superiority suggest.

Historical myths: The theories of the hierarchy of cultures, eugenics, and national races often involve origin myths. For example, the Nazi Aryan myth assumed Nordic races hailed from the mythical country of Atlantis. Likewise, many States in Southeast Asia assume the original inhabitants of their lands can be traced back to particular groups of people who should therefore own the land. However, human ancestry is often aligned to many different ethnicities and not a single group as most racial theories assume. Thus, much of these supposed histories are not based in scientific fact. At the same time, it must also be borne in mind that every person alive today originally came out of Africa.

21.3 The International Convention on the Elimination of All forms of Racial Discrimination

21.3.1 Drafting and adoption of the ICERD

When the ICERD was first deliberated in the 1960s, discussion of human rights had reached a stalemate in the UN; the promise to make the UDHR legally binding through its two covenants had been debated for nearly 20 years with little progress. Although developing nations, particularly African and Asian countries, were some of the main

advocates for human rights, they focused only on a select group of rights: mainly self-determination and racism. A number of resolutions and actions on self-determination were achieved by the UN General Assembly (or UNGA) in the early 1960s, such as the Declaration on the Granting of Independence to Colonial Countries and Peoples in December 1960 and the establishment of the Special Committee on Decolonization in 1961. The action to decolonize countries also adopted racism and was mainly responsible for the drafting and adoption of an international treaty eventually resulting in the ICERD of 1965.

Why the ICERD became the first human rights treaty is largely due to the changing politics of the UN General Assembly. Decolonizing States, having been subject to racism in their colonial history, wanted this abuse of rights eliminated. Nearly half the States in the UNGA in the 1960s were recently decolonized (of 113, 52 were African and Asian). In addition, eliminating racism was fast becoming a global concern with growing unease over anti-Semitism in Europe, the rise of the civil rights movement in the US advocating for African American rights, and widespread condemnation of the apartheid system in South Africa. These events combined to necessitate a global and unified response to racism.

The ICERD had some advantages over the UDHR covenants which had been embroiled in a 20 year stalemate. Racism was not seen as a Cold War issue. The US, which previously may have been cautious about supporting anti-racism because of its own civil rights movement, changed track after President Lyndon Johnson gave a televised speech in March 1965 advocating voting rights for African Americans, noting they were human rights. The Soviet Union had long supported the elimination of racism as a way to criticise the US's record on racism. Within the UN, the Philippines and Ghana were also strong supporters of the treaty and advocated for a monitoring mechanism. Consequently, the Convention was passed unanimously by the UNGA in December 1965. The treaty was important because it played a role in breaking the deadlock facing human rights treaties in the United Nations. A year later, the ICCPR and ICESCR were adopted by the UNGA, with the ICCPR also adopting a treaty body monitoring mechanism similar to the ICERD.

21.3.2 International Convention on the Elimination of All Forms of Racial Discrimination

The ICERD was adopted by the UNGA on 21 December 1965, and entered into force on 4 January 1969. It has 182 ratifications worldwide, with only 12 countries not ratifying it; three of these are in Southeast Asia (see Table 1 below). The Philippines and Cambodia signed the Convention soon after it was adopted, while Singapore made it law in 2017.

Table 21-1: International Convention on the Elimination of All Forms of Racial Discrimination – Ratifications (as of 2019)

Country	Ratification
Brunei Darussalam	No Action
Cambodia	Signature: 1966; Ratification/Accession: 1983
Indonesia	Ratification/Accession: 1999
Lao PDR	Ratification/Accession: 1974
Malaysia	No Action
Myanmar	No Action
Philippines	Signature: 1966; Ratification/Accession: 1967
Singapore	Signature: 2015; Ratification/Accession: 2017
Thailand	Ratification/Accession: 2003
Timor-Leste	Ratification/Accession: 2003
Vietnam	Ratification/Accession 1982

The ICERD is a brief treaty. Part 1 focusing on rights and obligations has only seven articles, and provides a definition of racial discrimination, a clarification of State obligations, and details the civil, political, economic, social, and cultural rights every person should be able to enjoy without discrimination. Because the focus of the treaty is on the elimination of racial discrimination, it defines racism, outlines State obligations, and lists the areas where racial discrimination must be eliminated, including movement, nationality, marriage, inheritance, housing, membership of unions, and health. Pat II outlines the body managing the treaty detailed below in section 21.5. Part II is significant because it gave rise to the first human rights treaty body, and as such, its model was followed by all other treaties.

FOCUS ON
ICERD summary

Art 1 Defines racial discrimination, and outlines when it does not apply, for example, during special measures to advance certain groups or to distinguish citizens and non-citizens.

Art 2 Outlines measures to eliminate racial discrimination including not supporting racism, reviewing laws, and eliminating barriers between different groups.

Art 3 Condemns apartheid and segregation.

Art 4 Condemns propaganda based on racial superiority making it punishable by law, and outlawing those groups supporting it.

Art 5 Eliminates racial discrimination in the field of law, politics, marriage, nationality, work, housing, education, culture, and so on.

Art 6 Ensures access to justice for those experiencing discrimination.

Art 7 Advocates combatting prejudice through education.

21.3.3 ICERD definition of racial discrimination

A major achievement of the ICERD is its definition of racial discrimination. Article 1 states that racial discrimination shall mean:

> *[A]ny distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.*

The definition of racial discrimination has three components.

First, there must be differential treatment: distinction, exclusion, restriction, or preference. Distinctions refer to actions or practices under which people are treated differently because of their race, such as segregation laws in the United States under which black people could not sit in the front rows of a bus. Exclusion or restriction refers to cases where people of a certain race are denied access, services, or freedoms because of their race, such as being excluded from education, or obtaining a driver's license, or being able to marry as per one's choice. Preference refers to cases where people of one race are given easier access to services, such as education scholarships or passports.

Second, the differential treatment must be based on race, and similar categories such as colour, descent, or national or ethnic origin. This distinction concerns not only skin colour but any way a person is identified by inherent characteristics, such as nationality or ethnicity. For example, being Khmer or Chinese may be a basis for discrimination.

Finally, the purpose or effect of such differential treatment must impair or nullify the recognition or enjoyment of human rights on an equal footing with others. 'Purpose' is when the objective of a law or practice is to discriminate. Thus, a law on citizenship excluding a particular group from applying is an example of direct discrimination. The purpose of discrimination may be deliberate, intentional, or direct. But it also may be indirect, e.g. a town prohibiting the building of low cost housing. While this may appear to have little direct relationship to race, if most people who live in low cost housing are from a particular ethnic group, the impact will be to prevent those people, because of their ethnicity, to live in that town. The 'effect' refers to those cases where although the law or policy may be neutral or non-discriminatory in nature, its implementation has a discriminatory impact. For example, the population policy introduced by the Singapore government in 1987 of 'Have 3, or more if you can afford it' did not explicitly support or exclude anyone based on race or ethnicity. However, it was argued that since the policy targeted young graduates, and since it was mostly the Chinese who attended university, the policy mainly benefited the Chinese population. So the policy had the effect of preferring one ethnicity, indirectly discriminating against Malays and Indians.

Direct discrimination is not as common now as it was decades ago, perhaps because of the universal acceptance of the ICERD. Most Southeast Asian countries have anti-discrimination laws (often in their constitutions) and do not openly support racist views. However, States still make decisions based on ethnicity or national origin, for example in immigration and family law, which does result in human rights not being available to all. These laws aside, the challenge of eliminating racial discrimination rests more on preventing indirect discrimination. Indirect discrimination results from

certain practices and attitudes, or a specific interpretation of laws. For example, home owners may be reluctant to rent their premises to people of certain ethnicities, or people belonging to particular races may find it difficult to get certain kinds of employment. Such behaviour is the result of society-wide prejudices, biases, or stereotypes. However, it is difficult to eliminate indirect discrimination because attitudes and perceptions must first be changed.

21.3.4 Exceptions to racial discrimination: Citizenship and religion

The two problematic areas in the fight to eliminate racial discrimination are citizenship and religion. Article 1(2) states that the Convention does not apply to differential treatment between citizens and non-citizens. The Committee later clarified this in General Recommendation No 30 (2005) stating that the Convention does indeed apply to non-citizens, especially the long list of rights detailed in Art 5. It reasoned that the Durban Declaration adopted in 2001 at the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance (discussed below in section 21.5.2) recognised that non-nationals such as migrants, refugees, and asylum seekers, faced discrimination and racist practices.2 However, States could treat citizens differently in some respects, such as the right to participate in elections or access higher education. Nevertheless, non-citizens should be able to enjoy all other rights recognised under international law. In other words, these restrictions are not due to race but citizenship. Importantly, there should be no discrimination between non-citizens on grounds of race, so for example, asylum seekers cannot be treated differently because of their race or ethnicity.

A second problem area is discrimination based on religion. While the treaty body has stated that the Convention does not cover discrimination based on religion, it does recognize that religious and racial discrimination often overlap. For example in Southeast Asia, the Rohingya are persecuted because of both their religion (Islam), and their ethnicity. It can be challenging to identify if discrimination against a person's religion contains elements of racism. When Chinese authorities cracked down on the Falung Gong religious sect, there was no ethnic or racial basis to the act as most believers came from the dominant ethnic group. This does not mean their actions were legitimate as the discrimination was based on religion which is a violation of ICCPR rights, but not of the ICERD. However when Vietnamese, Indonesian, or Laotian authorities arrest religious leaders from minority groups, this can be considered discrimination under the ICERD.

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2 United Nations, 'Declaration and program of action' *World Conference Against Racism, Racial Discrimination, Xenophobia and Related Intolerance*, United Nations, 2002.

FOCUS ON
Religious discrimination and the ICERD in Southeast Asia

The ICERD Committee in its responses to State Party reports have raised the following concerns:

To Vietnam in 2012, the Committee noted "[n]umerous and consistent reports of discrimination and restriction on religious practices faced by some Christian and Buddhist denominations among Khmer Krom, Degar (Montagnard), and Hmong."

To Laos in 2012, the Committee noted concern "at the discrimination reportedly experienced by certain ethnic groups in the exercise of their freedom of religion."

To Indonesia in 2007, the Committee expressed concern about "rights to freedom of thought, conscience and religion of persons belonging to ethnic groups and indigenous peoples."

21.3.5 Special measures

In Art 1 on the definition of racial discrimination, allowance is made for special measures. These refer to situations where there are significant disparities between different groups. In such instances, States can undertake activities aimed at closing this gap. This is also known as the principle of affirmative action or **positive discrimination**, and is explained in Arts 1(4) and 2(2), and General Recommendation 32. Conditions for the use of special measures include that once measures meet their objective of equality between groups, they should be discontinued. Further, Art 2(2) cautions that special measures should not result in the maintenance of unequal or separate rights for different racial groups after the objectives for which such measures were adopted are achieved. General Recommendation 32 suggests that special measures should be temporary in nature, and should be designed and implemented on the basis of need. Further, States should undertake periodical appraisals to assess the need for continuation of the measures. Such appraisals should be based on data that is accurate and gender sensitive. Special measures can occur in education, where assistance to access education or special schools are often developed for marginalised ethnic groups. They also occur in situations concerning indigenous access and ownership of land, the reservation of employment for certain groups, or to protect the sale of cultural products.

Positive discrimination

A law or a policy aimed at benefiting members of a minority group who have historically faced discrimination.

CASE STUDY
Affirmative action for the Bumiputera in Malaysia

In 1957, when Malaysia gained independence, there were major gaps in economic and social status between the Chinese, Indians, Malays, and other indigenous groups. Article 153 of the Malaysian Constitution created a specially reserved quota for Malays and natives of the states of Sabah and Sarawak to work in public service, receive educational scholarships, or receive permits or licenses for the operation of any trade or business. The gaps continued to widen between 1957 and 1970, when the New Economic Policy (NEP) was announced. A purpose of the NEP was to eliminate

poverty and improve the socio-economic status of Malays and other indigenous groups, which it did by introducing an affirmative action program. Under this program, Bumiputeras were provided with easier access to loans and credit, quotas in education, employment in the private sector, and support for trading, cottage industries, livestock and agriculture, among other special rights. The government explained that during colonial times, the British had given preference to Chinese and Indian immigrants over Malays. And thus, affirmative action was needed to correct these historical wrongs.

However, the affirmative action program continues even today. Although the policy benefits Malays, critics argue that most provisions, such as access to easy loans and support for business, are used more by Malay elites and have failed to help the poor. They argue that instead of basing such affirmative action on race, it should be targeted towards the poor of all ethnic groups.

21.4 State Obligations

21.4.1 Legal obligations

Much of the ICERD concerns the obligation on States to eliminate racial discrimination including to prevent, prohibit, and condemn all forms of racial discrimination. A number of actions are required by States including to ensure no government policies and laws have the effect of creating or perpetuating racial discrimination. As noted above, it may be relatively easy to identify and eliminate direct discrimination, but indirect discrimination may be harder to identify, and it may also be unclear whether the impact was even based on racial discrimination, for example, the housing laws under Singapore's Ethnic Integration Policy discussed below, and the special protection laws for groups such as the Orang Asli in Malaysia, where the group's special rights to education meant many children had to leave home and stay in boarding schools (discussed in Chapter 22 under Indigenous Rights), or the laws on National Parks in Thailand which disproportionately affect its Hill Tribes.

DISCUSSION AND DEBATE

Ethnic integration policy, Singapore

In 1989, in order to respond to the ethic clustering in housing (where people of the same ethnicity tend to live close to each other), Singapore introduced the Ethnic Integration Policy (EIP). The objective was to ensure a better ethnic mix in Housing Development Board (HDB) estates (State-subsidised residential buildings). Under the policy, the government established ethnic quotas for HDB neighbourhoods that set maximum proportions for ethnic groups. Owners were free to sell their flats to buyers of any ethnicity as long as the prescribed racial limits were maintained. The quotas were set based on the ethnic make-up of Singapore.

The UN Special Rapporteur for Racism (whose full title is the UN Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia, and related intolerance), during a country visit to Singapore in 2010, observed that the EIP allowed Singaporeans from diverse backgrounds to mix and regularly interact in the community spaces of the housing development blocks. However, the Special Rapporteur also noted that implementation of the policy had created problems,

such as some ethnic minorities being unable to find housing close to their families, or others facing difficulties in reselling their apartments, because sale to particular ethnic groups was prohibited after quotas had been reached.

If a racial quota is reached in an apartment block, meaning people of a specific ethnicity are unable to buy apartments there, is this racial discrimination?

If the objective of the policy is to ensure multicultural suburbs, can it ever lead to racial discrimination?

What should be the rule for people who are not one of the identified ethnicities subject to quotas? Can they just live anywhere? Is this fair?

In addition, States are expected to pass laws against racial discrimination. These are commonly found in anti-discrimination legislation, constitutional rights, and sometimes in criminal law including laws against 'hate speech.' There is no definition of hate speech in international human rights law although it is examined in ICERD General Recommendation 35. However, in the United Nations Strategy and Plan of Action on Hate Speech (May 2019), it is understood as:

> *any kind of communication in speech, writing or behaviour, that attacks or uses pejorative or discriminatory language with reference to a person or a group on the basis of who they are, in other words, based on their religion, ethnicity, nationality, race, colour, descent, gender or other identity factor.*[3]

Racist hate speech can take many forms, such as explicit racial remarks, speech attacking a particular racial or ethnic group using indirect language, and even non-verbal forms of expression such as displays of racist symbols, images, and behaviour at public gatherings. Article 4 of ICERD condemns propaganda based on ideas or theories of racial superiority. It also condemns attempts to justify or promote racial hatred or discrimination in any form. Additionally, it places an obligation upon States to criminalise four categories of actions:

(1) Dissemination of ideas promoting racial superiority or hatred;

(2) Incitement to hatred and racial discrimination;

(3) Threats to incite violence; and

(4) Provision of assistance to racist activities, including provision of financial support.

Article 4 also places an obligation on States to impose restrictions on organisations engaged in promoting or inciting racial discrimination. Hate speech based on ethnicity is criminalized in some Southeast Asian countries such as Singapore and Vietnam, although these laws can also in effect criminalize political speech unless the element of race is clearly excluded.

[3] 'United Nations Strategy and Plan of Action on Hate Speech' United Nations, May 2019.

CASE STUDY
Hate speech, Facebook, and the Rohingya in Myanmar

Widespread use of social media has increased the challenges in addressing hate speech. A notorious example in Southeast Asia was the Burmese majority's use and distribution of hate speech about the Rohingya minority. Users made violent, abusive, and pornographic statements about the Rohingya, advocating death and even genocide. Eventually, it was found that some of this emanated from an officer-led military campaign to incite unrest on Facebook (which is very popular in the country). As a result, fake accounts were set up, stories about Rohingya violence were fabricated, and the history of the Rohingya in the country was re-written.

In March 2018, United Nations investigators concluded that Facebook had played a determining role in inciting hatred and violence against the Rohingya. In April 2018, its founder, Mark Zuckerberg, faced questions from the US Senate regarding the role of Facebook in spreading hate speech and the measures taken by it to address the problem. While the company has incorporated changes including banning a number of accounts and establishing an education program in the country, some people still consider hate speech on Facebook a serious problem.

International courts and inquiries have found that the actions against the Rohingya were genocidal and hate speech has done much to create domestic support for the military's actions.

21.4.2 Addressing racial discrimination through education, teaching, and information

As discussed, ideas of racial superiority and racism are social constructs – humans are not born hating each other. Rather, they learn to hate from society including families, school, and the community. Consequently, children slowly internalise prejudices and stereotyping against other racial groups and ethnicities in society.

Article 7 of the ICERD addresses this aspect of racial discrimination, requiring States to adopt measures, particularly in the fields of teaching, education, culture, and information to effectively combat the prejudices leading to racial discrimination.

An example of measures that can be taken by States under Art 7 can be seen in the Concluding Observations of the Committee (considering the periodic report of Thailand in August 2012).[4] The Committee expressed concern at the negative stereotypes and prejudices around ethnic groups communicated by the media. In this regard, it suggested Thailand develop ethics and standards for media professionals, create awareness about such ethical standards, and establish a system to monitor professional standards. As the case study below shows, many well-established stereotypes concerning indigenous groups led to widespread discrimination against them.

[4] 'Concluding observations on the first to third periodic reports of Thailand, adopted by the Committee at its eighty-first session, 6–31 August 2012 (CERD/C/THA/CO/1-3)' Committee on the Elimination of All Forms of Racial Discrimination, 15 November 2012.

CASE STUDY

How are the ethnic groups of Thailand represented in the media?

Thai media has a tendency to represent its hill tribe groups in a number of negative ways. They are often seen as drug smugglers, destroyers of the environment (due to forest burning), and uneducated. These myths are prevalent because many hill tribes live in the mountainous region, sometimes known as the golden triangle, between Thailand, Myanmar, and Lao PDR, where opium was once grown and smuggled across borders. Further, the indigenous tribes use a method of agriculture known as 'slash and burn' where areas of forest are burnt to sow crops. However, hill tribes are not engaged in the drug trade (mostly the purview of organized criminal networks) and their 'slash and burn' agriculture only comprises a minor part of their farming practice, contributing neither to deforestation (commercial loggers being the main culprits) nor air pollution (plantations or low-land crops being the main culprits).

Regardless, these myths are circulated in soap operas, the news, and social media. In Thai soap operas, hill tribe people are often seen as violent drug smugglers or occasionally as domestic workers. When present, they are stereotyped, for example, they are usually dressed in traditional clothes despite most hill tribe people wearing T-shirts and jeans like everyone else. Consequently, this group faces discrimination when accessing education, or seeking work or healthcare.

These stereotypes have other repercussions. Hill tribes face arbitrary arrest and detention because of suspected though unsubstantiated criminal activity. However, a country's pollution and deforestation problems cannot be solved by merely assigning blame if the actual problems are not addressed. Thus, if air pollution is blamed on the hill tribes, the actual polluters will escape blame.

21.5 Monitoring Racial Discrimination at the United Nations

As with other treaties, implementation of the ICERD is monitored at the UN by both treaty and charter-based mechanisms (discussed in Chapter 5 of this textbook). Because this problem has been recognized as significant, the UN has had mechanisms to address racism since its inception.

21.5.1 Treaty-based mechanisms

The Committee on the Elimination of Racial Discrimination monitors implementation of the ICERD by State Parties. Among its many activities, States are required to submit periodic reports to the Committee, once every two years to begin, although most States now submit every eight to ten years. After the review process during which the Committee enters into a constructive dialogue with the State Party, the Committee issues its concluding observations. Assessing these, some familiar concerns of the treaty body as regards Southeast Asian States arise. One is the confiscation of land or the forced displacement of indigenous groups. Another is that racial discrimination is not always clearly detailed in State laws. While countries may have non-discrimination laws, definitions of racial discrimination are often absent. Concerns about support for ethnic languages, the treatment of women from minority groups, and access to education are also frequently raised.

Table 21-2: Southeast Asian State Party Reports to the ICERD Committee (as of 2019)

Country	Year Ratified	Years State Party Reports Submitted
Brunei Darussalam	Not Ratified	-
Cambodia	1983	1997, 2009, 2018
Indonesia	1999	2006
Lao PDR	1974	2004, 2011
Malaysia	Not Ratified	-
Myanmar	Not Ratified	-
Philippines	1967	1997, 2008
Singapore	2017	2018
Thailand	2003	2011, 2019
Timor-Leste	2003	None submitted
Vietnam	1982	1993, 2000, 2011

Aside from State Party reports, the treaty body also issues general recommendations or explanatory notes to clarify the scope and content of rights guaranteed in the ICERD. In total, 35 general recommendations explain individual articles and address specific issues like non-citizens, indigenous groups, and self-determination. The ICERD Committee also allows for individual complaints although no Southeast Asian country has allowed acceptance of individual complaints (South Korea is the only Asian State to allow individual complaints). There are 58 cases as of 2019, and of these, violations were found in 15. In the only case so far in Asia, an English language instructor in South Korea complained of racial discrimination when she had to submit to a drugs test and a HIV test to keep her job in a language school. The complaint noted that not all migrants had to undergo HIV tests, just English language teachers. The South Korean government did not give any justification for the tests. The case is interesting because the discrimination was not purely based on race. Although the teacher was a New Zealander, the reason she faced discrimination was more due to her status as a foreigner.

The ICERD Committee has two notable mechanisms to combat racism. The first is an early warning and urgent appeal mechanism through which the Committee can issue early warnings or take urgent measures to prevent existing situations from escalating into conflicts. This is a frequently used mechanism with 17 early warnings being sent in 2019 alone. For example, Thailand, the Philippines, and Indonesia all received warnings in the past two years. Thus, in May 2018, the treaty body sent a communication to the Philippines, expressing concern at the targeting of indigenous leaders and human rights defenders.

The other mechanism is inter-State complaints, where one State can make a complaint against another. While this mechanism exists in nearly all treaties, it is only under the ICERD and only very recently that a State has made a complaint against another State. To date, there have been three: Palestine against Israel, Qatar against Saudi

Arabia, and Qatar against the United Arab Emirates. The treaty body has accepted all the complaints and as of the end of 2019, is establishing a commission to look into them further.

21.5.2 Eliminating racism in the broader UN

The UN is addressing racism in a number of other ways. For example, the ICERD is discussed in the Universal Period Review where questions or recommendations on eliminating racism may be raised by States. As previously mentioned, there is also a Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia, and related intolerance. This work is complemented by the Special Rapporteurs on cultural rights and the Special Rapporteur on the rights of indigenous peoples. The work includes undertaking country visits, conducting thematic studies, convening consultations, and contributing to the development of international human rights standards.

A final mechanism to note is the World Conference Against Racism, Racial Discrimination, Xenophobia, and Related Intolerance (WCAR). There have been four World Conferences (1978, 1983, 2001, and 2009), although the WCAR held in Durban, South Africa in 2001 is the most well-known. At this event, after a series of difficult discussions, the Durban Declaration and Programme of Action[5] was adopted under which member States of the United Nations committed to undertake a wide range of measures to combat racism and discrimination at the national, regional, and international levels. The deliberations created some friction with US and Israeli delegates walking out because the draft contained references to the racist practices of Zionism and criticised Israel's treatment of Palestinians as a new form of 'apartheid.' In addition, representatives of European countries refused to give a full apology for slavery, as they feared such apologies could lead to claims for reparations. Moreover, the Indian government was of the view that caste should not be a subject of discussion as notions of caste were different from race, and discrimination based on caste identities could not be equated with racial discrimination. Despite these disagreements, the outcome document of the World Conference was an important milestone as it brought States together to discuss racial discrimination, different types of contemporary racism, and measures to counter these issues.

21.6 Contemporary Forms of Racism

Practices of slavery where entire races were robbed of their human dignity and converted to the property of individuals belonging to a 'superior' race have long been abolished. Practices segregating races, such as apartheid in South Africa or the segregation system in US schools, have also been abolished. However, these changes do not mean that institutionalised forms of racism have been eliminated. In contemporary times, the forms of racism and racial discrimination have changed. The following sections discuss three issues of contemporary racism: gender and race intersectionality, racial profiling, and how indigenous groups are threatened by extractive industries.

[5] United Nations (see note 2 above).

21.6.1 Gender-related dimensions of racial discrimination

Racial discrimination affects men and women differently. A social construction of gender can create its own set of discriminations which can add to and magnify the discriminations created by the social construct of race. Thus, an indigenous women may face discrimination because of her ethnicity, for example, accessing education or being arbitrarily searched by the police. But on top of this, she may also face discrimination because she is a woman which denies her equal pay at work and forces her to be the primary care-giver of her children. This phenomena is known as intersectionality (and is briefly discussed in Chapter 9 on women). These discriminations can be added to, for example, if the person also has a disability, is LGBTQI, or is a non-citizen. The treaty body, in General Recommendation 25, highlighted areas of concern including sexual violence against women from racial or ethnic groups during war or in police detention. These concerns have been highlighted in Myanmar where the recent ethnic cleansing of the Rohingya includes many complaints about the rape of Rohingya women. Similarly, the police in the Philippines have received many complaints about women from indigenous and minority groups being mistreated in detention.

21.6.2 Racial profiling in law enforcement

Law enforcement officers often use race, colour, nationality, or ethnic origin as factors to subject individuals to detailed searches, identity checks, and investigations. Such a practice is known as racial profiling. Racial profiling must be distinguished from criminal profiling, which is an investigative technique used to identify the probable personality and behavioural characteristics of offenders based on crime scene analysis. For example, if a witness reports the use of a foreign language during a crime, this can contribute to the criminal profile of the suspect. By contrast, it would be racial profiling if the police were to assume a crime has been committed by a foreigner because it occurred in a poor area of the city. The consequence of racial profiling is that law enforcement subjects certain individuals to searches, identity checks, or criminal investigations based on external characteristics such as skin colour, physical appearance, or assumptions about nationality.

This has been recognized at the UN as a form of racial discrimination. In 2009, a complaint was brought against Spain to the UN Human Rights Committee. In this case, the complainant, Rosalind Williams, was stopped by a police officer at a railway station in Spain and asked to produce identity documents. She claimed no one else around her had been similarly checked and that the police officer explained that she (and no other) had been asked to show her identity documents because of her physical traits. In fact, the police officer said, "It's because you're black." Accordingly, Rosalind submitted a complaint before the UN Human Rights Committee alleging she had been subject to discrimination. As the Human Rights Committee observed,

> *[I]t is generally legitimate to carry out identity checks for the purposes of protecting public safety and crime prevention or to control illegal immigration. However, when the authorities carry out these checks, the physical or ethnic characteristics of the persons should not be considered as indicative of their possibly illegal situation in the country. Nor should identity checks be carried out so that only people with certain physical characteristics or ethnic backgrounds are targeted. This would not only adversely affect the dignity of those affected, but also contribute to the spread of xenophobic attitudes among the general population; it would also be inconsistent with an effective policy to combat racial discrimination.*[6]

[6] *Rosalind Williams v Spain* (Communication No 1493/2006), UN doc CCPR/C/96/D/1493/2006, 17 August 2009.

In 2015, the Special Rapporteur on racism also addressed the issue of racial profiling in his report to the Human Rights Council, by noting that racial profiling included disproportionate targeting of members of minority groups for traffic violations or 'stop and frisk' operations, targeting of members of minority groups to check on irregular migration, and the increasing use of force by law enforcement against minority populations.[7] It was also noted that increasingly, racial and ethnic profiling was being used in relation to counter-terrorism operations. Therefore, it is hardly surprising that racial profiling also regularly occurs across Southeast Asia where migrant workers are often stopped and searched by police, especially if South Asian or from Myanmar.

DISCUSSION AND DEBATE
Racial profiling or criminal profiling?

A State initiates a policy to take action against illegal migrants and tourists who have overstayed their visas. To achieve this objective, it launches an operation called, 'Action against illegal foreigners.' The officer tasked with implementing the operation claims two main groups illegally overstay their visas according to his records. One group is from a geographical region where many people have been caught with drugs. It is decided that the operation will target these people. The other group, young travelling backpackers, only overstay a couple of weeks, and as such, officials believe they do not need to be targeted. Under the operation, those suspected of lacking proper immigration documentation are subject to a body search and a passport check.

Does this action involve racial profiling? Because criminal records show that people from a particular region have been caught with drugs before, is it legitimate to target this group? Or is it possible that such people are arrested more because the police have been targeting this group and ignoring other immigrants?

Should the police simply assume that every non-citizen is a potential illegal immigrant? But if this is the case, is it not a waste of the official's time to question some immigrant groups, such as older, wealthy travellers, who rarely have problems with status?

21.6.3 Indigenous groups and resource extraction

In 2019, the Special Rapporteur on racism presenting a report on *Global Extractivism and Racial Equality*,[8] noted the links between racial equality and the global **extractive economy**. The defining features of such an economy involves the removal of raw materials from territories and the processing, sale, and consumption of said materials in the global economy. More commonly, the extraction is done in areas housing more indigenous or minority groups, for example, in mountainous regions and forests. The terms of such developments are set by actors such as States, national and

Extractive economy

The economy based on extracting resources from a country, commonly including mineral and fossil fuels through mining or drilling, food, wood products, or fishing through large scale agriculture, forestry plantations, or farming.

[7] Human Rights Council, 'Report of the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance, Mutuma Ruteere (A/HRC/29/46)' United Nations General Assembly, 20 April 2015.

[8] Human Rights Council, 'Global extractivism and racial equality: Report of the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance (A/HRC/41/54)' United Nations General Assembly, 14 May 2019.

transnational corporations, international financial and development institutions, and multilateral governance bodies and institutions. The result is the benefits of such extractions are often taken by the States of transnational corporations and rarely returned to the indigenous groups involved. And although people in affected areas can participate, they will have no control over the conditions of the extraction. The negative consequences of such developments is summarised by the phrase the 'resource curse,' meaning people living in close communion with natural resources often pay the heaviest price and are unable to enjoy the benefits arising from the extraction of these resources.

The extractive economy is widespread throughout Southeast Asia. The CERD Committee found in its response to Indonesia's State Party report in 2007, that the Kalimantan Border Oil Palm Mega Project along the Indonesian and Malaysian border threatened the rights of indigenous peoples to own their lands and enjoy their culture. In this regard, it made the following observations:

> *The Committee, while noting that land, water and natural resources shall be controlled by the State party and exploited for the greatest benefit of the people under Indonesian law, recalls that such a principle must be exercised consistently with the rights of indigenous peoples. The State party should review its laws … as well as the way they are interpreted and implemented in practice, to ensure that they respect the rights of indigenous peoples to possess, develop, control and use their communal lands. While noting that the Kalimantan Border Oil Palm Mega-project is being subjected to further studies, the Committee recommends that the State party secure the possession and ownership rights of local communities before proceeding further with this plan. The State party should also ensure that meaningful consultations are undertaken with the concerned communities, with a view to obtaining their consent and participation in it.*[9]

Though raised by the CERD Committee nearly 15 years ago, the issue has still not been resolved leaving indigenous groups struggling to protect their livelihoods. The sheer length of this struggle shows the enormous power wielded by the actors driving this extractive economy. The issues here are similarly reflected in many other areas, such as dam building in Lao PDR, Myanmar, and Vietnam, mining in the Philippines, palm plantations in Indonesia and Malaysia, and logging in Cambodia.

[9] Committee on the Elimination of Racial Discrimination, 'Consideration of reports submitted by States Parties under Article 9 of the convention (CERD/C/IDN/CO/3)' International Convention on the Elimination of all Forms of Racial Discrimination, 15 August 2007

A. Chapter Summary and Key Points

Introduction

The first human rights treaty that entered into force was the International Convention on the Elimination of All forms of Racial Discrimination (ICERD). Its objective was to stop racism, or the ideas and practices espousing that certain groups have power or superiority over others on the basis of physical and cultural attributes. Ethnicity comprises a combination of cultural views and values, social practices, and inherited physical characteristics, and it differs from race because identity is not assumed to be biological. Racism affects many people in all societies in many ways, such as access to education or personal security.

History of Racism

Many of the main concepts used in racism date from the colonial period, such as the idea of a racial hierarchy, the belief that superior races will naturally take over from their inferior counterparts, and the science of eugenics. These beliefs led to anti-miscegenation legislation or laws of segregation and apartheid. In Southeast Asia, these extreme forms did not occur although during the colonial era, policies such as indentured labour did cause some ethnic minority groups to face racism. It also created racism. Following decolonisation, new States across Asia created national identities intertwined with one ethnicity, language, or religion. Some States were able to manage racial relations constructively; others suffered violence between communities leading to race riots.

Racism is wrong because …

… race itself is not real; it is an artificial grouping. Racism can be manipulated for political objectives causing political groups to motivate their followers or distract voters from other problems by encouraging racism. Race has no basis in biology or genetics, and tends to be based on historical myth.

International Convention on the Elimination of All Forms of Racial Discrimination (ICERD)

The ICERD is notable for kickstarting the human rights treaty system in the United Nations. It emerged following many discussions in the UN General Assembly about such issues as self-determination and racism in decolonizing States, anti-Semitism in Europe, and African American rights in the US. In Southeast Asia, three countries (Brunei, Malaysia, and Myanmar) have still not ratified despite most of the rest of the world having already done so. The ICERD defines racial discrimination, clarifies State obligations, and details the areas where racism should be eliminated.

However, racial discrimination may allow some differential treatment based on race to ensure the equal distribution of rights. Discrimination can be direct (where the object of a law or policy is differential treatment) or indirect (where the effect of a law is to treat people differently). Non-citizens cannot be treated differently because of their ethnicity. While the ICERD does not cover religious discrimination, religious and racial discrimination often overlap. The ICERD also allows for special measures to enable States to close the gap between certain ethnic groups through better access to their rights. In addition, States should have laws against racial discrimination, criminalize hate speech, and halt the use of racial stereotypes in media and education systems.

Racial Discrimination at the United Nations

The ICERD treaty body has a number of monitoring mechanisms such as State Party reports and individual communications. The ICERD Committee can also receive early

warnings and inter-State complaints. Other bodies include a special rapporteur and the four World Conferences Against Racism.

Contemporary Forms of Racism

Women from minority groups face multiple levels of discrimination based on both gender and ethnicity. Another contemporary concern is the use of racial profiling by police which occurs across Southeast Asia when, for example, migrant workers are repeatedly stopped and searched by police. Indigenous groups face problems caused by the extractive economy (e.g. mining and plantation agriculture) as such developments often occur in areas where they live.

B. Typical Exam or Essay Questions

- Is racism illegal in your country? What laws specifically prohibit it? What about laws on hate speech based on race or ethnicity?
- In the history of your country, is there tension between different ethnic groups? What caused these tensions?
- Do racist stereotypes exist in your media? Examine a major stereotype and discuss why it is used.
- Examine the concluding observations of the ICERD to any Southeast Asian country. What were the main concerns, and do you think the State would be willing to address them?
- How have indigenous groups in any Southeast Asian country suffered from mining or plantation agriculture? Find an example of a group which has been displaced, examine the reasons why, and discuss the impact on the group.
- How does intersectionality work? Analyse a case where someone from a minority group faces multiple discrimination because of their ethnicity, gender, sexuality, age, or disability.

C. Further Reading

Committee on the Elimination of Racial Discrimination

- General Comments of the Committee on the Elimination of Racial Discrimination.
- Periodic reports submitted to the Committee on the Elimination of Racial Discrimination as part of the ICERD monitoring implementation process. Available at https://www.ohchr.org/en/hrbodies/cerd/pages/cerdindex.aspx

Committee on the Elimination of Racial Discrimination, (2007), 'Consideration of reports submitted by States Parties under Article 9 of the convention (CERD/C/IDN/CO/3)' International Convention on the Elimination of all Forms of Racial Discrimination, 15 August 2007, available at https://www2.ohchr.org/english/bodies/cerd/docs/CERD.C.IDN.CO.3.pdf

Human Rights Council, (2015), 'Report of the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance, Mutuma Ruteere (A/HRC/29/46)' United Nations General Assembly, 20 April 2015, available at https://www.ohchr.org/Documents/Issues/Racism/A-HRC-29-46.pdf

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22

Indigenous, Minority, and Cultural Rights

22.1 Introduction

The end of colonialism in Southeast Asia saw the emergence of new nation States. This drawing of political boundaries was accompanied by the demarcation of cultural boundaries. As a part of this process, many nation States identified themselves with particular religions, ethnicities, or languages which led to the emergence of minority groups. Numerically less in number and possessing distinct linguistic, religious, or ethnic identities, indigenous communities tend to fall within this category because their way of life is closely linked to ancestral lands often located in remote or mountainous regions. Therefore, as the newly formed States embarked upon the process of nation-building, they also had to design minority policies. While some helped to create multicultural harmonious societies, other, less successful efforts instigated tension and strife as exemplified by the ethnic and religious struggles of Myanmar, the Philippines, and Thailand.

CONCEPT

Westphalian Nation State system

This term stems from the Treaties of Westphalia (1648) and is taken to mean an international system where each State has sovereignty over its territory and domestic affairs. Thus, no State can legitimately intervene in the domestic affairs of another. A nation State refers to an independent country consisting of a group of people sharing a common language, traditions, and history.

22.2 Protection of Minority Rights: An Historical Perspective

22.2.1 League of Nations and self-determination

Self-determination

Freedom of people to choose their political status and the form of their economic, social, and cultural development. The exercise of self-determination can have a series of outcomes, ranging from political independence at one end to full integration into the State at the other.

The protection of minorities and indigenous peoples (IPs) was greatly advanced with the promulgation of **self-determination** after World War I. As a consequence of the border changes, several States offered to protect these new minority groups to prevent further descent into conflict. This protection system was placed under the guarantee of the League of Nations.

ination was beginning to gain acceptance, it was only with the adoption of the United Nations Charter in 1945 that it received normative recognition. As such, Art 1(2) recognises “respect for the principle of equal rights and self-determinations of peoples” as a purpose of the UN.

The Declaration on the Granting of Independence to Colonial Countries and Peoples adopted by the General Assembly in 1960 recognised that all peoples had the right to self-determination, to freely determine their political status, and to pursue economic, social, and cultural development. Soon after, the right to self-determination was also included in Art 1 of the International Covenant on Civil and Political Rights (ICCPR), and the International Covenant on Economic, Social and Cultural Rights (ICESCR).

However, many States ratifying the ICCPR and ICESCR submitted declarations that the right should be understood as only applying to those under colonial rule or foreign domination and would not otherwise bestow greater autonomy over decision-making processes.

In World War I, the Entente Powers used the quest for self-determination to justify waging war on their opponents and in so doing were able to claim the moral high ground. Indeed, the United States entered the war on this basis. President Wilson's 'Fourteen Point' speech on 8 January 1918 also took the idea to heart – that members of a nationality or ethnic group sharing a cultural heritage should be allowed the right to national self-determination. However, the geopolitical realities of the era prevented the re-drawing of boundaries that would have created new nation States with similar racial or ethnic backgrounds, as religions, languages and cultures were too intermingled and the dividing lines between nations too unclear. Nevertheless, some controls had to be exerted on those countries absorbing territories with large populations pertaining to the defeated powers. As such, the League of Nations minorities protection system sought to fulfil this role.

22.2.2 League of Nations minority protection system

The system comprised treaties, institutions, and procedures.

Treaties

A treaty between the Principal Allied and Associated Powers and Poland was signed at the Paris Peace Conference on 28 June 1919 and served as a blueprint for subsequent treaties on minority protection.

> *General Peace Treaty obligations:* The General Peace Treaties signed to end World War I included an obligation to protect minorities. In addition, several countries made unilateral declarations to do the same.
>
> *Non-European adherence:* Upon joining the League of Nations in 1932, Iraq also accepted minority protection obligations, becoming the one instance where the League's minority protection system took effect beyond Europe.

Institutional elements

The Leagues' Secretariat and Council were responsible for minority protection matters. In addition, the Permanent Court of International Justice (PCIJ) also played a role in settling disputes over minority treaties.

Procedural elements

Any member of the League could bring infractions to the attention of the League Council, which had the right to take action and give such direction as it deemed proper and effective in the circumstances. In addition, any member of the Council had the right to refer to the PCIJ any difference of opinion as regards questions of law or fact arising out of its instruments' minority provisions. Fearing that States would not criticize each other, in 1920, minority members and minority associations were also granted an opportunity to bring any infraction or danger of infraction to the attention of the Council.

The core content of the League minority protection system as summarised by Professor Peter Hilpold in a briefing entitled 'The League of Nations and the protection of minorities: Rediscovering a great experiment" included the following points:

(1) Acquisition of nationality, especially in newly created States, and the avoidance of statelessness: Citizenship had to be granted both to persons habitually resident in the transferred territory or possessing citizenship rights at the time the treaty came into force. It also had to be given to persons born in the territory of parents domiciled there at the time of their birth.

(2) Recognition of rights: There had to be recognition and respect for the right of every citizen to equal protection of the law, equality of treatment, and non-discrimination in the enjoyment of civil and political rights. There also had to be recognition of the rights of minorities to establish and manage educational institutions, practice their religion, acquire primary education in their minority language, and the right to freely use their language.[1]

FOCUS ON
Decisions of the PCIJ on minorities

The ***Greco-Bulgarian Communities*** [2] case (1930) established that the existence of minorities was a question of fact and not law, meaning the existence of minorities was not dependant on official recognition from the State.

In ***Minority Schools in Albania*** [3] (1935), the Court stated that effective protection of minorities not only required an absence of discrimination but also the adoption of positive measures. The Court observed that:

> *The idea underlying the treaties for the protection of minorities is to secure for certain elements incorporated in a State, the population of which differs from them in race, language or religion, the possibility of living peacefully alongside that population and cooperating amicably with it, while at the same time preserving the characteristics which distinguish them from the majority, and satisfying the ensuing special needs.*
>
> *In order to attain this object, two things were regarded as particularly necessary, and have formed the subject of provisions in these treaties.*
>
> *The first is to ensure that nationals belonging to racial, religious or linguistic minorities shall be placed in every respect on a footing of perfect equality with the other nationals of the State.*
>
> *The second is to ensure for the minority elements suitable means for the preservation of their racial peculiarities, their traditions and their national characteristics.*
>
> *These two requirements are indeed closely interlocked, for there would be no true equality between a majority and a minority if the latter were deprived of its own institutions, and were consequently compelled to renounce that which constitutes the very essence of its being as a minority.* [4]

Thus, the PCIJ recommended minorities should have the possibility of living peacefully alongside the majority while preserving their distinguishing characteristics.

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1 Hilpold, P, 'The League of Nations and the protection of minorities: Rediscovering a great experiment' *Max Planck Yearbook of United Nations Law*, 2013, Vol 17, p 87.

2 *Greco-Bulgarian Communities*, Advisory Opinion, 1930 PCIJ (ser B) No 17 (July 31)

3 *Minority Schools in Albania*, Advisory Opinion, 1935 PCIJ (ser A/B) No 64 (Apr 6)

4 *Minority Schools in Albania*, at paras 48-52.

However, the League's grand experiment suffered from a number of defects. It was haphazard, imposing obligations on some parties but not others. For example, no obligations were imposed on the great powers themselves, notably France and Italy, despite the former gaining the large German-speaking populations of Alsace-Lorraine in 1919. Likewise, Italy skilfully avoided minority protection obligations arguing it was only one of the victorious powers. Further, the system was not anchored in general human rights standards. Rather, it operated in the context of the retreat of democracy and the rise of authoritarian regimes that were not amenable to humanitarian ideals and norms.

Nevertheless, it proved to be an important precedent that would inform the human rights regimes to follow.

22.2.3 Post-World War II developments

At the end of World War II, the United Nations was set up to replace the League of Nations. One of the key purposes of the UN as stated in Art 1(3) of its Charter was international cooperation to "promot[e] and encourag[e] respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion." After the Universal Declaration of Human Rights (UDHR) was adopted in 1948, norms and mechanisms to protect the rights of minorities and indigenous communities were also gradually adopted.

22.2.4 Development of norms protecting and promoting indigenous peoples' rights

International Labour Organisation (ILO) Convention 107 (1957) was the first international instrument to address the rights of indigenous peoples or IPs. However, due to its patronising language and integrationist approach, it proved problematic. For example, in Art 1, it suggested that tribal or semi tribal people were at "a less advanced stage." Likewise, "progressive integration into the life of their respective countries" was called for under Art 2 through vocational trainings, education, etc. Despite its problems, the instrument did constitute a first step towards discouraging forced assimilation (Arts 4-5), recognising the right of indigenous communities to protection as regards recruitment and conditions of employment (Art 15), rights to land (Art 11), and the right to be educated in their own language (Art 23).

As discussed earlier, common to the ICCPR and ICESCR, Art 1 recognises that all people have the right to self-determination so as to freely determine their political status and pursue their economic, social, and cultural development.

Having strengthened advocacy for recognition of their rights as distinct peoples, the ILO re-examined Convention 107 and in 1989 replaced it with the Indigenous and Tribal Peoples Convention (No 169). Article 1, while making a distinction between tribal and IPs, specifies its applicability to both. The distinction between indigenous and tribal people rests primarily on the following element: the former's historical continuity with populations inhabiting the area prior to colonisation or formation of the nation State. Further, Art 1(2) recognised the rights of groups to self-identify themselves as indigenous or tribal so as to determine the Convention's applicability.

Moreover, the Convention reiterates that indigenous and tribal people have the right to enjoyment of their human rights without dissemination or hindrance of any kind. It also obligates governments to consult with IPs when developing laws, policies, and administrative frameworks for the protection and promotion of their rights. Based on these general principles, the Convention elaborates upon their rights to land, recruitment, conditions of employment, vocational training, handicrafts and rural

industries, social security and health, education, and means of communication. In conclusion, it must be noted that Convention 169 therefore expounds the same rights identified in Convention 107, albeit with an approach that was more respectful of the rights of IPs (as compared to the assimilationist approach adopted in Convention 107). To date, however, not one ASEAN State has ratified Convention 169.

General Comment 23 of the ICERD focuses on eliminating all forms of discrimination on grounds of race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition and enjoyment of all human rights. In General Recommendation 23 (released in 1997), the Committee on the Elimination of Racial Discrimination reiterated that the scope of the ICERD included discrimination against IPs. It further called upon States to:

- Recognise and respect IP's distinct culture, history, language, and way of life as an enrichment of the State's cultural identity and to promote its preservation;
- Ensure that members of indigenous communities are free and equal in dignity and rights and are also free from any discrimination;
- Provide IPs with conditions allowing for a sustainable economic and social development compatible with their cultural characteristics;
- Ensure that members of indigenous communities have equal rights in respect of effective participation in public life and that no decisions directly relating to their rights and interests are taken without their informed consent;
- Ensure that indigenous communities can exercise their rights to practice and revitalise their cultural traditions and customs and to preserve and to practice their languages; and
- Recognise and protect the rights of IPs to own, develop, control, and use their communal lands, territories, and resources.

Although General Recommendation 23 recognised elements of the rights to land and natural resources and the principle of free, prior, and informed consent, it was not until the UN Declaration on the Rights of Indigenous Peoples (UNDRIP) was adopted in 2007 that the rights were elaborately spelled out.

UNDRIP's *Travaux Preparatoires* reveals that its drafters preferred not to give a formal definition of indigenous persons to avoid the difficulties of trying to include the range of diversities and specificities of IPs. Thus, the Declaration reaffirms the rights of IPs as individuals or collectives to fully enjoy the human rights recognised in international human rights law. Some important elements include:

- IPs, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs. They also have the right to maintain and strengthen their distinct political, legal, economic, social, and cultural institutions.
- The State has an obligation to offer effective mechanisms to prevent and provide redress for violations of the rights of IPs, such as actions aiming to effectively deprive them of their identity, lands, and resources, and that involve forced assimilation or integration. States are also obligated to consult with IPs in good faith to obtain their free and informed consent prior to granting approval to any project affecting their lands or territories, particularly in connection with the development, utilisation or exploitation of minerals, water, or other resources. Finally, States have an obligation to adopt measures to eliminate discrimination against IPs.

CASE STUDY

Research and advocacy efforts leading to the adoption of the United Nations Declaration on the Rights of Indigenous Peoples (2007)

In 1971, the United Nations Sub-Commission on the Prevention of Discrimination and the Protection of Minorities (known as the Sub-Commission on the Promotion and Protection of Human Rights after 1999) mandated a study on violations of the rights of IPs. Jose Martinez Cobo, as Special Rapporteur, was given the mandate to carry out a worldwide study on the situation of indigenous communities. In his final report, 'Study of the Problem of Discrimination Against Indigenous Populations (1981),'[5] he recommended the formulation of specific principles for use as guidelines by governments of all States in their activities concerning indigenous populations. Such principles should be based on respect for their identity and the rights and freedoms to which they are entitled.

While the study was being completed, indigenous communities themselves began to organise meetings in Geneva to bring attention to their cause. Representatives appeared before the annual sessions of the Commission on Human Rights to speak about their plight. Pursuant to such advocacy efforts, the United Nations Working Group on Indigenous Populations was established in 1982 as a subsidiary organ of the Sub-Commission. The Working Group had a two-fold mandate: to review developments pertaining to the promotion and protection of the rights of IPs, and to give attention to the evolution of international standards concerning such rights.

The Working Group sessions included participation from government representatives, non-governmental organisations, and UN agencies. The United Nations Voluntary Fund for Indigenous Populations was established in 1985 to help representatives of indigenous communities participate in the deliberations. As a result, the Working Group produced a draft of the Declaration for internal consideration in 1993. Discussion continued for more than a decade as many governments were not prepared to give blanket recognition to the right to self-determination or to recognise indigenous people's land or collective rights. As such, the UN Permanent Forum on Indigenous Issues was created on 28 July 2000 by General Assembly Resolution 2000/22. It provides expert advice, raises awareness and promotes and disseminates information on indigenous issues related to economic and social development, culture, the environment, education, health, and human rights.

In 2006, efforts were renewed to finalise the Declaration so it could be adopted at the first session of the newly formed Human Rights Council. In particular, the Chair of the Working Group suggested some changes to the 1993 draft. Most notable amongst these changes was an understanding of the right to self-determination.

The Declaration was finally adopted in 2007. Four States (Australia, Canada, New Zealand, and the United States) voted against it as they had concerns over the self-determination provisions, land and resource rights, and the right of veto over law and policy decisions concerning the management of resources.

[5] Martinez Cobo, J, 'Study of the problem of discrimination against indigenous populations: Final report submitted by the Special Rapporteur, Mr José Martínez Cobo' United Nations Department of Economic and Social Affairs.

22.2.5 Development of norms: Protection and promotion of the rights of minorities

Special Rapporteur of the United Nations Sub-Commission on the prevention of discrimination and protection of minorities, Capotorti, suggested the following definition of minorities in 1977:

> *A group numerically inferior to the rest of the population of a State, in a non-dominant position, whose members—being nationals of the State—possess ethnic, religious or linguistic characteristics differing from those of the rest of the population and show, if only implicitly, a sense of solidarity, directed towards preserving their culture, traditions, religion or language.*[6]

Critics immediately highlighted some concerns: What does 'numerically inferior' mean? Does it infer a minimum number? What about groups which are numerically in the majority but in politically inferior positions (e.g. South Africa during its apartheid years)? In order to be recognised as a minority, must the group be nationals of a State? In which case, does this effectively exclude stateless persons?

In view of these criticisms, the thorny issue of actually defining the word, 'minority' was therefore avoided. Instead, a pragmatic approach which focused on strengthening the protection of minority rights was adopted. In essence, all minorities are entitled to the enjoyment of basic human rights. However, minority groups face specific vulnerabilities, such as discrimination in the enjoyment of their civil, political, economic, social, and cultural rights and the ability to express their identity, culture, and religion.

In 1992, the UN General Assembly, adopted the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious, and Linguistic Minorities. This imposes an obligation on States to adopt appropriate legislative and other measures to protect the existence and identity of ethnic, cultural, religious, and linguistic minorities. It further recognises the rights of minority groups to enjoy freely and without interference or any form of discrimination, their own culture, to profess and practice their own religion, and use their own language. It also recognises the rights of minorities to participate effectively in cultural, religious, social, economic, and public life.

While the Declaration is non-binding on States, the rights recognised therein have already been documented in the ICCPR, ICESCR, and ICERD which are binding on those States ratifying or acceding to these treaties. Even States not party to these treaties, become accountable for these rights and obligations through the mechanism of the Universal Periodic Review under the UN Human Rights Council.

Provisions of the ICCPR and ICESCR guaranteeing the fundamental elements of minority rights are discussed below. These include the rights to equality and non-discrimination. The right not to be discriminated against in the enjoyment of rights because of one's religion, language, ethnicity, or other status is one of the most important elements of minority rights protection. Minorities may experience direct as well as indirect discrimination. The right to equality and non-discrimination is protected under the following human rights treaties:

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[6] Capotorti, F, 'Study on the rights of persons belonging to ethnic, religious and linguistic minorities (E/CN.4/Sub.2/384/Rev.1)' New York: United Nations, 1979, at para. 568.

- Articles 2(1) and 26 of the International Covenant on Civil and Political Rights;
- International Covenant on Economic, Social and Cultural Rights; and
- International Convention on the Elimination of All Forms of Racial Discrimination.

One of the central aspects of minority rights protection relates to the fear of minorities of being forcibly assimilated, leading to loss of culture, religion, and language. Thus, the core human rights treaties recognise the rights of minority groups to enjoy their own culture, profess and practice their own religion, and use their own language as outlined in Art 27 of the ICCPR and Art 15(1a) of the ICESCR.

The Human Rights Committee in General Comment 23 clarified that the protection under Art 27 of the ICCPR even extends to minority individuals and groups who are not citizens of the State Party. It also specified that States are under an obligation to adopt measures to ensure such individuals and communities can practice their culture, religion, and language in addition to abstaining from interfering in the practices of minority groups. Further, the Human Rights Committee elaborated that culture manifests itself in many forms such as the use of land resources to practice one's way of life. Moreover, the Committee also noted that the exercise of Art 27 rights should not contravene other rights guaranteed by it. In other words, exercise of Art 27 rights cannot be legitimate if they violate other fundamental rights or freedoms.

Similarly, the Committee on Economic, Social and Cultural Rights in General Comment 21 noted that full promotion and respect for cultural rights is essential for the maintenance of human dignity and positive social interaction between individuals and communities in a diverse and multicultural world.

DISCUSSION AND DEBATE

Individual or cultural rights?

In cases where the right of a group to practice their culture results in a loss of rights by an individual, which right should prevail – the right of the group or the right of the individual?

The International Bill of Rights clearly states that exercise of rights by an individual or group should not hurt the human rights of others. Thus, the practice of culture should be curtailed to the extent it does not impede the enjoyment of rights by another.

Limiting the practice of culture is not easy. For example, the practice of female genital mutilation (FGM) is common in some parts of Indonesia. However, it causes health problems with some girls even bleeding to death or dying from infections while others may suffer complications during child birth. Despite this, State efforts to ban the practice of FGM has met with stiff resistance from traditional and religious leaders who consider it a part of their religious traditions.

22.3 Indigenous and Minority Rights: Contemporary Issues in Southeast Asia

Although all Southeast Asian nations signed UNDRIP, most, other than the Philippines, do not even recognise the term 'indigenous.' Rather, most States use the term, 'ethnic minorities' to characterise indigenous groups. One reason for such resistance is that the term 'indigenous peoples' is linked to claims over land and natural resources that States are reluctant to recognise. As the only State recognising the term, the Philippines enacted the Indigenous Peoples Rights Act 1997.

Table 22-1 below outlines the terms used by States to describe IPs, together with the number of indigenous groups in different States, and the specific laws enacted to protect their rights.

Table 22-1: Indigenous Groups in Southeast Asia and the Laws Protecting their Rights (as of 2019)

Country	Common External Designation	Number of Indigenous Groups	Specific Laws
Cambodia	Indigenous communities, indigenous ethnic minorities, highland peoples (no official definition)	Around 17-24 groups	Land Law 2001
Indonesia	Masyarakat Adat or people using customary laws	More than 1000 ethnic groups	Article 18(b)(2) of the Indonesian Constitution, Law No 5/1960 on Basic Agrarian Regulation, Law No 39/1999 on Human Rights
Lao PDR	Ethnic groups	49 ethnic groups, 160 ethnic sub-groups	No specific law
Malaysia	Natives, Orang Asli, Orang Asal	97	Sarawak and Sabah: Customary land rights and customary law Peninsular Malaysia: Orang Asli customary tenure recognised under common law. Aborginal Peoples Act 1954 governs Orang Asli administration and their occupation of land
Myanmar	Ethnic nationalities	More than 100	Vacant, Fallow and Virgin Land Management Law 2018: Implementation of the law may result in eviction of indigenous peoples from their land
Philippines	Indigenous peoples	Approximately 100	Indigenous Peoples Rights Act 1997: Protects cultural integrity, the right to lands, and the right to self-directed development
Thailand	Indigenous peoples, indigenous hill/mountain people	Around 20	No specific law
Vietnam	Ethnic minorities, hill tribes, mountain people	54	No specific law

22.3.1 Land rights

Indigenous people's way of life and economic livelihood is very much connected to the land, territories, and resources they have traditionally owned, occupied, or otherwise used. However, in most countries, indigenous groups do not have formal titles to such land and are vulnerable to eviction due to development and infrastructure projects.

For example, during Cambodia's Universal Periodic Review (UPR), the Report of the Office of the United Nations High Commissioner for Human Rights (OHCHR) considered by the Human Rights Council in early 2019 noted that the Bunong indigenous people in Stung Treng Provicnce were losing their homes, spiritual forest, and burial grounds due to the Lower Sesan II hydroelectric project. It also noted that in Preah Vihear Province, the farmland and spiritual forests of the Kui had been cleared by sugar cane plantations. With regard to these issues, the report noted that the Special Rapporteur on the situation of human rights in Cambodia recommended that the government should simplify its land titling process and allocate additional funding for the development of indigenous communities.

In 2014, while considering Indonesia's periodic report on the ICESCR, the Committee on Economic, Social and Cultural Rights, in its concluding observations expressed concern at the absence of an effective legal protection framework for the rights of Masyarakat Adat and urged the State Party to expedite adoption of a draft law to effectively guarantee the rights of the Masyarakat Adat to own, develop, control, and use their customary lands and resources. It also recommended that the law should define strong mechanisms to ensure respect of the principle of free, prior, and informed consent on decisions affecting indigenous groups and their resources. These recommendations were reiterated by the OHCHR during its UPR process in 2017.

CASE STUDY

The Tampakan copper-gold project and human rights violations (South Cotabato, Philippines)

The story of the Tampakan copper mine began when Western Mining Corporation (WMC) obtained a mining contract in Tampakan in 1995. In 1997, the project faced challenges in its operations leading Glencore-Xstrata to restart the project in 2007 with a local subsidiary, Sagittarius.

The open pit mine falls within the boundaries of four provinces with a substantial portion in the ancestral domains of the Bla'an. The environmental impact assessment (EIA) conducted by the company estimated that almost 5,000 people, most of them indigenous, would be directly affected. In a report submitted to the UN Special Rapporteur on indigenous peoples in 2002, it was highlighted that the project had been initiated without securing the free, prior, and informed consent of the Bla'an people. A fact-finding mission conducted by the Tampakan Forum (a coalition of local organisations in South Cotabato and national and international support groups) in 2012 revealed that the corporations had acted in violation of a government order, continuing their activities even while their application for environmental clearance had still been under review. It also found a heightened presence of military and security forces in the area, and that the widening of roads by the mining company had resulted in the destruction of crops, farms, and houses.

In addition, between 2012-2013, three incidents of extra-judicial killings occurred. All the victims were families and relatives of the Bla'an chief who had been defending the community's ancestral lands against the Tampakan mining project.

As of May 2014, while the mining project has not been suspended or abandoned, it has been "down-scaled." Glencore/Xstrata have committed to complete all regulatory requirements, including securing the Bla'an community's consent.

22.3.2 Right to practice language

As discussed previously, language is a vital component of the identity of indigenous and minority groups. International human rights law calls upon States to protect the freedom of such groups to practice their language. It also places an obligation on States to take measures to support the maintenance and revitalisation of minority languages.

However, in practice the challenges are many. For example, Indonesia has more than 500 ethnic languages. While Art 36 of the 1945 Constitution of Indonesia recognises Bahasa Indonesia to be the national language, Art 32 places an obligation on the State to respect and preserve local languages as national cultural treasures. Although a national language policy was put in place in 1986, there was no corresponding policy to promote ethnic languages. Further, as all education is conducted in Bahasa Indonesian, minority languages are placed at even more of a disadvantage.

DISCUSSION AND DEBATE

Question for reflection

In a globalised world, English and some other languages have gained prominence. As a fallout, in the national context, English is often given prominence in the education system to enable children to communicate in the global system. In such a context, what steps can be taken to preserve and promote minority languages?

22.3.3 Right to practice culture

A central part of indigenous and minority cultural rights is the right to protect, maintain, and develop cultural customs, practices, and traditions. These are at the core of indigenous identities, and respect for such elements has a salutary impact on the general well-being of individuals and their communities. However, the indigenous way of life is often not understood by States which may deem them primitive and uncivilised. An example is the practice of shifting cultivation amongst indigenous groups in the mountainous regions of Southeast Asia. This practice makes the land fertile and eliminates the need for pesticides. For generations, indigenous groups have established a set of rules with regard to implementing this practice. Such systems help to preserve local biodiversity and enable communities to grow a range of vegetables, fruit trees, herbs, and medicinal plants. Thus, this practice contributes to the sustainability of their way of living. However, this practice is also stigmatised for its 'slash and burn' cultivation methods with indigenous groups often blamed for Southeast Asia's annual haze. Rather than understanding this system of agriculture, the tendency is for States to adopt measures to discourage such practices.

22.3.4 Threats to activists and environmental rights defenders

According to Front Line Defenders, 77% of activists killed in 2018 were engaged in defending land, environmental, or indigenous rights.[7] The Special Rapporteur on the rights of indigenous peoples, in her report on the attacks and criminalisation of IPs in defence of their rights (submitted to the Human Rights Council in 2018), noted that most instances of violence against indigenous leaders arose during opposition to projects relating to extractive industries, agribusiness, infrastructure projects, hydroelectric dams, and logging.[8] She further noted that one crucial cause for the vulnerability of indigenous and environmental rights defenders was the lack of respect for their collective land rights and the failure of States to provide indigenous communities with secure land tenure.[9] She also noted that in most cases, the laws relating to forestry, mining, and the energy sector were not harmonised with IP land rights to the benefit of commercial interests.[10]

Thus, the Special Rapporteur highlighted the structural causes underlying the risks to life and security faced by environmental rights defenders. The issue of structural violence acquires importance in the ASEAN context as the vision for regional economic integration has led to many cross border investments, such as Thailand's investment in Lao PDR (Xayaburi Dam) and Myanmar (Dawei Deep Sea Port and special economic zone). In such cases, the rule of law and access to justice systems in host States are generally weak. Moreover, States are more interested in investment opportunities than indigenous rights. Accordingly, the right of such communities to their land and resources becomes threatened, and their struggle to access justice becomes ever more challenging.

22.3.5 Climate change and indigenous persons

The fact ASEAN's population and economic activities are concentrated along its coastline makes it particularly vulnerable to climate change. Since the economies of this region are still largely agriculture based, the imminent rise of sea levels poses a considerable threat to its coastal cities and those dependent on agriculture in its fertile deltas.

A sizeable population of indigenous communities in the ASEAN region is already grappling with climate change. An increase in rainfall and heavier downpours have led to more frequent flooding. Also, the El Nino southern oscillation phenomenon is becoming more frequent and higher in intensity. As a result, the region suffers either storms and floods which destroy crops and homes or prolonged droughts that reduce the productivity of fields and pastures. In addition, Southeast Asia has witnessed increasingly devastating forest fires. Further, warming temperatures harm coral reefs threatening fish stocks.

Climate change has increased the pressure on indigenous communities to adapt to such changes. Also, worsening food and water insecurity and an increase in vector borne diseases makes this already vulnerable population more susceptible to hardship. Already marginalised and impoverished, their resources are often minimal. Thus, the threat is not merely temporary economic hardship but the wholescale destruction of traditional ways of life linked to nature and agricultural cycles.

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7 Front Line Defenders, *Global Analysis 2018*, Ireland: Front Line Defenders, 2019.

8 Human Rights Council, 'Report of the Special Rapporteur on the rights of indigenous peoples (A/HRC/39/17)' United Nations General Assembly, 10 August 2018.

9 A/HRC/39/17 (see note 7 above), at 8.

10 A/HRC/39/17 (see note 7 above), at 8.

While IPs are already grappling with such changes, government schemes intended to cope with climate change (e.g. the expansion of biofuel plantations, the building of dams under the Clean Development Mechanism, and uranium extraction for nuclear power plants to avoid dependence on fossil fuels) often disregard the effect of such schemes on indigenous communities whose land and other rights may be directly violated.

In other words, while ASEAN's 'Vision 2020' calls for a "clean and green ASEAN," ASEAN does not have a specific climate change policy. Instead, it is addressed in the context of sustainable development.

22.4 Protection Mechanisms

Mechanisms to promote and protect rights exist at the national, regional, and international level. At the national level, the mechanisms include the judiciary and national human rights institutions.

In ASEAN, the ASEAN Intergovernmental Commission on Human Rights has the mandate to promote rights. While the ASEAN Human Rights Declaration adopted in 2012 recognises civil, political, economic, social, and cultural rights, it does not mention IP or minority groups specifically. In fact, the terms are not even mentioned in the Declaration.

In recent years, the ASEAN Intergovernmental Commission on Human Rights (AICHR) has held a series of workshops on human rights, the environment, and climate change. In its most recent workshop, it focused on the benefits and feasibility of a regional approach towards environmental impact assessments or EIAs such to effectively address environmental, social, economic, and human rights issues. Such an initiative by the AICHR can help to strengthen standards relating to EIAs which could then be effectively used for transboundary investment projects in ASEAN.

At the international level, UNDRIP, being a declaration of non-binding nature, is also without a monitoring mechanism. However, as discussed in this chapter, other UN human rights instruments do contain protection for the rights of indigenous and minority groups. Also, numerous charter-based and treaty-based mechanisms exist to aid such communities.

22.5 Universal Mechanisms

22.5.1 Charter-based mechanisms

Universal Periodic Review. All member States of the UN have to submit themselves for the Universal Periodic Review or UPR before the Human Rights Council. The UPR assesses State compliance to the obligations laid out in: (1) the UN Charter; (2) the Universal Declaration of Human Rights or UDHR; and (3) the human rights treaties ratified by the State; (4) voluntary pledges made by the State such as commitments in national human rights policies; and (5) international humanitarian law.

The UDHR recognises and protects the rights of indigenous and minority groups. Thus, even if a State has not ratified the ICCPR, ICESCR or ICERD, the measures adopted by it to protect and promote the rights of such groups will be assessed during its UPR process.

Special Rapporteur in the field of cultural rights. The mandate of the Special Rapporteur includes: identifying best practices as well as obstacles in the promotion and protection of cultural rights; working in cooperation with States to encourage adoption of measures at the local, national, regional, and international levels aimed at the promotion and protection of cultural rights; studying the relationship between cultural rights and cultural diversity; integrating a gender and disabilities perspective; and working in close coordination with other intergovernmental and non-governmental organisations. The activities of the Special Rapporteur include: conducting two official country visits per year; engaging in thematic research; receiving communications from all stakeholders; and participating in conferences, seminars, and other events relevant to the mandate.

Special Rapporteur on the rights of indigenous peoples. The mandate of the Special Rapporteur includes: examining ways and means of overcoming obstacles for full and effective protection of the rights of IPs; gathering information from relevant sources on alleged violations of the rights of IPs; formulating recommendations and proposals; and working in close cooperation and coordination with other UN mechanisms and regional human rights organisations. The activities of the Special Rapporteur include: addressing specific cases of alleged violations of the rights of IPs through communications with governments; and conducting and contributing to thematic studies on the rights of IPs.

Special Rapporteur on minority issues. The mandate of the Special Rapporteur includes: promoting the implementation of the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities; identifying best practices and ways and means of overcoming existing obstacles in the effective realisation of rights; guiding the work of the Forum on Minority Issues; and applying a gender perspective on minority issues. The activities of the Rapporteur includes: receiving information from various sources; undertaking official country visits; and making annual reports.

While these mechanisms are specific to indigenous rights, other mechanisms can also be of use, such as the Working Group on the issue of human rights and transnational corporations and other business enterprises, and the Special Rapporteur on the Right to Development.

22.5.2 Treaty-based bodies

All nine core human rights treaties have a committee of independent experts to periodically review State compliance with its obligations under the treaty. This treaty monitoring process is also useful to assess the measures adopted by State Parties to promote and protect the rights of indigenous and minority groups.

22.6 Role of Civil Society Organisations

It is important to note that civil society organisations at the local, national, regional, and international levels play a vital role in strengthening the promotion and protection of rights. At the local level, such organisations can help to empower affected people and develop leadership amongst them. These organisations and community leaders help to give representation to the voice of the people. National level organisations play a significant role in facilitating network-building with non-governmental organisations at the regional and international levels. They also help to facilitate interactions of people at the local level with human rights mechanisms at the national, regional, and international levels.

Regional organisations such as the Asia Indigenous Peoples Pact and international organisations such as ESCR-Net, Minority Rights Group International, and the International Work Group for Indigenous Affairs have also played a key role in giving voice to groups at the local level.

A. Chapter Summary and Key Points

Minorities and the Westphalian Nation-State

The creation of nation States also resulted in the creation of minority populations. These groups identified with different religions, languages, or cultures to those practiced by the dominant group. Indigenous communities often comprise such minorities.

Definition of Indigenous Peoples and Minorities

Framing a definition of indigenous peoples and minorities has proved problematic. As such, international instruments such as the Indigenous and Tribal Peoples Convention (No 169) recognised the right of indigenous or tribal groups to self-identify as indigenous or tribal. Characteristics distinguishing indigenous and minority groups from others include their historical connection to their ancestral lands, and their distinct culture, language, and way of life. Indigenous peoples' rights are collective in nature.

Minority groups possess common religious, language, or ethnic characteristics, and are also less in number than the dominant group.

International Standards and Protection Mechanisms

There is no specific binding human rights treaty focusing on the rights of indigenous peoples and minority groups. However, the core human rights treaties such as the ICCPR, ICESCR, and ICERD do provide some protection of their rights. The United Nations Declaration on the Rights of Indigenous Peoples (2007) and the Declaration on the Rights of Persons belonging to National or Ethnic, Religious and Linguistic Minorities (1992) also elaborate upon the rights of indigenous peoples and minority groups.

The charter-based mechanisms such as the Universal Periodic Review, Special Rapporteurs, and Treaty Bodies are relevant and important for the promotion and protection of the rights of indigenous peoples and minority groups. While no specific protection mechanisms are available at the ASEAN level, the AICHR is taking steps towards developing a regional approach to environmental impact assessments which could prove crucial in the protection of indigenous rights affected by transboundary investments. At the national level, protection mechanisms include the judiciary and national human rights institutions.

B. Typical Exam or Essay Questions

- Analyse the state of protection (laws and institutions) of minorities and indigenous peoples in Southeast Asia.
- When and why did the international community begin addressing problems of minorities and indigenous rights?
- Why do minorities pose a "problem" for nation States?
- Why has formal recognition of the rights of minorities and indigenous peoples been so problematic?
- Explain the complexities involved in accurately defining a 'minority.' How was this problem addressed during drafting of the instruments?
- Are minority and indigenous rights individual or collective rights?
- What are the limitations of the international instruments dealing with minority or indigenous rights?
- How can UN institutions and processes advance the protection of minority and indigenous rights?
- What are the differences between the League of Nations minority system and the UN architecture for the protection of minority rights?

C. Further Reading

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23

The Rights of Persons with Disabilities

23.1 Introduction

Throughout history, people with disabilities have been treated with fear, suspicion, and contempt. In many societies, such individuals were even considered a source of shame or embarrassment to their families and were quietly locked away. In other cultures, people with disabilities were thought to be possessed by demons so religious leaders were often called upon to exorcise those evil spirits. In the late 19th century, attitudes changed when the belief that disability was hereditary led to the practice of eugenics. As a consequence, people with disabilities were sterilised to prevent them giving birth to children who might inherit the same conditions. In Japan, the Eugenics Protection Law under which persons with physical and mental disabilities were forcibly sterilised, was only repealed in 1996. Accordingly, adoption of the United Nations Convention on the Rights of Persons with Disabilities (CRPD) in 2006 constituted a milestone, marking a dramatic shift away from treating persons with disabilities as objects of charity requiring medical treatment and social protection to recognising them as rights holders capable of making decisions about their own lives.

This chapter examines the different attitudes to disability that have evolved over the years. First, the human rights approach is analysed along with an in-depth look at the CRPD. Some initiatives taken at the ASEAN level are then discussed followed finally by the role of businesses in promoting the rights of persons with disabilities.

DISCUSSION AND DEBATE

Disability in your society

How are people with disabilities perceived in your society?

Have these perceptions undergone change over time?

23.1.1 Evolving approaches to addressing disability

Over the years, society's understanding of disability has evolved along with the way it addresses the needs and concerns of people with disabilities. This section examines the four main perspectives: (1) the charity model, (2) the medical model, (3) the social model, and (4) the human rights-based approach.

Charity model

This strategy treats persons with disabilities as victims unable to think or provide for themselves meaning it is the duty of society to take care of them. Consequently, persons with disabilities are dependent on the charity of others and since charity depends on goodwill, the quality of care provided may be deemed less important. As a natural progression of this approach, care institutions or asylums were developed. Albeit with the intention of providing support, people with disabilities were therefore removed from their families and communities and confined to special institutions.

Medical model
Similarly fixated on negative stereotypes, this strategy is based on the understanding that disability is a medical condition that can be treated by focusing on the individual. Thus, disability is viewed in terms of a person's physical or mental limitations which can be managed with medical care. Comparable to the previous approach, this model also encourages loss of independence and institutionalisation. As disability is considered a treatable problem, medical professionals are given considerable power to decide the best interests of such persons. Again, as in the above approach, persons with disabilities lack choice and control of their lives and will have scant opportunity to participate in decisions affecting them.

Social model
This model shifts the focus away from the individual to society and sees disability as stemming from the barriers existing in one's environment including systems, buildings, and processes designed without regard for the needs of some – this prevents people with disabilities from fully enjoying their rights on an equal footing. For example, this approach sees a visually impaired person as unable to move freely not as a result of his/her disability, but because the pavement itself makes movement impossible. Or a wheelchair user may be restricted due to a lack of ramps on buses or steps, considerably limiting their mobility. Thus, the social approach focuses on eliminating such barriers from the environment.

At the same time, the approach does not ignore the fact that persons with disabilities may require special care and support. Accordingly, it puts them at the centre of the equation, requiring care providers to respond to their expectations only after listening to their wants and needs.

Human rights-based approach
This model builds on an understanding of the social approach and recognises that persons with disabilities are still rights holders; therefore, States have an obligation to take appropriate measures to ensure they can enjoy their rights on an equal footing with others. As such, it acknowledges that environmental barriers can lead to discrimination and recognises the importance of enabling access to justice and appropriate remedies. The human rights approach also focuses on empowering persons with disabilities so they can participate in society to the fullest extent.

Table 23-1: Comparison of Different Approaches to Disability

Approach	How Disability is Viewed	How Disability is Treated	Duty Bearer
Charity Model	Disability is a tragedy of nature. Persons with disabilities are unable to look after themselves. Society must take care of them.	Collect funds to provide for people with disabilities. Set up special homes where people with disabilities can be looked after.	Charitable and religious institutions. Compassionate persons in society.
Medical Model	People with disabilities have a medical condition which can be either physical or mental. Disabilities are an abnormality preventing sufferers from leading independent lives.	Treat the disability. Set up specialised medical institutions to look after people with disabilities. As experts, medical professionals are best qualified to treat the conditions causing disabilities.	Medical professionals. State (the health ministry and related departments).
Social Model	Disability is not the problem of individuals. Rather, the social environment—its infrastructure, attitudes, and bias—prevents such people from participating in society on an equal footing with others.	Eliminate barriers in the social environment and ensure public services and goods are accessible to people with disabilities. Put people with disabilities at the centre and respond to their needs and expectations accordingly.	State and society.
Human Rights-Based Approach	People with disabilities are also rights holders. People with disabilities have the right to equality of opportunities and to participate in all aspects of social, political, economic, and cultural life.	Laws and policies should facilitate the full inclusion of persons with disabilities into society.	State is the primary duty bearer. Society also has a duty to change the social construct of disability.

23.1.2 Brief history of the human rights-based approach to disability

The rights of persons with disabilities were officially recognised by the United Nations in 1948 when the United Nations General Assembly (UNGA) adopted the Universal Declaration of Human Rights (UDHR) which promoted the rights to life, liberty, and the security of all persons in society, including persons with disabilities. Although it conceptualised disability as a condition, as opposed to a status or a result of a person's interaction with society, the Declaration is widely recognised for establishing the core principle of equality for all. The rights of persons with disabilities is recognised in Art 25 which states that:

> *Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.*

The International Convention on Civil and Political Rights (ICCPR) and the International Convention on Economic, Social and Cultural Rights (ICESCR) also promote and protect the rights of persons with disabilities. Article 2 of both includes a non-discrimination clause and places an obligation on States to guarantee rights without regard to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. The phrase, "other status" has been interpreted to include disability.

Apart from the international bill of rights (the UDHR, ICCPR and ICESCR), some specific instruments on the rights of persons with disabilities were adopted as well.

The Declaration on the Rights of Mentally Retarded Persons was adopted in 1971 by the UNGA. The Declaration raised awareness on the rights of persons with intellectual disabilities and the importance of education to enable such persons to reach their full potential. However, it was still based on the charity and medical models in which persons with disabilities are regarded as recipients of welfare and medical treatment.

Another milestone was the adoption of the Declaration on the Rights of Disabled Persons by the UNGA in 1975 which promoted the social integration of persons with disabilities on the basis of their inherent dignity and human rights. Thus, in the last few decades, there has been a noticeable transition from the medical and welfare models (which denied disabled persons agency) to social and human rights-based approaches (which promote equal rights and opportunities).

The 1980s saw other significant developments. For example, the United Nations declared 1981 the International Year of Disabled Persons (IYDP). The theme was "full participation" and the objectives included: helping people with disabilities to physically and psychologically adjust to society; promoting national and international efforts to provide such persons with proper assistance and care; increasing the availability of suitable work opportunities; and increasing public awareness, study, and research projects to facilitate the participation of persons with disabilities in daily life. A valuable lesson from this year was the realisation that existing social attitudes were a major barrier to achieving this goal of full participation.

In 1982, the World Programme of Action Concerning Disabled Persons (WPA) was adopted by the UNGA to promote effective measures for the prevention of disability and to realise the goals of "full participation" and "equality." As such, the WPA proposed prevention, rehabilitation, and the equalisation of opportunities. In order to advance these goals, the UNGA declared 1983-1992 the Decade of Disabled Persons during which many activities were conducted to improve the situation and status of persons with disabilities, including the facilitation of equal opportunities in education and employment to encourage their full participation in society.

Similarly, in 1989, the UNGA declared December 3 the International Day of Disabled Persons. In 1993, the Standard Rules on the Equalisation of Opportunities for Persons with Disabilities were adopted, another consequence of the 1983-1992 United Nations Decade of Disabled Persons.

These developments led to the drafting of the CRPD and its adoption in 2006.

23.2 Terminology

Terms relating to disabilities have evolved over time, from the use of insulting words like 'idiot,' 'cripple,' or 'retard' to terms reflecting respect such as persons with developmental disabilities, persons with intellectual disabilities, persons with physical disabilities, or persons with mental disabilities. Significantly, persons with disabilities themselves advocated for these changes.

Table 23-2: Changes in Terminology Regarding Persons with Disabilities

Terms No Longer in Use	Terms in Use
Retarded, idiots	Persons with intellectual disabilities
Crippled	Persons with physical disabilities
The disabled, the handicapped	Persons with disabilities
Wheelchair-bound	Wheelchair users
Victims of (certain diseases that cause disabilities)	Persons with (certain diseases or disabilities)
Handicap	Disability
Normal people	Persons without disabilities
Suffers from (e.g. asthma)	Has (e.g. asthma)

23.3 Convention on the Rights of Persons with Disabilities

The Convention on the Rights of Persons with Disabilities or the CRPD and its Optional Protocol were adopted on 13 December 2006. The CRPD was the first human rights treaty allowing regional integration organizations to become party to its provisions. As a result, the European Union (EU) ratified it in 2010. Currently, ASEAN is still debating the issue although all 10 ASEAN countries have individually ratified it. Also adopted on 13 December 2006, the Optional Protocol entered into force on 3 May 2008 and is a mechanism for considering individual complaints from States Parties.

The CRPD reaffirms the human dignity of persons with disabilities and their equal rights to enjoy the full range of human rights. While not providing a definition of the term 'disability,' it focuses on the discrimination faced by such persons and identifies measures that may be taken by States to eliminate it. Although the Convention does not recognise new rights, it does elaborate on those guaranteed in the international bill of rights in the context of persons with disabilities.

The following section gives an overview of the CRPD and elaborates on a few important articles.

23.3.1 Disability as a concept

In its preamble, the CRPD recognises that disability is an evolving concept that does not reside within a person. Rather, disability results from barriers in society hindering a person's full enjoyment of their rights.

What is the nature of such barriers? The World Health Organisation (WHO) defines barriers as "factors in a person's environment that, through their absence or presence, limit functioning and create disability."[1] Barriers may be of different natures and are outlined below.

Attitudinal barriers
Stigma, prejudice, and bias against persons with disabilities can result in a denial of their rights. In addition, negative attitudes may have the impact of creating a disabling environment. Examples of such attitudes are: assumptions that persons with disabilities are inferior, having low expectations of persons with disabilities, assuming the provision of accommodation is a special favour, or making a person with a disability feel like a burden to society. Such attitudes can affect self-perception and give birth to a lack of self-esteem, further reducing confidence in one's abilities.

Environmental barriers
This refers to barriers present in a person's everyday environment restricting participation and inclusion and may include physical barriers, such as work space design, schools, hospitals, public transport, etc, not facilitating easy access. For example, public transport may lack ramps, making it difficult for persons with disabilities to access vehicles without aid. Similarly, communication systems may make it difficult for certain people to access information and knowledge, thereby restricting their opportunities to fully participate in many aspects of everyday life. However, such barriers are constructed by society so can be changed by it.

Institutional barriers
These include laws and policies discriminating against persons with disabilities which restrict the opportunities available to them. For example, some countries do not allow people with visual impairments to open bank accounts, or the State may not recognise that people with mental disabilities have capacity to make their own decisions, forcing them into custodial care.

Thus, in conclusion, the CRPD recognises disability as a product of the obstructions existing in society and lays down a framework to eliminate such barriers as well as empowering persons with disabilities to participate in society to the fullest extent.

23.3.2 General principles

Article 3 (listed below) sets out the CRPD's general principles which can be used as a guide to interpret other articles and their implementation thereof.

Respect for inherent dignity and individual autonomy: Inherent dignity refers to the inner worth of every person. Individual autonomy refers to the freedom of a person to be in charge of his/her life and includes the ability to make decisions. Often, persons with disabilities are treated as objects of pity and not as individuals able to think and act for themselves. This principle recognises the agency inherent in every person.

Non-discrimination: Non-discrimination is a fundamental principle common to all human rights treaties. The CRPD prohibits discrimination on the basis of disability and places an obligation on States to eliminate all forms of discrimination present in society. In addition, it recognises that obstacles causing discrimination may include invisible barriers such as society's negative attitudes – this calls for awareness building.

[1] World Health Organization and The World Bank, *World Report on Disability*, Malta: WHO, 2011.

Effective participation and inclusion in society: The charity and medical models view people with disabilities as 'special,' i.e. they need care or have a medical condition requiring treatment. The fallout of adopting this approach is the creation of special institutions such as care homes for people with mental disabilities, or special schools for children with disabilities, etc. Such institutions lead to the segregation of such persons from the rest of society. Segregation reaffirms the stereotypes, biases, and prejudices already existing in society. The CRPD seeks to address this and facilitates the effective participation and inclusion of persons with disabilities into society. It also implies reaffirming the dignity of persons with disabilities and recognising them as equal participants in society.

Respect for differences and acceptance of persons with disabilities: The notion of 'normal' is a societal construct. For example, the standards set for an ideal man or woman are created by society. Thus, its rules, regulations, and institutions are based on these understandings, and anyone behaving differently will not be considered normal, and may be subject to exclusion. Similarly, people with disabilities are often considered abnormal and treated differently. The CRPD stresses that human society is diverse and all persons are different. Persons with disabilities comprise part of this human diversity and therefore mutual respect is vital.

Equality of opportunity: An aspect of the right to equality and non-discrimination, this does not imply everyone should have identical opportunities. Rather, the principle recognises that some people/groups in society have historically faced discrimination and stresses the elimination of these obstacles or barriers, thus enabling, for example, those with disabilities to enjoy the same opportunities as everyone else.

Accessibility: The CRPD recognises that barriers present in the physical environment cause disability. Thus, it stresses facilitating accessibility by dismantling those barriers.

Equality between men and women: The Convention recognises that women with disabilities may face multiple discrimination, as a result of both their gender and impairment. The principle of equality between men and women calls upon States to recognise that women with disabilities may face discrimination in different ways than men, and requires States to take appropriate measures to eliminate barriers preventing women from enjoying their rights on an equal footing with men.

Respect for the evolving capacities of children with disabilities and respect for the rights of children with disabilities to preserve their identities: One of the basic principles of the Convention on the Rights of the Child (CRC) is respect for the evolving capacities of children. This principle recognises that children develop competency and understanding, and the State while addressing the concerns of children with disabilities should also support the child's maturation, autonomy, and self-expression.

23.3.3 State obligations

Article 4 sets out the Convention's general obligations, while subsequent articles detail obligations corresponding to specific rights. These can be reviewed in the general framework of respect, protect, fulfil, non-discrimination, and progressive realisation.

Obligation to respect: This requires States to refrain from any act that impairs enjoyment of a right. Accordingly, Art 4(1d) obliges a State to refrain from engaging in any act or practice inconsistent with the rights recognised in the Convention.

Obligation to protect: This requires State Parties to prevent the violation of a person's rights by third parties or private actors. In this regard, Art 4(e) requires States to take appropriate measures to eliminate discrimination on the basis of disability by private actors. Such measures may include enacting legislation to prohibit discrimination by third parties, establishing effective mechanisms for enforcing the law, and providing access to justice.

Obligation to fulfil: This requires States to take appropriate legislative, administrative, budgetary, judicial, and other action to realise such rights. To this effect, Art 4 requires States to:

- Adopt appropriate legislative, administrative, and other measures to implement the rights recognised in the Convention.
- Ensure that all policies and programs are inclusive of concerns of the rights of people with disabilities.
- Undertake or promote research and the development of universally designed goods, services, and facilities that meet the specific needs of people with disabilities, and facilitate the availability and use of such goods.
- Provide easily accessible information about mobility aids, devices, and assistive technologies, and other forms of assistance, support services, and facilities.
- Promote the training of professionals and staff working with persons with disabilities on the rights guaranteed in the Convention and the corresponding obligations.

Obligation of non-discrimination: Articles 4(1e) and 5 place an obligation on States to take all appropriate measures to eliminate discrimination on the basis of disability by any person, organisation, or private enterprise.

Obligation with regard to economic, social, and cultural rights: Article 4(2) places an obligation on States to utilize the maximum available resources to work progressively towards the full realisation of the rights guaranteed in the Convention. Maximum available resources refer to resources available within the State and from the international community. Progressive realisation means achieving targets incrementally over a period of time. Article 4(2) also mentions that some aspects of obligations with respect to economic and social rights are immediate and not subject to progressive realisation. These aspects include the obligations to not discriminate and to protect people with disabilities.

Obligation of participation: Article 4(3) stresses the right to participation. It places an obligation on States to ensure that people with disabilities are included in the drafting of laws and policies and other decision-making processes concerning them.

23.3.4 Right to equality and non-discrimination

Article 5 of the Convention encapsulates the following rights and obligations.

First, it recognises that all persons are equal before the law and are entitled to the equal protection and benefit of the law. These rights imply that the law should not discriminate against people with disabilities and deny, restrict, or limit the enjoyment of such rights. Equal benefit of the law implies that State Parties should eliminate the barriers impeding such access.

Second, Art 5 places an obligation on States to prohibit all forms of discrimination against people with disabilities and guarantee legal protection against it.

Third, it requires States to take appropriate measures for the provision of reasonable accommodation to eliminate discrimination in practice.

The question then arises: What constitutes discrimination against persons with disabilities? Article 2 of the Convention defines discrimination on the basis of disability as:

> *any distinction, exclusion or restriction on the basis of disability which has the purpose or effect of impairing or nullifying the recognition, enjoyment or exercise, on an equal basis with others, of all human rights and fundamental freedoms in the political, economic, social, cultural, civil, or any other field. It includes all forms of discrimination, including denial of reasonable accommodation*.

Reasonable accommodation is defined in Art 2 as:

> *Necessary and appropriate modification and adjustments not imposing a disproportionate burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms*.

The definition of discrimination as provided in Art 2 includes both direct (purpose) and indirect (effect) forms of discrimination. An example of direct discrimination is when the law allows forced sterilisation of people with disabilities. Indirect discrimination occurs, for example, when interviews for jobs are held on the second floor of a building only accessible by stairs and one of the candidates is of restricted mobility. Thus, this candidate will be in an unequal situation with his/her counterparts as will be unable to attend. Such a situation could be remedied by, for example, arranging a ground floor interview, a measure that would not cause undue burden on the entity conducting the interviews.

23.3.5 Accessibility

As discussed before, disability is the result of the interaction of a person having some form of impairment with environmental barriers existing in society. Removal of such barriers is essential to enable persons with disabilities to live independently and participate fully in society.

Article 9(1) places an obligation on States to take appropriate measures to ensure persons with disabilities are on an equal basis with others. In addition, they should also have unfettered access to the physical environment and full access to

information, communications, and other public services. This obligation is applicable to both urban and rural areas.

Article 9(1) further clarifies that the appropriate measures taken by States to facilitate accessibility should include identifying and eliminating barriers with respect to:

- Buildings, roads, transportation and other indoor and outdoor facilities, including schools, housing, medical facilities, and workplaces.
- Information, communications and other services, including electronic services and emergency services.

In General Comment 2, the Committee on the Rights of Persons with Disabilities has clarified that indoor and outdoor facilities should include law enforcement agencies, tribunals, prisons, social institutions, areas for social interaction and recreation, cultural, religious, political and sports activities, and shopping establishments. Other services include postal, banking, telecommunication, and information services.

Further, as discussed under State obligations, even private actors have an obligation not to discriminate on this basis. Thus, even a private entity offering goods, products, and services to the public must ensure accessibility.

DISCUSSION AND DEBATE

Societal barriers

What accessibility barriers exist in society? Are such examples found in your community?

- Lack of professional sign language interpreters
- Difficulty in accessing public services due to prejudices held by service providers
- Lack of signage in braille, lack of guides, or assistance in public buildings
- Lack of information and communication available in easy-to-read formats
- Lack of communication in augmentative and alternative modes and methods that can be understood by persons with disabilities

Barriers to accessibility can be addressed by adopting universal designs taking into account the diversity of persons living in society. Article 9(2) provides some guidance on measures that can be taken by States to facilitate accessibility. These measures include the following:

- Developing, promulgating, and monitoring implementation of minimum standards to ensure the accessibility of public facilities and services. Such standards must be developed in consultation with persons with disabilities.

- Promoting the design, development, production, and distribution of accessible information and communication technologies and systems at an early stage, so these technologies and systems become accessible at minimum cost.

Article 9 also places obligations on State Parties to establish legislative and policy frameworks with specific, enforceable, time-bound benchmarks for monitoring and assessing the gradual modification and adjustment by private entities of their previously inaccessible services. Further, they need to ensure that all newly procured goods and services are fully accessible to persons with disabilities. Article 4(3) requires States to develop minimum standards with respect to accessibility in close consultation with persons with disabilities and their representative organisations. Such standards can also be developed in collaboration with other State Parties, international organisations, and agencies through international cooperation in accordance with Art 32 of the Convention.

FOCUS ON
Reasonable accommodation and accessibility

Is ensuring accessibility under Art 9 the same as providing reasonable accommodation?

No. Accessibility is related to making systemic changes, whereas reasonable accommodation is undertaken in response to an individual complaint.

State Parties have an obligation to ensure accessibility so that persons with disabilities can enjoy their rights on an equal footing with others. Accessibility is facilitated through the development of minimum standards and their adoption by various service providers and stakeholders. However, such standards may not provide for every need of persons with disabilities. In such cases, reasonable accommodation becomes relevant.

Reasonable accommodation becomes relevant from the moment an individual with impairment expresses the need for it in a given situation, such as when an interviewee in a wheelchair is called for an interview on the second floor of a building with no elevator. Standards of universal design may require that office buildings should have elevators but if the building does not follow such standards, reasonable accommodation must be applied. In this sense, reasonable accommodation ensures accessibility to an individual with a disability in a specific situation. Or it can be said that reasonable accommodation is about ensuring individual justice.

Also, while States can ensure that accessibility is achieved through gradual implementation, the obligation to provide reasonable accommodation is immediate

23.3.6 Equal recognition before the law

Article 12 reaffirms that persons with disabilities have the right to recognition everywhere as persons before the law. What is the significance of this right in relation to people with disabilities?

Recognition as a person before the law is also known as legal capacity. Legal capacity has two components:

1. Legal standing to hold rights and to be recognised as a legal person before the law, e.g. to be registered on the electoral roll, or being able to apply for a passport.
2. Recognition of the agency of the person to engage in transactions, create, modify, or end legal relationships.

These two aspects of legal standing and legal agency can be illustrated with the right to property. For example, the laws in country A recognise the right of every person to hold property. However, the law also states that persons with disabilities can make transactions relating to the sale and purchase of property only through a legal guardian. In such a case, while there is respect for the first aspect of legal standing, the second aspect (i.e. the capacity to make decisions in order to exercise one's rights) is denied.

Persons with disabilities are generally denied the right of legal capacity due to reasons of mental capacity. Mental capacity refers to a person's decision-making skills. Mental capacity may vary from person to person depending on environmental and social factors. General Comment 1 observes that in most States, legal capacity and mental capacity are conflated. Thus, if a person is found to have impaired mental capacity, then his/her legal capacity to exercise agency is also taken away. The assumption is that a person with impaired mental capacity will neither be able to assess relevant information before making a decision, nor understand the consequences of such a decision. However, this assumption is flawed. Even a person without a disability may suffer from the same shortcoming. As such, applying such assumptions only to persons with disabilities amounts to discrimination.

Article 12(5) seeks to address this discrimination and places an obligation on States to take all appropriate measures to ensure the equal rights of persons with disabilities to own and inherit property, to control their own financial affairs, to have equal access to bank loans, mortgages, and other forms of financial credit, and to ensure they are not arbitrarily deprived of their property.

At the same time, Art 12 recognises that all persons with disabilities may not be able to exercise their agency independently. Thus, it places an obligation on States to take appropriate measures to provide support to people with disabilities in the exercise of their legal capacity. Such support can take different forms. Persons with disabilities may choose one or more others to assist them in exercising their legal capacity. Universal design or accessibility measures may also be used, e.g. requiring a bank to provide information in a format accessible to a visually impaired person.

However, under the guise of providing support, the danger of undue influence looms large. Recognising this, Art 12 specifies that States should provide effective safeguards such that the nature of support does not become substitute decision-making. Article 12(4) outlines the nature of such safeguards.

Recognition of legal capacity is important as it is linked to the enjoyment of other rights recognised in the CRPD, such as: the right to access justice (Art 13); the right to be free from involuntary detention in a mental health facility and the right not to be forced to undergo mental health treatment (Art 14); the right to respect for one's physical and mental integrity (Art 17); the right to liberty of movement and nationality (Art 18); the right to choose where and with whom to live (Art 19); the right to freedom of expression (Art 21); the right to marry and start a family (Art 23); the right to consent to medical treatment (Art 25); and the right to vote and stand for election (Art 29).

23.3.7 Statistics and data collection

Article 31 of the Convention places an obligation on States to collect appropriate information including statistical and research data, so they are better able to formulate and implement policies to meet their obligations. It recommends that such information should help the State in identifying and addressing the barriers faced by persons with disabilities. At the same time, in order to ensure confidentiality and

respect for the privacy of persons with disabilities, Art 31 recommends State Parties comply with internationally accepted ethical principles in the collection and use of data.

23.3.8 Implementation at the national and regional levels

Article 33 places an obligation on States to take the following steps to facilitate implementation of the Convention:

- Designating one or more focal points within the government with the responsibility of implementing the Convention;
- Establishing a co-ordination mechanism with the government to facilitate coordination between different sectors and different levels;
- Establishing independent mechanisms to promote, protect, and monitor implementation of the Convention; and
- Ensure participation of civil society, in particular, persons with disabilities and their representative organisations in the implementation and monitoring process.

23.4 Policies in Southeast Asia Related to Disability

The CRPD has been ratified by all ASEAN countries. Some other steps have also been taken by ASEAN countries at the regional level to promote and protect the rights of persons with disabilities.

In 2011, ASEAN Member States adopted the Bali Declaration on the Enhancement of the Role and Participation of Persons with Disabilities in the ASEAN Community. The Bali Declaration was an important milestone. It recognised that persons with disabilities have important contributions to make towards the achievement of the action plans under the blueprint of the ASEAN Socio-Cultural Community and proclaimed the period of 2011-2020 as the ASEAN Decade of Persons with Disabilities. It also urged Member States to promote the quality of life of persons with disabilities and ensure the fulfilment of such rights by mainstreaming disability perspectives in the development and implementation of policies and programs of ASEAN across its three pillars – economic, political security, and socio-cultural. It also encouraged Member States to develop national plans of action on disability and to allocate budgets for their implementation.

In 2018, at its 33rd ASEAN Summit, ASEAN adopted the ASEAN Enabling Masterplan 2025: Mainstreaming the Rights of Persons with Disabilities which builds upon the achievements of the ASEAN Decade of Persons with Disabilities proclaimed in the Bali Declaration, and seeks to mainstream the rights of persons with disabilities in Blueprint 2025 of all three pillars of the ASEAN community.

These ASEAN level initiatives have helped to encourage Member States to ratify the Convention. It also created a push to adopt disability specific legislation at the national level.

Table 23-3: Ratification Status of the CRPD and its Optional Protocol by ASEAN Member States (as of 2019)

Country	CRPD Signature Date	CRPD Ratification Date	CRPD Optional Protocol
Brunei Darussalam	18 Dec 2007	11 Apr 2016	-
Cambodia	1 Oct 2007	20 Dec 2012	Signed: 1 Oct 2007
Indonesia	30 Mar 2007	30 Nov 2011	-
Lao PDR	15 Jan 2008	25 Sep 2009	-
Malaysia	8 Apr 2008	19 Jul 2010	-
Myanmar	-	7 Dec 2011	-
Philippines	25 Sep 2007	15 Apr 2008	-
Singapore	-	18 Jul 2013	-
Thailand	30 Mar 2007	29 Jul 2008	Ratified: 2 Sep 2016
Vietnam	22 Oct 2007	5 Feb 2015	-
Timor-Leste	-	-	-

Table 23-4: Major Disability Specific Laws in ASEAN Member States (as of 2019)

Country	Major Disability Specific Laws
Brunei Darussalam	N/A
Cambodia	Protection and Promotion of the Rights of Persons with Disabilities 2009
Indonesia	Law on Disabilities, No 8/2016
Lao PDR	Decree on Persons with Disabilities, No 137 of 2014
Malaysia	Persons with Disabilities Act 2008
Myanmar	Rights of Persons with Disabilities Law, 2015
Philippines	Magna Carta for Disabled Persons, 1992
Singapore	N/A
Thailand	Persons with Disabilities Empowerment Act 2007
Viet Nam	National Law on Persons with Disabilities, 2010
Timor-Leste	Law No 17/2017 approving the Legal Regime for Disability and Old Age Pensions under the Social Security Contribution Scheme

23.5 Business and Disability Rights

States are the primary duty bearers under the international human rights framework. At the same time, non-State actors such as businesses, also have a duty to respect the rights of others in society. Businesses discharge this duty by ensuring that human rights are respected in all their operations and dealings. In this regard, the ILO Global Business and Disability Network is an employer-led initiative that works to promote the inclusion of people with disabilities in the workplace. Businesses also engage in voluntary initiatives under the realm of corporate social responsibility to make contributions to society.

FOCUS ON

What measures can businesses adopt to ensure respect for human rights?

Business enterprises can take a range of measures, including:

- Conducting due diligence to assess and identify whether any of their activities have an adverse impact on people with disabilities, and taking remedial measures if such risks are identified.
- Placing human rights at the centre of its policies, such as committing to respect diversity and ensuring its workforce inclusive of persons with disabilities.
- Ensuring accessibility is a factor in the design of their workplaces, products, and services.

23.5.1 Examples of good practices

In 2016, the Indonesian government issued a regulation with the objective of improving inclusivity in the workplace. According to the regulation, 1% of the workforce in private companies and 2% of State-owned enterprises and government offices, should comprise persons with disabilities. Accordingly, five companies launched the Indonesia Business and Disability Network in Jakarta with the aim of promoting diversity and inclusivity in the workplace.

These companies were the Bank Mandiri, Standard Chartered Bank, L'Oreal Indonesia, TetraPak Stainless Equipment, and Trans Retail Indonesia. The initiative was also supported by the International Labour Organisation (ILO), the Ministry of Manpower, the Indonesian Disabled People's Association, and the Social Security Administration Body for Employment.

23.6 Conclusion

In the past decades, there has been vast progress in recognising the rights of persons with disabilities. A binding human rights instrument, the CRPD, was adopted at the international level. At the national level, States adopted laws and policies to promote and protect the rights of people with disabilities. Efforts are also being made to eliminate barriers faced by persons with disabilities. However, much more remains to be done to change the attitude of society and mainstream consciousness. It is only then that existing barriers will be eliminated and products, services, and infrastructure will be made disability friendly.

A. Chapter Summary and Key Points

Approaches to Disability

Approaches to persons with disability have evolved over the years. From being considered recipients of charity and medical treatment, they are now recognised as rights holders.

Convention on the Rights of Persons with Disabilities (CRPD)

The CRPD lays down rights and obligations as regarding persons with disabilities. It does not guarantee new rights, but elaborates upon the rights recognised in the international bill of rights and their significance in relation to the concerns of persons with disabilities. While providing no definition of disability, it recognises it as a social construct which evolves over time and which may have different meanings across different societies. The Convention focuses on eliminating the barriers that persons with disabilities face in the enjoyment of their rights.

Initiatives at the ASEAN Level

ASEAN has taken several initiatives to mainstream disability across all three pillars of the ASEAN community. Currently, it is implementing the action points identified in the ASEAN Enabling Masterplan 2025: Mainstreaming the Rights of Persons with Disabilities.

Business and the Rights of Persons with Disabilities

As important economic actors in society, businesses have a duty to respect the rights of persons with disabilities. Such a duty includes the obligation to follow the laws with respect to disability in the country of operation. Businesses also have duties to take proactive measures to create inclusive societies by ensuring that their workplaces are inclusive of diversity and the products and services offered by them are disability friendly.

B. Typical Exam or Essay Questions

- What is the key difference between the medical and social models of disability?
- Find an example of reasonable accommodation according to the CRPD. Discuss it from the perspective of persons with disabilities.
- Has your country enacted specific laws on disability? What are the main provisions of such laws?
- In what ways can businesses respect the rights of persons with disabilities? Explain, giving examples.

C. Further Reading

ASEAN Disability Forum (ADF)

For basic information and an introduction to disability rights in the ASEAN region, see the Forum's website at http://aseandisabilityforum.org/digaleri/.

ASEAN documents

Bali Declaration on the Enhancement of the Role and Participation of Persons with Disabilities in the ASEAN Community, Jakarta: ASEAN Secretariat, 2013. Available at https://www.asean.org/wp- content/uploads/images/2013/resources/publication/2013%208.%20aug%20-%20bali%20declaration%20on%20persons%20with%20disabilities.pdf.

ASEAN Enabling Masterplan 2025: Mainstreaming the Rights of Persons with Disabilities, available at https://asean.org/storage/2018/11/ASEAN-Enabling-Masterplan-2025-Mainstreaming-the-Rights-of-Persons-with-Disabilities.pdf.

Asia-Pacific Development Center on Disability (APCD)

Conducts training, seminars, and workshops at the regional level. For more information see its website at http://www.apcdfoundation.org/.

Convention on the Rights of Persons with Disabilities (CRPD)

Information specific to the CRPD can be found at the OHCHR website: 'Committee on the Rights of Persons with Disabilities' available at https://www.ohchr.org/en/hrbodies/crpd/pages/crpdindex.aspx.

International Disability Alliance (IDA)

For more specific information according to the type of disability or region, refer to the International Disability Alliance (IDA), whose partners are: African Disability Forum, Arab Organization of Persons with Disabilities, ASEAN Disability Forum, Down Syndrome International, European Disability Forum, Inclusion International, International Federation of Hard of Hearing People, International Federation for Spina Bifida and Hydrocephalus, Pacific Disability Forum, RIADIS, World Blind Union, World Federation of the Deaf, World Federation of Deafblind, World Network of Users and Survivors of Psychiatry.

International Disability and Development Consortium (IDDC)

A global consortium of disability and development related organizations, working in more than 100 countries around the world. See its website at https://www.iddcconsortium.net/.

United Nations Economic and Social Commission for Asia and the Pacific (ESCAP)

Contains a wide range of studies on disability including the publication, 'Disability at a glance 2019' which covers basic country profiles in the Asia-Pacific region. Available at https://www.unescap.org/sites/default/files/publications/SDD-DAG-2019.pdf.

World Bank Group

For a general overview to better understand the issue, see, World Bank Group, 'Disability inclusion' April 2020, available at https://www.worldbank.org/en/topic/disability#1.

World Report on Disability

Produced jointly by WHO and the World Bank, the objective of this report was to create synergy for implementation of the CRPD.

World Health Organization and The World Bank, *World Report on Disability*, Malta: WHO, 2011. Available at https://www.who.int/disabilities/world_report/2011/report.pdf..

Authors, editors and contributors

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Authors to the chapters are:

Bencharat Sae-Chua, Institute of Human Rights and Peace Studies (IHRP), Mahidol University
Herlambang P. Wiratraman, Center of Human Rights Law Studies (HRLS) Faculty of Law Airlangga University
Matthew Mullen, Institute of Human Rights and Peace Studies (IHRP), Mahidol University
Michael (Mike) Hayes, Institute of Human Rights and Peace Studies (IHRP), Mahidol University
Rosanno Robindranauth Ramcharan, Asia Centre
Ryuhei Sano, Faculty of Social Policy and Administration, Hosei University
Sriprapha Petcharamesree, Institute of Human Rights and Peace Studies (IHRP), Mahidol University
Vu Cong Giao, Department of Administrative Law-Constitutional Law, Hanoi National University School of Law

Editors for the whole textbook include:

Kalpalata Dutta, Asian Institute for Human Rights
Michael (Mike) Hayes, Institute of Human Rights and Peace Studies (IHRP), Mahidol University

The editorial and peer review has been done by

James Gomez, Asia Centre
Mark Calpaldi, Institute of Human Rights and Peace Studies (IHRP), Mahidol University
Naruemon Thabchumpon, Faculty of Political Science, Chulalongkorn University
Kalpalata Dutta, Asian Institute for Human Rights
Seree Nonthasoot, Former Representative of Thailand to the ASEAN Intergovernmental Commission on Human Rights (AICHR) 2013-2018
Shekh Mohammad Altafur Rahman, School of Global Studies, Thammasat University
Yanuar Sumarlan, Institute of Human Rights and Peace Studies (IHRP), Mahidol University

Proof reading and editing done by Magdalen Spooner.

The project was coordinated by Sunsanee Sutthisunsanee, SHAPE-SEA

ASEAN University Network
Human Rights Education (AUN-HRE)

About AUN-HRE

Realizing that human rights and fundamental freedoms are key principles for ASEAN community-building, the ASEAN University Network–Human Rights Education theme (AUN-HRE) was formally established in 2009 by the ASEAN University Network Board of Trustees to promote research opportunities in the area of human rights, serve as a platform for collaboration and capacity-building amongst member institutions, and to strengthen existing cooperation and enhance human rights education in the ASEAN region.

Mahidol University was appointed as the focal point for the theme. The Institute of Human Rights and Peace Studies has been assigned to coordinate the network and implement relevant activities in cooperation with its members.

To contact the Secretariat:
Institute of Human Rights and Peace Studies, Mahidol University
999 Phuttamonthon Sai 4 Rd, Salaya, Nakhon Pathom 73170, Thailand
Tel: (66) 2-441-0813-5
Fax: (66) 2-441-0872-3
E-mail: ihrpmahidol@gmail.com
Website: http://www.ihrp.mahidol.ac.th/

About SHAPE-SEA

The Strengthening Human Rights and Peace Research and Education in ASEAN/Southeast Asia (SHAPE-SEA) was launched in February 2015 in Bangkok, Thailand. It is a collaboration between the ASEAN University Network–Human Rights Education (AUN-HRE) which has thirty member-universities and the Southeast Asian Human Rights Studies Network (SEAHRN) which has twenty-two members.

The overall aim of SHAPE-SEA is to contribute to the improvement of the human rights and peace situation in ASEAN/Southeast Asia through applied research and education. The core themes of the Programme are: (1) ASEAN and Human Rights, (2) Business Accountability, (3) Peace and Security, (4) Governance and Justice, and (5) Academic Freedom.

Its main areas of work are Research, Education, Capacity-Building and Outreach, and Publications and Public Relations.

The Programme focuses on supporting research on innovative and critical human rights and peace projects and on exploring ways this knowledge can be made accessible to university students throughout Southeast Asia/ASEAN. As such, it is directly involved and engaged with universities in the Region to play a more significant role in the sustainability of human rights protection by contributing research, increasing knowledge on human rights and peace, and by incorporating these issues into university education. The Programme also creates spaces for knowledge-building and dissemination through the production and publication of research amongst the academic community and other human rights and peace stakeholders.

SHAPE-SEA Secretariat is hosted by the Institute of Human Rights and Peace Studies (IHRP) at Mahidol University. The programme is supported by the Swedish International Development Cooperation Agency (SIDA), and the Norwegian Centre for Human Rights (NCHR).

To contact the Secretariat:
Room #310, 3rd Floor
Institute of Human Rights and Peace Studies, Mahidol University
999 Phuttamonthon Sai 4 Road, Salaya, Nakhorn Pathom 73170, Thailand
Email: shape.seasec@gmail.com
Website: http://shapesea.com/

Institute of Human Rights and Peace Studies
Mahidol University

About the IHRP

The Institute of Human Rights and Peace Studies (IHRP) is the result of a merger between Mahidol University's Center for Human Rights Studies and Social Development (established in 1998) and the Research Center for Peacebuilding (established in 2004). The IHRP therefore combines the experience and perspective of both centers. Moreover, it is uniquely interdisciplinary and is redefining the fields of peace, conflict, justice, and human rights studies in the Asian Pacific region and beyond.

The Center for Human Rights Studies and Social Development (CHRSD), formerly called the Office of Human Rights Studies and Social Development was established in 1998. For more than ten years, it served as an academic institution specializing in human rights, with a track record of providing postgraduate education as well as offering training programs to students, human rights workers, human rights defenders, members of civil society organizations, and government officials. The MA in Human Rights started by the CHRSD is the longest-running graduate degree program in human rights in Asia.

The Research Center for Peacebuilding was founded in November 2004 to be part of a peaceful solution to conflicts in Thailand especially in the three southernmost provinces of Pattani, Yala, and Narathiwat. As such, the Center has developed and implemented action plans and participated in research projects to reduce the violence and identify the needs of affected communities. These projects focused on facilitating cooperative efforts to handle the conflicts by opening space for dialogue at all levels. Further, they provide input to new public policies with the aim of transforming conflicts and building a more just and peaceful society.

Our focus remains on social and political realities at the community, national, and international levels. The IHRP is committed to the advancement of human rights and peace by educating human rights and peace practitioners, promoting outreach programs to community and international organizations, and conducting cutting edge research on important issues.

Vision: The Institute of Human Rights and Peace Studies plays a leading role in academic enquiry and offers practical wisdom on human rights and peace-building.

Mission: To promote learning excellence in human rights and peace and engage communities in the transformation towards peace.

Programmes offered:

- Master of Arts in Human Rights (International Programme)
- Master of Arts in Human Rights and Democratization (International Programme)
- Master of Arts in Human Rights and Peace Studies (Thai Programme)
- Doctor of Philosophy in Human Rights and Peace Studies (International Programme)

To contact the Secretariat:
Institute of Human Rights and Peace Studies, Mahidol University
999 Phuttamonthon Sai 4 Rd, Salaya, Nakhon Pathom 73170, Thailand
Tel: (66) 2-441-0813-5
Fax: (66) 2-441-0872-3
E-mail: ihrpmahidol@gmail.com
Website: http://www.ihrp.mahidol.ac.th/

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