

International Human Rights

Spring 2005 Outline

INTRODUCTION

What are human rights?

- Freedom from slavery (trafficking): children, women (sexual violence)
- Right to life (death penalty)
- Family life (protection from illegal adoption, trafficking, etc.)
- Freedom of expression
- Freedom from arbitrary detention; due process of law (Guantanamo)
- Freedom from torture or cruel, inhuman or degrading treatment or punishment (e.g. domestic violence, many things which do not rise to the degree of torture)
- Conditions of detention (prisons, asylums, etc.)
- Physical integrity (pat-downs: who gets to touch you, and where?)
- Privacy
- Freedom of religion
- Issues involving refugee law
- Development/poverty eradication
- Right to health, education, social security, adequate standard of living

Broader/policy questions

- What is the role of politics in IHR law, both internationally and intra-nationally?
- Is there selective enforcement of IHR? Is the enforcement machinery a political one?
- Role of culture? Is this a universal set of rights, or does it vary with local cultures?

Binding Sources of International Law

- Treaties (bilateral, multi-lateral): bind countries which become parties to them through 3 steps:
 - (1) signing on (by President or other authorized figure);
 - (2) ratification (by internal processes specified by domestic law);
 - (3) deposit of instrument of ratification with depository (formality)
- Customary International Law: implied contract based on consent of states through conduct rather than express acceptance. Elements:
 - (1) Practice of States: what States do
 - (2) Required by law (*opinio juris*): States are doing this out of a sense of legal obligation
- General principles of Law:
 - e.g., no one should be the judge in her own case. Some theme that exists as a common core among States' laws
 - but, some argue that issues not directly relating to international concerns (e.g. prohibition of murder) may not apply

“Soft Law”

- Principles, guidelines, draft treaties compiled by professors, standard minimum rules
- Some are picked up and codified by international institutions, e.g. G.A. Resolutions
- Useful as interpretation of binding law, or to fill the gaps in binding law.
- You can argue that this constitutes the *opinio juris* needed to make customary law

Universal Declaration of Human Rights

- Not a treaty, but an assembly resolution which is soft law. However, because its basic declarations have repeatedly been cited by governments and form the basis of government discourse on IHR, they have made the move into Customary International Law.
 - Some say the whole document is customary law and therefore binding on all states whether they have signed or ratified a human rights treaty, others argue it is only parts of the UDHR.

- Can also be said to interpret the provisions of the UN Charter (Art. 1, 55, 56, 2(7)), which is a Treaty.
- Guarantees: life and liberty of person, recognition before law, equal protection, remedy before law, presumption of innocence, arbitrary interference with privacy/family/home/correspondence, freedom of movement and residence, right to seek asylum, right to a nationality, right to marry, right to own property, freedom of thought/religion/opinion/expression, assembly/association, right to take part in government, free elections and universal suffrage, social security, right to work and do so under favorable conditions, just pay, join unions, adequate standard of living, special care for motherhood & childhood, education and choice of education, participation in cultural life, protection of material interests resulting from scientific/artistic productions, social/international order in which these rights can be realized. Legal limitations on exercise of these rights should only serve to recognize the similar rights of others/ensure free and orderly society, and exercise of rights can't be contrary to UN principles. Prohibits: slavery, torture, CIDTP, arbitrary arrest/detention/exile, ex post facto conviction
- There was a split in the rights guaranteed under the Universal Declaration – 1948
 - Cold War: Soviets said economic, social and cultural rights take precedence (otherwise, free speech is a waste of time!)
 - Civil and political rights protect our right to obtain food, shelter, etc. and allow us to ask our government if we are wanting (Western countries)
 - End of war: The answer is that we need both – both arguments are right. You need all of those rights to ensure people can 1) exercise their civil rights and 2) have access to economic, etc. rights

Civil and Political Covenant – ICCPR

- Guarantees: Right to self-determination, to freely dispose of wealth, to life (no DP unless for most serious crimes, no genocide), liberty/security of person, criminal rights (informed of charges, right to court, accused separated from criminals, juveniles), liberty of movement and to enter own country, process for alien expulsion, equality before courts, fair trial, publication of judgment, recognition before the law, freedom of thought/conscience/religion/expression (caveats for others' rights and public order), assembly/association (and no prejudicing ILO convention for parties to it), right to marry, equality of spouses, protection of children, equal protection, minorities to enjoy own culture. Prohibits: torture, CIDTP, slavery, forced labor, arbitrary arrest/detention, ex post facto convictions (unless clearly crime under int'l law), arbitrary interference w/privacy/family/home/correspondence, war propaganda, national/racial/religious hatred,
- Establishes Human Right Committee: Procedures for election to Committee, State Parties must submit reports to Committee yearly and upon request, Committee shall transmit its reports and other comments to SPs, SPs may submit comments to these reports. SPs may submit communications re: other States and other States must reply in 3 months, and after 6 months may be referred to Committee. If Committee finds exhaustion of domestic remedies, it may examine, asks States to work it out, and submit a report, can appoint Conciliation Commission, which can in turn submit a report.
- What must States do to comply? Note: these apply to all people within the State's boundaries and/or under its jurisdiction – cf. Guantanamo
 - Respect the rights in the covenant
 - Ensure the rights in the covenant
 - Do so without distinction (America: “political or other opinion, national origin, property or other status” → what is “other status”? Covers sexual orientation, works to keep list from being exhaustive). Also ensures equal right of men and women (Article 3).
- What must State do once it's ratified? (Articles 2.2. and 2.3)
 - Take necessary steps to pass laws enforcing it, or other measures (e.g. regulations); make sure these rights are implemented/exist in domestic law
 - Make sure people can sue State officials (Eleanor Roosevelt wanted to ensure judicial remedy). Allows for non-judicial remedies to accommodate other countries.
 - Make sure competent authorities will enforce.
- Derogation (Article 4)
 - Recognizes in emergencies, war, etc. you can't provide rights to everyone – State has to be able to respond, but the way they do so is limited (e.g. no more than necessary, no violating other treaties,

etc.). Some rights – e.g. fair trial guarantees, detention guarantees, are derogable (can be played around with)

- BUT certain rights can't be fucked with: right to life, to be free of torture, right to be free of slavery, freedom from cruel, inhuman, etc. treatment.
- Limitation Clause (Article 19): “clawback clause” – claws back at the right put out there if they infringe on rights of others or national security.
- Optional protocols exist (2).

ICESCR (International Covenant on Economic, Social and Cultural Rights) & Differences w/ ICCPR

- Guarantees: self-determination, det. of political status, disposing of wealth, right to work and gain living the way you choose, just and favorable working conditions, remuneration, equal pay for equal work, decent living, safe conditions, rest hours, equality for promotions, right to unions/strike and no interference with ILO for SPs to it, social security, assistance to the family, free marriage, protection to working mothers, protections from child labor, adequate standard of living, food, clothing and housing, freedom from hunger, right to physical and mental health, right to education and equal accessibility to it, take part in cultural life, enjoy benefits of scientific progress, protection of material interest from art/inventions.
- SPs to report to SG, who passes on to Economic and Social Council and special agencies (if States are members of these agencies). ESC may make arrangement with agencies. ESC may submit generalized reports to GA.
- Similar limitations as ICCPR (UN principles, others' freedom, State limitations only for welfare of democratic society).
- Implementation: Immediate vs. programmatic: CESCRC has language about implementation to best of ability, etc. More qualification re: when and how much you are supposed to do it (ICCPR silent on the issue). There is much more leeway with CESCRC, esp. to developing nations.
 - How much? Varies state to state (housing provision means something different here than in South Africa). A provision like right to a lawyer is less likely to be so disparate – so there's a range of “how much-ness”
 - How? Undertakes to “take steps” “to achieve progressively the full realization of the rights”
 - State must do something
 - Anti-backsliding: you can't make things worse
 - Get rid of obstacles – e.g. get rid of laws that obstruct certain rights
 - Planning required
 - “Progressively” – unlike CP rights, the ECS rights have notion that they'll get better over time. You don't have to get to the end of the line today, but you have to START.
 - “Maximum available resources” – what resources can you say are “available”? If 99% of your money goes to army can you say that you have none left? Committee says you don't have unfettered discretion – if you have a huge crisis then you can't be giving your money to your diplomats. But if you meet a certain minimum, your state has much wider margin for allocating its resources. This raises question of corruption: looting state treasuries as violation of ESC rights
- Justiciability: Leadership of “Southern” countries in this area
 - E.g. South African Constitution incorporates both covenants and uses International Law as an interpretive guide, so SA has amazing program of building low-income housing
 - *Greethaam* (p. 93): Land squatters are on land designated as low-income housing but it has not yet been developed. Move to private land because government evicts them.
 - The respect part of the right is easiest to adjudicate – we know within this paradigm courts can apply at least this
 - Court deals with negative aspect of the right
 - Court does not say how much but does say there is a minimum
 - Court looks at State constitution and the covenant
 - Solution: you have to move expeditiously, provide minimum standard while they wait

- BOP: prima facie evidence that State is not meeting its obligation is that there are a fair number of people living without housing
- More positive rights (states must do) than negative rights (states must not) in CDESCR.
- More differentiated set of responsibilities because of different resources (e.g. “to the best of their ability,” etc.).
- Allows accomplishment through social policy under existing legislation (ICCPR requires legislation or regulations or something).
- Tension between language of individual (holding rights that do not depend on the State) and his insertion into a collective society.
- Ratification – why not ratify the CDESCR?
 - We do most of this through the States. Our court system is very different – see *Deshaney*: our government does not like positive obligations.
 - Looks bad if we sign on and later don’t ratify.
 - There’s no obligation to create a welfare State – we can always use private actors to handle all of this. BUT there is a problem with the public perception – people see it as anti-welfare.
 - Has been interpreted as potentially infringing on free speech – e.g. you can’t engage in speech that prohibits people’s rights (Article 5).
 - Problems of interpretation: some Committee down the line might not agree that “promote” does not involve positive obligations
 - Problem of lack of international supervision
 - Perception that US ratifies HR treaties only to the extent that they are consistent with current law. Otherwise we are reticent. We think that we live in the best of all possible worlds and most of these rights exist here anyway. Plus, it’s anti-democratic because requires only President and 2/3 Senate to ratify a treaty
- RUDs: Package of reservations, understandings and declarations which conform a treaty to existing law. These are ways countries can accept the overall obligation without accepting the whole treaty (but nonetheless accepting most of it).

Positive vs. Negative Rights; Civil/Political vs. Economic/Social Rights

Every right has a positive and negative aspect, in some one dominates and in others the other does. For each right you can find the following:

- obligation to respect the right: negative “stay out” by the State – respect the right to be free of torture, etc.
- obligation to ensure the right: negative – State cannot promote discrimination and state must make sure other groups don’t interfere with the right (duty to protect from private actors – *Velasquez*)
- obligation to promote the right: positive – State must make sure it happens
- obligation to fulfill the right: positive – state as provider of last resort
- Example: CDESCR Article II – Right to adequate food
 - respect: not taking away crops/confiscating harvests, not blocking food only to part of country with insurgents
 - ensure: make sure private parties/insurgents are not going in and burning people’s crops
 - promote: giving food to famine-stricken areas, food stamps, school lunches, agricultural subsidies
 - 2 ways: providing directly as a State or setting up private resources. Framework does not require State be the actor – no implicit economic model underlying this
 - fulfill: State provides minimum standard with its own resources
- Example: Housing
 - respect: do not demolish
 - ensure: regulations limiting what developers can do to demolish housing
 - promote: subsidies for low-income housing, rent control policies
 - fulfill: minimum standard – roof over your head out of the rain

- Right to form trade unions
 - negative because state just has to keep its nose out
 - both political/civil (Article 22) and econ/social (Art 8)
- Right to choose school
 - both negative (stay out) and positive (give resources)
 - Economic/social (Article 13)
- Right to accused to be segregated from convicted persons
 - civil/political
 - positive – you have to create separate cells or prisons and negative – can't consolidate
- Minor protection
 - both civil/political and economic/social/cultural (Article 10)
- Minorities to enjoy own culture
 - negative (don't close down temples; stay out)
 - civil/political (Article 27)
- Take part in cultural life
 - negative (stay out) and positive (state takes positive action to keep other people or groups from hurting them)
 - ESC Article 15
- Equal protection
 - ESC
 - negative (don't interfere with things to make things unequal) and positive (safeguard equality)
- Right to lawyer for accused
 - Civil/political
 - positive (State must give resources)
- Marriage – full and free consent
 - Both CP (Art 23) and ESC (article 10)
 - negative (State can't interfere) and positive (State must . . .)

TREATIES

Treaty drafting process

- Who does it? State representatives (diplomats, some are experts on certain issues such as children's rights but others are not - broad range of experience), NGOs (care a lot about the issue, are experts and advocates), IGOs (World health org., UNICEF, UNDP, etc.).
- Who votes? Only State representatives
 - Consensus process: not actual voting, not "true" consensus but more of a decision not to fight anymore. This is good because it maintains diplomatic relations, and leaves no written record of who the obstructionists were. The downside is that it causes the watering down of language and reduced us to mush when there is danger of offending people.
 - Chair decides when consensus has been reached
 - States have to accept the text and then get the right people to sign on and ratify. If powerful States don't sign, then you've accomplished nothing. Tension between how far you can go in creation of better rights and going too far into self-defeating situations (great text which no one wants to ratify). You want to push as far as possible but not so far as to lose the states you need.

Example: Convention of the Rights of the Child

- We have 1924 declaration on the rights of the child
- Geneva Convention protocols – 15 years
- States want to go further – enforcement of Geneva Convention is inadequate, we want progressive development
- US response: we don't need to do this; we should just re-negotiate Geneva

- Problem: There is no hierarchy, no ‘Supreme Court’ and nowhere to go in the event of a clash. Drafters must take into account US wanting to recruit 17 year olds, which is why they oppose the language
- Compromise: maybe we can accommodate interests of powerful states on voluntary recruitment age issue. Direct/indirect participation in battle distinction, compulsory, voluntary recruitment age, military schools, non-State actors (who is recruiting? Anti-governmental militias?)
- p. 50 – CRC – final provision: between 15 and 18 y.o. we give priority to the oldest. How do you enforce this? A lot of States find this pitiful and want to do better. Have we accomplished anything? The States finding it pitiful come up with their own protocol.
- Chairman’s perception: 18 is age for minimum participation in frontlines, 18 for drafting. We have accomplished something. Voluntary recruitment sticks to convention (15 minimum); special treatment for under 18. Top of page 80: each State must deposit its own binding declaration, so US just has to say “we promise to recruit 17 year olds but we’ll have safeguards in place.”

Systemic Problems

- Holdout: Temptation of hardest-line State to hold everyone hostage – you need a lot of states to become parties. Ex: Russia coming up with exceptions that apply only to Russia in order to sign onto a Treaty
- Widespread Acceptance:
 - Won’t be effective with too small a group of States
 - States will be loath to join and put conditions on themselves that do not apply to others
 - Small countries with no army or enemies are often first to sign on – e.g. Denmark, Costa Rica
 - Powerful countries – EU, US, China, India, etc. should come along unless you want trouble. We don’t need all of them – often the US stays out – but it strengthens the regime
- Entry into Force: Child soldiers protocol had 10 States needed to ratify before it became effective. Often the numbers are higher. Seems to counteract problem of needing main actors involved
 - Solution: Protocol: you have your basic version and the souped-up version. Not everyone needs to sign the latter but it puts pressure on.

Reservations see pp. 130-133, 677-687

- Intended to allow States to become parties to treaties that are problematic in one or a couple of provisions (e.g., a country wants to ratify a treaty, but parts of it may conflict with its Con Law or be otherwise impractical).
- Rationale: it’s better to have more States in the treaty regime than to not participate at all, esp. with multilateral treaties which work only when they have a lot of parties. Also, the idea is that they can be removed over time when people see that the sky won’t fall.
- Need not be explicitly called a reservation – if function and result is to exclude or modify some part of the legal effect of the treaty, then it’s a reservation
 - e.g. the US calls something a “declaration” but it changes its legal obligation under the treaty, then it’s a reservation
- How do we know if a Reservation is valid? Does the treaty allow reservations at all? Does it allow them with respect to that particular article? If not, they are invalid. 90% of the time treaties are silent on both of these questions, and you must ask if it violates the object and purpose of the treaty.
- How do we know if a reservation violates object & purpose? You can ask the parties if they object to the reservations.
 - Vienna Convention (subjective):
 - As with Contracts, we look to the intent of the parties, which is manifested by whether the parties object and by what they think the result of the objection should be.
 - Who decides? States decide by objecting. Lack of objection means reservation comes into force and legal obligations remain unchanged.
 - Problem: There is no objective test. State objections modify State obligations vis-à-vis each other - states are the only ones who decide; there is no objective limit under Vienna Convention

- How do the Constitution and current legislation give effect to these things?
- Proposed changes
- Access to remedies
- States should in theory be providing information about how this stuff works in practice – the reality of it.
- Now, NGOs participate in the process by sending reports to the experts before the meetings to help them – they know stuff a lot of countries don't reveal in their reports
- After the reps have submitted their reports (if it's the 2nd or 3rd report, for example, you just update since the last report), they respond to any concerns Committee raised last time. Committee members ask questions and then express their continuing concerns, produce a report which goes to the States. The States don't always listen or care at all about the report.
- Purpose of the submission of reports:
 - Puts States on record
 - Sets baselines
 - State has to develop its own info/monitoring system
 - Self-reflection causes States to consider how they can improve
 - Makes treaty an ongoing process – State can't just ratify and forget about it
- Problems: Delays in submission, a lot more of States patting themselves on the back and not pointing out their flaws, lack of money throughout system, lack of creative ways to figure out the right carrots and sticks to make this process work.
- What do we do about it?
 - Bayefsky: Chuck the whole system and start over with smaller system that includes only the States that take this seriously. Fuck the States who make a mockery of it – we don't need them (supp 1)
 - Alston: The Bayefsky approach is counter-productive (supp 11)
 - US argument: When we ratify these things, we take them seriously, we don't just forget about them. Why would you let a State get the benefit of saying they are a party to these treaties without actually having to do anything?
 - Counter-argument: Things change over time, and it's helpful to have the States in the regime and maybe they will start to improve
 - Idea that bringing in the rogue states may create a dynamic towards compliance

Iran exercise

- Questions from HR Committee to Iran
 - How many/often are hands partially amputated? Stoning? Flogging (esp. pregnant women)? How does it break down by gender, ethnicity, religion, etc?
 - What is Iranian definition of torture under Article 7 of ICCPR?
 - Note: CAT expresses consensus of States as to what torture means, so we argue that this is the international consensus as to what torture means.
 - Why are practices necessary if other Islamic States don't?
 - How are laws in Qu'ran interpreted and by whom?
 - Which part of the government is responsible for implementation?
 - How is the state monitoring implementation?
 - Detainees and detention conditions?
- Responses from Iran
 - CAT Article 1 excludes “lawful sanctions” from definition of torture. Our alleged torture practices are lawful and therefore ok, any pain is incidental to the lawful sanction. Furthermore we are not parties to the CAT – that's your definition!
 - note: CAT does not allow “severe pain or suffering.” Here the pain is the purpose of the stoning, and is not incidental to it. p. 186 – pre-treaty language included an international standard (standard minimum rules)
 - “death row phenomenon” – the mental suffering leading up to execution may constitute a violation of the prohibition on torture and cruel, inhuman or degrading treatment

- Democratically elected representatives imposed these laws pursuant to the will of the people – policy is widely supported
- We need to deter crime and protect the rights of others, especially victims
- Our culture has adequate protections, especially the protection of God!
- Selective and culturally specific - this is your Western view of what is inappropriate. What about your practices of solitary confinement or holding people for 23 hours a day? At least we get it over with. See articles pp. 211-218; 900-903 (feminist theory).
 - Problem: Then where is the baseline/universal core? If there is none, what is the point of all of this? This is fundamental tension in IHR law: what are cores, and where can we allow flexibility?
 - Cultural Relativism: To what degree should we vary how we understand concepts such as culture based on difference? Is there a common core, and if so how big are the edges?
 - Relativist argument critique: governments really just do what they want to, and use culture as a romanticized notion or excuse when in reality things have changes so much in the culture; there is a backlash when people see human rights as being imposed from the outside, and it is tempting for governments to make use of relativist arguments and circumvent their violations – e.g. female cutting in the 1980s
 - Positivist argument: States agree to universal rights – these are not necessarily Western but occur in every legal system, and several major systems participated in the drafting of the treaty. You signed on and accepted these obligations, so now what is your problem?
 - Critique: Are these treaty drafters truly representative of their people? A number of govts. are of questionable representation
 - Problem: we all agree that torture is prohibited, but countries like Iran say “what we’re doing is not torture!”
 - You can look at it in terms of a pyramid hierarchy of rights, e.g. food/shelter/water, and argue that the closer you are to the basic rights at the top the more important it is to find a common core. You have more room to play around towards the bottom, with rights that vary more, e.g. consensual marriage.
 - Human rights are about things in the public sphere, and while we need to argue about torture we don’t need to address things like family law, marriage, etc.
 - critique: The definition of what is public is problematic. Why should you be free from torture by “public officials” but not our fathers? This system further marginalizes dominated groups, e.g. women
 - Examples: (1) court process for people set us as genocide ringleaders. Is this a violation of human rights? There are no hearsay rules, no DP, no presumption of innocence, etc; (2) caning in Singapore.
 - In sum, we want to ask if there is a core value, or if there is a function that is the core value. How does it fit within the framework of the cultural tradition, and is there a way to harmonize it with the tradition?

Treaty enforcement – What are the options?

- Monitoring/reporting – see above, p. 153-163
 - problem: only for ratifying govts, only require reporting every 2-5 years, not good at handling emergency situations (p. 228)
- Complaint through optional protocol/special acceptance – ICCPR (only states ratifying optional protocol are allowed to use it), CAT, CEDAW, CERD (optional protocol is written into these 3 treaties and all signatories accept it by signing). Under these 4 there is an individual complaint procedure (if an individual, must show exhaustion).
 - Problem: Not an adequate international response for human rights emergencies involving large-scale violations (p. 228)
 - Advantage: Getting useful precedent on the specific matter, making law.

- HR Committee: There are only 98 parties to the protocol (ICCPR) but many more parties to the treaty. So it's not a universal mechanism. How it works (see also pp. 189-199)
 - Send communication with particulars of a case
 - You end up with views – they cannot give damages or injunctions, can just forward their views to State party and ask it to do something about it
 - Pg. 157 example: State is supposed to do what you tell it to. If it doesn't, eventually they get publicity, put on blacklist of states not complying. Eventually though very rarely they might get an on-site visit.
- State to State: one state can complain about another. This has NEVER been used because no one wants to throw the first stone.
- General UN Procedures:
 - Do not require that State be a party to any particular treaty but are based on authority of UN charter
 - Enforced by HR Commission – 53 State reps., diplomats. No “T” – unlike Committee, no treaty required. This is a political body – they have agendas. Quasi-judicial actors – involves interpretation.
 - HR Subcommission: hybrid, experts appointed by States. Not tied to any treaty and make decisions based on a number of political and non-political factors.

GENERAL UN PROCEDURES see pp. 252-260 for format recommendations

1235 Procedure: (1) Resolution on specific country; and/or (2) Creation of special Rapporteur; or (3) Advisory Services

- Burma hypo: There are many problems in the country but they are not a party to any of the treaties with complaint procedures. Geneva Conventions are n/a because no armed conflict, so you go to General UN procedures and try to get a 1235 resolution passed (p. 237).
- Written in 1967 because of South Africa – decolonization and apartheid, African States are pissed and this is the result. Text p. 237.
- Best when prompt publicity, public action, and continuous monitoring are required (p. 273)
- Allows Commission to examine information on gross violations of human rights. You must show a consistent pattern. This is NOT an individual complaint mechanism, but a means of putting pressure on governments to change their overall patterns.
- Gross violation is never defined, but until now has included summary executions, torture, arbitrary detention, disappearances, extreme discrimination (e.g. something in the law, looking very much like apartheid)
- You have to show a lot of info – see list p. 268 – to show consistent pattern.
- You need to find a State willing to carry the resolution and you have to convince it you have enough info to back it up. This is a political determination – what are benefits? Will it make us look good? Will our trade be harmed? What favor will we get back? This is quite political – a bargaining process – and nothing like going to a court.
- You want to put fear into the State, engineer a situation where it's worried enough to change what it's doing. Goal is to keep it going for a number of years – what keeps it going is that they have to come back.
- Effect of the resolutions is not great – it just says “bad State.” But the spillover may be important, e.g. in the domestic laws of other countries. Note, however, that these are all indirect: it is not the resolution itself that “does” anything, but rather the political pressure resulting from it. Do States care?
 - May impact perception that it's a good place to do business
 - Trade sanctions (through the ILO), e.g. banks may not be able to give loans b/c a country's domestic laws forbid loaning to condemned countries.
 - Many countries' domestic laws prohibit them from giving military or financial aid to governments that are gross consistent HR violators
 - Some states may change their ways even if they publicly deny allegations (Coliver, p. 279)
 - Main potency of procedure: (1) naming and shaming; (2) links to military aid regimes, trade sanctions, domestic laws

- Advisory services: this is rarely the case, but they apply not to willful failures but situations where they are trying to comply but so not have the capability. This is a halfway house – you can't condemn but you want to put the State on notice that they need to shape up. Problem: need some cooperation from the state.
- Resolutions are hard to get – it depends on how powerful or enmeshed in a regional block the state is. Countries against which resolutions are adopted, therefore, may not be the same as the countries that should be condemned, e.g. China. If the State has no friends (e.g. Burma) then you get a resolution re: the country saying things like “noting with concern” (they don't like you) or “condemning” (big trouble).
- Special rapporteur: You can ask for a rapporteur to look at country conditions and report back. The report is important. It's not enough to have the resolution condemning because it does not get you anywhere in terms of leverage.
 - check if country has had one assigned in the past – see p. 238
 - problem: some countries may refuse to grant permission for visits
- No exhaustion of remedies required b/c not individual complaint (so nothing to exhaust)
- Public procedure: 1235 resolutions are public and generally go directly to the commission
 - The subcommission may raise certain issues which will go on Commission's agenda – e.g. Palestine and Israel. Often its suggestions are taken up.
 - NGOs have to go find a State willing to stand up and say this is a gross violation and consistent pattern.

1503 Procedure

- You have a State no one cares about and you're not going to get a 1235 resolution. This is a way of putting pressure on States that are not as “bad” as those that would qualify for a 1235. Text p. 239.
- Also may be good for states whose govts. have not accepted protocol to ICCPR allowing complaints
- What you need to submit: evidence of your individual case, evidence that it fits into a pattern, evidence of exhaustion of domestic remedies (give State a chance to fix the problem) (see p. 245)
- If you file a timely complaint with all the necessary information it goes to the WG communications; they sift through the complaints and consider the serious, well-put-together ones (some are just postcards)
- Like a 1235 you must show a consistent pattern, but here they consider your individual communication provided it fits into the “consistent pattern of gross violations” (p. 239).
- This is more of a private procedure than 1235 – preferable to the States because they can avoid the political chess game and don't have to be publicly shamed
- Pro: you may get more honest cooperation from the States whereas you could get a backlash for publicly shaming them, may be more effective way to promote constructive dialogue (p. 274), states may take action even if it doesn't go to the commission. But, may not be as confidential as we think (p. 277).
- Result: threat of public pressure if the States don't shape up. If State does not act you can send it to the public procedure. Communication is sent to the states that either the situation has been referred to the WG situations or is being monitored by the WG communications (243)
- Person representing the client filing the 1503 gets nothing – “don't call us; we'll call you.” The rest has to be done through informal channels
- Problems: It's a year-long process, so no good if you need urgent action, e.g. your client is jailed. It's complicated, secret, and vulnerable to political influence (p. 275). No good if you need prompt publicity or public action.
- Strength: For something that is a pattern and not as urgent, e.g. State is doing something under color of a discriminating law

WG Communications → **WG Situations** → **Commission on HR**
 (get it to them by May or forget it) (they decide in March-April if it goes to next level) (for grilling of reps from “bad” country)

Commission decides whether to: (1) refer to 1235; (2) hold over (can happen at any stage); (3) dismiss

Thematic Mechanisms pp. 246-252 (esp. good for list of mechanisms in place)

- Pro: effective and prompt choice for cases involving individual victims of HR abuses and for emergency situations (p. 275), responds on a global level.

- Require framing the type of violation, e.g. “arbitrary detention.” You can go to more than one rapporteur (they will not all look the same, e.g. rapporteur on arbitrary detention, rapporteur on women’s rights, etc.)
- No need to show consistent pattern of gross violations – act on individual cases.
- No need to show exhaustion of dom. remedies; your person is simply an exemplar of the violation of rights
- No time frame/limits – ability to respond relatively promptly
- Downside: these mechanisms are very overburdened, people do not get paid to do this and are incredibly under-resourced and overworked
- Problem: government may give you problems/refuse to allow visits. See policy discussion re: fact-finding.
- Different styles: some are working groups that study a problem and try to figure out what it means, how states implement it, etc. Others are more quasi-adjudicatory, e.g. WG on disappearances which went out looking for people, or WG on summary execution, which is more court-like
- Among other things, they receive complaints, appeal to govts, visit countries, make recs, seek end to violations

How do these three options interact?

- There is no formal impediment to bringing them all at once
- It may make sense in some cases to start with 1503
- With thematic mechanisms there is no indication they will get to your case soon; you need to highlight the urgency of the situation
- There is jurisprudence saying you can bring a complaint under one of these even though the State may be party to other treaty mechanisms (you can still bring a treaty-based complaint)

TORTURE

Definition of Torture

- CPC and regional covenants also have prohibitions against torture and cruel inhuman and degrading punishment but there is no definition.
- **US memo opinion** (supplement pp. 22-45)
 - specific intent to cause severe pain
 - prolonged mental pain
 - threat of imminent death or severe physical harm specifically intended to cause prolonged mental pain
 - the reasonable person’s perception applies
 - Bybee memo talks only about torture and not CIDTP (which need not be made a criminal offense) b/c they’re worried about criminal prosecution. But we have a treaty obligation not to engage in cruel, inhuman, etc., so why is it not anywhere in the memo?
- **Convention Against Torture**
 - Requires states to criminalize torture (but not CIDTP)
 - Must reach a certain level of severity
 - Provides regime of jurisdiction allowing states to prosecute torture
 - Rendition: Article 3 forbids from sending people to a place where they will be tortured (no wink and nod), if substantial grounds exist to believe they’ll be tortured.
 - Treatment provision: includes pretrial detainees, people in mental hospitals, CYA (people treated in custody of state but not punished)
 - Article 16: must prevent other acts of cruel, inhuman, degrading treatment that are not torture. They are prohibited under international law – the only difference is that states are not required to criminalize.
 - This does not rise to level of severity required for torture or is for a reason that is not one of the enumerated purposes listed in the torture definition (e.g. to interrogate, etc.)
 - Why do we have this distinction? Ambiguity as to where the line is between torture and not torture. This was meant to catch the things that come close to the line but don’t go over it –

“imperfect torture” is still bad. We don’t want people tiptoeing the line and going over (note: this is exactly what the Gonzalez memo tried to do).

- Cruel and inhuman often used together – its hard to tell these apart. This is less severe mental or physical suffering. It need not cause actual bodily injury, must be less severe but still intense. That’s as good a definition as we seem to get.
- Degrading – deliberately induced fear/anguish/humiliation. Deliberateness makes it difficult (always have to show intent). Does not require physical pain but suffering. It’s about how you perceive it – it does not matter that it would not be degrading in a different context if your intent is to degrade.

Did the “stress and duress” techniques of US forces in Iraq constitute torture?

- Water boarding – strapping prisoner to surfboard and dipping them upside down in water until it looks like they are going to drown. Under the memo:
 - feels like death, but you need specific intent to cause prolonged pain. Reasonably likely to cause the pain is not good enough
 - you can say the mental pain is not prolonged – the person doing it must know and intend that you will be traumatized for months afterwards, and your average torturer will say he does not know
 - you can say you are torturing to get information, not because you don’t like the person, so they can seemingly always get out of it
 - Under the jurisprudence of the ECHR, it must reach a certain level of severity but the
- Guy on block with electrodes
 - again, it’s pretty difficult to fit this into definition of torture
- Under Gonzales memo it would be extremely difficult to show torture because:
 - specific intent
 - requisite severity
 - prolonged nature of mental harm
 - perhaps in isolation these could be shown, but you would have problems show them in total
 - We are looking at U.S. statute that implements the torture convention.
 - *Cardozo-Fonseca*: When looking at a statute passed in order to implement a treaty you look at intent of treaty and U.N. Handbook. Gonzales memo lacks reference to this case.
- Under International law you might reach a different result:
 - Waterboarding would probably qualify as torture: in 1970s Uruguayans did similar acts and HRC found they constituted torture
 - Guy standing on board with electrodes; you have a threat, but it’s the threat of shock. Would shock create serious bodily injury? If yes, then it probably qualifies, but if not, maybe no. You can also argue mental pain engendered by the threat of serious injury
 - Abu Graila photos: pyramids of bodies, guy on leash. Degradation alone probably would not constitute torture, but possibly cruel inhuman and degrading treatment.

Case Law

- ECHR jurisprudence: Purposive definition: “deliberate inhuman treatment causing very serious and cruel suffering” (*Furundzija*), including disorientation and sensory deprivation techniques = CIDTP. ICTY = solitary confinement may be enough. Inter-American convention: even broader, “obliterate personality” “diminish physical or mental capacities” even if they do not cause physical pain or mental anguish. Rome Statute does not require official consent/action (all on supp p. 52)
- *Tyner*: Juveniles being physically birched by police is degrading. Why then is being slippered by the headmaster ok (in another case)? Perhaps in the latter case they were putting themselves at the mercy of a school voluntarily.
- *Costello*: Just the fact that you are punished is not good enough, even if public. Bottom line.
- *Ireland v. UK*: Treatment of IRA detainees in British jails. Government has a terrorist threat and it puts into place special legislation to deal with the situation, including various interrogation techniques
 - 5 techniques: loud music 24 hours a day, extreme cold and heat, etc.

- Irish government brought case saying (1) this is torture; (2) you can't look at these in isolation but cumulatively
- European Commission on HR agreed with Ireland
- British argued that a certain roughness of treatment was to be expected. EC said no way, it's inhuman or degrading, but not severe enough to be torture.

Necessity Defense/Terrorism

- US: President has inherent power as CIC or in his capacity to execute laws to override when he thinks it's necessary. Cf. *Youngstown*, which says even in times of war, he does not have authority to blow off the law.
- Article 2: No exceptional circumstances whatsoever may be involved – the drafters put this in there to specifically prevent states from finding a justification for torture (supp 52-61 – there should be no balancing act)
- Sri Lanka invented the concept of suicide bombers years ago. Terrorism is not some newfound danger that requires us to chuck international law! (Redress Trust, supp. p. 47)
- We must relativize the discussion that we're in a new age where terrorism reigns.
- **Ticking time bomb scenario:** Strong version of the argument - you have a suspect in your office with information on a nuclear bomb that's about to go off
 - Problem is that even if this were true there is proof that torture does not work. People tell you what they think you want to hear. It turns out to be a totally ineffective means of getting information. Best way to get information is through a long term relationship and a lot of deception to get people to open up to you.
 - Also, you don't know when the bomb is actually ticking, governments are wrong all the time. It's a slippery slope.
- Israeli Supreme Court considered the necessity defense and said you can't a priori decide/no before-the-fact justification – e.g. a directive saying “it's ok to do this” before you actually do it. However, in the case of criminal prosecution they can raise the necessity defense if they can show it really was a case of serious imminent harm. Roht-Ariaza says this is the best decision we have saying why we have to keep an absolute value to torture.
- **Alan Dershevit**z – Opened up debate about whether disallowing torture is right. Given the fact that we feel the need to do it, we should come up with a warrant allowing you to do it if given permission by a judge. Otherwise it happens anyway and we go down the slippery slope.
 - Problem: if it is so imminent then no time to go to a judge
 - Problem: we are just blowing holes in the prohibition on torture
 - Problem: judge may be reluctant to deny the warrant – expertise (he will want to defer) and competency problems (not wanting to override command decisions).
 - Problem: Philosophically, why are we allowing this balancing act? Every HR body has said you can't do this – it's an absolute right, and you can't put it on a scale.

Optional Protocol to Torture Convention (2003)

- Based on a European convention
- Sets up system of routine visits to places of detention by national protection bodies – prisons, jails, military barracks. E.g., incommunicado detention lends itself to abuse, and this system tries to contain potential abuses
- Purpose: oversight mechanism that does not stigmatize (make countries feel attacked) and gives routine oversight likely to deter abuses
- International mechanism works in coordination with the national mechanisms, with the idea that they can do both regular and surprise visits: regular visits appear routine (you're not being picked on), while surprises are effective in avoiding pre-visit “clean-up.” National system does routine oversight only.
- Not many States are parties as it was just ratified. The European one has pretty much universal adherence.

FACT FINDING see pp. 465-481, 498-502, 516-521

- Before going on an investigative mission you need contacts:

- for trial observation, a local attorney to (1) introduce you to the judge and (2) help you interpret the local law
- for interviews/investigation, you need official permission from government to go in if you are with an IGO; if you are a smaller NGO you can usually just go in (if the place generally gets some sort of tourism/foreign traffic).
- local NGOs, religious groups, witnesses are excellent sources of information
- US (or your government's) Embassy must know you are coming
- Logistics: translators, drivers, accommodation, etc. You do NOT want government to be chauffeuring you around, as no one will want to talk to you that way. You NEVER want the government translator.
- Interviewing Witnesses
 - Sometimes if you are with a big organization you can set up shop, announce you are there, and have people come talk to you
 - On the other hand if you are in the middle of nowhere you have to go out and find people or find an office of a local NGO so people can come in to see you without as much risk of surveillance
 - How do you look to people? To what extent can you use local NGOs or diplomatic personnel? What people tell you depends on how you present yourself.
 - People who are heavily traumatized, e.g. post-massacre, may be difficult to understand.
 - Must be aware of cultural practices and taboos before you go to a country
 - Standard of evidence: as interviewer, you are the fact finder and the one who adjudicates which facts are trustworthy. Cross-checking, corroboration: is the information you are receiving consistent or inconsistent with what you know
 - Security: There is generally no threat to you as interviewer, but you need to think of the people you talk to, who may be heavily at risk.
 - You have to be up front about fact that you can't guarantee their safety, while making them at ease enough to trust you. Setting up a way with local NGOs for you to get contacted if there are reprisals may at least help voice outrage if there's retaliation
 - Afterwards you should take precautionary measures with the written materials, any tape recordings, etc. so you can protect people as best you can.
- Trial observation
 - Most of the time you are worried about due process and whitewash
 - You want a lawyer familiar with the local legal system to explain that legal system, or at least similar legal systems
 - Balance between how many of the differences you observe are ok (just different) and how many are troubling insufficiencies
- Often you go back to the government and tell them preliminarily what your findings will be
 - Put them on notice if you are going to slam them publicly
 - Let them know what you found unacceptable
 - Suggest steps, e.g. government should investigate, arrest those responsible and pay compensation
 - Often the gov will claim no responsibility – good idea to report this
- Preparing a report when you go home
 - Lay out your methodology – what you did and how, who you talked to and who they are (if government officials, NOT if victim-witnesses)
 - Balance between slamming gov and diplomacy: if you want to go back you may need to tone it down
 - Tension between congratulating the gov. if they have been improving while firmly shaking your finger at them

REGIONAL SYSTEMS

- Inter-American, European and African (newest, least developed) systems
- Purpose: Scale/resources (fewer countries to deal with, so you can focus better; countries are closer together, so there is spillover); informs global system (violations are similar in a number of countries, and

jurisprudence develops as basis for global mechanisms, e.g. fair trial); cultural similarities may facilitate development of legal standards (note, however, that in Europe the differences between the civil and common law traditions do not necessarily make things easier)

- There are no systems in the Middle East or Asia – governments claim there is no need in these places as HR protections are built into Islamic law, for example. Also Asia tends to view society more collectively, and focuses less on individual rights (which are presumably the basis of HR)
 - Asian model is developing now; based on existence of national bodies – e.g. ombudsperson – but this coordinating mechanism has no independent existence.

The Inter-American System

- OAS (Organization of American States): political organ of the American States, has meetings and passes resolutions, like a mini-UN general assembly. Can do conflict resolution, election monitoring, etc. Every State in the Americas except Cuba is a member.
 - Funds the system – decided on budget of various commissions
 - Declarations re Democracy: Santiago Commitment to Democracy says any State where elected government is overthrown should be condemned, and we should figure out how to put the elected gov. back in place. This worked in Peru with Fujimori, Guatemala, etc. The exception is Haiti, where these commitments have not been invoked (politics!)
- Inter-American Commission on HR: 7 experts, can be from any OAS Member State, work part-time and are appointed for 4-year terms
 - Standard-setting: They write and/or propose new treaties
 - Fact-finding and country reports: Have been highly effective and successful, e.g. in 1974 wrote scathing report of Chilean regime and helped establish a number of sanctions, in 1979 it was key in making known publicly extent of HR violations
 - Annual report: on their activities and on trends in the hemisphere
 - Individual complaint: Must frame your complaint under either of 2 agreements, and can also add in a violation of customary international law
 - Can consider an individual complaint under the American Declaration of Rights and Duties of Man, because in 1961 General Assembly resolution the OAS Member States gave the Commission jurisdiction to apply this declaration and receive individual complaints based on it.
 - Used for U.S., Brazil, and the spattering of Caribbean countries who did not sign on to ADHR
 - Every Member State is bound and must respond to the Commission as arbiter; US has said that there is no binding force (see p. 598).
 - Note: Vienna Convention provides that subsequent conduct of parties can change a provision and make something binding, but the US responds that it has always protested being bound, and you can't use Vienna to get around that. US, however, often takes into account what the Commission is saying because of the political cost of not doing so - not in the Guantanamo case, but perhaps with something like a criminal procedure problem.
 - Can also consider complaints under the American Convention of Human Rights – all Member States are parties, except Brazil and US and a couple of Caribbeans. It is a treaty and is binding as a treaty.
 - Result: May try to facilitate friendly settlement, sends a report to State with recommendations and asks state to respond, then either adopts final report for both parties on extent of compliance or issues more recommendations, may refer to IAC for adjudication.
 - Comm. or Court may ask state to take urgent precautions (595), you can ask court to take precautionary measures
 - You begin by sending a communication to the IACHR. What do you need?
 - exhaustion of domestic remedies (see 604)

- must show injury to an actual (named) person of one of the rights guaranteed in the relevant instrument, but need not be personal to you or your family, nor do you need to represent the injured person – anyone can bring, even an NGO (purpose: to prevent retribution, if the injured party or their family did not want to make themselves known to the government)
 - must be brought within 6 months of a final judgment (if there is one) or if not within a reasonable time of occurrence of the situation (p. 594).
 - same issue cannot have been considered before by commission, and cannot now be under consideration by another HR body (e.g. a petition to UN Treaty body like HR Committee, but not the Commission b/c technically those are not individual complaints).
 - Critiques: decisions often not obeyed, receive little notice, inadequate staffing (p. 597)
- Inter-American Court of Human Rights see pp. 608-614
 - Only the Commission or a State can bring a case to the IACHR, so that material brought before court is screened (In *Velasquez*, the first thing that happened is that his sister brought a communication to the Commission saying he disappeared in a vehicle with tinted windows).
 - Only parties to the Convention and parties that have accepted the jurisdiction of the court at the time the events took place may have cases brought against them. Most Latin American States have accepted jx.
 - But, if events occurred before a State accepted jx but the State then failed to provide remedies after accepting jx, the case may be brought.
 - Must show exhaustion of remedies: must be effective (must be what the petition is trying to do); must be available (must be in the requirements of domestic law, can also be de facto unavailable if in practice no one will bring such a case b/c they're afraid for their lives); must not be futile (easier to show by pattern of non-responsiveness: our 5 habeas petitions were denied, or they are generally denied in similar situations) nor unreasonably prolonged (it's clear nothing will happen within a reasonable period of time)
 - In general, this is very easy to show in situations where you have consistent patterns of gross violations (e.g. disappearance, arbitrary killing, pattern of arbitrary detentions). Otherwise, court may be more demanding.
 - BOP: State has to raise issue of exhaustion, or it's waived. They always do, and once they do it is up to petitioner to show why they have exhausted.
 - In *Velasquez*, the State argued that there were criminal complaints that could have been brought. But, the punishment of the perpetrators, although nice, does not accomplish the end of finding the disappeared person. Similarly, a certificate of death is ineffective at finding the person. Habeas petition was not available remedy, because they said they had no clue where he was.
 - Commission can presume facts are true unless they hear from the State
 - Usually the State ignores the whole thing until the very last minute – in *Velasquez*, 7 years elapsed in this back and forth with the State.
 - Effective mostly at stopping future violations, compensation and condemnation: Perhaps after a long time the State realizes that the cost of what they are doing and change their ways (e.g. in *Velasquez*, the disappearance policy). But this is not a good system for stopping crimes in the making. Occasionally the initial complaint has an effect.
 - Problem: Sometimes states refuse to comply and OAS has hard time enforcing (p. 656), though it does provide for enforcement of judgments in national courts.
 - Victims' lawyers can participate alongside the Commission but they have independent status before the court.
 - Note: you may borrow jurisprudence of European system for interpreting.
 - One of the two required treaties is the starting point, but the court can then bring in all sorts of violations of international law.
- *Velasquez Rodriguez* (supp p. 65-107)

- Disappearance – an unacknowledged abduction and detention usually followed by torture and/or execution by State agents or those acting with their knowledge or acquiescence
- Became widespread phenomenon in 1970s. esp. in Latin America, but much greater problem in Argentina and Chile than in Honduras where there was a relatively small number of disappearances.
- *Velasquez* was brought as test case so as not to scare off the rest of the States from accepting jx.
- Evidence was very strong: witnesses are military member with personal knowledge, other persons detained under similar circumstances (Inez Murillo), guy in the cell next door to his who heard him say his name and that he was tortured, etc. Here we have amazing evidence of the personal situation; usually you just have the pattern and practice.
- Minimum amount of evidence needed: *Velasquez* court says that you need (1) evidence of pattern and practice and (2) evidence the individual himself fits the pattern and (3) both must be proved by a preponderance of the evidence – not the beyond a reasonable doubt standard of a criminal case. This is a civil proceeding against the State.
 - Note: in a case where there is no pattern but an individual violation the court will require you to prove the violation.
 - State’s silence can lead to adverse inference (again, unlike a criminal prosecution)
- What are the obligations of a State after *Velasquez*?
 - State must respect (not do the bad thing), ensure (e.g. if they say they didn’t do it, they were still obligated to prevent, investigate, prosecute if necessary and provide redress). They must protect against private parties!
 - Due diligence: this does not mean they are always liable for HR abuses, but in the *Velasquez* case the investigation was a farce
 - These are both negative and positive (ensure obligations out of Article 1.1) obligations
- State may be held liable for PRIVATE violations of HR
 - Distinguish from individual liability, which we will cover later
 - Death squads, goons, organized criminal gangs
 - Domestic violence: private individuals committing violations, but State is nonetheless liable if aware of the violations
 - Willful blindness: when it is obvious that a violation is going on – e.g. Honduras – State cannot get away with it. But, in the case of violent drug cartels, State may not actually be actively shirking responsibility
 - State must make showing of good faith efforts to fix the situation
 - A new government may be liable for what an old government did even if they disagree (because we can’t let States write off financial debt of the old State)
- Case Law: Inter-American System
 - *Velasquez* is first such case, but many more have been brought since
 - Summary executions, torture, prolonged detention, disappearance are most common examples
 - Remedy: Ps asked for money damages, prosecution of individuals, disbanding, new educational curriculum for armed forces, monument for victims
 - Article 63 of American convention is broad – does not restrict remedies to money. Nonetheless the court has been conservative when it comes to ordering remedies.
 - *Velasquez* court said our judgment alone is a great remedy – you should be happy!
 - Court has gotten better over the years and granted remedies more creatively – e.g. ordering the Colombian government to drain a lake in order to find the bodies hidden in it
 - Available damages:
 - Pecuniary damages: medical expenses, lost wages
 - Non-pecuniary damages: pain and suffering, emotional distress
 - Interference with life project: based only on the fact that your life will never be the same because you didn’t get to do x – e.g. go to school. Changing the course of your life is compensable. This is an innovation of the inter-American system and not done elsewhere.
 - *Barrios-Altos*: Peruvian summary execution case
 - They rely not only on *Velasquez* but also Articles 8 and 25: access to justice isn’t only for criminal Ds but also for complainants

- Has been highly influential
- They came back and asked whether finding that amnesty didn't apply in this killing precluded it from applying to all other killings because there is no *stare decisis* in International Law. The court said the effects of its decision are general in nature (Supp. 108-110).
- Inter-American court now has heard cases treating freedom of expression, censorship, labor rights, indigenous rights → starting to look more like the European system, which in turn is starting to look like the American system.

The European System

| System/Body | Court | Relevant Treaty |
|--|----------------------|---|
| <u>Council of Europe</u> 45-48 Member States – everyone from UK to Turkey | ECHR (Strasbourg) | ECHRFF |
| <u>European Union</u> (smaller – now 25 States) | ECJ (Luxembourg) | Treaty of Rome and subsequent documents |

- ECJ deals with freedom of movement – trade, ideas, etc.
- ECHR deals with violations of ECHRFF
- Overlap comes with provisions on freedom of movement of people, e.g. family reunification in immigration context
- ECJ used ECHR jurisprudence to interpret obligations of States and say it must conform with the ECHR

Differences between the European and Inter-American systems

- Compliance: In OAS, if a State does not comply you can 1) harass the State or 2) complain to the rather toothless OAS general assembly (compliance with money judgments is slightly better). In Europe, the Council of Ministers has been much more capable of bearing on recalcitrant States. States also tend to comply more because of the political culture of being part of the EU.
 - ex: in the 1960s, there was a coup in Greece and the Council of Ministers was set to meet on throwing Greece out, so Greece quit, only to come back 2 years later after the overthrow of the government.
- Structure: There is no European commission. As the system matured, in 1998, they abolished the commission and created something more like a federal court system. They have an admissibility panel, a merits panel and an appeals chamber.
 - The European court is much bigger and sits in panels
 - It does not provide appeal from admissibility ruling and it takes only one person to say something is inadmissible
 - Because there is no commission, an individual goes directly to the court and files complaints.
- Standing:
 - In European system states can go after each other
 - In European system you must be a victim. An NGO can represent you as your attorney, however.
 - Conditions that gave rise to standing problems in American system do not apply. With the exception of Turkey most of the cases do not look like huge, widespread complaints of systematic violations.
- Resources: Far fewer in the Inter-American system
- Damages: More money damages generally available in Euro system (though some in IAC), but American allows court to require gov. to take specific action (654-55)

European System Jurisprudence

- Holding of *Velasquez* – that State has positive as opposed to only negative obligations – has been adopted by European system
- Gay rights (p. 628): In the US relevant case is *Lawrence*; European jurisprudence has always been pro-gay rights. Analysis is different.

- *Dudgeon*: explicit right to privacy in Article 8 – not a penumbral right like in the US.
 - Even though there was no prosecution, fear and distress over the fact that he might get arrested was enough.
 - *Prima facie* violation is not enough though – can be rebutted under Article 8.2 by showing that the violation is “in accordance with law” and “necessary” in democratic society for the protection of morals and freedoms of others (must be for one of these purposes)
 - What is necessary in democratic society? Pressing social need, proportionality, **margin of appreciation** (greater if no consensus among European nations).
 - This is a sort of balancing test, but SIGNIFICANTLY stricter than in US → the purpose has to be important and the means have to be tailored.
 - Court will look at alternatives
 - Margin of appreciation: WHY do we give national government discretion in figuring out how to legislate? Sensitivity to cultural difference/leeway to States/recognition of diversity. Also, a recognition of frontline status of national State in solving its own problems – a nod to sovereignty, but NOT absolute. At the end of the day it’s the court that decides. Cf. exhaustion of remedies in the Inter-American system: let State deal with it on its own.
 - Proportionality: Conservative milieu of Northern Ireland won’t mean people suddenly start going wild.
 - European-wide consensus meant that burden on Northern Ireland is greater to show why it needs a different way of doing this (Cf. transsexual case where margin of appreciation is higher)
- Burden on petitioner to show violation (e.g. Article 8). Burden then shifts to State to raise 8.2 and show how violation is excused under limitations clause.
- *Lustig-Prean* (632): Don’t ask, don’t tell case. Similar result but different purpose: national security and prevention of disorder.
 - Court still requires showing proportionality
 - Sliding scale: the more intrusive into privacy rights, the more you have to show good reason and purpose for national security
- Damages: *Dudgeon* fairly low but economic loss (e.g. losing job) gets you more money: pp. 638-639, 650-54
- *Soerig* (642): Does the death penalty contravene Article 3 (cruel, inhuman degrading)?
 - All European States are now parties to protocol saying that death penalty is per se a HR violation, but the actual convention does not mention it
 - Court looks at “death row phenomenon:” long wait, mental anguish, etc. combined with the fact that this is a kid with mental problems of his own. Under these conditions, extraditing him to VA would violate Article 3.
 - Ramifications:
 - Made US legislators wary of international treaties (will we inadvertently outlaw the death penalty?)
 - Prosecutors learned that they could not charge as a capital offense if trying to extradite
 - Now European governments will not extradite if there is a chance of death row phenomenon
- The European system has been successful at dealing with small individual cases but not with large-scale cases such as Chechnya, which have proven very hard to deal with (opposite of IA system)
 - Exception: Turkey, Where there is a powerful incentive coming from outside the system because they want to be in the EU.
- Borrowing: e.g., disappearance cases of the European systems borrow from the Inter-American system
- For other options within Europe see pp. 660-66.
- Africa also has a regional HR system with a relatively new court.

SOURCES OF INTERNATIONAL LAW

How do we know if something is a violation of the law of nations? (ATCA, but may apply elsewhere)

- Treaties – treaty is not used *qua* treaty but as evidence of consensus.

- Judicial practice and decisions, and writings by jurists.
- “Soft law” resolutions, declarations.
- Practice and customary international law – if the country says it is against x but does it anyway, the denouncement itself is the relevant evidence of the international norm (states know they are not to do this).
- Many treaty violations require state action
 - exceptions: (1) slave trading and slavery-like practices (it is assumed that forced labor can apply here, but you have a stronger case if you can show something more like life servitude); (2) genocide (because you are probably state-like if you have power to commit it); (3) war crimes (must be person who is part of the fighting); (4) crimes against humanity have been assumed to be in the category
 - classic violations of the law of nations require state action: torture, killing, disappearances (you can frame the latter as a war crime depending on group the person belongs to)
 - Widespread practices – e.g. honor killings tolerated by government – can arguably be framed as state action. Therefore the state can be pursued, but not the individuals unless you show serious cohorts.
- Examples:
 - Slavery (being held as violation of liberty of person)
 - Sources of law: long-existing treaties, ILO conventions
 - May not fit into mold of chattel slavery – practice has evolved such that modern-day variants should arguably be fit into the definition, e.g. what went on at Unocal (come work for us, or else ...)
 - Does not require state action
 - Trafficking: like slavery, may not take its traditional form of buying and selling people, but may involve trickery (e.g. you will work as a baby-sitter)
 - Rape
 - as discrimination under CEDAW
 - as torture under CAT: sever pain or suffering; purpose of intimidation or discrimination; consent or acquiescence of public official (must show state action)
 - as crime against humanity (must be attack on civilian population & widespread or systematic, perpetrator must have knowledge)
 - as a war crime (violation of Geneva Convention): must have an armed conflict (international or national); cruel/inhuman/degrading treatment; outrages on personal dignity (see Common Article 3 and Protocol 2, if ratified)
 - as discrimination: against women, usually requires state action (see CEDAW and/or Declaration on Violence Against Women)
 - Forced eviction
 - Crimes Against Humanity (some showing of pattern and practice)
 - Torture
 - Genocide
 - Discrimination against women

Jus Cogens: Mandatory or obligatory law that cannot be derogated

- e.g. France and U.S. cannot enter into a treaty saying they will allow slavery vis-à-vis each other’s nationals. You cannot opt out or say you disagree
- This goes against the largely consent-based notions of international law – these things are so fundamental that 1) you cannot get rid of them by treaty; and 2) they exist as part of bundle of rights and duties that make up being a state, whether you explicitly consent to them or not.
- Examples: you must comply with your treaty obligations; genocide; slavery; torture (to the extent that we don’t disagree as to what it is); apartheid; piracy.
- *Cf. Customary International Law*, which acknowledges that there are persistent objectors who are not bound by it

Treaties: Are they binding on the US?

- Supreme law of the land (must be ratified by 2/3 Senate, if not ratified, there is international agreement by Executive Agreement and it therefore operates as statute)
- Evaluate conflicts
 - Cannot conflict with Constitution
 - If conflicts with federal law, later in time rule applies
 - If conflicts with State law, treaty trumps
 - Note: courts should construe to avoid conflicts
- Is it Self-executing?
 - Can the treaty be enforced without further legislation? Court-created doctrine.
 - Intent of parties – can be discerned from language, may be hard to tell if a lot of states are parties
 - If it says the parties commit to further legislation = not self-executing.
 - If the Constitution requires legislation = not self-executing
 - To whom are the rights addressed? Does it involve rights of individuals?
 - “Thou shall provide hearings to persons” = self-executing
 - The beneficiary of the provision is not the state but the individual
 - Language of treaty: is it fairly clear or does it need further leg. to be implemented?
 - If too broad, it gives judges too much discretion if they can implement it (e.g., you have to give housing to everyone in the country is too broad, but you can’t kill those under 18 is specific enough)
 - Ex: Geneva Convention is non-self-executing so the court cannot adjudicate.
 - Court says there’s a difference between a private right of action (which gives basis to sue) and use of treaty as a defense
 - Court also says you have to look provision by provision, not to the treaty as a whole
- Reservations
 - Is there one?
 - Does it violate the object and purpose of the treaty?
 - Vienna Convention says it cannot violate object and purpose
 - HR Committee made a comment w/r/t ICCPR in its General Comment, using Vienna Convention as a basis
 - Language of treaty: is a provision non-derogable?
 - Have countries objected to the reservation?
 - Is the reservation too broad (broad reservations are disfavored)?
 - If the reservation is invalid, what are the options for that party?
 - ECHR has held you are bound to the treaty without reservation
 - If the State indicated the reservation was a huge part of its ratification, maybe it is not bound by the treaty
 - If treaty is not self-executing, you are not bound
- Ex: ICCPR Article 6.5
 - You can say there is no conflict with Constitution or federal law, which does not codify execution for minors
 - Is it self-executing? Language is clear – involves individual rights, treaty itself gives cause of action in U.S. Courts
 - Reservation? US said it would not adopt this provision
 - You can say it violates object and purpose of treaty b/c it’s non-derogable right (HR Committee)
 - Vienna Convention says you can’t use your own law to justify violating object and purpose
 - 11 countries objected to reservation: there are 140 parties so you can say it’s not a strong argument
 - You can argue that non-self executing reservation is invalid because it’s a broad objection and therefore disfavored

Customary International Law

- Applies in US as federal common law
 - Can't violate Constitution
 - If conflict with federal law, federal law trumps and there is no enforcement (unlike treaties)
 - You should nonetheless try to avoid conflict with law
 - If conflicts with state law judge will have a hard time violating state law
- State practice with *opinio juris*: have countries expressed obligation by their behavior?
 - Hard law: treaties which countries have agreed to make it easy to establish *opinio juris*
 - Declarations by various bodies, e.g. General Assembly, ECOSOC
 - Resolutions
 - Judicial decisions: help with both practice of States and international standards
 - General principles of law: look at national Constitution and statutes to establish if it is custom
- Persistent Objector
 - Long-standing objection to a custom. You can't just start doing it (like US did with juvenile DP in 1980s)
 - You should have started objecting at time of inception
 - Has to be clear – silence is not enough
 - Effect: you are not bound by the custom
- Peremptory Norms of international law or *jus cogens*
 - Higher level of customary international norm
 - Certain norms are so accepted that it does not matter whether you object or not
 - Most/large number of countries accept it (though unanimity not required)
 - There should be no derogation permitted
 - No contrary emerging norms

ACCOUNTABILITY FOR PAST HR VIOLATIONS

- There needs to be some accounting for past violations in order to prevent future one – not necessarily a bright line between prevention and accountability
- Civil suits in the US are one form of accountability, actions before regional courts are another form of holding States accountable

Accountability of Individuals

- Remember: States can only be held civilly accountable – injunctions, declaratory judgments, damages. They cannot be thrown in jail. Sister of Manfredo Velasquez brought case against Venezuela as State, not individuals who threw him in the hole or tortured him.
- In contrast, individual penal or criminal accountability is possible – where the defendant is not the State, but the individual who committed the crime. There may also be damages associated with it, especially in systems with no clear distinction between civil/criminal.
- The two are linked: the State incurs responsibility for not adequately investigating and prosecuting individuals within its jurisdiction – *Velasquez*.
- The international system handles criminal accountability by and large through the individual states despite the existence of international tribunals. State has international obligation to “do it right.”
- On top of this basic system is an array of institutions and mechanisms on international/transnational level. But the basic obligation is a national State obligation.
- This comes up most often when you have a massive violation of human rights and it ends (b/c the violators get thrown out by rebels, or by an outsider, or because the ruling elite runs out of steam and savages the economy, or because of a bargain). A new government then comes in with high hopes for democracy and the rule of law. What do you do with the bad guys, if they are still there, or have fled and returned?

Options – what can you do to bring the violators to justice?

- International Tribunal: to put the criminals on trial

- Disadvantages: the people you are trying to jail may react very badly and hamper your advances toward democracy. You may be better off not prosecuting them. Does non-prosecution mean amnesty, or can it mean do nothing? Critics say most notorious indictees remain unpunished (403), ICTY was farce (403), bureaucracy, limited resources (407)
- Disadvantage: Unsatisfactory vehicle for victims, because it's hard to get witnesses willing to testify, or who actually can identify the perpetrators, or there may be problems putting perpetrators on trial.
- Advantages: forum for victims, creating and preserving historical record, stigmatizing wrongdoers and forcing them to relinquish power (even if they refuse to surrender into custody), creating body of jurisprudence, prosecuting those on top can at least make those below aware of their guilt
- Questions: what would be preconditions (e.g. guarantees for arrest, independent prosecutor, ban on amnesties,), do we want to limit prosecutions to guys at the top, barriers to reconciliation, alternative means for holding lower-ranking officials accountable, temporal jurisdiction (p. 369-71), what crimes would be subject to JX (397), how to get personal JX (398 and 409 - problems), what substantive law to apply (402), *nullum crimen sine lege* (402), procedural protections (402)
- For critique of ICTY see pp. 228-233
- Investigative Committee: To try to find out what violations occurred and the names of violators
 - South African truth commission case is the only one allowing for conditional amnesty: South Africans looked at all of the problems with criminal prosecutions, and said that if we have a truth commission we can look at overall patterns of violations, can use people who might not be willing to come forward in an individual criminal prosecution. They say it is superior to prosecutions because it focuses on the victims and does not require you to tailor your evidence to the conviction of a perpetrator. Also, this is better on the victims who may not be believed, could be vigorously cross-examined, etc.
 - Finding out who did it is vexing: if you decide to name names, people will say it was not them (note: superior orders by themselves are not a defense).
 - Disadvantage: when you have an investigative committee doing the fact-finding, there is not the same level of confidence about a finding of individual responsibility. They can't point at someone and say "you did it!" This raises due process issues – you named my name and my reputation is now destroyed without a judge saying so. Answer: countries create some sort of mini-administrative solution, whereby notice is given to perpetrators and they have the option of coming in and denying/rebutting the charges against them.
 - You have to decide on whether to do public or private hearings – both have their advantages.
 - You can still say it fulfills international law, because the South African truth commission allowed the truth to come out and gave victims access to a forum in which to hear what happened (John Dugart).
 - Problem: There are specific Treaty-based obligations that are a matter of international criminal law and are not dealt with by conditional amnesty. For example, the torture convention provides that states with torturers in their territory must prosecute them or extradite them to a State that will. Similarly, the genocide convention requires prosecution by an international or national criminal court. This is not about access to the truth – it's about criminal prosecution.
 - Do you have to choose between this and trial? Or can you do them both? Increasingly, the either/or idea is dissipating, and the consensus emerging is that an investigating committee is important, and that prosecutions may also be a good idea. You could do both. You could do commission now, and wait until later to prosecute.
- Amnesty Law: appears the opposite of having a tribunal
 - Disadvantage: Symbolically, it may seem to condone what went on. Also, allowing it may prevent future prosecutions. However, often when there is amnesty law you can still change things later and hold violators accountable.
 - Goals: Reconciliation, amnesty, reparation, search for truth, prevent repetition, restore human dignity (381). See 383 and 385 for international norms.
 - You can't have a blanket amnesty, unless it's for fighting against the government.
 - Apology is a cleansing process for both the victim and the perpetrator – South Africa film
 - Things like international crimes – genocide, torture, arguably crimes against humanity (massive forced disappearances, massive killings) – cannot be amnestied.

- Under international law you cannot amnesty certain things, so specific countries can't violate this principle under their local rules.
 - International law limits stem from the fact that those harmed have a right to hear the truth about what happened and a right to access to a hearing and a judicial forum
- National/International/Transnational (3rd party national actors): who is dealing with the situation? Is it an entirely national issue or will we try to bring in international actors?
- Punishment vs. Amnesty or Truth Commission (note: need not be either/or) (see pp. 372-900)
 - For punishment: punishment encourages deterrence and denunciation and affirms authority of law, no punishment vitiates authority of the law itself, prosecutions under international law less likely to be seen as vengeance/politics, failure to punish may be violation of IHR and treaty obligations (Genocide Conv., CAT and Geneva Conv. for gross violations) and so may failure to investigate (ICCPR, ECPHRFF, ACHR)
 - Reasons not to prosecute: danger of rebellions or additional confrontations (esp. when military's still around), new gov. may not have power to bring military to account, not yet a viable democracy, perpetrators may oppose trials more if they think they were justified in avoiding subversion or war, peace may have been achieved with neither side having been defeated or willing to subject its people to prosecutions, old bad actors may press for amnesty saying that opponents themselves engaged in HR violations, ethnic considerations may be barrier to impartial policy
 - Must balance ethical principles w/political reality, goals should be preventing recurrence and repairing damage (p. 376)
 - Immediate trial may be good if there's a risk that euphoria of new democracy will fade
 - Barriers to accountability may diminish over time
- Do Nothing: advantage - you may be able to change things later.
- Deportation/Exile
- Compensation: it is very difficult to compensate people with money – there are too many people and not enough money
- Acknowledgment
- Memorialization
- Constitution-building: legal judicial reform, accedance to IHR Law
- Lustration/Vetting: trying to keep those with unsavory records out of office (Eastern Europe)s

International Accountability for HR violations – Why?

- It is advisable to do things at the national level: the witnesses are there, people know their own history, etc. But there are circumstances under which remedies at the national level are not adequate enough.
- Some are not simply a national issue: the crimes are international in scope (both in geographic scope and the severity/nature of the crimes themselves, e.g. murder vs. genocide or crime against humanity).
- It is hard to get the powerful to punish themselves – if they are the people in power there is an obvious tension between the desire for accountability and the desire of people in power to stay there.
- Impartiality of judicial system: witch-hunt (it might be hard for a new government to be impartial towards the government it replaced) or whitewash (same government is in power, and it does not want to implicate itself).
- Due process – theoretically, the tribunals apply some sort of uniform and just standard.
- Deterrent effect of making something subject to international law – international trials are more widely publicized than national and are taken seriously.
- Development of a uniform jurisprudence that can be used by national courts to develop their own responses.
- Logistics: the national governments have little money and resources (e.g. no paper in Rwanda). It may be faster to set up a special entity than load such complex issues onto an over-burdened court system. Let the national tribunals adjudicate things like cow-stealing, and build a special purpose court to handle large-scale international violations.

Ad Hoc International Criminal Tribunals

- The factors above drove the creation of ad hoc tribunals. They are ad hoc because they are not established by treaty (standard protocol).
- Statutory basis is chapter 7 of the U.N. Charter and the Security Council's resolution pursuant to it.
- Time: it was necessary to create a quick deterrent in the Yugoslav case. Fighting was still going on.
- Some say members of the Security Council did not want to stop what was going on, and this was the cheap and dirty alternative (cynical view).
- Others believed the only way to stop this was to "break the cycle of impunity," because these crimes had been going on forever and no one had ever been punished. Same rationale applied in Rwanda.
- Idea was that the creation of the tribunal would create peace and security.
 - Importance of establishing rule of law
 - Importance of deterrence
 - Need for fact-finding process that would serve as authoritative record of what happened – everybody would have to agree on what happened (though not necessarily admit to culpability)
 - Importance of individualizing responsibility, moving away from the group-based nature of these conflicts (Serbs vs. Bosnians vs. Croats) and saying the people themselves were responsible for crimes.
 - Need to establish the narrative that these were not age-old conflicts, but rather manipulations of powerful people who wanted to mobilize communities against each other for their own political gain.
 - Need to avoid vigilante action: people were wronged and were pissed, and there was a need for judgment according to law. Otherwise, people would go after those they thought were collaborators and string them up themselves.
- Structure of tribunals in Arutha and the Hague is shared:
 - Office of the Prosecutor
 - Judges
 - Registry (like a clerk's office)
 - Joint appeals chamber for both tribunals
- Getting a hold of defendants
 - Originally, NATO forces went knocking on people's doors. Ultimately, countries began to comply and assist in getting these people. The U.S. also uses economic arm-twisting to get governments to comply.
 - The Rwandan tribunal mostly got people who had fled the country by getting cooperation with many African countries (Kenya, Togo) and some Europeans.
 - There are still 2 leaders of the Bosnian-Serb republic still at large and possibly shielded by the government.
- Yugoslav tribunal has indicted 52 individuals and Rwandan has indicted 21.

Problems

- Justiciability: How do we get people for violations of law when the tribunal is set up AFTER the crimes occurred?
 - We are simply creating another forum for adjudication of long-standing customary international law, not criminalizing things that were not criminal before, so there is no problem of notice to Ds
- Death penalty
 - Rwandan tribunal does not have DP because the tribunal did not want to put a stamp of approval on it. But Rwandan courts allow the death penalty and defend its necessity in their culture.
 - Therefore, criminals will want to be tried in the international tribunal. Under rule of primacy, national courts have to turn over to international courts anyone the international court wants to try. Problem: the big fish, who get to be in the international tribunal, will sit in jail for life. The little fish get thrown back to Rwanda and end up being executed.
- There are problems both with doing things outside the forum (witnesses who have never been on a plane have to fly abroad) and inside the forum.
- Who should these tribunals be trying? Should they be limited to those most responsible – the leaders and organizers – or to everyone who was part of it?

- *Tadic*: first case in Yugoslav tribunal. He was just a thug, an opportunist who participated in the ethnic cleansing, but not an organizer. He had fled after the war and been found in Germany, and he was the first to be tried
- Since then there has been more of an emphasis on the people at the top or right below the top.

ICTY Jurisprudence

Tadic (supp pp. 203-215)

- First case taken by ICTY
- Substantive Crimes: *Tadic* charged with violating Articles 2, 3, 5
 - Article 2: grave breaches of Geneva Conventions
 - Article 3: violations of laws and customs of war (from Hague Conventions)
 - Article 4: Genocide
 - Article 5: Crimes Against Humanity
- Jurisdiction: He claims the court has no JX
 - Articles 2 and 3 require that it be an international armed conflict, and this was a civil war
 - response: grave breaches require states to prosecute offenders
 - response: p. 211 – we are not applying the convention per se, but simply using its language in the context of Security Council’s statute, so we are not limited to international conflicts
 - this is a mixed international and civil war, and the law can extend to civil or mixed wars
 - Article 3: Hague Regulations apply to States and do not allow for individual responsibility. *Tadic* claims that even if you extend the articles to apply to mixed conflicts, they do not apply to him.
 - response: individual responsibility is implied in the text – it’s people who commit the crimes
 - response: there is room for more on the list, which is not exhaustive (p. 209). Violation of “laws and customs of war” is open-ended (so long as they are serious) and contains common Article 3 (civil war). It also includes criminal responsibility for all violations (this is a huge leap – individual responsibility grafted onto the conventions – we can bring in anything else we think is customary international law, perhaps even the protocol)
 - Article 5: Crimes Against Humanity: He claims an armed conflict is required. Nuremberg required an armed conflict (so they could not get any pre-war stuff – nexus requirement said only things in conjunction with war)
 - response: As a matter of customary international law, they can occur in times of peace or war – doesn’t matter what the statute says. The tribunal says for the purposes of THIS STATUTE it has to be in the course of armed conflict. This does NOT mean that customary international law requires a nexus. Regardless, almost anything can be found to be in the context of a broader armed conflict so for immediate purposes this does not matter.
 - Note: This is an open-ended provision; “other inhumane acts” are proscribed.
 - Note: “against a civilian population” has been read to require widespread/systematic.

Kristic: Genocide – Article 4. This is very difficult to prove (supp pp. 216-225)

- *mens rea*: intent to destroy (specific intent), in whole or in part, national, ethnic, racial or religious group.
 - Specific intent can be proven by inference (because people won’t admit intent). If you could not possibly destroy all the people you set out to, that does not suffice to rebut inference of intent.
 - “Substantial part” of group: totality of circumstances – numbers both absolute and relative to size of group, ambit of control of perpetrator
- *actus reus*: killing, SBI. Does not include destruction of language/culture/politics (unless you can show physical elimination), moving people from one place to another.
- Stalin was convinced that broad definition of genocide would put his acts (moving people off farms) within this rubric. The U.S. agreed because it did not want things like lynchings in the South or Native Americans to fall under this definition.
- *Kristic* argues they were just trying to get rid of a military threat, and did not kill the women and children. Court says that if you kill all the men you are essentially getting rid of a population.

- Preventing births, etc.: Anything making it impossible to reproduce could qualify, but that does not solve very hard-to-prove intent

Future of ICTY

- Jurisprudence: how they apply it in practice is developing slowly
- Questions of complicity/joint enterprise
- Criticized because of circus of Milosevic trial: we think these create a trustworthy narrative but it's not clear that's true. Serbs think all the defendants are Serbs, Croats think they're all Croats
- Cost: multiple-defendant, complex criminal trials require a lot of resources. Thus, ICC was formed so we don't have to re-create the ad hoc tribunals each time.
- We are moving towards creating more hybrid national/international tribunals – Sierra Leone, East Timor, Cambodia
 - located where the crime took place
 - national judges supervising
 - international supervision

THE ICC STATUTE

Trigger of JX

- Referral by State Parties
- Referral by Security Council
- Prosecutor may start her own investigation
 - US did not want an independent prosecutor to run wild (Ken Starr) but if you don't have one then you won't have an independent court
 - Independent prosecutor must submit to an independent chamber of three judges to review it and decide whether it falls w/in JX of the court and whether there is a reasonable basis to proceed.
 - Prosecutor can also be removed by the coalition of state parties and needs the funding of states – these serve as inherent limitations to the prosecutor
- BUT
 - There is a 12-month reverse veto (Article 16): The SC can defer but it only takes one permanent member of the SC to stop the referral. So if the SC doesn't want to proceed in Darfur, it only takes one member to veto that and it's not deferred. The default position is going forward and it puts the onus on states to stop that. After a year, the SC would have to go back and defer it again. They can do it indefinitely but every year they have to take the decision to again defer.
 - This doesn't allow the SC to protect their own

Preconditions – Article 12

- Consent by parties
- For non-parties, if either the state of nationality of offender or the state where the crime took place has accepted (this is known as the Korean compromise)
- Opt-in: State may accept JX

Complementarity – Article 17

- National courts have primacy if the case is being investigated or prosecuted by a State which has Jx over it, unless the state (1) is unwilling or unable or (2) state has decided not to prosecute (unless this decision resulted from unwillingness or inability). Unable or unwilling includes bad faith (if they're shielding people from investigation) or undue delay

Procedure

- Prosecutor has to notify all state parties and any other state which might have exercised its Jx (state where it happened, etc.) so the state can lodge a notice that it is doing it itself
- Hearing on Admissibility - The state can raise it, the accused can raise it if the State doesn't

United States Position

- You can't bind us without our consent – it's like a treaty
- You can't bind non-parties
- By allowing an independent prosecutor, state of territory or nationality there is a possibility that our people could be prosecuted without our consent and that is unacceptable
 - Response: not if you are doing your job – if the U.S. is adequately investigating or prosecuting, so long as there's no unwillingness (shielding, unwarranted delay, etc.) then the court has no JX (even if it disagrees with the outcome).
 - This is not sufficient for the United States
 - Don't want some foreign judge deciding this
 - Military – these are battlefield decisions and we don't want some armchair judge deciding whether this was appropriate or not.
 - Counter: you get better decision-making if the military knows there could be some judge looking into this afterwards.
- Nightmare scenario – Iraq.
 - In 1998 had Hussein doing terrible things and the US thinking of deciding to take him out by sending in peacekeepers/troops. Some get caught and accused of a war crimes (using disproportionate amount of force). Worried about scenario of Iraqis bringing a case against our guys (state of territory) but we can't bring a case against the Iraqis for gassing the Kurds.
 - Complementarity (the US could look into it rather than give it to the Iraqis) but US doesn't want to concede that it has to even do this.
- U.S. claims it is worried about prosecution of soldiers, though the true concern is likely about Rumsfeld. Supporters of the court argue that complementarity should prevent such uses of the court, but the US replies that it wants something iron-clad. Clinton administration did not want to be a party, so it signed and sort of neglected it. Bush administration took more active steps to oppose the court: American Service Members Protection Act, the Hague Act, Article 98 agreements, Security Council resolutions.

Current ICC Investigations

- Democratic Republic of Congo – the largest number of human rights abuses, mostly deaths due to famine and disease due to a set of civil wars facilitated by support from a number of countries. Initiated by the State of Congo.
- Uganda – Lord's Resistance Army, supported by Sudan, has been running around terrorizing people, including recruitment of children and sexual violence against young girls. Government of Uganda, who referred the case, is itself complicit. Question is whether the prosecutor can then investigate Ugandan government (idea is that the term "situations" is meant to include this type of thing). Peacekeeping forces in the north (non-governmental) have asked prosecutor not to go forward – although the statute only allows a Security Council block, the prosecutor can choose not to move forward "in the interest of justice." Question is whether it would further justice to let the peace negotiators do their thing.
- Darfur – Security Council referred the situation. U.S. tried to suggest an alternative to the ICC within Africa (e.g. an extension of ICTR), but the SC said no, that's the whole point of the ICC.
- Bigger question: how do you use outside pressure to catalize inside pressure? How do you trigger something happening on the inside, and how do you discern if it's then a sham? What amount of pressure is needed to understand that the internal process is real and not a sham?
- Aggression: There is the possibility of adding this as a fourth crime – the waging of aggressive war, crimes against peace. Problems: (1) it is difficult to define – when is it humanitarian intervention, and when is it aggression? (2) Security Council is supposed to deal with threats to peace, so would giving the ICC this power interfere with the SC's role? There is a working group that is supposedly dealing with these questions because at the Rome Conference it was left open. NRA thinks it will be a long, long time before this issue is resolved, if ever.
- Measure of success should not be the number of convictions there are, but the extent to which this is a credible threat that makes other things happen
- ICC has ability to award reparations from individuals (but not States)

- For exam: (1) make sure you have temporal & spatial JX; (2) complementarity, (3) then assume it will borrow ad hoc jurisprudence

CRIMINAL PROSECUTIONS - TRANSNATIONAL CASES

Grounds for criminal jurisdiction in international law (in order of acceptance, starting w/most widespread):

- State of territory where crime occurred
- State of nationality of suspect (a.k.a. active personality)
- Something that has effects in your territory – e.g. antitrust law, counterfeiting of U.S. money abroad (protective JX)
- Passive personality JX – state of the victim. Many states have this JX, but over some crimes and not all.
- Universal JX – no tie between the doer and forum. Idea is that the interest of the forum is the interest of all humanity in squelching certain types of crimes. Bases: (1) These are international crimes, prohibited in both international and domestic law, and are the worst of crimes; (2) Internal jurisdictions are unlikely to adequately punish these crimes. 100 countries have some sort of universal JX, most apply only to war crimes though some (like Spain) have broader JX grounds.

Crimes subject to Universal JX (based either on treaty or customary international law)

- Piracy
- Slavery and slave trade (unclear if it extends beyond chattel slavery to modern forms such as forced labor)
- Genocide (though the Genocide Convention does not allow for universal JX – the basis is in changing notions of law and soft law instruments) (447)
- Grave breaches of Geneva Conventions - controversy: do they apply to internal war context? (448)
- Crimes against humanity – as a matter of customary international law, but may be harder to do (448)
- Torture – Article 5 of Torture Convention says that state of territory, nationality, of victim must prosecute and if torturer is found on your territory you must extradite or prosecute (447)
- Apartheid

Pinochet: Spain, 1996. p. 433.

- Part of a cluster of cases involving Argentina and Chile eventually consolidated into one case.
- Involved charges of genocide, torture and terrorism, all allowed under domestic (Spanish) penal code.
- Immunity: arguments against
 - Treaty-based: You have a regime criminalizing torture and let every state prosecute. Immunity would be inconsistent with its purpose
 - p. 438: Gough responds by saying the treaty does not explicitly say no immunity, so we shouldn't write it in there
 - It violates *jus cogens*
 - Official Acts: It's a functional immunity which only extends to official acts. These cannot be official acts because torture convention says they are crimes. It would subvert the whole purpose of having a regime of criminalization if torture requires state action but officials can be excused – this would mean you can get the lowly cop but not the guy on top
 - Single Acts: there is a split: (1) some say torture must be *systematic* to be criminal (Hope); (2) others say one act is good enough – there is no explicit reference to a need for systematic torture.
 - P. 444 – As of now, certain things cannot be immunized: (1) torture, (2) genocide, (3) war crimes that are grave breaches (only international). Development in international law says some type of conduct cannot be immunized – maybe crimes against humanity/other acts that shock the conscience. Current heads of state and ministers are immunized in national courts but not in international, past heads get no immunity.
- Extradition: if we get past immunity
 - Double Criminality: Due process rule to protect defendants – must be forbidden both in state where criminal is and state where he is being sent. National law built into many extradition treaties (you might even try to say it's customary international law)

- When? Previously, was seen as when the case comes to trial (court below).
- Pinochet's lawyers latch onto this and say it should be when the acts took place – this is problematic because CAT ratified in 1988, which would preclude 1973-88 acts. Once ruling comes out there is a mad scramble to find post-1988 torture cases.
- Millet: Everyone knows torture was a crime since 1945. CAT was just formalizing the pre-existing customary law prohibition against torture.

Other cases of Universal JX: mixed results

- Argentine case in Spanish courts was successful in (1) getting Argentine judges to give up amnesty; (2) getting Argentine courts to hear such cases
- Belgium: universal JX law amended 1993 after cases against Sharon and Bush elder for bombing
- ICJ: Solidified into law the idea of functional immunity
 - Current heads of state (Milosevic), only international courts can sue because it interferes with other customary law norms. No suits in national courts.
 - Former heads of state require functional immunity analysis (public vs. private acts). See arrest warrant case (Belgian Judge sued foreign minister for inciting genocide in Rwanda). ICJ says he was foreign minister at the time so he is suable.
- Legal strategy: importance of not sinking laws by bringing crappy test cases.

Developments in Universal JX since Pinochet

- Clearer tie to the forum required: if someone shows up and is present or if the victims are of that nationality, you have JX, but you can't just reach out and grab someone.
- Primacy/Exhaustion: Belgian courts say if there's a functioning legal system at home then no JX. Spain looks at whether a case has been filed at home – if not they go forward.
- Victim and Issue: Going directly to investigating Judge without involvement of State prosecutor impossible. Prosecutor must look at it first. In most cases prosecutor says to go ahead.
- Where to prosecute? Some countries have incorporated treaties into their domestic law (civil law countries and many Latin American nations) (see 499). Existence of democratic government, independent judiciary and large number of exiles may also help. May have problems convincing foreign nation to divert their human and financial resources from local cases. factors p. 452.

LABOR – ACCOUNTABILITY OF PRIVATE CORPORATIONS

ILO

- Formed in the wake of WWI (predates the U.N.)
- Tripartite structure (unique among international organizations): governments, labor unions and employer associations. Fairly high level of consensus required among them. See 923-25.
- Functions
 - drafts treaties: some very general, others specific
 - issues recommendations: not binding but states agree to implement
 - complaint procedure: around freedom of association (e.g. right to form a union)
 - technical assistance program

Child Labor

Why is it forbidden? Arguments for and against:

- relation to schooling – do kids need to go to school?
- survival of family: in poor societies, everyone has to work
- black market: children going into prostitution and drug-selling
- conditions of work
- need to learn a trade
- disguised protectionism: cross-cultural issue
- definitions of child: is this cross-cultural?

- is it voluntary labor or not?

Solutions – what can we do?

- Improve conditions of work – prevent stunting of growth, going blind, psychological trauma, inhaling chemicals
- Norms on responsibilities of transnational corporations (supp. 263)
- WTO – trade disciplines: questions of how to label things, differentiate processes by which they're made
- Convention on the Worst Forms of Child Labor – ILO's solution: we can't solve this but maybe we can focus on just the worst part and we can at least agree on these - Convention 182 (p. 941):
 - Bonded labor: labor recruiter comes to village with money and loans them money in exchange for kid. Kid is then charged for food, etc, so she can never repay her debt. Before you know, family is in even deeper.
 - Forced labor
 - Child Soldiers
 - Sex, drugs and arms industries
 - Work likely to harm health, safety or morals (mining, heavy duty construction)
 - Arguments against: if we only go after the worst forms, are we saying the rest are ok? (consensus is that states are still free to go after other forms)
- What must States do?
 - Must prohibit and criminalize use of children in these ways
 - Must take effective action
 - Does this solve the problem that people need to make a living?

ILO Program on Child Labor (IPEC)

- Tries to deal with schooling and survival issues – see pp. 952-57 for descriptions
- Along with monitoring of standards, most important activity of ILO
- Discourages people from fining children when they find out they're underage
- Solutions
 - Tell company to educate children a certain number of hours a day if they're working
 - We will pay you what you were earning on the job if you go to school and maintain a certain GPA (problem: budgetary constraints)
 - Look at family members and see if you can instead employ an older family member (problem: kids are employed because you can pay them less and they're more docile)

What can companies do to avoid being caught for using child labor?

- Code of conduct
 - wages: national minimum wage, or a more living wage? prevailing (industry) wage?
 - working conditions, hours
 - child labor: must be tied to compulsory schooling (can't hire anyone unless above level of national compulsory schooling)
- Monitoring: Internal vs. external – can you get other people to say they are doing a good job? Problem: how do you get someone impartial?
- Industry Code: get together with other CEOs in your industry – if you're on your own then your prices will go up and your competitors' wont
- Public Relations/Branding: Campaigns to show you aren't using sweat labor; branding yourself as high end (you don't need to use sweatshops)
- Policy: tax breaks from governments if you act responsibly, multi-stake holder (bring in NGOs)
- Wages: national minimum wage vs. prevailing wage vs. living wage (calculated based on “basket of necessities” – how many calories do they need of their local staple food and how much would it cost. Same with shelter, etc. Translate into local currency and approximate what a family would need).

- Problem with living wages: you are creating a two-tiered market, where global industries pay a large amount and local industries have no incentive to pay as much. The UN norms talk about prevailing wage
- Some people say a business is a business, no matter whether it is a mom and pop or large organized global corporation. All businesses with more than x employees should be subject to these rules.
- Problem with corruption when large corporations are bargaining there, and taking away money that could be used to improve ESC rights of citizens. Solution: OECD treaty on bribery and in the US, Foreign Corrupt Practices Act.
- Developing countries say raising price of labor means it's less attractive for companies to come to your country. Some countries may try to package themselves as higher-level labor force (vs. cheap labor) and tend to do better over time (exception: China).
- Result: agreement to disagree.
- Working conditions: physical coercion, people not being allowed to take bathroom breaks
- Right to Organize: to some it's very basic – if you can't organize as a worker, it's hard to enforce any of these other rights.
 - Problem: in a place like China, you can say we will not stand in the way of you organizing, but Chinese law forbids such practices, so what can you do? Maybe some grievance procedure within the company to allow workers to bring complaints to management. Your job is to figure out how to allow this while complying with national law.
 - Situations where US corps play less benign role: Allegations where corporate actors turn a blind eye to use of repression against labor organizers (e.g. Colombia – US turning blind eye or even turning in certain people).
- Discrimination: women, age. There are principles such as Sullivan principles in South Africa (no discrimination based on race) and McBride principles in Northern Ireland (no discrimination based on religion).
- See summary of corporate obligations, supp pp. 269-281

Existing Solutions

- ILO Declaration of fundamental principles (p. 904): Freedom of association, child labor, forced labor, discrimination (note which of the above issues are not there). This is the bottom line – binds all states who are members regardless of whether they have signed on to any particular treaties.
- OECD guidelines include those above plus anti-corruption, security forces (do not hire actors with history of HR Abuses). Provides national contact point for complaints, which will in turn act as mediator and take it up with the company. If that does not work at most they can make the exchange public. These have worked in many countries, but not in the US.
- Project of developing norms came out as a result of frustration with the weakness of methods above. Attempts to move forward on direct accountability for foreign corporate actors. Attempt was to draw the principles from international human rights law rather than self-imposed codes of conduct.
- UN has 9 principles called the global compact: thou shalt not discriminate, use child labor, etc. Companies sign on and then have to tell you they're complying (or not). There is no mechanism, however, if you don't believe them.
- SA8000 (social accountability 8000): code of conduct that is auditable – you can send someone in to see if a company has complied. This is an exception - the ONLY auditable standard.
- Need for standards based on IHR law, not something made up by corporations, and that has a UN imprimatur, and that can begin to move from voluntary to binding obligations. UNHR Commission, last week, approved a process by which the UN can figure out what these norms are with caveats from the US and 13 others that they're not binding. As a matter of international law, it's not clear that we can bind people to child labor standards (unlike something like genocide, or torture).
- The next question is: what is out enforcement mechanism?
- There is a sense that more and more corporations will have to worry about these things. We are moving towards agreed-upon definitions, but still a lot of questions re: enforcement. Do we require labeling (e.g. the rugmark label)? Self-certification?

- There are proposals for a binding treaty on corporate accountability, but NRA thinks we are a long way away
- Perhaps there will be a UN special rapporteur on corporate accountability
- WTO/Trade agreement: you could build some sort of labor clause or HR clause into trade agreements.
 - Advantage: would allow you to feed into the rather hard enforcement mechanisms of international bodies such as the WTO.
 - The WTO already has something around labor rights, article XX(e), allowing states to restrict the importation of products made with prison labor. So why not child labor, forced labor, or labor under conditions that do not ensure an adequate wage for the worker?
 - There have been increasing efforts to build some sort of social cost provision into the trade agreements. Have only succeeded in getting declarations that child labor should not be used. Big problem is that developing countries see it as closing off their countries to global markets.
- NAFTA/CAFTA: Each country agrees to enforce its own laws. But this is not an international standard and does not create any kind of level playing field. It lets every country do what they want, but requires them to do it right (e.g. Mexicans at the time had decent labor laws but were not enforcing them).
- NAFTA side agreement: Another idea was to take this out of the main agreement but to sign a side agreement on labor. This agreement does not work – it’s useless, and as a mechanism has been unsuccessful.

HUMANITARIAN INTERVENTION

Now, a state may act in self-defense until the Security Council says otherwise

UN Charter: why does it not address humanitarian intervention?

- After all, these were the allies who had fought the Nazis in WWII
- Tainted history of concept of humanitarian intervention – it was implicit in notion of colonization, and had even been used by Nazis as an excuse to go into Poland.

How do you define humanitarian intervention, and when is it justified?

- No provision in U.N. Charter. Glennon article: the charter assumes that interstate violence will be the biggest problem in the world, while today intrastate violence (among ethnic groups within countries) is truly the big problem. The Charter’s notion of sovereignty (State as autonomous, independent territory) is antiquated.
- U.N. efforts failed because Russia and China saw this as outside purview of Security Council
- Glennon: Failure to intervene at the right times represents failure of this UN system. The UN system is dead and intervention is justified until we come up with something else.
- If we were to put together a treaty, what would you want as conditions for intervention?
 - Consensus of violation of human rights – *jus cogens*?
 - Means of intervention
 - Force: proportional, necessary, imminence of threat, retreat
 - Last resort – exhaustion of alternatives
 - Multilateralism: is this problematic, given the fact that usually those in the region do not have a say? Regionalism may need to be a requirement – getting all the countries in the neighborhood to agree. Problem: can they be impartial?
 - Remove suspicion of self-interest
- Can you argue that the UN Charter today reinforced the above considerations? If the Security Council fails to approve your intervention, maybe you have the wrong motives and should reconsider. Does SC approval legitimize intervention? See p. 336.
- If it is the practice of states to create international law, then intervention may be justified by saying it was custom/opinio juris b/c supported by most states
- Int’l law recognizes right to democratic governance as exception to non-intervention rule (327)
- Glennon: new regime: intervention ok if costs of not intervening “too high,” intervention on pretext not ok, prefers multilateral intervention over unilateral (333).
- Teleological approach looks to goal of charter as a whole, says can be justified under certain circs. (346-48)
- Examples of US intervention and self-defense args. (352-57)

- OAS Charter allows self-defense (p. 356)

Kosvo: Was NATO intervention justified? See pp. 338-341

- Threshold: is the issue even relevant, given institutions' inability to act this way?
- Would it have been justifiable to have intervened at the time of Yugoslavia's collapse?
- If we have a moral duty to intervene, why did we not do so in Rwanda?
 - We are culturally unaware of Africa, we may not care as much about helping people with whom we can't identify, perhaps we were reluctant to intervene after Somalia and Beirut fiascos.
 - Powell doctrine – US should not intervene when there is a lack of political will to do so
- Is it rather than a duty an opportunity?
- *Erga omnes* obligations – these are owed to all States by all States. Is the legal obligation itself, or the moral undercurrent, more important?
- There is tension between our sense of morality (most people support intervention) and our legal rights under the U.N. Charter. If we see intervention in moral terms, is it legitimized on humanitarian grounds despite its illegality?
- How we intervene may be relevant – is bombing justified, or are there other ways to achieve our ends? We bombed them into compliance, but our aim was to change public opinion/force Milosevic to back down
 - Clinton knew the casualties for Americans would be much fewer than putting men on the ground

ENVIRONMENT AND HR: To what degree is environmentalism connected to HR?

- How do HR problems cause environmental degradation?
 - not providing housing → teeming slums have problems with sanitation, air and water pollution, etc.
 - conflict (war, bombings, destruction of villages/land, water contamination) → source of environmental degradation
 - ESC right to standard of living → unsustainable resource use (deforestation, effects on wildlife, overgrazing/hunting/fishing, etc. b/b no other way for people to survive)
 - lack of labor rights or ability to defend right create cheap labor → things that don't take into account the cost of natural resources make unsustainable resource use economically viable
 - indigenous people → cultural survival depends on ability to continue maintaining traditional way of life in balance with nature, so you get degradation when they are under attack or subject to outside pressures
 - Most of these have to do with direct exploitation (except war). But also, if you don't have political and civil rights (direct representation, right to protest, free expression, freedom from arbitrary detention, etc.) then there is no way to protest or protect the environment or their communities
- How does environmental harm/degradation cause HR violations?
 - Cutting down of forest or contamination of water through large-scale infrastructure projects (oil and mineral extraction, building pipelines, etc.) → (1) makes community unreliable, outbreaks of disease b/c of introduction of new peoples, impact on health and well-being of the community and standard of living; (2) impacts freedom of movement (ability to travel, to enjoy land/property freely)
 - Global warming, desertification (loss of land, e.g. in Mexico), sea-level rise, etc. → refugee flows as people move away to cities or to other countries.
 - Lack of water due to environmental changes → in Sudan, causes the Nomadic groups to move South, to run into territory of farmers, more people looking for a living with fewer resources is a recipe for disaster and conflicts driven by resource degradation.
 - No trees, no rain, climate gets drier and harder
- Is there a right to an environment? How do we frame it?
 - Its aspects cut across civil and political as well as economic social and cultural: right to health, enjoyment of property, right to culture or worship, right to life (your water supply is poisoned)
 - Right to environment, then, is best framed as a procedural right (to be informed, protest, etc.) plus a right to human health and livelihood.
 - It's both a positive and negative right – see Nigeria case (supp 292):
 - African Convention has an explicit right to environment because of colonialism.

participated in the drafting of? You have to go through elaborate process and look at state practice. Look at widely ratified declarations or resolutions, esp. where state would be negatively affected but they agree anyway, court decisions, in criminal law the ICTY tribunals, in other areas the ICJ or regional courts that have dealt with the issue, diplomatic notes, situations where states have gotten up and yelled and screamed and said “you can’t do that!” Anything that would make apparent the thinking of the executive branch, also taking into account the state’s legislature and judiciary.

- What do you need, where do you find it, what args will you and the other side make, what do you need to do to accomplish your goals? What treaties apply, and what is the customary international law?