NATIONAL OPEN UNIVERSITY OF NIGERIA

SCHOOL OF LAW

COURSE CODE:-LAW 242

COURSE TITLE:-
THE HUMAN RIGHTS LAW II

COURSE GUIDE

LAW 242
THE HUMAN RIGHTS LAW II

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Introduction

Human Right Law is a two-semester course. You would take the first part in the first semester. The code is LAW 242. It is a foundation level course and available to all students towards fulfilling core requirements for the degree in Law.

The course will discuss basic law principles. The material has been developed to suit students in Nigeria by adapting practical examples from within our jurisdictions.

This course guide tells you briefly what the course is about, what course materials you will be using and how you can work your way through these materials. It suggests some general guidelines for the amount of time you are likely to spend on each unit of the course in order to complete it successfully. It also gives you some guidance on your tutor-marked assignment (TMAs). Detailed information on TMAs is found in the separate assignment file, which will be available to you in due course. There are regular tutorial and surgery classes that are linked to the course. You are advised to attend these sessions.

What You Will Learn in this Course

The aim of LAW 242 is to introduce the fundamental principles and applications of the Law of Human Right. During this course, you will learn about Group Right, Right of woman, Right of Refuges and fundamental Human Right enforcemenet procedure

Course Aims

The aim of the course can be summarised as follows: this course aims to give you an understanding of the general principles of law and how they can be used in relation to other branches of law.

This will be achieved by aiming to:

- Introduce you to the basic sources of law of Human Right
- Formation of Group Right
- Terms of Human Rights, Governmental administrative process and administration of justice
- Locus Standi.

Course Objectives

To achieve the aims set out above, the course sets overall objectives. In addition, each unit also has specific objectives. The objectives are always included at the beginning of a unit; you should read them before you start working through the unit. You may want to refer to them during your study of the unit to monitor your progress. You should always ensure that you have done what was required of you by the unit.

Set out below is the wider objectives of the course. By meeting these objectives you should have achieved the aims of the course.

On successful completion of this course, you should be able to:

3 explain the term Human Rights
4 differentiate between Domestic Law and International Law
5 describe the nature of International Obligations
6 describe what constitutes a Treaty in International Law
7 explain building blocks of Human Right Laws
8 explain the enforcement of Human Rights
9 define Locus Standi
10 explain Declaration actions.

Working through this Course

To complete this course you are required to read the study units, read set books and other materials: Each unit contains self assessment exercises, and at points in the course you are required to submit assignments for assessment purposes. At the end of the course is there a final examination. The course should take you about 12 weeks or more to complete. Below you will find a list of all the components of the course,

what you have to do and how you should allocate your time to each unit in order to complete the course successfully on time.

Course Materials

The major components of the course are:

1. Course Guide
2. Study Units
3. Textbooks
4. Assignment File and
5. Presentation Schedule.

In addition, you obtain the set books; these are not provided by the National Open University of Nigeria (NOUN), obtaining them is your responsibility. You may purchase your own copies. You may contact your tutor if you have problems in obtaining these textbooks.

Study Units

These are 17 study units in this course, as follows:

Module 1

Unit 1 The Human Rights of Woman
Unit 2 Right of Children
Unit 3 Rights of Refugees
Unit 4 Ethnic Nationals in Nigeria and the Right to Self Determination

Module 2

Unit 1 European System of Protection of Human Rights
Unit 2 Inter American System for the Protection of Human Right and e.g. African Charter of Human Rights
Unit 3 African Charter of Human Rights and the Status of Domestic Legislation

Module 3

Unit 1 Human Rights, Governmental Administrative Process and Administration of Justice
Unit 2 Enforcement of Human Rights; Locus Standi
Unit 3 Locus Standi

Module 4

Unit 1 Enforcement of Human Rights; The Role and Functions of the National Commission on Human Rights particularly in Relation to the Monitoring and Investigation of Human Rights Violations
Unit 2 The Public Complaints Commission
Unit 3 The Role and Function of the African Commission on Human and People's Rights

Module 5

Unit 1 The Fundamental Rights (Enforcement Procedure) Rules.
Unit 2 Relief Available upon an Application for Judicial Review
Unit 3 Declaratory Action
Unit 4 Originating Notice of Motion

Each unit contains a number of self assessments. In general, these self assessments question you on the materials you have just covered or

required you to apply it in some way and, thereby, help you to gauge your progress and reinforce your understanding of material. Together with Tutor-Marked Assignments (TMAs), these exercises will assist you in achieving the stated learning objectives of the individual units of the course.

Textbooks and References

There are some books you should purchase for yourself:

London: Sweet .

Assignment File

In this file you will find all the details of the work you must submit to your tutor for marking. The marks you obtain for these assignments will count towards the final mark you obtain for this course. Further information on assignments will be found in the assignment file itself and later in this course guide in the section on assignment. You are to submit five assignments, out of which the best four will be selected and recorded for you.

Presentation Schedule

There are two aspects to the assessments of the course. First, are the TMAs and second, there is a written examination.

In tackling the assignments, you are expected to apply information, knowledge and techniques gathered during the course. The assignments must be submitted to your tutor for formal assessment in accordance with the deadlines stated in the presentation schedule and the assignment file. The work you submit to your tutor for assessment will count for 30% of your total course mark.

At the end of the course you will need to sit for a final written examination for three hours duration. This examination will also count for 70% of your total course mark.

Tutor-Marked Assignment

There are five tutor-marked assignments in this course. You only need to submit four of them. You are encouraged, however, to submit all five assignments, in which case the highest four assignments count for 30% towards your course mark.

Assignment questions for the units in this course are contained in the assignment file. You will be able to complete your assignments from

the information and materials contained in your set books, reading and study units. However, it is desirable in all degree level education to demonstrate that you have read and researched more than the required minimum. Using other references will give you a broader viewpoint and may provide a deeper understanding of the subject. When you have completed each assignment, send it together with a TMA form to your tutor. Make sure that each assignment reaches your tutor on or before the deadline given in the presentation schedule and assignment file. If, for any reason, you cannot complete your work on time, contact your tutor before the assignment is due to discus the possibility of an extension. Extensions will not be granted after the due date unless exceptional circumstances.

Final Examination and Grading

The final examination for LAW 242 will be of two hours duration and have a value of 70% of the total course grade. The examination will consist of questions that reflect the types of self assessment, and tutor-marked problems you have previously encountered. All areas of the course will assessed.

Use the time between finishing the last unit and sitting for the examination to revise the entire course. You might find it useful to review your self assessment exercises, TMAs and comments by your tutorial facilitator before the examination. The final examination covers information from all parts of the course.

Course Marking Schedule

The following Table spells out how the actual course mark allocation is broken down:

Assessment	Marks
Assignments 1-4	Four assignments, best three marks of the count at 30% of course marks.
Final examination	70% of overall course marks
Total	100% of course marks

Table 1 Course-Marking Schedule

Course Overview

This Table brings together the units, the number of weeks you should take to complete them and the assignments that follow them.

Unit	Title of Work	Weeks Activity	Assessment (End of Unit)

	Course Guide	Week 1	
	Module 1		
1	The Human Rights of Woman	Week 1	Assignment 1
2	Right of Children	Week 2	Assignment 2
3	Rights of Refugees	Week 3	Assignment 3
4	Ethnic Nationals in Nigeria and the Right to Self Determination	Week 4	Assignment 4
	Module 2		
1	European System of Protection of Human Rights	Week 5	Assignment 5
2	Inter American System for the Protection of Human Right and e.g. African Charter of Human Rights	Week 6	Assignment 6
3	African Charter of Human Rights and the Status of Domestic Legislation	Week 7	Assignment 7
	Module 3		
1	Human Rights, Governmental Administrative Process and Administration of Justice	Week 8	Assignment 8
2	Enforcement of Human Rights; Locus Standi	Week 9	Assignment 9
3	Locus Standi	Week 10	Assignment 10
	Module 4		
1	Enforcement of Human Rights; The Role and Functions of the National Commission on Human Rights particularly in Relation to the Monitoring and Investigation of Human Rights Violations	Week 11	Assignment 11
2	The Public Complaints Commission	Week 12	Assignment 12
3	The Role and Function of the African Commission on Human and People's Rights	Week 13	Assignment 13
	Module 5		
1	The Fundamental Rights	Week 13	Assignment 14

	(Enforcement Procedure) Rules		
2	Relief Available upon an Application for Judicial Review	Week 14	Assignment 15
3	Declaratory Action	Week 15	Assignment 16
4	Originating Notice of Motion	Week 16	Assignment 17

Table 2 Course organizer

How to Get the Most from this Course

In distance learning the study units replace the university lecturer. This is one of the great advantages of distance learning; you can read and work through specially designed study materials at you own pace, and at a time and place that suit you best. Think of it as reading the lecture instead of listening to a lecturer. In the same way that a lecturer might recommend some reading, the study units tell you when to read recommended books or other materials, and when to undertake practical work. Just as a lecturer might give you an in-class exercise, your study units provide exercises for you to do at appropriate time.

Each of the study units follows a common format. The first item is an introduction to the subject matter and how a particular unit is integrated with the other units and the course as a whole. Next, is a set of learning objectives. These objectives let you know what you should be able to do by the time you have completed the unit. You should use these objectives to guide your study. When you have finished the unit you must go back and check whether you have achieved the objectives. If you make a habit of doing this you will significantly improve your chances of passing the course.

The main body of the unit guides you through the required reading from other sources. This will usually be either from your recommended books or from a reading section. Self assessment exercises are interspersed throughout the unit, and answers are given at the end of units. Working through these tests will help you to achieve the objectives of the unit and prepare you for the assignments and the examination. You should do each self assessment exercise as you come to it in the study unit. There will also be numerous examples given in the study units; work through these when you come to them too.

The following is a practical strategy for working through the course. If you run into any trouble, telephone your tutorial facilitator or visit your

study centre. Remember that your tutor's job is to help you. When you need help, don't hesitate the call and ask your tutor.

- Read this course guide thoroughly
- Organise a study schedule. Refer to the 'Course Overview' for more details. Note the time you are expected to spend on each unit and how the assignments relate to the units. Important information, e.g. details of your tutorials, and the date of the first day of the semester is available. You need to gather together all this information in one place, such as your diary or a wall calendar. Whatever method you choose to use, you should decide on and write in your own dates for working on each unit.
- Once you have created your own study schedule, do everything you can to stick to it. The major reason that students do not perform well is that they get behind with their course work. If you have difficulties with your schedule, please let your tutor know before it is too late for help.

Facilitators/Tutors and Tutorials

There are 10 hours of tutorials provided in support of this course. You will be notified of the dates, times and location of these tutorials together with the name and phone numbers of your tutor, as soon as you are allocated a tutorial group.

Your tutor will mark and comment on your assignments, keep a close watch on your progress and on any difficulties you might encounter and assistance will be available at the study centre. You must submit your tutor-marked assignments to your tutor well before the due date (at least two working days are required). They will be marked by your tutor and returned to you as soon as possible.

Do not hesitate to contact your tutor by telephone, e-mail, or during tutorial sessions if you need to. The following might be circumstances in which you would find help necessary. Contact your tutor if:

1. You do not understand any part of the study units or the assigned readings
2. You have difficulty with the self assessment exercises
3. You have a question or problem with an assignment or with your tutor's comments on an assignment or with the grading of an assignment.

You should try your best to attend the tutorials. This is the only chance to have face to face contact with your tutor and to ask questions which are answered instantly. You can raise any problem encountered in the

course of your study. To gain the maximum benefit from course tutorials, prepare a question list before attending them. You will learn a lot from participating in discussions actively.

Some of the questions you may be able to answer are not limited to the following:

a) Distinguish between Agreement and a contract
b) Outline four constituent elements of a contract
c) Define the term contract
d) Explain the term offer? And invitation to Treat
e) What constitute acceptance in the law of contract
f) What if illegal contract
g) Can a court of law enforce an illegal contract

Summary

Of course the list of questions that you can answer is not limited to the above list. To gain the most from this course you should try to apply the principles that you encounter in every day life. You are also equipped to take part in the debate about legal methods.

We wish you success in the course and hope that you will find it both interesting and useful.

UNIT 1 THE HUMAN RIGHTS OF WOMEN

CONTENTS

1.0 INTRODUCTION

Women's rights are an integral part of human rights. The centrality of women's rights to human rights, and indeed, the inter-linked nature of all human rights, was affirmed by the 1993 Vienna World Conference. The Vienna Declaration and Programme of Action stated that 'The human rights of women and the girl child are an inalienable, integral, and indivisible part of universal human rights'. The protection and enhancement of women's rights ensures:

4. the full and equal participation of women in political, civil, economic, social and cultural life, at the national, regional, and international levels, and the eradication of all forms of

discrimination on the grounds of sex are priority objectives of the international community.

(http://www.unhchr,org/huricane/huricane,nsf/NewsRoom)

2.0 OBJECTIVES

By the end of this chapter and the relevant readings you should be able to:

5. explain the nature of women's rights as human rights including feminist critiques of international law
6. outline the Article of the Convention for the Elimination of All Forms of Discrimination Against Women (CEDAW)
7. explain the operation of the Optional Protocol to CEDAW
8. describe the role of The Commission on the Status of Women (CSW) and
9. gender mainstreaming
10. summarise the Declaration on the Elimination of Violence against Women
11. explain the role of the Special Rapporteur on Violence against Women
12. appreciate the cultural issues relating to the enforcement of women's rights.

3.0 MAIN CONTENT

3.1 The Challenge of 'Women's Rights'

3.1.1 An Overview

Women's rights seek to challenge and break down the exclusion that women have suffered in all parts of the world. We could relate women's rights to feminism as a cultural and political force. Feminism can be understood as a broad based and diverse movement that seeks to protect and promote the interests of women. Feminists are also active in linking women's rights to the eradication of poverty; a factor that increasingly drives forward the rights agenda. A recent UN report provides some details. Poverty has to be understood in a wide sense, as including not just a lack of financial and social resources, but an exclusion from health care, legal services and civic life. On the whole, women work longer hours than men, with at least half the total time spent in unremunerated labour. This invisibility leads to 'lower social entitlements to women as compared to .men. This inequity in turn perpetuates the gender gap in accessing needed resources'.

Reproductive health problems also impact negatively on women.
Poor women may be forced to have more children than they want. Infection rates of AIDS/HIV and other SIDs are also higher for women than men because:

- gender inequality often deprives women of the ability to refuse risky practices, which leads to coerced sex and sexual behaviour. ..Women represented half of all HN-positive adults in 2001, up from 41 per cent in 1997.

Social and economic development requires the empowerment of women. Those countries that have show good development rates have also invested in universal health care and education.

Furthermore, successfully developing nations have passed laws and taken policy initiatives to end discrimination and ensure that women playa full part in the social and economic life of a country. However, these initiatives have to be driven from the grass roots. There is no point imposing health care programmes if they do not deal with the problems that women are experiencing. Policies should thus be driven by consultative processes that take the problems of both rural and urban women seriously. If a nation is able to improve the opportunities open to women, there are other positive consequences:

- Improving women's education has proved to contribute the most to reducing the rate of child malnutrition, even more important than improvements in food availability. Mothers' education delivers improved nutrition. Closing the gender gap in education also helps women to reduce fertility and improve child survival. In countries where girls are only half as likely to go to school as boys, adds the report, there are on average 21.1 more infant deaths per 1,000 live births than in countries with no such gender gap.

- ‘People, Poverty and Possibilities: Making Development Work for the Poor’ UNPFA, 2002 [ISBN 0897146506]. (See also UNFPA’s *State of World Population* at www.unfpa.org.)

For further information on women's social and economic conditions, see Steiner and Alston (2000 pp.163-173). You might want to use this information in your notes to build up a more detailed account of the problems that women's rights are meant to counter. In particular, Steiner and Alston provide extracts from reports detailing violence against women in Brazil, and an Amne9ty International report on Rape and Sexual Abuse. These extracts are printed alongside other reports and comments on the social exclusion that women suffer. The problems of

violence and social exclusion are clearly linked. We will return to this problem later in this chapter.

We will now examine in a little more detail one particular area of discrimination against Women.

i. Case Study: Property rights of Women in Kenya

We can briefly examine a Human Rights Watch Report on Property Rights in Kenya. Property rights of women in Kenya are bound up with the structure of the country's land law. What has tended to drive reform since independence was gained in 1962, has been the need to ensure an equitable ~~vision of land between the different ethnic groups within Kenya. A related problem has been the different customary jurisdictions, with frequent contradictory provisions and the historical structure of title, inherited from colonial times which favoured male ownership of land. Reforms have been made in the law of succession and family law, but gender imbalance in land ownership remains. There are at present five different legal systems that apply to marriage. These are:

1) civil (under the Marriage Act)
2) Christian (under the African Christian Marriage and Divorce Act and the Marriage Act)
3) Islamic (under the Mohammedan Marriage, Divorce and Succession Act)
4) Hindu (under the Hindu Marriage and Divorce Act) and
5) Customary (under customary laws).

At a constitutional level discrimination on the basis of sex is prohibited, but there are exceptions which allow discrimination in personal and customary law. At present, though, there is an ongoing process of constitutional reform, and it is hoped that this will enhance women's rights.

The failure to effectively protect women is one reason why they remain ‘worse off than men’:

- By just about any measure, women in Kenya are worse off than men. Their average earnings are less than half those of men. Only 29 per cent of those engaged in formal wage employment are women, leaving most to work in the informal sector with no social security and little income. The numbers of women in formal employment are decreasing. Women head 37 per cent of all households in Kenya, a number likely to grow as *AIDS* claims more victims. Eighty per cent of female-headed households are either poor or very poor, in part due

to their limited ownership of and access to land. Girls receive less education than boys at every level, and women's literacy rate (76 per cent) is lower than men's (89 per cent).Violence against women is commonplace: 60 per cent of married women reported in a 2002 study that they were victims of domestic abuse. In another study published in 2002, 83 per cent of women reported physical abuse in childhood and nearly 61 per cent reported physical abuse as adults. According to women's rights advocates, there is only one shelter for battered women and their children in the entire country.

- Women's property rights violations and their consequences hnp://hrw.org/reports/2003/kenya0303/

A similar pattern can be observed in relation to land holding:

1. Women's land ownership is miniscule despite their enormous contribution to agricultural production. Women account for only 5 per cent of registered landholders nationally. The agricultural sector contributes over 80 per cent of employment and 60 per cent of national income. Women constitute over 80 per cent of the agricultural labour force, often working on an unpaid basis, and 64 per cent of subsistence farmers are women. Women provide approximately 60 per cent of farm-derived income, yet female-headed households on average own less than half the amount of farm equipment owned by male-headed households. Rural women work an average of nearly three hours longer per day than rural men. With so many women working in the agricultural sector and so few in formal employment, it is all the more devastating when women lose their land. (ibid)

Customary law derives from custom and practice, but is also formally recognised by legislation and the Kenyan legal system. The tendency towards a complex patterning of customary law reflects the fact that each ethnic or tribal grouping may have its own law.

Customary law is enforced by tribal leaders or elders, but may also be applied in court proceedings. Customary laws that relate to property can be traced back to the pre-colonial period. Precisely because customary law is fluid, and changes as custom changes, it is not necessarily resistant to social change. However, what is problematic is the fact that the norms of customary law are rooted in customs that may themselves be deep-seated and hard to change. Consider the practice of wife inheritance that is practiced in some parts of Kenya. Although there are many different permutations to this practice, some common features can be suggested. In the past, this custom was one way of ensuring a degree

of social protection for widows. Widows were not themselves able to inherit land, so, providing that the widow herself was inherited went some way to making sure that the widow and her dependents would be supported. The rituals associated with wife inheritance involved the 'cleaning' of the widow. There was a fear that she would be contaminated with her husband's spirit. In one particular ritual, the widow would have to have sexual intercourse with a social outcast:

2. Women's property rights closely relate to wife inheritance and cleansing rituals in that many women cannot stay in their homes or on their land unless they are inherited or cleansed. According to one women's rights advocate, Women have to be inherited to keep any property after their husbands die. They have access to property because of their husband and lose that right when the husband dies.' Women who experienced these practices told Human Rights Watch they had mixed feelings about them. Most said the cleansing and inheritance were not voluntary, but they succumbed so that they could keep their property and stay in their communities. (ibid)

SELF ASSESSMENT EXERCISE

1. What inherent problems with the structure of Kenyan society and law tend to militate against women's property rights?
2. What do the figures quoted above suggest about the social and economic position of Women in Kenya?
3. What is customary law? Are there any particular problems with customary law as far as women's rights are concerned?

Customary Law

See Steiner and Alston (2000 PP.420-421) on how customary practices can change. The example concerns the Sabiny people in eastern Uganda. It shows that the norms of customary law can change to reject practices that are unacceptable from a human rights perspective.

SELF ASSESSMENT EXERCISE

Read Steiner and Alston's summary of the article by An-Na'im on Pp. 426-428. This piece concerns state responsibility under international human rights law to change religious and customary practices. An-Na'im concerns himself with the way in which customary law can change.

1. What does An-Na'im suggest in relation to the authority of customary law? Why is an understanding of the basis of customary law important (or a human rights lawyer or activist?

Summary

Women's rights are an integral pan of human rights. Women's rights guarantee the inherent dignity of women, but are also relevant to the Struggle against poverty. Women face structured disadvantage in many if not an countries of the world, although we have tended to concentrate in this section on the developing world. We have *also* seen that furthering the protection of women's rights involves complex issues of social change. It is necessary that advocates of human rights do not approach cultures in a high-handed way, and seek to engage in constructive and sensitive cross-cultural dialogues in order to break down resistances to those changes that are necessary to empower women.

ii. A Note on Women's Rights and International Law

There are other pieces that draw inspiration from feminism in Steiner and Alston's collection. Please read the summary of Charlesworth and Chinkin's article, pp.218-220. Charlesworth is critical of the centrality of the state to international law in the first extract. In the second extract, writing with Christine Chinkin, she turns her attention to the international law doctrine of *jus cogens.* This is related to arguments about human rights. Although human rights are seen as a radical intervention in international law, these interventions are not radical enough from the viewpoint of women. Although developments in human rights law have broken down a traditional divide between public and private, these values have been re-inscribed in a way that reflects male interests. Human rights catalogues tend to reflect the public harms that men fear most: harms that come out of a fear that government will act in certain unrestrained ways. The same prestige has not been given to social and economic rights that affect the private sphere; a sphere associated more with women than men.

This is not to say that women do not suffer from the rights linked to the public sphere, but the way in which 'rights have been constructed obscures the more pervasive harms done to women' (ibid., p.174). Consider Article 6 of the ICCPR, the right to life, a right concerned with public actions that 'arbitrarily' deprive individuals of their life. This ignores the private way in which women may suffer harm in the private sphere; from the abortion of female foetuses and female infanticide to the preference given to male over female children; a point that could be linked to violence against women in the family. To take one final example, even the fundamental right to self-determination asserts the

right of groups of people to determine their political status; it does not apply to women within those groups.

SELF ASSESSMENT EXERCISE

1. Refresh your memory of what *jus cogens* means, and prepare a short spoken statement which you could use to explain it to others. Include one or two examples of where it might apply.

The extract from Engle's article, pp.218-220, is a slightly different critique of the foundational public private distinction in international law. Criticizing the different critiques of this notion, Engle argues that the 'private', or at least the legal protection of privacy, can be beneficial for women. The piece suggests that it is necessary to re-consider some of the key terms used both by critics and apologists in debates over the nature of human rights and international law.

Summary

This brief section has looked at feminist critiques of international law. These critiques are important as suggesting a different and alternative perspective on the foundational concepts of the subject. If there are weaknesses in the international protection of Women's human rights, might it be that the subject itself is biased against the identification and effective protection of those rights?

3.2 The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)

3.2.1 Overview of CEDAW

CEDAW results from the work of the Commission on the Status of .Women (CSW).

The (CSW) was established by a resolution of the Economic and Social Council by Council resolution in 1946. The CSW was, at first only a sub-commission of the Commission on Human Rights, but its role was enhanced as the UN began to appreciate that the Bill of Rights was not effective in promoting women's rights. From 1949- 1959, the CSW created a number of documents that covered women's rights in various areas, it was increasingly felt that there was a need for a coherent and consistent approach to the issue. The Declaration on the Elimination of Discrimination against Women was adopted in 1967. However, the subordinate status of women's rights was apparent in the form of the

document. The Declaration was a statement of principle, and did not have the force of a treaty. In the early 1970s, however, as the awareness of the scale of discrimination against women became increasingly obvious, the CSW argued that a treaty was necessary. The Convention on the Elimination of All Forms of Discrimination against Women was adopted in 1979. We will examine its enforcement mechanisms below.

CEDAW begins with a reference back to the Charter of the United Nations, thus connecting the idea of the rights of women with the fundamental ideas of dignity and human worth that underlie that document. The paragraph goes on to make reference to the Universal Declaration of Human Rights and the central prohibition of discrimination. The prohibition on discrimination clearly underlies the idea that men and women are equal in worth and dignity. However, despite state parties subscribing to the standards set out in the Declaration, and undertaking the obligations contained in the International Covenants, ‘extensive discrimination against women continues to exist’. This means that women are not enjoying human rights, and are not participating in society on equal terms as men. Moreover, the burden of poverty presses unduly on women who may not have less access to food, health, education, and employment opportunities than men. CEDAW then makes a reference to the new international economic order. This UN initiative was an attempt by developing nations to redress the inequities of the world economy. The Convention asserts that this will ‘contribute significantly towards the promotion of equality between men and women’, and thus associates the struggle for women’s rights with the broader struggle for economic justice.

Other reference points are specified, and thus the championing of the rights of women is inseparable from the struggle against ‘apartheid, all forms of racism, racial discrimination, colonialism, neo-colonialism, aggression, foreign occupation and domination'. This is in turn linked to the valorisation of state sovereignty. One can appreciate that, in the context of colonialism, the need to privilege the nation state was important; indeed, ‘social progress’ is explicitly linked to the right to self-determination and international respect for the sovereignty of those new states emerging from colonial domination.

The introduction then turns to address the specific role that women play. CEDAW states that women make a ‘great contribution...to the welfare of the family and to the development of society’. Their role, however, has not been recognised, and the 'social significance of maternity and the role of both parents in the family and in the upbringing of children’ has been insufficiently protected. It is important to note, though, that this ‘special role’ that 1inks women to the family and the home, 'should not

be a basis for discrimination but that the upbringing of children requires a sharing of responsibility between men and women and society as a whole'. The burdens and responsibilities of the family, then, should not fall disproportionately on women: society as a whole should be organised in such a way as to involve men and women in equal measures in the tasks associated with the family. The problematic nature of this goal is articulated very clearly by the next paragraph:

3. ‘a change in the traditional role of men as well as the role of women in society and in the family is needed to achieve full equality between men and women'. It is easy to appreciate that this objective may lead to clashes between human rights and cultures that seek to preserve the ‘traditional’ role of women.

.

▪ Content of CEDAW

Part 1

Article 1 contains a definition of discrimination against women: the term 'shall mean any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field'.

This definition of discrimination would presumably cover both direct and indirect discrimination. This distinction is characteristic of UK anti-discrimination legalisation. Direct discrimination is an overt act of discrimination; indirect discrimination in a little harder to define. It can be understood as the imposition of a standard or a rule that is not explicitly discriminatory, but, the proportion of those in the discriminated group who can comply with it is much smaller than those not in that group. Thus, a job requirement specifying that an employee has to be away from home for long periods may be seen as indirectly discriminatory to women looking after children. The condition does not explicitly state that women caring for children cannot apply, but the proportion that would be able to comply is presumably much smaller than those not looking after children.

It is worth noting that discrimination on the basis on marital status is directly prohibited (i.e. any requirement that a person should be married, or not married).

Article 2 moves from a general definition to cover the ways in which discrimination is to be combated. Note how the obligation rests with the state party to:

4. incorporate anti-discrimination principles in the constitution and in legislation
5. deploy sanctions if necessary to achieve the goal of equality 0 require public authorities to act in a non-discriminatory way and
6. repeal penal legislation that is discriminatory.

Article 3 can be read alongside Article 2. It states that 'all appropriate measures' will be taken to further the fundamental rights and freedoms of women. Article 4 states an important caveat: measures promoting women's rights shall not themselves be considered discriminatory. Moreover, they must not amount to the 'maintenance of unequal or separate standards', as these are in themselves discriminatory. However, adoption of special measures to protect maternity is not to be considered discriminatory.

Article 5 places further duties on state parties. First of all, the article places an obligation to:

1) 'modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based' on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women.'

This is accompanied by a duty to ensure that family education includes a proper understanding of maternity as a social function and the recognition of the common responsibility of men and women in the upbringing and development of their children. Underlying this obligation is the assertion that the best interest of the children is the primary consideration in all cases.

Article 5 thus requires a significant input from the state in creating the conditions for a social re-alignment that breaks down those conditions that have kept women out of public life, or treated them as second class citizens. This requires action on stereotypical ideas of the roles of women and men; and a significant programme of education in relation to the role of the family. Coupled with the earlier article of section 1, this broad set of goals could be achieved through legislation, but, to be successful, such a programme would have to be accompanied with education.

Article 6 is brief. It moves from a consideration of the family to two other areas where women have been oppressed. It places a duty on state parties to 'take all appropriate measures...to suppress all forms of traffic in women and exploitation of prostitution of women'.

Part II

Part II of CEDAW elaborates in more detail the rights contained in Part I.

Article 7 concerns voting rights and public participation. State parties undertake to ensure that women, like men, can 'vote in all elections and public referenda ...and be eligible for election to all publicly-elected bodies'. State parties must also guarantee that women can 'participate in the formulation of government policy' and its implementation and hold public office. Women must also be allowed to 'participate in non-governmental organizations and associations concerned with the public and political life of the country''

Article 8 elaborates these provisions to an international level, placing an obligation on state parties to ensure that women have 'the opportunity to represent their governments at the international level and to participate in the work of international organizations'.

Article 9 moves on to a different but related concern. CEDAW places the right of nationality in the context of the problems faced by women. The right to 'acquire, change or retain…nationality' should be enjoyed equally by men and women. However, in relation to women, state parties must ensure that 'neither marriage to an alien nor change of nationality by the husband during marriage' should 'automatically change the nationality of the wife, render her stateless or force upon her the nationality of the husband'. In the second paragraph, state parties grant women equal rights with men 'with respect to the nationality of their children'.

Part III

Article 10 relates to the right to education. It addresses various issues that have tended to restrict the rights of women to enjoy equal opportunities in this area with men. Paragraph (a) concerns itself with conditions for career and vocational guidance, with particular reference to promoting the opportunities of women in rural as well as urban environments. The Article is detailed, as it elaborates an educational culture that does not operate on the provision of unequal and separate standards. Paragraph (b) thus specifies that women must have access to the same premises, facilities, teachers and curricula as men; later paragraphs stress that there must also be equal access to grants, and opportunities for physical education. Article 10 also elaborates the need

to break down stereotypical ideas about the role of women in education. Thus, state parties must work towards:
‘The elimination of any stereotyped concept of the roles of men and women at all levels and in all forms of education by encouraging coeducation and other types of education which will help to achieve this aim and, in particular, by the revision of textbooks and school programmes and the adaptation of teaching methods,’

Another broad policy goal is specified at para. (f). State parties must work towards the 'reduction of female student drop-out rates and the organisation of programmes for girls and women who have left school prematurely’. In other words, states must make a special effort to counter the pressures on girls to leave education. Family planning is also made part of this general approach to education in paragraph (h).

Article 11 moves from education rights to employment rights. The Article re-states the basic prohibition on discrimination, and then goes on, at 1 (a) to assert the right to work as ‘an inalienable right of all human beings’. This assertion relies on the fact that work is itself the access to civic status, and a wage in turn should allow the generation of personal resources. To be forcefully deprived of the opportunity to work is to be deprived of the benefits that come with working. Historically, and in the present day, preventing women from working, or from working in specific sectors or fields, was and is effective in limiting life opportunities and maintaining the subordinate status of women. Article 11 is then specific about how employment rights are to be protected. These methods include 'the application of the same criteria for selection in matters of employment, and at (c), the right to choice of profession, promotion, job security and all the benefits incidental to employment. Employment rights are further specified to include the right to equal remuneration (d), the right to social security (e), and the right to safe working conditions (t). The second part of the Article concerns the employment rights of pregnant women. Paragraph 2(a) prohibits discrimination on the grounds of pregnancy or maternity leave; (b) makes it a duty of state parties to provide 'the necessary supporting social services to enable parents to combine family obligations with work responsibilities and participation in public life’. Paragraph (d) states that special protection must be provided for pregnant women at work. The third part of the Article mandates a review of legislation in the 'the light of scientific and technological knowledge’.

Article 12 guarantees equal access to health care for women and men, as well as requiring state parties to ‘ensure to women appropriate services in connection with pregnancy, confinement and the post-natal period, granting free services where necessary, as well as adequate nutrition during pregnancy and lactation’.

Women's rights are distinctive to the extent that they recognise the special health care needs of women; indeed, this is one important area where women differ from men. These are outlined as the biological factors that relate to women's reproductive role, and also the 'higher risk of exposure to sexually transmitted diseases that women face'. But these differences are not just biological:

2) socio-economic factors that vary for women in general and some groups of women in particular. For example, unequal power relationships between women and men in the home and workplace may negatively affect women's nutrition and health. They may also be exposed to different forms of violence which can affect their health. Girl children and adolescent girls are often vulnerable to sexual abuse by older men and .family members, placing them at risk of physical and psychological harm and unwanted and early pregnancy. Some cultural or traditional practices such as female genital mutilation also carry a high risk of death and disability.

3) (www .ohchr .org/ english/ about/publications/ docs)

It may also be the case that women may be deterred from seeking medical advice in relation to contraception, abortion or when victims of sexual or physical violence, because of the stigma sometimes attached to such matters.

Article 13 further elaborates the prohibition on discrimination in relation to 'economic and social life'. More specifically, women and men must have equal access to: family benefits, the right to bank loans and credit, and the right to participate in cultural life. This Article seems somewhat underdeveloped. The access to finance, loan facilities and credit is increasingly important to the structure of the contemporary social world in both the developed and the developing world. For instance, one can only run a business if one can access credit facilities. It is somewhat strange that the right to work, and the right to education (for example) are so explicitly presented, whereas the right to financial services is so under- developed. Perhaps this reflects the situation at the time of the drafting of the Article; this is one area where a more thorough articulation of the right may be useful.

Article 14 perhaps addresses a reality that is more pressing in the life of women in the developing world than the developed world, as economies in the former are less dependent on mass employment in agriculture than the latter. The Article places a duty on state parties to take into account the 'particular problems faced by rural women and the significant roles

which rural women play in the economic survival of their families'. This means that special regard must be had to women's work in the 'non-monetised sectors of the economy'. In other words, women are disproportionately represented in informal and unregulated areas of economy as a result of their subordinate status. The Article goes on to specify objectives that must be addressed. States Parties must combat discrimination in rural areas, and ensure that women 'benefit from rural development'. More specifically, women must be encouraged 'to participate in the elaboration and implementation of development planning at all levels'. The rights covered above in relation to education and training are then re-iterated; but, other areas of participation are also elaborated. For instance, women must be enabled to 'organise self-help groups and co-operatives in order to obtain equal access to economic opportunities through employment or self employment'. Article 13 is then repeated in a slightly revised version: women must be enabled to 'have access to agricultural credit and loans, marketing facilities, appropriate technology and equal treatment in land and agrarian reform as well as in land resettlement schemes'. The final paragraph specifies that women must also 'enjoy adequate living conditions, particularly in relation to housing, sanitation, electricity and water supply, transport and communications'.

Part IV

Part IV addresses the legal and social status of women.

Article 15 addresses the equality of men and women before the law. The second paragraph requires state parties to provide identical legal capacity to women and men in civil matters: 'in particular, they shall give women equal rights to conclude contracts and to administer property and shall treat them equally in all stages of procedure in courts and tribunals'. As a corollary of this, state parties must ensure that all contracts and other private legal documents that deprive women of capacity are null and void, and must ensure that men and women have the same rights of movement, residence and domicile. This point has been made before, but it is worth repeating. The guarantee of lega1 capacity is a centra1 human right; indeed, a case could be made for it being the essentia1 human right. If anything, a human right expresses the conjunction of humanity with lega1 capacity. To be deprived of humanity is to become right-less, to have no lega1 capacity. Thus, human rights must, at base, assert an essentia1 connection between human being and the civic identity that the law enables.

Article 16 elaborates this notion of equa1 rights and legal capacity in relation to a specific area of law: marriage and divorce.

Discrimination against women must be eliminated in these areas by providing women and men with the same rights to enter into marriage with free consent and by maintaining a legal system that gives men and women that same rights during marriage and in the event of its dissolution. This would a1so cover rights over children, irrespective of marita1 status, including rights over guardianship, ward-ship, trusteeship and adoption of children. The last paragraph of the Article is interesting as it suggests an essentia1link between the rights of women and children: 'the betrothal and the marriage of a child sha11 have no lega1 effect, and a11 necessary action, including legislation, sha11 be taken to specify a minimum age for marriage and to make the registration of marriages in an official registry compulsory'.

Part V

Part V of CEDAW moves from substantive rights to certain institutiona1 and procedura1 concerns.

Article 17 sets up the Committee on the Elimination of Discrimination against Women staffed by 'experts of high mora1 standing and competence in the field covered by the Convention'. Elected by states parties from among their nationa1s in a secret ba11ot, and serving in a persona1 capacity (consideration being. given to both geographica1 distribution and to the representation of 'different forms of civilization as well as the principallega1 systems'), the members of the Committee are empowered, by

Article 18, to consider reports submitted to them by the Secretary-Genera1 of the United Nations. These reports must cover 'the legislative, judicia1, administrative or other measures' that states parties 'have adopted to give effect to the provisions of the present Convention'. States parties must also report on the progress they have made in implementing the CEDAW.

Article 21 goes on to detail the powers and duties of the Committee. Reporting annua1ly through the Economic and Social Council to the Genera1 Assembly, the Committee makes recommendations based on the reports that have been submitted by states parties. In turn, the Secretaty-Genera1 transmits the reports of the Committee to the Commission on the Status of Women for its information.

Article 22 empowers 'the specialised agencies' to make reports to the Committee.

Part VI of CEDAW concerns itself with a number of technica1 matters which will not be discussed here.

Under **Article 29** of CEDAW, two or more state parties can refer disputes about the interpretation and implementation of CEDAW to arbitration, and if the dispute is not settled, it can be referred to the International Court of Justice. This procedure is subject to a large number of reservations and has never been used.

▪ Additional Enforcement Mechanisms

In 1994, the Commission on Human Rights created, by resolution 1994/45, the post of special rapporteur on Violence Against Women, and created procedures whereby information could be obtained from governments on cases concerning alleged violence against women.

It is also worth remembering that mechanisms under different treaties may be employed. Communications could be made under the first Optional Protocol to the ICCPR. Communications concerning laws that discriminate against women could be made under this Protocol and by reference to Article 26 of the ICCPR.

This provides that men and women are equal before the law, and that the law must guarantee effective protection against discrimination. This procedure was used in Broeks v Netherlands 172/1984where a Dutch Unemployment Benefits Act was successfully challenged on grounds of discrimination.

The mechanism that we considered in Chapter 5, the 1503
Procedure of the Commission of Human Rights, may also be used.

Discrimination or violence against women may also fall under Article 14 of The Convention on the Elimination of All Forms of Racial Discrimination, or Article 22 of the The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

▪ Analysis of Rights in CEDAW and Other Human Rights Instruments

It is worth noting that more states have made reservations to this treaty than to any other human rights treaty. What does this suggest about the resistance to women's rights at a state level?

Pages 181-185 of Steiner and Alston contain an interesting analysis of rights and duties, and we will examine this in depth.

The comment on the state duties points out that human rights law has made a distinction between positive and negative rights. It is worth remembering that all rights correlate with duties to make sense of this

analysis. You might also want to look again at Chapter 3 of this subject guide, where we considered the legal nature of rights. Negative rights place a duty on the state not to interfere in certain areas where individuals have rights. Positive rights place a positive duty on the state: the duty to do something, such as providing food. Social and economic rights fell into this latter category. The classic civil liberties, for the most part, fall into the former category. However, to what extent is this distinction useful? If one remembers that rights develop over time, then a negative duty merely not to interfere, can become a positive duty to facilitate an area of activity: to encourage free speech, for instance.

Respect for the rights of others
This was a good example of a basic negative duty placed on the state. It is a basic human rights notion, laying down a fundamental standard that could even extend beyond the state to private parties. To the extent that a state should ensure private parties respect the rights of others, a negative duty has turned into a positive duty.

The creation of institutional machinery
There are many provisions in both the Declaration and CEDAW that require the provision of certain institutions: a voting system, or an independent legal system, for instance. This is a positive duty placed on a state; it would be hard to think of it as a negative duty simply not to interfere.

The duty to protect rights and prevent violations
Once again the strict negative/positive distinction tends to break down here. The duty to protect rights means that a state must not interfere, i.e. has a negative duty; but the duty to prevent violations is positive as it requires the creation of a police force and a legal system.

Provide goods and services to satisfy rights
Welfare rights which involve state expenditure are good examples of positive duties: the state has to provide institutions and resources, a health service, for instance.

Promotion of rights
Another positive duty, for reasons similar to those stated above.

It would seem, then, that a strict distinction between positive and negative rights is not useful. Indeed, the extract from the article by Nickel, suggests that one needs a more sophisticated way of understanding the complex nature of rights. Consider the prohibition of torture (or indeed, the prohibition of discrimination in the context of

CEDAW). The duty to refrain from an act is universal and general- it is addressed to both state and non-state bodies. However, an 'adequate response to the claim to freedom from torture also requires finding individuals or institutions that can protect people against torture' (185). This positive duty is not necessarily universal. It is only binding on those states or institutions that can mobilize the necessary resources. Nickel then makes a further distinction between the primary addressees, i.e. the state in our example, and secondary addressees who bear 'secondary or back up responsibilities'.

Thus, the people at large in a country, and also international agencies, are secondary addressees because they owe duties to assist, encourage and pressure governments to refrain from torture (186). The point of this analysis is to clarify the sense in which rights are always linked with duties; and duties can fall on different bodies.

SELF ASSESSMENT EXERCISE

1. In what ways could CEDAW be enforced?

▪ Feminist Criticisms of CEDAW

Feminist critiques of the Universal Declaration have made a number of points. There have been criticisms of Article 16 because it valorisesa notion of the family that is both unclear, and, in relation to Article 25(2), ill thought out. One issue that the Declaration does not cover adequately is the rights of the abused child, or even the abused wife against the family. Other criticisms of the ICCPR raise the issue that the reporting system does not deal properly with violations of women's rights. Criticisms of CEDAW address the fact that it has led to a 'ghettoisation' of women's rights issues. Furthermore, in comparison with other human rights bodies, the enforcement mechanism under CEDAW is poorly funded.

Are these criticisms fair? Clearly any assessment of these claims would depend on a derailed study of the reports under the ICCPR; it would also be necessary. to look at the figures for the budget of various UN agencies before one could assess the claim that CEDAW is under-funded. One would also have to bear in mind gender mainstreaming, and other recent developments before one could make an overall assessment of these claims.

Summary

In this section we have looked at the subsrantive rights contained in CEDAW. We have also considered the enforcement mechanisms that exist under the treaty. We then turned to a more formal analysis of

rights, and attempted to analyse the complex interplay between rights and duties.

- **The Optional Protocol**

CEDAW also has an optional protocol. Its Articles, so far as they concern us, are explained below.

6.1.1 Why was there a Need for an Optional Protocol?

The Optional Protocol to CEDAW was based on commitments made in the Vienna Declaration in 1993 and the 1995 Fourth Conference on Women. It was created by a resolution of the General Assembly. The protocol begins by asserting the competence of the Committee on the Elimination of Discrimination against Women to receive and consider communications in accordance with **Article 2**.

Article 2 provides that communications may be submitted by or on behalf of individuals or groups of individuals who are claiming to be victims of a violation of Convention rights. **Article 3** specifies that communications must be in writing and cannot be anonymous. Communication can only be received by the Committee if the communication concerns a state party that is a signatory to the Protocol. In other words, the Committee would not be able to consider a communication if it came from an individual or a group from a state party that was a signatory to the Convention, but not the Protocol.

Article 4 states that the Committee will only consider a communication if it can make sure that all available domestic remedies have been exhausted. There is an exception to this rule. A communication could be considered if all domestic remedies had not been exhausted, but, the application of such remedies was subject to an unreasonably delay; or indeed, it was unlikely that the available remedy would be effective. There are other grounds of inadmissibility:

The Committee shall declare a communication inadmissible where:

(a) The same matter has already been examined by the Committee or has been or is being examined under another procedure of international investigation or settlement;
(b) It is incompatible with the provisions of the Convention;
(c) It is manifestly ill-founded or not sufficiently substantiated; (d) It is an abuse of the right to submit a communication;

(e) The facts that are the subject of the communication occurred prior to the entry into force of the present Protocol for the State Party concerned unless those facts continued after that date.

Article 5 empowers the Committee to request a state party to take interim measures whilst a communication is being considered. These measures must prevent 'irreparable damage to the victim or victims of the alleged violation'. This does not apply, however, when the Committee is merely considering the admissibility of a communication. Interim measures thus only become available once a communication has been declared admissible.

Article 6 makes it a condition of the Committee bringing a communication to the attention of the state party concerned (confidentially) that the complainants consent to the disclosure of their own identity. Once the state party has received the communication, it has six months to submit to the Committee 'written explanations or statements clarifying the matter and the remedy, if any, that may have been provided by that State party'.

Article 7 stresses the confidential nature of the proceedings before the Committee. Article 7 para. 4 provides that once the state party has received the views of the Committee, it has six months to provide a written response, that specifies any action taken in the light of the views and recommendations of the Committee.

Article 8 allows the Committee to conduct an inquiry and to report urgently to the Committee where there is evidence of 'grave or systematic violations by a State party'. Such an inquiry may involve a visit to the territory of the state party concerned, and results in a report to the Committee, who in turn, transmits these findings to the State. Once the state party has received this report, it has six months to submit its observations to the Committee. Paragraph (5) provides that these inquiries are confidential, and consensual.

Article 9 specifies that a report to the Committee may contain details of the measures taken to respond to the issues raised by the inquiry.

Article 10 provides that it is possible to derogate Articles 8 and 9.

Article 11 is very necessary. It places a duty on state parties to take 'all appropriate steps' to make sure that those communicating with the Committee are not ill-treated.

6.1.2 What is the Role of the Optical Protocol?

The Optional Protocol includes two procedures: the communication procedure and the inquiry procedure. The communication procedure allows individuals and groups to complain to the Committee about violations of rights. The inquiry procedure enables inquiries to be made into grave or systematic abuses of human rights by experts.

SELF ASSESSMENT EXERCISE

Read Steiner and Alston, pp.188-189. This is an extract from an article by 8yrnes that attempts to assess the work of the Committee.

1. What are Byrnes' main concerns?

Steiner and Alston have summarised concluding observations from the Committee's third and fourth periodic reports on China on pp.191-195. There are also summarised General Recommendations on pp 195-202.

2. Do you think that they show the Committee engaged in constructive dialogue?

A note on gender mainstreaming

As we saw above, the Commission's mandate was to promote the principle that men and women have equal rights. Its role was to prepare recommendations and reports for the Council on promoting women's rights and to make recommendations on urgent problems.

The Commission's role was expanded in 1987, and again in 1995 following the Fourth World Conference on Women in Beijing. The Commission was tasked with building on the Beijing Declaration and the concerns expressed in the **Platform for** Action, including the mainstreaming of gender perspectives in the work of all UN agencies.

We need to consider the Platform for Action, and the idea of gender mainstreaming in a little more detail.

The Platform for Action builds on the report of the 1985 Nairobi conference on Women. It calls for a concerted international effort to advance the human rights of women, and a social justice agenda, which in turn re-affirms the central principle of the Vienna Declaration and Programme of Action that women's and girls' rights are central to human rights. The Platform for Action also recognises that men and women should work together to achieve these ends. (http://www.un.org/ womenwatch/daw/beijing/platfoml/plat1.ht m)

The Platform for Action is linked to the practice of gender mainstreaming. How can one understand this latter term?

Mainstreaming a gender perspective is the process of assessing the implications for women and men of any planned action, including legislation, policies or programmes, in all areas and at all levels. It is a strategy for making women's as well as men's concerns and experiences an integral dimension of the design, implementation, monitoring and evaluation of policies and programmes in all political, economic and societal spheres so that women and men benefit equally and inequality is not perpetuated. The ultimate goat is to achieve gender equality. (http://WWw.un.orgiwomenwatcll/daw/csw/gms.pdt)

The General Assembly was encouraged to direct the bodies and committees of the UN system to make a gender perspective part of all their work. Particular attention was drawn to macroeconomic issues, development activities, poverty eradication, human rights, humanitarian assistance and legal and political matters.

Once we turn from the law of the treaties to the issue of the implementation of women's rights, we can appreciate the complex issues of culture and tradition that this raises. We will now look at two initial country reports in an attempt to determine what is at stake in the implementation of women's rights.

So in summary, gender mainstreaming aims to make gender issues far more central to the work of the UN (and within the UN itself).

6.1.3 Case Study: Singapore

The Republic of Singapore became a signatory to CEDAW in 1995. In the initial report submitted under Article 18, the government of Singapore outlined the steps the country was taking to honour its obligations under the treaty. The report pointed out the multi- cultural nature of Singapore. Of a population of about 3.1 million (as at June 1997), 77.15 per cent were Chinese, 14.11 per cent were Malays, 7.40 per cent were Indians and the remaining 1.34 per cent were from the other ethnic groups. In terms of religious faith: 31.9 per cent are Buddhists, 21.9 per cent Taoists, 15.0 per cent Muslims, 12.9 per cent Christians and 3.3 per cent Hindus.

This multi-racial composition influences the legal system. Civil law applies to non-Muslims, while the Administration of Muslim Law Act (AMLA) applies to Muslims. Recognising their duties under Article 12, the government pointed out that the Constitution guarantees equality before the law. At a policy level, equal opportunity based on merit is central. Evidence of the progress made in Singapore is provided by the UNDP Human Development Report of 1997, which states that Singapore was one of the countries that had 'succeeded in enhancing the basic human capabilities of both women and men'. Various policy and legislative initiatives have been made to further recognise women's rights. These include various programmes relating to Article 11 such as child care for working mothers and provisions to safeguard the interest of pan-time workers; initiatives under Article 12 such as provision of health services for women and older women; provision of services for elder women and disabled women under Articles 3 and 12; and tax incentives for married women under Article 13.

These advances have to be read alongside the reservations made by Singapore to the Treaty. Reservations have been made to Articles 2 and 16. These Articles require the modification or abolition of laws and customs that are discriminatory. These reservations have been tabled because Articles of the Singapore Constitution guarantee the rights of minorities in personal and religious law. Provisions under the Administration of Muslim Law Act (AMLA) are probably not consistent with the CEDAW. These would include the right of Muslim men to marry four wives, but not the right of a Muslim woman to marry four husbands. The government of Singapore argues that it is necessary to maintain these laws to preserve a multi-cultural society. There are also reservations from Article 9, in relation to the equal rights of women and men to determine the nationality of their children. This is because it:

is necessary to ensure that our immigration policy remains in line with our Asian tradition where husbands are the heads of households.' A reservation has also been made in relation to Article 29, which requires arbitration on any dispute concerning the interpretation of the Convention which cannot be settled by negotiation. Reservations have been made here to 'maintain Singapore's right to its domestic policies.

Singapore's Initial Report to the UN Committee for the Convention on the Elimination of All Forms of Discrimination Against Women (Singapore: Ministry of Community Development, 2000).

SELF ASSESSMENT EXERCISE

What general impression of the enforcement of women's' rights is suggested by the report from Singapore?

6.1.4 Case Study: Nigeria

If we turn to Nigeria's country report, we can see that the issues raised by women's rights in Africa's most populous nation are somewhat different from those in the Republic of Singapore. Note, first of all, that we are considering here the combined fourth and fifth periodic reports (document CEDAW/C/NGN405), not the interim report, as we did above. In other words, Nigeria has been a signatory to CEDAW for longer than Singapore.

Nigeria has ratified both CEDAW (in 1985) and the Optional Protocol (1999).

There was general praise for the advances that were being made in the protection and enhancement of women's rights. Experts drew attention to state laws that have prohibited female genital mutilation, early marriage and trafficking in women and children. Legal aid provision was also praised; in particular as it allowed one woman, Safiya Hussein, who had been sentenced to death by stoning for adultery, to appeal to the Sokoto State Sharia of Appeal, which overturned the sentence of the lower court. A major policy initiative was also coming to the fore. The National Policy on Women was intended to improve the profile of women in public life.

However, there were profound misgivings about the operation of a tripartite legal system and a governance process that impeded the implementation of policy. In Nigeria there are three legal systems in operation: Islamic Sharia law, customary law and common law.

The reason for this is in part historical, but problems of coherence between these three jurisdictions, make for difficulties in common standard setting. The Nigerian Constitution does provide for freedom from discrimination, but, many states in the Nigerian federation remain committed to traditional gender roles that are from the perspective of CEDAW discriminatory. Moreover, there are inconsistencies within legal traditions. For instance, whilst some provisions of Sharia law practiced in the northern states of Nigeria are not compatible with CEDAW, other provisions are. An example would be section 239 of the Zamfara State Sharia Penal Code Law 2000. This punishes the trafficking in women. As far as customary law is concerned, an example was given of practices in the Southern states, where practices, such as widowhood rites and inheritance rights remain discriminatory. These problems are exacerbated by social attitudes:

- In most communities…. a divorced or separated woman is despised regardless of the circumstances. The woman is stigmatised and becomes socially vulnerable, especially in the eastern part of the country. In northern Nigeria, separated or divorced women can marry after three months and usually do. While the marriage age in southern Nigeria is between the ages of 18 and 21, in the north it is between the ages of 12 and 15. In the Northern part of the country, girls as young as nine, depending on the onset of puberty, are allowed to marry.

There were also problems with property rights. The report details that around 90 per cent of registered land and properties remain in men's names. Property rights are also complicated by the tripartite legal system, and by general ignorance of the existence of rights and social exclusion.

Some states in the south of the country do not even allow women to own land and other properties:

- Under customary law, however, wives remain as slaves to their husbands and in-laws. 4 Widows in southern and eastern parts of Nigeria have no protection, and their rights are seriously abused.

- Under the Sharia legal system, widows are accorded more rights. If their husbands die, they are allowed an in-house compulsory mourning period of four months and 10 days to determine whether they are pregnant. After the compulsory mourning period, if found not pregnant, women are free to remarry. Widows under the Sharia law inherit their husband's properties together with their children.

SELF ASSESSMENT EXERCISE

1. What general impression of the enforcement of women's rights are suggested by the report from Nigeria?
2. How is the situation in Nigeria different from that in Singapore?

6.2 Declaration on the Elimination of Violence against Women

CEDAW is silent on an explicit condemnation of violence against women, although the core principles of the Treaty clearly prohibit it. The need to combat such practices led in 1993 to the General Assembly resolution. It was felt .that this was necessary to build on the programme announced in Nairobi, to counter the widespread use of violence against women and to produce a clear statement of women's rights in this area.

The resolution of the General Assembly that proclaimed the Declaration effectively put the whole issue of violence in context. It asserted that 'violence against women is a manifestation of historically unequal power relations between men and women', and 'is one of the crucial social mechanized by which women are forced into a subordinate position compared with men'. Violence against women is all-pervasive. It may be that certain groups of women such as those 'belonging to minority groups, indigenous women, refugee women, migrant women, women living in rural or remote communities, destitute women, women in institutions or in detention, female children, women with disabilities, elderly women and women in situations of armed conflict, are especially vulnerable to violence', but the issue of violence against women 'cut across lines of income, class and culture'.

We can examine some of the key Articles.

Article 1 begins with a definition: 'violence against women means any act of gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life'. Violence is .thus understood in a broad sense -it covers psychological as well as physical harm, and includes threats of violence as well. Note that it covers both public and private life, and so would apply to domestic violence as well as violence taking place in the public sphere. The definition is expanded by article 2 the first paragraph applies to violence practiced against women in what could be seen as a private or at least family-oriented context. Thus violence against women includes:

3 ‘Physical, sexual and psychological violence occurring in the family, including battering, sexual abuse of female children in the household, dowry-related violence, marital rape, female genital mutilation and other traditional practices handful to women, non-spousal violence and violence related to exploitation.’

The second paragraph moves away from this context, to consider violence in a wider 'social' sense:

4 ’Physical, sexual and psychological violence occurring within the general community, including rape, sexual abuse, sexual harassment and intimidation at work, in educational -institutions and elsewhere, trafficking in women and forced prostitution.’

That violence can include ‘harassment and intimidation' builds on the definition of Article 1. Thus prostitution, to the extent that it is forced,

would constitute violence against women. Consensual prostitution, in itself, would presumably not constitute violence against women. The third paragraph addresses violence condoned by the state:

5 'Physical, sexual and psychological violence perpetrated or condoned by the State, wherever it occurs. After Article 3, which stresses the coherence of the Declaration with the International Bill of Rights, Article 4 returns to this concern with the state.'

Article 4 states that nations that are signatories to the Declaration should condemn violence against women, and should not use 'custom, tradition or religious consideration' to avoid their obligations with respect to its elimination. This duty extends far a beyond merely legislating against violence. One of the problems with enforcement of human rights norms is that merely legislating is never enough, as patterns of social behaviour have to be changed. Thus, the Article provides that states must:

6 'Exercise due diligence to prevent, investigate and, in accordance with national legislation, punish acts of violence against women, whether those acts are perpetrated by the State or by private persons.'

This includes legislation, research and policy initiatives.

Acknowledging the need for a concerted international effort, **Article 5** concerns the UN, and provides that it should encourage co-operative regional cooperation, using the UN system to advance co-ordinated programmes both to set standards and take action against violent practices.

The fact that the Declaration does not contain an enforcement mechanism was remedied to some extent by the appointment of the special rapponeur on violence against women

6.3 The Special Raporteur on Violence Against Women

In 1994, The United Nations Commission on Human Rights appointed a special rapporteur on violence against women, including its causes and consequences. The mandate of the Special Rapporteur allows her to receive individual complaints, to make country visits and to submit annual thematic reports to the Commission on Human Rights.

Self assessment exercise

Read Steiner and Alston pp.203-205. Steiner and Alston extract the Preliminary Report on Violence against Women.

1. What does the report suggest about the nature of violence against women?

2. What is the role of the Declaration on the Elimination of Violence against Women?

We will now consider an annual thematic report.

6.3.1 Case Study: The US Prison Service

This section refers .to the Report of the mission to the United States of America on the issue of violence against women in state and federal prisons.

In 1988, at the invitation of the Government of the United States of America, the Special Rapporteur on violence against women visited Washington DC and the States of New York, Connecticut, New Jersey, Georgia, California, Michigan and Minnesota from 31 May to 18 June 1998 to study the issue of violence against women in the state and federal prisons.

We cannot consider all the findings of the Special Rapporteur, but we can consider some of the issues that she raised. Of particular concern was 'the disproportionate number of African Americans in prison, including African American women' (para.27). This raises questions about a possible failure of the criminal justice system in the US. It suggests that African Americans are being discriminated against. There was also evidence of racial discrimination in some prisons. The Rapporteur noted that this had not led to any policy discussion at either state or federal level; although there was a 'national dialogue on race' (para.28) no particular agency had been set up to deal with researching these problems in the criminal justice system and making recommendations. The Special Rapporteur also drew attention to the fact that in some prisons, at least two thirds of female prisoners complained that they had been sexually abused. There was insufficient action being taken to research this problem, and provide mechanisms of preventing its occurrence.

As part of her study, the rapporteur considers the legal context of penal institutions in the US. At an international level, standards applying to the treatment of prisoners are detailed in the Standard Minimum Rules for the Treatment of Prisoners. These rules, adopted by the First United Nations Congress in 1955 are not binding, but provide minimum

standards for the treatment of prisoners. The rules are founded on the principle of non- discrimination, and lay down standards relating to the treatment of women. These specify that men and women should be kept in separate institutions, or in separate parts of the same institution.

Women prisoners must only ever be supervised by women officers, although there are certain exceptions which would allow male supervision of female prisoners.

How do these standards apply to US jails? The special rapporteur drew attention to the ‘extraordinary diversity of conditions in United States prisons’ (para.49) that made coherent standards difficult to maintain. Thus, in some Californian institutions there were very little awareness of the problem of sexual misconduct, whereas in others, cases were actually being prosecuted. In the US state of Georgia, which is composed of 159 administrative counties, there were no uniform state practices with regard to prisons policy. The report thus recommends that there is a need to develop coherent policies with reference to sexual misconduct. The special rapporteur also drew attention to a lack of minimum standards relating to the use of instruments of restraint, and 'large scale breaches' (para.51) of rule 33 of the Standard Minimum Rules that specifies that restraints should not be used as a punishment. There was also evidence that restraints had been used on mentally disturbed prisoners, and on women in labour. 5 This could even amount to 'cruel and unusual praCtices' (para. 54).

The special rapporteur found that there was evidence that sexual misconduct was widespread in the prison system:

‘Sexual misconduct covers a whole range of abusive sexual practices in the context of custody. Rape does occur, but it is a fairly rare phenomenon. The more common types of sexual misconduct are sex in return for favours or consensual sex. Given the power imbalance inherent in prison/prisoner relationships and the hierarchy within the prison, relationships between prison guards and prisoners corrupt the prison environment and tend to exploit the women. Sanctioned sexual harassment, i.e. women being pat-frisked by men and monitored in their rooms and in the showers by male corrections officers, is also prevalent. A woman who was housed in a Michigan prison said that 1985, when the prison system began allowing men to guard women in women's prisons, was the turning point; after that sexual misconduct accelerated.' (para.55).

Attempts were being made to address and deal with these problems, but the situation had been made more complex by a ruling of the Supreme Court, that the Standard Minimum Rules relating to the supervision of

female prisoners were unconstitutional as they breached equal employment opportunities legislation. This was because, as there was only a small number of Women's prisons, the opportunities for women prison officers would be limited. As a consequence of this ruling, male officers still work female prisoners. The special rapponeur did not accept supporting arguments d1at male prison officers provided positive role models, or that the gender composition of prisons should reflect that of society at large. However, there had been successful litigation that addressed sexual misconduct, most notably in Georgia, but the guidelines laid down in d1e wake of this case did not adequately deal with the problem of privacy in prisons. There was also, at the time of the report a bill before Congress that would seek to prevent assaults by correctional staff in prisons. (See http://www.unhchr.ch/huridocda/huridoca).

The report suggests that there are abuses of women's rights in state and federal prisons. As we have seen, a disproportionate number of African Americans were incarcerated, suggesting discrimination against this group of the population. There was also a failure to enforce general minimum standards in relation to a number of areas: sexual misconduct, use of restraints and the supervision of female prisoners by male guards. Although there was some progress in enforcing minimum standards, there were still profound problems within the prison system.

4. CONCLUSION

Perhaps one of the defining features of women's rights is their relative subordination to a supposedly more universal idea of human rights. Accounting for this takes us to the core of the problem. Why is it that the International Bill of Rights is relatively silent on the abuses of women's' rights? One reason may be that even within the UN the importance of women's rights has been played down and even though this is perhaps changing, there is still the sense that enforcement mechanisms remain weaker in relation to women's rights, and that patriarchal cultural attitudes remain ingrained and resistant to change. In this chapter we have examined CEDAW and it's Optional Protocol; we have also looked at the Declaration on the Elimination of Violence against Women and the role of the Special Rapponeur. We have seen that these institutions and treaties represent a major development in protecting women's rights, but that a great deal must still be done.

5. SUMMARY

6. TUTOR-MARKED ASSIGNMENT

1. Women's rights are human rights? Discuss

7. REFERENCES/FURTHER READINGS

Merry, S.A, 'Women, violence and the human rights system', in Agosin, M, (ed,) *Women, gender and human rights.* (New Jersey: Rutgers University Press, 2001) pp.83-98, Merry's work provides an argument that the human rights system is a "quasi-legal system" (p.84), and explores what this means with reference to preventing violence against women,

Wright, S. 'Human rights and women's rights: an analysis of the UN convention on the elimination of all forms of discrimination against women', in Mahoney, K. and P. Mahoney (eds) *Human fights in the twenty-first century.* (Dordrecht: Martinus Nijhoff, 1993) pp.?5-89, Wright presents an overview of the ideas that structure the Convention, and locates it in the struggle against poverty and social exclusion.

Advice on answering the question

This seemingly simple statement reveals, on closer inspection, some complex and subtle issues. In terms of an approach to this question, the invitation to 'discuss' might be best answered with a broad agreement to the statement. The link between women's rights and human rights has been asserted by numerous documents, and one might want to consider some of these in detail. The Preamble to CEDAW, for example, or the Vienna Declaration would be germane. However, if women's rights are human rights one would also have to account for the relative weakness of protection for women's rights, and the absence of rights that reflect the specific harms suffered by women in the International Bill of Rights. From this perspective, women's rights are something a little less than the Universal rights of 'man'. Building this argument might involve making use of some of the feminist critiques of international law, and international human rights law that we considered, and also some detail on the enforcement mechanisms under CEDAW and the Protocol, the reservations from these treaties and the refusal to sign the Protocol. In recent years, though with gender mainstreaming, there is perhaps a greater correlation between human rights and women's rights. These positive developments would have to be put in context of those resistances to recognising the full and equal humanity of women that are present in patriarchal cultures throughout the world.

UNIT 2 THE RIGHTS OF THE CHILD

CONTENTS

- **INTRODUCTION**

Children's rights are not somehow 'additional' to human rights; rather, like women's rights they are the application of the key principles of human rights to a sector of humanity that deserves special protection. We will see that the main treaty in this area is the Convention on the Rights of the Child, and we shall review the powers of the Committee on the Rights of the Child in overseeing the implementation of the Treaty. But, we will also come to understand that children's rights raise particular problems, and cannot be understood purely in the abstract. Although the Convention on the Rights of the Child is the most widely adopted of international human rights instruments (even having been adopted by the Sudan People's Liberation Army) we need to appreciate that some of the most acute problems come out of situations where, either through poverty, war, or other factors, civil society and its institutions have broken down. How are human rights to be safeguarded in situations where the institutions that are meant to protect rights are not functioning? We will also examine situations where rights are not protected through a lack of political will, or because cultural forces are deeply embedded and resistant to change.

- **OBJECTIVES**

By the end of this chapter and the relevant readings, you should be able to:

- describe the basic provisions of the Convention on the Rights of the Child
- explain the functions of the Committee on the Rights of the Child
- explain the main issues relating to bonded labour
- explain the main issues relating to child soldiers
- explain the main issues relating to the right to health care and the problem of HIV/AIDS
- outline the main issues relating to juvenile justice.

- **MAIN CONTENTS**

3.1 The Convention on the Rights of the Child

Children's rights are at the core of the UN system. In Article 25 the Declaration itself makes reference to the 'special care and assistance' that is due to mothers and children and clearly, the right to education in Article 26 is of particular relevance to children. Article 24 of ICCPR and Article 10 of the ICESC Rights are also of relevance in this context. These documents build on earlier statements such as the Geneva Declaration of the Rights of the Child of 1924 and the General Assembly Resolution of 1959. There are three other recent documents of international importance that feed into the principles that underlie the Convention:

3 the Declaration on Social and Legal Principles relating to the Protection and Welfare of Children, 1986,
4 the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (The Beijing Rules 1985)
5 the Declaration on the Protection of Women and Children in Emergency and Armed Conflict.

Despite the existence of these documents, the need for a coherent and comprehensive statement of the law remained. This was because there were widespread and ongoing abuses of children's rights. High mortality rates, poor access to health care and .education, the economic exploitation of children and the abuse of children in armed conflict demanded international action.

The Convention was drafted by a working group set up by the UN Commission on Human Rights and consisted of government and UN representatives, members of NGOs and delegates from the International Labour Organisation (ILO), the United Nations Children's Fund (UNICEF) and the World Health Organization (WHO). The Convention on the Rights of the Child was adopted by a General Assembly Resolution in November 1989, and came into force in September 1990.

The Child and the Family

The preamble to the Convention includes a paragraph that affirms the family as 'as the fundamental group of society' and asserts that 'the natural environment for the growth and well-being of all its members and particularly children should be afforded the necessary protection and assistance so that it can fully assume its responsibilities within the community'. We have already read criticism from a feminist perspective on the emphasis on the family. Feminists argue that the family can itself be a place of oppression; and we will return to this issue as we continue to consider children's rights; but it is worth pointing out at this stage that there are many connections between women's rights and children's

rights. In particular, one of the major problems is that cultures often contain customs and beliefs about children that, like those that relate to women, see a child as under the care and protection of a **male** adult. Thus, any universal statement of the rights of the child must take account of 'the importance of the traditions and cultural values of each people'. We are aware that there are problems when such customs are inconsistent with human rights, and resistant to change (see Article 24(3) in this context). If we are aware that children's rights raise similar problems to women's rights, we also have to take into account the fact that children's rights raise a specific set of issues.

One of the problems for children's rights is that if one asserts that the family is a 'natural environment', it becomes difficult to understand that the family may also be the source of the problem of children's oppression and abuse. This is a complex argument. It is not suggesting that the family should somehow be 'reformed' or abolished; rather, it attempts to point out a key issue for children's rights; an issue that is inherent in the very notion of the rights of the child. Precisely because the child is not mature, it is dependent on care in the way that able-bodied adults are not. As the preamble goes on to state:

3 'the child, by reason of his physical and mental immaturity needs special safeguards and care, including appropriate legal protection, before as well as after birth.'

How does one ensure that the career does not become an abuser? Given that the care relationship involves unequal power, and abuse is always a question of a stronger party imposing its will on a weaker party, it would seem that there is an inescapable pathology to the family. The Convention must, then, assert that it is concerned with nurturing a 'family environment' that has an 'atmosphere of happiness, love and understanding'; moreover, it recognises that abuses of children's rights are a global problem in both the developing and the developed world: 'in all countries in the world, there are children living in exceptionally difficult conditions'.

3.2 An Overview of the Articles of the Convention

Part I

Article 1 provides a definition: 'a child means every human being below the age of eighteen years'. A child is thus defined by a lack of majority; in this sense, the child is outside of the law, deprived of legal status and something less than an adult. The exception to this rule, that 'majority' can be attained 'earlier' than eighteen if a national law so allows, does not affect this general principle that a child lacks majority.

In this sense, children's rights belong to those that are otherwise deprived of full legal being. .
Article 2 places what we could call both a negative and a positive duty on state parties (see Chapter 5). State parties must both respect and ensure compliance with the rights contained in the Convention without any form of discrimination towards a child or the child's parents or guardians. Furthermore, children must be protected from the discrimination or 'punishment' that is inflicted upon the child's parents or guardians. Article 2 thus reveals another key theme in the structure of children's rights: given that the child is linked to the family, to protect the child, it is necessary to protect her parents or guardians.

Article 3 articulates a key principle: 'the best interests of the child'. This principle is to govern all dealings with children whether by public or private actors; however, it is immediately qua1ified.

The best interests of the child, or at least as it relates to 'protection and care' must take into account 'the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her'. Presuming that it is possible to determine the best interests of the child,' these best interests, if determined by a public or private agency, could easily conflict with the 'right' of the parents be or guardians to determine themselves what is best for 'their' child. We will see that other Articles below (specifically, 9 and 19) are intended to resolve some of these difficult concerns.

The third paragraph of Article 3 outlines a positive duty that places in! an obligation on a state party to ensure that agencies and institutions responsible for the well-being of children conform to standards 'established by competent authorities'. This is elaborated **by Article 4**, which goes on to specify that states must ensure that social, economic and cultural rights are enforced to 'the maximum extent of their available resources'. Of course, the power to determine that either no or few resources are available means that a state party could always dramatically limit the effectiveness of this Article.

Article 5 returns to another key concern: the location of the child in the family, and the need for a cultural sensitivity to children's rights given the customs that pertain to family life. Thus, state parties are ordered to 'respect' the 'responsibilities, rights and duties' of parents/guardians, and to take into account that the family could itself be broadly defined to include those beyond the guardians/parents of the child. The extended family itself has a 'right' to provide 'appropriate direction and guidance in the exercise by the child of the rights recognised in the present Convention'.

Article 5 thus recognises in a slightly different way that the rights of the child are qualified by the rights of those who have responsibility for the child.

Article 6 repeats the key human rights principle that the child has an 'inherent right to life', and the following articles, in returning to rights with which we are already familiar, elaborate what the right to life means in terms of a civil and legal identity. It could be said, then, that the Convention is not just concerned with bare life, but with a life that is defined and determined by the law. Thus, **Article 7** is a right to registration (expanded by **Article 8**) which is linked to the right to a name and a nationality and the right to be nurtured; a right to 'know and be cared for by his or her parents'. Once again, though, this right is potentially qualified by the second paragraph, which leaves the implementation of the rights in the first paragraph to 'national law'. Article 6 could be read alongside Article 12, which could be seen as a due process right, or a guarantee of a right to a hearing for a child who is 'capable of forming his or her own views'.

Article 9 provides detail to the general principle that the child is to be cared for by and within the family. The first paragraph places a duty on states parties to make sure that a child is not 'separated from his or her parents against their will'. That this principle addresses the will of the parents, rather than of the child, shows that children's rights are dependent on the rights of the child's parents. However, this principle is also qualified: a child can be removed against the will of his or her parents when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child'. Thus, the state is able to act in circumstances when a competent agency external to the family determines that the parent's rights should be over-ridden. However, such is the seriousness of such a decision, that it is protected by due process guarantees. The reference to judicial review above suggests that any decision to remove a child from its parents must be open to review by a court; the second paragraph gives a different due process guarantee; the right of 'interested parties' to be involved in any proceedings. Should a child be removed from its parents, then there is a residual right to 'maintain personal relations and direct contact with both... on a regular basis'. Furthermore, the state has a duty to provide information concerning the whereabouts of a parent, if separation has been a result of 'any action initiated by a state party, such as the detention, imprisonment, exile, deportation or death (including death arising from any cause while the person is in the custody of the state)'. **Article 10** further elaborates this right, relating it to the right of movement of family members between states.

Article 11 prohibits the 'illicit transfer and non-return of children abroad'.

Articles 13 to 17 relate the classic civil liberties to the child. Thus, **Article 13** concerns that right to freedom of expression; **Article 14** guarantees the right to freedom of thought, conscience and religion; although the rights and duties of parents to 'provide direction' to the child are also guaranteed; **Article 15** recognises the rights of the child to freedom of association and to freedom of peaceful assembly; **Article 16** concerns rights to privacy and **Article 17,** the right to access of information from the media.

As pointed out above, children's rights are inseparable from the rights and duties of parents, and these are given further consideration in Article 18, This Article gives both parents and guardians 'common responsibilities for the upbringing and development of the child'; and the best interests of the child is to the basic standard in any understanding of what upbringing and development mean, States have to make sure that parents are well- supported in their parenting role, and this extends to taking appropriate measures 'to ensure that children of working parents have the right to benefit from child-care services and facilities for which they are eligible',

Article 19 is at the core of the Convention. It places a duty on state parties to make sure that legislative and administrative measures are undertaken to ensure that the child is protected from physical and mental abuse, 'neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child'. Article 19 thus relates back to Article 9.

Together these Articles specify the obligations of the state, and those instances where state action is in the best interests of the child, even if the parents/guardians believe otherwise. Once a child is in the care of the state, Article 20 would apply. This grants special protection to a child 'deprived of his or her family environment' and covers, 'foster placement, *kafalah* of Islamic law, adoption or if necessary placement in suitable institutions for the care of children'. Arrangements for the care of the child have to take into account the child's ethnic, cultural, religious and linguistic background.

Article 21 to 23 relate to children in certain special situations.

Article 21 applies to those state parties that permit or recognise adoption. It lays down a series of duties that are meant to safeguard the best interests of the child in such a situation. Article 22 places a duty on

state parties in relation to the refugee status of children and Article 23 .relates to the rights of mentally or physically disabled children.

The next group of Articles, 24-28 elaborate certain social and economic rights as they pertain to children, **Article 24** recognises the right to 'the highest attainable standard of health and to facilities for the treatment of illness and rehabilitation of health', This translates into a series of specific duties. State parties must take action to: diminish infant and child mortality rates; to make sure children received health care, with an emphasis on primary health care; to alleviate disease and malnutrition through the provision of food and clean water and to provide pre- and post- natal health care: Paragraph 3 lays down an obligation to 'take all effective and appropriate measures with a view to abolishing traditional practices prejudicial to the health of children', Article 25 elaborates these rights even further and relates to a right to competent health care.

Article 26 changes the focus from health care to the 'right to benefit from social security, including social insurance' and places a duty on states to ensure the realisation of this right.

Article 27 could be read as a classic articulation of a social and economic right. It provides that state parties should recognise the child's right to 'a standard of living adequate for the child's physical, mental, spiritual, moral and social development'. The 'primary responsibility' for the delivery of these ends lies with the parents; but parents must be assisted in these duties by the state which must 'provide material assistance and support programmes, particularly with regard to nutrition, clothing and housing'. This duty extends to taking measures to secure financial support for a child from parents.

Article 28 concern the right to education. The right to education, on the basis of equal opportunity, contains a list of more specific duties: the state must provide general and compulsory primary education; it must also 'encourage' the provision of accessible general secondary and vocational education. Within education, the state must discourage drop-outs, and ensure that discipline is consistent with other human rights.

Article 29 mandates the form of education. It must address, amongst other matters, 'the development of the child's personality, talents and mental and physical abilities to their fullest potential'; respect for human rights, for his or her own culture and other cultures, and, above all, prepare the child for 'responsible life in a free society'.

Article 30 relates to the right of the children of minorities to be educated in such a way as to ‘enjoy his or her own culture, to profess and practise his or her own religion, or to use his or her own language’.

Article 31, the right of the child to rest and leisure, clearly extends beyond education and links through to Article 32. **Article 32** is another key provision in that it prohibits the economic exploitation of the child; the prohibition of exploitation extends to any work that 'is likely to be hazardous or to interfere with the child's education, or to be harmful to the child's health' and state parties must take both legislative and educational measures to achieve this end. More specifically state parties must mandate a minimum employment age; regulation of the hours and conditions of employment; ensure that these standards are effectively applied.

Article 33 links together a right to health care, and a right to protection by providing that state parties must take measures to ensure that children do not use illicit drugs and are not involved in either the production or trafficking of illegal drugs.

Article 34 protects children from ‘sexual exploitation and sexual abuse’. State parties are given a number of duties to ensure that children do not take part in ‘unlawful sexual activity’ and are not involved in prostitution or pornography.

Article 35 prohibits trafficking in children.

Article 36 is a general provision requiring state parties to protect children from 'all other forms of exploitation' that 'are prejudicial' to their ‘welfare.’

Article 37 relates various due process guarantees that concern sentencing and criminal law to children. As well as restating the generic rights (prohibition on torture and arbitrary arrest; guarantee of a right of access to the courts) it articulates a key Principle: children should be treated as such in the criminal justice System. For instance: ‘every child deprived of liberty shall be c separated from adults unless it is considered in the child’s best interest not to do so and shall have the right to maintain contact with his or her family through correspondence and visits, save in exceptional circumstances’. The rights of the child in the criminal justice system are expanded at much greater length in Article 40.

Article 38 concerns armed conflict. In keeping with general humanitarian norms that relate to non-combatants, states must guarantee

that children under the age of 15 do not take part in warfare; and thus must not be recruited into the armed forces.

Article 39 also relates armed conflicts, but is much broader. State parties must make sure of the physical and psychological recovery of child victims of 'neglect, exploitation, or abuse; torture or any other form of cruel, inhuman or degrading treatment or punishment'; or armed conflicts.

Part II

In looking at Part II of the Convention, we will concentrate on those Articles that set up the Committee on the Rights of the Child, which is set up by Article 43. The Committee consists of ten experts elected by state parties but serving in their personal capacity. Under Article 44, state parties are under a duty to submit to the Committee reports on the steps they have taken to implement Convention rights. Reports must be submitted within two years of the Convention entering into force, and thereafter every five years. Article 45 provides that the specialised UN Agencies, such as the Children's Fund, have a right to representation before the Committee to provide advice on the implementation of the Convention. This Article also states that the Committee can make recommendation to the General Assembly which request that the Secretary-General undertakes studies on specific issues relevant to children's rights. The Committee can make suggestions and general recommendations based on information received pursuant to Articles 44 and 45. These can be addressed to any State Party and also reported to the General Assembly, together with comments, if any, from States Parties themselves.

Part III of the Convention contains various technical provisions that we will not consider.

Note: The Committee cannot consider individual complaints. However, it would be possible to raise a concern about children's rights before other committees with the jurisdiction to hear individual complaints.

SELF ASSESSMENT EXERCISE

1. Which other committees might be involved in hearing such complaints?
2. What are the General principles of the Convention?
3. How does the Convention protect the human rights of children?
4. Are there any nations that have not ratified the Convention?

Turning now to abuses of children's rights, we shift our focus from the law to questions of how the law is applied. To some extent, it is slightly

misleading to label the following areas 'abuses of children's rights'. Although they clearly show that children are not being respected, they could equally be seen, more generally, as problems of structural and endemic poverty, the social dislocations brought about by armed conflict or issues of national development. One must keep this in mind: it is the essential context of the abuse of all human rights.

3.3 Child Labour

Children provide a significant portion of the world's workforce. Figures from the International Labor Organisation (ILO) suggest that in the developing world as many as 250 million children are in employment, with a little less than half of this figure working full- time. Regionally, this breaks down in the following way: 61 per cent of working children are in Asia, 32 per cent in Africa, and 7 per cent in Latin America. Primary sectors of employment are agriculture and domestic labour, although there is also some employment in trade and services, and a small amount in manufacturing and the construction industry. This is not to condemn all forms of child labour; however, it is necessary to look at the context and examine the conditions of employment and the educational opportunities available to the child. Human Rights groups have drawn attention to the worst areas of employment for children: particular areas of concern are silk production in India, and the pan played by children in the sugar industry in El Salvador, but concerns were also drawn to practices in the Middle East and the US. Abuses of children's rights include bonded labour, poor and dangerous working conditions and the denial of the freedom of movement. (http://www.hrw.org/children/labor.htm)

3.3.1 Bonded Labour

'Bonded labor takes place when a family receives an advance payment (sometimes as little as US $15) to hand a child-boy or girl over to an employer. In most cases the child cannot work off the debt, nor can the family raise enough money to buy the child back. The workplace is often structured so that 'expenses' and/or 'interest' are deducted from a child's earnings in such amounts that it is almost impossible for a child to repay the debt. In some cases, the labour is generational -that is, a child's grandfather or great-grandfather was promised to an employer many years earlier, with the understanding that each generation would provide the employer with a new worker -often with no pay at all.' (http://www.hrw.org;children/1abor.htm).

The issue of bonded labour takes us to the core of the problem. This is not the case of a child taking apart-time job to assist the family's income. Rather, it is a form of slavery that reflects conditions of extreme poverty

that blights generations. The child is effectively owned by the employer. Bonded labour may be a feature of those societies that are marked by poverty, but poverty must be understood in a broad sense. Thus, bonded labour tends to occur when people generally lack resources: this can mean a failure of access to credit and welfare, lack of employment for adults, but could also include discrimination against groups that exacerbate this general lack of social capital. As the quotation above suggests, the problem is also generational. The children of those who experienced bonded labour are likely to become bonded labourers themselves. What also contributes to the problem are pressures that keep wages low, so that people are forced to borrow from their employers, and then pledge their children's labour as a means of repaying the debt. In this sense, bonded labour creates a vicious circle: because there is a supply of Cheap bonded labour, wages for adults are also suppressed. Bonded labour is thus a self-sustaining social and economic phenomenon. Some researchers have also suggested that bonded labour is more likely in those places where social and economic relations are marked by caste and hierarchy.

What can be done to alleviate the problem?

- The law relating to bonded labour is not just to be found in the Convention. It was made illegal by the UN Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery in 1956. Some other important sources include Article 8 of the ICCPR, which explicitly prohibits slavery and servitude and Article 7 of the ICESCR contains a guarantee of labour rights that are inconsistent with bonded labour. The ILO promulgated in 1999 a Worst Forms of Child Labour Convention, a Convention on Minimum Age and a recommendation for eliminating the worst forms of child labour.

3.3.2 Child Labour in India

There is clearly a body of international law that prohibits the worst forms of the practice, or at least attempts to regulate Child labour. Is the problem that certain nations have not ratified this law? Consider the case of India: ‘with credible estimates ranging from 60 to 115 million, India has the largest number of working children in the world'. (Human Rights Watch Report: The Small Hands of Slavery; bonded child labour in India hrtp://www.hrw.org/reports/1996/lndia3.htm). We can gain a sense of the problem and an indication of the economic importance of children’ labour from the following extract:

‘Apart from agriculture, which accounts for 64 per cent of all labor in India, bonded child laborers form a significant part of the work force in

a multitude of domestic and export industries. These include, but are not limited to, the production of silk and silk saris, beedi (hand- rolled cigarettes), silver jewelry, synthetic gemstones, leather products (including footwear and sporting goods), handwoven wool carpets, and precious gemstones and diamonds. Services where bonded child labor is prevalent include prostitution, small restaurants, truck stops and tea shop services, and domestic servitude.' (ibid: part 1: summary)

Children's labour is not restricted to one area of economy, although agriculture accounts for the greater proportion of child labourers; it is thus general and not local and spread throughout different sectors, from the production of leisure goods to prostitution.

India is a party to and has ratified all the Conventions mentioned above except the !LO on the Worst Forms of Child Labour, and Indian domestic law does contain prohibitions on bonded labour, including the Bonded Labour System (Abolition) Act 1976 and regulations in relation to the employment of children. Moreover, bonded labour is in breach of cenain constitutional rights. There has also been litigation in Indian courts that has successfully led to obligations on states to identify the illegal employment of children and punish employers.

So, why does bonded labour persist to such a degree in India? Commentators have identified the lack of political will as one of the major issues. Although there has been a high level of commitment to action at the policy level, these policies have not, on the whole, been translated into meaningful programmes of action. There are two primary failures of government: a failure to enforce the Child Labour (Prohibition and Regulation) Act 1986 and the Bonded Labour System (Abolition) Act 1976. For instance, there has been no consistent and concerted attempt to produce government figures on child labour. Such figures that can be collected show that, for instance, from 1990 to 1993, only 7 prosecutions were made of employers under the Child Labour (Prohibition and Regulation) Act, and these led to light fines; in the province of Tamil Nadu there had been (at the time of the report) no imprisonments under the Child Labour (prohibition and Regulation) Act. The last date for which figures were available under the Bonded Labour Systems Act show that over 250,000 bonded labourers had been released, but it is not possible to know how many of these were children. Some states simply kept no records at all; and some officials believed the Act did not apply to children.

Other obstacles to enforcement include corruption and neglect of duty among officials. The report suggests that officials are committed to maintaining the status quo, and show little regard for the well-being of

bonded labourers. For instance, the Child Labour (Prohibition and Regulation) Act 1986 requires states to draw up implementation procedures. By 1996, a majority of states had not complied with this obligation. District magistrates were also not particularly concerned with the problem, with evidence that, in terms of a list of priorities made available to a journalist, child labour appeared well below the need to invest in technology. A senior official in the Ministry of Labour stated in an interview:

'Laws don't matter. Economics do'. There was no point attempting to enforce labour standards unless rural poverty was tackled.

Vigilance Committees, required under the Bonded Labour System (Abolition) Act, were not operational in any part of the country. Evidence also shows that many bond masters are themselves government employees:

Because of their steady income, these people are more likely to own land -which they need someone to cultivate -and are more likely to have money available for lending purposes. They are also more likely to be local leaders and to have ties to the local and district administration, both factors which tend to inhibit prosecution'.

There are thus 'obvious limitations' in making 'high-caste and local landowning officials' the key players in the identification of bonded labour and the enforcement of standards. Significant problems relating to the bribery of local officials are also prevalent. Bribery is endemic from top officials through to magistrates and judges. It also has to be pointed out that bonded labour is drawn from particular sectors of Indian society:

Nationwide, the vast majority of bonded laborers are Dalits; almost all bonded children interviewed for this report were Dalit or Muslim. Dalits are generally in a state of economic dependency that, when combined with the threat of, or actual, violence prevents them from reporting abuses against them -including being held in bondage -or from getting justice if they do.
http://www.hrw.orgleditoria!s/2003/india/indiaO13103.htm#P169-20786

Within the Indian caste system, the Dalits, or the untouchables, are the lowest members of society. Performing the most menial of jobs, they are condemned to poverty and social exclusion. Despite the fact that India is a democratic nation, the caste system and the poverty and exclusion associated with it persist. It is worth noting that caste systems exist throughout the world. A Dalit rights web site argues that 'though the

communities themselves may be indistinguishable in appearance from others, unlike with race or ethnicity, socio-economic disparities are glaring, as are the peculiar forms of discrimination practiced against them. It is approximated that around 250-300 trillion people across the world suffer from caste, or work- and descent-based discrimination, a form of discrimination that impinges on their civil, political, religious, socio-economic and cultural rights, and their right to freedom of choice to develop as individuals and as a community with dignity.' http://www.dalits.orgiglobalcastesystems.htm.

Although it is difficult to make generalizations about the status of the Muslim population of India, it is fair to say that in certain states Indian Muslims are suffering discrimination from the Hindu majority, which means that many Muslims suffer from unemployment, restricted job prospects, discrimination and poverty.

3.3.3 India's Reports to the Committee

The initial report of India stressed the country's commitment to children's rights, and stated that the infrastructure was now in place to make a difference. Moreover, there was a National Plan of Action and a committee to monitor progress. The report also pointed out that the rights of children would improve if the general rights of families also improved.
(http://www.unhchr.orgihuricaneihuricane.nsfiO/86DBBOE6F28B lEI680256863005FE7A9?opendocument)

Second periodic report of India 2004

The second periodic report placed children's rights in the general context of the battle against poverty and pointed out that high mortality rates, malnutrition and il1iteracyremain problems. It also highlighted that India has over 400 million children below the age of 18 years. This represents the largest child population in the world. The report stressed the committee to making elementary education universal, but, as yet the National Commission for Children had not been established.
(http://www.unhchr.org/huricaneihuricane.nsflO/E6DB9B85AA3 A1304C1256E23003551D8?opendocument)

These reports suggest that advances are being made, but significant problems still remain.

SELF ASSESSMENT EXERCISE

1. Bonded labour continues to play a significant role in the Indian economy despite the nation's commitment to human rights standards', Discuss.

3.4 Child Soldiers

Child soldiers are part of armies and militias in many nations of the world. Some child soldiers are abducted and forced to fight; others join to escape poverty or abuse. Both girls and boys are involved in combat, although girls are also taken as 'wives' by commanders and sexually abused (the extent of sexual abuse of boys remains unknown). The problem is particularly acute in parts of Africa, most notably in the war zones in the Congo, Liberia and Sierra Leone. The Lord's Revolutionary Army, a guerrilla organization in the north of Uganda, is also notorious for its use of child soldiers. Child soldiers are also part of armies in Colombia and the Lebanon. In Colombia, both government and rebel forces make. use of significant numbers of children; in Lebanon, children have been forced to join the South Lebanon Army. Child soldiers are not only subjected to the traumas of combat; they have taken part in war crimes and massacres. After conflict is over, child soldiers are not re-trained, and remained traumatized; indeed, peace treaties often do not even recognize that child soldiers have been involved in the fighting. (http://www.hrw.org/campaigns/crp/index.htm) .

As with bonded labour, a legal framework exists to prohibit the use of child soldiers. In 2002 the Optional Protocol to the Convention on the Rights of the Child on children in armed conflict came into force. This outlaws that use of children under 18 in armed forces, whether state-run or irregular. Convention (182) of the ILO also prohibits the recruitment of children under 18. Furthermore, under the Rome Statute of the International Criminal Court, recruitment of children under 15 is to be considered a war crime. The 1999 African Charter on the Rights and Welfare of the Child also accords with these international standards. Under the African Charter, 18 is also the minimum age for recruitment into armed forces. (Child Soldier Use 2003: A Briefing for the 4th UN Security Council Open

Debate on Children and Am1ed Conflict: Introduction,
http://hrw.org/reports/2004/chiIdsoldiers0104/1.htm)

To understand the role of child soldiers in the Congo war, it is necessary to have a basic understanding of the causes of conflict in this country. A power struggle within the Democratic Republic of the Congo (DRC) involving neighboring countries triggered the First Congo War in 1998. Forces loyal to the president of the Congo, Laurent Kabila, overthrew the dictatorial regime of Mobutu Sese Seko in 1997. The war began a

year later, when Kabila acted against Rwandan forces who had aided him in his coup. Burundi, Rwanda and Uganda, all share a border with the DRC and relied on the presence of Rwandan troops for their own security. At the same time as these nations became embroiled in this conflict, other neighbouring nations, Zimbabwe, Angola, Chad and Namibia mobilised to assist forces loyal to Kabila. Conflict in the Congo is also driven by attempts to control the nation's natural resources, and tensions between the ethnic groups that make up this massive nation.

It is against this backdrop of regional conflict, that we have to appreciate the issue of mobilisation of child soldiers. Some efforts have proved successful in de-mobilising child soldiers, with inputs from local NGOs, the UNDP and UNICEF. However, all factions in the conflict continue to rely on child soldiers. As far as government forces are concerned, the Congolese Am1ed Forces (PAC) still have child soldiers. They have made promises to demobilise, but this process is proceeding very slowly. The problem is not as simple as this, because the Congolese government also supports militias that make use of child soldiers, such *Mai-Mai* and the Rassamblement congolais pour Ia democratie-mouvement de liberation (RCD-ML).

The alliance of groups opposed to the government also recruit child soldiers. There is evidence that one of these groups, the *Union des patriotes congolais* (UPC) has made use of children as young as seven; forced conscriptions have taken place. A second militia group, which receives aid from Rwandan government, has confirmed that it too recruits child soldiers. Other local militia groups have organised to defend their land and villages from opposition militias. These local groups also rely on child soldiers. The problem is exacerbated by the intervention of other East African nations in the Congolese war. Rwandan and Burundian armed forces make significant use of child soldiers.

The other region we will study is West Africa where there have been conflicts in Cote d'lvoire, Liberia and Sierra Leone. Establishing the causes of the war in this region is also difficult, as there are many factors. Order in Sierra Leone had been undermined for a long period before civil war broke out in 1991. Factions engaged in civil conflict in neighbouring Liberia began to intervene in the fighting in Sierra Leone - further complicating the situation. Unlike the situation in the Congo, there is, at present, a peace and reconciliation process underway in Sierra Leone. ‘Estimates of war- related deaths since 1991 vary widely - from 20,000 to 75,000. Approximately half the population of 4.5 million is internally displaced, or living as refugees outside the country’ http://www.afrol.com/news/sil007_civil_war.htm

To date, the Special Court in Sierra Leone has indicated a number of former leaders of armed guerrilla groups for conscripting child soldiers. Charles Taylor, the former president of Liberia, appeared before the Special Court for Sierra Leone in April 2006. He was charged with war crimes that included responsibility for militias who made use of child combatants. Liberian and Liberian- controlled forces were particularly active in recruitment in Monrovia, particularly in the period before Taylor stepped down as President that was marked by an intensification of the fighting. It was alleged that Taylor sponsored 'small boys units'. The degree of militarisation of these young combatants can be evidenced in accounts that report a military 'career' that began with fighting as a young child in Liberia, then Sierra Leone, and then being contracted to fight in Togo.

(htrp:/ /hrw .orgireports/2004/childsoldiersOl04/7 .htm# _Toc5987 2923)

The Liberian government claimed that the young soldier had volunteered to fight out of a sense of patriotic duty. However, popular demonstrations in Monrovia in 2003 showed that this was not the case. Groups fighting against the Liberian government, and allegedly backed by Sierra Leone and the US, were also found to be using child soldiers and labourer, particularly in the northern part of Liberia. Eyewitness accounts reported child soldiers actively taking part in fighting, but also carrying ammunition and supplies. Other groups recruited in the Cote d'lvoire for soldier to fight in Liberia.

Charles Taylor has pleaded not guilty to the charges, and his trial is ongoing in the Hague.

As mentioned above, the civil war in Sierra Leone has come to an end. UN missions to the country in 2003 said that progress had been made in demobilising child soldiers, and re-integrating them into society. There were serious problems with funding, and the scale of the task that is exacerbated by the refugee problem and the economic and social problems occasioned by the civil war: htrp:/ /hrw .orgireports/2004/ childsoldiers0l 04/6.htm

SELF ASSESSMENT EXERCISE

1. What common factors can you see in the use of child soldiers?

3.5 Children, Healthcare and HIV/AIDS

HIV/AIDS is a global problem:

- HIV/AIDS continued to pose an acute threat to children's human rights in general. Unlike many virulent epidemics in history that have killed mainly young children and the elderly, AIDS for the most part infects and kills adults aged eighteen to forty years, in or near the most productive years of their lives. Globally, most persons in this age group are parents. Thus, for children, the epidemic too often represents both the loss of a parent or parents and exposure to the stigma and discrimination that go hand in hand with AIDS throughout the world.'

  (http://www.hrw.org;wr2k2/children.html#HN/AIDs%20and %2OC hildren's%20Rights

HIV/AIDS is peculiar in that mortality rates are borne disproportionately by young people at the age where they are either starting a family, or have a young family. From a children's rights perspective, it is this aspect of the disease that is most devastating as it destroys the key structure in the nurturing and protection of the child. There are other consequences that follow from the death of a parent or parents. It often means that older children will have to care for their younger brothers and sisters, with the negative impact this has on their education or employment opportunities. Furthermore, children infected with AIDS/HIV are often forced into labouring for poor wages or prostitution, the latter adding to the spread of the disease. A report has also drawn attention to a problem of disinheritance in Kenya. After a death of a parent from AIDS/HIV, children have been deprived of property by distant relatives exploiting the law and the stigma attached to the disease. Finally, there is also evidence to suggest that children do not have access to sufficient information about AIDS/HIV. Often resistance from religious leaders and institutions to providing children with information on reproductive health has handicapped efforts to inform children about health care issues.

The scale of the disease is shocking:

- 'In sub-Saharan Africa -the most heavily AIDS-affected region of the world -AIDS [has] orphaned children at a rate unprecedented in history. The United Nations conservatively estimated that by December 2000, about 13 million children under age fifteen in sub-Saharan Africa had lost their mother or both parents to AIDS. In July 2000, the United States Bureau of the Census, which keeps data on AIDS independent of the United Nations, estimated that there were about 15 million children under age fifteen who had lost at least one parent to AIDS in Africa and that by 2010 this number would be at least 28 million, including over 30 per cent of all children under age fifteen in five countries of eastern and southern Africa.'

(Children's Rights, World Report, 2002)

(http://www.hrw.org;wr2k2/children.html#HN/AIDs%20and%20Children's%20Rights

The African continent is not the only area affected. Thailand has seen approximately 300,000 deaths with the associated orphaning of children; the Caribbean basin has also been badly affected; however, at present, the disease is spreading most rapidly in the former Soviet Union and Eastern Europe, where drug use among children is exacerbating infection rates.

In 1992, at the International Summit on The Rights of Children in South Africa, children aged 12-16 from allover the country came together and drew up the Children's Charter of South Africa. In itself this suggests the shared perception that the rights of the child in South Africa are not adequately protected. We will now examine this particular issue, focusing on the right to health care.

Once again, we will see that the problems in this area are not necessarily linked with the legal framework. The South African Constitution contains a right to health care and the country is a signatory to the Convention on the Rights of the Child.

'South Africa ratified the Convention on the Rights of the Child ('CRC'), shortly after the advent of democratic rule, in June 1995. In the process leading to the formulation of the National Programme of Action that followed ratification, the matter of law reform for children was identified as an important priority. The most pressing reason for this was the need to eliminate oven discrimination, especially racial discrimination, from the statute book, but there *were* other compelling factors as well. Not the least of these was the need to harmonise the laws of the so- called 'independent Bantustans' created under apartheid with those of the rest of South Africa, and the desire to take legislative account of the provisions of the Convention itself. Since the CRC was the first international convention to be ratified by South Africa, previously denied accession to UN treaties, the review of legislation pertaining to children enjoyed high political profile and support.'

Children's Rights in South Africa: An Update (http://www.dci-au.org/htmJ/sa.html)

First it is necessary to disabuse oneself of the idea that AIDS/HIV is somehow a 'punishment' for sexual promiscuity. This approach to aids has influenced government policy. However, as we will see below, a large proportion of AIDS/HIV sufferers are the victims of sexual

violence. Arguing that sexual abstinence will tackle the problem of AIDS/HIV is thus utterly misconceived.

First of all, we need to understand the basic legal position of the child in South Africa. At common law, consent from either a parent, guardian or the High Court is necessary before a child can receive medical treatment. The Child Care Act of 1983 permits children over 14 to consent to treatment themselves, and there are other mechanisms to obtain consent *for* children under 14 if the consent or a parent or a guardian is not available. Permission may be sought from the Minister of Social Development, or, in emergency cases, a hospital superintendent.

These legal mechanisms have to be placed in the context of the HIV/AIDS epidemic. When the 1983 Act was passed, the scale of the problem had not been anticipated; neither had policy makers understood the link between sexual violence and AIDS. Indeed, the report from which we are quoting talks of 'the dual epidemics of HIV/AIDS and sexual violence-including a virtually unprecedented epidemic of child rape'. The consent to treatment procedures under statute and at common law are not now robust enough to deal with these problems; especially since a large number of children have no parent or guardian: children have been ‘orphaned or abandoned’. Thus, in the opinion of South African Human Rights activists, the law on consent does not protect children, but places ‘serious barriers’ in the way of their health care; barriers that contradict both the SA constitution, and international human rights law.

There was also ambiguity in the law. For instance, one pressing issue was whether testing for HIV/AIDS constitutes medical treatment. Many children had been refused help until a legal ruling clarified that testing did count as treatment.

The struggle against HIV/AIDS in SA has also been hampered by the government's reluctance to make the necessary drugs available. Although this has recently changed, the legal environment is not conducive to effective health care implementation. Litigation has been attempted to obtain antiretroviral treatment and drugs for children living with HIV/AIDS. *Ex Parte Nigel Redman NO(* 4), concerned four orphaned children with HIV 1 AIDS. As the children had not yet had legal guardians appointed, it was not possible to obtain the consent of legal guardians. The consent of the relevant Minister was also not forthcoming. An application was thus made to the High Court, and this was successful. Whilst this shows that courts will intervene, applications made to the Minister of Social Development have been time-consuming and not entirely successful. For children living with a life-threatening

illness, such protracted procedures are extremely obstructive, and may even prove fatal. The scale of the problem means that, if AIDS is to be controlled, far more efficient legal mechanisms are necessary. It is simply not possible to make applications to the High Court every time a child needs treatment, or to wait for the ruling of the Minister of Social Development.

The Children's Act (2004) goes a long way to rectify the situation. Section 32 replaces the existing law with a new set of definition that describe a child's care giver; care givers are people who assume care for a child, but otherwise are not parents. A care giver may give consent to 'any medical examination or treatment of the child if such consent cannot reasonably be obtained from the parent or primary care-giver of the child'. This section should make obtaining treatment and care for children much more straight forward. However, unless the Act also allows medical practitioners to authorize treatment, victims of sexual violence would not obtain the necessary anti AIDS/HIV drugs. This is because government guidelines require these medicines to be administered within 72 hours of the sexual assault raking place. In rural areas, children may have to travel a great distance to a hospital, possibly without parents or careers; the position of refugee or street children is similar. Unless the medical practitioner who treats them can authorize treatment himself or herself, it is very unlikely that the necessary consent would be forthcoming.

http://hrw.org/english/docs/2004/07/27/safric9150.htm (South Africa: Safeguarding Children's Rights to Medical Care', Lise! Gerntholtz, 2004.)

South Africa and Its Reports to the CRC

South Africa's first report to the Committee for the Rights of the Child stressed that the health care system had been inherited from the Apartheid regime. Despite this historical problem, the ANC government has pushed forward with the implementation of a free health care service for all children under 6 years old; although problems still remain in relation to disparities of provision in rural and urban areas. As well as drawing attention to infant mortality rates, the report also mentioned the problem of 'STD/HIV infection in adolescents', HIV/AIDS and stated that it was a a 'national child health priorit[y]' A number of further issues of special concern are identified. The report also put the health care system into context. South Africa is a developing nation, and operates under difficult financial conditions; health care and welfare concerns need to be assessed from this perspective.
(http://www.communitylawcentre.org.za/ser/esr1999/1999jul_charter.php).

SELF ASSESSMENT EXERCISE

1. AIDS/HIV treatment is a children's rights issue. Discuss

3.6 Children in the Criminal System

In turning to consider juveniles in the justice system, we are primarily concerned with matters of criminal justice. The guiding principles of children's rights in this area, resting on notions of the inherent dignity and rights of the child, stress rehabilitation rather than punishment. We will see, though, that many countries persist in treating children as adults, and breaching these guiding principles.

The fundamental principles contained in the Beijing Rules are based on securing the well-being of the juvenile in the criminal justice system. Policy initiatives are recommended which 'reduce the need for intervention under the law', and juvenile justice needs to be thought of as part of a 'comprehensive framework of social justice'. Rule 5.1 specifies that measures taken in relation to a juvenile offender are proportionate to both the circumstances of the 'offender and the offence'. This is especially pertinent in those 'status offences' under national legal systems where the behaviour attracting criminal sanction is wider than that for adults. The examples given are 'truancy, school and family disobedience [and] public drunkenness'. The principles go on to recognise and confirm the relevance of due process guarantees for juveniles. (United Nations Standard Minimum Rules for the Administration of Juvenile Justice (The Beijing Rules'), GA. res. 40/33, annex, 40 U.N. GAOR Supp. (No. 53).at 207, U.N. Doc. *N40/53* (1985).)

As well as stressing the general principles contained in the Beijing rules, the United Nations Rules for the Protection of Juveniles

Deprived of their Liberty, [G.A. res. 45/113, annex, 45 U.N. GAOR Supp. (No. 49A) at 205, U.N. Doc. *N45/49* (1990)] stress that detention for juveniles should only ever be a punishment of 'last resort' and any prison sentence or deprivation of liberty must be 'for the minimum period possible'. Perhaps the most useful statement of policies regarding juvenile justice are provided by the Riyadh Guidelines, the United Nations Guidelines for the Prevention of Juvenile Delinquency, G.A. res. 45/112, annex, 45 U.N. GAOR Supp. (No. 49A) at 201, UN Doc.

N45/49 (1990). These guidelines stress the importance of integrating young adults into society: 'By engaging in lawful, socially useful activities and adopting a humanistic orientation towards society and outlook on life, young persons can develop non-criminogenic attitudes'. Thus, the response of any criminal justice system should be to understand the reasons for deviance. Punishment may be necessary, but the emphasis is on understanding why an offence has taken place, and re-orientating individuals to less anti-social attitudes.

Breaches of these standards can be found across the spectrum of law enforcement and in all countries of the world, but we will consider some examples drawn from Latin America and the United States. Abuses begin once children are under the control of the police. One particularly extreme example, as reported by the United Nations special rapporteur on extrajudicial executions, was evidence that, since 1998, up to 800 children had been murdered by the Police in Honduras. Also in Latin America, the Inter- American Court of Human Rights made an order against Guatemala relating to the murder of street children by the Police. In Paraguay, a Human Rights group also reported that children were being held with adults in overcrowded prisons and were victims of ill-treatment, including punishment by solitary confinement.

The record of the United States is also not particularly good in this area. Although there is a juvenile justice system in the US, concern has been drawn to the fact that the US criminal justice system tries children as adults in a number of cases where special juvenile processes would be more suitable. It is a general principle of children's rights that there should be a minimum age for criminal responsibility. An Amnesty International report shows that more than half of all US states have crimes for which any child can be prosecuted in an adult court; there are also inconsistencies between different states as to the age at which a child can be tried in a juvenile court. For instance, in North Carolina the minimum age is six; in Maryland, Massachusetts and New York, the minimum age is seven. The Report goes on to state that:

..Between 1986 and 1995, the number of children confined in custody before their cases were heard or following conviction grew by more than 30 per cent. h1 many jurisdictions, the increase in the number of children who are held in custody has outstripped the increase in resources that are available to house the children and provide services for them. The most recent survey found that 40 per cent of facilities around the USA housed more children than they were designed to accommodate.

(Betraying the Young: Children in the US Criminal Justice System http://www.amnesty.org/library/index/ENGAMR510601998)

Breaches of international standards thus concern the excessive use of incarceration, both before formal conviction, and as a means of punishment after conviction; and the incarceration of children in facilities that are not equipped with resources that are suitable to juveniles, or to those with mental health problems. However, special censure was due to the fact that the US imposes death sentences on those convicted of crimes committed when they were children:

When it ratified the ICCPR, the US government reserved the right to impose the death penalty for crimes committed by those under 18. In 1995 the UN Human Rights Committee, the body of experts set up to monitor compliance with the ICCPR, said that the US reservation was incompatible with the object and purpose of the ICCPR and should be withdrawn. However, since ratification, US state authorities have executed six prisoners for crimes committed when they were under 18, including two in 1998. In June 1998, there were 70 such prisoners awaiting this fate on US death rows.

In 1998, twenty-four US states permit the use of the death penalty against those under 18 at the time of the crime. Fourteen states have legislation enforcing 18 as the minimum age. (ibid)

Amnesty International goes on to point out that the federal government has specified 18 as the minimum age of criminal responsibility, and thus should be obliged to ensure each state complies with this rule. The federal government is responsible for making sure that state governments abide by their international obligations. Although the US has not ratified the Convention, which sets 18 as the age of criminal responsibility, the fact that the majority of nations in the world have, suggests that there is more or less universal consensus on the age of criminal responsibility. The Supreme Court has also shown that it is not willing to accept this consensus, holding that 16 should be the relevant age; it has also held that the execution of juveniles aged 16 or 17 at the time of the offence does not violate the constitution.

SELF ASSESSMENT EXERCISE

1. Why is there resistance to children’s rights standards in the US criminal justice system?

2. Although the Convention on children’s rights is described as the most ratified of international human rights instruments, abuses of children's rights are still widespread. How can this situation be accounted for? Discuss.

Advice on answering the question
Any answer to this question would do well to agree with all parts of this statement. It is indeed accurate to describe the Convention in this way. That it has been so widely accepted does suggest a general level of acceptance of the principles that it contains, and a couple of paragraphs of the essay should outline the key principles of the Treaty, and outline the functions of the Committee. The key to the Committee's role is its commitment to constructive dialogue with state parties. This approach may also encourage a broad engagement with the principles of the Treaty at a-national level. The second part of the quotation is also accurate. The essay should outline the degree of abuse and violation of children's rights, perhaps choosing to focus on one of the areas outlined above. The third part of the statement is possibly the most difficult part of the question. The reasons why children's rights continue to be abused are complex. However, it might be possible to suggest that the main problems relate to the breakdown of civil institutions that could protect rights in instances of armed conflict, the broader context of endemic poverty, and the persistence of cultural and economic patterns that will take a long time to change; if they change at all.

Activity 7.1 (a) The Convention is built on four general principles that are articulated in articles 2, 3, 6 and 12. Article 2 provides a prohibition on discrimination against children, a positive statement of equal opportunity. Article 3 concerns the 'best interests of the child'. If a public authority acts in relation to a child, that authority must abide by this test. Article 6 states that right to life, survival and development. It is expressed somewhat differently from the Declaration because this right applies specifically to children; development must be understood in a broad sense to include emotional, physical, mental and cultural development. Article 12 specifies that children should be allowed to have opinions, and that these opinions must be considered in matters that concern the child. This would of course include judicial and quasi-judicial hearings.

(b) The Convention is a statement of general principles and provides a reference point for human rights standards as far as they relate to children. Once a government has become a signatory to the Convention, it must make sure that it honours the principles contained with the Convention, to the extent that it legislates or provides programmes of action to achieve the goals of the Treaty. Governments must submit periodic reports to the Committee, which can then make recommendations to the General Assembly. These recommendations might request that the Secretary-General undertakes studies on specific issues relevant to children's rights. The Committee can also make suggestions and general recommendations based on information

received in the periodic reports, and also call for assistance from other specialist international organisations.

(c) As mentioned above, the Convention on the rights of the child is the most widely ratified of international human rights instruments. Two nations have not ratified the Convention: Somalia and the USA. The former has not been able to ratify the Convention, because its government is not internationally recognised. The USA has signed the Convention, but has not yet ratified it. There are several reasons for non-ratification: it has been the practice of the US government to concentrate on ratifying one treaty at a time; and currently this is the Convention on the Elimination of All Forms of Discrimination against Women. The reason given for this is that it is necessary to make sure national and federal law is coherent with the Treaty's obligations. However, there may also be a degree of political reluctance to ratify. As we will see below, there are many important areas where state law in the USA remains contrary to the Convention.

Activity 7.2 This quotation is an accurate description of the persistence of bonded labour in India. The country’s government has committed itself to international human rights standards, and domestic law is, for the most part in line with these standards. The government has also shown itself, at a policy level, to be committed to the struggle against the economic exploitation of children. However, the persistence of bonded labour can explained by the failure to put either law or policy into effect at a grass roots level. The reasons for this failure are complex, but can be mentioned in

UNIT 3 THE RIGHTS OF REFUGEES

CONTENTS

1.0 INTRODUCTION

The rights of refugees raise in a particularly acute form one of the main issues that has concerned us throughout this subject guide.

The refugee is a person who has had to leave the country of his or her birth or domicile through a fear of persecution. How are human rights to protect this most vulnerable group? As we have seen, international law places obligations on sovereign states. How can refugees rely on a state to protect their rights when it is the state itself that is persecuting them?

It is in the area of refugees' rights that the obligations of the international community are perhaps the most meaningful. Could we speak of an international duty to protect those fleeing persecution; or of those who have been made state-less and right- less? We will see that the UN has attempted to make a duty to refugees a reality but, that there is still a great resistance to open- ended responsibility to refugees in most nations of the world.

Refugee law is a complex and ever-changing body of doctrine and principle. Like all human rights law, it is also an intensely political subject. In this chapter, we will see how an appreciation of the problems faced by refugees has transformed itself from a European to a world

issue. The UN, its agencies and other INGOs and pressure groups are perhaps responsible for this increased awareness of the issue -and we will focus on the role of the 1951 Convention and the 1967 Protocol. However, we need to appreciate that refugees' rights are increasingly being criticised.

The Convention and the concept of refugees' rights are ctiticised by politicians in the developing and developed world. For instance, in 2001 the then Home Secretary of the UK, Jack Straw, argued that the Convention was in need of revision as the ten-fold increase in asylum seekers in the UK suggested that economic migrants were taking advantage of a state's responsibility to refugees. Certain politicians and irresponsible journalists also portray the asylum seeker as a person seeking to claim benefits and privileges that they do not deserve.

But to what extent are these views accurate?

h) Two countries in southwest Asia, Iran and Pakistan, host twice as many refugees as do all the countries of Western Europe combined. Yet in 2000, the world's wealthiest nations contributed less than $1 bi1lion-one-tenth the amount they spent on maintaining their own asylum systems--to fund UNHCR's protection work around the world. [http://www.unhcr.org/cgi-bin/texis/vtx/protect].

This authoritative quotation suggests that the real problem might rest with the failure of powerful nations to commit themselves to a meaningful and coherent international system for the protection of the rights of refugees.

We thus need to place refugees' rights in their political as well as their legal context. It is worth also noting at this stage that there is a distinction between the refugee and the asylum seeker. Indeed, although there are references to asylum in the Preamble to the Convention, the granting of asylum is not dealt with in the 1951 Convention or the 1967 Protocol.

2.0 OBJECTIVES

By the end of this chapter and the relevant readings you should be able to:

- describe the political and social context of refugees' rights
- explain the legal theoretical issues raised by refugees' rights
- summarise the basic provisions of the 1951 Convention relating to the Status of Refugees and the 1967 Protocol

- understand the problems inherent in the test for determining refugee status identify the provisions that relate to women and girls as refugees and to family reunification
- describe the response of the English courts to the test for the determination of refugee status
- outline reforms to immigration and asylum policy in the UK and the political issues these reforms raise
- have a basic understanding of the refugee crisis in the Sudan.

3.0 MAIN CONTENT

3.1 Thinking about the Rights of the Refugee

As suggested in the introduction above, the concept of the refugee fug problems in humans rights law. The following passage contains an engaging analysis of some of the key issues:

- Refuges movement called into question the organisation of the world into distinct foreign territories to which individuals were allied by birth…since the essence of the phenomenon of refugeehood is that an individual is left without the protection of his or her state, the refugee problem was seen by many to be a fundamental problem of modern political organisation. The political theorist, Hannah Arendt, was one of the earliest writers to see articulated in the refugee condition the inherently violent and discriminatory nature of the Westphalian state system. According to Arendt, human rights, even those of the most basic and fundamental kind, such as the right to life and freedom from inhuman or degrading treatment or punishment, , do not devolve to the human subject through mere impulsive existence in the world, but due rather to attachment to the social and political organisation known as the state. Those without the protection of the state -the refugee being the paradigmatic instance – 'exist without the right to have rights'. Whilst Arendt and others called for a corrective (to the state system, so that falling states accord proper protection to its citizens) others viewed the refugee condition as potentially productive of a new political consciousness able to challenge the nexus of state, territory and identity that has resulted in the disinfranchisment of millions of refugees throughout the ages…indeed, Gorgio Agamben, whose work has been highly influential, speaks of refugeehood as the 'only thinkable category for the people of our time.'

Tuitt argues that the status of the refugee provides an insight into the nature of human rights. The refugee challenges the very notion of a system of formally equal sovereign states (the Westphalian state system). Because the refugee is a stateless person, he presents a problem

to a system of human rights that depends on the sovereign state. According to the German philosopher Hannah Arendt, the refugee characterises the modem political condition: the inherently violent nature of the state that can both grant and deprive citizens of rights. In Arendt's opinion, human rights are not the product of inherent dignity, but exist purely because a state might grant and recognise them. A number of conclusions can be drawn from this point. One is that it is necessary to have a supra-governmental system that guarantees human rights; another sees the very condition of the refugee as relevant to a new political consciousness that takes the refugee as the right-less person as the paradigm of modern politics, rather than the model of the citizen with rights.

Tuitt's analysis also suggests that the refugee needs to be put into a historical context; and so before we can think critically about the issued raised, we need to examine briefly the modem problem of the refugee.

Summary

The focus of this chapter will be on the 1951 Convention and the 1967 Protocol. Despite these international agreements, though, the human rights of refugees are often neglected. This is because by being state-less, refugees fall outside the human rights system as rights obligations rest within nation states. Another central problem is the demonisation of refugees and asylum seekers, and the failure of powerful countries to pledge a significant level of financial support to the system for the protection of refugees.

1.1 The Recent History of the Refugee

1.1.1 Measures to Protect Refugees

The roots of the modem law relating to the protection of the refugee can be found in the immediate aftermath of the Second World War. The United Nations Relief and Rehabilitation Agency (UNRRA) and the International Refugee Organisation (IRO) were involved in aiding the hundreds of thousands of displaced people in Europe. However, there was not, as yet, a coherent body of refugee law. There were two relevant instruments: the 1933 League of Nations Convention relating to the International Status of Refugees and the 1938 Convention concerning the Status of Refugees coming from Germany. Although the 1933 Convention contained principles that, as we will see, went on to inform the Convention relating to the Status of Refugees, these documents cannot be seen as providing a coherent framework for the protection of the human rights of refugees. Indeed, although the 1933 Convention placed duties on signatories to accept refugees, and prohibited their

expulsion, the effect of this treaty was severely limited by the fact that those few nations who did sign imposed limitations on its influence.

In the post-war period, the continuing nature of the refugee problem in Europe, and the appreciation that the refugee crisis raised humanitarian and human rights issues, made the UN keen to improve the international protection of displaced persons. The UNHCR was created in 1950 by the UN General Assembly and given a remit that covered the protection of refugees worldwide.

One year after the creation of the UNHCR, the Convention relating to the Status of Refugees was adopted by the UN. One of the main reasons for the Convention is outlined by the UNHCR Handbook:

- Instead of *ad hoc* agreements adopted in relation to specific refugee situations, there was a call for an instrument containing a general definition of who was to be considered a refugee.

The nature of the Convention reflects the fact that it was largely a compromise acceptable to the parties present when it was drawn up. As with all international human rights, refugee rights place obligations on sovereign states, and state parties were reluctant to commit to obligations that were too broad or interfered too dramatically with their own internal affairs. Thus, as we will see, the very definition of the refugee status has a temporal limit. It applies to those who became refugees 'as a result of events occurring before 1 January 1951 '. There is also an option to limit the geographical reach of the treaty to events happening in Europe.

Both limitations reflect the fact that sovereign states were unwilling to adopt open-ended responsibilities in this area. However, the 1967 Protocol relating to the Status of Refugees removed the geographical and temporal1imits of the Convention.

The 1967 Protocol also created a duty for national authorities to co-operate with the UN in the 'exercise of its functions', and in the collection of statistical data relating to the condition of refugees and the status of laws relating to refugees in the signatory state. A fu11list of parties to the Protocol and the Convention can be found at: http://www.unhcr.org/cgi- bin/texis/vtx/protect/ opendoc. pdfltbl = PROTECTION&id = 3b73bOd63

The Convention is important from a legal perspective because it contains a general definition of the refugee, and also grants them some rights. The core of the Convention is the principle that a nation must not expel or return a refugee (refoulement). This principle was contentious

at the time of the drafting of the Convention, and remains so today. Governments were concerned that they were under an obligation to allow unlimited numbers of persons to claim status as refugees once they had crossed a national border. Misgivings about a nation's obligations to refugees is reflected in the fact that the Convention also imposes obligations on refugees to the nation that is protecting them. In this sense, refugee's rights clearly correlate with refugee'' duties.

The Convention is supplemented by other international instruments, including the International Covenant on Civil and Political Rights (1966), the Convention on the Rights of the Child (1989) and the Convention Against Torture and Other Cruel, Inhumane and Degrading Treatment or Punishment (1.984). There are also other, regional instruments that relate to refugees. For example in Latin America, there are a number of relevant international statutes. Amongst these documents are:

- the Treaty on International Penal Law (Montevideo, 1889)
- the Agreement on Extradition (Caracas, 1911)
- the Convention on Asylum (Havana, 1928)
- the Convention on Political Asylum (Montevideo, 1933)
- the Convention on Diplomatic Asylum (Caracas, 1954)
- the Convention on Territorial Asylum (Caracas, 1954).

There is also the Convention Governing the Specific Aspects of Refugee Problems in Africa. This was adopted by the Organisation of African Unity in 1969. We shall examine this treaty in a later Chapter.

1.1.2 What is a Refugee?

Before we examine the Refugee Convention in depth, it is worth thinking in a little more detail about the very idea of the refugee. The distinction between a refugee and a person seeking entry to a country for other purposes of migration is rather arbitrary. From a historical perspective, for instance, it was not until the late eighteenth century in England that the word 'refugee' was used to describe an individual escaping persecution; such 'refugees' were then considered 'aliens'. More recently, we can see that the word, and indeed the legal concept, has been used rather loosely. In 1968, a large group of Kenyan citizens of Asian dissent were facing discrimination in Kenya and sought to enter the UK; later in 1972 a group of 'Ugandan Asians' also sought entry into the UK. Although a case could be made that these people were refugees fleeing persecution, it was not the way that they were considered by immigration law. The treatment of this group can be compared with the later treatment of Albanians fleeing Kosovo in the 1990s. These people were treated as asylum seekers (for the distinction

between refugees and asylum seekers, please see below). One more example is pertinent. From November 2002, all claims for asylum to the UK from countries acceding to the EU are to be treated as unfounded. However, from May 2004, nationals from these same countries can enter the UK as citizens of the EU: thus, depending on whether, for example, a Polish national enters the UK before or after the May 2004 deadline, he will either be regarded as either a European worker or as a failed asylum seeker. These examples suggest that the dividing lines between immigrant or economic migrant and asylum seeker or refugee are rather blurred (see Clayton, G. *Textbook on Immigration and Asylum Law.* (Oxford: Blackstone Press, 2004 pp.344-S [ISBN: 1841741884])).

Refugees or Asylum Seekers?

The term refugee is somewhat vague, and we must distinguish between a refugee and an asylum seeker. First, the concept of asylum, historically at least, was a privilege of sovereign states. From an international law perspective, this is still probably the case: it is a state that has the right to grant asylum. What does this mean? A state can only demand the return of its nationals in formal extradition proceedings, and another state may choose to grant asylum. This notion that the ‘right to asylum arises between states' (Clayton, p.34S), has been qualified by the Universal Declaration, as Article 14 states the right to 'seek and enjoy' asylum. However, it has been argued that this does not actually mean that one has a right to asylum. This would mean, therefore, that a state is not under an obligation to grant asylum.

How does this relate to the Convention relating to the Status of Refugees? As argued above, the core of the Convention is the prohibition on refoulement. This means that a state cannot return refugees. An obligation not to return refugees does not necessarily equate to a right to asylum. Also note that refoulement relates to refugees already on the territory of the state: it does not prevent a state from stopping refugees reaching its borders in the first place (Clayton, p. 346).

SELF ASSESSMENT EXERCISE

1. ‘Although one has to distinguish between refugees, asylum seekers and economic migrants, there is no clear boundary between the terms.’ Discuss.

2. What does Tuitt’s analysis of the refugee suggest about the nature of refugee law?

Summary

This section has dealt with the historical and conceptual structure of the idea of the refugee. We have reviewed the work of Arendt, Agamben and Tuitt who suggest, in different ways, that the refugee is a 'figure' of our times. We have also looked at the historical development of refugee law which took place immediately after the Second World War in Europe. Although the United Nations Relief and Rehabilitation Agency (UNRRA) and the International Refugee Organization (IRO) provided assistance for displaced peoples, a coherent body of refugee law was only achieved with the Convention relating to the Status of Refugees in 1951. Although the Convention could be seen as a compromise, because states were not keen to assume broad responsibilities for refugees, it does contain some important provisions. The Convention provides a general definition of the refugee and a basic set of rights. The Convention states that a nation must not expel or return a refugee (refoulement). Further advances mean that there are now a number of measures that relate to the international protection of refugees rights.

1.2 The Convention Relating to the Status of refugees and the 1967 Protocol

1.2.1 Definition of a Refugee

The Convention Relating to the Status of Refugees was adopted in 1951 by the United Nations and came into force in April 1954. The Preamble states that the Convention ‘revises and consolidates’ the previous documents that relate to the status of refugees.

Chapter I of the Treaty contains general provisions. **Article 1** contains a definition of refugee. It is, in part, a technical definition that refers back to previous documents. Thus, a refugee is someone who has been considered a refugee under 'the Arrangements of 12 May 1926 and 30 June 1928 or under the Conventions of 28 October 1933 and 10 February 1938, the Protocol of 14 September 1939 or the Constitution of the International Refugee Organization'. Why are these dates significant?

The above enumeration is given in order to provide a link with the past and to ensure the continuity of international protection of refugees who became the concern of the international community at various earlier periods these instruments have by now lost much of their significance, and a discussion of them here would be of little practical value. However, a person who has been considered a refugee under the terms of any of these instruments is automatically a refugee under the 1951 Convention. (UNHCR Handbook para. 33)

This paragraph thus tells us how the 1951 Convention is coherent with other, earlier Conventions.

Paragraph (2) adds significantly to this definition:

As a result of events occurring before I January 1951 and owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable, or owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.

There are a number of elements to this definition. First, it is necessary to explain the importance of the date 1 January 1951. As explained above, the date is significant because it shows that the state parties who were involved in the early stages of making the Convention law were keen to limit their liability to people who had been made refugees during the Second World War, and so include only events that had already happened. States did not want the Convention to create an open-ended responsibility for refugees that would be a burden on national governments. However, as the UNHCR Handbook explains, with the signing of the 1967 Convention, this definition has lost most of its significance. It is relevant mainly to those states that have signed the Convention, but not the Protocol.

The core sense of the definition is a ‘well-founded fear of persecution’; the reasons for the persecution relate to a broad list of factors that include ethnicity, but also cultural and political concerns. Owing to this fear of persecution, the person claiming refugee status is either ‘outside the country of his nationality’ and unable or unwilling to return or, in cases where the individual has no nationality, is unable or unwilling to return to the place of ‘former habitual residence’. A refugee is thus a ‘stateless’ person; someone who cannot call on a state to protect him or her.

It is also worth noting that an individual can lose refugee status.
There are a number of grounds under which this could happen, for instance if he or she ‘voluntarily re-avails himself of the protection of the country of his nationality’ or the reasons for the fear of prosecution no longer exist. The commission of certain crimes can also deprive an individual of refugee status. Included in this list would be war crimes and crimes against humanity; ‘non-political’ crimes committed in the

country from which s/he has fled, or if the person has been 'guilty of acts contrary to the purposes and principles of the United Nations'.

Before we move on, we need to examine in detail the meaning of these keywords in the Convention. Later in this chapter, when we look at the response of the English Courts to the Convention, we will see that their meaning is far from straightforward.

The phrase 'well-founded fear of being persecuted' replaces the earlier method of defining refugees by categories (i.e. persons of a certain origin not enjoying the protection of their country) by the general concept of 'fear' for a relevant motive. Since fear is subjective, the definition involves a subjective element in the person applying for recognition as a refugee. Determination of refugee status will therefore primarily require an evaluation of the applicant's statements .rather than a judgment on the situation prevailing in his country of origin. *(UNHCR Handbook* para. 37).

However,
To the element of fear -a state of mind and a subjective condition - **.**is added the qualification 'well-founded'. This implies that it is not only the frame of mind of the person concerned that determines his refugee status, but that this frame of mind must be supported by an objective situation. *(UNHCR Handbook* para. 38).

There are thus both subjective and objective elements to the test for refugee status. The Handbook explains that the general test for refugee status replaced the previous approach which had been to determine refugee status by reference to categories of person. The Convention test has both a subjective and an objective element: the decision-maker must ask first of all whether or not a person applying for refugee status is in fear. This is a subjective test, and relates to the applicant's own understanding of the threat that he or she faces. However, this must be 'well-founded'; and this requires an objective element. There must be objective reasons for the individual's fear. Note also that the UNHCR Handbook stresses that, for the purposes of the Convention, being the victim of a natural disaster does not, in itself, qualify a person for refugee status.

As far as the subjective element is concerned, the Handbook provides further usefu1 clarification of the way in which it is to be understood:

Due to the importance that the definition attaches to the subjective element, an assessment of credibility is indispensable where the case is not sufficiently clear from the facts on record. It will be necessary to take into account the personal and family background of the applicant,

his membership of a particular racial, religious, national, social or political group, his own interpretation of his situation, and his personal experiences -in other words, everything that may serve to indicate that the predominant motive for his application is fear. Fear must be reasonable. Exaggerated fear, however, may be well- founded if, in all the circumstances of the case, such a state of mind can be regarded as justified. [42]

The subjective element demands that the decision-maker takes into account the credibility of the applicant; especially when the facts as presented are not themselves clear. The decision-maker must assess the subjective fear of the applicant as an individual, taking into account his or her beliefs, status and ethnicity; and give due weight to the individual's own appreciation of the facts of the situation. Determining the objective element is equally as difficult. Although the decision-maker is not called upon to 'pass judgment on conditions in the applicant's country of origin', it is impossible to consider the applicant's statements in the 'abstract' and the decision must be related to 'the context of the...background situation'. Thus, whilst a knowledge of the situation in the country of the applicant is not a primary consideration, it is 'an important element in assessing the applicant's credibility'. [43] The applicant's own experiences are important in assessing these issues, but so too are the experiences of his family, friends, or the ethnic or religious group from which he originates. Also important are the laws of the relevant country, and the way in which they are applied.

In this context it is also important to note that, although the Convention envisages that refugee status is normally determined on an individual basis, there is the possibility of cases where whole groups of people have been displaced. In such circumstances it is not possible to make individual determination of refugee status for each person in the group. In this situation it is Possible to make a 'group determination' of refugee status: 'each member of the group is regarded prima fade (i.e. in the absence of evidence to the contrary) as a refugee'.

An equally important issue is the meaning of the word persecution. At present there is no single accepted definition of this word. Interpretations are thus thrown back to the Convention itself. From Article 33, it is possible to 'infer' that persecution means 'a threat to life or freedom on account of race, religion, nationality, political opinion or membership of a particular social group... Other serious' violations of human rights -for the same reasons -would also constitute persecution.' Although this appears a reasonably wide definition, it begs the question of whether other acts could amount to persecution. This would depend on 'circumstances of each case'. It would be necessary to take into

account the subjective and objective elements of the test as analysed above.

Another issue that should be considered here is the problematic distinction between economic migrants and refugees. The UNHCR Handbook defines a migrant as: '…. a person who...voluntarily leaves his country in order to take up residence elsewhere'. In this sense, an economic migrant is not a refugee; however, in certain circumstances, an economic migrant may be considered a refugee. For instance, punitive economic measures (for example, prohibiting people from taking certain jobs/ raising levels of taxation that apply to certain groups of people) may lead to a person leaving a country. This begs the question: when is an economic migrant a refugee?

- ...Objections to general economic measures are not by themselves good reasons for claiming refugee status. On the other hand, what appears at first sight to be primarily an economic motive for departure may in reality also involve a political element, and it may be the political opinions of the individual that expose him to serious consequence!; rather than his objections to the economic measures themselves. (UNHCR handbook para. 64)

An economic migrant may be a refugee, depending on the facts of the case. Obviously, the other elements of the definition above would have to apply.

SELF ASSESSMENT EXERCISE

1. What is the nature of the test to determine refugee status?

1.2.2 Obligation on States and refugees

The Convention goes on to list certain obligations that apply to both state parties, and refugees.

Article 2 articulates a set of 'general obligations' that the refugee owes to the country of refuge. These require that she or he conforms 'to its laws and regulations, as well as to measures taken for the maintenance of public order'. It is perhaps best to view this article as aspirational. As the Convention is an international treaty, and, as the individual has, at best, a problematic status in international law, it is hard to see how this duty could be enforced against individuals. It is a broad obligation to respect not just the law, but, also general measures taken to preserve public order.

Article 3 is a duty placed on state parties. They must apply the Convention to refugees without any form of discrimination. Moreover, by Article 4, state parties must accord to refugees' treatment that is ‘as favourable as that accorded to their nationals' in relation to the right to practice a religion. These duties are the minimal obligations that a state owes to refugees. Article 5 stresses that nothing in the Convention should be interpreted as limiting the 'benefits' that a contracting party might grant to refugees.

The next set of Articles relates to the peculiar legal status of the refugee as a displaced person; an individual in a form of legal limbo.

Article 7 obligates a state party to treat the refugee in the same way that it treats ‘aliens generally’, i.e. not as a citizen of the state in which the person is in residence. Once a refugee has been resident for three years, she or he is exempted from reciprocity arrangements that exist between his country of refuge and the nation from which he fled. There are further provisions in this Article that protect the rights of refugees in the absence of reciprocity arrangements. Furthermore, Article 8 provides that if a state party takes 'exceptional measures' against a foreign state, any refugees from that state already within the territory of the state party, should not be treated as subject to those special measures. Thus, the refugee is, as far as special measures are concerned, already separated from and treated differently from his fellow nationals.

Article 9 is a qualification of this principle. A contracting state can, in ‘times of war or other grave and exceptional circumstances', take measures to protect 'national security' in relation to the determination of refugee status. **Article 10** can be read as part of this group of Articles, but it relates to specific circumstances: those displaced in the Second World War and resident in the territory of a contracting party are to be considered lawful residents for the period of their settlement. 10(2) contain some further provisions for determining a period of continuous residence, and Article 11 provides special provisions for refugee seamen.

SELF ASSESSMENT EXERCISE

1. What are the main areas of concern of Articles 2-11 of the Convention?

Chapter II

Chapter II further elaborates the juridical nature of the refugee.
Article 12 provides that the personal status of the refugee is determined by the law of the country in which she or he is domiciled. For those

without a country of domicile, personal status is provided by the country in which the person has residence. Any rights which the individual refugee might have acquired, such as rights acquired on marriage, in the country in which he was a national must be respected by the country of refuge, subject to whatever formalities that country of refuge imposes. The exception to this principle is that the state would have recognised the right had the individual not been a refugee.

Article 13 provides that the refugee must have rights at least as favourable as those accorded to aliens in relation to the ownership of movable and immovable property, and contractual or property law related rights.

Article 14 relates to artistic rights and rights over industrial property. Articles 15 and 16 move from property rights to public rights. **Article 15** provides that a refugee has a right of association in 'non-political and non-profit-making associations and trade unions' that are the same as those given to nationals of a foreign country that may be in the territory of the state party. **Article 16** addresses due process and fair trial rights. The Article states that a refugee has to have' free access to the courts of law on the territory of the state party.

SELF ASSESSMENT EXERCISE

1. What are the main features of Chapter II?

Chapter III

Chapter III of the Convention sets out employment rights of the refugee. **Article 17** provides that a state party must allow refugees who are lawfully in its territory 'most favourable treatment' in relation to wage-earning employment as they would allow to nationals of a foreign country who were resident in their territory. However, a state is allowed to put in place restrictions to protect national labour markets. These restrictions would not apply to a refugee from a nation whose nationals would have been exempt from such restrictions; or, a refugee who has been resident for three years in the territory of the state party who has granted him refugee status. A refugee married to a spouse who is a national of the state party would also be exempt; as would a refugee having one or more children possessing the nationality of the state party. There is also a general duty at Art. 17(3) that is worth considering in full:

The Contracting States shall give sympathetic consideration to assimilating the rights of all refugees with regard to wage-earning employment to those of nationals, and in particular of those refugees who have entered their territory pursuant to programmes of labour recruitment or under immigration schemes.

In relation to self-employment, **Article 18** applies the general principle that a refugee should be treated as favourably as possible. The minimum standard is that the refugee must not be treated less favourably than 'aliens generally in the same circumstances.' As far as the 'liberal professions' are concerned, **Article 19** provides the same principle to those refugees who hold 'diplomas recognised by the competent authorities of that State.'

Chapter IV

Article 20 provides that refugees shall enjoy the same rights with regard to entitlements under a rationing system as nationals. In relation to rights to housing, the state must treat refugees as favourably as possible, and no less favourably than aliens who are lawfully in the contracting parties' territory.

By virtue of **Article 22**, refugees enjoy the same rights to elementary education as nationals. With regard to educational matters other than elementary schooling, a refugee must be treated as favourably as possible, and not less favourably than an alien lawfully resident in the relevant country. Article 23 provides refugees with the same rights to public relief as nationals.

Article 24 extends to labour legislation and social security. It is an article that has vertical effect against the state. Thus, the contracting party must undertake to afford refugees the same protection as nationals in certain areas relating to employment and welfare, to the extent that 'such matters are governed by laws or regulations or are subject to the control of administrative authorities'. Thus, to the extent that these matters are entirely in the hands of private parties, it would fall outside the remit of the Convention. The Article also recommends that there be 'appropriate arrangements' to deal with the acquisition of rights in this area.

This Article, then, resembles the ones above, in that it understands the refugee to be able to acquire rights in the country of refuge. Sometimes, though, and for justifiable reasons, these rights or entitlements must fall below those enjoyed by nationals. For instance, Article 24 allows refugee status to be taken into account in assessing benefits or pension rights. It may of course be by virtue of refugee status that a person has

not made sufficient payments to receive either full welfare or pension entitlements.

Chapter V

Chapter V includes important administrative measures relating to refugee status. These measures have to take into account the problems a refugee might be experiencing due to displacement or flight from the country where he had residence or was domiciled. For instance, the individual might not be able to locate documents to prove identity and entitlement. In this sense, lacking papers and unable to prove his identity, a refugee becomes a legal 'non-person'.

Article 25 takes this into account. If a refugee cannot rely on the administrative support of the authorities in the country he has left, then the state party in whose territory the refugee is in residence must afford the necessary assistance. The relevant authorities must 'deliver or cause to be delivered... such documents or certifications as would normally be delivered to aliens by or through their national authorities'. These documents must then be treated as official.

Articles 26 to 28 concern freedom of movement. **Article 26** grants freedom of movement to refugees, and **Article 27** provides that a state must issue the relevant documents to enable free movement within the territory. **Article 28** relates to travel documents for movement outside the country. Unless reasons of national security or public order apply, travel documents must be issued.

Article 29 states that refugees cannot be taxed in a way that is different from nationals in the same situation; but this principle does not apply to recovery of costs relating to the issuing of relevant documents.

Article 30 places a duty on a state party to allow refugees to transfer assets which they have brought into a state's territory to another country where they may be resettled.

Article 31 relates to refugees unlawfully in the country of refuge. Providing that such persons report to the relevant authorities, and show that they had good cause to enter the country in question illegally, the state party cannot impose penalties upon them. Such persons would also have to show, however, that they tell within the definition of Article 1, and that 'their life or freedom was threatened'.

According to **Article 32**, once a refugee is lawfully in a territory, the state party cannot expel that person, unless there are grounds of national security or public order. The decision to expel must be made in accordance with the due process of law. Except in extreme situations, a

refugee must be allowed to submit evidence to ‘clear himself’ and must be accorded certain due process rights. There must be the possibility of appeal and representation before the competent authority. Moreover, the contracting state must allow a person facing expulsion a 'reasonable period’ to ‘seek legal admission into another country.’ Article 32 is backed up by **Article 33**, which prohibits ‘refoulement’. Refoulement is the return of refugees to the 'frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion'. The exception to this rule is provided at 33(2). Refoulement does not apply to a refugee who presents a threat to security, or, having been convicted of a serious crime, represents a 'danger' to the country that is expelling him.

Article 34 moves from expulsion to naturalisation. State parties should ensure that refugees are naturalised and assimilated.

We can examine some of the more important Article in Chapter VI.

Article 35 provides that contracting parties must co-operate with the Office of the United Nations High Commissioner for Refugees. The contracting parties undertake to provide the UN with reports relating to the condition of refugees in their territories. The report must also cover the implementation of the Convention and the relevant laws and regulations that relate to refugees. Article 35 provides that the contracting states must inform the Secretary-General of the laws and regulations that have been enacted or passed to ensure that the Convention applies in national law.

Summary

Chapter III lays out the employment rights of refugees; Chapter IV contains a group of Article relating to welfare and outlines the legal status of the refugee in relation to various social and economic rights. Chapter V contains the important rule against refoulement, as well as major administrative provisions. The Article we considered in Chapter VI concerns the duty of state parties to r collaborate with the UNHCR.

SELF ASSESSMENT EXERCISE

1. What are the main provisions in the Convention and the 1967 Protocol?

1.3Women and Girls as refugees

Figures made available by the UNHCR in 2005 show that nearly half the world's population of refugees is female. However, the proportion of female refugees varies depending on region and the precise nature of the problems that have given rise to a refugee situation. Mass refugee situations tend to produce refugee populations where around half the total numbers are women.

Asylum claims, on the other hand, tend to be made by men rather than women. 47 per cent of the total numbers of refugees are children under the age of 18, with a little over 10 per cent being children under the age of five. However, these figures tend not to be representative, as the figures come primarily from the developing, rather than the developed world. It is estimated that in Africa and CASWANAME (North Africa. The Middle East. South-West Asia. Central Asia) over half the total numbers of refugees are children under 18, whilst this figure is significantly lower for other regions of the world (for instance, Europe: 23 per cent; Asia and the Pacific: 37 per cent). (UNHCR 2005 Global refugee trends p.7)

In 1985 the Executive Committee of the UNHCR adopted a conclusion, Executive Committee Conclusion No. 39-85 on Refugee Women and International Protection, which stated that refugee women and girls compose the majority of refugees, and that this leads to special concerns about how best to protect their human rights. This was backed up by Executive Committee Conclusion No. 60 (XXX) on Refugee Women that called on the High Commissioner to review the development of policy in this area.

Other UN bodies have also been concerned with the fate of female refugees. ln 1990, the Economic and Social Council called on governments and NGOs to keep this issue current, and to increase their efforts to protect these particularly vulnerable groups. It is worth remembering that the Convention on the Elimination of All Forms of Discrimination Against Women is also relevant here; in particular Article 3 stresses the obligation to ensure the advancement of women and the protection of their rights. Policy 8Iso feeds into the interpretation of these instruments. The UN is committed to the goals set out in the Nairobi Forward Looking Strategies on the Status of Women that stress the inclusion of women into programmes that are executed in their name.

The fundamental principles on which this law and policy are made thus reflect the inherent dignity of women, and their equality with men. In order to achieve these ends it is necessary to take into account the fact that women require special protection.

When analysing the problems faced by refugee women, these are often found to be similar, if not identical, to those faced by women generally. Several forms of physical violence and discrimination against women, for example, are endemic in most, if not all, countries. The particularity of the situation of refugee women is not simply because they are subject to such violations of their rights, but also that they are especially vulnerable to these violations for a number of reasons: they are fleeing persecution; the social disruption caused by flight; sometimes because they have become detached from their families and the protection provided by their communities; and certainly because they are foreigners in an alien environment.
It is necessary then to provide mechanisms that recognise that women face these gender-specific forms of violence and abuse.

There are many ways in which this could be achieved. Given the difficulty of talking about sexual violence and abuse, for example, it would be necessary for a state party to ensure that women refugees claiming abuse are interviewed by women officers; if they are indeed victims of such violence, counseling should be provided. Governments should be aware of the need to encourage refugee women to organise their own associations and to draw them into the process of planning and administering refugee communities. There should be sensitivity to the needs of women in planning accommodation in refugee camps, and ensuring women's safety.

The special needs of women and girls in terms of education, health care and provision of food and water should also be made a priority; for instance, it is necessary to be aware that:

i) Even in Such precarious situations, food distribution through male networks has been diverted to resistance forces or for sale on black markets with refugee women and children suffering as a result. In other instances, male distributors of food and other relief goods have required sexual favours in exchange for relief goods. [31]
(http://www.unhcr.ch/cgi-bin/texis/Vtx/home/opendoc.htm?tbl= EXCOM&id = 3ae68ccd O&page = exec)

Further information on this topic is contained in the Guidelines on '.the Protection of Refugee Women, UNHRC, 1991. The Guidelines call for 'integrating the resources and needs of refugee women into all aspects of programming so as to assure equitable protection and assistance activities.' (UNHCR *Guidelines on the Protection of Refugee Women,* 1.4.)

Family reunification

Although the 1951 Convention did not provide for the preservation of family reunification, the Final Act of the Conference that adopted the Convention did address the issue. The 1951 United Nations Conference called on governments:

- to take the necessary measures for the protection of the refugee's family especially with the view to:

    1. ensuring that the unity of the refugee's family is maintained particularly in cases where the head of the family has fulfilled the necessary conditions for admission to a particular county;
    2. the protection of refugees who are minotS, in particular unaccompanied children and girls with special reference to guardianship and adoption.

This principle has been adopted in UNHCR Executive Committee Conclusions and in the UNHCR Handbook on Procedures and Criteria for Determining Refugee Status.

The key Principle is that if the head of the family is granted refugee status, then family dependants are accorded similar status.

SELF ASSESSMENT EXERCISE

1. What is the status of the principles that relate to the protection of women and children who are refugees? Are *there* similar considerations in relation to family reunification?

Summary

We have been considering two areas in which the Convention does not go into great detail: the protection of women and girls and family reunification. We have seen that certain Executive Committee Conclusions have elaborated the principles that are important in this area.

1.4The Convention and National Law

1.4.1 English Courts and the Convention

Refugee law raises a great many issues that impact on national legal systems. Limitations of space mean that we can only focus on a couple of concerns. In this section, we will examine the way in which English courts have interpreted the Convention. We will study a line of cases: *R*

v *Secretary of* State *for the Home Department, Ex parte Sivakumaran* [1988] 1 All ER 193 HL,
Karanakaran v *Secretary of State for the Home Department* (CA *(Civ* Div)) (2000] Imm AR 271 and *Kaja* v *Secretary of* State *for the Home Department* (1995] InIm AR 1.

These cases show how the courts approached the issue of the test for determination of refugee status, and the standard of evidence required under the test.

In *R* v *Secretary of State for the Home Department, Ex parte Sivakumaran* (1988] 1 All ER 193 HL, the House of Lords held that the question of whether or not there was a 'well-founded fear' of persecution within the meaning of Article *1A(2)* of the Convention and Protocol was to be determined by an objective test.

This had to take into account the circumstances existing in the country of the refugee's nationality. Furthermore, the applicant had to show that there Was a reasonable degree of likelihood that he or she would be persecuted for one of the reasons referred to in article 1A(2*)* if s/he were returned to that country. On the facts, there was no real risk of persecution if the applicants were returned to Sri Lanka, and their asylum claim was unsuccessful.

Some have argued that this is a very stringent test. For instance, the Court of Appeal itself preferred a different interpretation of the Convention in this case. This is how the Court of Appeal's argument was understood by the House of Lords:

The Court of Appeal's formulation would accord refugee status to one whose fears, though genuine, were objectively demonstrated to have been misconceived, that is to say one who was at no actual risk of persecution for a Convention reason. The Court of Appeal would qualify this by denying refugee status to one who, while holding a genuine fear, was not a person of reasonable courage, so that his fears were not such as a person of that degree of courage would entertain. The differentiation means that the fears of some, but not those of others, would be allayed, and it might be by no means easy to decide what degree of courage a person of ordinary fortitude might be expected to display. Further, the court's illustration of the bank cashier threatened by an imitation firearm does not truly support the thesis for which it is prayed in aid. An objective observer of the scene would agree that at the time the imitation firearm was presented the cashier's fear was well founded. But once it became clear that the firearm was an imitation the fear, if it continued to exist, would no longer be well founded. Fear of persecution, in the sense of the Convention, is not to be assimilated to a

fear of instant personal danger arising out of an immediately presented predicament. The claimant to refugee status is not immediately threatened with danger arising out of a situation then confronting him. The question is what might happen if he were to return to the country of his nationality. He fears that he might be persecuted there. Whether that might happen can only be determined by examining the actual state of affairs in that country. If that examination shows that persecution might indeed take place then the fear is well-founded. Otherwise it is not.

How are the interpretations of the test by the two courts different? The test preferred by the Court of Appeal would allow a refugee who had genuine fears, even though objectively these fears could be shown to be unfounded, to claim refugee status. However, the Court of Appeal did make a significant qualification to this test. The genuine fear would have to be that of a person of reasonable courage. This does impose something of a limit on the degree of fear that would have to be shown. Yet it is arguably a less stringent test than that preferred by the House of Lords, even though there may be problems in its application; for instance, determining what are the reasonable fears of a person of reasonable courage. The question raised by the House of Lords, in questioning the analogy that the Court of Appeal was using, is interesting because it shows how the court is approaching the issue of fear of persecution. The Court of Appeal had used the analogy of a bank clerk threatened in a robbery with an imitation gun. An objective observer would conclude that in the moment that the gun is produced, and the clerk threatened, there is a well-founded fear. However, if and when it becomes obvious that the weapon is an imitation, then the fear would not be objectively well-founded. The House of Lords is critical of this analogy, because the claimant is not immediately threatened with persecution; rather the issue is what might happen were he or she to go back to the country of his or her nationality. It may be that, objectively, there is no possibility of persecution, in which case an objective observer would have to assume that the fear was unfounded. The House of Lords went on to argue that:

It is a reasonable inference that the question of whether the fear of persecution held by an applicant for refugee status is well-founded is likewise intended to be objectively determined by reference to the circumstances at the time prevailing in the country of the applicant's nationality…….

This inference is fortified by the reflection that the general purpose of the Convention is surely to afford protection and fair treatment to those for whom neither is available in their own country, and does not extend to the allaying of fears not objectively justified, however reasonable

these fears may appear from the point of view of the individual in question.

The argument of the House of Lords is supported by their interpretation of the Convention. It is contended that the purpose of the Convention as a whole is to afford protection to those in genuine fear; a fear that can be objectively demonstrated. From the viewpoint of the individual claiming refugee status, the fear might be real, but this is not the acid test. In stressing the objective test, the House of Lords thus make it more difficult to claim refugee status.

As Clayton explains, it is now 'settled law' (353) that an asylum seeker must show, objectively, that there is a reasonable degree to That he would face persecution. But what standard of proof should be used? Should it be a lower standard of proof than a civil case?

This issue, amongst others, was examined in *Karanakaran* v *Secretary of* State *for the Home Department* (CA (Civ Div)) [2000] Imm AR 271. The facts concerned a Tamil refugee:

The appellant is a young Tamil from the Jaffna peninsula whose community was destroyed by the civil conflict and who fled from his home area in fear of both the government forces and the terrorist movement. All this was found as fact. So was the consequent history of flight, first to Colombo and ultimately to the United Kingdom. It followed that (unless there were a finding that flight was not a logical reaction to the persecution -a possibility in certain cases but not in this one) the appellant was outside the country of his nationality owing to a well-founded fear of being persecuted for reasons of race. He was therefore entitled by virtue of Article 1 (A) (2) of the 1951

Geneva Convention to asylum provided that, in addition, it could be established that he was 'unable or, owing to such fear, ….unwilling to avail himself of the protection' of his home state. The latter-unwillingness through fear -is what this appeal is, at least initially, about.

In allowing the plaintiffs appeal, *Karanakaran* builds on the issues in *Sivakumaran.* Lord Justice Sedley, in his summary of the facts of the case *Sivakumaran,* returns to the issue of the well-founded fear of persecution. The issue here, however, is that the appellant had been internally displaced from his home on the Jaffna peninsula to the city of Columbo. Although the well-founded fear of persecution could be shown on these facts, an associated issue had also to be determined: that the fear of persecution meant that he was 'unwilling to avail himself of the protection' of his home state. The Home Secretary was arguing that

Karanakaran should be returned to Columbo, and that, as he was not fearing persecution there, this would not be in breach of the Convention; the appellant accepted this point, but was arguing that it was unreasonable to send him there as he had no work, no housing and no friends or family in that country. The case thus raises the issue of 'how a decision-maker, a tribunal or a court is to gauge whether internal relocation is a legitimate alternative to asylum for a person who otherwise ranks as a Convention refugee' (para. 7). It raises a question of evidence, and how that evidence is to be judged:

- Is the want of such an option i.e. internal relocation is not an option] to be proved by the asylum seeker (in which case it is common ground that proof would not have to go as high as a balance of probability); or disproved by the Home Secretary (in which case it would follow that the standard exceeds a bare balance of probability); or simply gauged on the evidence?

If the asylum seeker had to prove that internal relocation was not an option, then the standard of proof is higher than it wound be if it had to be disproved by the Home Secretary. The third option suggests a different standard. How, then, should the court proceed? Sedley L. J begins by pointing out that the task facing the decision- maker under the Convention is an issue of 'evaluation' (para. 15). The applicant will lead evidence on issues such as that of fear of prosecution; and the decision-maker must evaluate questions such as the one in the present appeal: is Columbo safer than the applicant's home? or is it unduly harsh to expect this applicant to survive in a new and strange place?' (para. 15). This must be placed in context:

- What matters throughout is that the applicant's autobiographical account is only part of the picture. People who have not yet suffered actual persecution (one thinks of many Jews who fled Nazi Germany just in time) may have a very well-founded fear of persecution should they remain. People who have suffered appalling persecution may for one reason or another not come within the protection of the Convention.

Sedley L. J then goes on to argue that a claim to asylum was not like a claim made in civil litigation, where a judge must act as umpire between two competing versions of events. It is in fact an administrative process, and thus cannot be modeled on civil litigation. Rather than treat facts as established on a civil standard, the evidence offered must be treated as a whole:

The question whether an applicant for asylum is within the protection of the 1951 Convention is not a head-to-head litigation issue. Testing a

claim ordinarily involves no choice between two conflicting accounts but an evaluation of the intrinsic and extrinsic credibility, and ultimately the significance, of the applicant's case. Finally, and importantly, the Convention issues from first to last are evaluative, not factual. The facts, so far as they can be established, are signposts on the road to a conclusion on the issues; they are not themselves conclusions. How far this process truly differs from civil or crirnina1 litigation need not detain us now.

His argument concludes that the question to be determined is whether, 'taking a1J relevant matters into account, it wound be unduly harsh to return the applicant to Colombo'.
This issue was further explored in Kaja v Secretary of State for the Home Department [1995] Imm AR 1. Z, a national of Zaire, had appealed against a decision to refuse him entry to the UK. The decision maker had stated that he did not believe Z's evidence, rather than making reference to a standard of proof. He appealed on a number of points, but the one we will examine is the claim that the decision-maker had to make a reference to a standard of proof. The Tribunal accepted this argument. It was necessary to make reference to a standard of proof, and that the lower standard set out in Sivakumaran applies to a determination of the likelihood that both a future event will happen, and that a past event has happened.

These cases as a whole show that the courts approach the issue of the determination of refugee status as a public law inquiry into the relevant evidence. The process is not to be thought of as modeled on civil litigation; rather the decision-maker must evaluate all the evidence to the standard of proof articulated in *Sivakumaran.* Clayton observes that this means that decision-makers should not approach their task in a 'mechanistic manner' and the asylum seeker does not have to bear a burden of proof to the standard of reasonable probability. Assessing an asylum claim is ultimately a matter of evaluation: '[I]t must be approached as a whole, as a public law exercise in the need for protection rather than as an exercise in proving facts to a standard'. (Clayton, p.354).

SELF ASSESSMENT EXERCISE

1. What is the relevant standard of proof for an asylum claim?

Summary

We have been studying R v *Secretary of State for the Home Department,* ex *parte Sivakumaran* [1988] *Karanakaran* v *Secretary of State for the Home Department* [2000] and *Kaja* v *Secretary of State for*

the Home Department [1995]. In the first case the court determined the nature of the test for refugee status; in the second two the issue of the standard of proof required in an asylum hearing was addressed. The hearing is to be approached in a different way to civil litigation. The correct approach was one of evaluation, rather than choosing l5etween the evidence presented by two parties.

1.4.2 Refugees, asylum and Immigration in the UK

Asylum and immigration are prominent on the political agenda in the UK. Many NGOs and pressure groups have been critical of government policy, which appears to be restricting the rights of refugees, and redefining the UK's obligations under the Convention. We will look at two main issues: the Immigration, Asylum and Nationality Act (which received Royal assent on 30 March 2006) and the UK’s proposals for a reformed asylum system.

First we need to think about the relationship between refugee law and the law of immigration. Whilst the definition of refugee status may be determined by the Convention, as the Convention puts in place an individual application process, the different ways in which national legal systems have dealt with applications by refugees means that refugee law is intimately bound up with national law. In the UK, the responsibility for overseeing this area of law rests with the Home Office, which also deals with immigration. This has led to immigration and refugee law becoming bound up together at both the level of legal doctrine and institution. Thus, the Aliens Act 1905 allowed the courts to determine whether or not an individual's claim to asylum would provide grounds to prevent deportation.

When this Act was replaced with the Aliens Restriction Acts of 1914 and 1919, the determination of refugee status was given to the Secretary of State. It was not until the Asylum and Immigration Appeals Act of 1993 that a claim for asylum was presented as consistent with the UK’s obligations under the Convention: '[t]his refers to the non-refoulement obligation under Article 33, and gave a statutory meaning to an asylum claim' (349).

In domestic politics, the issue of refugee rights has long been open to critical scrutiny. The Prime Minister has been quoted as saying that it was time to 'stand back and consider its [the Convention’s] applications in today'’ world’.

So, what reforms are currently being made to the asylum and immigration system?

The Immigration, Asylum and Nationality Bill

First we will consider the Immigration, Asylum and Nationality Act 2006. The Act creates a single tier Asylum and Immigration Tribunal. This body considers appeals against immigration and asylum decisions. Only in limited cases can the Tribunal's decision be reviewed by the High Court on the grounds that the Tribunal made an error of law. Amongst other measures are: the removal of rights of appeal against refusal of entry or leave to enter for students (s.4) and limited rights of appeal for family visitors. It also aims to streamline post-entry rights of appeal. Section 15 creates civil penalties for employers of illegal workers and s.21 makes it a criminal offence to knowingly employ an illegal worker.

How has this Act, and the policy behind it been presented by the government? We will consider the following extract:

The purpose of the [Bill and the government's immigration] strategy is to make migration work for Britain. It includes measures to make our immigration system simpler, clearer and more robust. The reformed system will explain publicly and clearly who we will admit to the UK and why, and who we will allow to stay in the UK and why. It will also show that we enforce the rules rigorously in every respect. The UK needs economic migration. We welcome people who migrate here to work and study -they are an essential part of our society and economy. Anyone who looks back over the recent years and decades will be able to give testimony to the major contribution that they have made to the life of this country. We need migration to fill the gaps in our labour market that cannot be filled from the domestic workforce. Of course, the government will continue to welcome people who are genuinely fleeing persecution. However, as we do so we will not- and cannot-tolerate abuse of the system. That explains why the five. year strategy contains four major work streams, in each of which we work with a range of other countries to improve the effectiveness of our system.' (Charles Clarke, former Horne Secretary, introducing the Immigration, Asylum and Nationality Bill to Parliament)

This defence of the Act suggests that it will strike a balance between the need for economic migrants, and the need to police immigration. Indeed, asylum seekers seem to be primarily considered, at least in the speech above, as economic migrants, rather than those for whom the UK has responsibilities under international law. However, many NGOs and pressure groups have been very critical of the Act. Critics have pointed out that the limitations on the right to appeal are against the rule of law, and that the Act effectively criminalises refugees and removes state

support from them. It has to be seen in the context of other initiatives to reform UK asylum and immigration law.

The Immigration, Asylum and Nationality Act must be seen in the context of an ongoing drive to push through far-reaching reforms of the international obligations that the UK has entered into under the Convention. To get a sense of the direction of these reforms, we will look at the proposals for a reformed asylum system, and the response to the European Commission in the paper: *'Towards* a *more accessible, equitable and managed asylum system'.*

Proposed Asylum Reforms

The reforms proposed are essentially focused on creating transit centres either in Europe, at its border, or in nations outside of Europe. These 'transit processing centres' would deal with the claims of asylum seekers who were intending to enter the UK; once the claims had been processed outside the UK, some would be permitted to enter. These centres would allow a 'more equitable management' of the 'irregular migrants' who want to enter Europe. A system of regional centres also includes a proposal for 'regional protection areas' where those asylum seekers who have failed to be accepted can be accommodated instead of being returned to the countries from which they have fled.

There are various factors driving these reforms. The government has cited one compelling reason to be the costs of running the present asylum system. Human Rights Watch have criticised this argument and have accused the government of ignoring other ways of reducing the costs of the system. For instance, costs of detention centres, and the practice of detaining asylum seekers, could be decreased by allowing asylum seekers to work. The government had withdrawn the 'work concession' arrangement whereby asylum seekers were issued with work permits after a certain period. This means that asylum seekers are entirely dependent on government funding. Figures were cited that showed that the cost of detention had risen from £362 to £1,620 per week *(Hansard,* House of Commons Debates, 25 October 2001, C 333 W). This is backed up by information from the UNHCR which shows that the UK detains more asylum seekers than any other European nation (UNHCR, 2000).

Proposals for regional centres and transit processing centres have also been encouraged by arguments about the scale of the illegal entry of asylum seekers to the UK. However, this is not a reasonable approach to the problem, as the very fact that an asylum seeker is fleeing persecution may mean that an illegal entry is his or her only option (how can one enter a country legally if one is deprived of a passport, for instance?). Moreover, such arguments also contradict the Convention which states

that those arriving illegally should not be penalised. A similar analysis can be made of other government arguments. The government has alleged that the number of failed asylum seekers show that most make bogus applications. However, this cannot be used as a reliable index of the status of asylum seekers; it reflects equally on the failings of those who are making the decision on status and the procedures they are applying.

Human Rights Watch cite as evidence a recent report that shows that in procedures applied in 60 per cent of claims in the Netherlands, applicants were deprived of fundamental human rights. The high court itself has held that depriving asylum seekers of basic social support amounted to a breach of the European Convention. Evidence for the weakness of the government's arguments is also suggested by the fact that 'approximately one-quarter of those asylum seekers who appeal their rejection in the UK are successfully granted asylum' (Immigration and Nationality Directorate, 2002).

The UK's obligations under international law must also be taken into account. Human Rights Watch argue that these proposals are contrary to the spirit and the letter of the Convention that 'calls upon state parties to engage in international co-operation to ameliorate the plight of the world's refugees'. The proposals effectively shift the burden of asylum to countries that do not have the economic resources of the UK. Furthermore, the proposals come close to both threatening the right to asylum in the Declaration and the fundamental principle of non-refoulement. Human Rights Watch have also argued that there is a potential breach of Article 31, which states that refugees should only be detained in exceptional cases; the removal and detention of those who arrive illegally in the UK to transit centres outside the UK arguably breaches this right. There is also the risk that the proposals are discriminatory. The plans for the construction of regional centres suggest that these might be geographically proximal to areas which produce large numbers of refugees. If those in the regional centres enjoyed fewer rights than those in the UK, then Article 3 of the Convention is also violated.

SELF ASSESSMENT EXERCISE

1. Reforms in immigration and asylum law in the UK show an increasing disregard for the rights of refugees. Discuss.

Summary

Refugee law, and the rights of refugees, are bound up with national law. We have examined how reforms in the UK immigration system are

driven by a need to streamline a means of policing refugees and ensuring that the number of refugees entering the UK is kept to a minimum.

1.5The Crisis in the Sudan: Oil, Power and Refugees

This final section will study the crisis in the Sudan, so that we can appreciate how the refugee problem must be seen in the context of broader political concerns; in this sense the rights of refugees can perhaps be seen as less important to certain governments than the need to control territory and revenue. Refugee crises also arise as a result of the failure to galvanise action by the international community. Some might see this as a failure of states to intervene in regions or countries despite the evidence of the mass abuse of human rights.

UNICEF describes the situation in western Sudan as 'one of the world's worst humanitarian crises'. UNICEF's figures show that nearly 1.8 million people have been internally displaced; and the situation has been exacerbated by shortages of food and water and by over-crowding of refugee camps. For instance, Kalma camp, which originally accommodated 30,000, currently has to cope with 150,000 people. There are nearly 260,000 people from the Darfur region in camps in the neighbouring Chad. But what are the causes of this crisis?

The African non-Muslim citizens who populate the south have been at war with the central government, dominated by Arabised Muslim elite, since independence in 1956. State power remains in the hands of these elite, which dominates the officer corps of the army, security agencies, and other agencies wielding power.

Although there was a decade of peace and southern autonomy in 1972-83 after the separatist southern rebels laid down their arms, it came to an end when the central government abolished the southern autonomous region and made *Shariah* (Islamic law) the law of the land in 1983. The civil war flared up again, but with a different political agenda. While southern sentiment remained strongly separatist, Dr John Garang, the leader of the main rebel force, the SPLM/ A called for a 'united, secular Sudan.'

The background reasons for the war are complex, but, as the passage above suggests, they relate to ethnic tensions within the country. These are reflected in the fact that an 'Arabised Muslim elite' has controlled the country since independence, and has kept power and resources from

'socially marginalised sections of the population' in the 'west and east, north and south' of the country. That there was a period of peace suggests that these tensions did not necessarily lead to war; however, the most immediate causes can be found in the central government's move to increase its control over the country, and the subsequent resistance by the SPLM/A.

Another central factor in the Sudanese civil war can be traced to the discovery of oil in 1978. The Autonomous Southern Region protested against the Northern government'' plans for the exploitation of these oil reserves. Although the oil fields are located in the south, the government's plans placed the infrastructures and refineries in the North. Various foreign oil companies have been involved in the Sudan, and have turned a blind eye to the ongoing human rights abuses. Determined to control the exploitation of these natural resources, the Northern government engaged in specific policies aimed at subjugating the south of the country:

- In order to control the production of oil, the unelected government of Jafa'ar Nimeiri (1969-85) adopted a two-pronged strategy, division and displacement of the southern population. It has taken almost two decades and various governments to develop and refine this strategy, but the division and displacement strategy has accomplished what direct military action from the central government alone could never achieve: clear control of certain oil areas in southern Sudan.

Government policy has been to sponsor and encourage various 'proxies' to attack those peoples who live in the areas of the oil

What has been the response of the international community to this crisis? As was pointed out in the *Washington* Post, 'on the 10th anniversary of the Rwandan genocide, the world community again chosen to watch, wait and, so far, do nothing'. Although international aid agencies are active in the region, and diplomatic efforts are ongoing to promote and sustain peace, many have accused the international community of doing too little. The UN has issued two Resolutions calling on the Northern government to disband its militias, but these have been ignored. The African Union has troops in the region, but seems to lack the will to intervene. The United States has made diplomatic initiatives, but also lacks the political will to intervene more robustly. The EU has also stood by. It would appear that the genocide in Sudan is off the world's political agenda.

SELF ASSESSMENT EXERCISE

1. 'The situation in the Sudan suggests that refugee rights and human rights have very little meaning at all

Summary

This final section has considered the political reality of human rights in the refugee crisis in the Sudan. While the need to protect refugee rights may be part of the genuine humanitarian desire to protect those displaced by the conflict, it would seem that the scale of the problem has not met with a suitable response from the world human rights lobby.

4.0 CONCLUSION

5.0 SUMMARY

6.0 TUTOR-MARKED ASSIGNMENT

1. ‘Despite the importance of the 1 951 Convention, the rights of refugees seem to be increasing limited in contemporary politics’. Discuss.

7.0 REFERENCES/FURTHER READINGS

Kjaerum, M. 'Refugee protection between state interests and human rights: contains the articles by where is Europe heading?' *Human Rights Quarter* 24 2002, pp.513-536. This. R d essay reviews directions in refugee policy in different European nations and KJaerum and Hathaway. ea argues that there is a developing tension between these policies and human them now. rights law. As such, Kjaerum builds on the perspective of Tuitt and others that there is a serious disjuncture between the refugee law and a meaningful realisation of the rights of refugees.

Hathaway, J. C. 'Reconceiving refugee law as human rights protection', *Journal of Refugee Studies,* 4(2) 1991, pp.113-131. Hathaway's article also relates to a central set of themes in this chapter. If there are significant problems with the

Advice on answering the question

This question is calling for a discussion of the Convention in its political context. The essay should begin by offering a direct response to the quotation. It would be reasonable to agree with the statement: the Convention is undoubtedly important, but there are numerous examples

of refugee's rights being attacked or limited in recent times. The difficulty with this question is limiting one's answer to illustrative examples; obviously, one could not hope to cover all of contemporary politics in an exam answer.

The statement falls into two parts; one has to assess the Convention, then turn one's attention to the issue of the politics of refugee's rights. The structure of the essay should reflect the fact that the statement raises two main issues. Thus, the first part of the essay should outline the importance of the Convention in providing a coherent statement of refugees rights; the second part should engage with the limitations on or challenges to the rights of the refugee. In illustrating this point, one could draw information from this chapter, and perhaps focus on the recent reforms to asylum and immigration law in the UK and show how they effectively limit the protection that refugees enjoy. Other examples could be drawn from the crisis in the Sudan. This suggests a failure of the international community to respond at the necessary level. The conclusion of the essay should re-state the main thesis, that one is in broad agreement with the statement in the title, and offer a brief recap of the most salient themes in the essay.

Activity 9.1 This statement is an accurate description of a problem that underlies refugee law. First, it would be worth asking why the question asserts that it is necessary to distinguish between these three terms. It is presumably because the law itself creates distinctions between these categories of person, and accords them different rights and obligations. A refugee is rather narrowly defined and cannot be seen as an economic migrant. A refugee may be considered an asylum seeker, but, it is suggested, there is no automatic right to asylum. So, it would appear that the law does draw a sharp distinction between these classes of person. However, if we look at the problem in a slightly different way, we come to a different conclusion. Again, this suggests that the statement above is accurate, as it suggests that despite the boundaries that the law draws, the concept of the refugee remains somewhat fluid. For instance, the ‘Ugandan’ and ‘Kenyan’ Asians who sought entry to the UK in the 1970s were not treated as refugees, although arguably they were. The Albanian Kosovans arriving in the UK in the 1990s were treated as refugees seeking asylum. Such distinctions suggest a great deal about the political climate of the times.

Activity 9.2 Tuitt suggests that the mechanisms of human rights, which tend to address and place duties on the sovereign state in which a person has nationality or residence, have already broken down for the refugee. In this sense the refugee is, by being stateless, an international concern. A refugee may be seeking refuge in a country of which he does not have nationality. The international community must act in unison to relieve

individual countries of the additional duties that accommodating refugees places upon them.

Activity 9.3 We need to begin by specifying the key features of the test. As the main issue relates to the subjective and objective features of the test, we do not need to outline the whole definition. The key features of the test for the purposes of this question are that a person has a 'well-founded fear of being persecuted'; and that this persecution is for 'reasons of race, religion, nationality, membership of a particular social group or political opinion'. This well-founded fear means that a person has placed himself 'outside the country of his nationality and is unable, or owing to such fear, is unwilling to avail himself of the protection of that country'. As fear is subjective, the definition includes a subjective element. Determination of refugee status requires an evaluation of the applicant's statements. To assess the subjective element, the decision-maker must take into account the individual's personal and family background, his membership of a particular racial, religious, national, social or political group and his own interpretation of his situation. The applicant's fear must be reasonable; exaggerated rear, can be well-founded if, in all the circumstances of the case, such a state of mind can be regarded as justified. However, the fear must also be 'well-founded', and this means that the test also has an objective element.

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MODULE 1

UNIT 1 THE HUMAN RIGHTS OF WOMEN

CONTENTS

1.0 INTRODUCTION

Women's rights are an integral part of human rights. The centrality of women's rights to human rights, and indeed, the inter-linked nature of all human rights, was affirmed by the 1993 Vienna World Conference. The Vienna Declaration and Programme of Action stated that 'The human rights of women and the girl child are an inalienable, integral,

and indivisible part of universal human rights'. The protection and enhancement of women's rights ensures:

- the full and equal participation of women in political, civil, economic, social and cultural life, at the national, regional, and international levels, and the eradication of all forms of discrimination on the grounds of sex are priority objectives of the international community.

2.0 OBJECTIVES

By the end of this unit and the relevant readings, you should be able to:

- explain the nature of women's rights as human rights including feminist critiques of international law
- outline the Article of the Convention for the Elimination of All Forms of Discrimination Against Women (CEDAW)
- explain the operation of the Optional Protocol to CEDAW
- describe the role of the Commission on the Status of Women (CSW) and gender mainstreaming
- summarise the Declaration on the Elimination of Violence against Women
- explain the role of the Special Rapporteur on Violence against Women
- explain the cultural issues relating to the enforcement of women's rights.

3.0 MAIN CONTENT

3.1 The Challenge of Women's Rights

3.1.1 An Overview

Women's rights seek to challenge and break down the exclusion that women have suffered in all parts of the world. We could relate women's rights to feminism as a cultural and political force. Feminism can be understood as a broad-based and diverse movement that seeks to protect and promote the interests of women. Feminists are also active in linking women's rights to the eradication of poverty; a factor that increasingly drives forward the rights agenda. A recent UN report provides some details. Poverty has to be understood in a wide sense, as including not just a lack of financial and social resources, but an exclusion from health care, legal services and civic life. On the whole, women work longer hours than men, with at least half the total time spent in unremunerated labour. This invisibility leads to 'lower social entitlements to women as

compared to .men. This inequity in turn perpetuates the gender gap in accessing needed resources'.

Reproductive health problems also impact negatively on women.
Poor women may be forced to have more children than they want. Infection rates of AIDS/HIV and other SIDs are also higher for women than men because gender inequality often deprives women of the ability to refuse risky practices, which leads to coerced sex and sexual behaviour. ..Women represented half of all HIV-positive adults in 2001, up from 41 per cent in 1997.

Social and economic development requires the empowerment of women. Those countries that have shown good development rates have also invested in universal health care and education.

Furthermore, successfully developing nations have passed laws and taken policy initiatives to end discrimination and ensure that women play a full part in the social and economic life of a country. However, these initiatives have to be driven from the grass roots. There is no point imposing health care programmes if they do not deal with the problems that women are experiencing. Policies should thus be driven by consultative processes that take the problems of both rural and urban women seriously. If a nation is able to improve the opportunities open to women, there are other positive consequences:

- Improving women's education has proved to contribute the most to reducing the rate of child malnutrition, even more important than improvements in food availability. Mothers' education delivers improved nutrition. Closing the gender gap in education also helps women to reduce fertility and improve child survival.

We will now examine in more detail one particular area of discrimination against women.

3.1.2 Case Study: Property Rights of Women in Kenya

We can briefly examine a Human Rights Watch Report on Property Rights in Kenya. Property rights of women in Kenya are bound up with the structure of the country's land law. What tended to have been driving reform since independence (1962) has been the need to ensure an equitable division of land between the different ethnic groups within Kenya. A related problem has been the different customary jurisdictions, with frequent contradictory provisions and the historical structure of title inherited from colonial times which favoured male ownership of land. Reforms have been made in the law of succession and family law, but

gender imbalance in land ownership remains. At present, five different legal systems that apply to marriage. These are:

- civil (under the Marriage Act)
- Christian (under the African Christian Marriage and Divorce Act and the Marriage Act)
- Islamic (under the Mohammedan Marriage, Divorce and Succession Act)
- Hindu (under the Hindu Marriage and Divorce Act) and
- Customary (under customary laws).

At a constitutional, level discrimination on the basis of sex is prohibited, but there are exceptions which allow discrimination in personal and customary law. Though there is an ongoing process of constitutional reform, it is hoped that this will enhance women's rights.

The failure to effectively protect women is one reason they remain 'worse off than men':

> *By just about any measure, women in Kenya are worse off than men. Their average earnings are less than half those of men. Only 29 per cent of those engaged in formal wage employment are women, leaving most to work in the informal sector with no social security and little income. The numbers of women in formal employment are decreasing. Women head 37 per cent of all households in Kenya, a number likely to grow as AIDS claims more victims. Eighty per cent of female-headed households are either poor or very poor, in part due to their limited ownership of and access to land. Girls receive less education than boys at every level, and women's literacy rate (76 per cent) is lower than men's (89 per cent).Violence against women is commonplace: 60 per cent of married women reported in a 2002 study that they were victims of domestic abuse. In another study published in 2002, 83 per cent of women reported physical abuse in childhood and nearly 61 per cent reported physical abuse as adults. According to women's rights advocates, there is only one shelter for battered women and their children in the entire country.*

A similar pattern can be observed in relation to land holding:

> *Women's land ownership is miniscule despite their enormous contribution to agricultural production. Women account for only 5 per cent of registered landholders*

> *nationally. The agricultural sector contributes over 80 per cent of employment and 60 per cent of national income. Women constitute over 80 per cent of the agricultural labour force, often working on an unpaid basis, and 64 per cent of subsistence farmers are women. Women provide approximately 60 per cent of farm-derived income, yet female-headed households on average own less than half the amount of farm equipment owned by male-headed households. Rural women work an average of nearly three hours longer per day than rural men. With so many women working in the agricultural sector and so few in formal employment, it is all the more devastating when women lose their land. (ibid)*

Customary law derives from custom and practice, but is also formally recognised by legislation and the Kenyan legal system. The tendency towards a complex patterning of customary law reflects the fact that each ethnic or tribal grouping may have its own law.

Customary law is enforced by tribal leaders or elders, but may also be applied in court proceedings. Customary laws that relate to property can be traced back to the pre-colonial period. Precisely because customary law is fluid, and changes as custom changes, it is not necessarily resistant to social change. However, what is problematic is the fact that the norms of customary law are rooted in customs that may themselves be deep-seated and hard to change. Consider the practice of wife inheritance that is practised in some parts of Kenya. Although there are many different permutations to this practice, some common features can be suggested. In the past, this custom was one way of ensuring a degree of social protection for widows. Widows were not themselves able to inherit land, so, providing that the widow herself was inherited went some way to making sure that the widow and her dependents would be supported. The rituals associated with wife inheritance involved the ‘cleaning’ of the widow. There was a fear that she would be contaminated with her husband's spirit. In one particular ritual, the widow would have to have sexual intercourse with a social outcast:

- Women’s property rights closely relate to wife inheritance and cleansing rituals in that many women cannot stay in their homes or on their land unless they are inherited or cleansed. According to one women's rights advocate, Women have to be inherited to keep any property after their husbands die. They have access to property because of their husband and lose that right when the husband dies.' Women who experienced these practices told Human Rights Watch they had mixed feelings about them. Most said the cleansing and

inheritance were not voluntary, but they succumbed so that they could keep their property and stay in their communities. (ibid)

SELF ASSESSMENT EXERCISE 1

1. What are the inherent problems with the structure of Kenyan society and law that tend to militate against women's property rights?
2. What do the figures quoted above suggest about the social and economic position of Women in Kenya?
3. What is customary law? Are there any particular problems with customary law as far as women's rights are concerned?

Customary Law

See Steiner and Alston (2000 PP.420-421) on how customary practices can change. The example concerns the Sabiny people in eastern Uganda. It shows that the norms of customary law can change to reject practices that are unacceptable from a human rights perspective.

SELF ASSESSMENT EXERCISE 2

Read Steiner and Alston's summary of the article by An-Na'im on Pp. 426-428. This piece concerns state responsibility under international human rights law to change religious and customary practices. An-Na'im concerns himself with the way in which customary law can change.

What does An-Na'im suggest in relation to the authority of customary law? Why is an understanding of the basis of customary law important (or a human rights lawyer or activist)?

Summary

Women's rights are an integral part of human rights. Women's rights guarantee the inherent dignity of women, but are also relevant to the struggle against poverty. Women face structured disadvantage in many if not all countries of the world, although we concentrated on the developing world in this unit. We have also seen that furthering the protection of women's rights involves complex issues of social change. It is necessary that advocates of human rights do not approach cultures in a high-handed way, but seek to engage in constructive and sensitive cross-cultural dialogues in order to break down resistances to those changes that are necessary to empower women.

3.1.3 A Note on Women's Rights and International Law

There are other pieces that draw inspiration from feminism in Steiner and Alston's collection. Please read the summary of Charlesworth and Chinkin's article, pp.218-220. Charlesworth is critical of the centrality of the state to international law in the first extract. In the second extract, writing with Christine Chinkin, she turns her attention to the international law doctrine of *jus cogens.* This is related to arguments about human rights. Although human rights are seen as a radical intervention in international law, these interventions are not radical enough from the viewpoint of women. Although developments in human rights law have broken down a traditional divide between public and private, these values have been re-inscribed in a way that reflects male interests. Human rights catalogues tend to reflect the public harms that men fear most: harms that come out of a fear that government will act in certain unrestrained ways. The same prestige has not been given to social and economic rights that affect the private sphere; a sphere associated more with women than men.

This is not to say that women do not suffer from the rights linked to the public sphere, but the way in which 'rights have been constructed obscures the more pervasive harms done to women' (ibid., p.174). Consider Article 6 of the ICCPR, the right to life, a right concerned with public actions that 'arbitrarily' deprive individuals of their life. This ignores the private way in which women may suffer harm in the private sphere; from the abortion of female foetuses and female infanticide to the preference given to male over female children; a point that could be linked to violence against women in the family. To take one final example, even the fundamental right to self-determination asserts the right of groups of people to determine their political status; it does not apply to women within those groups.

SELF ASSESSMENT EXERCISE 3

Refresh your memory of what *jus cogens* means, and prepare a short spoken statement which you could use to explain it to others. Include one or two examples of where it might apply.

The extract from Engle's article, pp.218-220, is a slightly different critique of the foundational public private distinction in international law. Criticizing the different critiques of this notion, Engle argues that the 'private', or at least the legal protection of privacy, can be beneficial for women. The piece suggests that it is necessary to re-consider some of the key terms used both by critics and apologists in debates over the nature of human rights and international law.

Summary

This brief section has looked at feminist critiques of international law. These critiques are important as suggesting a different and alternative perspective on the foundational concepts of the subject. If there are weaknesses in the international protection of Women's human rights, might it be that the subject itself is biased against the identification and effective protection of those rights?

3.2 The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)

3.2.1 An Overview of CEDAW

CEDAW results from the work of the Commission on the Status of .Women (CSW).

The (CSW) was established by a resolution of the Economic and Social Council by Council resolution in 1946. The CSW was, at first only a sub-commission of the Commission on Human Rights, but its role was enhanced as the UN began to appreciate that the Bill of Rights was not effective in promoting women's rights. From 1949 to 1959, the CSW created a number of documents that covered women's rights in various areas, it was increasingly felt that there was a need for a coherent and consistent approach to the issue. The Declaration on the Elimination of Discrimination against Women was adopted in 1967. However, the subordinate status of women's rights was apparent in the form of the document. The Declaration was a statement of principle, and did not have the force of a treaty. In the early 1970s, however, as the awareness of the scale of discrimination against women became increasingly obvious, the CSW argued that a treaty was necessary. The Convention on the Elimination of All Forms of Discrimination against Women was adopted in 1979. We will examine its enforcement mechanisms below.

CEDAW begins with a reference to the Charter of the United Nations, thus connecting the idea of the rights of women with the fundamental ideas of dignity and human worth that underlie that document. The paragraph goes on to make reference to the Universal Declaration of Human Rights and the central prohibition of discrimination. The prohibition on discrimination clearly underlies the idea that men and women are equal in worth and dignity. However, despite state parties subscribing to the standards set out in the Declaration, and undertaking the obligations contained in the International Covenants, 'extensive discrimination against women continues to exist'. This means that women are not enjoying human rights, and are not participating in society on equal terms as men. Moreover, the burden of poverty presses

unduly on women who may not have less access to food, health, education, and employment opportunities than men. CEDAW then makes a reference to the new international economic order. This UN initiative was an attempt by developing nations to redress the inequities of the world economy. The Convention asserts that this will 'contribute significantly towards the promotion of equality between men and women', and thus associates the struggle for women's rights with the broader struggle for economic justice.

Other reference points are specified, and thus the championing of the rights of women is inseparable from the struggle against 'apartheid, all forms of racism, racial discrimination, colonialism, neo-colonialism, aggression, foreign occupation and domination'. This is in turn linked to the valorisation of state sovereignty. One can appreciate that, in the context of colonialism, the need to privilege the nation state was important; indeed, 'social progress' is explicitly linked to the right to self-determination and international respect for the sovereignty of those new states emerging from colonial domination.

The introduction then turns to address the specific role that women play. CEDAW states that women make a 'great contribution...to the welfare of the family and to the development of society'. Their role, however, has not been recognised, and the 'social significance of maternity and the role of both parents in the family and in the upbringing of children' has been insufficiently protected. It is important to note, though, that this 'special role' that 1inks women to the family and the home, 'should not be a basis for discrimination but that the upbringing of children requires a sharing of responsibility between men and women and society as a whole'. The burdens and responsibilities of the family, then, should not fall disproportionately on women: society as a whole should be organised in such a way as to involve men and women in equal measures in the tasks associated with the family. The problematic nature of this goal is articulated very clearly by the next paragraph:

- 'a change in the traditional role of men as well as the role of women in society and in the family is needed to achieve full equality between men and women'. It is easy to appreciate that this objective may lead to clashes between human rights and cultures that seek to preserve the 'traditional' role of women.

6.2.2 Content of CEDAW

Part 1

Article 1 contains a definition of discrimination against women: the term 'shall mean any distinction, exclusion or restriction made on the

basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field'.

This definition of discrimination would presumably cover both direct and indirect discrimination. This distinction is characteristic of UK anti-discrimination legalisation. Direct discrimination is an overt act of discrimination; indirect discrimination in a little harder to define. It can be understood as the imposition of a standard or a rule that is not explicitly discriminatory, but, the proportion of those in the discriminated group who can comply with it is much smaller than those not in that group. Thus, a job requirement specifying that an employee has to be away from home for long periods may be seen as indirectly discriminatory to women looking after children. The condition does not explicitly state that women caring for children cannot apply, but the proportion that would be able to comply is presumably much smaller than those not looking after children.

It is worth noting that discrimination on the basis on marital status is directly prohibited (i.e. any requirement that a person should be married, or not married).

Article 2 moves from a general definition to cover the ways in which discrimination is to be combated. Note how the obligation rests with the state party to:

- incorporate anti-discrimination principles in the constitution and in legislation
- deploy sanctions if necessary to achieve the goal of equality require public authorities to act in a non-discriminatory way and
- repeal penal legislation that is discriminatory.

Article 3 can be read alongside Article 2. It states that ‘all appropriate measures’ will be taken to further the fundamental rights and freedoms of women. Article 4 states an important caveat: measures promoting women’s rights shall not themselves be considered discriminatory. Moreover, they must not amount to the ‘maintenance of unequal or separate standards’, as these are in themselves discriminatory. However, adoption of special measures to protect maternity is not to be considered discriminatory.

Article 5 places further duties on state parties. First of all, the article places an obligation to:

> *'modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based' on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women.'*

This is accompanied by a duty to ensure that family education includes a proper understanding of maternity as a social function and the recognition of the common responsibility of men and women in the upbringing and development of their children. Underlying this obligation is the assertion that the best interest of the children is the primary consideration in all cases.

Article 5 thus requires a significant input from the state in creating the conditions for a social re-alignment that breaks down those conditions that have kept women out of public life, or treated them as second class citizens. This requires action on stereotypical ideas of the roles of women and men; and a significant programme of education in relation to the role of the family. Coupled with the earlier article of section 1, this broad set of goals could be achieved through legislation, but, to be successful, such a programme would have to be accompanied with education.

Article 6 is brief. It moves from a consideration of the family to two other areas where women have been oppressed. It places a duty on state parties to 'take all appropriate measures...to suppress all forms of traffic in women and exploitation of prostitution of women'.

Part II

Part II of CEDAW elaborates on the rights contained in Part I.

Article 7 concerns voting rights and public participation. State parties undertake to ensure that women, like men, can 'vote in all elections and public referenda ...and be eligible for election to all publicly-elected bodies'. State parties must also guarantee that women can 'participate in the formulation of government policy' and its implementation and hold public office. Women must also be allowed to 'participate in non-governmental organizations and associations concerned with the public and political life of the country''

Article 8 elaborates these provisions to an international level, placing an obligation on state parties to ensure that women have 'the opportunity to represent their governments at the international level and to participate in the work of international organizations'.

Article 9 moves on to a different but related concern. CEDAW places the right of nationality in the context of the problems faced by women. The right to ‘acquire, change or retain…nationality' should be enjoyed equally by men and women. However, in relation to women, state parties must ensure that 'neither marriage to an alien nor change of nationality by the husband during marriage' should 'automatically change the nationality of the wife, render her stateless or force upon her the nationality of the husband'. In the second paragraph, state parties grant women equal rights with men ‘with respect to the nationality of their children’.

Part III

Article 10 relates to the right to education. It addresses various issues that have tended to restrict the rights of women to enjoy equal opportunities in this area with men. Paragraph (a) concerns itself with conditions for career and vocational guidance, with particular reference to promoting the opportunities of women in rural as well as urban environments. The Article is detailed, as it elaborates an educational culture that does not operate on the provision of unequal and separate standards. Paragraph (b) thus specifies that women must have access to the same premises, facilities, teachers and curricula as men; later paragraphs stress that there must also be equal access to grants, and opportunities for physical education. Article 10 also elaborates the need to break down stereotypical ideas about the role of women in education. Thus, state parties must work towards:

‘The elimination of any stereotyped concept of the roles of men and women at all levels and in all forms of education by encouraging coeducation and other types of education which will help to achieve this aim and, in particular, by the revision of textbooks and school programmes and the adaptation of teaching methods,’

Another broad policy goal is specified at para. (f). State parties must work towards the 'reduction of female student drop-out rates and the organisation of programmes for girls and women who have left school prematurely’. In other words, states must make a special effort to counter the pressures on girls to leave education. Family planning is also made part of this general approach to education in paragraph (h).

Article 11 moves from education rights to employment rights. The Article re-states the basic prohibition on discrimination, and then goes on, at 1 (a) to assert the right to work as ‘an inalienable right of all human beings’. This assertion relies on the fact that work is itself the access to civic status, and a wage in turn should allow the generation of personal resources. To be forcefully deprived of the opportunity to work

is to be deprived of the benefits that come with working. Historically, and in the present day, preventing women from working, or from working in specific sectors or fields, was and is effective in limiting life opportunities and maintaining the subordinate status of women. Article 11 is then specific about how employment rights are to be protected. These methods include 'the application of the same criteria for selection in matters of employment, and at (c), the right to choice of profession, promotion, job security and all the benefits incidental to employment. Employment rights are further specified to include the right to equal remuneration (d), the right to social security (e), and the right to safe working conditions (t). The second part of the Article concerns the employment rights of pregnant women. Paragraph 2(a) prohibits discrimination on the grounds of pregnancy or maternity leave; (b) makes it a duty of state parties to provide 'the necessary supporting social services to enable parents to combine family obligations with work responsibilities and participation in public life'. Paragraph (d) states that special protection must be provided for pregnant women at work. The third part of the Article mandates a review of legislation in the 'the light of scientific and technological knowledge'.

Article 12 guarantees equal access to health care for women and men, as well as requiring state parties to 'ensure to women appropriate services in connection with pregnancy, confinement and the post-natal period, granting free services where necessary, as well as adequate nutrition during pregnancy and lactation'.

Women's rights are distinctive to the extent that they recognise the special health care needs of women; indeed, this is one important area where women differ from men. These are outlined as the biological factors that relate to women's reproductive role, and also the 'higher risk of exposure to sexually transmitted diseases that women face'. But these differences are not just biological.

Socio-economic factors vary for women in general and some groups of women in particular. For example, unequal power relationships between women and men in the home and workplace may negatively affect women's nutrition and health. They may also be exposed to different forms of violence which can affect their health. Girl children and adolescent girls are often vulnerable to sexual abuse by older men and .family members, placing them at risk of physical and psychological harm and unwanted and early pregnancy. Some cultural or traditional practices such as female genital mutilation also carry a high risk of death and disability.

It may also be the case that women may be deterred from seeking medical advice in relation to contraception, abortion or when victims of

sexual or physical violence, because of the stigma sometimes attached to such matters.

Article 13 further elaborates the prohibition on discrimination in relation to 'economic and social life'. More specifically, women and men must have equal access to: family benefits, the right to bank loans and credit, and the right to participate in cultural life. This Article seems somewhat underdeveloped. The access to finance, loan facilities and credit is increasingly important to the structure of the contemporary social world in both the developed and the developing world. For instance, one can only run a business if one can access credit facilities. It is somewhat strange that the right to work, and the right to education (for example) are so explicitly presented, whereas the right to financial services is so under- developed. Perhaps this reflects the situation at the time of the drafting of the Article; this is one area where a more thorough articulation of the right may be useful.

Article 14 perhaps addresses a reality that is more pressing in the life of women in the developing world than the developed world, as economies in the former are less dependent on mass employment in agriculture than the latter. The Article places a duty on state parties to take into account the ‘particular problems faced by rural women and the significant roles which rural women play in the economic survival of their families’. This means that special regard must be had to women's work in the ‘non-monetised sectors of the economy'. In other words, women are disproportionately represented in informal and unregulated areas of economy as a result of their subordinate status. The Article goes on to specify objectives that must be addressed. States Parties must combat discrimination in rural areas, and ensure that women 'benefit from rural development'. More specifically, women must be encouraged 'to participate in the elaboration and implementation of development planning at all levels'. The rights covered above in relation to education and training are then re-iterated; but, other areas of participation are also elaborated. For instance, women must be enabled to ‘organise self-help groups and co-operatives in order to obtain equal access to economic opportunities through employment or self employment’. Article 13 is then repeated in a slightly revised version: women must be enabled to 'have access to agricultural credit and loans, marketing facilities, appropriate technology and equal treatment in land and agrarian reform as well as in land resettlement schemes’. The final paragraph specifies that women must also ‘enjoy adequate living conditions, particularly in relation to housing, sanitation, electricity and water supply, transport and communications’.

Part IV

Part IV addresses the legal and social status of women.

Article 15 addresses the equality of men and women before the law. The second paragraph requires state parties to provide identical legal capacity to women and men in civil matters: 'in particular, they shall give women equal rights to conclude contracts and to administer property and shall treat them equally in all stages of procedure in courts and tribunals'. As a corollary of this, state parties must ensure that all contracts and other private legal documents that deprive women of capacity are null and void, and must ensure that men and women have the same rights of movement, residence and domicile. This point has been made before, but it is worth repeating. The guarantee of lega1 capacity is a centra1 human right; indeed, a case could be made for it being the essentia1 human right. If anything, a human right expresses the conjunction of humanity with lega1 capacity. To be deprived of humanity is to become right-less, to have no lega1 capacity. Thus, human rights must, at base, assert an essentia1 connection between human being and the civic identity that the law enables.

Article 16 elaborates this notion of equa1 rights and legal capacity in relation to a specific area of law: marriage and divorce.

Discrimination against women must be eliminated in these areas by providing women and men with the same rights to enter into marriage with free consent and by maintaining a legal system that gives men and women that same rights during marriage and in the event of its dissolution. This would a1so cover rights over children, irrespective of marita1 status, including rights over guardianship, ward-ship, trusteeship and adoption of children. The last paragraph of the Article is interesting as it suggests an essentia1link between the rights of women and children: 'the betrothal and the marriage of a child sha11 have no lega1 effect, and a11 necessary action, including legislation, sha11 be taken to specify a minimum age for marriage and to make the registration of marriages in an official registry compulsory'.

Part V

Part V of CEDAW moves from substantive rights to certain institutiona1 and procedura1 concerns.

Article 17 sets up the Committee on the Elimination of Discrimination against Women staffed by 'experts of high mora1 standing and competence in the field covered by the Convention'. Elected by states parties from among their nationa1s in a secret ba1lot, and serving in a persona1 capacity (consideration being. given to both geographica1

distribution and to the representation of ‘different forms of civilization as well as the principallega1 systems’), the members of the Committee are empowered, by

Article 18, to consider reports submitted to them by the Secretary-Genera1 of the United Nations. These reports must cover ‘the legislative, judicia1, administrative or other measures’ that states parties 'have adopted to give effect to the provisions of the present Convention'. States parties must also report on the progress they have made in implementing the CEDAW.

Article 21 goes on to detail the powers and duties of the Committee. Reporting annua1ly through the Economic and Social Council to the Genera1 Assembly, the Committee makes recommendations based on the reports that have been submitted by states parties. In turn, the Secretaty-Genera1 transmits the reports of the Committee to the Commission on the Status of Women for its information.

Article 22 empowers ‘the specialised agencies’ to make reports to the Committee.

Part VI of CEDAW concerns itself with a number of technica1 matters which will not be discussed here.

Under **Article 29** of CEDAW, two or more state parties can refer disputes about the interpretation and implementation of CEDAW to arbitration, and if the dispute is not settled, it can be referred to the International Court of Justice. This procedure is subject to a large number of reservations and has never been used.

6.2.3 Additional Enforcement Mechanisms

In 1994, the Commission on Human Rights created, by resolution 1994/45, the post of special rapporteur on Violence Against Women, and created procedures whereby information could be obtained from governments on cases concerning alleged violence against women.

It is also worth remembering that mechanisms under different treaties may be employed. Communications could be made under the first Optional Protocol to the ICCPR. Communications concerning laws that discriminate against women could be made under this Protocol and by reference to Article 26 of the ICCPR.

This provides that men and women are equal before the law, and that the law must guarantee effective protection against discrimination. This procedure was used in Broeks v Netherlands 172/1984where a Dutch

Unemployment Benefits Act was successfully challenged on grounds of discrimination.

The mechanism that we considered in Chapter 5, the 1503 Procedure of the Commission of Human Rights, may also be used.

Discrimination or violence against women may also fall under Article 14 of The Convention on the Elimination of All Forms of Racial Discrimination, or Article 22 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

6.2.4 Analysis of Rights in CEDAW and Other Human Rights Instruments

It is worth noting that more states have made reservations to this treaty than to any other human rights treaty. What does this suggest about the resistance to women's rights at a state level?

The comment on the state duties points out that human rights law has made a distinction between positive and negative rights. It is worth remembering that all rights correlate with duties to make sense of this analysis. where we Negative rights place a duty on the state not to interfere in certain areas where individuals have rights. Positive rights place a positive duty on the state: the duty to do something, such as providing food. Social and economic rights fell into this latter category. The classic civil liberties, for the most part, fall into the former category. However, to what extent is this distinction useful? If one remembers that rights develop over time, then a negative duty merely not to interfere can become a positive duty to facilitate an area of activity: to encourage free speech, for instance.

Respect for the Rights of Others

This was a good example of a basic negative duty placed on the state. It is a basic human rights notion, laying down a fundamental standard that could even extend beyond the state to private parties. To the extent that a state should ensure private parties respect the rights of others, a negative duty has turned into a positive duty.

The Creation of Institutional Machinery

There are many provisions in both the Declaration and CEDAW that require the provision of certain institutions: a voting system, or an independent legal system, for instance. This is a positive duty placed on a state; it would be hard to think of it as a negative duty simply not to interfere.

The Duty to Protect Rights and Prevent Violations

Once again the strict negative/positive distinction tends to break down here. The duty to protect rights means that a state must not interfere, i.e. has a negative duty; but the duty to prevent violations is positive as it requires the creation of a police force and a legal system.

Provide Goods and Services to Satisfy Rights

Welfare rights which involve state expenditure are good examples of positive duties: the state has to provide institutions and resources, a health service, for instance.

Promotion of Rights

Another positive duty for reasons similar to those stated above.

It would seem, then, that a strict distinction between positive and negative rights is not useful. Indeed, the extract from the article by Nickel, suggests that one needs a more sophisticated way of understanding the complex nature of rights. Consider the prohibition of torture (or indeed, the prohibition of discrimination in the context of CEDAW). The duty to refrain from an act is universal and general- it is addressed to both state and non-state bodies. However, an 'adequate response to the claim to freedom from torture also requires finding individuals or institutions that can protect people against torture'. This positive duty is not necessarily universal. It is only binding on those states or institutions that can mobilize the necessary resources.

Thus, the people at large in a country, and also international agencies, are secondary addressees because they owe duties to assist, encourage and pressure governments to refrain from torture (186). The point of this analysis is to clarify the sense in which rights are always linked with duties; and duties can fall on different bodies.

SELF ASSESSMENT EXERCISE 4

In what ways could CEDAW be enforced?

6.2.5 Feminist Criticisms of CEDAW

Feminist critiques of the Universal Declaration have made a number of points. There have been criticisms of Article 16 because it valorises a notion of the family that is both unclear, and, in relation to Article 25(2), ill thought out. One issue that the Declaration does not cover adequately is the rights of the abused child, or even the abused wife against the

family. Other criticisms of the ICCPR raise the issue that the reporting system does not deal properly with violations of women's rights. Criticisms of CEDAW address the fact that it has led to a 'ghettoisation' of women's rights issues. Furthermore, in comparison with other human rights bodies, the enforcement mechanism under CEDAW is poorly funded.

Are these criticisms fair? Clearly any assessment of these claims would depend on a derailed study of the reports under the ICCPR; it would also be necessary. to look at the figures for the budget of various UN agencies before one could assess the claim that CEDAW is under-funded. One would also have to bear in mind gender mainstreaming, and other recent developments before one could make an overall assessment of these claims.

Summary

In this section we have looked at the substantive rights contained in CEDAW. We have also considered the enforcement mechanisms that exist under the treaty. We then turned to a more formal analysis of rights, and attempted to analyse the complex interplay between rights and duties.

6.3 The Optional Protocol

CEDAW also has an optional protocol. Its Articles, so far as they concern us, are explained below.

3.3.1 Why was there a Need for an Optional Protocol?

The Optional Protocol to CEDAW was based on commitments made in the Vienna Declaration in 1993 and the 1995 Fourth Conference on Women. It was created by a resolution of the General Assembly. The protocol begins by asserting the competence of the Committee on the Elimination of Discrimination against Women to receive and consider communications in accordance with **Article 2**.

Article 2 provides that communications may be submitted by or on behalf of individuals or groups of individuals who are claiming to be victims of a violation of Convention rights. **Article 3** specifies that communications must be in writing and cannot be anonymous. Communication can only be received by the Committee if the communication concerns a state party that is a signatory to the Protocol. In other words, the Committee would not be able to consider a communication if it came from an individual or a group from a state party that was a signatory to the Convention, but not the Protocol.

Article 4 states that the Committee will only consider a communication if it can make sure that all available domestic remedies have been exhausted. There is an exception to this rule. A communication could be considered if all domestic remedies had not been exhausted, but, the application of such remedies was subject to an unreasonable delay; or indeed, it was unlikely that the available remedy would be effective. There are other grounds of inadmissibility:

The Committee shall declare a communication inadmissible where:

(a) The same matter has already been examined by the Committee or has been or is being examined under another procedure of international investigation or settlement;
(b) It is incompatible with the provisions of the Convention;
(c) It is manifestly ill-founded or not sufficiently substantiated; (d) It is an abuse of the right to submit a communication;
(e) The facts that are the subject of the communication occurred prior to the entry into force of the present Protocol for the State Party concerned unless those facts continued after that date.

Article 5 empowers the Committee to request a state party to take interim measures whilst a communication is being considered. These measures must prevent 'irreparable damage to the victim or victims of the alleged violation'. This does not apply, however, when the Committee is merely considering the admissibility of a communication. Interim measures thus only become available once a communication has been declared admissible.

Article 6 makes it a condition of the Committee bringing a communication to the attention of the state party concerned (confidentially) that the complainants consent to the disclosure of their own identity. Once the state party has received the communication, it has six months to submit to the Committee ‘written explanations or statements clarifying the matter and the remedy, if any, that may have been provided by that State party’.

Article 7 stresses the confidential nature of the proceedings before the Committee. Article 7 para. 4 provides that once the state party has received the views of the Committee, it has six months to provide a written response, that specifies any action taken in the light of the views and recommendations of the Committee.

Article 8 allows the Committee to conduct an inquiry and to report urgently to the Committee where there is evidence of ‘grave or systematic violations by a State party’. Such an inquiry may involve a visit to the territory of the state party concerned, and results in a report

to the Committee, who in turn, transmits these findings to the State. Once the state party has received this report, it has six months to submit its observations to the Committee. Paragraph (5) provides that these inquiries are confidential, and consensual.

Article 9 specifies that a report to the Committee may contain details of the measures taken to respond to the issues raised by the inquiry.

Article 10 provides that it is possible to derogate Articles 8 and 9.

Article 11 is very necessary. It places a duty on state parties to take 'all appropriate steps' to make sure that those communicating with the Committee are not ill-treated.

3.3.2 What is the Role of the Optical Protocol?

The Optional Protocol includes two procedures: the communication procedure and the inquiry procedure. The communication procedure allows individuals and groups to complain to the Committee about violations of rights. The inquiry procedure enables inquiries to be made into grave or systematic abuses of human rights by experts.

SELF ASSESSMENT EXERCISE 5

Read Steiner and Alston, pp.188-189. This is an extract from an article by Byrnes that attempts to assess the work of the Committee.

1. What are Byrnes' main concerns?

Steiner and Alston have summarised concluding observations from the Committee's third and fourth periodic reports on China on pp.191-195. There are also summarised General Recommendations on pp. 195-202.

2. Do you think that they showed that the Committee engaged in constructive dialogue?

A Note on Gender Mainstreaming

As we saw above, the Commission's mandate was to promote the principle that men and women have equal rights. Its role was to prepare recommendations and reports for the Council on promoting women's rights and to make recommendations on urgent problems.

The Commission's role was expanded in 1987, and again in 1995 following the Fourth World Conference on Women in Beijing. The Commission was tasked with building on the Beijing Declaration and

the concerns expressed in the **Platform for** Action, including the mainstreaming of gender perspectives in the work of all UN agencies.

We need to consider the Platform for Action, and the idea of gender mainstreaming in greater detail.

The Platform for Action builds on the report of the 1985 Nairobi conference on Women. It calls for a concerted international effort to advance the human rights of women, and a social justice agenda, which in turn re-affirms the central principle of the Vienna Declaration and Programme of Action that women's and girls' rights are central to human rights. The Platform for Action also recognises that men and women should work together to achieve these ends.

The Platform for Action is linked to the practice of gender mainstreaming. How can one understand this latter term?

Mainstreaming a gender perspective is the process of assessing the implications for women and men of any planned action, including legislation, policies or programmes, in all areas and at all levels. It is a strategy for making women's as well as men's concerns and experiences an integral dimension of the design, implementation, monitoring and evaluation of policies and programmes in all political, economic and societal spheres so that women and men benefit equally and inequality is not perpetuated. The ultimate goat is to achieve gender equality.

The General Assembly was encouraged to direct the bodies and committees of the UN system to make a gender perspective part of all their work. Particular attention was drawn to macroeconomic issues, development activities, poverty eradication, human rights, humanitarian assistance and legal and political matters.

Once we turn from the law of the treaties to the issue of the implementation of women's rights, we can appreciate the complex issues of culture and tradition that this raises. We will now look at two initial country reports in an attempt to determine what is at stake in the implementation of women's rights.

So, in summary, gender mainstreaming aims to make gender issues far more central to the work of the UN (and within the UN itself).

3.3.3 Case Study: Nigeria

If we turn to Nigeria's country report, we can see that the issues raised by women's rights in Africa's most populous nation are somewhat different from those in the Republic of Singapore. Note, first of all, that

we are considering here the combined fourth and fifth periodic reports (document CEDAW/C/NGN405), not the interim report, as we did above. In other words, Nigeria has been a signatory to CEDAW for longer than Singapore.

Nigeria has ratified both CEDAW (in 1985) and the Optional Protocol (1999).

There was general praise for the advances that were being made in the protection and enhancement of women's rights. Experts drew attention to state laws that have prohibited female genital mutilation, early marriage and trafficking in women and children. Legal aid provision was also praised; in particular as it allowed one woman, Safiya Hussein, who had been sentenced to death by stoning for adultery, to appeal to the Sokoto State Sharia of Appeal, which overturned the sentence of the lower court. A major policy initiative was also coming to the fore. The National Policy on Women was intended to improve the profile of women in public life.

However, there were profound misgivings about the operation of a tripartite legal system and a governance process that impeded the implementation of policy. In Nigeria there are three legal systems in operation: Islamic Sharia law, customary law and common law.

The reason for this is in part historical, but problems of coherence among these three jurisdictions, make for difficulties in setting a common standard. The Nigerian Constitution does provide for freedom from discrimination, but, many states in the Nigerian federation remain committed to traditional gender roles that are from the perspective of CEDAW. Moreover, there are inconsistencies within legal traditions. For instance, whilst some provisions of Sharia law practised in the northern states of Nigeria are not compatible with CEDAW, but other provisions are. An example would be section 239 of the Zamfara State Sharia Penal Code Law 2000. This punishes the trafficking in women. As far as customary law is concerned, examples of practices in the Southern states, include widowhood rites and inheritance rights which remain discriminatory. These problems are exacerbated by social attitudes:

- In most communities…. a divorced or separated woman is despised regardless of the circumstances. The woman is stigmatised and becomes socially vulnerable, especially in the eastern part of the country. In northern Nigeria, separated or divorced women can marry after three months and usually do. While the marriage age in southern Nigeria is between the ages of 18 and 21, in the north it is between the ages of 12 and 15. In the Northern part of the country,

girls as young as nine, depending on the onset of puberty, are allowed to marry.

There were also problems with property rights. The report details that around 90 per cent of registered land and properties remain in men's names. Property rights are also complicated by the tripartite legal system, and by general ignorance of the existence of rights and social exclusion.

Some states in the south of the country do not even allow women to own land and other properties:

- Under customary law, however, wives remain as slaves to their husbands and in-laws. Widows in southern and eastern parts of Nigeria have no protection, and their rights are seriously abused.

- Under the Sharia legal system, widows are accorded more rights. If their husbands die, they are allowed an in-house compulsory mourning period of four months and 10 days to determine whether they are pregnant. After the compulsory mourning period, if found not pregnant, women are free to remarry. Widows under the Sharia law inherit their husband's properties together with their children.

SELF ASSESSMENT EXERCISE 6

What general impressions of the enforcement of women's rights are suggested by the report from Nigeria?

3.4 Declaration on the Elimination of Violence against Women

CEDAW is silent on an explicit condemnation of violence against women, although the core principles of the Treaty clearly prohibit it. The need to combat such practices led to the General Assembly resolution in 1993. It was felt that this was necessary to build on the programme announced in Nairobi, to counter the widespread use of violence against women and to produce a clear statement of women's rights in this area. The resolution of the General Assembly that proclaimed the Declaration effectively put the whole issue of violence in context. It asserted that 'violence against women is a manifestation of historically unequal power relations between men and women', and 'is one of the crucial social mechanized by which women are forced into a subordinate position compared with men'. Violence against women is all-pervasive. It may be that certain groups of women such as those 'belonging to minority groups, indigenous women, refugee women,

migrant women, women living in rural or remote communities, destitute women, women in institutions or in detention, female children, women with disabilities, elderly women and women in situations of armed conflict, are especially vulnerable to violence', but the issue of violence against women 'cut across lines of income, class and culture'.

We can examine some of the key Articles.

Article 1 begins with a definition: 'violence against women means any act of gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life'. Violence is .thus understood in a broad sense -it covers psychological as well as physical harm, and includes threats of violence as well. Note that it covers both public and private life, and so would apply to domestic violence as well as violence taking place in the public sphere. The definition is expanded by article 2; the first paragraph applies to violence practised against women in what could be seen as a private or at least family-oriented context. Thus, violence against women includes:

> *'Physical, sexual and psychological violence occurring in the family, including battering, sexual abuse of female children in the household, dowry-related violence, marital rape, female genital mutilation and other traditional practices handful to women, non-spousal violence and violence related to exploitation.'*

The second paragraph moves away from this context, to consider violence in a wider 'social' sense:

- 'Physical, sexual and psychological violence occurring within the general community, including rape, sexual abuse, sexual harassment and intimidation at work, in educational -institutions and elsewhere, trafficking in women and forced prostitution.'

That violence can include 'harassment and intimidation' builds on the definition of Article 1. Thus prostitution, to the extent that it is forced, would constitute violence against women. Consensual prostitution, in itself, would presumably not constitute violence against women. The third paragraph addresses violence condoned by the state:

- 'Physical, sexual and psychological violence perpetrated or condoned by the State, wherever it occurs. After Article 3, which stresses the coherence of the Declaration with the International Bill of Rights, Article 4 returns to this concern with the state.'

Article 4 states that nations that are signatories to the Declaration should condemn violence against women, and should not use 'custom, tradition or religious consideration' to avoid their obligations with respect to its elimination. This duty extends far a beyond merely legislating against violence. One of the problems with enforcement of human rights norms is that merely legislating is never enough, as patterns of social behaviour have to be changed. Thus, the Article provides that states must:

- 'Exercise due diligence to prevent, investigate and, in accordance with national legislation, punish acts of violence against women, whether those acts are perpetrated by the State or by private persons.'

This includes legislation, research and policy initiatives.

Acknowledging the need for a concerted international effort, **Article 5** concerns the UN, and provides that it should encourage co-operative regional cooperation, using the UN system to advance co-ordinated programmes both to set standards and take action against violent practices.

The fact that the Declaration does not contain an enforcement mechanism was remedied to some extent by the appointment of the special rapponeur on violence against women

3.5 The Special Raporteur on Violence Against Women

In 1994, The United Nations Commission on Human Rights appointed a special rapporteur on violence against women, including its causes and consequences. The mandate of the Special Rapporteur allows her to receive individual complaints, to make country visits and to submit annual thematic reports to the Commission on Human Rights.

SELF ASSESSMENT EXERCISE 7

1. What does the report suggest about the nature of violence against women?
2. What is the role of the Declaration on the Elimination of Violence against Women?

4.0 CONCLUSION

Perhaps one of the defining features of women's rights is their relative subordination to a supposedly more universal idea of human rights. Accounting for this takes us to the core of the problem. Why is it that

the International Bill of Rights is relatively silent on the abuses of women's' rights? One reason may be that even within the UN the importance of women's rights has been played down and even though this is perhaps changing, there is still the sense that enforcement mechanisms remain weaker in relation to women's rights, and that patriarchal cultural attitudes remain ingrained and resistant to change. In this chapter we have examined CEDAW and it's Optional Protocol; we have also looked at the Declaration on the Elimination of Violence against Women and the role of the Special Rapponeur. We have seen that these institutions and treaties represent a major development in protecting women's rights, but that a great deal must still be done.

5.0 SUMMARY

The link between women's right and human right has been asserted by numerous documents. The preamble to CEDAW, for example, or viena declaration would be germane to all discuss in this unit

6.0 TUTOR-MARKED ASSIGNMENT

Women's rights are human rights? Discuss

7.0 REFERENCES/FURTHER READINGS

Merry, S.A, 'Women, Violence and the Human Rights System', in Agosin, M, (ed,) *Women, Gender and Human Rights.* (New Jersey: Rutgers University Press, 2001) pp.83-98, Merry's work provides an argument that the human rights system is a "quasi-legal system" (p.84), and explores what this means with reference to preventing Violence Against Women.

Wright, S. 'Human Rights and Women's Rights: An Analysis of the UN Convention on the Elimination of all Forms of Discrimination Against Women', in Mahoney, K. and P. Mahoney (eds) *Human Fights in the Twenty-First Century.* (Dordrecht: Martinus Nijhoff, 1993) pp.?5-89, Wright presents an overview of the ideas that structure the Convention, and locates it in the struggle against poverty and social exclusion.

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UNIT 2 THE RIGHTS OF THE CHILD

CONTENTS

1.0 INTRODUCTION

Children's rights are not somehow 'additional' to human rights; rather, like women's rights they are the application of the key principles of human rights to a sector of humanity that deserves special protection. We will see that the main treaty in this area is the Convention on the Rights of the Child, and we shall review the powers of the Committee on the Rights of the Child in overseeing the implementation of the Treaty. But, we will also come to understand that children's rights raise particular problems, and cannot be understood purely in the abstract. Although the Convention on the Rights of the Child is the most widely adopted of international human rights instruments (even having been adopted by the Sudan People's Liberation Army) we need to appreciate that some of the most acute problems come out of situations where, either through poverty, war, or other factors, civil society and its institutions have broken down. How are human rights to be safeguarded in situations where the institutions that are meant to protect rights are not functioning? We will also examine situations where rights are not protected through a lack of political will, or because cultural forces are deeply embedded and resistant to change.

2.0 OBJECTIVES

By the end of this unit and the relevant readings, you should be able to:

- describe the basic provisions of the Convention on the Rights of the Child
- explain the functions of the Committee on the Rights of the Child
- explain the main issues relating to bonded labour
- explain the main issues relating to child soldiers
- explain the main issues relating to the right to health care and the problem of HIV/AIDS
- outline the main issues relating to juvenile justice.

3.0 MAIN CONTENT

3.1 The Convention on the Rights of the Child

Children's rights are at the core of the UN system. In Article 25 the Declaration itself makes reference to the 'special care and assistance' that is due to mothers and children and clearly, the right to education in Article 26 is of particular relevance to children. Article 24 of ICCPR and Article 10 of the ICESC Rights are also of relevance in this context. These documents build on earlier statements such as the Geneva Declaration of the Rights of the Child of 1924 and the General Assembly Resolution of 1959. There are three other recent documents of international importance that feed into the principles that underlie the Convention:

- the Declaration on Social and Legal Principles relating to the Protection and Welfare of Children, 1986,
- the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (The Beijing Rules 1985)
- the Declaration on the Protection of Women and Children in Emergency and Armed Conflict.

Despite the existence of these documents, the need for a coherent and comprehensive statement of the law remained. This was because there were widespread and ongoing abuses of children's rights. High mortality rates, poor access to health care and education, the economic exploitation of children and the abuse of children in armed conflict demanded international action.

The Convention was drafted by a working group set up by the UN Commission on Human Rights and consisted of government and UN representatives, members of NGOs and delegates from the International Labour Organisation (ILO), the United Nations Children's Fund (UNICEF) and the World Health Organization (WHO). The Convention

on the Rights of the Child was adopted by a General Assembly Resolution in November 1989, and came into force in September 1990.

The Child and the Family

The preamble to the Convention includes a paragraph that affirms the family as 'as the fundamental group of society' and asserts that 'the natural environment for the growth and well-being of all its members and particularly children should be afforded the necessary protection and assistance so that it can fully assume its responsibilities within the community'. We have already read criticism from a feminist perspective on the emphasis on the family. Feminists argue that the family can itself be a place of oppression; and we will return to this issue as we continue to consider children's rights; but it is worth pointing out at this stage that there are many connections between women's rights and children's rights. In particular, one of the major problems is that cultures often contain customs and beliefs about children that, like those that relate to women, see a child as under the care and protection of a **male** adult. Thus, any universal statement of the rights of the child must take account of 'the importance of the traditions and cultural values of each people'. We are aware that there are problems when such customs are inconsistent with human rights, and resistant to change (see Article 24(3) in this context). If we are aware that children's rights raise similar problems to women's rights, we also have to take into account the fact that children's rights raise a specific set of issues.

One of the problems for children's rights is that if one asserts that the family is a 'natural environment', it becomes difficult to understand that the family may also be the source of the problem of children's oppression and abuse. This is a complex argument. It is not suggesting that the family should somehow be 'reformed' or abolished; rather, it attempts to point out a key issue for children's rights; an issue that is inherent in the very notion of the rights of the child. Precisely because the child is not mature, it is dependent on care in the way that able-bodied adults are not. As the preamble goes on to state:

> *the child, by reason of his physical and mental immaturity needs special safeguards and care, including appropriate legal protection, before as well as after birth.'*
>
> *How does one ensure that the career does not become an abuser? Given that the care relationship involves unequal power, and abuse is always a question of a stronger party imposing its will on a weaker party, it would seem that there is an inescapable pathology to the family. The Convention must, then, assert that it is concerned with nurturing a 'family environment' that has an 'atmosphere*

of happiness, love and understanding'; moreover, it recognises that abuses of children's rights are a global problem in both the developing and the developed world: 'in all countries in the world, there are children living in exceptionally difficult conditions.

3.2 An Overview of the Articles of the Convention

Part I

Article 1 provides a definition: 'a child means every human being below the age of eighteen years'. A child is thus defined by a lack of majority; in this sense, the child is outside of the law, deprived of legal status and something less than an adult. The exception to this rule, that 'majority' can be attained 'earlier' than eighteen if a national law so allows, does not affect this general principle that a child lacks majority. In this sense, children's rights belong to those that are otherwise deprived of full legal being.

Article 2 places what we could call both a negative and a positive duty on state parties (see Chapter 5). State parties must both respect and ensure compliance with the rights contained in the Convention without any form of discrimination towards a child or the child's parents or guardians. Furthermore, children must be protected from the discrimination or 'punishment' that is inflicted upon the child's parents or guardians. Article 2 thus reveals another key theme in the structure of children's rights: given that the child is linked to the family, to protect the child, it is necessary to protect her parents or guardians.

Article 3 articulates a key principle: 'the best interests of the child'. This principle is to govern all dealings with children whether by public or private actors; however, it is immediately qua1ified.

The best interests of the child, or at least as it relates to 'protection and care' must take into account 'the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her'. Presuming that it is possible to determine the best interests of the child,' these best interests, if determined by a public or private agency, could easily conflict with the 'right' of the parents be or guardians to determine themselves what is best for 'their' child. We will see that other Articles below (specifically, 9 and 19) are intended to resolve some of these difficult concerns.

The third paragraph of Article 3 outlines a positive duty that places in! an obligation on a state party to ensure that agencies and institutions responsible for the well-being of children conform to standards

‘established by competent authorities'. This is elaborated **by Article 4**, which goes on to specify that states must ensure that social, economic and cultural rights are enforced to 'the maximum extent of their available resources’. Of course, the power to determine that either no or few resources are available means that a state party could always dramatically limit the effectiveness of this Article.

Article 5 returns to another key concern: the location of the child in the family, and the need for a cultural sensitivity to children's rights given the customs that pertain to family life. Thus, state parties are ordered to ‘respect’ the ‘responsibilities, rights and duties’ of parents/guardians, and to take into account that the family could itself be broadly defined to include those beyond the guardians/parents of the child. The extended family itself has a ‘right’ to provide ‘appropriate direction and guidance in the exercise by the child of the rights recognised in the present Convention’.

Article 5 thus recognises in a slightly different way that the rights of the child are qualified by the rights of those who have responsibility for the child.

Article 6 repeats the key human rights principle that the child has an 'inherent right to life', and the following articles, in returning to rights with which we are already familiar, elaborate what the right to life means in terms of a civil and legal identity. It could be said, then, that the Convention is not just concerned with bare life, but with a life that is defined and determined by the law. Thus, **Article 7** is a right to registration (expanded by **Article 8**) which is linked to the right to a name and a nationality and the right to be nurtured; a right to 'know and be cared for by his or her parents'. Once again, though, this right is potentially qualified by the second paragraph, which leaves the implementation of the rights in the first paragraph to ‘national law’. Article 6 could be read alongside Article 12, which could be seen as a due process right, or a guarantee of a right to a hearing for a child who is 'capable of forming his or her own views'.

Article 9 provides detail to the general principle that the child is to be cared for by and within the family. The first paragraph places a duty on states parties to make sure that a child is not 'separated from his or her parents against their will'. That this principle addresses the will of the parents, rather than of the child, shows that children’s rights are dependent on the rights of the child's parents. However, this principle is also qualified: a child can be removed against the will of his or her parents when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child'. Thus, the state is able to

act in circumstances when a competent agency external to the family determines that the parent's rights should be over-ridden. However, such is the seriousness of such a decision, that it is protected by due process guarantees. The reference to judicial review above suggests that any decision to remove a child from its parents must be open to review by a court; the second paragraph gives a different due process guarantee; the right of 'interested parties' to be involved in any proceedings. Should a child be removed from its parents, then there is a residual right to 'maintain personal relations and direct contact with both... on a regular basis'. Furthermore, the state has a duty to provide information concerning the whereabouts of a parent, if separation has been a result of 'any action initiated by a state party, such as the detention, imprisonment, exile, deportation or death (including death arising from any cause while the person is in the custody of the state)'. **Article 10** further elaborates this right, relating it to the right of movement of family members between states.

Article 11 prohibits the 'illicit transfer and non-return of children abroad'.

Articles 13 to 17 relate the classic civil liberties to the child. Thus, **Article 13** concerns that right to freedom of expression; **Article 14** guarantees the right to freedom of thought, conscience and religion; although the rights and duties of parents to 'provide direction' to the child are also guaranteed; **Article 15** recognises the rights of the child to freedom of association and to freedom of peaceful assembly; **Article 16** concerns rights to privacy and **Article 17,** the right to access of information from the media.

As pointed out above, children's rights are inseparable from the rights and duties of parents, and these are given further consideration in Article 18, This Article gives both parents and guardians 'common responsibilities for the upbringing and development of the child'; and the best interests of the child is to the basic standard in any understanding of what upbringing and development mean, States have to make sure that parents are well- supported in their parenting role, and this extends to taking appropriate measures 'to ensure that children of working parents have the right to benefit from child-care services and facilities for which they are eligible',

Article 19 is at the core of the Convention. It places a duty on state parties to make sure that legislative and administrative measures are undertaken to ensure that the child is protected from physical and mental abuse, 'neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s)

or any other person who has the care of the child'. Article 19 thus relates back to Article 9.

Together these Articles specify the obligations of the state, and those instances where state action is in the best interests of the child, even if the parents/guardians believe otherwise. Once a child is in the care of the state, **Article 20** would apply. This grants special protection to a child 'deprived of his or her family environment' and covers, 'foster placement, *kafalah* of Islamic law, adoption or if necessary placement in suitable institutions for the care of children'. Arrangements for the care of the child have to take into account the child's ethnic, cultural, religious and linguistic background.

Articles 21 to 23 relate to children in certain special situations.

Article 21 applies to those state parties that permit or recognise adoption. It lays down a series of duties that are meant to safeguard the best interests of the child in such a situation. **Article 22** places a duty on state parties in relation to the refugee status of children and **Article 23** .relates to the rights of mentally or physically disabled children.

The next group of Articles, 24-28 elaborate certain social and economic rights as they pertain to children, **Article 24** recognises the right to 'the highest attainable standard of health and to facilities for the treatment of illness and rehabilitation of health', This translates into a series of specific duties. State parties must take action to: diminish infant and child mortality rates; to make sure children received health care, with an emphasis on primary health care; to alleviate disease and malnutrition through the provision of food and clean water and to provide pre- and post- natal health care: Paragraph 3 lays down an obligation to 'take all effective and appropriate measures with a view to abolishing traditional practices prejudicial to the health of children', **Article 25** elaborates these rights even further and relates to a right to competent health care.

Article 26 changes the focus from health care to the 'right to benefit from social security, including social insurance' and places a duty on states to ensure the realisation of this right.

Article 27 could be read as a classic articulation of a social and economic right. It provides that state parties should recognise the child's right to 'a standard of living adequate for the child's physical, mental, spiritual, moral and social development'. The 'primary responsibility' for the delivery of these ends lies with the parents; but parents must be assisted in these duties by the state which must 'provide material assistance and support programmes, particularly with regard to nutrition,

clothing and housing'. This duty extends to taking measures to secure financial support for a child from parents.

Article 28 concern the right to education. The right to education, on the basis of equal opportunity, contains a list of more specific duties: the state must provide general and compulsory primary education; it must also ‘encourage’ the provision of accessible general secondary and vocational education. Within education, the state must discourage drop-outs, and ensure that discipline is consistent with other human rights.

Article 29 mandates the form of education. It must address, amongst other matters, ‘the development of the child's personality, talents and mental and physical abilities to their fullest potential'; respect for human rights, for his or her own culture and other cultures, and, above all, prepare the child for 'responsible life in a free society’.

Article 30 relates to the right of the children of minorities to be educated in such a way as to ‘enjoy his or her own culture, to profess and practise his or her own religion, or to use his or her own language’.

Article 31, the right of the child to rest and leisure, clearly extends beyond education and links through to Article 32. **Article 32** is another key provision in that it prohibits the economic exploitation of the child; the prohibition of exploitation extends to any work that 'is likely to be hazardous or to interfere with the child's education, or to be harmful to the child's health' and state parties must take both legislative and educational measures to achieve this end. More specifically state parties must mandate a minimum employment age; regulation of the hours and conditions of employment; ensure that these standards are effectively applied.

Article 33 links together a right to health care, and a right to protection by providing that state parties must take measures to ensure that children do not use illicit drugs and are not involved in either the production or trafficking of illegal drugs.

Article 34 protects children from ‘sexual exploitation and sexual abuse’. State parties are given a number of duties to ensure that children do not take part in ‘unlawful sexual activity’ and are not involved in prostitution or pornography.

Article 35 prohibits trafficking in children.

Article 36 is a general provision requiring state parties to protect children from 'all other forms of exploitation' that 'are prejudicial' to their ‘welfare.’

Article 37 relates various due process guarantees that concern sentencing and criminal law to children. As well as restating the generic rights (prohibition on torture and arbitrary arrest; guarantee of a right of access to the courts) it articulates a key Principle: children should be treated as such in the criminal justice system. For instance: 'every child deprived of liberty shall be separated from adults unless it is considered in the child's best interest not to do so and shall have the right to maintain contact with his or her family through correspondence and visits, save in exceptional circumstances'. The rights of the child in the criminal justice system are expanded at much greater length in Article 40.

Article 38 concerns armed conflict. In keeping with general humanitarian norms that relate to non-combatants, states must guarantee that children under the age of 15 do not take part in warfare; and thus must not be recruited into the armed forces.

Article 39 also relates to armed conflicts, but is much broader. State parties must make sure of the physical and psychological recovery of child victims of 'neglect, exploitation, or abuse; torture or any other form of cruel, inhuman or degrading treatment or punishment'; or armed conflicts.

Part II

In looking at Part II of the Convention, we will concentrate on those Articles that set up the Committee on the Rights of the Child, which is set up by Article 43. The Committee consists of ten experts elected by state parties but serving in their personal capacity. Under Article 44, state parties are under a duty to submit to the Committee reports on the steps they have taken to implement Convention rights. Reports must be submitted within two years of the Convention entering into force, and thereafter every five years. Article 45 provides that the specialised UN Agencies, such as the Children's Fund, have a right to representation before the Committee to provide advice on the implementation of the Convention. This Article also states that the Committee can make recommendation to the General Assembly which request that the Secretary-General undertakes studies on specific issues relevant to children's rights. The Committee can make suggestions and general recommendations based on information received pursuant to Articles 44 and 45. These can be addressed to any State Party and also reported to the General Assembly, together with comments, if any, from States Parties themselves.

Part III of the Convention contains various technical provisions that we will not consider.

Note: The Committee cannot consider individual complaints. However, it would be possible to raise a concern about children's rights before other committees with the jurisdiction to hear individual complaints.

SELF ASSESSMENT EXERCISE 1

1. Which other committees might be involved in hearing such complaints?
2. What are the General principles of the Convention?
3. How does the Convention protect the human rights of children?
4. Are there any nations that have not ratified the Convention?

Turning now to abuses of children's rights, we shift our focus from the law to questions of how the law is applied. To some extent, it is slightly misleading to label the following areas 'abuses of children's rights'. Although they clearly show that children are not being respected, they could equally be seen, more generally, as problems of structural and endemic poverty, the social dislocations brought about by armed conflict or issues of national development. One must keep this in mind: it is the essential context of the abuse of all human rights.

3.3 Child Labour

Children provide a significant portion of the world's workforce. Figures from the International Labor Organisation (ILO) suggest that in the developing world as many as 250 million children are in employment, with a little less than half of this figure working full- time. Regionally, this breaks down in the following way: 61 per cent of working children are in Asia, 32 per cent in Africa, and 7 per cent in Latin America. Primary sectors of employment are agriculture and domestic labour, although there is also some employment in trade and services, and a small amount in manufacturing and the construction industry. This is not to condemn all forms of child labour; however, it is necessary to look at the context and examine the conditions of employment and the educational opportunities available to the child. Human Rights groups have drawn attention to the worst areas of employment for children: particular areas of concern are silk production in India, and the pan played by children in the sugar industry in El Salvador, but concerns were also drawn to practices in the Middle East and the US. Abuses of children's rights include bonded labour, poor and dangerous working conditions and the denial of the freedom of movement.

3.3.1 Bonded Labour

‘Bonded labor takes place when a family receives an advance payment (sometimes as little as US $15) to hand a child-boy or girl over to an employer. In most cases the child cannot work off the debt, nor can the family raise enough money to buy the child back. The workplace is often structured so that 'expenses' and/or ‘interest’ are deducted from a child's earnings in such amounts that it is almost impossible for a child to repay the debt. In some cases, the labour is generational -that is, a child’s grandfather or great-grandfather was promised to an employer many years earlier, with the understanding that each generation would provide the employer with a new worker -often with no pay at all.'

The issue of bonded labour takes us to the core of the problem. This is not the case of a child taking a part-time job to assist the family's income. Rather, it is a form of slavery that reflects conditions of extreme poverty that blights generations. The child is effectively owned by the employer. Bonded labour may be a feature of those societies that are marked by poverty, but poverty must be understood in a broad sense. Thus, bonded labour tends to occur when people generally lack resources: this can mean a failure of access to credit and welfare, lack of employment for adults, but could also include discrimination against groups that exacerbate this general lack of social capital. As the quotation above suggests, the problem is also generational. The children of those who experienced bonded labour are likely to become bonded labourers themselves. What also contributes to the problem are pressures that keep wages low, so that people are forced to borrow from their employers, and then pledge their children's labour as a means of repaying the debt. In this sense, bonded labour creates a vicious circle: because there is a supply of Cheap bonded labour, wages for adults are also suppressed. Bonded labour is thus a self-sustaining social and economic phenomenon. Some researchers have also suggested that bonded labour is more likely in those places where social and economic relations are marked by caste and hierarchy.

What can be done to alleviate the problem?

The law relating to bonded labour is not just to be found in the Convention. It was made illegal by the UN Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery in 1956. Some other important sources include Article 8 of the ICCPR, which explicitly prohibits slavery and servitude and Article 7 of the ICESCR contains a guarantee of labour rights that are inconsistent with bonded labour. The ILO promulgated in 1999 a Worst Forms of Child Labour Convention, a Convention on Minimum Age and a recommendation for eliminating the worst forms of child labour.

3.3.2 Child Labour in India

There is clearly a body of international law that prohibits the worst forms of the practice, or at least attempts to regulate Child labour. Is the problem that certain nations have not ratified this law? Consider the case of India: 'with credible estimates ranging from 60 to 115 million, India has the largest number of working children in the world'. (Human Rights Watch Report: The Small Hands of Slavery; bonded child labour in India hrtp://www.hrw.org/reports/1996/lndia3.htm). We can gain a sense of the problem and an indication of the economic importance of children' labour from the following extract:

> *Apart from agriculture, which accounts for 64 per cent of all labor in India, bonded child laborers form a significant part of the work force in a multitude of domestic and export industries. These include, but are not limited to, the production of silk and silk saris, beedi (hand- rolled cigarettes), silver jewelry, synthetic gemstones, leather products (including footwear and sporting goods), handwoven wool carpets, and precious gemstones and diamonds. Services where bonded child labor is prevalent include prostitution, small restaurants, truck stops and tea shop services, and domestic servitude. (ibid: part 1: summary)*

Children's labour is not restricted to one area of economy, although agriculture accounts for the greater proportion of child labourers; it is thus general and not local and spread throughout different sectors, from the production of leisure goods to prostitution.

India is a party to and has ratified all the Conventions mentioned above except the ILO on the Worst Forms of Child Labour, and Indian domestic law does contain prohibitions on bonded labour, including the Bonded Labour System (Abolition) Act 1976 and regulations in relation to the employment of children. Moreover, bonded labour is in breach of cenain constitutional rights. There has also been litigation in Indian courts that has successfully led to obligations on states to identify the illegal employment of children and punish employers.

So, why does bonded labour persist to such a degree in India? Commentators have identified the lack of political will as one of the major issues. Although there has been a high level of commitment to action at the policy level, these policies have not, on the whole, been translated into meaningful programmes of action. There are two primary failures of government: a failure to enforce the Child Labour

(Prohibition and Regulation) Act 1986 and the Bonded Labour System (Abolition) Act 1976. For instance, there has been no consistent and concerted attempt to produce government figures on child labour. Such figures that can be collected show that, for instance, from 1990 to 1993, only 7 prosecutions were made of employers under the Child Labour (Prohibition and Regulation) Act, and these led to light fines; in the province of Tamil Nadu there had been (at the time of the report) no imprisonments under the Child Labour (prohibition and Regulation) Act. The last date for which figures were available under the Bonded Labour Systems Act show that over 250,000 bonded labourers had been released, but it is not possible to know how many of these were children. Some states simply kept no records at all; and some officials believed the Act did not apply to children.

Other obstacles to enforcement include corruption and neglect of duty among officials. The report suggests that officials are committed to maintaining the status quo, and show little regard for the well-being of bonded labourers. For instance, the Child Labour (Prohibition and Regulation) Act 1986 requires states to draw up implementation procedures. By 1996, a majority of states had not complied with this obligation. District magistrates were also not particularly concerned with the problem, with evidence that, in terms of a list of priorities made available to a journalist, child labour appeared well below the need to invest in technology. A senior official in the Ministry of Labour stated in an interview:

‘Laws don't matter. Economics do'. There was no point attempting to enforce labour standards unless rural poverty was tackled.

Vigilance Committees, required under the Bonded Labour System (Abolition) Act, were not operational in any part of the country. Evidence also shows that many bond masters are themselves government employees:

Because of their steady income, these people are more likely to own land -which they need someone to cultivate -and are more likely to have money available for lending purposes. They are also more likely to be local leaders and to have ties to the local and district administration, both factors which tend to inhibit prosecution’.

There are thus ‘obvious limitations’ in making ‘high-caste and local landowning officials’ the key players in the identification of bonded labour and the enforcement of standards. Significant problems relating to the bribery of local officials are also prevalent. Bribery is endemic from top officials through to magistrates and judges. It also has to be

pointed out that bonded labour is drawn from particular sectors of Indian society:

Nationwide, the vast majority of bonded laborers are Dalits; almost all bonded children interviewed for this report were Dalit or Muslim. Dalits are generally in a state of economic dependency that, when combined with the threat of, or actual, violence prevents them from reporting abuses against them -including being held in bondage -or from getting justice if they do.

Within the Indian caste system, the Dalits, or the untouchables, are the lowest members of society. Performing the most menial of jobs, they are condemned to poverty and social exclusion. Despite the fact that India is a democratic nation, the caste system and the poverty and exclusion associated with it persist. It is worth noting that caste systems exist throughout the world. A Dalit rights web site argues that 'though the communities themselves may be indistinguishable in appearance from others, unlike with race or ethnicity, socio-economic disparities are glaring, as are the peculiar forms of discrimination practiced against them. It is approximated that around 250-300 trillion people across the world suffer from caste, or work- and descent-based discrimination, a form of discrimination that impinges on their civil, political, religious, socio-economic and cultural rights, and their right to freedom of choice to develop as individuals and as a community with dignity.'

Although it is difficult to make generalizations about the status of the Muslim population of India, it is fair to say that in certain states Indian Muslims are suffering discrimination from the Hindu majority, which means that many Muslims suffer from unemployment, restricted job prospects, discrimination and poverty.

3.3.3 India's Reports to the Committee

The initial report of India stressed the country's commitment to children's rights, and stated that the infrastructure was now in place to make a difference. Moreover, there was a National Plan of Action and a committee to monitor progress. The report also pointed out that the rights of children would improve if the general rights of families also improved.

Second Periodic Report of India 2004

The second periodic report placed children's rights in the general context of the battle against poverty and pointed out that high mortality rates, malnutrition and il1iteracyremain problems. It also highlighted that India has over 400 million children below the age of 18 years. This represents the largest child population in the world. The report stressed the committee to making elementary education universal, but, as yet the National Commission for Children had not been established.

These reports suggest that advances are being made, but significant problems still remain.

SELF ASSESSMENT EXERCISE 2

Bonded labour continues to play a significant role in the Indian economy despite the nation's commitment to human rights standards, Discuss.

3.4 Child Soldiers

Child soldiers are part of armies and militias in many nations of the world. Some child soldiers are abducted and forced to fight; others join to escape poverty or abuse. Both girls and boys are involved in combat, although girls are also taken as 'wives' by commanders and sexually abused (the extent of sexual abuse of boys remains unknown). The problem is particularly acute in parts of Africa, most notably in the war zones in the Congo, Liberia and Sierra Leone. The Lord's Revolutionary Army, a guerrilla organization in the north of Uganda, is also notorious for its use of child soldiers. Child soldiers are also part of armies in Colombia and the Lebanon. In Colombia, both government and rebel forces make. use of significant numbers of children; in Lebanon, children have been forced to join the South Lebanon Army. Child soldiers are not only subjected to the traumas of combat; they have taken part in war crimes and massacres. After conflict is over, child soldiers are not re-trained, and remained traumatized; indeed, peace treaties often do not even recognize that child soldiers have been involved in the fighting.

As with bonded labour, a legal framework exists to prohibit the use of child soldiers. In 2002 the Optional Protocol to the Convention on the Rights of the Child on children in armed conflict came into force. This outlaws that use of children under 18 in armed forces, whether state-run or irregular. Convention (182) of the ILO also prohibits the recruitment of children under 18. Furthermore, under the Rome Statute of the International Criminal Court, recruitment of children under 15 is to be considered a war crime. The 1999 African Charter on the Rights and Welfare of the Child also accords with these international standards.

Under the African Charter, 18 is also the minimum age for recruitment into armed forces. (Child Soldier Use 2003: A Briefing for the 4th UN Security Council Open.

To understand the role of child soldiers in the Congo war, it is necessary to have a basic understanding of the causes of conflict in this country. A power struggle within the Democratic Republic of the Congo (DRC) involving neighboring countries triggered the First Congo War in 1998. Forces loyal to the president of the Congo, Laurent Kabila, overthrew the dictatorial regime of Mobutu Sese Seko in 1997. The war began a year later, when Kabila acted against Rwandan forces who had aided him in his coup. Burundi, Rwanda and Uganda, all share a border with the DRC and relied on the presence of Rwandan troops for their own security. At the same time as these nations became embroiled in this conflict, other neighbouring nations, Zimbabwe, Angola, Chad and Namibia mobilised to assist forces loyal to Kabila. Conflict in the Congo is also driven by attempts to control the nation's natural resources, and tensions between the ethnic groups that make up this massive nation.

It is against this backdrop of regional conflict, that we have to appreciate the issue of mobilisation of child soldiers. Some efforts have proved successful in de-mobilising child soldiers, with inputs from local NGOs, the UNDP and UNICEF. However, all factions in the conflict continue to rely on child soldiers. As far as government forces are concerned, the Congolese Am1ed Forces (PAC) still have child soldiers. They have made promises to demobilise, but this process is proceeding very slowly. The problem is not as simple as this, because the Congolese government also supports militias that make use of child soldiers, such *Mai-Mai* and the Rassamblement congolais pour Ia democratie-mouvement de liberation (RCD-ML).

The alliance of groups opposed to the government also recruit child soldiers. There is evidence that one of these groups, the *Union des patriotes congolais* (UPC) has made use of children as young as seven; forced conscriptions have taken place. A second militia group, which receives aid from Rwandan government, has confirmed that it too recruits child soldiers. Other local militia groups have organised to defend their land and villages from opposition militias. These local groups also rely on child soldiers. The problem is exacerbated by the intervention of other East African nations in the Congolese war. Rwandan and Burundian armed forces make significant use of child soldiers.

The other region we will study is West Africa where there have been conflicts in Cote d'lvoire, Liberia and Sierra Leone. Establishing the causes of the war in this region is also difficult, as there are many

factors. Order in Sierra Leone had been undermined for a long period before civil war broke out in 1991. Factions engaged in civil conflict in neighbouring Liberia began to intervene in the fighting in Sierra Leone - further complicating the situation. Unlike the situation in the Congo, there is, at present, a peace and reconciliation process underway in Sierra Leone. 'Estimates of war- related deaths since 1991 vary widely - from 20,000 to 75,000. Approximately half the population of 4.5 million is internally displaced, or living as refugees outside the country'.

To date, the Special Court in Sierra Leone has indicated a number of former leaders of armed guerrilla groups for conscripting child soldiers. Charles Taylor, the former president of Liberia, appeared before the Special Court for Sierra Leone in April 2006. He was charged with war crimes that included responsibility for militias who made use of child combatants. Liberian and Liberian- controlled forces were particularly active in recruitment in Monrovia, particularly in the period before Taylor stepped down as President that was marked by an intensification of the fighting. It was alleged that Taylor sponsored 'small boys units'. The degree of militarisation of these young combatants can be evidenced in accounts that report a military 'career' that began with fighting as a young child in Liberia, then Sierra Leone, and then being contracted to fight in Togo.

The Liberian government claimed that the young soldier had volunteered to fight out of a sense of patriotic duty. However, popular demonstrations in Monrovia in 2003 showed that this was not the case. Groups fighting against the Liberian government, and allegedly backed by Sierra Leone and the US, were also found to be using child soldiers and labourer, particularly in the northern part of Liberia. Eyewitness accounts reported child soldiers actively taking part in fighting, but also carrying ammunition and supplies. Other groups recruited in the Cote d'lvoire for soldier to fight in Liberia.

Charles Taylor has pleaded not guilty to the charges, and his trial is ongoing in the Hague.

As mentioned above, the civil war in Sierra Leone has come to an end. UN missions to the country in 2003 said that progress had been made in demobilising child soldiers, and re-integrating them into society. There were serious problems with funding, and the scale of the task that is exacerbated by the refugee problem and the economic and social problems occasioned by the civil war:

SELF ASSESSMENT EXERCISE 3

What common factors can you see in the use of child soldiers?

3.5 Children, Healthcare and HIV/AIDS

HIV/AIDS is a global problem:

> *HIV/AIDS continued to pose an acute threat to children's human rights in general. Unlike many virulent epidemics in history that have killed mainly young children and the elderly, AIDS for the most part infects and kills adults aged eighteen to forty years, in or near the most productive years of their lives. Globally, most persons in this age group are parents. Thus, for children, the epidemic too often represents both the loss of a parent or parents and exposure to the stigma and discrimination that go hand in hand with AIDS throughout the world.'*

HIV/AIDS is peculiar in that mortality rates are borne disproportionately by young people at the age where they are either starting a family, or have a young family. From a children's rights perspective, it is this aspect of the disease that is most devastating as it destroys the key structure in the nurturing and protection of the child. There are other consequences that follow from the death of a parent or parents. It often means that older children will have to care for their younger brothers and sisters, with the negative impact this has on their education or employment opportunities. Furthermore, children infected with AIDS/HIV are often forced into labouring for poor wages or prostitution, the latter adding to the spread of the disease. A report has also drawn attention to a problem of disinheritance in Kenya. After a death of a parent from AIDS/HIV, children have been deprived of property by distant relatives exploiting the law and the stigma attached to the disease. Finally, there is also evidence to suggest that children do not have access to sufficient information about AIDS/HIV. Often resistance from religious leaders and institutions to providing children with information on reproductive health has handicapped efforts to inform children about health care issues.

The scale of the disease is shocking:

> *In sub-Saharan Africa -the most heavily AIDS-affected region of the world -AIDS [has] orphaned children at a rate unprecedented in history. The United Nations conservatively estimated that by December 2000, about 13 million children under age fifteen in sub- Saharan Africa had lost their mother or both parents to AIDS. In July*

> *2000, the United States Bureau of the Census, which keeps data on AIDS independent of the United Nations, estimated that there were about 15 million children under age fifteen who had lost at least one parent to AIDS in Africa and that by 2010 this number would be at least 28 million, including over 30 per cent of all children under age fifteen in five countries of eastern and southern Africa.*

The African continent is not the only area affected. Thailand has seen approximately 300,000 deaths with the associated orphaning of children; the Caribbean basin has also been badly affected; however, at present, the disease is spreading most rapidly in the former Soviet Union and Eastern Europe, where drug use among children is exacerbating infection rates.

In 1992, at the International Summit on The Rights of Children in South Africa, children aged 12-16 from allover the country came together and drew up the Children's Charter of South Africa. In itself this suggests the shared perception that the rights of the child in South Africa are not adequately protected. We will now examine this particular issue, focusing on the right to health care.

Once again, we will see that the problems in this area are not necessarily linked with the legal framework. The South African Constitution contains a right to health care and the country is a signatory to the Convention on the Rights of the Child.

> *South Africa ratified the Convention on the Rights of the Child ('CRC'), shortly after the advent of democratic rule, in June 1995. In the process leading to the formulation of the National Programme of Action that followed ratification, the matter of law reform for children was identified as an important priority. The most pressing reason for this was the need to eliminate oven discrimination, especially racial discrimination, from the statute book, but there were other compelling factors as well. Not the least of these was the need to harmonise the laws of the so- called 'independent Bantustans' created under apartheid with those of the rest of South Africa, and the desire to take legislative account of the provisions of the Convention itself. Since the CRC was the first international convention to be ratified by South Africa, previously denied accession to UN treaties, the review of legislation pertaining to children enjoyed high political profile and support.*

First, it is necessary to disabuse oneself of the idea that AIDS/HIV is somehow a ‘punishment’ for sexual promiscuity. This approach to aids has influenced government policy. However, as we will see below, a large proportion of AIDS/HIV sufferers are the victims of sexual violence. Arguing that sexual abstinence will tackle the problem of AIDS/HIV is thus utterly misconceived.

First of all, we need to understand the basic legal position of the child in South Africa. At common law, consent from either a parent, guardian or the High Court is necessary before a child can receive medical treatment. The Child Care Act of 1983 permits children over 14 to consent to treatment themselves, and there are other mechanisms to obtain consent *for* children under 14 if the consent or a parent or a guardian is not available. Permission may be sought from the Minister of Social Development, or, in emergency cases, a hospital superintendent.

These legal mechanisms have to be placed in the context of the HIV/AIDS epidemic. When the 1983 Act was passed, the scale of the problem had not been anticipated; neither had policy makers understood the link between sexual violence and AIDS. Indeed, the report from which we are quoting talks of 'the dual epidemics of HIV/AIDS and sexual violence-including a virtually unprecedented epidemic of child rape'. The consent to treatment procedures under statute and at common law are not now robust enough to deal with these problems; especially since a large number of children have no parent or guardian: children have been ‘orphaned or abandoned’. Thus, in the opinion of South African Human Rights activists, the law on consent does not protect children, but places ‘serious barriers’ in the way of their health care; barriers that contradict both the SA constitution, and international human rights law.

There was also ambiguity in the law. For instance, one pressing issue was whether testing for HIV/AIDS constitutes medical treatment. Many children had been refused help until a legal ruling clarified that testing did count as treatment.

The struggle against HIV/AIDS in SA has also been hampered by the government's reluctance to make the necessary drugs available. Although this has recently changed, the legal environment is not conducive to effective health care implementation. Litigation has been attempted to obtain antiretroviral treatment and drugs for children living with HIV/AIDS. *Ex Parte Nigel Redman NO(* 4), concerned four orphaned children with HIV 1 AIDS. As the children had not yet had legal guardians appointed, it was not possible to obtain the consent of legal guardians. The consent of the relevant Minister was also not

forthcoming. An application was thus made to the High Court, and this was successful. Whilst this shows that courts will intervene, applications made to the Minister of Social Development have been time-consuming and not entirely successful. For children living with a life-threatening illness, such protracted procedures are extremely obstructive, and may even prove fatal. The scale of the problem means that, if AIDS is to be controlled, far more efficient legal mechanisms are necessary. It is simply not possible to make applications to the High Court every time a child needs treatment, or to wait for the ruling of the Minister of Social Development.

The Children's Act (2004) goes a long way to rectify the situation. Section 32 replaces the existing law with a new set of definition that describes a child's care giver; care givers are people who assume care for a child, but otherwise are not parents. A care giver may give consent to 'any medical examination or treatment of the child if such consent cannot reasonably be obtained from the parent or primary care-giver of the child'. This section should make obtaining treatment and care for children much more straight forward. However, unless the Act also allows medical practitioners to authorize treatment, victims of sexual violence would not obtain the necessary anti AIDS/HIV drugs. This is because government guidelines require these medicines to be administered within 72 hours of the sexual assault raking place. In rural areas, children may have to travel a great distance to a hospital, possibly without parents or careers; the position of refugee or street children is similar. Unless the medical practitioner who treats them can authorize treatment himself or herself, it is very unlikely that the necessary consent would be forthcoming.

SELF ASSESSMENT EXERCISE 4

AIDS/HIV treatment is a children's rights issue. Discuss

3.6 Children in the Criminal System

In turning to consider juveniles in the justice system, we are primarily concerned with matters of criminal justice. The guiding principles of children's rights in this area, resting on notions of the inherent dignity and rights of the child, stress rehabilitation rather than punishment. We will see, though, that many countries persist in treating children as adults, and breaching these guiding principles.

The fundamental principles contained in the Beijing Rules are based on securing the well-being of the juvenile in the criminal justice system. Policy initiatives are recommended which 'reduce the need for intervention under the law', and juvenile justice needs to be thought of

as part of a 'comprehensive framework of social justice'. Rule 5.1 specifies that measures taken in relation to a juvenile offender are proportionate to both the circumstances of the 'offender and the offence'. This is especially pertinent in those 'status offences' under national legal systems where the behaviour attracting criminal sanction is wider than that for adults. The examples given are 'truancy, school and family disobedience [and] public drunkenness'. The principles go on to recognise and confirm the relevance of due process guarantees for juveniles. (United Nations Standard Minimum Rules for the Administration of Juvenile Justice (The Beijing Rules'), GA. res. 40/33, annex, 40 U.N. GAOR Supp. (No. 53).at 207, U.N. Doc. *N40/53* (1985).)

As well as stressing the general principles contained in the Beijing rules, the United Nations Rules for the Protection of Juveniles

Deprived of their Liberty, [G.A. res. 45/113, annex, 45 U.N. GAOR Supp. (No. 49A) at 205, U.N. Doc. *N45/49* (1990)] stress that detention for juveniles should only ever be a punishment of 'last resort' and any prison sentence or deprivation of liberty must be 'for the minimum period possible'. Perhaps the most useful statement of policies regarding juvenile justice are provided by the Riyadh Guidelines, the United Nations Guidelines for the Prevention of Juvenile Delinquency, G.A. res. 45/112, annex, 45 U.N. GAOR Supp. (No. 49A) at 201, UN Doc. *N45/49* (1990). These guidelines stress the importance of integrating young adults into society: 'By engaging in lawful, socially useful activities and adopting a humanistic orientation towards society and outlook on life, young persons can develop non-criminogenic attitudes'. Thus, the response of any criminal justice system should be to understand the reasons for deviance. Punishment may be necessary, but the emphasis is on understanding why an offence has taken place, and re-orientating individuals to less anti-social attitudes.

4.0 CONCLUSION

When it ratified the ICCPR, the US government reserved the right to impose the death penalty for crimes committed by those under 18. In 1995 the UN Human Rights Committee, the body of experts set up to monitor compliance with the ICCPR, said that the US reservation was incompatible with the object and purpose of the ICCPR and should be withdrawn. However, since ratification, US state authorities have executed six prisoners for crimes committed when they were under 18, including two in 1998. In June 1998, there were 70 such prisoners awaiting this fate on US death rows.

In 1998, twenty-four US states permit the use of the death penalty against those under 18 at the time of the crime. Fourteen states have legislation enforcing 18 as the minimum age. (ibid)

Amnesty International goes on to point out that the federal government has specified 18 as the minimum age of criminal responsibility, and thus should be obliged to ensure each state complies with this rule. The federal government is responsible for making sure that state governments abide by their international obligations. Although the US has not ratified the Convention, which sets 18 as the age of criminal responsibility, the fact that the majority of nations in the world have, suggests that there is more or less universal consensus on the age of criminal responsibility. The Supreme Court has also shown that it is not willing to accept this consensus, holding that 16 should be the relevant age; it has also held that the execution of juveniles aged 16 or 17 at the time of the offence does not violate the constitution.

5.0 SUMMARY

Breaches of these standards can be found across the spectrum of law enforcement and in all countries of the world, but we will consider some examples drawn from Latin America and the United States. Abuses begin once children are under the control of the police. One particularly extreme example, as reported by the United Nations special rapporteur on extrajudicial executions, was evidence that, since 1998, up to 800 children had been murdered by the Police in Honduras. Also in Latin America, the Inter- American Court of Human Rights made an order against Guatemala relating to the murder of street children by the Police. In Paraguay, a Human Rights group also reported that children were being held with adults in overcrowded prisons and were victims of ill-treatment, including punishment by solitary confinement.

The record of the United States is also not particularly good in this area. Although there is a juvenile justice system in the US, concern has been drawn to the fact that the US criminal justice system tries children as adults in a number of cases where special juvenile processes would be more suitable. It is a general principle of children's rights that there should be a minimum age for criminal responsibility. An Amnesty International report shows that more than half of all US states have crimes for which any child can be prosecuted in an adult court; there are also inconsistencies between different states as to the age at which a child can be tried in a juvenile court. For instance, in North Carolina the minimum age is six; in Maryland, Massachusetts and New York, the minimum age is seven. The Report goes on to state that:

> *..Between 1986 and 1995, the number of children confined in custody before their cases were heard or following conviction grew by more than 30 per cent. h1 many jurisdictions, the increase in the number of children who are held in custody has outstripped the increase in resources that are available to house the children and provide services for them. The most recent survey found that 40 per cent of facilities around the USA housed more children than they were designed to accommodate.*

Breaches of international standards thus concern the excessive use of incarceration, both before formal conviction, and as a means of punishment after conviction; and the incarceration of children in facilities that are not equipped with resources that are suitable to juveniles, or to those with mental health problems. However, special censure was due to the fact that the US imposes death sentences on those convicted of crimes committed when they were children:

6.0 TUTOR-MARKED ASSIGNMENT

1. Why is there resistance to children's rights standards in the US criminal justice system?
2. Although the Convention on children's rights is described as the most ratified of international human rights instruments, abuses of children's rights are still widespread. How can this situation be accounted for? Discuss.

7.0 RFERENCES/FURTHER READINGS

A. Liearey: International Protection of Human Rights. University of London Press. 2002.

UNIT 3 THE RIGHTS OF REFUGEES

CONTENTS

1.0 INTRODUCTION

The rights of refugees raise in a particularly acute form, one of the main issues that has concerned us throughout this subject guide.

The refugee is a person who has had to leave the country of his or her birth or domicile through a fear of persecution. How are human rights to protect this most vulnerable group? As we have seen, international law places obligations on sovereign states. How can refugees rely on a state to protect their rights when it is the state itself that is persecuting them?

It is in the area of refugees' rights that the obligations of the international community are perhaps the most meaningful. Could we speak of an international duty to protect those fleeing persecution; or of those who have been made state-less and right- less? We will see that the UN has attempted to make a duty to refugees a reality but, that there is still a great resistance to open- ended responsibility to refugees in most nations of the world.

Refugee law is a complex and ever-changing body of doctrine and principle. Like all human rights law, it is also an intensely political

subject. In this unit, we will see how an appreciation of the problems faced by refugees has transformed itself from a European to a world issue. The UN, its agencies and other INGOs and pressure groups are perhaps responsible for this increased awareness of the issue -and we will focus on the role of the 1951 Convention and the 1967 Protocol. However, we need to appreciate that refugees' rights are increasingly being criticised.

The Convention and the concept of refugees' rights are criticised by politicians in the developing and developed world. For instance, in 2001 the then Home Secretary of the UK, Jack Straw, argued that the Convention was in need of revision as the ten-fold increase in asylum seekers in the UK suggested that economic migrants were taking advantage of a state's responsibility to refugees. Certain politicians and irresponsible journalists also portray the asylum seeker as a person seeking to claim benefits and privileges that they do not deserve.

But to what extent are these views accurate?

> *Two countries in southwest Asia, Iran and Pakistan, host twice as many refugees as do all the countries of Western Europe combined. Yet in 2000, the world's wealthiest nations contributed less than $1 bi1lion-one-tenth the amount they spent on maintaining their own asylum systems--to fund UNHCR's protection work around the world.*

This authoritative quotation suggests that the real problem might rest with the failure of powerful nations to commit themselves to a meaningful and coherent international system for the protection of the rights of refugees.

We thus need to place refugees' rights in their political as well as their legal context. It is also worth noting at this stage that there is a distinction between the refugee and the asylum seeker. Indeed, although there are references to asylum in the Preamble to the Convention, the granting of asylum is not dealt with in the 1951 Convention or the 1967 Protocol.

2.0 OBJECTIVES

By the end of this unit and the relevant readings you should be able to:

- describe the political and social context of refugees' rights
- explain the legal theoretical issues raised by refugees' rights
- summarise the basic provisions of the 1951 Convention relating to the Status of Refugees and the 1967 Protocol
- explain the problems inherent in the test for determining refugee status identify the provisions that relate to women and girls as refugees and to family reunification
- describe the response of the English courts to the test for the determination of refugee status
- outline reforms to immigration and asylum policy in the UK and the political issues these reforms raise.

3.0 MAIN CONTENT

3.1 Thinking about the Rights of the Refugee

As suggested in the introduction above, the concept of the refugee constitutes problems in humans rights law. The following passage contains an engaging analysis of some of the key issues:

- Refuges movement called into question the organisation of the world into distinct foreign territories to which individuals were allied by birth…since the essence of the phenomenon of refugeehood is that an individual is left without the protection of his or her state, the refugee problem was seen by many to be a fundamental problem of modern political organisation. The political theorist, Hannah Arendt, was one of the earliest writers to see articulated in the refugee condition, the inherently violent and discriminatory nature of the Westphalian state system. According to Arendt, human rights, even those of the most basic and fundamental kind, such as the right to life and freedom from inhuman or degrading treatment or punishment, do not devolve to the human subject through mere impulsive existence in the world, but due rather to attachment to the social and political organisation known as the state. Those without the protection of the state -the refugee being the paradigmatic instance – 'exist without the right to have rights'. Whilst Arendt and others called for a corrective (to the state system, so that falling states accord proper protection to its citizens) others viewed the refugee condition as potentially productive of a new political consciousness able to challenge the nexus of state, territory and identity that has resulted in the disinfranchisment of millions of refugees throughout the ages…indeed, Gorgio Agamben, whose work has been highly

influential, speaks of refugeehood as the 'only thinkable category for the people of our time.'

Tuitt argues that the status of the refugee provides an insight into the nature of human rights. The refugee challenges the very notion of a system of formally equal sovereign states (the Westphalian state system). Because the refugee is a stateless person, he presents a problem to a system of human rights that depends on the sovereign state. According to the German philosopher Hannah Arendt, the refugee characterises the modem political condition: the inherently violent nature of the state that can both grant and deprive citizens of rights. In Arendt's opinion, human rights are not the product of inherent dignity, but exist purely because a state might grant and recognise them. A number of conclusions can be drawn from this point. One is that it is necessary to have a supra-governmental system that guarantees human rights; another sees the very condition of the refugee as relevant to a new political consciousness that takes the refugee as the right-less person as the paradigm of modern politics, rather than the model of the citizen with rights.

Tuitt's analysis also suggests that the refugee needs to be put into a historical context; and so before we can think critically about the issues raised, we need to examine briefly the modern problem of the refugee.

Summary

The focus of this unit will be on the 1951 Convention and the 1967 Protocol. Despite these international agreements, though, the human rights of refugees are often neglected. This is because by being state-less, refugees fall outside the human rights system as rights obligations rest within nation states. Another central problem is the demonisation of refugees and asylum seekers, and the failure of powerful countries to pledge a significant level of financial support to the system for the protection of refugees.

3.2 The Recent History of the Refugee

3.2.1 Measures to Protect Refugees

The roots of the modern law relating to the protection of the refugee can be found in the immediate aftermath of the Second World War. The United Nations Relief and Rehabilitation Agency (UNRRA) and the International Refugee Organisation (IRO) were involved in aiding the hundreds of thousands of displaced people in Europe. However, there was not, as yet, a coherent body of refugee law. There were two relevant instruments: the 1933 League of Nations Convention relating to the

International Status of Refugees and the 1938 Convention concerning the Status of Refugees coming from Germany. Although the 1933 Convention contained principles that, as we will see, went on to inform the Convention relating to the Status of Refugees, these documents cannot be seen as providing a coherent framework for the protection of the human rights of refugees. Indeed, although the 1933 Convention placed duties on signatories to accept refugees, and prohibited their expulsion, the effect of this treaty was severely limited by the fact that those few nations who did sign imposed limitations on its influence.

In the post-war period, the continuing nature of the refugee problem in Europe, and the appreciation that the refugee crisis raised humanitarian and human rights issues, made the UN keen to improve the international protection of displaced persons. The UNHCR was created in 1950 by the UN General Assembly and given a remit that covered the protection of refugees worldwide.

One year after the creation of the UNHCR, the Convention relating to the Status of Refugees was adopted by the UN. One of the main reasons for the Convention is outlined by the UNHCR Handbook: “Instead of *ad hoc* agreements adopted in relation to specific refugee situations, there was a call for an instrument containing a general definition of who was to be considered a refugee.”

The nature of the Convention reflects the fact that it was largely a compromise acceptable to the parties present when it was drawn up. As with all international human rights, refugee rights place obligations on sovereign states, and state parties were reluctant to commit to obligations that were too broad or interfered too dramatically with their own internal affairs. Thus, as we will see, the very definition of the refugee status has a temporal limit. It applies to those who became refugees 'as a result of events occurring before 1 January 1951 '. There is also an option to limit the geographical reach of the treaty to events happening in Europe.

Both limitations reflect the fact that sovereign states were unwilling to adopt open-ended responsibilities in this area. However, the 1967 Protocol relating to the Status of Refugees removed the geographical and temporal1imits of the Convention.

The 1967 Protocol also created a duty for national authorities to co-operate with the UN in the 'exercise of its functions’, and in the collection of statistical data relating to the condition of refugees and the status of laws relating to refugees in the signatory state. A fu11list of parties to the Protocol and the Convention can be found at:

http://www.unhcr.org/cgi- bin/texis/vtx/protect/ opendoc. pdfltbl = PROTECTION&id = 3b73bOd63

The Convention is important from a legal perspective because it contains a general definition of the refugee, and also grants them some rights. The core of the Convention is the principle that a nation must not expel or return a refugee (refoulement). This principle was contentious at the time of the drafting of the Convention, and remains so today. Governments were concerned that they were under an obligation to allow unlimited numbers of persons to claim status as refugees once they had crossed a national border. Misgivings about a nation's obligations to refugees are reflected in the fact that the Convention also imposes obligations on refugees to the nation that is protecting them. In this sense, refugee's rights clearly correlate with refugee'' duties.

The Convention is supplemented by other international instruments, including the International Covenant on Civil and Political Rights (1966), the Convention on the Rights of the Child (1989) and the Convention Against Torture and Other Cruel, Inhumane and Degrading Treatment or Punishment (1.984). There are also other, regional instruments that relate to refugees. For example in Latin America, there are a number of relevant international statutes. Amongst these documents are:

- the Treaty on International Penal Law (Montevideo, 1889)
- the Agreement on Extradition (Caracas, 1911)
- the Convention on Asylum (Havana, 1928)
- the Convention on Political Asylum (Montevideo, 1933)
- the Convention on Diplomatic Asylum (Caracas, 1954)
- the Convention on Territorial Asylum (Caracas, 1954).

There is also the Convention Governing the Specific Aspects of Refugee Problems in Africa. This was adopted by the Organisation of African Unity in 1969. We shall examine this treaty in a later unit.

3.2.2 Who is a Refugee?

Before we examine the Refugee Convention in depth, it is worth thinking in a little more detail about the very idea of the refugee. The distinction between a refugee and a person seeking entry to a country for other purposes of migration is rather arbitrary. From a historical perspective, for instance, it was not until the late eighteenth century in England that the word 'refugee' was used to describe an individual escaping persecution; such 'refugees' were then considered 'aliens'. More recently, we can see that the word, and indeed the legal concept, has been used rather loosely. In 1968, a large group of Kenyan citizens

of Asian descent were facing discrimination in Kenya and sought to enter the UK; later in 1972 a group of 'Ugandan Asians' also sought entry into the UK. Although a case could be made that these people were refugees fleeing persecution, it was not the way that they were considered by immigration law. The treatment of this group can be compared with the later treatment of Albanians fleeing Kosovo in the 1990s. These people were treated as asylum seekers (for the distinction between refugees and asylum seekers, please see below). One more example is pertinent. From November 2002, all claims for asylum to the UK from countries acceding to the EU are to be treated as unfounded. However, from May 2004, nationals from these same countries can enter the UK as citizens of the EU: thus, depending on whether, for example, a Polish national enters the UK before or after the May 2004 deadline, he will either be regarded as either a European worker or as a failed asylum seeker. These examples suggest that the dividing lines between immigrant or economic migrant and asylum seeker or refugee are rather blurred

Refugees or Asylum Seekers?

The term refugee is somewhat vague, and we must distinguish between a refugee and an asylum seeker. First, the concept of asylum, historically at least, was a privilege of sovereign states. From an international law perspective, this is still probably the case: it is a state that has the right to grant asylum. What does this mean? A state can only demand the return of its nationals in formal extradition proceedings, and another state may choose to grant asylum. This notion that the 'right to asylum arises between states' has been qualified by the Universal Declaration, as Article 14 states the right to 'seek and enjoy' asylum. However, it has been argued that this does not actually mean that one has a right to asylum. This would mean, therefore, that a state is not under an obligation to grant asylum.

How does this relate to the Convention relating to the Status of Refugees? As argued above, the core of the Convention is the prohibition on refoulement. This means that a state cannot return refugees. An obligation not to return refugees does not necessarily equate to a right to asylum. Also note that refoulement relates to refugees already on the territory of the state: it does not prevent a state from stopping refugees reaching its borders in the first place.

SELF ASSESSMENT EXERCISE 1

1. 'Although one has to distinguish between refugees, asylum seekers and economic migrants, there is no clear boundary among the terms.' Discuss.
2. What does Tuitt's analysis of the refugee suggest about the nature of refugee law?

Summary

This section has dealt with the historical and conceptual structure of the idea of the refugee. We have reviewed the work of Arendt, Agamben and Tuitt who suggest, in different ways, that the refugee is a 'figure' of our times. We have also looked at the historical development of refugee law which took place immediately after the Second World War in Europe. Although the United Nations Relief and Rehabilitation Agency (UNRRA) and the International Refugee Organization (IRO) provided assistance for displaced peoples, a coherent body of refugee law was only achieved with the Convention relating to the Status of Refugees in 1951. Although the Convention could be seen as a compromise, because states were not keen to assume broad responsibilities for refugees, it does contain some important provisions. The Convention provides a general definition of the refugee and a basic set of rights. The Convention states that a nation must not expel or return a refugee (refoulement). Further advances mean that there are now a number of measures that relate to the international protection of refugees rights.

3.3 The Convention Relating to the Status of Refugees and the 1967 Protocol

3.3.1 Definition of a Refugee

The Convention Relating to the Status of Refugees was adopted in 1951 by the United Nations and came into force in April 1954. The Preamble states that the Convention 'revises and consolidates' the previous documents that relate to the status of refugees.

Chapter I of the Treaty contains general provisions. **Article 1** contains a definition of refugee. It is, in part, a technical definition that refers back to previous documents. Thus, a refugee is someone who has been considered a refugee under 'the Arrangements of 12 May 1926 and 30 June 1928 or under the Conventions of 28 October 1933 and 10 February 1938, the Protocol of 14 September 1939 or the Constitution of the International Refugee Organization'. Why are these dates significant?

The above enumeration is given in order to provide a link with the past and to ensure the continuity of international protection of refugees who became the concern of the international community at various earlier periods these instruments have by now lost much of their significance, and a discussion of them here would be of little practical value. However, a person who has been considered a refugee under the terms of any of these instruments is automatically a refugee under the 1951 Convention.

This paragraph thus tells us how the 1951 Convention is coherent with earlier Conventions.
Paragraph (2) adds significantly to this definition:

As a result of events occurring before I January 1951 and owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable, or owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.

There are a number of elements to this definition. First, it is necessary to explain the importance of the date 1 January 1951. As explained above, the date is significant because it shows that the state parties who were involved in the early stages of making the Convention law were keen to limit their liability to people who had been made refugees during the Second World War, and so include only events that had already happened. States did not want the Convention to create an open-ended responsibility for refugees that would be a burden on national governments. However, as the UNHCR Handbook explains, with the signing of the 1967 Convention, this definition has lost most of its significance. It is relevant mainly to those states that have signed the Convention, but not the Protocol.

The core sense of the definition is a ‘well-founded fear of persecution’; the reasons for the persecution relate to a broad list of factors that include ethnicity, but also cultural and political concerns. Owing to this fear of persecution, the person claiming refugee status is either ‘outside the country of his nationality’ and unable or unwilling to return or, in cases where the individual has no nationality, is unable or unwilling to return to the place of ‘former habitual residence’. A refugee is thus a ‘stateless’ person; someone who cannot call on a state to protect him or her.

It is also worth noting that an individual can lose refugee status.

There are a number of grounds under which this could happen, for instance if he or she ‘voluntarily re-avails himself of the protection of the country of his nationality’ or the reasons for the fear of prosecution no longer exist. The commission of certain crimes can also deprive an individual of refugee status. Included in this list would be war crimes and crimes against humanity; ‘non-political’ crimes committed in the country from which s/he has fled, or if the person has been ‘guilty of acts contrary to the purposes and principles of the United Nations’.

Before we move on, we need to examine in detail the meaning of these keywords in the Convention. Later in this unit, when we look at the response of the English Courts to the Convention, we will see that their meaning is far from straightforward.

The phrase ‘well-founded fear of being persecuted’ replaces the earlier method of defining refugees by categories (i.e. persons of a certain origin not enjoying the protection of their country) by the general concept of 'fear' for a relevant motive. Since fear is subjective, the definition involves a subjective element in the person applying for recognition as a refugee. Determination of refugee status will therefore primarily require an evaluation of the applicant's statements .rather than a judgment on the situation prevailing in his country of origin.

However, to the element of fear -a state of mind and a subjective condition - **.**is added the qualification ‘well-founded’. This implies that it is not only the frame of mind of the person concerned that determines his refugee status, but that this frame of mind must be supported by an objective situation.

There are thus both subjective and objective elements to the test for refugee status. The Handbook explains that the general test for refugee status replaced the previous approach which had been to determine refugee status by reference to categories of person. The Convention test has both a subjective and an objective element: the decision-maker must ask first of all whether or not a person applying for refugee status is in fear. This is a subjective test, and relates to the applicant's own understanding of the threat that he or she faces. However, this must be 'well-founded’; and this requires an objective element. There must be objective reasons for the individual’s fear. Note also that the UNHCR Handbook stresses that, for the purposes of the Convention, being the victim of a natural disaster does not, in itself, qualify a person for refugee status.

As far as the subjective element is concerned, the Handbook provides further usefu1 clarification of the way in which it is to be understood:

Due to the importance that the definition attaches to the subjective element, an assessment of credibility is indispensable where the case is not sufficiently clear from the facts on record. It will be necessary to take into account the personal and family background of the applicant, his membership of a particular racial, religious, national, social or political group, his own interpretation of his situation, and his personal experiences -in other words, everything that may serve to indicate that the predominant motive for his application is fear. Fear must be reasonable. Exaggerated fear, however, may be well- founded if, in all the circumstances of the case, such a state of mind can be regarded as justified.

The subjective element demands that the decision-maker takes into account the credibility of the applicant; especially when the facts as presented are not themselves clear. The decision-maker must assess the subjective fear of the applicant as an individual, taking into account his or her beliefs, status and ethnicity; and give due weight to the individual's own appreciation of the facts of the situation. Determining the objective element is equally as difficult. Although the decision-maker is not called upon to 'pass judgment on conditions in the applicant's country of origin', it is impossible to consider the applicant's statements in the 'abstract' and the decision must be related to 'the context of the...background situation'. Thus, whilst a knowledge of the situation in the country of the applicant is not a primary consideration, it is 'an important element in assessing the applicant's credibility'. The applicant's own experiences are important in assessing these issues, but so too are the experiences of his family, friends, or the ethnic or religious group from which he originates. Also important are the laws of the relevant country, and the way in which they are applied.

In this context it is also important to note that, although the Convention envisages that refugee status is normally determined on an individual basis, there is the possibility of cases where whole groups of people have been displaced. In such circumstances it is not possible to make individual determination of refugee status for each person in the group. In this situation it is Possible to make a 'group determination' of refugee status: 'each member of the group is regarded prima fade (i.e. in the absence of evidence to the contrary) as a refugee'.

An equally important issue is the meaning of the word persecution. At present there is no single accepted definition of this word. Interpretations are thus thrown back to the Convention itself. From Article 33, it is possible to 'infer' that persecution means 'a threat to life or freedom on account of race, religion, nationality, political opinion or membership of a particular social group... Other serious' violations of human rights -for the same reasons -would also constitute persecution.'

Although this appears a reasonably wide definition, it begs the question of whether other acts could amount to persecution. This would depend on 'circumstances of each case'. It would be necessary to take into account the subjective and objective elements of the test as analysed above.

Another issue that should be considered here is the problematic distinction between economic migrants and refugees. The UNHCR Handbook defines a migrant as: '…. a person who...voluntarily leaves his country in order to take up residence elsewhere'. In this sense, an economic migrant is not a refugee; however, in certain circumstances, an economic migrant may be considered a refugee. For instance, punitive economic measures (for example, prohibiting people from taking certain jobs/ raising levels of taxation that apply to certain groups of people) may lead to a person leaving a country. This begs the question: when is an economic migrant a refugee?

> *...Objections to general economic measures are not by themselves good reasons for claiming refugee status. On the other hand, what appears at first sight to be primarily an economic motive for departure may in reality also involve a political element, and it may be the political opinions of the individual that expose him to serious consequence!; rather than his objections to the economic measures themselves.*

An economic migrant may be a refugee, depending on the facts of the case. Obviously, the other elements of the definition above would have to apply.

SELF ASSESSMENT EXERCISE 2

What is the nature of the test to determine refugee status?

3.3.2 Obligation on States and refugees

The Convention goes on to list certain obligations that apply to both state parties and refugees.

Article 2 articulates a set of 'general obligations' that the refugee owes to the country of refuge. These require that she or he conforms 'to its laws and regulations, as well as to measures taken for the maintenance of public order'. It is perhaps best to view this article as aspirational. As the Convention is an international treaty, and, as the individual has, at best, a problematic status in international law, it is hard to see how this duty could be enforced against individuals. It is a broad obligation to

respect not just the law, but, also general measures taken to preserve public order.

Article 3 is a duty placed on state parties. They must apply the Convention to refugees without any form of discrimination. Moreover, by Article 4, state parties must accord to refugees' treatment that is ‘as favourable as that accorded to their nationals' in relation to the right to practice a religion. These duties are the minimal obligations that a state owes to refugees. Article 5 stresses that nothing in the Convention should be interpreted as limiting the 'benefits' that a contracting party might grant to refugees.

The next set of Articles relates to the peculiar legal status of the refugee as a displaced person; an individual in a form of legal limbo.

Article 7 obligates a state party to treat the refugee in the same way that it treats ‘aliens generally’, i.e. not as a citizen of the state in which the person is in residence. Once a refugee has been resident for three years, she or he is exempted from reciprocity arrangements that exist between his country of refuge and the nation from which he fled. There are further provisions in this Article that protect the rights of refugees in the absence of reciprocity arrangements. Furthermore, Article 8 provides that if a state party takes 'exceptional measures' against a foreign state, any refugees from that state already within the territory of the state party, should not be treated as subject to those special measures. Thus, the refugee is, as far as special measures are concerned, already separated from and treated differently from his fellow nationals.

Article 9 is a qualification of this principle. A contracting state can, in ‘times of war or other grave and exceptional circumstances', take measures to protect 'national security' in relation to the determination of refugee status. **Article 10** can be read as part of this group of Articles, but it relates to specific circumstances: those displaced in the Second World War and resident in the territory of a contracting party are to be considered lawful residents for the period of their settlement. 10(2) contain some further provisions for determining a period of continuous residence, and Article 11 provides special provisions for refugee seamen.

SELF ASSESSMENT EXERCISE 3

What are the main areas of concern of Articles 2-11 of the Convention?

Chapter II

Chapter II further elaborates the juridical nature of the refugee.

Article 12 provides that the personal status of the refugee is determined by the law of the country in which she or he is domiciled. For those without a country of domicile, personal status is provided by the country in which the person has residence. Any rights which the individual refugee might have acquired, such as rights acquired on marriage, in the country in which he was a national must be respected by the country of refuge, subject to whatever formalities that country of refuge imposes. The exception to this principle is that the state would have recognised the right had the individual not been a refugee.

Article 13 provides that the refugee must have rights at least as favourable as those accorded to aliens in relation to the ownership of movable and immovable property, and contractual or property law related rights.

Article 14 relates to artistic rights and rights over industrial property. Articles 15 and 16 move from property rights to public rights. **Article 15** provides that a refugee has a right of association in 'non-political and non-profit-making associations and trade unions' that are the same as those given to nationals of a foreign country that may be in the territory of the state party. **Article 16** addresses due process and fair trial rights. The Article states that a refugee has to have' free access to the courts of law on the territory of the state party.

SELF ASSESSMENT EXERCISE 4

What are the main features of Chapter II?

Chapter III

Chapter III of the Convention sets out employment rights of the refugee. **Article 17** provides that a state party must allow refugees who are lawfully in its territory 'most favourable treatment' in relation to wage-earning employment as they would allow to nationals of a foreign country who were resident in their territory. However, a state is allowed to put in place restrictions to protect national labour markets. These restrictions would not apply to a refugee from a nation whose nationals would have been exempt from such restrictions; or, a refugee who has been resident for three years in the territory of the state party who has granted him refugee status. A refugee married to a spouse who is a national of the state party would also be exempt; as would a refugee having one or more children possessing the nationality of the state party. There is also a general duty at Art. 17(3) that is worth considering in full:

The Contracting States shall give sympathetic consideration to assimilating the rights of all refugees with regard to wage-earning employment to those of nationals, and in particular of those refugees who have entered their territory pursuant to programmes of labour recruitment or under immigration schemes.

In relation to self-employment, **Article 18** applies the general principle that a refugee should be treated as favourably as possible. The minimum standard is that the refugee must not be treated less favourably than 'aliens generally in the same circumstances.' As far as the 'liberal professions' are concerned, **Article 19** provides the same principle to those refugees who hold 'diplomas recognised by the competent authorities of that State.'

Chapter IV

Article 20 provides that refugees shall enjoy the same rights with regard to entitlements under a rationing system as nationals. In relation to rights to housing, the state must treat refugees as favourably as possible, and no less favourably than aliens who are lawfully in the contracting parties' territory.

By virtue of **Article 22**, refugees enjoy the same rights to elementary education as nationals. With regard to educational matters other than elementary schooling, a refugee must be treated as favourably as possible, and not less favourably than an alien lawfully resident in the relevant country. **Article 23** provides refugees with the same rights to public relief as nationals.

Article 24 extends to labour legislation and social security. It is an article that has vertical effect against the state. Thus, the contracting party must undertake to afford refugees the same protection as nationals in certain areas relating to employment and welfare, to the extent that 'such matters are governed by laws or regulations or are subject to the control of administrative authorities'. Thus, to the extent that these matters are entirely in the hands of private parties, it would fall outside the remit of the Convention. The Article also recommends that there be 'appropriate arrangements' to deal with the acquisition of rights in this area.

This Article, then, resembles the ones above, in that it understands the refugee to be able to acquire rights in the country of refuge. Sometimes, though, and for justifiable reasons, these rights or entitlements must fall below those enjoyed by nationals. For instance, Article 24 allows refugee status to be taken into account in assessing benefits or pension rights. It may of course be by virtue of refugee status that a person has

not made sufficient payments to receive either full welfare or pension entitlements.

Chapter V

Chapter V includes important administrative measures relating to refugee status. These measures have to take into account the problems a refugee might be experiencing due to displacement or flight from the country where he had residence or was domiciled. For instance, the individual might not be able to locate documents to prove identity and entitlement. In this sense, lacking papers and unable to prove his identity, a refugee becomes a legal 'non-person'.

Article 25 takes this into account. If a refugee cannot rely on the administrative support of the authorities in the country he has left, then the state party in whose territory the refugee is in residence must afford the necessary assistance. The relevant authorities must 'deliver or cause to be delivered... such documents or certifications as would normally be delivered to aliens by or through their national authorities'. These documents must then be treated as official.

Articles 26 to 28 concern freedom of movement. **Article 26** grants freedom of movement to refugees, and **Article 27** provides that a state must issue the relevant documents to enable free movement within the territory. **Article 28** relates to travel documents for movement outside the country. Unless reasons of national security or public order apply, travel documents must be issued.

Article 29 states that refugees cannot be taxed in a way that is different from nationals in the same situation; but this principle does not apply to recovery of costs relating to the issuing of relevant documents.

Article 30 places a duty on a state party to allow refugees to transfer assets which they have brought into a state's territory to another country where they may be resettled.

Article 31 relates to refugees unlawfully in the country of refuge. Providing that such persons report to the relevant authorities, and show that they had good cause to enter the country in question illegally, the state party cannot impose penalties upon them. Such persons would also have to show, however, that they tell within the definition of Article 1, and that 'their life or freedom was threatened'.

According to **Article 32**, once a refugee is lawfully in a territory, the state party cannot expel that person, unless there are grounds of national security or public order. The decision to expel must be made in

accordance with the due process of law. Except in extreme situations, a refugee must be allowed to submit evidence to 'clear himself' and must be accorded certain due process rights. There must be the possibility of appeal and representation before the competent authority. Moreover, the contracting state must allow a person facing expulsion a 'reasonable period' to 'seek legal admission into another country.' Article 32 is backed up by **Article 33**, which prohibits 'refoulement'. Refoulement is the return of refugees to the 'frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion'. The exception to this rule is provided at 33(2). Refoulement does not apply to a refugee who presents a threat to security, or, having been convicted of a serious crime, represents a 'danger' to the country that is expelling him.

Article 34 moves from expulsion to naturalisation. State parties should ensure that refugees are naturalised and assimilated.

We can examine some of the more important Article in Chapter VI.

Article 35 provides that contracting parties must co-operate with the Office of the United Nations High Commissioner for Refugees. The contracting parties undertake to provide the UN with reports relating to the condition of refugees in their territories. The report must also cover the implementation of the Convention and the relevant laws and regulations that relate to refugees. Article 35 provides that the contracting states must inform the Secretary-General of the laws and regulations that have been enacted or passed to ensure that the Convention applies in national law.

Summary

Chapter III lays out the employment rights of refugees; Chapter IV contains a group of Article relating to welfare and outlines the legal status of the refugee in relation to various social and economic rights. Chapter V contains the important rule against refoulement, as well as major administrative provisions. The Article we considered in Chapter VI concerns the duty of state parties to r collaborate with the UNHCR.

SELF ASSESSMENT EXERCISE 5

What are the main provisions in the Convention and the 1967 Protocol?

3.4 Women and Girls as Refugees

Figures made available by the UNHCR in 2005 show that nearly half the world's population of refugees is female. However, the proportion of

female refugees varies depending on region and the precise nature of the problems that have given rise to a refugee situation. Mass refugee situations tend to produce refugee populations where around half the total numbers are women.

Asylum claims, on the other hand, tend to be made by men rather than women. 47 per cent of the total numbers of refugees are children under the age of 18, with a little over 10 per cent being children under the age of five. However, these figures tend not to be representative, as the figures come primarily from the developing, rather than the developed world. It is estimated that in Africa and CASWANAME (North Africa. The Middle East. South-West Asia. Central Asia) over half the total numbers of refugees are children under 18, whilst this figure is significantly lower for other regions of the world (for instance, Europe: 23 per cent; Asia and the Pacific: 37 per cent).

In 1985 the Executive Committee of the UNHCR adopted a conclusion, Executive Committee Conclusion No. 39-85 on Refugee Women and International Protection, which stated that refugee women and girls compose the majority of refugees, and that this leads to special concerns about how best to protect their human rights. This was backed up by Executive Committee Conclusion No. 60 (XXX) on Refugee Women that called on the High Commissioner to review the development of policy in this area.

Other UN bodies have also been concerned with the fate of female refugees. In 1990, the Economic and Social Council called on governments and NGOs to keep this issue current, and to increase their efforts to protect these particularly vulnerable groups. It is worth remembering that the Convention on the Elimination of All Forms of Discrimination Against Women is also relevant here; in particular Article 3 stresses the obligation to ensure the advancement of women and the protection of their rights. Policy 8Iso feeds into the interpretation of these instruments. The UN is committed to the goals set out in the Nairobi Forward Looking Strategies on the Status of Women that stress the inclusion of women into programmes that are executed in their name.

The fundamental principles on which this law and policy are made thus reflect the inherent dignity of women, and their equality with men. In order to achieve these ends it is necessary to take into account the fact that women require special protection.

When analysing the problems faced by refugee women, these are often found to be similar, if not identical, to those faced by women generally. Several forms of physical violence and discrimination against women,

for example, are endemic in most, if not all, countries. The particularity of the situation of refugee women is not simply because they are subject to such violations of their rights, but also that they are especially vulnerable to these violations for a number of reasons: they are fleeing persecution; the social disruption caused by flight; sometimes because they have become detached from their families and the protection provided by their communities; and certainly because they are foreigners in an alien environment.

It is necessary then to provide mechanisms that recognise that women face these gender-specific forms of violence and abuse.

There are many ways in which this could be achieved. Given the difficulty of talking about sexual violence and abuse, for example, it would be necessary for a state party to ensure that women refugees claiming abuse are interviewed by women officers; if they are indeed victims of such violence, counseling should be provided. Governments should be aware of the need to encourage refugee women to organise their own associations and to draw them into the process of planning and administering refugee communities. There should be sensitivity to the needs of women in planning accommodation in refugee camps, and ensuring women's safety.

The special needs of women and girls in terms of education, health care and provision of food and water should also be made a priority; for instance, it is necessary to be aware that:

- Even in Such precarious situations, food distribution through male networks has been diverted to resistance forces or for sale on black markets with refugee women and children suffering as a result. In other instances, male distributors of food and other relief goods have required sexual favours in exchange for relief goods. [31]

Further information on this topic is contained in the Guidelines on '.the Protection of Refugee Women, UNHRC, 1991. The Guidelines call for 'integrating the resources and needs of refugee women into all aspects of programming so as to assure equitable protection and assistance activities.'

Family Reunification

Although the 1951 Convention did not provide for the preservation of family reunification, the Final Act of the Conference that adopted the Convention did address the issue. The 1951 United Nations Conference called on governments:

- to take the necessary measures for the protection of the refugee's family especially with the view to:

1. ensuring that the unity of the refugee's family is maintained particularly in cases where the head of the family has fulfilled the necessary conditions for admission to a particular county;
2. the protection of refugees who are minors, in particular unaccompanied children and girls with special reference to guardianship and adoption.

This principle has been adopted in UNHCR Executive Committee Conclusions and in the UNHCR Handbook on Procedures and Criteria for Determining Refugee Status.

The key principle is that if the head of the family is granted refugee status, then family dependants are accorded similar status.

SELF ASSESSMENT EXERCISE 6

What is the status of the principles that relate to the protection of women and children who are refugees? Are *there* similar considerations in relation to family reunification?

Summary

We have been considering two areas in which the Convention does not go into great detail: the protection of women and girls and family reunification. We have seen that certain Executive Committee Conclusions have elaborated the principles that are important in this area.

3.5 The Convention and National Law

3.5.1 English Courts and the Convention

Refugee law raises a great many issues that impact on national legal systems. Limitations of space mean that we can only focus on a couple of concerns. In this section, we will examine the way in which English courts have interpreted the Convention. We will study a line of cases: *R* v *Secretary of* State *for the Home Department, Ex parte Sivakumaran* [1988] 1 All ER 193 HL,

Karanakaran v *Secretary of State for the Home Department* (CA *(Civ* Div)) (2000] Imm AR 271 and *Kaja* v *Secretary of* State *for the Home Department* (1995] InIm AR 1.

These cases show how the courts approached the issue of the test for determination of refugee status, and the standard of evidence required under the test.

In *R* v *Secretary of State for the Home Department, Ex parte Sivakumaran* (1988] 1 All ER 193 HL, the House of Lords held that the question of whether or not there was a 'well-founded fear' of persecution within the meaning of Article *1A(2)* of the Convention and Protocol was to be determined by an objective test.

This had to take into account the circumstances existing in the country of the refugee's nationality. Furthermore, the applicant had to show that there Was a reasonable degree of likelihood that he or she would be persecuted for one of the reasons referred to in article 1A(2*)* if s/he were returned to that country. On the facts, there was no real risk of persecution if the applicants were returned to Sri Lanka, and their asylum claim was unsuccessful.

Some have argued that this is a very stringent test. For instance, the Court of Appeal itself preferred a different interpretation of the Convention in this case. This is how the Court of Appeal's argument was understood by the House of Lords:

The Court of Appeal's formulation would accord refugee status to one whose fears, though genuine, were objectively demonstrated to have been misconceived, that is to say one who was at no actual risk of persecution for a Convention reason. The Court of Appeal would qualify this by denying refugee status to one who, while holding a genuine fear, was not a person of reasonable courage, so that his fears were not such as a person of that degree of courage would entertain. The differentiation means that the fears of some, but not those of others, would be allayed, and it might be by no means easy to decide what degree of courage a person of ordinary fortitude might be expected to display. Further, the court's illustration of the bank cashier threatened by an imitation firearm does not truly support the thesis for which it is prayed in aid. An objective observer of the scene would agree that at the time the imitation firearm was presented the cashier's fear was well founded. But once it became clear that the firearm was an imitation the fear, if it continued to exist, would no longer be well founded. Fear of persecution, in the sense of the Convention, is not to be assimilated to a fear of instant personal danger arising out of an immediately presented predicament. The claimant to refugee status is not immediately threatened with danger arising out of a situation then confronting him. The question is what might happen if he were to return to the country of his nationality. He fears that he might be persecuted there. Whether that might happen can only be determined by examining the actual state of

affairs in that country. If that examination shows that persecution might indeed take place then the fear is well-founded. Otherwise it is not.

How are the interpretations of the test by the two courts different? The test preferred by the Court of Appeal would allow a refugee who had genuine fears, even though objectively these fears could be shown to be unfounded, to claim refugee status. However, the Court of Appeal did make a significant qualification to this test. The genuine fear would have to be that of a person of reasonable courage. This does impose something of a limit on the degree of fear that would have to be shown. Yet it is arguably a less stringent test than that preferred by the House of Lords, even though there may be problems in its application; for instance, determining what are the reasonable fears of a person of reasonable courage. The question raised by the House of Lords, in questioning the analogy that the Court of Appeal was using, is interesting because it shows how the court is approaching the issue of fear of persecution. The Court of Appeal had used the analogy of a bank clerk threatened in a robbery with an imitation gun. An objective observer would conclude that in the moment that the gun is produced, and the clerk threatened, there is a well-founded fear. However, if and when it becomes obvious that the weapon is an imitation, then the fear would not be objectively well-founded. The House of Lords is critical of this analogy, because the claimant is not immediately threatened with persecution; rather the issue is what might happen were he or she to go back to the country of his or her nationality. It may be that, objectively, there is no possibility of persecution, in which case an objective observer would have to assume that the fear was unfounded. The House of Lords went on to argue that:

It is a reasonable inference that the question of whether the fear of persecution held by an applicant for refugee status is well-founded is likewise intended to be objectively determined by reference to the circumstances at the time prevailing in the country of the applicant's nationality…….

This inference is fortified by the reflection that the general purpose of the Convention is surely to afford protection and fair treatment to those for whom neither is available in their own country, and does not extend to the allaying of fears not objectively justified, however reasonable these fears may appear from the point of view of the individual in question.

The argument of the House of Lords is supported by their interpretation of the Convention. It is contended that the purpose of the Convention as a whole is to afford protection to those in genuine fear; a fear that can be objectively demonstrated. From the viewpoint of the individual claiming

refugee status, the fear might be real, but this is not the acid test. In stressing the objective test, the House of Lords thus make it more difficult to claim refugee status.

That an asylum seeker must show, objectively, that there is a reasonable degree to That he would face persecution. But what standard of proof should be used? Should it be a lower standard of proof than a civil case?

This issue, amongst others, was examined in *Karanakaran* v *Secretary of* State *for the Home Department* (CA (Civ Div)) [2000] Imm AR 271. The facts concerned a Tamil refugee:

The appellant is a young Tamil from the Jaffna peninsula whose community was destroyed by the civil conflict and who fled from his home area in fear of both the government forces and the terrorist movement. All this was found as fact. So was the consequent history of flight, first to Colombo and ultimately to the United Kingdom. It followed that (unless there were a finding that flight was not a logical reaction to the persecution -a possibility in certain cases but not in this one) the appellant was outside the country of his nationality owing to a well-founded fear of being persecuted for reasons of race. He was therefore entitled by virtue of Article 1 (A) (2) of the 1951

Geneva Convention to asylum provided that, in addition, it could be established that he was 'unable or, owing to such fear, ….unwilling to avail himself of the protection' of his home state. The latter-unwillingness through fear -is what this appeal is, at least initially, about.

In allowing the plaintiffs appeal, *Karanakaran* builds on the issues in *Sivakumaran.* Lord Justice Sedley, in his summary of the facts of the case *Sivakumaran,* returns to the issue of the well-founded fear of persecution. The issue here, however, is that the appellant had been internally displaced from his home on the Jaffna peninsula to the city of Columbo. Although the well-founded fear of persecution could be shown on these facts, an associated issue had also to be determined: that the fear of persecution meant that he was 'unwilling to avail himself of the protection' of his home state. The Home Secretary was arguing that Karanakaran should be returned to Columbo, and that, as he was not fearing persecution there, this would not be in breach of the Convention; the appellant accepted this point, but was arguing that it was unreasonable to send him there as he had no work, no housing and no friends or family in that country. The case thus raises the issue of 'how a decision-maker, a tribunal or a court is to gauge whether internal relocation is a legitimate alternative to asylum for a person who

otherwise ranks as a Convention refugee' (para. 7). It raises a question of evidence, and how that evidence is to be judged:

- Is the want of such an option i.e. internal relocation is not an option] to be proved by the asylum seeker (in which case it is common ground that proof would not have to go as high as a balance of probability); or disproved by the Home Secretary (in which case it would follow that the standard exceeds a bare balance of probability); or simply gauged on the evidence?

If the asylum seeker had to prove that internal relocation was not an option, then the standard of proof is higher than it wound be if it had to be disproved by the Home Secretary. The third option suggests a different standard. How, then, should the court proceed? Sedley L. J begins by pointing out that the task facing the decision- maker under the Convention is an issue of 'evaluation' (para. 15). The applicant will lead evidence on issues such as that of fear of prosecution; and the decision-maker must evaluate questions such as the one in the present appeal: is Columbo safer than the applicant's home? or is it unduly harsh to expect this applicant to survive in a new and strange place?' (para. 15). This must be placed in context:

- What matters throughout is that the applicant's autobiographical account is only part of the picture. People who have not yet suffered actual persecution (one thinks of many Jews who fled Nazi Germany just in time) may have a very well-founded fear of persecution should they remain. People who have suffered appalling persecution may for one reason or another not come within the protection of the Convention.

Sedley L. J then goes on to argue that a claim to asylum was not like a claim made in civil litigation, where a judge must act as umpire between two competing versions of events. It is in fact an administrative process, and thus cannot be modeled on civil litigation. Rather than treat facts as established on a civil standard, the evidence offered must be treated as a whole:

The question whether an applicant for asylum is within the protection of the 1951 Convention is not a head-to-head litigation issue. Testing a claim ordinarily involves no choice between two conflicting accounts but an evaluation of the intrinsic and extrinsic credibility, and ultimately the significance, of the applicant's case. Finally, and importantly, the Convention issues from first to last are evaluative, not factual. The facts, so far as they can be established, are signposts on the road to a conclusion on the issues; they are not themselves conclusions. How far

this process truly differs from civil or crirnina1 litigation need not detain us now.

His argument concludes that the question to be determined is whether, ‘taking a1J relevant matters into account, it wound be unduly harsh to return the applicant to Colombo’.

This issue was further explored in Kaja v Secretary of State for the Home Department [1995] Imm AR 1. Z, a national of Zaire, had appealed against a decision to refuse him entry to the UK. The decision maker had stated that he did not believe Z’s evidence, rather than making reference to a standard of proof. He appealed on a number of points, but the one we will examine is the claim that the decision-maker had to make a reference to a standard of proof. The Tribunal accepted this argument. It was necessary to make reference to a standard of proof, and that the lower standard set out in Sivakumaran applies to a determination of the likelihood that both a future event will happen, and that a past event has happened.

These cases as a whole show that the courts approach the issue of the determination of refugee status as a public law inquiry into the relevant evidence. The process is not to be thought of as modeled on civil litigation; rather the decision-maker must evaluate all the evidence to the standard of proof articulated in *Sivakumaran.* Clayton observes that this means that decision-makers should not approach their task in a 'mechanistic manner' and the asylum seeker does not have to bear a burden of proof to the standard of reasonable probability. Assessing an asylum claim is ultimately a matter of evaluation: '[I]t must be approached as a whole, as a public law exercise in the need for protection rather than as an exercise in proving facts to a standard'.

SELF ASSESSMENT EXERCISE 7

What is the relevant standard of proof for an asylum claim?

Summary

We have been studying R v *Secretary of State for the Home Department,* ex *parte Sivakumaran* [1988] *Karanakaran* v *Secretary of State for the Home Department* [2000] and *Kaja* v *Secretary of State for the Home Department* [1995]. In the first case the court determined the nature of the test for refugee status; in the second two the issue of the standard of proof required in an asylum hearing was addressed. The hearing is to be approached in a different way to civil litigation. The correct approach was one of evaluation, rather than choosing l5etween the evidence presented by two parties.

3.5.2 Refugees, Asylum and Immigration in the UK

Asylum and immigration are prominent on the political agenda in the UK. Many NGOs and pressure groups have been critical of government policy, which appears to be restricting the rights of refugees, and redefining the UK's obligations under the Convention. We will look at two main issues: the Immigration, Asylum and Nationality Act (which received Royal assent on 30 March 2006) and the UK's proposals for a reformed asylum system.

First we need to think about the relationship between refugee law and the law of immigration. Whilst the definition of refugee status may be determined by the Convention, as the Convention puts in place an individual application process, the different ways in which national legal systems have dealt with applications by refugees means that refugee law is intimately bound up with national law. In the UK, the responsibility for overseeing this area of law rests with the Home Office, which also deals with immigration. This has led to immigration and refugee law becoming bound up together at both the level of legal doctrine and institution. Thus, the Aliens Act 1905 allowed the courts to determine whether or not an individual's claim to asylum would provide grounds to prevent deportation.

When this Act was replaced with the Aliens Restriction Acts of 1914 and 1919, the determination of refugee status was given to the Secretary of State. It was not until the Asylum and Immigration Appeals Act of 1993 that a claim for asylum was presented as consistent with the UK's obligations under the Convention: '[t]his refers to the non-refoulement obligation under Article 33, and gave a statutory meaning to an asylum claim' (349).

In domestic politics, the issue of refugee rights has long been open to critical scrutiny. The Prime Minister has been quoted as saying that it was time to 'stand back and consider its [the Convention's] applications in today'' world'.

So, what reforms are currently being made to the asylum and immigration system?

The Immigration, Asylum and Nationality Bill

First, we will consider the Immigration, Asylum and Nationality Act 2006. The Act creates a single tier Asylum and Immigration Tribunal. This body considers appeals against immigration and asylum decisions. Only in limited cases can the Tribunal's decision be reviewed by the High Court on the grounds that the Tribunal made an error of law.

Amongst other measures are: the removal of rights of appeal against refusal of entry or leave to enter for students (s.4) and limited rights of appeal for family visitors. It also aims to streamline post-entry rights of appeal. Section 15 creates civil penalties for employers of illegal workers and s.21 makes it a criminal offence to knowingly employ an illegal worker.

How has this Act, and the policy behind it been presented by the government? We will consider the following extract:

The purpose of the [Bill and the government's immigration] strategy is to make migration work for Britain. It includes measures to make our immigration system simpler, clearer and more robust. The reformed system will explain publicly and clearly who we will admit to the UK and why, and who we will allow to stay in the UK and why. It will also show that we enforce the rules rigorously in every respect. The UK needs economic migration. We welcome people who migrate here to work and study -they are an essential part of our society and economy. Anyone who looks back over the recent years and decades will be able to give testimony to the major contribution that they have made to the life of this country. We need migration to fill the gaps in our labour market that cannot be filled from the domestic workforce. Of course, the government will continue to welcome people who are genuinely fleeing persecution. However, as we do so we will not- and cannot-tolerate abuse of the system. That explains why the five. year strategy contains four major work streams, in each of which we work with a range of other countries to improve the effectiveness of our system.' (Charles Clarke, former Horne Secretary, introducing the Immigration, Asylum and Nationality Bill to Parliament)

This defence of the Act suggests that it will strike a balance between the need for economic migrants, and the need to police immigration. Indeed, asylum seekers seem to be primarily considered, at least in the speech above, as economic migrants, rather than those for whom the UK has responsibilities under international law. However, many NGOs and pressure groups have been very critical of the Act. Critics have pointed out that the limitations on the right to appeal are against the rule of law, and that the Act effectively criminalises refugees and removes state support from them. It has to be seen in the context of other initiatives to reform UK asylum and immigration law.

The Immigration, Asylum and Nationality Act must be seen in the context of an ongoing drive to push through far-reaching reforms of the international obligations that the UK has entered into under the Convention. To get a sense of the direction of these reforms, we will look at the proposals for a reformed asylum system, and the response to

the European Commission in the paper: *'Towards* a *more accessible, equitable and managed asylum system'.*

Proposed Asylum Reforms

The reforms proposed are essentially focused on creating transit centres either in Europe, at its border, or in nations outside of Europe. These 'transit processing centres' would deal with the claims of asylum seekers who were intending to enter the UK; once the claims had been processed outside the UK, some would be permitted to enter. These centres would allow a 'more equitable management' of the 'irregular migrants' who want to enter Europe. A system of regional centres also includes a proposal for 'regional protection areas' where those asylum seekers who have failed to be accepted can be accommodated instead of being returned to the countries from which they have fled.
There are various factors driving these reforms. The government has cited one compelling reason to be the costs of running the present asylum system. Human Rights Watch have criticised this argument and have accused the government of ignoring other ways of reducing the costs of the system. For instance, costs of detention centres, and the practice of detaining asylum seekers, could be decreased by allowing asylum seekers to work. The government had withdrawn the 'work concession' arrangement whereby asylum seekers were issued with work permits after a certain period. This means that asylum seekers are entirely dependent on government funding. Figures were cited that showed that the cost of detention had risen from £362 to £1,620 per week *(Hansard,* House of Commons Debates, 25 October 2001, C 333 W). This is backed up by information from the UNHCR which shows that the UK detains more asylum seekers than any other European nation (UNHCR, 2000).

Proposals for regional centres and transit processing centres have also been encouraged by arguments about the scale of the illegal entry of asylum seekers to the UK. However, this is not a reasonable approach to the problem, as the very fact that an asylum seeker is fleeing persecution may mean that an illegal entry is his or her only option (how can one enter a country legally if one is deprived of a passport, for instance?). Moreover, such arguments also contradict the Convention which states that those arriving illegally should not be penalised. A similar analysis can be made of other government arguments. The government has alleged that the number of failed asylum seekers show that most make bogus applications. However, this cannot be used as a reliable index of the status of asylum seekers; it reflects equally on the failings of those who are making the decision on status and the procedures they are applying.

Human Rights Watch cite as evidence a recent report that shows that in procedures applied in 60 per cent of claims in the Netherlands, applicants were deprived of fundamental human rights. The high court itself has held that depriving asylum seekers of basic social support amounted to a breach of the European Convention. Evidence for the weakness of the government's arguments is also suggested by the fact that 'approximately one-quarter of those asylum seekers who appeal their rejection in the UK are successfully granted asylum' (Immigration and Nationality Directorate, 2002).

The UK's obligations under international law must also be taken into account. Human Rights Watch argue that these proposals are contrary to the spirit and the letter of the Convention that 'calls upon state parties to engage in international co-operation to ameliorate the plight of the world's refugees'. The proposals effectively shift the burden of asylum to countries that do not have the economic resources of the UK. Furthermore, the proposals come close to both threatening the right to asylum in the Declaration and the fundamental principle of non-refoulement. Human Rights Watch have also argued that there is a potential breach of Article 31, which states that refugees should only be detained in exceptional cases; the removal and detention of those who arrive illegally in the UK to transit centres outside the UK arguably breaches this right. There is also the risk that the proposals are discriminatory. The plans for the construction of regional centres suggest that these might be geographically proximal to areas which produce large numbers of refugees. If those in the regional centres enjoyed fewer rights than those in the UK, then Article 3 of the Convention is also violated.

SELF ASSESSMENT EXERCISE 8

Reforms in immigration and asylum law in the UK show an increasing disregard for the rights of refugees. Discuss.

Summary

Refugee law, and the rights of refugees, are bound up with national law. We have examined how reforms in the UK immigration system are driven by a need to streamline a means of policing refugees and ensuring that the number of refugees entering the UK is kept to a minimum.

3.6 The Crisis in the Sudan: Oil, Power and Refugees

This final section will study the crisis in the Sudan, so that we can appreciate how the refugee problem must be seen in the context of

broader political concerns; in this sense the rights of refugees can perhaps be seen as less important to certain governments than the need to control territory and revenue. Refugee crises also arise as a result of the failure to galvanise action by the international community. Some might see this as a failure of states to intervene in regions or countries despite the evidence of the mass abuse of human rights.

UNICEF describes the situation in western Sudan as 'one of the world's worst humanitarian crises'. UNICEF's figures show that nearly 1.8 million people have been internally displaced; and the situation has been exacerbated by shortages of food and water and by over-crowding of refugee camps. For instance, Kalma camp, which originally accommodated 30,000, currently has to cope with 150,000 people. There are nearly 260,000 people from the Darfur region in camps in the neighbouring Chad. But what are the causes of this crisis?

The African non-Muslim citizens who populate the south have been at war with the central government, dominated by Arabised Muslim elite, since independence in 1956. State power remains in the hands of these elite, which dominates the officer corps of the army, security agencies, and other agencies wielding power.

Although there was a decade of peace and southern autonomy in 1972-83 after the separatist southern rebels laid down their arms, it came to an end when the central government abolished the southern autonomous region and made *Shariah* (Islamic law) the law of the land in 1983. The civil war flared up again, but with a different political agenda. While southern sentiment remained strongly separatist, Dr John Garang, the leader of the main rebel force, the SPLM/ A called for a 'united, secular Sudan.'

The background reasons for the war are complex, but, as the passage above suggests, they relate to ethnic tensions within the country. These are reflected in the fact that an 'Arabised Muslim elite' has controlled the country since independence, and has kept power and resources from 'socially marginalised sections of the population' in the 'west and east, north and south' of the country. That there was a period of peace suggests that these tensions did not necessarily lead to war; however, the most immediate causes can be found in the central government's move to increase its control over the country, and the subsequent resistance by the SPLM/A.

Another central factor in the Sudanese civil war can be traced to the discovery of oil in 1978. The Autonomous Southern Region protested against the Northern government'' plans for the exploitation of these oil reserves. Although the oil fields are located in the south, the

government's plans placed the infrastructures and refineries in the North. Various foreign oil companies have been involved in the Sudan, and have turned a blind eye to the ongoing human rights abuses. Determined to control the exploitation of these natural resources, the Northern government engaged in specific policies aimed at subjugating the south of the country:

> *In order to control the production of oil, the unelected government of Jafa'ar Nimeiri (1969-85) adopted a two-pronged strategy, division and displacement of the southern population. It has taken almost two decades and various governments to develop and refine this strategy, but the division and displacement strategy has accomplished what direct military action from the central government alone could never achieve: clear control of certain oil areas in southern Sudan.*

Government policy has been to sponsor and encourage various 'proxies' to attack those peoples who live in the areas of the oil

What has been the response of the international community to this crisis? As was pointed out in the *Washington* Post, 'on the 10th anniversary of the Rwandan genocide, the world community again chosen to watch, wait and, so far, do nothing'. Although international aid agencies are active in the region, and diplomatic efforts are ongoing to promote and sustain peace, many have accused the international community of doing too little. The UN has issued two Resolutions calling on the Northern government to disband its militias, but these have been ignored. The African Union has troops in the region, but seems to lack the will to intervene. The United States has made diplomatic initiatives, but also lacks the political will to intervene more robustly. The EU has also stood by. It would appear that the genocide in Sudan is off the world's political agenda.

SELF ASSESSMENT EXERCISE 9

'The situation in the Sudan suggests that refugee rights and human rights have very little meaning at all

4.0 CONCLUSION

In this unit, you have hear about the Right of Refuges and Refuge problems in Africa.

5.0 SUMMARY

This final section has considered the political reality of human rights in the refugee crisis in the Sudan. While the need to protect refugee rights may be part of the genuine humanitarian desire to protect those displaced by the conflict, it would seem that the scale of the problem has not met with a suitable response from the world human rights lobby.

6.0 TUTOR-MARKED ASSIGNMENT

'Despite the importance of the 1 951 Convention, the rights of refugees seem to be increasing limited in contemporary politics'. Discuss.

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UNIT 4 ETHNIC NATIONALS IN NIGERIA AND THE RIGHT TO SELF DETERMINATION

CONTENTS

1.0 INTRODUCTION

It is not in doubt that Nigeria is a unilateral colonial creation. It was created not for the good of Nigeria people but to ease colonial administration and financial management of a vast and disparate territory.

Tekena Tamuno put it succinctly - "The amalgamation of Northern and Southern Nigeria was basically a major political means of solving a serious economic problem. Its main weakness, however, lay in the British government's failure to consult the wishes of the people in matter of such great political and economic significance between 1898 and 1914."

Different people were thus brought into forced cohabitation. Since the forced creation of Nigeria in 1914, Nigeria has grappled with the problems of different people living in one society and trying to build one nation. With that queer geographical engineering, a multi-nation state whose binding matrix was colonial violence was born with forced draft case, cascade of ethnic and national inequities were erected.

2.0 OBJECTIVES

By the end of this unit, you should be able to:

- define self-determination
- explain the origin, characteristics and functions of self-determination
- relate self-determination to Nigeria especially the agitation of the Niger Deltans for resource control and limited autonomy over the conduct of their affairs.

3.0 MAIN CONTENT

5.1 The Nigerian State and the Different Major Ethnic Groups

The country has many ethnic groups, more than 250 ethnic groups. Some of these groups have peculiar customs, tradition and languages. The groups inhabit different zones of the nation. The distribution of ethnic groups in the country has been partly influenced by geography. Areas that could support life were well occupied, while people avoided environments that were hostile.

For instance, there was a large concentration of small groups in Central Nigeria. Several of these groups enjoyed a large measure of political autonomy. This concentration and political patterns have been attributed to the rugged topography, hostility of more powerful neighbours and rampant slave trade.

Today, Central Nigeria is noted as an area of sparse population. Other similar areas are the North East, especially around the Chad and to some extent the Niger Delta. The country now has 3 major clusters of dense population.

1. The Igbo area in the Southeast with an average population density of over 150 persons per kilometre;
2. Yoruba land in the Southwest with a density of over 140 persons per kilometer; and
3. Kano with an average density of 100 persons per kilometre.

These are some of the major groups of people who live in the different geographical zones in the country.

3.2 Geographical Distribution of Ethnic Nationals

The Central Zone

This area covers the Niger Delta, Lagos and the Creeks. The coastal people include the Yorubas in the creeks and lagoons; and the Kalabari, Okrika, Ijaw, Nembe, Bonny, Itsekiri, Urhobo, Oron, Ogba, Ogoni, Andoni, Isoko and Benin.

The Forest Zone

This is the area of tall trees and dense undergrowth. Among the groups in this zone are the Edo, Ibibio, Igbo and Yoruba.

The Savanna Zone

This is a region of open woodland and tall grasses. It covers the large plains that extend from the sahara desert in the north, to the tropical forest in the south. The Savanna zone is inhabited by the Kanuri of Lake Chad, who speak Nilo sahara language, the Hausa speaking people, the Fulani, the Jukun, Nupe, Igala, Tiv, Angas, Idoma, Kataf, Kaje, Jaba, Birom, Gwari, Beriberi, Shuwa, Chamba, Egbirra, Bede and Bole kanakuru.

3.3 The Concept of Self-Determination

Self determination is defined as the determination of one's act or state by oneself without external compulsion. The right of a people to decide its future political status (as with respect to form of government or independence) or its actions in so deciding by plebiscite.

The right to self-determination is a third generation right which is the collective or group rights. These are rather recent rights that emerged in the later 1960 and 1970 and were predominantly supported by the newly independent and developing states. Although this right has since been recognised as a legal right in international law, its enforcement remains a topical issue today more than ever in the light of recent events around the world especially in the Balkams. The right to self-determination has become a peremptory norm of international law.

3.4 The Degree of Self-Determination

There are different degrees of self-determination. Independence is not the only outcome of self-determination. Some ethnic, racial or minority groups who are concentrated in a part of a country could demand independence. Some others demand for limited self-rule within existing

borders with links to the Federal government. Others demand just a right to greater participation in the political, social and economic processes of their countries not self government as such.

As a result of non-recognition of a legal right to secede, the international community has invented autonomy. This allows groups of people to have a degree of autonomy within borders and is viewed as a middle ground between the principle of territorial integrity and the chaos of universal self-determination within a federal state. An autonomy scheme for a geographically concentrated ethnic minority may grant that minority modest self-government and retain vital powers for the Central government internal self-determination through autonomy schemes may blunt a minority's demand for external self-determination.

The international community is more likely to support a degree of autonomy as they have in Kosoro than full independence, which could lead to more instability and conflict. The success of autonomy depends on a pre-existing ethnic accommodation and civic faith in the rule of law, democratic set-up, all of which are rare in the countries where ethnic minority and violence occur.

SELF ASSESSMENT EXERCISE 1

Describe the concept of self-determination.

3.5 Ethnicity, Self-Determination: The Nigerian Experience

Nigeria, being a nation of hundreds of ethnic groups or nationalities and having been under military dictatorship for most of her post-independence years, have had a fair share of attempts by ethnic minorities to assert a right to self-determination. Apart from Col. Odumegwu Ojukwu's failed Biafra attempt in 1967 at asserting a right to self-determination, there was the Isaac Adaka Boro-led attempt in the Niger-Delta which was quickly repressed by the Nigerian government.

Also, the Kenule Saro-wiwa-led Movement for the Survival of Ogoni People (MOSSOP) which led to the hanging of Ken Saro-wiwa and 8 other Ogoni activists by the Nigerian government on November 10, 1994.

Recently, there has been a resurgence of nascent struggle for self-determination by the Ijaws in the Niger-Delta, the Yorubas of the Southwest, the Igbos of the Southeast, the Middlebelt region and the Arewa group representing the northern states of Nigeria. These groups do not seek full autonomy or a right to secede. They had to use a popular

Nigerian phrase "being marginalized over the years" and feel that they ought to have a greater participation in national affairs.

The case of the Ijaws and Ogonis has more to do with neglect by the Federal government. They assert a right to more participation and representation in government and economic development of the region as the crude oil that oils the machinery of the Nigerian government is mostly located under their soil or off their shores with the attendant environmental degradation.

This is a classical reason why ethnic groups or minorities seek self-determination as the more these groups feel alienated and removed from the main stream of socio-political and economic processes of the nation, the more they seek to assert their right to self-determination.

In present day Nigeria of the 21st century, what we are witnessing in the Niger-Delta region of Nigeria where the ethnic militia resorted to kidnapping of expatriates, children and reputable politicians in the region to press home their points. The agitation has assumed a dangerous dimension where sophisticated weapons are employed to confront security agents.

It is a man-made disaster of epic proportion. All around in Nigeria, trenches are being dug and positions are hardened. There are frightening memoranda and manuals for disintegration flying all over the place. Nigeria is witnessing the worst form of political violence and the country is passing through the most difficult period.

Indeed, questions are being asked openly and constantly on the feasibility and desirability of Nigeria as a nation as presently constituted. The response of some of the different ethnic groups can be found in the memoranda below.

OGONI BILL OF RIGHTS

The Ogoni comprising of Babble, Gokanna, Ken Khana, Nyo Khana and Tai numbering about 500,000 people, is a separate and distinct ethnic nationality within the Federal Republic of Nigeria. On 2nd of October 1990, an "Ogoni Bill of Rights" was addressed to the then President of the Federal Republic of Nigeria, General Ibrahim Babangida and members of the Armed Forces Ruling Council.

The Ogoni Bill of Rights states thus:

"Now therefore while re-affirming our wish to remain a part of the Federal Republic of Nigeria, we make demands upon the Republic as

follows: That the Ogoni people be granted political autonomy to participate in the affairs of the Republic as a distinct and separate unit of whatever name called, provided that this autonomy guaranteed the following –

(b) Political control of Ogoni affairs by Ogoni people.
(c) The right to control and use of a fair proportion of Ogoni economic resources for Ogoni development.
(d) Adequate and direct representation as of right in all Nigeria national institutions.
(e) The use and development of Ogoni languages in Ogoni territory.
(f) The full development of Ogoni culture.
(g) The right of religious freedom.
(h) The right to protect Ogoni environment and ecology from further degradation".

THE KAIAMA DECLARATION

The Kaiama declaration is the article of faith of the Ijaw nation to the government of the Federal Republic of Nigeria. The resolution of the 19th December, 1998 of All Ijaw Conference held in Kaiama, Bayelsa State Nigeria, states as follows:

We the humble youth of Ijawland hereby make the following resolutions to be known as the Kaiama Declaration –

(a) We agree to remain within Nigeria but to demand and work for self-government and resource control for Ijaw people. The conference approved that the best way for Nigeria is a Federation of ethnic nationalities. The Federation should be run on the basis of equality and social justice.
(b) All land and natural resources (including mineral resources) within the Ijaw territory belong to Ijaw community and are the basis of our survival.
(c) We cease to recognize all undemocratic decrees that rob our people/communities of the right to ownership and control of our lives and resources, which were enacted without our participation and consent. These include the Land Use Decree, Petroleum Resources Decree, etc.

This Kaiama Declaration of the Ijaw people has been the basis of agitation for resource control and the struggle has taken many dimensions and it is still the basis of agitation till present day within the Nigeria Federation.

THE YORUBA AGENDA

The focus of the Yoruba nation of the Southwestern part of Nigeria and as aptly articulated by their leader, Senator Abraham Adesanya, is an unflagging commitment to the earnest restructuring of the Nigerian polity with a view to ensuring that each of the federating units enjoy ample right to self-determination. That is to say each federating unit not only has access to but also has total control over its God-given endowments – human, mineral and material resources.

For the Yorubas, the Yoruba problem of unity has never been more urgent since the June 12 election of Moshood Abiola presidential election that was annulled by the Federal government in 1993. They have been the bull of physical and psychological attack from the Nigerian State.

Since the days of Chief Obafemi Awolowo, they insist on a balance federation that gives the regions greater autonomy. While calling on a vigorous type of federalism, they can say all that came was an initial deformed federalism and lately a full-scale unitary government.

THE IGBO AGENDA

The Ohaneze Ndigbo, the Igbo mainstream socio-cultural and political movement captured the condition of the Igbos thus; “It is not just marginalization, neither is it only alienation or mere deprivation. It is simply exclusion.” Perhaps it is a measure of some recrudescence of their faith in Nigeria that they even bother to complain.

The Agenda of the Igbos for a united Nigeria is as follows:

> A united Nigeria that has a 6 regional structure as the basis of a new federation, rotational presidency, a derivation-based revenue allocation formula and redefined citizenship rights.

The intellectual and theoretical grounding for the demands are quite robust. They involved the idea of a “functional federation of nationalities” to include 6 zones (3 zones each for the major and minor ethnic groups).

The preference for large zones is a recognition that the creation of states rather than expand federalism has actually strengthened the momentum towards unitarism. In response to the aggravation, unitarism and the subversion of federalism, the zones will become the new federal units completely at liberty to create and manage as many states as the component nationalities of each zone / region desires.

When power changed hands on May 29, 1999 from military to civilian government, it was more than a return to democracy. There was a fundamental power shift from the North to the South which totally altered the geo-political equation in Nigeria. The coming on board of the Arewa Consultative forum underscores the Northern part of the country's interest in finding a common platform where Northern interest could be articulated and protected.

The Arewa Consultative Forum is an amorphous assembly comprising of retired military generals, former leaders, Heads of states, traditional rulers, politicians and businessmen of the Northern extraction. It is also interesting to note that many of the 19 Northern states have adopted the Sharia legal system in their various states in defiance of the provisions of the Nigerian Constitution. The Sharia legal crusade is a danger sign post which is a clear pointer to the principle of self-determination.

The Nigeria federation is today based on the most challenging test of survival. The minorities do not believe in their place within the federation. None of the federating partners today see the other as a next brother on a collective journey of destiny.

Elsewhere, the NigerDelta resistance youths have plunged the area in unwholesome violence. The creeks, waterways and even the cities have been made unsafe by a sudden explosion of ethnic-based militia groups who kill, take hostages, sack villages and vandalise oil installations.

The philosophy of violence expressed in different tenors by the various ethnic groups appears to have gained currency all over the country. Hitherto bottled-up frustration, grievance and fear are being generously oftentimes recklessly vented.

SELF ASSESSMENT EXERCISE 2

Define the term Resource Control.

3.6 Self Determination in Nigeria and the Minority National Question

The minority and the national question are as old as the Nigerian nation state. The insecurity felt by the minority communities across the country has merged with ethnic claims and agitation to now constitute what is popularly referred to as the national question.

Essentially, the national question refers to how to structure the Nigeria Federation to acknowledge and guarantee identity and national rights within the context of a true democratic framework.

The persistent mismanagement of the national question as well as apparent insensitivity even trivialisation of the issue by the custodians of state power has created a fertile ground for ethnic entrepreneurs, local warlords and political opportunists that have only further complicated matters.

While the minority question was prominent in both the southern and northern protectorates, the amalgamation of both protectorates in 1914, largely for administrative convenience only widened the field for minority and ethnic agitation and conflicts. Of course several Nigeria leaders are on record as to their regrets and belly acting over the amalgamation.

One founding father once described Nigeria as "a mere geographical expression" while another felt that the amalgamation of the northern and southern protectorate in 1914 to create the territory of Nigeria was "a mistake". They have, however, never answered the question as to why they continue to fail to address the national question.

The emergence of hundreds of environmental ethnic minority successimist groups, regionalists, human rights and pro-democracy groups around the national question shows that it has defied all the superficial and opportunistic responses by various central governments since independence.

SELF ASSESSMENT EXERCISE 3

1. Briefly explain the fear of the minority groups within the Federation of Nigeria.
2. How can the problems of the minority groups in Nigeria be solved?

4.0 CONCLUSION

We are in the 21st century and the right to self-determination of people is still as relevant as it was 60 years ago. Although it began as the right of colonial or occupied people only; the right to self-determination has continually reinvented itself and it is now the right of oppressed people everywhere.

Self-determination is a continuing process and will endure as long as certain ethnic groups do not feel that they are part of the machinery of government by which decision affecting them are made and implemented. So long will claims to a right to self-determination be it external or internal continue.

If the nature of government in a nation is more responsive than it is and the level of participation of all groups in the country is higher, there would be less need to assert the right to self-determination by any of the constituent groups. A good example of this is Quebec region of Canada where a 1997 referendum on whether to secede was defeated due to the democratic and representative system of government where the rights of the Quebecois are truly protected.

The reverse is the case in Africa where governments are always violently opposed to any assertion of a right to self-determination. The ethnic nature of Nigeria society is a real one, it cannot be wished away. Those who try to do so at least in public, only have to turn to the example of the Soviet Union, Yugoslavia and Romania to disabuse their minds.

5.0 SUMMARY

The feeling is that 47 years after political independence, the majority of the ethnic groups especially the minority groups are frustrated about the structure of the nation. This development of feelings of frustration could be monitored through the memoranda or Bill of Rights of the different ethnic groups in Nigeria, served on the federal government about how they want to control their own affairs.

A thorough study of the constitutions and the Bill of Rights or charters of demands of the different groups do not advocate a breakup of Nigeria. But they want maximum control over the affairs of their territories.

7.0 TUTOR-MARKED ASSIGNMENT

1. Explain the term self-determination.
2. The Ogoni Bill of Rights or Charter of Demand is meant to break up the Nigerian nation. Discuss.
3. Compare the nature of the demands of the Ijaw nation, the Ogoni people on the Nigeria nation and the independence of Nigeria from the British in 1960. Any similarity?
4. (i) What is resource control?
   (ii) Discuss resource control in relation to the demand of the Ijaw people.

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MODULE 2

UNIT 1 THE EUROPEAN SYSTEM FOR THE PROTECTION OF HUMAN RIGHTS

CONTENTS

1.0 INTRODUCTION

In this unit we will examine the European system for the protection of human rights. There are three European Organisations: the European Union, The Council of Europe and the Organisation for Security and Co-operation in Europe. We will concentrate on the first two, as they have a primary role in the encouragement and protection of human rights. We will see that a basic distinction can be made between:

- the European Convention on Human Rights, which is a creation of the Council of Europe
- the European Union and its associated institutions.

Although the Union is committed to Human Rights, its legal and political status derives from a variety of treaties that are not in themselves Human Rights treaties. Rather, they set up and elaborate the structure of a European common market. We will see, however, that this increasingly makes a system of human rights protection central to its operation. When we turn to the European Convention, we will see that it

is marked by an active court and an expanding jurisprudence. Finally, we will turn to examine a series of cases related to Article 9 of the Convention that show how the Court is dealing with contemporary issues that relate to religious freedom. This is part of a much wider question about the identity and the future of Europe as a tolerant, inclusive political community.

2.0 OBJECTIVES

At the end of this unit and the relevant readings, you stand be able to:

- describe the role of European convention on Human Rights
- the European union and its associated institution.

3.0 MAIN CONTENT

3.1 The Origins of the European Convention on Human Rights 330

In 1949 Europe was in ruins at the end of the Second World War. The scale of the task of reconstruction was massive -its size is perhaps hard to imagine from today's perspective. It was necessary not only to rebuild economies and infrastructure, but also to re- found European democracy. How could this huge task be approached?

- What is this sovereign remedy? It is to recreate the European fabric, or as much of it as we can, and to provide it with a structure under which it can dwell in peace, in safety, and in freedom. We must build a kind of United States of Europe.

Churchill's hope for a 'United States of Europe' suggests a need to bring European nations together. Underlying this desire to achieve a lasting peace were both economic and social principles. Rather than gearing economies to mutual competition, would it be possible to collaborate and avoid suspicion and hostility? Moreover, fascism had showed the need for a European-wide commitment to the values of democracy, human rights and the rule of law. The foundations of the new Europe were thus to be found in a spirit of economic co-operation and mutual respect for human rights. Cold War tensions also added to the sense in which it was necessary to bring together nations committed to democratic government. But, one has to be aware that the nature of the European project is not limited to these historical events. The end of the Cold War and the desire of former Eastern bloc nations to be included in the European Union have changed the nature and direction of the debate about the form of European integration. Furthermore, it would also seem that nationalistic aggression and ethnic tensions are on the rise in

Europe. The atrocities committed in Kosovo, and the wars resulting from the break up of Yugoslavia have presented new challenges to the project of human rights and democracy in Europe.

We will see, during the course of this unit, that these ongoing efforts to build democracy and human rights in Europe are manifold and complex. They have also met with some political resistance from those who fear the loss of power and influence from the nation state and the rise of what some see as a European federal structure; 9ur focus in this Chapter is, of course, on human's rights, but, as will be argued, the European experiment is increasingly bringing together human rights and social and economic rights to create a system that is unlike the others that we have studied in this study guide.

In May 1948, delegates from numerous European countries attended The Hague Conference. The Conference was dedicated to promoting European unification. One of the resolutions taken at the conclusion of proceedings was for the drafting of a European Convention on Human Rights. In 1949, the Council of Europe was created, and tasked with the creation of the Convention. Although the Council was initially reluctant about the project, it became one of the major champions of the Convention which it began to appreciate was central to the realisation of social, economic and democratic stability.

The European Convention for the Protection of Human Rights [ECHR] was signed in Rome in 1950 and came into force in 1953. The Convention guarantees certain rights including the right to life, freedom from torture, freedom from arbitrary arrest, the right to a fair trial, the right to privacy, freedom of religion, freedom of expression, and freedom of assembly and association. It is worth noting that the very content of the Convention has been criticised; in particular its exclusion of social and economic rights.

Institutionally, the Convention provided for an international court and a Commission to consider complaints and decide whether or not to remit them to the court. Even at this early stage, it is possible to see that certain nations saw this as a possible compromise of their sovereignty. The Convention allowed a nation to determine whether or not it would accept the jurisdiction of the court. As Hoffman and Rowe argue:

- The Convention was an extremely radical innovation. Never before had there been a system of international law which held states accountable to some superior court in respect of actions against their own citizens: previous international courts and tribunals were constituted solely to settle disputes between states, or, in the case of

the Nuremberg Tribunal, to try individuals for their own criminal responsibility.

We can stress a number of points. The ECHR was innovative in that it made sovereign states responsible to an international court. Hoffman and Rowe suggest that this represents a departure from the previous manner in which international law operated.

International law had previously only provided means for states to resolve disputes with each other. The consequence of this new development is that sovereign states have to accept that they must uphold the human rights of their citizens. Underlying this responsibility is a sense that the state itself can be an abuser of human rights.

It is worth pointing out at this stage that there has been significant reform in the operation of the Court set up by the Convention.

Under former arrangements there was a European Commission of Human Rights and a Committee of Ministers. The Commission of Human Rights would rule on breaches of the Convention when a case was submitted to it by a state party. Under the old procedure state parties and the Commission could then refer the case to the ECHR. In other words, an individual complainant did not have a right to petition the ECHR. This system was found to be increasingly inefficient, and unable to deal with the increasing case load. The Commission was abolished by Protocol 11 in 1998 (the Committee of Ministers retains enforcement powers under the new arrangements), and further changes were made to the structure of the court by Protocol 8 (see section II of the Convention below). These changes have enhanced the power of the court, but there are still misgivings about its ability to cope with the number of cases with which it has to deal.

The other peculiarity of the Convention is the status of the 'shared' political inheritance between nations to which it appeals.

Undoubtedly this refers to the books, philosophies and thinkers that could be said to characterise the European tradition; but, the trauma of the Second World War might also suggest that the values of humanity had been quickly forgotten in a Europe of concentration camps, collaborators and total war. It might actually be difficult to find a historical period prior to the drafting of the Convention when Europe was free of conflict. From this perspective, the Preamble of the Convention has to be read as an inculcation of the values that it stands for. Precisely because Europe had tom itself apart, it is now necessary to speak of what could bring it back together. Even if the Second World War suggested that the values of European democracy were not as strong as a drive towards annihilation, the Convention will seek to

remind Europeans that those values existed in the past, and could be recovered for the future.
As Churchill himself warned in the Zurich speech of 1946, the dark days could very easily return.

Summary

The roots of the ECHR lie in the movement for European reconstruction and the attempts to create a lasting peace after the Second World War. The Council of which came into force in 1953. The Convention contains a catalogue of rights, but has been criticised for excluding social and economic rights. The Convention also created a Commission and a Court, and it is worth noting the radical nature of these institutional innovations. It is also important to note that there have been institutional reforms -most importantly, the abolition of the Commission and the rise in importance of the right of individual petition.

3.2 The European Union and Human Rights

The European Union was founded in 1992 by the Treaty on European Union. It was formerly known as the European Community.

The ECHR is not to be confused with the various treaties that constitute the European Union. Defining the Union is a difficult task; and indeed, the political implications of various definitions of the Union are currently being fought out in European politics. A basic working definition is, however, possible. The European Union is essentially a common market. Linked to the common market, and open to varying degrees of acceptance by the member states of the Union is an ongoing experiment in social democracy. This means that the common market is subject to regulation, and, that there is a commitment to a package of various social, economic and welfare rights. This section of the chapter will attempt to outline the nature of these rights, and their relationship with the ECHR and the European Court. But it is worth stressing (because it is a common error), that the law deriving from the Treaty of Rome, and the other treaties that relate to the European Union are different sources of law from those of the Convention. Clearly, though, both sources of law feed into the broader context of the protection and enforcement of rights in Europe.

The Treaty of Rome, 1957, provides the basic framework of the common market, which is founded on the free movement of goods, labour, capital and services, as well as policies on transport, competition, agriculture and external trade. Article 2 states:

- The community shall have as its task, by establishing a common market and progressively approximating the economic policies of member states, to promote throughout the Community a harmonious development of economic activities, a continuous and balanced expansion, an increase in stability, an accelerated raising of the standard of living and closer relations between the States belonging to it.

As this Article suggests, the Community (as the Union was then known) is primarily an economic grouping. The point of the community is to co-ordinate the economic policies of the member states to create a trade bloc that allows Europe to compete internationally. The social democratic impetus of the community is perhaps apparent here in the statement that one of the key goals of the community is the 'accelerated raising of the standards of living' of the citizens of member states. The economy, in this sense, operates as a social market, bringing benefits to the citizens of those states that make up the community.

The Treaty of Rome does contain certain rights that could be seen as human rights, to the extent that they are similar to those contained in the Universal Declaration, the Covenants or other international human rights instruments. The following examples are not meant to offer a definitive coverage of the Treaty, but are meant to indicate the extent to which the common market is also linked to social and economic rights. Thus Article 8a, backed up by Article 48, states that all citizens of the European Union (EU) have the 'right to move and reside freely within the territory of the Member States'. This is clearly comparative with rights to freedom of movement within the Declaration, although it is obviously more limited. Perhaps one of the most controversial rights (at least from the perspective of English law), is Article 119, which provides that member states should 'maintain the application of the principle that men and women should receive equal pay for equal work'. This principle is itself based on the wider prohibition on discrimination that runs through human rights instruments. It is clearly rather limited in its scope in Article 119, as this applies only to equal pay for equal work, but, it also clearly illustrates the way in which the Treaty of Rome draws on the wider human rights inheritance.

The Institutions of the European Union

The Treaty of Rome established the central institutions of the Community. These are:

- The Commission
- The Council of the European Union
- The European Parliament

- The European Court of Justice (ECJ).

We will briefly describe these bodies and their relationship. The Commission can be thought of as the Community's executive body.
The objectives of the Council of the European Union are to co- ordinate the economic policies of member states. The European, Parliament provides a democratic input. It is involved in the legislative process, but also has other, broader powers. The European Court of Justice (do not confuse with the European Court of Human Rights) is the Union's judicial body with authority over the application and interpretation of the treaties that make up the Union.

It is worth pointing out at this stage that the legal order of the EU is different from the forms of international human rights law that we have examined so far. The following statement, drawn from one of human rights cultures in the new member states that had formerly been part of the Soviet bloc.

There is one other important institution we need to briefly examine. Established in 1999, the Office of the Commissioner for Human Rights exists as 'an independent institution within the Council of Europe'. The Commissioner's mandate extends over four areas: education in human rights awareness, the encouragement for and facilitation of human rights protection, the identification of failures in human rights protection and promotion of human rights in the Union. For instance, in January 2001, the Commissioner visited Andorra.[1] In 1993 Andorra had adopted its first democratic constitution. The Commissioner made largely favourable comments on the rights of foreigners in the country, the operation of its legal system and penal institutions, employment rights and social security provision. Although the Commissioner made some constructive and critical comments, he reported that 'there [are] no insurmountable problems in Andorra as far as the overall enjoyment of human rights is concerned'.

Other Significant European Human Rights Bodies

To achieve a broad overview of human rights protection within the EU, it is necessary to briefly review the operation of some other significant European bodies and their foundational texts. The European Social Charter contains a list of rights and freedoms, primarily social and economic rights, and a supervisory procedure which involves the European Committee of Social Rights (ECSR). States must report annually on the Charter's implementation, and the Committee's reports are published. If a state fails to take action on an ECSR decision, the Committee of Ministers can issue a recommendation for legal change to the relevant state's government. There is also a collective complaints

procedure under the Charter. This enables trade unions and employer's organisations, and certain other parties, to lodge complaints of violations with the ECSR. If the case is admissible, the Committee makes a decision and reports to the Committee of Ministers.

There is also the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, 1998. This is discussed below.

Established in 1993, The European Commission against Racism and Intolerance (ECRI) provides an independent monitoring mechanism. Its mandate covers Council of Europe member states, and includes racism, xenophobia, antisemitism and intolerance. The Council of Europe also adopted in 1994 a Framework Convention that relates to the protection of national minorities.

Note: Alongside the EU, the Council of Europe and the Convention, there is a third European Institution, the Organisation for Security and Co-operation in Europe (OSCE). Founded in 1995, this organisation has its roots in the Conference on Security and Co-operation in Europe which sponsored the Helsinki Accord and the meetings that followed the signing of this document. This process essentially concerned matters of security, and included the Soviet Union, Canada and the United States. At this point, Human Rights concerns were limited in the work of the Conference; and the agreements that it encouraged were not legally binding. However, the Conference played an important diplomatic role. Since 1995, the Organisation has dedicated itself to the creation and support of democratic institutions, international co-operation and the rule of law.

Summary

One must be careful to observe that the ECHR and its associated institutions are separate and distinct from those of the EU. The EU can be thought of as a common market, with its own institutional structure that is described in this section. However, because of the ideological underpinnings of the EU, the common market also contains a commitment to a catalogue of human rights. These are contained in the law of the EU. Although not essentially human rights law, as it is concerned with the structure and operation of the EU, this law has a human rights element. EU law can be thought of as entering directly into the domestic legal systems of member states. This could therefore create human rights in a way different from the other systems that we have studied in this book. Recent developments and reforms in the EU show an increasing commitment to human rights, in part because of the need

to inculcate rights cultures in those new member states that were formerly part of the Soviet bloc.

3.3 The European Convention on Human Rights

Article 1 states an 'obligation to respect human rights'. Like the equivalent in the American Convention, it states a founding principle that underlies the operation of the Treaty. State parties undertake to 'secure to everyone within, their jurisdiction' the rights that are defined by the Convention. Section 1 goes on to list the rights and freedoms that are protected.

Section 1

Article 2 states the right to life. This is a more extended definition than that provided by the Universal Declaration. The fundamental nature of this Article is indicated by the fact that it is not possible to derogate from it (see 15(2)), except for 'deaths resulting from lawful acts of war'. The Article begins by placing a positive duty on a state party to protect 'Everyone's right to life'. There are then exceptions to the principle. The first broad exception covers judicial execution pursuant to a sentence pronounced by a court of law.

Section 1 (2) goes on to provide that the right to life will not have been breached if, in cases of necessity, force is used:

- to defend a person from unlawful violence
- to make an arrest or prevent an escape of someone who has been lawfully detained
- in lawful actions taken against extreme instances of public disorder such as 'riot or insurrection'.

Article 3 states the prohibition on torture. This also covers 'inhuman or degrading treatment or punishment'. Like Article 2, no derogation from this Article is possible (see 15(2)). The absolute nature of the Article has led some to argue that less serious forms of ill-treatment could not be considered under it, as this would trivialise the protection that Article 3 offers. This was also pointed out in *Ireland* v *UK* (1980) 2 EHRR 25, where Judge Fitzmaurice pointed out that a temptation existed to apply Article 3 to treatment that fell short of torture because there were no other relevant Articles in the Convention. [2] In the same case, the Court defined torture as 'deliberate inhuman treatment causing very serious and cruel suffering'-certain robust interrogation techniques and even physical assaults on prisoners were thus not found to constitute torture. To date, the only case (and this was considered by the Commission and the Committee of Ministers) in which torture was found was 'the Greek

case' (12 YB 1 504 Com Rep.1969). Severe beatings allover the body to extract information was held to have constituted 'the necessary level of suffering'.
The European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment 1998 supplements Article 3. The Convention establishes a European Committee for the Prevention of Torture (CPT). This body has the power to visit detention centres and prisons and monitor the treatment of those detained. The Committee draws up reports after visits; these reports are communicated to the state party concerned.

Article 4 concerns the prohibition of slavery and forced labour. The Article begins by explicitly prohibiting 'slavery and servitude', and goes on to prohibit 'forced or compulsory labour'. No derogation is possible from Article 4(1) (see 15(2)). Article 4(3) then outlines the exceptions to this general principle. 'Forced or compulsory labour' does not include work carried out in the 'ordinary course of detention', work of 'service or a military character', work carried out in emergency situations, or work as part of normal civic obligations. This Article has generated very little case law, and to date, no breach has been found.

Article 5 articulates the right to liberty and security. The Article begins with a positive statement of the right: 'Everyone has the right to liberty and security of person'; the consequence of this is that arbitrary detention is prohibited, except in certain circumstances where it is 'prescribed by law'. These include:

- lawful detention after sentence has been pronounced by a competent court
- lawful arrest pursuant to a court order or to 'secure' the fulfillment of lawful obligations
- detention to enable a person to be brought before a court of law where there is reasonable suspicion of an offence having been committed or to prevent the commission of an offence
- detention of a minor for educational purposes or to enable the minor to be brought before competent legal authorities
- detention to prevent the spread of contagious disease or to control certain classes of persons.
- lawful arrest to prevent unauthorised entry into a country or to allow deportation.

Due process safeguards are also provided by the Article: in the situation of arrest, the right to be promptly informed, in a language which the detainee understands, of the reasons for the arrest, and whether or not there are any charges against him. Paragraph 3 states that the detainee must be brought before a judge, equivalent law officer or tribunal and is

entitled to a trial in a reasonable time, or release pending trial. Paragraph 4 states that the detained person is also entitled to take proceedings that determine the lawfulness of his detention, and, the final paragraph provides a right to compensation if his Article 5 rights have been breached.

This Article has produced a great deal of case law. We can examine one important case, *Engel and Others* v *The Netherlands (No.1)* (1979-80) 1 EHRR 647, a case that concerned military discipline. : The court argued that Article 5(1):

- Is contemplating individual liberty in its classic sense, that is to say the physical liberty of the person. Its aim is to ensure that no one should be dispossessed of this liberty in an arbitrary fashion. As pointed out by the Government and the Commission, it does not concern mere restrictions upon liberty of movement (Art. 2 of Protocol No.4). This is clear both from the use of the terms 'deprived of his liberty', 'arrest' and 'detention', which appear also in paragraphs 2 to 5, and from a comparison between Article 5 and the other normative provisions of the Convention and its Protocols. (para 58).

It is necessary, therefore, to read this Article in its correct context. It is aimed primarily at unlawful detention; or deprivation of liberty in 'an arbitrary fashion'. One can thus understand that the structure of the Article reflects the positive statement of the rights and an enumeration of those instances where detention is justifiable. The Court held, *inter alia,* that a system of military discipline did not, in itself, constitute a breach of the Article; although certain disciplinary practices could in themselves amount to breaches if a penalty or measure deviated from those normally pertaining to the armed forces.

Article 6 covers the right to a fair trial. Article 6(1) covers fair trial rights that relate to both 'determinations' of criminal and civil 'rights and obligations'. Note that this definition is broad, and thus extends beyond formal courts of law. The paragraph contains a list of minimal rights: every person has a right to be judged by a lawfully constituted independent tribunal within a reasonable time. There are a number of exceptions to the principle that the hearing must be in public: the right to a public judgment can be legitimately restricted in the interests of 'morals, public order or national security in a democratic society' or, in the interests of juveniles, the protection of private life, or, a catch -all provision: 'to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice'.

If a person is charged with a criminal offence, they have by act. 6(2), the right *to* be 'presumed innocent until proved guilty according to law'. The Article then enumerates a number of minimum rights. These include:

- the right to be informed in a language that one understands, of the 'nature and cause' of the ,accusations made against one
- adequate time and facilities to prepare a defence
- the right to defend oneself, or to counsel.

In certain circumstances, there may be:

- a right to legal aid
- the right to examine hostile witnesses and to compel the attendance of witnesses
- to use a translator free of charge, if he cannot understand the language of the court.

To benefit from Article 6, the applicant must have an arguable right under domestic law. Article 6(1) does not guarantee any particular substantive content for civil rights and obligations in national law, but provides only the procedural guarantees for the determination of tenable rights. Although Article 6(1) cannot be used to create a substantive civil right, it may apply in cases where domestic law contains immunities or procedural bars that limit the possibility of bringing potential claims to court. In such cases, the Convention provides a degree of 'constraint or control' on states' abilities to remove civil rights from the jurisdiction of the court or to provide immunity to particular groups of persons.

Clayton and Tomlinson argue that Article 6 expressly confers fair hearing rights in broad and unqualified terms. In addition, the Court has recognised an 'implied right' of access to the courts and a series of other 'implied' fair trial rights. It has taken the view that implied Article 6 rights can only be restricted in furtherance of a legitimate aim and where the measures taken are necessary for the achievement of this aim and are proportionate. Special additional rights are conferred on those facing criminal charges. There are therefore five questions *to* be asked when considering whether a public body has violated Article 6:

- Is the body engaged in the determination of civil rights and obligations or a criminal charge?
- In the case of a criminal charge has there been any breach of the minimum guarantees in Articles 6(2) and 6(3)?
- Has there been an infringement of the express right to an independent and impartial tribunal, a hearing within reasonable time, a public hearing and public pronouncement of judgment?

- Has there been an apparent infringement of the applicable implied fair trial rights? If so, was this infringement for a legitimate aim, necessary and proportionate?
- Has the applicant waived the right in question?

Article 7 enshrines the principle that there should be no punishment without law. (Article 15(2) provides that no derogation from this Article is possible.) It effectively prohibits *ex post facto* laws. In *Kokkinakis* v *Greece* ((1994) 17 EHRR 397), the court pointed out that:

- …Article 7(1) of the Convention, which prohibits the retroactive application of the criminal law and the retroactive imposition of heavier penalties to the detriment of the accused, also enunciates 'in a more general way, the principle of the statutory nature of offences and punishment *(nullum crimen, nulla poena sine lege)'* [3] and prohibits 'in particular, extension of the application of the criminal law *'in malam partem'* by analogy'. In addition, that principle also includes 'the requirement that the offence should be clearly described by law… This requirement is satisfied where it is possible to determine from the relevant statutory provision what act or omission entails criminal liability, even if such determination derives from the courts' interpretation of the provision concerned.

The Right to respect for private and family life is guaranteed by **Article 8**. Article 8 (2) prohibits any 'interference' by public authorities except 'as in accordance with the law and is necessary in a democratic society'. Such restrictions would include limitations on the Article in 'the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others'. In *Kroon* v *The Netherlands* (1995) 19 EHRR 263), the Court outlined the essential scope of this Article:

- The essential object of Article 8 is to protect the individual against arbitrary action by the public authorities. There may in addition be positive obligations inherent in effective 'respect' for family life. Although the boundaries between the State's positive and negative obligations under this provision do not lend themselves to precise definition, the applicable principles are similar. In both contexts regard must be had to the fair balance to be struck between the competing interests of the individual and of the community as a whole; and in both contexts the State enjoys a margin of appreciation. [paragraph 31].

The Court thus explained that the positive obligation to respect private life relates to an obligation to refrain from certain conduct; however, the

precise extent of the state's obligations is difficult to define. The relevant test is to balance the interests of the individual and the community, but, in striking this balance, the 'right' of the state itself to take action must be respected. Commentators suggest that the Court has not spelt out in detail the precise content of the restrictions that would be considered legitimate. Arguably, this does accord with a margin of appreciation that accepts that state action in these areas is necessary.

Article 9 on freedom of thought, conscience and religion has also produced very little case law. The second paragraph of the Article, 9(2), places restrictions on the right as articulated in 9(1). The restrictions are ones that are justifiable in a 'democratic society' in the 'interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others'. Commentators (Harris et *al.* 1995) have described the Article as representing the values of pluralism and tolerance that underlie the Convention. Whether this Article will be invoked more frequently in the present clash between religious fundamentalisms and freedom of expression remains to be seen.

Article 10 articulates the right to freedom of expression. Broadly defined as covering the 'freedom to hold opinions and receive and impart information and ideas', the right is restricted at art. 10(2) by a statement of the 'duties' that the right entails. It may thus be subject to 'such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society'. The list of exceptions is somewhat different to that provided in the Articles above. It covers: 'the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary'.

The Article is fundamental to the achievement of a democratic society. In *Handyside* v *UK* [1976] 1 EHRR 737, the court elaborated this principle. The Article aims to protect 'pluralism, tolerance and broadmindedness', civic virtues that are necessary for a flourishing democracy. However, the fundamental nature of freedom of expression does not mean that the Article is absolute, as we can see from the restrictions imposed.

Article 11 states two connected freedoms: assembly and association. The latter includes the 'right to form and to join trade unions'. As with the Articles above, there are also restrictions on the extent of these freedoms. These are limited to those that are 'prescribed by law and are necessary in a democratic society'. They thus cover restrictions: 'in the

interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others'. There is an important concluding sentence that stresses that restrictions can be lawfully imposed by 'the armed forces... the police or... the administration of the State.'

The right to marry in **Article 12** covers the right to 'found a family' within the context of the domestic laws that govern this area. The Court has held in *Van Oosterwijk* v *Belgium* (A 40 (1980) Com Rep) that this does not mean, however, that a state could completely remove the right to marry from a person or category of persons. In other words, the domestic law of the state parties has not to be arbitrary or effectively prevent the enjoyment of a general right to marry.

Articles 13 and 14 provide, respectively, a right to an effective remedy and a prohibition of discrimination. Article 14 is widely drawn, and we shall see below how it has fed into the jurisprudence of the Court as it relates to various forms of discrimination.

The relevant applications of **Article 15** have been referred to above.
Articles 16-18 can be read as a group. Article 16 allows restrictions to be imposed on the political activity of aliens (which includes citizens of other EU states). Article 17 prevents both states and individuals or groups from claiming 'any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention'. The Article has been described by the Court as safeguarding 'the free functioning of democratic institutions' *(KPD* v *FRG* [1957] No 250/571 YB222, at 223. The court also went on to say that an order banning the German Communist Party could be justified under this Article because it advocated a form of politics in which the rights of the Convention would not be respected. Article 18 is not an independent and free-standing Article. It can only be pleaded by someone alleging a restriction on a substantive right. The Article seeks to prevent restrictions on one set of rights being used as restrictions on other rights.

Section II

Section II of the Convention establishes the institutions dedicated to the protection and enhancement of human rights. **Article 19** establishes the European Court of Human Rights. Various Articles then relate to the appointment of judges and their terms of office. It is worth noting that the judges of the Court serve in their individual capacities (Article 21). The court is thus impartial and independent of the state parties who are

signatories to the Convention. **Articles 27-30** state that the court is organised into Committees, Chambers and a Grand Chamber. These divisions of the court have slightly different powers in relation to declaring cases inadmissible.

Article 32 outlines the Court's jurisdiction. Article 32(1) states that it extends to both the interpretation and application of the Convention and its protocols. The Court also has a general power to determine its own jurisdiction in event of dispute (art. 32(2)).

These powers are then further outlined. **Article 33** relates to inter state cases. One state party may refer to the Court any breach of the Convention or its protocols by another state party. **Article 34 allows individual applications. The Court can receive applications from 'any person, non-governmental organisation or group of** individuals' who claim that a state party has violated one or more of his Convention rights. However, there are admissibility criteria, set out by **Article 35.** The applicant must first have exhausted 'all domestic remedies'; furthermore (art. 35(2)), the court will not accept anonymous submissions, or those that are 'substantially the same' as those it has already considered, or which are being considered by 'another procedure of international investigation or settlement and contains no relevant new information'. The Court also has a wide jurisdiction to declare inadmissible applications that are 'incompatible' with the Convention, are 'manifestly ill-founded' or an abuse of process. The Court also has a wide power to strike out applications (Article 37).

Article 36 provides that in all cases that go before a Chamber or the Grand Chamber, a High Contracting Party has a right to submit written comments and to take part in hearings if one of its nationals is involved in proceedings.

Article 38 provides that once the Court has declared a case admissible, it can itself pursue investigations, for which states must provide 'all the necessary facilities' (art. 38(1)). The Article also provides that the Court must secure a 'friendly settlement' that is coherent with the Convention. If a friendly settlement is reached, then Article 39 states that the decision of the court is limited to a statement of facts and a statement of the solution reached.

If, however, the Court finds that there has been a violation of the Convention, and the relevant state party's domestic law does not provide a full set of remedies, the Court has the power to 'afford just satisfaction to the injured party'. (Article 41).

The division of the Court into Committees, Chambers and a Grand Chamber is also relevant to the way in which cases are dealt with and judgments issued. Judgments of the Chambers become final:

- if the parties state that they do not want the case to be referred to the Grand Chamber
- if a referral is not requested
- if the Grand Chamber refuses a request within three months after the judgment (44(2)).

A party can, under exceptional circumstances and within a three month period, request referral to the Grand Chamber under **Article 43**. The Grand Chamber will accept the request if it raises a serious question relating to the Convention and its protocols, or of general importance (art. 43(2)). Article 44(1) provides that the judgment of the Grand Chamber is final, and that reasons for judgments should be given (45), including any dissenting opinions (45(2)).

By **Article 46**, state parties undertake to 'abide by the final judgment of the Court'.

Article 47 allows the court to issue Advisory opinions at the request of the Committee of Ministers. These opinions do not concern themselves 'with any question relating to the content or scope of the rights or freedoms defined in Section I of the Convention and the protocols thereto, or with any other question which the Court or the Committee of Ministers might have to consider in consequence of any such proceedings as could be instituted in accordance with the Convention. Reasons must be given for advisory opinions, as per Article 44.

Protocols

Note: there are also a number of protocols under the Convention. Protocols 8 and 11 have been mentioned above, and reference will be made to Protocol 2 below. We can also briefly review some of the most important Articles of the other Protocols.

- **Protocol 1** adds further rights to the Convention: the right to property (Article 1), certain educational rights of parents. (Article 2) and the right to free elections (Article 3).

- **Protocol 4** contains:

- freedom from imprisonment for debt (Article 1)
- liberty of movement (Article 2)
- freedom from exile (Article 3)
- a prohibition on mass expulsion of aliens (Article 4).

- **Protocol 6** prohibits the death penalty in time of peace . (Article 1 and 2).

- **Protocol 7** contains: the right not to be expelled form a nation without due process (Article 1); a right to appeal in criminal cases (Article 2)

- the right to compensation for miscarriages of justice (Article 3)
- immunity from prosecution twice for the same offence (Article 4)
- equality of rights for spouses in matters of private law relating to children (Article 5).

Summary

The ECHR creates a catalogue of rights that is not dissimilar from the other international covenants on human rights that we have studied. Article 2, the right to life; Article 3, the prohibition on torture; Article 4, the prohibition on slavery; Article 5, the right to liberty and security; Article 6, the right to a fair trial; Article 7, the principle that there should be no punishment without law; Article 8, the right to respect for private and family life; Article 9, freedom of thought, conscience and religion; Article 10, the right to freedom of expression; Article 11, freedom of assembly and association;

Article 13, the right to a remedy; Article 14, the prohibition on discrimination. Section II of the Convention creates the European Court of Human Rights and defines its personnel and jurisdiction. In overview, these include the authority to provide rulings on the interpretation of the Convention; a jurisdiction over inter-state actions; a jurisdiction over individual petitions. Although the Court is charged with promoting 'friendly settlements' in disputes, it does have the power to award remedies to injured parties in certain limited circumstances.

3.4 Freedom of Speech and Religious Rights

In the sections above, we have been considering the general powers of the Court and obtaining an overview of the rights contained in the Convention. We now turn our attention to the issues raised in some recent cases that concern religious freedom, and consider a line of cases in depth. We will look first at *Otto-Preminger-Institut* v *Austria,* before turning to consider the way in which the Court has interpreted Article 9 in some contemporary cases that raise the issue of religious freedom, and concern the right of Moslem women to wear clothes that manifest their faith. This issue is important because it goes to the extent to which Europe can present itself as an inclusive political community.

This would have a negative effect on school discipline, leading to 'divisiveness'. There were also fears expressed on health and safety grounds. The earlier court had accepted the school's evidence on this point, and held that limitations on the claimants rights were necessary to allow the protection of the rights and opinions of others.

The Appeal Court considered ECHR case law on this point. *Dahlab* v *Switzerland* (February 15, 2001; Application No.42393/98) concerned a primary school teacher who had been prohibited from wearing a head scarf. The Court had declared the case inadmissible. Their argument was based on the 'margin of appreciation' that was allowed to 'national authorities' in deciding whether an interference with rights was justifiable:

- The Court's task is to determine whether the measures taken at national level were justified in principle -that is, whether the reasons adduced to justify them appear 'relevant and sufficient' and are proportionate to the legitimate aim pursued... In order to rule on this latter point, the Court must weigh the requirements of the protection of the rights and liberties of others against the conduct of which the applicant stood accused. In exercising the supervisory jurisdiction, the court must look at the impugned judicial decisions against the background of the case as a whole.

In declaring the case inadmissible, the court had been much concerned about the principle of 'denominational neutrality in Swiss schools'. Allowing the Swiss government its margin of appreciation thus allowed this policy to 'trump' the applicant's religious freedom. As we have seen, such arguments were also made by the court in *Sahin* v *Turkey* (June 29, 2004; Application No. 44774/98). But, what was an English court to make of this case? Clearly, the UK is not a secular state. Indeed, under Chapter VI of the Schools Standards and Frameworks Act, 1998 schools are required to timetable daily acts of worship. The issue in the case is thus re-drawn:

The position of the School is already distinctive in the sense that despite its policy of inclusiveness it permits girls to wear a headscarf which is likely to identify them as Muslim. The central issue is therefore the more subtle one of whether, given that Muslim girls can already be identified in this way, it is necessary in a democratic society to place a particular restriction on those Muslim girls at this school who sincerely believe that when they arrive at the age of puberty they should cover themselves more comprehensively than is permitted by the school uniform policy. [74]

In order to address these issues, a school would have to address the following questions: has the claimant a valid Article 9 right? Was interference with that right justified under Article 9? (In other words, did the interference have a legitimate aim?) The School neither asked these questions nor approached the issue in this way:

- Nobody who considered the issues on its behalf started from the premise that the claimant had a right which is recognised by English law, and that the onus lay on the School to justify its interference with that right. Instead, it started from the premise that its uniform policy was there to be obeyed: if the claimant did not like it, she could go to a different school. [76] overrule their judgment on a matter as sensitive as this. The power of decision has been given to them for the compelling reason that they are best placed to exercise it, and I see no reason to disturb their decision.

The School's decision was proportionate because it had taken many factors into account; it would also be wrong for a court to substitute its opinion for that of those people who were most familiar with the context of school uniform policy. Not only had the school taken all relevant factors into account, it was necessary for the court to defer to those who had set the policy and were most familiar with the issues.

Baroness Hale disagreed with the majority. She argued that there had been an interference with Shabina Begum's rights, even though she had not reached the age of maturity. However, the interference is legitimate to the aim pursued. On this ground she agrees with Lord Bingham and Lord Hoffmann. Baroness Hale's disagreement with Lord Bingham and Lord Hoffmann relates to the question of whether or not there had been an interference with the Article 9 right. Baroness Hale argues that this right had indeed been breached. However, the interference was justified.

11.0 CONCLUSION

This chapter has considered the European system for the protection of human rights, and has concentrated mainly on the European Convention and the European Union. We have seen that there is a commitment to human rights in Europe, even though the cases on religious freedom that we considered suggest that the ECHR is also willing to tolerate the restriction of the rights of certain faith groups to the extent that they are legitimate and acceptable in a democratic society. The eastern expansion of the European Union has also been an issue in this chapter. Despite the advances made in the protection of human rights in Europe, it is necessary to be mindful of the darker side of European history and to be constantly reminded of the humanist values of rights and the rule of law.

12.0 SUMMARY

It is evident that the populations within the United Kingdom, France and Germany are very different in terms of religious and cultural identity than those of 50 years ago. The trend towards increasing diversity is one that is likely to increase in the future despite the constraints of highly restrictive immigration policies. With this increasing diversity comes a need to evaluate whether state policies continue to meet the requirements of the population as a whole. In particular there needs to be consideration of how minorities views are taken into account in a democracy and ensure there is effective participation in the political process by individuals and groups There needs to be acknowledgement that identity is contested, continually shifting, and can and should be renegotiated with participation of the population as a whole.

13.0 TUTOR-MARKED ASSIGNMENT

1) Mention the institutions for protection of Human Rights in Europe
2) Describe European Union Framework for the protection of human Rights

7.0 REFERENCES/FURTHER READINGS

A. Gearey: International protection of Human. University of London. Press.

D Sienho Yee, 'The role of law in the formation of regional perspectives in human rights and regional systems for the protection of human rights: the European and Asian Models as illustrations', Singapore Yearbook of International Law (2004), pp.157-164. Yee provides a jurisprudential analysis of human rights law, and an intriguing comparison between the European regional system, and the principle of non-intervention in Asian international politics that has militated against the development of a regional system.

UNIT 2 THE INTER-AMERICAN SYSTEM FOR THE PROTECTION OF HUMAN RIGHTS

CONTENTS

1.0 INTRODUCTION

This unit considers the Inter-American system for the protection of human rights. We examine the main foundational documents, and the two organs created to promote and protect human rights: the Inter-American Commission on Human Rights and the Inter- American Court of Human Rights.

The Inter-American system is one of the three regional systems that are dedicated to the protection of human rights. In this unit, we will draw some comparisons between it and the American and European systems. The Inter-American system also draws attention to a particularly pressing problem: how to deal with human rights violations on a massive scale. There are no easy solutions to this problem; but we will see that the Inter-American Court and Commission have been concerned with developing a human rights jurisprudence that engages with these most pressing issues.

2.0 OBJECTIVES

At the end of this unit, you should be able to:

- explain the inter-American system for the protection of Human Rights
- explain the main features of the framework for the protection of Human Right

3.0 MAIN CONTENT

3.1 The Origins and Development of the Inter-American System

3.1.1 Historical Background

The historical roots of the Inter-American system can be found in the movements to achieve unity amongst the North American and Latin American states in the mid-nineteenth century. The 'First Congress of American States' was held in 1826, but the effective beginnings can be traced to the Pan-American Union, founded after a series of meetings in Washington between 1889 and 1990. The objectives of the Union were economic co-operation and settlement of disputes between nations; the human rights agenda was, at this point, not a major concern. Indeed, it was not until after the Second World War that the states concerned sought to both reorganise the terms of their union and promulgate the protection of human rights as a key objective. The Charter of the Organisation of American States (OAS), 1948, established the Organisation as a regional agency within the UN to secure ‘peace and security, representative democracy, eradication of poverty and the pacific resolution of disputes between the nations of the region’.

The original signatories of the OAS Charter were: Argentina, Bolivia, Brazil, Chile, Colombia, Costa Rica, Cuba, the Dominican Republic, Ecuador, El Salvador, Guatemala, Haiti, Honduras, Mexico, Nicaragua, Panama, Paraguay, Peru, the United States, Uruguay and Venezuela. Other states have joined the OAS since 1948. This group includes: Barbados (1967); Trinidad and Tobago (1967); Jamaica (1969); Grenada (1975); Suriname (1977); Dominica (1979); Saint Lucia (1979); Antigua and Barbuda (1981); Saint Vincent and the Grenadines (1981); The Bahamas (1982); St. Kitts and Nevis (1984); Canada (1990); Belize (1991); and Guyana (1991).

A second foundational document was The American Declaration of the Rights and Duties of Man. This document was similar to the Universal

Declaration, containing a catalogue of the rights and duties of citizens. It was adopted in May 1948, and thus pre-dates the Universal Declaration. In Santiago (Chile) in 1959, it was resolved that an Inter-American Commission and a Court for Human Rights would be created. The OAS Council approved the Statute of the Commission in 1960.

Later on, and after protracted negotiations, The American Convention on Human Rights was adopted by the member states of the OAS in Costa Rica, in 1969.

We will look at this document in more detail below. In summary, it contains a catalogue of rights, and outlines the powers of the Court and the Commission. It is worth noting that the Convention redefined the powers of the Inter-American Commission that had been created ten years earlier. The Commission was made 'a statutory organ of the GAS' and given powers to protect human rights and operate as a consultative body to the Organisation. However, the new powers (see Articles 18, 19 and 20 below) of the Commission would only be binding on those nations who ratified the Convention. The situation thus existed whereby nations could be subject to the old powers of the Commission, but not to the new powers. We do not have the space in this Chapter to look in detail at this problem, and will concentrate instead on the new powers of the Commission under the Convention.

The American Convention has been ratified by: Argentina, Barbados, Brazil, Bolivia, Chile, Colombia, Costa Rica, Dominica, Dominican Republic, Ecuador, EI Salvador, Grenada, Guatemala, Haiti, Honduras, Jamaica, Mexico, Nicaragua, Panama, Paraguay, Peru, Suriname, Trinidad and Tobago, Uruguay and Venezuela.

Trinidad and Tobago denounced and quitted the American Convention on Human Rights by a communication addressed to the General Secretary of the GAS on May 26, 1998.

The United States is a signatory to the Convention, but to date has not ratified it. Canada is not a signatory to the Convention.

3.1.2 The Inter-American Commission

The old powers allowed the Commission to look at the human rights situation and to report on flagrant and repeated violations. The Commission could request information from the government concerned with a view to making recommendations, and with the consent of the relevant government, make a country visit. It could only consider individual complaints as part of its examination of general abuses of human rights. In 1965, these powers were extended, allowing the

Commission to take into account individual abuses, but only in limited cases. In these instances, the Commission could issue a report, but it could not make decisions. Using the powers to report on general abuses, the Commission was able to examine Cuba and the Dominican Republic; 'country reports' were also undertaken in relation to Haiti (1980), Uruguay (1977), Chile (1974-1980), Panama (1978), Nicaragua (1978), EI Salvador (1979) and Argentina (1980).1 The more extended powers attracted a large number of communications from individuals, but the Commission remains too under-funded and under-resourced to be able to achieve the co-operation of the relevant governments. The annual reports sent from the Commission to the General Assembly of the GAS describe the Commission's work in this area. They present 'a depressing picture of arbitrary arrest, detention without trial, interrogation accompanied by torture, exile without judicial process and a variety of similar violations'.

Thus, we need to note, at this stage, a peculiarity of the Inter- American system: the Commission has a 'dual mandate', and has done a great deal of its work under its 'old functions' which predate those powers granted by the Convention, which only came into force in 1978. Another general point can be made about the operation of the Commission if one compares it with the European Commission:

- The European Commission has, with very rare exceptions, been concerned with... the finer points of human rights law -questions, for example, such as what is a reasonable time in detention pending trial, what is the precise content of the right to a fair trial [etc]... the Inter-American Commission, on the other hand, has had to deal with problems of a quite different order: arbitrary arrests on a massive scale, systematic use of torture, scores or hundreds of 'disappeared persons', total absence of judicial remedies and other violations of civilized standards. In dealing with such cases it has found the governments concerned more like antagonists than willing partners…

As we will see below, the Commission and the Court have begun to develop a human rights jurisprudence that tackles these most difficult problems.

3.1.3 How is the Inter-American System for the Protection of Human Rights Distinctive?

The Inter-American system differs in many ways from the other well established regional system for the protection of human rights... ...The inter-American system is more complex than the European Convention in that it is based upon two overlapping instruments, namely the

American Declaration on the Rights and Duties of Man and the American Convention, with the jurisdiction of the Inter- American Commission on Human Rights over states depending upon whether they are parties to the Convention or not. The Court has jurisdiction in contentious cases only over Convention parties.

It also has more than one dimension in that the Inter-American Commission not only hears petitions but also conducts in loco visits, leading to the adoption of country reports on the human rights situations in OAS member states. This... has no counterpart in the European system.

The Inter-American system can thus be thought of as a regional system, but one that differs from the European system in the ways outlined above. Note that the Inter-American system is constituted by two 'overlapping documents': the Declaration and the Convention. In simplistic terms, the Convention can be seen as an amplification of the Declaration, but it also creates the Commission and the Court, and so gives rise to mechanisms of enforcement that were lacking from the earlier document.

The Inter-American system also differs from the African system. One striking difference concerns the absence of a Court of Human Rights from the African system. Although the Protocol to establish a court was signed in June 1998, the court will not function until some point in the future.

A final point of clarification: it has been suggested that the Inter-American system is in fact a Latin American system; there is a certain 'dislocation' between the Latin American nations, and America and Canada. The latter make occasional appearances in the jurisprudence of the court, but its focus is essentially on the human rights problems of Latin American nations.

3.2 The American Convention on Human Rights

We now turn to consider the text of the American Convention; the Pact signed at San Jose, Costa Rica, 1969.

The Preamble to the American Convention outlines the values that inform the document. Although it is rooted in the politics of North and South America and the Caribbean, it is also in touch with the broader currents of thought represented by the Universal Declaration. The American Convention can thus be seen as a regionally specific articulation of principles that are seen as universal.

The Convention has to be seen as encouraging a general democratic ethos, based on ‘personal liberty’, ‘social justice’ and the ‘essential rights of man’. The rights of man are themselves founded 'upon the attributes of the human personality' -a bold statement of what could be seen as a form of a natural law philosophy of rights. Moreover, this philosophy justifies a legal argument for a Convention that reinforces or complements the protection that is provided by domestic law. Reading between the lines, we can perhaps find here a negotiation of the perennial problem of human rights: the claim to human rights is universal, but the systems that protect human rights are domestic and local.

Chapter 1

Part 1 addresses the obligations of states, and Chapter I begins by outlining general obligations. Article 1 states the first of these general principles: the obligation to respect rights. State parties must guarantee that 'all persons subject to their jurisdiction' are granted the 'free and full exercise' of the Convention's rights and freedoms without any form of discrimination. Article 2 elaborates the sense of this general duty, by placing an obligation on state parties to achieve a realisation of Convention rights through legislative or other means.

Chapter 11

Chapter II goes on to outline the civil and political rights guaranteed by the Convention. Article 3 is the right to juridical personality’; or the right to be recognised as ‘a person before the law’. We have seen in our analysis of other conventions the centrality of such a right: without recognition of juridical personality, an individual is a ‘non-person’ deprived of all legal protection. In this sense, human rights as a legal concept must be founded on a claim to the legal recognition of the individual.

Article 4 articulates the fundamental right to life. Life is seen to start from the ‘moment of conception’, and the influence of the Catholic Church is perhaps evident here. However, in keeping with other statements of the right to life, the death penalty is not explicitly abolished. Rather, for those nations that have not already abolished it, it can be imposed, within certain limited instances, by a competent court for serious crimes.

Article 5, the articulation of a right to human treatment may be peculiar to the American Convention, but the content of this right is not unique. Article 5 rests on the basic principle that everyone has ‘the right to have his physical, mental, and moral integrity respected’. This is linked to the

prohibition on torture and on 'cruel, inhuman, or degrading punishment or treatment'. Article 5 goes on to outline other due process safeguards: those deprived of their liberty should be 'treated with respect for the inherent dignity of the human person'. This general principle can be made more detailed:

- Paragraph (3) states that punishment must only be for a criminal offence.
- Paragraph (4) makes a distinction in the treatment of accused and convicted persons.
- Paragraph (5) says minors who are subject to criminal proceedings must be treated as such.

Articles 11-16 are the classic civil liberties. Article 11, the right to privacy, is founded on respect for a person's 'honor and dignity'. Article 12 states that all are to enjoy freedom of conscience and religion within the limits provided by the law; a similar form of words applies to Article 13: the right to 'freedom of thought and expression' is also limited by the law, and Article 14, the right of reply (essentially a right to respond to libel or slander) also limits freedom of expression. Article 15 is a statement of the right to 'peaceful assembly' and Article 16 guarantees the freedom of association. All these rights are similarly limited.

Article 17 departs from civil liberties to cover the rights of the family. The American Convention, like the others that we have studied, is committed to the family as 'the natural and fundamental group unit of society' and, as such 'entitled to protection by society and the state'. This overall right can be broken down into a catalogue of principles. Thus paragraph (2) is the 'right of men and women of marriageable age to marry and to raise a family' within the terms of domestic law, so far as they are not discriminatory, and as long as the marriage is consensual (paragraph 3). Paragraph 4 is a broad duty placed on state parties to 'ensure' the 'equality of rights and the adequate balancing of responsibilities of the spouses as to marriage, during marriage, and in the event of its dissolution'. This right is thus broad enough to cover marriage as well as divorce. Paragraph 5 applies a similar principle to the right of children: these shall be the same whether the child is born in or out of 'wedlock'.

Article 18, the right to a name, can be read as an elaboration of Article 3, and as linked to the right of the child in Article 19. These are rather briefly described as 'the right to the measures of protection required by his condition as a minor on the part of his family, society, and the state'. These 'identity' rights are completed with a 'right to nationality' at

Article 20

The next group of rights can perhaps be seen as those enjoyed by the citizen, and thus follow on from guarantees of basic issues such as name and nationality. Thus, **Article 21** is the right to own property within the limits established by law; **Article 22,** the right to freedom of movement and residence and **Article 23** the right to participate in government. If one accepts that these are the rights that the citizen enjoys, then the slight repetition of due process guarantees that occurs in **Articles 24 and 25** can perhaps be seen as a further elaboration of the essential status of the citizen in a rule of law state. Thus, the citizen enjoys, by **Article 24**, equal protection before the law, and by **Article 25**, the right to judicial protection. **Article 25** is based on the principle that:

- everyone has the right to simple and prompt recourse, or any other effective recourse, to a competent court or tribunal for protection against acts that violate his fundamental rights recognised by the constitution or laws of the state concerned or by this Convention, even though such violation may have been committed by persons acting in the course of their official duties.

Article 25 is thus more than the due process guarantees specified above; it is more of a right to action and to remedy.

Chapters 111 and IV

Chapter III of the Convention is a statement of economic, social and cultural rights. We will now examine some of the more salient Articles. **Article 23** is a broad statement that states must co- operate towards the progressive development of the rights stated in the Charter of the Organisation of American States. However, as Chapter IV, Article 27 specifies, derogations from certain Convention obligations may be made in times of 'war, public danger or other emergency'. The Articles that are excluded from this category are:

- Article 3 (right to juridical personality)
- Article 4 (right to life)
- Article 5 (right to humane treatment)
- Article 6 (freedom from slavery)
- Article 9 (freedom from ex *post facto* laws)
- Article 12 (freedom of conscience and religion)
- Article 17 (rights of the family)
- Article 18 (right to a name)
- Article 19 (rights of the child)
- Article 20 (right to nationality)

- Article 23 (right to participate in government), or of the judicial guarantees essential for the protection of such rights.

These Articles thus represent something of a fundamental stratum of human rights from which a state can never derogate.

Chapter V

Chapter V, which contains Article 32, is also unique to the American Convention, as it expressly details the relationship between rights and duties:

- Every person has responsibilities to his family, his community, and mankind.
- The rights of each person are limited by the rights of others, by the security of all, and by the just demands of the general welfare, in a democratic society.

Both these paragraphs are rather widely drawn. For instance, it is hard to know what an individual's 'duty' to 'mankind' might be in detail; further elucidation is provided to some extent by the second paragraph, but again, phrases such as 'the just demands of the general welfare' remain vague. This Article is perhaps best read as a general ideological or philosophical statement of the necessary limitation of the idea of rights: all rights are limited by the duties that one might owe to others. That this is the case is stressed by the specific limitations on the rights contained in Chapters II and III. Of course, in these instances, the limitations are to the specific rights listed in the relevant Articles. Article 25 can be read as a general, overall statement that applies to the Convention in its entirety.

Chapter VI, Part II

PART II of the Treaty sets out the means for the protection of the rights that we have been considering. Chapter VI describes the organs that are established by the Convention. Article 33 describes these as: (a) the Inter-American Commission on Human Rights and (b) the Inter-American Court *of* Human Rights.[2]

The composition and functions of the Commission are the subject of Chapter VII (see below). The Commission is composed of seven members **(Article 34)** who represent all the member countries of the OAS **(Article 35).** Members of the Commission, elected by the General Assembly of the Organisation, serve in their personal capacity **(Article 36).** The main function of the Commission is to promote 'respect for and defence of human rights' **(Article 41).** To this end, it has a variety of

functions and powers; most notably: to make recommendations to the governments of the member states; to prepare studies and reports; to request governments of member states to provide it with information on measures adopted to promote human rights; to take action on petitions presented to it subject to **Articles 44-51** (below) and to submit an annual report to the General Assembly of the OAS.

Section 3 deals with the competence of the Commission. Although Articles 44 and 45 describe two different enforcement mechanisms, we will deal with them together because there are certain common features. Article 44 states that any persons or NGOs in the territories of member states may lodge with the Commission 'petitions... containing denunciations or complaints of violation of this Convention by a State Party'. Article 45 sets out a different mechanism: a state party can also indicate that it 'recognises the competence of the Commission...to receive and examine communications in which a State Party alleges that another State Party has committed a violation' of the human rights detailed in the Convention.

Article 46 details common procedural requirements that relate to both **Articles 44 and 45**. There are requirements that:

- all remedies in domestic law have been pursued and exhausted
- the petition or communication is made to the Commission within six months of the date from which the victim of the alleged violation was 'notified of the final judgment'
- the matter is not being dealt with by any other international procedure
- in applications under Article 44, the petition is not anonymous and contains certain details about the individual petitioner.

However, the first two requirements shall not be applicable if:

- the domestic law of the relevant state does not have due process provisions for the protection of the rights that have been allegedly breached
- or the alleged victim of a rights violation has been denied access to domestic remedies or prevented from exhausting all domestic remedies
- or there has been 'an unwarranted delay' in the final judgment.

Section 4, **Article 48,** details the procedure the Commission must follow when it considers a petition or communication. If the petition or communication is admissible, the Commission must request information about the alleged breach from the government concerned. Once the information has been received, the Commission must determine whether

or not a case of violation of right(s) has been established. If a violation is established, then the Commission must pursue further investigations to establish the facts; this could include visiting the territory of the state party concerned and the Commission can request any necessary further information or evidence from the state party. After gathering the evidence, the Commission must sponsor a 'friendly settlement' of the matter. In 'urgent' or 'serious' cases, the Commission can move straight to an investigation. **Article 50** deals with the situation if a friendly settlement is not reached: the Commission shall draw up a report (which may contain dissenting opinions from Commission members) containing such recommendations as it thinks necessary. If, after three months from the date of the receipt of the report by the state party, the matter has either not been settled, or not submitted to the Court, the Commission can determine its own conclusions and recommendations by majority vote (Article 51). If the state has not followed the recommendations of the Commission within the period mandated, then the Commission can decide by a majority vote to publish the report.

Article 41 states that the main function of the Commission is to promote 'respect for and defence of human rights'. Thus, the Commission is empowered to make recommendations to the governments of state parties; to prepare studies and reports; to request governments of member states to provide information on measures adopted to promote human rights and to submit an annual report to the General Assembly of the OAS. **Article 44** provides that any persons or NGOs in the territories of member states may lodge petitions with the Commission that allege violations of the Convention. **Article 45** allows one state party to allege to the Commission that another state party is in breach of the Convention. **Articles 46-50** deal with procedural requirements that apply to these enforcement mechanisms.

Chapter VII

Chapter VII describes the **composition and jurisdiction** of the Inter-American Court of Human Rights. We will now examine some of the more central Articles. **Article 52** states that the Court consists of a panel of seven judges (but the court is quorate with five (**Article 56**)), who serve in their personal capacity. They must be authorities in the field of human rights, and possess the requisite qualifications in the nations where they are nationals. To avoid disproportionate representation of states, no nationals of the same state (52 (2)). However, if the court is hearing a case from the same nation as a judge, the judge retains his right to hear the case (55(1)). There are also rules in this Article that relate to the appointment of 'ad hoc' judges should the nationality of the judge be an issue.

The Court is empowered to draw up its own constitutional statute, and determine its own rules of procedure **(Article** 60); but see Article 66, below.

The Statute of the Court was approved in 1980. Later, in 2003, definitive rules of procedure came into effect. These currently apply to cases being brought to the Court.

Article 57 states that the Commission appears in all cases before the Court. The sense of this Article is clarified in Section 2. Article 61 specifies that only state parties and the Commission have 'the right to submit a case to the Court'. **Articles 48 and 50,** described above, also relate to the procedures for putting a case to the Court.

Article 62 is important as it describes how the rulings of the Court are to be binding on state parties. For rulings to be binding, a state party must declare that it recognises the jurisdiction of the Court in all matters relating to the Convention. Such a declaration can be either 'unconditional', on the condition of 'reciprocity', or for a limited period, or for limited cases (62(2)). **Article 63** moves on to the remedies that the Court can provide. If the Court finds that there is a violation of a right, it can rule that 'the injured party be ensured the enjoyment of his right or freedom that was violated' 63(1), and that this could include compensation. Furthermore, 63(2) specifies that:

'In cases of extreme gravity and urgency, and when necessary to avoid irreparable damage to persons, the Court shall adopt such provisional measures as it deems pertinent in matters it has under consideration. With respect to a case not yet submitted to the Court, it may act at the request of the Commission.'

These Articles have to be read alongside **Article 68:** state parties undertake to comply with the judgments of the Court -and this extends to payments of compensation that are to be governed by the relevant domestic laws relating to judgments against the state.

Article 64 concerns the interpretative authority of the court. The member states of the OAS can consult the Court for authoritative rulings on the interpretation of the Convention, or indeed on other treaties concerning human rights in American states. The organs that make up the OAS have a similar right. The Procedure of the Court is also mandated by the Convention. Section 3, **Article 66** provides that the Court itself shall give reasons for its judgments; and that if a judgment is not unanimous, then a dissenting judge is entitled to have his dissent appended to the judgment. Under **Article 67,** judgments of the Court are final, and cannot be appealed.

Summary

In this section we have been examining the American Convention on Human Rights. Chapter I addresses the general obligations of states; chapter II deals with civil and political rights; chapters III and *N* elaborate social and economic rights; chapter V articulates the relationship between rights and duties; chapter VI outlines the powers of the organs that are established by the Convention: the Commission and the Court and chapter VII further describes the composition and jurisdiction of the Court.

3.3 The Jurisprudence of the Inter-American Court of Human Rights

In this section we will consider three cases decided by the American Court of Human Rights: *Rodriguez, Garbi and Corrales,* and *Cruz.*

The jurisprudence of the Court is expanding, and this study of these three cases is meant only as a rather limited example of the Court's work. As detailed above, the Court also has the power to provide advisory opinions, and, although we will make reference to one of these opinions, they will not concern us in a general sense. Our primary focus will be what *Rodriguez, Garbi and Corrales* and *Cruz* tell us about the Court's response to extreme violations of human rights.

This can be connected to the ‘second obligation’ of state parties. State parties are obligated to ‘ensure’ the full exercise of Convention rights to all in their jurisdiction. The implication of this principle is that the agencies of government must themselves guarantee human rights. The ‘consequence of this obligation’ is that states must do everything in their power to prevent violations of rights and, if a violation is proved, to both restore the right and provide compensation.

Article 1(1) is thus more 'direct' than Article 2. Article 2 obligates a state party to take legislative or other measures to make national law coherent with the Convention. Article 1(1), on the other hand, makes any exercise of power by a public body that violates a Convention right illegal. Furthermore, this would be the case whether or not the body has breached domestic law, as it is a principle of international law that a state assumes responsibility for the acts and omissions of its agents. Furthermore, the state itself has a legal duty to investigate human rights abuses to the best of its available resources, and to put right any breaches:

- In the instant case, the evidence shows a complete inability of the procedures of the State of Honduras, which were theoretically

> adequate, to carry out an investigation into the disappearance of Manfredo Velasquez, and of the fulfillment of its duties to pay compensation and punish those responsible, as set out in Article 1(1) of the Convention.

This is a powerful vindication of human rights.

SELF ASSESSMENT EXERCISE 1

What does the Rodriguez case tell us about disappearances as a human rights issue?

The *Garbi and Corrales* and the *Cruz* cases raise similar points. We will briefly outline the facts before turning to consider some aspects of the judgment in the former.

3.3.1 The Dodlinez Cruz Case 1989

In submitting the case, the Commission requested that the Court determines whether the State in question-Honduras-had violated Articles 4 (right to life), 5 (right to humane treatment) and 7 (right to personal liberty) of the Convention. In addition, the Commission asked the Court to rule that 'the consequences of the situation that constituted the breach of such right or freedom be remedied and that fair compensation be paid to the injured party or parties.'

Saul Godinez Cruz was a schoolteacher who disappeared on 22 July 1982. An eyewitness stated that a person resembling Cruz was arrested by a man in military uniform accompanied by two men in civilian dress. A petition was filed with the Commission, who after unsuccessful attempts to obtain information from the Honduran government, applied Article 42 of its Regulations and presumed 'as true the allegations contained in the communication of October 9, 1982 concerning the detention and possible disappearance of Saul Godinez in the Republic of Honduras'. The Commission pointed out to the Government that 'such acts are most serious violations of the right to life (Art. 4) and the right of personal liberty (Art. 7) of the American Convention' (Resolution 32/83 of October 4,1983). In turn, the Honduran government argued that a writ of *habeus corpus* had been refused because it was not served correctly, and another was still pending. The Commission decided to continue with the case, and the Honduran government appointed an investigatory committee. The report of the latter stated that there was no evidence that Cruz had been 'disappeared', and the Commission referred the case to the Court.

3.3.2 The Fairen Garbi and Solis Corrales Case

Francisco Fairen Garbi and Yolanda Solis Corrales were Costa Rican nationals who disappeared in December 1981, while traveling through-Honduras to Mexico. The Commission submitted the case to the Court to determine whether the Honduran government had breached Articles 4 (right to life), 5 (right to humane treatment) and 7 (right to personal liberty) of the Convention.

We can consider some of the rulings that the Court made in relation to the argument made by the Honduran government in both cases: that all the domestic remedies that were available in this case had not been exhausted. In reviewing this claim, the Court elaborated the jurisprudence of remedies under the Convention for breach of Human Rights. The Court pointed out that 'the rule of prior exhaustion of domestic remedies' means that a state must decide a case under its own domestic law before international proceedings become possible. A state is, of course, under a burden to provide legal remedies under Article 25, as the Court had itself decided in a prior ruling in the Fairen Garbi and Solis Corrales Case (Preliminary Objections, paragraph 90). The Honduran government was arguing that the writ of *habeus corpus* was one domestic remedy that would apply to the facts of the case. The Court argued, however, that such a remedy was not appropriate because the writ would have to specify the place of detention, and this was obviously not possible when people were being held 'clandestinely... by State officials'. Thus: 'Procedural requirements can make the remedy of *habeas corpus* ineffective: if it is powerless to compel the authorities...' to act. Moreover, if there is evidence that a particular practice is tolerated by government, then this would also render domestic remedies ineffective. In these instances the exceptions to Article 46(2) (see above) would apply, and there would be no obligation on the complainant to exhaust all domestic remedies. The case highlights the fact that a determined state and a pliant or intimidated judiciary can render the idea of the rule of law meaningless:

- According to that evidence, from 1981 to 1984 more than one hundred persons were illegally detained, many of whom never reappeared, and, in general, the legal remedies which the Government claimed were available to the victims were ineffective.

In *Garbi and Corrales* the Court also went on to consider other important procedural points. The Commission were arguing that the government both tolerated a policy of disappearances and suppressed evidence of those disappearances. If it was possible to show that such practices existed, then the disappearance of any given individual could be proved through circumstantial evidence or by inference. If this

argument was not acceptable, it would be impossiple to show that either Garbi or Corrales had been disappeared. The Court accepted this argument, and went on to clarify the standard of proof required, because no guidance was provided on this issue by either the Convention, the Statute of the Court nor the Court's own rules of procedure. It was thus necessary to look at international jurisprudence more broadly (130).

SELF ASSESSMENT EXERCISE 2

What do the cases Cruz and Garbi and Corrales tell us about a state's responsibility to provide effective remedies for human rights?

The Commission cites a report issued in 1981,6 which paints a stark picture of the human rights situation in the country:

- the general policy in human rights is organized around and based upon an analysis of the Colombian socio-political situation in the last forty years. Colombia's economic, political, social and moral structures are collapsing and the exercise of fundamental human rights is suffering as a result. In spite of the State's efforts to restore a just democracy, obstacles remain that the Government does not have the means to overcome. After four decades of progress and change, social inequalities and a concentration of wealth are still the country's most salient features. Despite its vigorous economy and cultural advancement, Colombia continues to be a country of alarming contrasts: there are those who are prospering in the tremendous economic boom, but they are far outnumbered by the many who still live in dire poverty.

The report shows that a government committed to the rule of law can be paralysed by strong oppositional groups who do not share such values. It is profoundly difficult to create a human rights culture in such a situation. Negotiations with various armed groups, and their attempted inclusion into legitimate politics made some progress towards social reconstruction. New institutions were also created. The Office of the Presidential Advisor for Human Rights was founded in 1987, and attempts made to bring the military under control through the appointment of a civilian Prosecutor for the Military and Police Forces. An Office of the Attorney Delegate for Human Rights was also created and given the remit to investigate cases of genocide, disappearances and torture. Despite these reforms, violence remained endemic. Three presidential candidates were assassinated between 1989 and 1990, and the Attorney General, Carlos Mauro Hoyos, was murdered in February 1988. The drugs cartels continued to try and force the government's hand and to prevent the suppression of the narcotics trade; a brand of

violence known as 'narcoterrorism' that continued unabated throughout the 1990s.

The laws establish, inter *alia,* that a cessation of procedure *(cesacion* de *procedimiento),* a resolution of preclusion of the investigation *(resolucion* de *preclusion* de *la instruccion),* or a resolution of dismissal *(resolucion inhibitoria)* may be granted on behalf of those who confess and have been or were accused of or tried for political crimes, and have not been convicted by a firm judgment, provided that they choose to participate in an individual or collective demobilisation. According *to* these provisions, those who have benefited from a pardon or with respect to whom a cessation of procedure has been ordered may not be tried or prosecuted for the same facts giving rise to the granting of benefits.

An upsurge in violence in 2002 brought an end to these negotiations; and critics have also argued that those already demobilised have not been successfully reintegrated into society.

3.3.3 Social Reconstruction After Armed Conflict: The Role of the Court and the Commission

Considering the situation in Columbia reinforces the sense of the magnitude of the task faced by the Inter-American system in creating and sustaining cultures of human rights in the region. In this last part of the chapter, we will look at the way that the Court and the Commission have collaborated in an attempt to develop principles that relate to social reconstruction and an elaboration of rights principles that can guide societies from conflict to peace.

The Court and the Commission have been active in developing a jurisprudence that relates to demobilisation and the disarmament of warring factions; and in doing so have applied an international jurisprudence to the situation in Latin America. The guiding themes in the creation of principles in this area have been balancing the re-creation of a functioning and peaceful civil society, with a need to determine the truth about the human rights violations and atrocities that took place in the conflict, and to provide reparations to the victims. The legal norms that inform this process are drawn from the Charter of the OAS and the American Declaration of the Rights and Duties of Man, and, in those instances where states are signatories, to the American Convention.

In all cases, these Treaties must be interpreted from the perspectives of the principles that can be found to govern international legal obligations in general and, in particular, human rights obligations. It has to be

stressed that these obligations are applicable to armed conflict, and so cannot be obviated by arguments that exceptional situations mean that human rights obligations are suspended. The human rights obligations entered into bind states, as international actors, but also relate to the persons under the jurisdictions of states; this is, of course, the peculiarity of international human rights law. As far as the inter- American system is concerned, these obligations are linked to the supervisory roles of the Commission and the Court. Ultimately the 'normative framework' also includes the other international treaties which state parties are signatories to, as well as customary law. The foundational principles derived from these sources are:

- truth, justice, and reparation as fundamental...in rebuilding a culture of peace, tolerance, respect for the law, and rejection of impunity.

The work of the Court has been predicated on the need to develop more precise rules that emanate from these grounding ideas. They have been active in a number of inter-related areas.

One of the most pressing problems in social reconstruction has been the need for the survivors of violence to know the truth about the crimes they suffered; and, for society at large to know the truth about those who died or were murdered during armed conflict. In this sense, it is possible to speak of a right to know the truth, and to compel those who were involved to reveal the truth about their activities. The Court has used Article 25 of the American Convention to provide legal remedies in this area. The starting point is that the right to truth should not be 'restricted through legislative or other measures'. [Columbia Report, 2004]. This means that any amnesty laws should not serve in such a way to allow the past, or the actions of actors, to be concealed. Moreover, amnesty laws should not allow victims to be deprived of remedies for any loss that they may have suffered. This, in turn, feeds into different policy initiatives. Article 25 compels states to take seriously the right to seek and receive information, to set up investigative commissions and to enable the judiciary to undertake investigations into alleged crimes and rights violations.

Furthermore, Articles 8 and 25 of the Convention require that the next of kin of a victim can obtain from the state both the relevant facts and the prosecution of those who have committed any crimes against the deceased. This is consistent with a ruling of the Human Rights Committee of the United Nations, which determined that states are under a duty to legally establish the precise details of human rights violations, as part of the political processes of social reconstruction and the granting of reparations to the victims. This has been further

generalised by both the Commission and the Court -to a right for society as a whole (19) to know the truth about the 'aberrant crimes' of the past:

- Society as a whole has the right to learn of the conduct of those who have been involved in committing serious violations of human rights or international humanitarian law, especially in the case of mass or systematic violations; to understand the objective and subjective elements that helped create the conditions and circumstances in which atrocious conduct was perpetrated, and to identify the legal and factual factors that gave rise to the appearance and persistence of impunity; to have a basis for determining whether the state mechanisms served as a context for punishable conduct; to identify the victims and the groups they belong to as well as those who have participated in acts victimising others; and to understand the impact of impunity.

One can appreciate that this linking of the individual right to know with a right for society at large to be told the truth is part of a much wider, complex and difficult process where the wounds of a society have to be healed through the law. Human rights are thus part of a political transformation. But this process is also a symbolic 'cleansing' of the law. In those societies that have experienced sustained civil conflict, the law itself has been compromised. As we saw above, one of the problems that the Court had to address in Columbia was the way in which the law was either abused or ineffective. The right to know can be linked to the need to effectively 'start again'; to show that an impartial and neutral rule of law society is possible. In this sense the state becomes universal, able to speak for all, rather than a partisan in an unspoken civil war.

So, certain crimes must not be left unpunished as part of an amnesty process. Amongst these crimes are: political assassinations, disappearances, rape, the displacement or forced resettlement of groups of people, torture, inhumane acts, military attacks on civilian populations and the use of child soldiers. In relation to these ‘imprescriptable’ offences, state parties are under a duty to investigate and punish those responsible. In terms of the Inter- American system, the relevant Articles are XVIII and XXIV of the American Declaration and Articles 1(1), 2, 8, 25 of the American Convention. These Articles apply whether the perpetrator is a state agent or a private party; moreover, the state in these circumstances bears the burden of bringing the prosecutions, and it, rather than the victims or their representatives, must both initiate the process and ensure that it is carried through. There are also non-derogable obligations under the Geneva Conventions that mandate the prosecution of war crimes. These correspond with Article 27 and 29 of the American Convention. [22]

From this perspective, the fundamental principle that underlies amnesty is that the crimes that can be a subject to amnesty are rather limited; restricted to 'political crimes or common crimes linked to political crimes' that are not serious violations of human rights standards. In the *Barrios Altos* Case, the Court established
that:

- all amnesty provisions, provisions on prescription and the establishment of measures designed to eliminate responsibility are inadmissible, because they are intended to prevent the investigation and punishment of those responsible for serious human rights violations such as torture, extrajudicial, summary or arbitrary execution and forced disappearance, all of them prohibited because they violate non-derogable rights recognised by international human rights law.

The other major principle that underlies the amnesty process is the victim's right to reparations for the harm caused. The reason underlying this principle is twofold: it stresses that citizens have legal status, and thus must be recompensed for harm suffered, and is an attempt to rebuild trust in the legal system (26). The remedies available must be diverse; they could take the form of compensation or rehabilitation, at least as far as those whose status has suffered; but, must in all cases be ‘proportionate’ to the offences committed. Of course in instances of kidnapping or unlawful detention, the person's liberty should immediately be restored; people who have lost land or property may have a right to restitution; those who are the next of kin of victims of unlawful violence may have the right to compensation. These principles are also coherent with those mentioned earlier; so that society as a whole has a right to 'public recognition of the events and the responsibilities; recovery of the memory of the victims; and teaching the historical truth' (32). The process must also include the disbanding of armed groups and factions, and the reintegration of combatants into civil society.

4.0 CONCLUSION

The focus of this unit has been the Inter-American system of human rights. We have looked in detail at the American Convention, and the powers and functions of the Commission and the Court. We have seen that both these bodies are developing a jurisprudence that engages with the particular political problems of the region: the wide-scale abuse of human rights. In examining the reports of the Commission on Columbia, we have seen that human rights rest on a functioning rule of law society. Achieving such a society demands much more than1egal principles; what is necessary is a cultural commitment to democracy. The Court and

the Commission are attempting to encourage the growth of democratic government in the region, and to move away from the legacy of armed conflict and organised crime that has been the traumatic experience of most Latin American nations.

5.0 SUMMARY

Although the beginnings of the Inter-American system can be traced back to the mid-1800s, the foundations of the system can be found in the Pan American Union (1889-1990), and the Charter of the Organization of American States (1948). This established the OAS as a regional agency within the UN. A second important foundational document was the American Declaration of the Rights and Duties of Man (1948). We have looked already in some detail at the 'new' powers created by the Convention, and focused on the role of the Commission. It is also important to understand the distinctive features of the Inter-American system in comparison with the other regional systems that this manual is concerned with: the African and the European.

6.0 TUTOR-MARKED ASSIGNMENT

What does the Rodriquez case tell us about disappearance as a Human rights issue?

7.0 REFERENCES/FURTHER READINGS

Harris D: Regional Protection of Human Rights: The Inter-American Achievement (Oxford: Clarndon Press. (1998) p2.

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UNIT 3 HUMAN AND PEOPLE'S RIGHTS IN THE AFRICAN SYSTEM

CONTENTS

1.0 INTRODUCTION

In this section we will trace the transformation of the Organisation of African Unity into the African Union, and examine the human rights aspects of both the old and the new bodies. Established in July 2001, the African Union is the regional organisation for Africa.

The African Human Rights system rests on four treaties:

- The Convention on Specific Aspects of the Refugee Problem in Africa (came into force in 1974)
- The African Charter on Human and Peoples' Rights (1986)
- The African Charter on the Rights and Welfare of the Child (1999)
- The Protocol on the Establishment of an African Court on Human and Peoples' Rights (the Protocol came into force in January 2004, but the Court has yet to be established).

A Protocol on the Rights of Women is currently under consideration. The Protocol comes out of a concern that, despite the ratification of the

African Charter on Human and Peoples' Rights and other international human rights instruments adopted by the majority of state parties, women in Africa still suffer from discrimination and marginalisation.

Two of these treaties have enforcement mechanisms. The African Commission on Human and Peoples' Rights was established by the African Charter on Human and Peoples' Rights.

2.0 OBJECTIVES

By the end of this unit and the relevant readings, you should be able to:

- describe the role of the Organisation of African Unity and the African Union in protecting human rights
- outline the basic provisions of the African .Charter on Human and Peoples' Rights (1986)
- outline the basic provisions of the Protocol on the Rights of Women
- outline the basic provisions of the African Charter on the Rights and Welfare of the Child (1999)
- outline the basic provision of the Convention on Specific Aspects of the Refugee problem in Africa (1974).

3.0 MAIN CONTENT

3.1 The Organisation of African Unity (OAU)

The Organisation of African Unity (OAU) was established on 25 May 1963 in Addis Ababa, Ethiopia. The ganisation's main objective was to bring to an end the control of Africa by those powers that had established colonial and dependent territories in the continent, and to end apartheid systems of government. Human rights were not, as such, the Organisation's main focus. Indeed, although the OAU was active in the anti-colonial struggle, it was perceived that the Organisation was ignoring human rights abuses within African states that had achieved independence. Responding to these criticisms, the Organisation took action. Work on drafting a Charter began in 1979, and it came into force in October 1986.

We will look in detail at the provisions of the Charter itself below (section 15.1.2). It is necessary, first of all, to examine the institutions created by the Charter.

3.1.1 The Commission

Article 30 creates ‘an African Commission on Human and Peoples’ Rights’. This is composed of 11 members serving in their personal and independent capacities and not as representatives of their countries. Its main functions, as described in Article 45, are the promotion and protection of human and peoples’ rights in Africa and the interpretation of the Charter.

The Commission’s promotion of the Charter is outlined in Article 45(1). To this end, the Commission has the power to:

- collect documents, undertake studies and researches on African problems in the field of human and peoples’ rights, organise seminars, symposia and conferences, disseminate information, encourage national and local institutions concerned with human and peoples’ rights and, should the case arise, give its views or make recommendations to governments.

The Commission’s activities in these areas have allowed it to work with non-governmental organisations (NGOs) and pressure groups to build up an archive that can be used for lobbying and educational purposes. The role played by NGOs in the work of the Commission was recognised, and intensified, in 1988 when observer status was granted to certain NGOs. The Commission has also appointed Special Rapporteurs whose role is to report on '\various human rights areas.

The tasks of the Commission are further outlined in Article 45 (1)(b), The Commission is obliged to ‘formulate and lay down principles and rules aimed at solving legal problems relating to human and peoples’ rights and fundamental problems upon which African governments may base their legislation’. This allows the Commission to co-operate with other institutions in the development of a body of African human rights law.

How does the Commission ensure the protection of rights as it is charged under Article 45(2) and how can it ensure that the state does not violate peoples' rights? The Charter details a ‘communication procedure’ which is a system by which an individual, NGO or group of individuals can petition the Commission about human rights abuses. A State Party can also petition the Commission if it believes that another State Party has violated the Charter. If the Communication meets with the conditions of Article 56 of the Charter, the Commission formally accepts it for consideration:

The Commission can proceed to consider a communication only after it has ascertained that all local remedies have been exhausted, unless it is obvious to the Commission that the procedure of achieving these remedies would be unduly prolonged. The Commission may, if it deems it necessary, ask States to provide it with all the relevant information; and when it is considering the matter, it may invite States to make oral or written presentations. The primary goal of the Commission in either procedure is to secure a friendly settlement.

Commission then informs the state that has been accused of rights violations, and invites it to submit a response. The mission will then determine whether or not there has been a violation of the Charter and make recommendations to the state to the OAU on what remedies are required. In emergency situations -when the life of the victim is in imminent danger, for example -the Commission can request that the state delays any ion and awaits the Commission's decision.

The Commission's final decisions are called **recommendations.**

The mandate of the Commission is only quasi-judicial and, as such, its final recommendations are not in themselves legally binding on the states concerned.

The Commission has not laid down procedures to supervise the implementation of its recommendations. However, the Secretariat the Commission does send letters of reminder to states that have been found to have violated the provisions of the Charter, calling upon them to honour their obligations under Article 1 of the Charter'…to recognise the rights, duties and freedoms enshrined in this Charter and ...adopt legislative and other measures to give effect to them'. The first letters are sent immediately after the adoption of the Commission's Annual Activity Report by the OAU Assembly of Heads of State and Government and subsequent letters are sent as often as is necessary.

There is no mechanism that can compel states to abide by these recommendations. Much depends on the goodwill of the states.

The Commission can also send missions to states to investigate alleged rights abuses, and to make recommendations to the state in question. Under Article 62, the Commission considers reports that states are required to submit every two years on the legislative measures taken to further and preserve the rights of the Charter. 'Counter reports' can be submitted by individuals and groups and specific questions can be asked of state representatives.

The Commission studies these reports and engages at the session in dialogue with representatives from the states, and makes recommendations, if necessary.

The Charter

The African Charter on Human and Peoples' Rights builds on the objectives of the Charter of the Organisation of African Unity. It states as its foundational principles: 'freedom, equality, justice and dignity'. These are the principles that underlie the eradication of 'all forms of colonialism from Africa', co-ordinate 'co-operation and efforts to achieve a better life for the peoples of Africa' and 'promote international co-operation'. The Charter of the United Nations and the Universal Declaration of Human Rights remain constant points of reference. The essentially African nature of this articulation of human rights is then stressed.

The Charter is an elaboration of the 'historical tradition and the values of African civilisation'; a set of concepts which in turn are linked to the 'concept of human and peoples' rights'. Peoples' rights becomes a fundamental concept that allows human rights to be posited:

- ...fundamental human rights stem from the attributes of human beings which justifies their national and international protection and on the other hand that the reality and respect of peoples' rights should necessarily guarantee human rights [sic].

The other essential aspect of the African notion of human rights is the emphasis on **duty:** 'the enjoyment of rights and freedoms also implies the performance of duties on the part of everyone'. This claim to an African tradition of human rights has to be related to the political circumstances of the Charter. There are two related concerns. The Charter stresses the right to development, and the fact that civil and political rights cannot be disassociated from economic, social and cultural rights. The Charter is thus essential to the liberation struggle:

- Conscious of their duty to achieve the total liberation of Africa, the peoples of which are still struggling for their dignity and genuine independence, and undertaking to eliminate colonialism, neo-colonialism, apartheid, Zionism and to dismantle aggressive foreign military bases and all forms of discrimination, particularly those based on race, ethnic group, colour, sex, language, religion or political opinions.

At the time of the drafting of the Charter in 1979, although some African nations had achieved their independence, many others were still governed by colonial powers or were ruled by apartheid regimes.

We examine the distinctive features of the Charter in section 15.2.

3.1.2 From the OAU to the AU

In 1999, the OAU called for the establishment of an African Union (AU). This new body would have different and broader objectives. The Constitutive Act made provisions for a transition from the old to the new body, and for the replacement of the Charter of the OAU by the Act itself. The Objectives of the Union are to:

- 'achieve greater unity and solidarity between African countries and the peoples of Africa'
- preserve the sovereignty of its member states
- work towards the 'political and socio-economic integration of the continent'
- promote common positions on matters of importance
- sponsor international co-operation, peace, security and stability
- promote democracy and good governance
- integrate the continent into the Global Economy
- promote sustainable development
- raise living standards in the continent
- promote research and public health.

The Constitutive Act also has an explicit concern with human rights: the AU is tasked with the promotion and protection of human rights 'in accordance with the African Charter on Human and Peoples' Rights and other relevant human rights instruments'.

These objectives rest on certain principles.

One group of principles stresses the need to preserve the sovereign equality of nations and to preserve the borders achieved at independence, although the achievement of a 'common defence policy' may mean some negotiation of sovereignty. A second group of principles concerns peaceful resolution of disputes, and 'prohibition of the use of force or threat to use force among Member States of the Union'.

These principles extend to cover the right to request intervention from the Union in order to 'restore peace and security'.

The principles are also careful to further qualify sovereignty with an important exception: 'the right of the Union to intervene in a Member State pursuant to a decision of the Assembly in respect of grave circumstances, namely: war crimes, genocide and crimes against humanity'. There is also a group of principles that elaborate the concern with rights and good governance:

1) promotion of gender equality .
2) respect for democratic principles, human rights, the rule of law and good governance
3) promotion of social justice to ensure balanced economic development
4) respect for the sanctity of human life, condemnation and rejection of impunity and political assassination, acts of terrorism and subversive activities
5) condemnation and rejection of unconstitutional changes of governments.

The African Union has to be seen in the context of the New Partnership for Africa's Development (NEPAD). NEPAD grew out of an OAU initiative to develop a plan for the social and economic development of the continent; in particular, to tackle escalating poverty levels, underdevelopment and the marginalisation of Africa in the world economy. Part of NEPAD's broad remit is a concern with good governance and human rights that builds on the principles of the Constitutive Act:

- The coming into force of the Constitutive Act of the AU provides a timely opportunity to focus on what needs to happen institutionally and at a policy level to galvanise integration, with particular regard to the promotion and protection of human rights. The Constitutive Act of the AU appears to provide for a stronger and more transparent approach to human rights, compared to the OAU where the principle of non-interference in internal affairs seemed sacrosanct. The Act includes all of the objectives and principles of the OAU, but further provides for the promotion of democratic principles and institutions, popular participation and good governance, the promotion and protection of human and peoples' rights in accordance with the ACHPR and other relevant instruments Particularly importantly, the Constitutive Act provides for the imposition of sanctions on members failing to comply with the decisions and policies of the AU, potentially providing for a more stringent human rights enforcement mechanism. ...The existence of the African Court of Justice may also help to consolidate this. Governments that have come to power through unconstitutional means can be suspended and prohibited from participating in the activities of the Union. Although

it is nonetheless debatable how far these provisions will be utilised, the recent decision of the Central Organ to suspend participation rights of the Central African Republic.. .as a result of the *coup d'etat* in March 2003 offers some hope for its implementation.

SELF ASSESSMENT EXERCISE 1

1. What is the nature of the African Union's concern with human rights? Does the AU offer any human rights advantages over the OAU?
2. Prepare a short spoken presentation (one minute) on the changes which have occurred in the human rights field as a result of the change from the OAU to the AU.

Summary

The OAU (1963) has its roots in the struggle against colonialism. Human Rights were not, at first, one of its priorities. However, the creation of the African Charter of Human and Peoples' Rights in 1986 made human rights far more central to the work of the Union. Like the American Declaration, or the European Convention, the African Charter can be seen as both part of the general tradition of human rights, and as reflecting specific national and international cultures. For instance, the African Charter contains more of a stress on duties and peoples' rights than other international documents; and also reflects the struggle against colonialism. In 1999, the OAU became the AU. This change reflects a re-focusing of the objectives of the organisation towards good governance and regional economic co-operation.

3.2 The African Charter on Human and People's Rights (ACHPR)

In this section, we will overview the rights that the ACHPR provides, and then turn to look in detail at the distinctive features of the Charter.

The main Articles of the Charter provide as follows:

Article 2: the right not to be discriminated against on the grounds of 'race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or other status'.
Article 3: equality before the law.
Article 4: right to life and integrity of the person.
Article 5: the right to respect and dignity. This Article includes a prohibition on slavery, 'torture, cruel, inhuman or degrading punishment and treatment'.

Article 6: the right to liberty and to the security of the person.
Article 7: the right to have [his] case heard. This Article contains numerous due process guarantees.
Article 8 guarantees 'freedom of conscience, the profession and free practice of religion'.
Article 9: the right to receive and disseminate information.
Article 10: the right to free association.
Article 11: the right to assemble freely.
Article 12: the right to freedom of movement and residence within the borders of the state.
Article 13: the right to participate freely in government.
Article 14 guarantees the right to property.
Article 15 gives individuals the right to 'work under equitable and satisfactory conditions' to 'receive equal *pay* for equal work'.
Article 16: the right to enjoy the best attainable state of physical and mental health.
Article 17: the right to education. Article17 (3) outlaws 'discrimination against women' and also makes it a duty of the state to 'ensure the protection of the rights of the woman and the child as stipulated in international declarations and conventions'.
Article 18 declares that the 'family shall be the natural unit and basis of society' and places a duty on the state 'to assist the family'.

We will now turn to the distinctive features of the Charter: the concept of peoples' rights and the concept of duties.

3.2.1 People's Rights

We will examine Articles 19-24.

Article 19

- All peoples shall be equal; they shall enjoy the same respect and shall have the same rights.

- Nothing shall justify the domination of a people by another.
- Article 19 reflects the anti-colonial inspiration of the Charter. It specifically relates the equality principle to the problem of domination.

Article 20

1. All peoples shall have the right to existence. They shall have the unquestionable and inalienable right to self-determination. They shall freely determine their political status and shall pursue their economic and social development according to the policy they have freely chosen.
2. Colonised or oppressed peoples shall have the right to free themselves from the bonds of domination by resorting to any means recognised by the international community.
3. All peoples shall have the right to the assistance of the state parties to the present Charter in their liberation struggle against foreign domination, be it political, economic or cultural.

It is clear that **Article 20** builds on **Article 19.** Whereas Article 19 elaborated a principle of equality, Article 20 articulates a right to existence that is explicitly related to the right to self- determination. This is the right to determine 'political status', and again refers to the struggle against imposed governments. The principle of self-determination is linked to the right to engage in a political struggle against foreign domination, and the associated right to aid in the liberation struggle.

Article 21

1. All peoples shall freely dispose of their wealth and natural resources. This right shall be exercised in the exclusive interest of the people. In no case shall a people be deprived of it.
2. In case of spoliation the dispossessed people shall have the right to the lawful recovery of its property as well as to an adequate compensation.
3. The free disposal of wealth and natural resources shall be exercised without prejudice to the obligation of promoting international economic co-operation based on mutual respect, equitable exchange and the principles of international law.
4. States parties to the present Charter shall individually and collectively exercise the right to free disposal of their wealth and natural resources with a view to strengthening African unity and solidarity.
5. States parties to the present Charter shall undertake to eliminate all forms of foreign economic exploitation particularly that practiced by international monopolies so as to enable their peoples to fully benefit from the advantages derived from their national resources.

Article 21 can be seen as an elaboration of Article 20 in that it states one of the consequences of self-determination: the claim over a people's ownership of wealth and resources. On a practical level, this Article would mean that a nation could claim ownership of resources within its

territorial boundaries, and oversee their exploitation in the interests of the nation as a whole.

The Article would be too limited if it referred to a nation's ownership of resources. Certain territories, still at the time under colonial government, could not be considered nations as such. The Article was consequently broadly framed.

Note the communitarian underpinnings of this Article. Ask yourself, r« to what extent is it consistent with an individual right to property?

Article 22

1. All peoples shall have the right to their economic, social and cultural development with due regard to their freedom and identity and in the equal enjoyment of the common heritage of mankind.
2. States shall have the duty, individually or collectively, to ensure the, exercise of the right to development.

Read in the context of Article **21,** Article 22 links ownership of resources to a right to development. This right could be seen as an element of the anti-colonial struggle. One aspect of colonialism was the under-development of colonial territories, and the linking of their economies to those of the colonial powers. Once nations had successfully achieved their independence, it was necessary to develop economic resources and capacity. The right to development gives a legal and political form to this aspiration.

Article 23

1. All peoples shall have the right to national and international peace and security. The principles of solidarity and friendly relations implicitly affirmed by the Charter of the United Nations and reaffirmed by that of the organisation of African Unity shall govern relations between States.

2. For the purpose of strengthening peace, solidarity and friendly relations, States parties to the present-Charter shall ensure that: (a) any individual enjoying the right of asylum under Article 12 of the present Charter shall not engage in subversive activities against his country of origin or any other State party to the present Charter; (b) their territories shall not be used as bases for subversive or terrorist activities against the people of any other State party to the present Charter.

Article 23 relates principles of the UN Charter to the African political situation. Article 23(2) is interesting. The newly independent states in Africa, with unsettled borders or restive populations unhappily included into new nations, were experiencing political instability. Article 23(2) attempts to resolve this problem, and affirms a principle of national sovereignty and non-interference in national affairs.

Article 24

All peoples shall have the right to a general satisfactory environment favorable to their development.

Article 24 brings together a number of concerns with the integrity of the environment and the need to safeguard social and economical development.
All these Articles refer to 'peoples' rights'. It is important that we understand this term.

As Issa Shivji writes:

The right holder…is not exclusively an autonomous individual but a collective: a people, a nation, a nationality, a national group, an interest/ social group, a cultural/oppressed minority' (The Concept of Human Rights in Africa [Academic Literature, CODESRIA, 19891).

So–peoples' rights refer in part to the role that rights play in a political or revolutionary struggle against oppression. A collectivist revolutionary paradigm would stress that a 'right' is not so much a claim or an entitlement, but part of a political 'struggle', a node around which struggles can organise themselves.

This argument would also redefine the notion of rights as political rather than moral claims. They make sense as collective rights that can be then 'asserted' through political rather than legal action.

What are Collective Rights?

A possible account of collective rights can begin by noting that collective entities (such as corporations) can have rights and duties. Arguably, a corporation has a legal identity because it has a particular structure and carries out policies towards certain ends. By analogy, if one finds that a people are represented by identifiable structures that have decision-making procedures, then there should be no fatal objection to making peoples the holders of rights. Moreover, these rights can be conceived as giving title to entities that cannot be divided, such as the environment (Van der Wal, 94-96).

Peoples' rights are linked with the right to self-determination -but in jurisprudence this has become almost exclusively linked to the notion of sovereign states and the problem of secession. If one compares the example of the cession of Biafra from Nigeria with that of the secession of Bangladesh from Pakistan, one could argue that the former failed and the latter succeeded, not so much because one had a better claim to a right of secession than the other, but that one was suppressed and the other wasn't. If the conclusion is reached that the right to self-determination is impossible to separate from broader political issues, then this may show that the discourse of rights can never exist separately from politics. (See Baehr; also Crawford, 1992.)

Looked at a different way, these are genealogical issues; concerns about how a new category of rights should relate to the existing catalogue of rights. One perspective is that new-generation rights're-inforce' existing rights (see Flinterman in Berting *et ai.,* 1990, 77). Rather than being disruptive claims, they are extensions of existing rights; thus, the right to development is concerned with sustainable democratic communities in the same way that classical rights are so engaged. Solidarity rights, as rights held by communities, challenge the existing concepts of civil liberties, as the these were primarily held by individuals. (78). These new developments force existing rights discourses to face new political problems. To argue otherwise would turn rights into a static concept. However, counter genealogies would suggest that the very invention of third (and perhaps even second) generation rights, 'devalues' and 'undermines' the foundational notion of rights. An extension of this criticism would hold that it turns a rights discourse into a set of utopian political claims, rather than arguments that can be made by lawyers in courts. If one looks at the UDHR, however, one comes across Article 28 which states: 'everyone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realised' -a statement that was not realised in the drafting of the Covenants in 1966. To the extent that debates over third generation rights return to this omission, it might be suggested that the problems are not so much those of external political factors being brought to the debate, but the shape of the debate in its most official forms.

Peoples' rights are thus a controversial and distinctive feature of the Charter. We will now turn our attention to the concept of duties.

3.2.2 Duties

The correlation of rights and duties in the Preamble connects with Articles 27, 28 and 29:

Article 1

- The Member States of the Organisation of African Unity parties to the present Charter shall recognise the rights, duties and freedoms enshrined in this Chapter and shall undertake to adopt legislative or other measures to give effect to them.

This suggests that rights, duties and freedoms are inseparable.

Article 27

1. Every individual shall have duties towards his family and society, the State and other legally recognised communities and the international community.
2. The rights and freedoms of each individual shall be exercised with due regard to the rights of others, collective security, morality and common interest.

Article 27 elaborates a principle left implicit in Article 1. Rights correlate with duties, and they can only be understood by seeing the individual holder of rights as a member of a community. Rights are qualified by virtue of this membership.

Article 28

Every individual shall have the duty to respect and consider his fellow beings without discrimination, and to maintain relations aimed at promoting, safeguarding and reinforcing mutual respect and tolerance.

Article 29

The individual shall also have the duty:

1. To preserve the harmonious development of the family and to work for the cohesion and respect of the family; to respect his parents at all times, to maintain them in case of need
2. To serve his national community by placing his physical and intellectual abilities at its service
3. Not to compromise the security of the State whose national or resident he is
4. To preserve and strengthen social and national solidarity, particularly when the latter is threatened

5. To preserve and strengthen the national independence and the territorial integrity of his country and to contribute to its defence in accordance with the law
6. To work to the best of his abilities and competence, and to pay taxes imposed by law in the interest of the society
7. To preserve and strengthen positive African cultural values in his relations with other members of the society, in the spirit of tolerance, dialogue and consultation and, in general, to contribute to the promotion of the moral well being of society
8. To contribute to the best of his abilities, at all times and at all levels, to the promotion and achievement of African unity.

Article 29 sets out the most extended definition of the duties of the individual. They are owed to family, the nation and to African cultural values. This makes explicit another pervasive concern: the concern with duties is an authentic mark of African culture. Thus, African human rights must represent this cultural development.

How can we Understand this Concept of Duties?

The concept of duties is the second feature that the drafters of the Charter believed distinguished the uniqueness of African human and peoples' rights. This is not a theoretical innovation in itself, rather it stakes its claim on the originality of the emphasis that these duties are given in the Charter.

This emphasis on duty is justified by referring to traditional African culture. The claim is also made that it is at this point in the Charter that African cultural values achieve a legal form. The duties describe an individual who is rooted in the context of family, community and nation. Already, then, there is a transposition of the notion of the traditional community to the notion of the nation: in other words, because tradition holds it clear that an individual has duties to kith and kin, then it follows that they should also have duties towards their nation.

Is this Link of Duties with the State Problematic?

The Charter makes the link between duties and the state because the liberation struggle was focused on achieving independence for colonial territories.

However, once independence was achieved, does this emphasis mean that individual rights are always to be limited by a duty towards a state? Even, for example, when a state is abusing peoples' rights?

There is a possible contradiction between the need to 'preserve and strengthen positive African cultural values' and the need not to

'compromise the security of the state'. It is clearly possible to suggest that preserving cultural values may be best served by opposing a corrupt and oppressive state, and thus to satisfy the demands of duty.

The problematic status of the concept of rights in the Charter could be linked to the criticism that the Charter's enforcement mechanisms are weak, and prevent the development of a vigorous human rights culture in Africa. Although this is true, to some extent, the later development of the Charter shows that the notion of duties becomes less important to those petitioning the Commission than are the claims to due process and social and economic rights that the Charter also provides.

To assess these claims, we will look at the way the ACHPR has been used in a recent case of national abuse of human rights.

SELF ASSESSMENT EXERCISE 2

What are the distinctive features of the ACHPR?

The Case of Ken Saro-Wiwa and the Ogoni Eight

The role of the ACHPR and the Commission can be better understood by referring to a specific example of how they operate. We will focus on the execution of the Nigerian writer and activist Ken Saro-Wiwa and other activists to see how petitions to the Commission can produce political and legal changes.

Saro-Wiwa and eight other activists were executed by the Nigerian government in 1994. They were protesting about the social and economic marginalisation of the Ogoni ethnic grouping to which they belonged. The Ogoni live in the Delta Region of Nigeria, and their lands are rich in oil. The Nigerian government was accused of extracting oil with little regard for the despoliation of the region or for financially compensating the Ogoni. Human rights abuses by the Nigerian police and military had also allegedly taken place.

After rioting in May 1994, during which four Ogoni leaders were murdered, Ken Saro-Wiwa and his nine co-accused found themselves before a Civil Disturbances Special Tribunal. Later, an ad *hoc* tribunal was established for their trial. Reviewing the case, the Special Rapporteur for the UN found that the rioting had resulted from government agents stirring up dissent between the Ogoni and neighbouring ethnic groups. The Tribunal itself was constituted in contravention of due process. Following procedures established by the military government, the judges (including an army officer) were appointed by the executive.2 As the United Nations report pointed out,

this was in direct contravention of the basic principle of the right to trial by an impartial court. The constitution of a tribunal in such a way is also in breach of the African Charter of Human and Peoples' Rights (Article 7; Article 26) and the International Covenant on Civil and Political Rights (Article 14 (1)). Indeed, a challenge was filed in the Constitutional court, but it was not heard. There were further serious breaches of due process in the conduct of the trial, including exclusion of evidence that shed serious doubt on the prosecution case. This was accompanied by military harassment of the defence counsel.

Saro-Wiwa's case was petitioned before the African Commission. The Commission affirmed that numerous breaches of the Charter had taken place.

In 1999 the Commission affirmed that there had been a breach of Article 5 of the African Charter. Saro-Wiwa and his co-defendants had been subject to ill-treatment during their imprisonment and interrogation. The government had effectively failed to recognise the 'legal status' of the human being. Breaches of Article 4, which protects the inviolability of the human being, supported this argument. There were also breaches of Articles 6 and 7. These Articles can be read as protecting due process, specifically aimed at outlawing arbitrary detention and specifying the standards that must govern the way in which a trial is conducted. The Nigerian government had also failed to uphold its obligations under Article 10, affirming the right of free association.

In 2001, a later decision of the Commission determined that the Nigerian government was in breach of a number of Articles of the Charter. Note how this decision is concerned with the economic rights and duties of the state.

Although the Nigerian government is entitled to produce oil, this entitlement is qualified by certain duties and obligations. Article 21 is precise in stressing that exploiting natural resources is to be undertaken in an equitable manner and in the interests of 'the people'. Where degradation has occurred as a result of industrial extraction of natural resources, those affected have the right to compensation. Furthermore, the Article specifies that African governments should work to 'eliminate all forms of foreign economic exploitation' by multinational corporations and 'international monopolies'. The cases to which the Commission referred stressed that governments have a duty to protect their citizens against acts by private parties, a proposition supported by cases under other human rights instruments.

It was also argued that the Nigerian government had violated two further Articles of the Charter. Article 24 places on the state the duty to

preserve the environment to the extent that it is ‘favourable’ to people's 'development'. Article 16 relates to the state's manifold duties to safeguard the mental and physical health of individuals. The government had breached both Articles as it had participated in polluting the environment, caused harm to the people of the Delta region and had failed to protect both people and the environment from the degradation caused by the Shell Consortium. The Nigerian government was also in breach of the obligation to undertake studies of the Ogoni lands with a view to assessing damage to the region. Those arguments were run alongside a claim that the government had not guaranteed the right to property under Article 14 and, drawing on a number of Articles, that the right to shelter had also been infringed by the destruction of Ogoni villages. The Commission also accepted arguments on the infringement of the right to food. Although this was not directly stated in the Charter, it was a clear implication of reading together the Articles protecting the right to life (Article 1), the right to health (Article 16) and the right to economic, social and cultural development (Article 22).

Although this case has been criticised, there is a sense in which it represents an important intervention in the political development of African democracy. During the period of military rule, the provisions in the Nigerian constitution that incorporated the African Charter on Human and Peoples' Rights had been suspended by the military. The fact that a civilian administration had returned to power suggests that there would also be a return to due process and a renewed commitment to human rights. The Commission noted, however, that the Nigerian government had not responded to communications about the availability of domestic remedies, and hence the status of the Charter in Nigerian law was uncertain. Moreover, the Nigerian government acknowledged that there were ongoing abuses of the Ogoni and their land by oil companies operating in the region.

SELF ASSESSMENT EXERCISE 3

List the Charter clauses under which the Nigerian government has been criticised over the Ken Saro-Wiwa/Ogoni case.

So, the criticisms that have rightly pinpointed the ultimate weakness of the Charter at the level of the remedies that it is able to invoke, draw attention, in part, to the failure of this discourse at perhaps its most vital level. The African Commission's decision merely reminds the Nigerian government of the importance of the matter. Although there is a symbolic importance to this type of utterance, it leaves a great deal to be desired in terms of compensation for the abuses suffered. This is an area that remains within the sovereign competence of the state.

In response to the Commission, the Nigerian government acknowledged the seriousness of the Ogoni issue, and outlined the response of the administration. They had set up a properly resourced Federal Ministry of Environment, with a brief that focused on the Ogoni region and the Niger Delta; a Judicial Commission of Inquiry has been instituted to examine the alleged human rights abuses and Ogoni petitions were being considered. Whether or not this is sufficient must remain, at this stage, an open question.

What wider conclusions could we draw about these decisions? The discourse of the Charter accords the state its proper rights and privileges, but sees them as qualified by the obligations that the state has towards its peoples. We can see, though, that the Charter also attempts to create a viable human rights regime by making the state responsible for the actions of those industries that are working within the territory for which that state is responsible. Taken together, the decisions can be seen as the law's recommendation of certain minimum political forms that include rights to due process, to fair trial and commitments to social and economic rights.

SELF ASSESSMENT EXERCISE 4

Although the ACHPR has been criticised for having weak enforcement mechanisms, the Commission has played a positive role in highlighting human rights abuses. Discuss.

Summary

The case of Ken Saro-Wiwa and the Ogoni eight shows how the ACHPR can bring pressure to bear on a national government for abuse of human rights. Saro-Wiwa and the Ogoni eight were wrongly accused, then tried without due process and executed. In 1999, the Commission affirmed that there had been a breach of Articles 4, 5, 6 7 and 10. In 2001, a second case found breaches of Articles 14, 16, 21, 22 and 24. Although there are no remedies for these breaches, the decisions have put pressure on the Nigerian government.

3.3 The African Charter on the Rights and Welfare of the Child

The need for an African Charter on the Rights and Welfare of the Child (ACRWC) was acute as African nations were under- represented in the drafting of the Convention on the Rights of the Child (CRC) in the late 1980s. Given the sensitiveness of issues relating to children, it became increasingly necessary to prepare a document that reflected African cultures.

The problems that came out of a specifically African context related to a variety of problems that can be sketched as follows. An African Charter must address:

- children who were living under apartheid regimes
- discriminatory practices towards girls, such as circumcision and genital mutilation
- the problems faced by children who were displaced or refugees.

There was also a concern that the CRC did not reflect African norms relating to the family, adoption and fostering. However, the ACRWC did make use of principles from the CRC: non- discrimination, the concept of the best interests of the child, the survival and development of the child and the evolving capacities of the child. Critics have drawn attention to the failures of the ACRWC in certain areas; most notably the rules that relate to juvenile justice.6

These concerns underlie the final document. We will examine some of the more important sections:

Article 1 places obligations on state parties: 'any custom, tradition, cultural or religious practice' inconsistent with the rights, duties and obligations of the Charter shall 'be discouraged'. The Charter then goes on to elaborate a series of rights and duties.

Article 3 on Non-Discrimination provides that:

- every child shall be entitled to the enjoyment of the rights and freedoms irrespective of the child's or his/her parents' or legal guardians' race, ethnic group, colour, sex, language, religion, political or other opinion, national and social origin, fortune, birth or other status.

Article 4 lays down a major principle: that of the best interests of the child. This provides as follows:

1. In all actions concerning the child undertaken by any person or authority the best interests of the child shall be the primary consideration.
2. In all judicial or administrative proceedings affecting a child who is capable of communicating his/her own views, an opportunity shall be provided for the views of the child to be heard either directly or through an impartial representative as a party to the proceedings, and those views shall be taken into consideration by the relevant authority in accordance with the provisions of appropriate law.

Article 5 deals with survival and development. Like Article 4, Article 5 concerns itself with providing a series of rights that are unique to children. However, these rights are based on the 'inherent' right to life that is common to both the UDHR and the ACHPR. Article 5 goes on to state that:

1. Every child has an inherent right to life. This right shall be protected by law.
2. States Parties to the present Charter shall ensure, to the maximum extent possible, the survival, protection and development of the child.
3. Death sentence shall not be pronounced for crimes committed by children.

Article 6 can be seen as providing for the civil identity of the child. Entitled ‘Name and Nationality’, it states that:

1. Every child shall have the right from his birth to a name.
2. Every child shall be registered immediately after birth.
3. Every child has the right to acquire a nationality.
4. States Parties to the present Charter shall undertake to ensure that their Constitutional legislation recognises the principles according to which a child shall acquire the nationality of the State in the territory of which he has been born if, at the time of the child’s birth, he is not granted nationality by any other State in accordance with its laws.

Three Articles follow that adapt rights found in the UDHR and the ACHPR to the specific situation of the child. **Article** 7 grants

Freedom of Expression, **Article** 8, Freedom of Association and **Article** 10, Protection of Privacy. **Article** 9 could also be seen as part of this series, as it declares the right of Freedom of Thought, Conscience and Religion. It specifies that ‘parents, and where applicable, legal guardians shall have a duty to provide guidance and direction in the exercise of these rights having regard to the evolving capacities, and best interests of the child.’

Article 11 relates to education. A child's education should be directed to: 'the preparation of the child for responsible life in a free society, in the spirit of understanding tolerance, dialogue, mutual respect and friendship among all peoples, ethnic, tribal and religious groups.

Article 15 concerns child labour. It provides that:

1. Every child shall be protected from all forms of economic exploitation and from performing any work that is likely to be hazardous or to interfere with the child's physical, mental, spiritual, moral, or social development.

Article 16 adapts rights found in the UDHR and ACHPR to provide protection against child abuse and torture:

1. States Parties to the present Charter shall take specific legislative, administrative, social and educational measures to protect the child from all forms of torture, inhuman or degrading treatment and especially physical or mental injury or abuse, neglect or maltreatment including sexual abuse, while in the care of the child.

The Charter builds on the concern in ACHPR with the family and roots of the child in this context. Article 18, entitled 'Protection of the Family', places a number of obligations on state parties:

1. The family shall be the natural unit and basis of society. It shall enjoy the protection and support of the State for its establishment and development.
2. States Parties to the present Charter shall take appropriate steps to ensure equality of rights and responsibilities of spouses with regard to children during marriage and in the event of its dissolution. In case of the dissolution, provision shall be made for the necessary protection of the child.

Article 19 can be understood as developing Article 18, and focuses on the relationship between parents and children:

Article 19: Parent Care and Protection

1. Every child shall be entitled to the enjoyment of parental care and protection and shall, whenever possible, have the right to reside with his or her parents. No child shall be separated from his parents against his will, except when a judicial authority determines in accordance with the appropriate law that such separation is in the best interest of the child.

There is further elaboration of parental responsibilities in Article 20:

1. Parents or other persons responsible for the child shall have the primary responsibility of the upbringing and development the child and shall have the duty:

    (a) to ensure that the best interests of the child are their basic concern at all times;
    (b) to secure, within their abilities and financial capacities, conditions of living necessary to the child's development; and
    (c) to ensure that domestic discipline is administered with humanity and in a manner consistent with the inherent dignity of the child.

Article 21 articulates a somewhat different set of concerns. The Charter turns from the parent-child relationship to lay down principles that relate to the protection of children from harmful cultural and social practices:

1. States Parties to the present Charter shall take all appropriate measures to eliminate harmful social and cultural practices affecting the welfare, dignity, normal growth and development of the child and in particular:

    (a) those customs and practices prejudicial to the health or life of the child; and
    (b) those customs and practices discriminatory to the child on the grounds of sex or other status.

2. Child marriage and the betrothal of girls and boys shall be prohibited and effective action, including legislation, shall be taken to specify the minimum age of marriage to be 18 years and make registration of all marriages in an official registry compulsory.

Article 23 relates to refugee children:

1. States Parties to the present Charter shall take all appropriate measures to ensure that a child who is seeking refugee status or who is considered a refugee in accordance with applicable international or domestic law shall, whether unaccompanied or accompanied by parents, legal guardians or close relatives, receive appropriate protection and humanitarian assistance in the enjoyment of the rights set out in this Charter and other international human rights and humanitarian instruments to which the States are Parties.

Article 25 is entitled 'Separation from Parents'. It could be understood as part of the complex of rights and duties that concern parent and child relationships, but one that deals with the breakdown of the child/parent nexus. It is also relevant to the situation faced by refugee children. The Article states that

…when considering alternative family care of the child and the best interests of the child, due regard shall be paid to the desirability of continuity in a child's up-bringing and to the child's ethnic, religious or linguistic background.

Article 26 places a duty on state parties to protect children against apartheid and discrimination.

Article 27 deals with the specific problem of the sexual exploitation of children. It places a duty on state parties to:

1. ….undertake to protect the child from all forms of sexual exploitation and sexual abuse and shall in particular take measures to prevent:

(a) the inducement, coercion or encouragement of a child to engage in any sexual activity;
(b) the use of children in prostitution or other sexual practices;
(c) the use of children in pornographic activities, performances and materials.

Article 31 is interesting as it relates back to the central concern in the ACHPR with duties: [7]

Responsibility of the Child

Every child shall have responsibilities towards his family and society, the State and other legally recognised communities and the international community. The child, subject to his age and ability, and such limitations as may be contained in the present Charter, shall have the duty:

(a) to work for the cohesion of the family, to respect his parents, superiors and elders at all times and to assist them in case of need;
(b) to serve his national community by placing his physical and intellectual abilities at its service;
(c) to preserve and strengthen social and national solidarity;
(d) to preserve and strengthen African cultural values in his relations with other members of the society, in the spirit of tolerance,

dialogue and consultation and to contribute to the moral well-being of society;

(e) to preserve and strengthen the independence and the integrity of his country;

(f) to contribute to the best of his abilities, at all times and at all levels, to the promotion and achievement of African Unity.

What enforcement mechanisms are provided by the Charter?

Article 32 establishes an African Committee of Experts on the Rights and Welfare of the Child to promote and protect the rights and welfare of the child. Article 42 describes the mandate of the Committee:

(a) To promote and protect the rights enshrined in this Charter and in particular to:

(i) collect and document information, commission inter-disciplinary assessment of situations on African problems in the fields of the rights and welfare of the child, organise meetings, encourage national and local institutions concerned with the rights and welfare of the child, and where necessary give its views and make recommendations to Governments;

(ii) formulate and lay down principles and rules aimed at protecting the rights and welfare of children in Africa;

(iii) co-operate with other African, international and regional institutions and organisations concerned with the promotion and protection of the rights and welfare of the child.

(b) To monitor the implementation and ensure protection of the rights enshrined in this Charter.

(c) to interpret the provisions of the present Charter at the request of a State Party, an Institution of the Organisation of African Unity or any other person or Institution recognised by the Organisation of African Unity, or any State Party.

(d) Perform such other task as may be entrusted to it by the Assembly of Heads of State and Government, Secretary-General of the OAU and any other organs of the OAU or the United Nations.'

Article 43 lays down the reporting procedure. States undertake to submit to the Committee reports on the measures they have adopted which give effect to the Charter. Article 44 states that the Committee may receive communication, from any person, group or non-governmental organisation recognised by the Organisation of African Unity, from a Member State, or the United Nations, relating to any matter covered by the Charter. Under Article 45, the Committee may carry out

investigations, resorting to any appropriate method of investigating. Their remit extends over any matter falling within the ambit of the present Charter, request from the States Parties for any information relevant to the implementation of the Charter and may also resort to any appropriate method of investigating the measures the State Party has adopted to implement the Charter. The Committee submits to each Ordinary Session of the Assembly of Heads of State and Government every two years, a report on its activities and on any communication made under Article 44 of this Charter.

SELF ASSESSMENT EXERCISE 5

Outline the protection offered by the ACRWC.

Summary

The Charter on the Rights and Welfare of the Child comes out of the fact that African nations did not have a major input into the drafting of the CRC. It was thus necessary to create a catalogue of rights that related specifically to the problems faced by children in Africa. The Charter elaborates a number of welfare and social/economic rights that rest on the principles of non-discrimination and the 'best interests of the child'. The Charter also creates a Committee which receives reports from states that have signed the Charter, and can undertake investigations.

3.4 The Protection of Refugees' Rights

The serious problems faced by refugees in Africa have been outlined in a recent report by leading human rights NGO:

Approximately 20 million Africans are currently uprooted from their homes by civil strife, social breakdown, and persecution. The rights of African refugees are protected, in theory at least, by what is widely believed to be the most progressive treaty regime in the world: the 1969 Organisation of African Unity Convention Governing the Specific Aspects of Refugees in Africa (OAU Convention). Yet in practice the OAU Convention has not prevented refugees from being subjected to military attacks, physical abuse, expulsion, and restrictions on their rights.

We will look first of all at the rights that are meant to protect refugees, before turning to look in more detail at the refugee situation in Africa.

Refugees are entitled to protection under the 1951 Geneva Convention Relating to the Status of Refugees, and to the social, economic and

political rights contained in both the UDHR and the associated Covenants as well as the ACHPR and its relevant Protocols. Refugees are also entitled to the protection offered by humanitarian law and the law of war, and it is worth referring back to Chapter 9 of this study guide when thinking about the human rights of refugees.

Relevant rights under the ACHPR would include:

- Article 4, respect for life
- Article 5, the prohibition of torture
- Article 6, the right to personal liberty
- Article 7, due process
- Article 18, family reunion
- Article 12, the rights to freedom of movement and residence, and the right to seek and enjoy asylum.

One example of the way in which ACHPR rights can be used to supplement the rights under the Convention is given by lard, Beyani and Odinklau:

- The Charter might also be helpful in addressing restrictions on freedom of movement and residence within host states, which are an all-too-regular aspect of the lives of refugees and asylum seekers in Africa. Both the UN and OAU Conventions do allow for restrictions on the freedom of movement and residence of refugees in host States in order to ensure the safe location of refugees as well as to ascertain the identity of the refugee or asylum seeker. Such restrictions may be challenged before the African Commission (see below) if they are so excessive as to deprive refugees of their freedom of movement within or outside the settlements and where they do not achieve the objective of safely locating refugees from the border of their country of origin. In any hearing of this issue before the Commission, the receiving State would bear the burden of proving that restrictions on the movement and residence of refugees are necessary, justified, and reasonable on acceptable grounds stipulated in human rights law, namely public order, public security, and public health.

The period from the 1960s to the early 1990s saw most African states follow an ‘open door’ policy. In the early part of this period, in the wake of decolonisation, conflicts in Rwanda and Burundi caused many people to be displaced, and to successfully seek asylum in neighbouring states. Refugees from the civil war in Mozambique likewise found asylum in neighbouring countries. Other conflicts in the southern part of the continent also generated large numbers of refugees. Since the early 1990s, however, there have been significant changes in refugee policy. The ongoing war in the Congo, the civil war in Angola and the Rwandan

genocide in 1994 meant that there were still large numbers of people fleeing conflict.

Changes in refugee policy were motivated by the problems caused by accommodating displaced peoples. States have closed their borders, failed to provide security and made forced repatriations.

There are a number of domestic concerns for countries that host refugees. The first of these is internal security. Many refugees come from situations of civil war and bring their weapons with them. These are then used by some for crimes which include armed robbery and poaching. Large influxes can also place serious strains on the environment and social infrastructure. These problems become more severe where burden sharing through international assistance is (or becomes) limited. For example, it was the lack of sustained co-operation from the international community that contributed in large part to Tanzania's drastic decision to close its borders at a point during the Great Lakes crisis.

South Africa has experienced particularly intense difficulties:

- ‘Refugees in South Africa have had a striking impact on the social fabric of society for a variety of reasons, These include the concentration of refugees in already densely populated urban areas where, without assistance from international or national agencies, they are forced to compete for scarce jobs with nationals.., .refugees [tend to] live on the margins of society and are largely incapable of either leading productive lives or contributing to their host societies in any meaningful way.

3.4.1 The Convention on Specific Aspects of the Refugee Problem in Africa

This Convention was founded on the need for a humanitarian approach to solving the problems of refugees. However, difficult distinctions had to make; in particular, between a refugees who seeks a peaceful and normal life and a person fleeing his country for the sole purpose of fomenting subversion from outside. The Declaration on the Problem of Subversion and Resolution on the Problem of Refugees had already been adopted at Accra in 1965, and the Convention sought to build on this document. It also sought other international reference points:

- the UN Charter

- the basic principles contained in the United Nations Convention of 28 July 1951, as modified by the Protocol of 31 January 1967 relating to the status of refugees
- Resolution 2312 (XXII) of 14 December 1967 of the United Nations General Assembly, relating to the Declaration on Territorial Asylum.

The Convention has been ratified by over 40 nations to date.

Article 1 contains a definition of the term refugee:

1. …the term 'refugee' shall mean every person who, owing to well- founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country, or who, not having a nationality and being outside the country of his former habitual residence as a result of such events is unable or, owing to such fear, is unwilling to return to it.

2. The term 'refugee' shall also apply to every person who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country of origin or nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality.

Article 1(4) contains important provisos and limitations that qualify Article 1. Article 1(5) also removes refugee status from war criminals or those who have committed crimes against humanity.

Article 2 goes on to define asylum:

1. Member States of the OAU shall use their best endeavours consistent with their respective legislations to receive refugees and to secure the settlement of those refugees who, for well founded reasons, are unable or unwilling to return to their country of origin or nationality.
2. The grant of asylum to refugees is a peaceful and humanitarian act and shall not be regarded as an unfriendly act by any Member State.
3. No person shall be subjected by a Member State to measures such as rejection at the frontier, return or expulsion, which would compel him to return to or remain in a territory where his life, physical integrity or liberty would be threatened for the reasons set out in Article I, paragraphs 1 and 2.

4. Where a Member State finds difficulty in continuing to grant asylum to refugees, such Member States may appeal directly to other Member States and through the OAU, and such other Member States shall in the spirit of African solidarity and international co-operation take appropriate measures to lighten the burden of the Member State granting asylum.
5. Where a refugee has not received the right to reside in any country of asylum, he may be granted temporary residence in any country of asylum in which he first presented himself as a refugee pending arrangement for his resettlement in accordance with the preceding paragraph.
6. For reasons of security, countries of asylum shall, as far as possible, settle at a reasonable distance from the frontier of their country of origin.

We can see from these Articles that a refugee is anyone who suffers loss or lack of protection in the country of origin due to a well-founded fear of persecution in his country of origin. A key part of the definition of persecution is the threat of violation or the actual violation of refugees' individual human rights.

The definition of the refugee in Article 1 (2) is different to that which was contained in the 1951 UN Convention (and its 1967 Protocol). This recognised as refugees those persons who had suffered what was primarily individualised persecution for reasons political opinion, religion, race or analogous reasons. We can see hat in the African Convention, this definition is modified: a refugee concludes any person forced to leave his place of habitual residence because of ‘external aggression, occupation, foreign domination and events seriously disturbing public order in either part or the hole of their countries of origin or nationality’. As a much broader definition of a refugee, it represents a context in which African states operated an ‘open door’ policy (see above).

Recent research by Human Rights First suggests that there are many problems with determining refugee status. For instance, insufficient vetting means that many war criminals have successfully gained refugee status. There is also a gap between ‘paper’ protection and actual practice:

- The plight of Mauritanian refugees in Senegal highlights the importance of recognition of legal status of refugees; whereas Senegal has ratified all relevant treaties regarding refugees and has even enacted domestic legislation guaranteeing additional rights of refugees, Mauritanian refugees enjoy none of the basic rights and protection because the Senegalese authorities, for political reasons,

do not recognise them as refugees. Thus Human Rights First found that Mauritanian refugees suffered from widespread discrimination as soon as they moved away from the border areas, in addition to indirect involuntary repatriation without the benefit of international supervision to guarantee their security.

Article 3 returns to the key concerns expressed in the introduction to this section of the chapter. It relates to the prohibition of subversive activities:

1. Every refugee has duties to the country in which he finds himself, which require in particular that he conforms with its laws and regulations as well as with measures taken for the maintenance of public order. He shall also abstain from any subversive activities against any Member State of the OAU.

2. Signatory States undertake to prohibit refugees residing in their respective territories from attacking any State Member of the OAU, by any activity likely to cause tension between Member States, and in particular by use of arms, through the press, or by radio.'

Article 4 contains a non-discrimination provision, and Article 5 a prohibition against involuntary repatriation. Article 1(4) is an important section that concerns the status of refugees once they have returned to their country of origin:

4. Refugees who voluntarily return to their country shall in no way be penalised for having left it for any of the reasons giving rise to refugee situations. Whenever necessary, an appeal shall be made through national information media and through the Administrative Secretary-General of the OAU, inviting refugees to return home and giving assurance that the new circumstances prevailing in their country of origin will enable them to return without risk and to take up a normal and peaceful life without fear of being disturbed or punished, and that the text of such appeal should be given to refugees and clearly explained to them by their country of asylum.

5. Refugees who freely decide to return to their homeland, as a result of such assurances or on their own initiative, shall be given every possible assistance by the country of asylum, the country of origin, voluntary agencies and international and intergovernmental organisations, to facilitate their return.

Article 6 states that member states should issue to refugees who are lawfully in their territories travel documents in accordance with the United Nations Convention relating to the Status of Refugees.

Article 7 outlines co-operation of the National Authorities with the Organization of African Unity.

In order to enable the Administrative Secretary-General of the Organisation of African Unity to make reports to the competent organs of the Organisation of African Unity, Member States undertake to provide the Secretariat in the appropriate form with information and statistical data requested concerning:

(a) the condition of refugees; (b) the implementation of this Convention, and (c) laws, regulations and decrees which are, or may hereafter be, in force relating to refugees.

Zard, Beyani and Odinklau write that, under the Charter, refugees and asylum seekers can petition the African Commission for protection when their rights have been violated. This right to petition would cover both their rights as refugees and their rights under the Charter. The UNHCR, the inter-governmental agency responsible for overseeing the 1969 UN Convention on Refugees, also monitors the implementation of the African Convention.

Despite the extensive protection offered by the African Convention, there are major problems with its implementation, and with the scale of the refugee problem in Africa:

On paper, African refugees benefit from one of the most progressive protection regimes in the world. In reality, however, they face seemingly endless human rights hurdles including forced return, discrimination, arbitrary arrest and detention, restricted freedom of movement and expression, and a level of economic deprivation synonymous with violations of social and economic rights. Faced with an ongoing struggle to bridge this gap between theory and reality, advocates for refugees have the option of innovatively using Africa's general human rights mechanisms to make the more specific case for refugee rights.

The crisis facing refugees on the continent reflects not a paucity of norms, but rather a failure to implement them. A major weakness of the current international legal framework to protect refugees -one that was recognised during the ambitious UNHCR Global.
Consultations process of 2000 -is the absence of any meaningful system of supervision, such as a court or treaty body, to ensure that States abide by the letter and spirit of international refugee conventions. International

and regional human rights mechanisms - and in particular the African human rights system -may go some way towards making up for this omission, providing advocates with an important complementary means by which to ensure that refugees and asylum seekers benefit in reality from those rights that they have on paper. Certainly the potential of such mechanisms to both develop the content of refugee rights and police their implementation warrants their being an important element of any comprehensive advocacy strategy on the continent.

Any meaningful attempt to alleviate the refugee problem would thus need to be multi-faceted and founded on the political will to act at both a national and international level:

- The refugee crisis needs to be addressed at both a regional and international level...this would entail a political and economic agenda aimed at eliminating ethnic strife and conflict; curtailing the arms trade; establishing a firm foundation for democratic institutions and governance; respect for human rights; and the promotion of economic development and social progress...Finally, meaningful solutions to the refugee problem should include initiatives aimed at enhancing international burden-sharing both in emergencies, but also to provide assistance to ameliorate the environmental and other long-term impacts experienced by countries hosting large refugee populations.

To some extent the call for a Human Rights Court by the AU may put in place a stronger system for providing remedies for rights abuses, and NEPAD, and other regional initiatives, may further the co-operation necessary to promote and sustain human rights.

4.0 CONCLUSION

Ultimately, then, one should perhaps be critical of any assessment of the African system that refuses to see it in context. Although it would be easy to agree with the sense in which there needs to be stronger enforcement mechanisms in the African system, any more general assessment of human rights in Africa is deeply problematic, as it must take into account the political, economic and social aspects of the continent. Ultimately, human rights in Africa are developing within this peculiar context.

5.0 SUMMARY

It is hard to say definitively whether the African system is any more or less efficient than other regional systems. To compare with the

European system, for instance, would be wrong, as the scale and complexity of the problems facing the African continent are different from those facing European nations (to say nothing of the systematic under-development of Africa). It may be closer, in this sense, to the Inter-American system; but how would one assess its effectiveness?

6.0 TUTOR-MARKED ASSIGNMENT

1) Identify the major problems find by African Refugees
2) Discuss the Rights of Refugees under the African charter.

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MODULE 3

Unit 1 Right to Remedy
Unit 2 Enforcement of Human Rights

Unit 3 Locus Standi

UNIT 1 RIGHT TO REMEDY

CONTENTS

1.0 INTRODUCTION

The remedies provided for the abridgement of human rights are extensive. The chain of right of remedy goes like this: *Locus standi*-justicaibility –reasonable cause of action, jurisdiction-exercise of judicial power to entertain remedy. The problem of *Locus Standi* in public law is very much intertwined with the concept of the role of the judiciary in the process of government. Judicial functions are primarily aimed at preserving legal order by confining legislative and executive organs of government within their provinces in the interest of the public. It is also directed towards the protection of private individuals by preventing illegal in encroachment on their individual rights. The first intention rests on the theory that the courts are the final arbiters of what is legal and illegal since the dominant objective is to ensure the observance of the law. This can best be achieved by permitting any person to put the judicial machinery in motion.

2.0 OBJECTIVES

At the end of this unit you should be able to:

- identify the chain of remedy
- understand the conditions precedent before going to court
- identify the ingredients necessary for an applicant to file before approaching a court of law.
- able to define jurisdiction and justicability of an action.

3.0 MAIN CONTENT

3.1 Justiciability of the Matter

A matter is justicable when it is capable of being enforced in law. Before a court of law can entertain a matter and do justice therein the matter must be justiciable, that is, the matter threat, injury or damage must be a wrong, which confers a right to a remedy. The matter must be a breach of a legal or equitable right or threat, which entitle a party to a relief. Therefore a justiciable matter is legal or equitable right which entitles a person to a legal remedy. In *Abraham v Adesanya,* President of the Federal Republic of Nigeria, Idigbe, JSC put it thus.

"A judicial power is therefore invested in the courts for the purpose of determining cases and controversies before it, the cases or controversies however must be justiciable. Examples of matters which are not justiciable are matters contained in chapter of the Nigerian Constitution. As a general rule any matter included in the fundamental objectives and directive principle of state policy which form chapter 2 of the Nigeria 1999 constitution does not confer a right in an aggrieved party to retain a remedy in court.

3.2 Rights of Action

A right of action is a legal right to sue *Adigun v A. G. Oyo State* (1987)1 NWLR (pt 53) another person, body or government. In Nigeria, a person has a right of action when any of his right has been, is being or is likely to be contravened. To be able to challenge a government or administrative decision one must have right of action in law. As a general rule in Nigeria, a person, has a right of action under section 6(6)b and section 46(1) of the 1999 constitution. For where there is a right there is a remedy, where there is a wrong, there is a remedy. This is expressed in Latin as *"ubi jus remedium."*

3.3 Right of Appeal

Right of appeal is the right to go to a higher court for its review of the judgment or ruling of a lower court with which the appellant is not satisfied. *Adigun A. G. v Oyo State* (1995)3 NWLR (pt 38) of 513.

As a general rule, a person can only appeal against a decision or judgement of a court or tribunal when there is a right of appeal, a right of appeal may be conferred by;

1. the constitution
2. by any other statute, including the statute establishing the court.

The right of appeal exists in two kinds these are:

a) appeal as of right; and
b) appeal with leave of court.

See *Lekwot & others v Judicial Tribunal* (1993)2 NWLR (pt 276), p. 410 and 442.

Where a statute specifically denies the right of appeal in a matter the only option left to an aggrieved party may be to appeal to the governor or president as the case may be, to exercise his prerogative of mercy and pardon the affected person.

3.4 Failure to Serve Pre-Action Notice

A pre-action notice is a notice of intended legal action, which a statute requires to be given to a prospective defendant to enable him or her decide whether to make reparation to the plaintiff or let the matter go to court for determination. Where a statute requires a pre-action notice to be given to a defendant, failure to do so means that the action is not maintainable against the defendant.

Mustafa v Monguno LGC (1987)3 NWLR pt 62. 663CA

SELF ASSESSMENT EXERCISE 1

Pre-action notice is a condition precedent in instructing an action. Discuss.

3.5 Ouster Clauses

An ouster clause is a provision or law which excludes the power of court to entertain a matter and decide it. Such a clause eliminates the jurisdiction of a court to decide a matter. Where a law contains an ouster clause, the only thing left for the court to do is to declare that it has no jurisdiction to entertain such matters. It is the duty of a court to determine whether or not it has jurisdiction on a matter.

3.6 Possession of Jurisdiction

Jurisdiction is the power of a court to hear and decide a case. It is the power or authority of a court to hear and determine matters, which statute has given it judicial power to adjudicate upon. Judicial power is the authority of a court to hear and decide cases. Where a court has no jurisdiction to entertain an action, any proceedings and decisions given thereon are a nullity no matter how well conducted. Judicial powers are tied up with jurisdiction and justiceability.

In *Nwosu v. Imo State Environmental Sanitation Authority* (1990)2 NWLR (pt 135) P. 688 at 727, the court said that the issue of jurisdiction is always fundamental and it is only prudent it be resolved first, otherwise the court that ignores that issue might find that going into real trial is a mere adventure. Jurisdiction is therefore the power of the court to adjudicate in the subject matter and it is either given by the constitution or a specific statute on the subject in issues. To avoid unnecessarily wasting the time of the court, it is advisable to ascertain first, if there is jurisdiction by the court on any of the issues canvassed.

3.7 *Res Judicata*

Res Judicata means that a final decision pronounced by a competent court or tribunal, which is not subject to appeal, is conclusive of the matter between the parties. See *Nwokedi v Okugo* (2002)16 NWLR (pt 794) SC. *Res judicata* means that a matter has been litigated upon and conclusively decided and rested.

3.8 Death of the Plaintiff

The general rule of law is that death brings a legal right to an end. *Ajakaye v Idehai* (1994)8 NWLR (pt 364) page 504 SC. Where a plaintiff dies, a personal right of action dies with him. Similarly, an action which is in person also automatically comes to an end on the death of the defendant. Unless there are other joint defendants on the other hand, where a cause of action is in rem, that is, in to property, the right of action and the right to defend, survive the death of a party, for the benefit of his estate, heirs, legal representative or assigns.

SELF ASSESSMENT EXERCISE 2

The death of a plaintiff in an action in remarks the end of the suit. Discuss.

3.9 Statute of Limitation

A statute of limitation is a provision or law which stipulates that after a specific period of time from the date of a cause of action, legal action cannot be brought to redress a wrong. See *Lamina v Ikeja LGC* (1993)8 NWLR (pt 314) p. 758. CA.

Thus, a wrong could have occurred without a remedy. As a rule, it is generally 12 years in land cases, 3 months in actions against public officers and bodies, 6 years in simple contract except for contract matters under seal or deed. However, there is no limitation period in criminal prosecution, and so time does not run against the State. *Yebugbe v COP* (1992) 4 NWLR (pt 234) 152.

3.10 Derogation from Fundamental Rights in the Interest of State

Under the common law doctrine of necessity, the fundamental rights of a person may be restricted, and/or derogated from in compelling circumstances and the interest of the state. See *Badejo v Federal Ministry of Education* (1996) 8 NWLR (pt 464) at p. 1 SC. This could also exist for the necessity of preserving the state from peril. Under the 1999 constitution, the fundamental rights of a person may only be restricted on the grounds provided in sections 33(2), 34(2), 35(1) (a)- (f) and 36(2) and (4), 39(3), 40, 41(2), 44(2) and 6(6 (d), 143, 158, 188, 307, 308 and section 45 and 305.

SELF ASSESSMENT EXERCISE 3

A court can determine its jurisdiction. Discuss

3.11 Immunity from Liability

When a person is immuned from legal process or from legal liability, then legal action for judicial remedy will not succeed see *Col. Rotimi v Macgregor* (1974) All NLR 828 SC.

Under the 1999 Constitution and other statutes, various persons enjoy different kinds of immunity while in office or are protected under the statute of limitation. Such persons include judges, diplomats, the President, Vice-President, Governors and Deputy Governors.

4.0 CONCLUSION

You have learned of situations in which the court of law may decline jurisdiction in respect of certain matters. In this unit we discussed essential elements which a litigant should look at before litigation. If any of these essential ingredients in commencing an action is missing a litigant may be denied *locus standi* by the court of law.

5.0 SUMMARY

We have discussed the claim of right to remedy, that is, *locus standi*, justiceability, cause of action, jurisdiction, exercise of judicial powers etc.

As Lord Hoff said in *Ashly v White* (1703)1 ER 417, "if the plaintiff has a right he must of necessity have the means to vindicate it, and a remedy, it is a vain thing to imagine a right without a remedy for want of right and remedy are reciprocal".

6.0 TUTOR-MARKED ASSIGNMENT

1) A court has a jurisdiction to determine its own jurisdiction. Discuss with respect to ouster clauses.
2) The death of a plaintiff in an action which is in person and in rem automatically brings the case to an end. Discuss.
3) In criminal matters, there is a stated period for the state to prosecute offenders. Discuss.
4) Immunity clause is one of the impediments to the part of *locus standi.* Discuss.

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UNIT 2 ENFORCEMENT OF HUMAN RIGHTS

CONTENTS

1.0 INTRODUCTION

Jurisdiction: The High Court has original jurisdiction to hear and determine applications relating to the contravention of human rights. The case of *Minister Internal affairs v Shugaba Darman* raised some issues relating to jurisdiction. At the Court of Appeal, the majority decision was that the High Court in reference under Section 46 (2) was either the State-High Court or the Federal High Court This decision gave applicants two options while seeking to enforce their fundamental human rights against the Government, either through the State High Court or through the Federal High Court

The lead judgment of Coker, JCA, read in part;

> "The plain and very clear meaning of a High Court in that state appearing in Section 42 (I) and (2) is defined in Section 277 as the Federal High Court or the High Court of a State"

Against this lead judgment was the equally instructive dissenting opinion of Nasir, the President of the Court who argued that:

> "… The intention cannot be that the applicant has a choice at his will and discretion As each government is supreme within its sphere of authority and independent of the other, the Federal government cannot be sued in a State Court except where jurisdiction is specifically vested in the State Court by the Constitution or … the National Assembly. To hold otherwise will knock the bottom off the citadel upon which the principles of separation of powers is based."

This opinion raised the genuine and important issue of separation of powers it is submitted that the importance of fundamental rights cannot but mellow down this hallowed constitutional concept It must be stressed that this dissenting opinion may be useful when the enforcement of fundamental rights graduates to a higher level than what it is now. This is only possible where there is a constitutional democracy and no decrees suspending or amending constitutional provisions exist The matter of commencement of actions of fundamental rights was raised in Onwo V Oko where the same court held inter alia that;

> "Unlike in most civil actions, an infringement of fundamental rights as earlier stated must be commenced in the High Court of the State where the contravention of the right occurred; and it is the High Court of that State that has jurisdiction"

2.0 OBJECTIVES

At the end of this unit you should be able to:

- define what enforcement procedure stands for
- understand the condition for learnt of Remedy rule of procedure
- understand the problem of enforcement.

3.0 MAIN CONTENT

The issue of jurisdiction was addressed in *Borno Radio and Television Corporation v Basil Egbuonu.* In this case, the court looked at jurisdiction from a wider spectrum. It held that the State High Court has jurisdiction under Section 42, now Section 46 of the 1999 Constitution to entertain an application for enforcement of fundamental rights, it cleared the remaining maze as to what court to apply for the enforcement of fundamental rights.

b. Rules of Procedure: The 1999 Constitution empowers the Chief Justice of Nigeria to make rules of procedure and practice for High Courts in order to exercise original jurisdiction in matters relating to the infringement of the fundamental rights. This same Constitution allows the National Assembly to confer upon a High Court such powers in addition to those conferred for the effective exercise of this jurisdiction.

By virtue or Section 42 of the Constitution, the Chief 1ustice made the Fundamental Right (Enforcement Procedure) Rules of 1979 which took effect on the I" January, 1980 Order I Rules 2 and 3 of the Rules make it mandatory for an applicant to apply ex-parte to the appropriate court for

leave to enforce or secure the enforcement of his fundamental right This application must be supported by a statement giving the name and description of the applicant along with the relief sought and the ground on which it is sought All these must be accompanied by an affidavit verifying the facts relied upon Such leave will not be granted unless the application is brought within.12 months of the happening of the event complained of.

When the leave is granted, a return date must be given which according to Order 2 Rule 2 must fall within 14 days from the date on which the leave was granted.[40] On the use of Enforcement Rules, it has been decided that where the main or principal claim in an application is not the enforcement or securing of the enforcement of a fundan1ental right, the jurisdiction of a High Court could not be properly exercised.[41] The exception to this rule was enunciated in *Anigboro v Sea Trucks (Nig) Ltd.*[42] In this case the main issue related to the right of freedom of association. The applicant had been compelled by his employers, the Respondents to join a Trade Union formed by them His refusal actuated a dismissal. It was the view of the court that a claim under common law could properly be joined in a special application under Section 42 of the Constitution only where such claim is ancillary or incidental to the principal of breach of fundamental right It was expressly held that the issues of fundamental right and dismissal could be brought together since the one actuated the other.

Another important factor is that once leave is granted to apply for an order under the Fundamental Rights (Enforcement Procedure) Rules, 1979, it is irreversible It is not open to the Same court to go back and reverse itself. In any case, no judge of the High Court has the power to reverse or even review the decision of a Court of co-ordinate jurisdiction that function must be left for the Court of Appeal.[43]

Finally, on the issue of procedure, Order 6 Rule 1 (2) of the Rules provide for committal of any party disobeying orders given application under the rules.

3.1 Problems of Enforcement

Having discussed the Constitutional procedure for the enforcement of fundamental rights, it is necessary to look briefly into some of the problems relating to' enforcement. These are discussed hereunder

a) **Ouster Clauses:** These are clauses provided in any statute for the time being in force which automatically remove the adequate statements against the abuse of power by the Executive For instance, Section 5 of Decree No 107[44] provided that;

> "No question as to the validity of this Decree or any other Decree made during the period 31st December, 1983 to 26th August 1993 or made after the commencement of this Decree or an Edict shall be entertained by any Court of Law in Nigeria"

This section simply lifts the law above any imaginable possibility of judicial review.

The injustice that an ouster clause is capable of producing could be seen in the case of federal *Civil Service Commission & Anor. V Saidu Garba*. Commenting on Section 3 of Decree No 17 of 1984, which ousted the Jurisdiction of the Court, Hon, Justice Kolawole said:

> "…what is oppressive is the provision of Section 3 (I) of the Decree what this Section means is that the respondent was dismissed after he had put in 29 years of service He was not asked to explain any allegation In other words, he was removed from service for no just cause"

Needless to say, ouster clauses come in the most naked and brazen manner under military regimes, This could be found from the circumstances in *Lakanmi v Attorney General* (West)[46] where an ouster clause was used against the decision of Supreme Court of Nigeria After this case, the approach of the judiciary to ouster clauses had been to blow muted trumpets.

b) **Commitment to Rule of Law:** The basis of the rule of law is the furtherance of fundamental rights in an atmosphere where the universal principles of justice and fairness to all without favour exist The Executive must be committed to this principle in all its actions The annihilation or attempted suffocation of these principles will have negative effects on the enforcement of fundamental rights The view of the Executive that *Le Roi est L' etat* is no longer useful in contemporary practice

c) **Publicity:** Citizens generally are not aware of their constitutional rights For instance at Police Stations, the inscription is there that bail is free However, it is common knowledge that if a person is arrested, he will not be released unless he pays a certain, bargained amount to the Police Otherwise, the arrested person will be made to spend weeks and months thereby infracting his rights: The non-publication of these rights through the media is certainly a problem to the' enforcement of fundamental rights Provisions in the Constitution can only be read by less than 10% of the population, which is literate Out of this 10% another 3% is

not interested because they are of the view that it makes no gain to them when they know

d) **Suspension of Constitution:** This goes to the root of enforcement and is created by regular changes in government through coup d'etats Under Decree No 107 of 1993, Sections 32 (2) -(7) and 41 of the 1979 Constitution which dealt with arrest and detention, unlawful arrest, bail, length of period of arrest and period of emergency were suspended This Decree removed all constitutional bridles against executive lawlessness Decrees like this extinct the rule of law and the remnants of fundamental rights

e) **Judicial Precedent:** Judicial Precedent in its negative manifestation is judicial conservation For instance, the tact that only the Supreme Court could overrule itself makes it impossible to have a rapid growth of law Even the process of distinguishing has its own limitations Judicial activism, it is suggested must be injected into the democratic spirit of our Constitution

f) **Judicial Independence:** One of the most essential factors in the enforcement of fundamental rights is the independence of the judiciary Afterwards, the Judiciary has been known to be the last bastion of the common man.

In spite of Section 6 (6) (a) of the Constitution, which states that judicial powers are inherent in the Courts, there are quite a number of impediments to this independence For instance, their conditions of service, membership and constitutional protocol.

3.2 Recommendations

We have attempted to state the constitutional position of fundamental rights as well as the enforcement of these rights No doubt, there is the need for improvements It is along these lines that this section shall focus on recommendations for the betterment of fundamental rights as well as their enforcement in Nigeria.

(a) The 1999 Constitution of the Federal Republic of Nigeria provides for twelve of such rights as well as two sections on their enforcements.[47]

Both the 1979 and 1999 Constitutions still fall short of contemporary African Standards For instance, the Ugandan Constitution[48] provides for rights under twenty-one headings It makes provisions from Article 20 to 41 for nearly all facets of human existence, taking into consideration contemporary technological and socio-cultural requirements For

instance, it provides for rights of disabled and handicapped persons[49] as well as economic rights[50] and rights of women[51] and children.[52] It also provides for the right of minorities[53] and actions in favour of marginalized persons[54]

All these rights are crowned by the creation of the Ugandan Human Rights Commission[55] whose sole duty is to review the cases of persons who are detaineds.[56] This commission undertakes salutary duties[57] and is endowed with enormous powers.[58] It may after consideration of the circumstance before it release detained persons.[59] Our suggestion is that the Nigerian Constitution should borrow a leaf from the Ugandan Constitution, particularly regarding the provisions on fundamental rights For instance, there is the immediate need for the establishment of a Human Rights Tribunal of an independent nature.[60] The duties of this Tribunal will include ensuring and monitoring the enforcement of fundamental rights In the process of review, the National Assembly should take the above into cognizance.

(b) **Rule of Law:** The Lawyer as a member of the honourable profession is a Minister in the temple of justice in this connection, the expectations of the public are immense The professional attributes of the Lawyer therefore put him at a vantage position against the other members of the public As Mr. Justice Olakunle Orojo; said, of a Legal Practitioner as "…one among the very few privileged people in an environment where the vast majorities are not only illiterate but also ignorant, superstitious an poor".[61]

The opinion of Lord Denning encapsulates what is expected of the Barrister He said;

> "A Barrister cannot pick or choose his clients He is bound to accept a brief from any man who comes before the courts No matter how great a rascal he may be No matter how given to complaining No matter how unpopular his cause. The barrister must defend him to the end".

(c) **Stable Government:** A stable government is a sine qua non of national progress Military Governments the world over have been known for their flagrant disregard for constitutional provisions Their penchant for draconian laws and disregard for fundamental rights which frustrate the intent and purport of the Constitution cannot be over emphasized It is therefore suggested that there should be a way to enforce Section 1 (2) of the 1999 Constitution which legislates against any governance of Nigeria except as provided by the Constitution.

(d) International Law: It is gladdening that fundamental rights have taken a new status Nations where infringement of human rights occur are looked at as pariahs by the rest of the world The existence of Regional Human rights Charters and Commissions[62] makes it clear that fundamental rights and their enforcement is no longer restricted to municipal law It has taken international dimensions State parties to this charter therefore ensure strict observance to its provisions as well as their enforcement.

Nigeria should endeavour to monitor the violation of human rights by evolving identifying sectors where there are suspected possibilities of human rights infraction A special Human Right Monitoring Group must be established, independent in nature and capable of rendering report of their findings quarterly.

4.0 CONCLUSION

The situation of human rights in Nigeria should take more positive and rapid steps Constitutional provisions on the enforcement of fundamental rights ought also to be boosted The period of military rule witnessed the highest level of infringement of peoples' rights The government should respect International Human Rights Laws and Norms and Domestic Legislation governing Human Rights.

5.0 SUMMARY

In the defence of the Constitution, the Legal Practitioner is expected to be in the forefront, particularly where the issue of rights of the individual under the Constitution is concerned.

6.0 TUTOR-MARKED ASSIGNMENT

1) Explain the Jurisdiction of the High Court on Fundamental Human right Cases.
2) Why are there problems of enforcement of fundamental Human Right Cases.

7.0 REFERENCES/FURTHER READINGS

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UNIT 3 LOCUS STANDI

CONTENTS

1.0 INTRODUCTION

Locus Standi means the right to sue in law. *Locus Standi* is the right to sue or defend a claim in court. It is the right of party to appear in a court, tribunal or other judicial proceedings and be heard on the matter before it. Bello Jsc (as he then was) in *Senator Adesanya v President of Nigeria* (1981) 2 NCR 358 defined *locus standi* as "the right of a party to appear and be heard on the question before the court or tribunal.

There is perhaps no question more fundamental in the whole process of enforcement of Human Rights and adjudication them that of access to the court. It is in this context and for this fundamental reason that many legal systems are now relaxing the severity of the rules regarding *locus standi*. The doctrine has been an attractive concept for ages and has posed serious problems both to litigants and the courts. It is a very important issue since it determines whether or not a person can institute an action in a court of law.

2.0 OBJECTIVES

When you have studied this course, you should be able to:

- outline this basic requirements of *Locus Standi*
- outline the elements that constitute *Locus Standi*
- describe *locus standi* in relation to justiciability and jurisdiction of courts
- differentiate between strangers and aggrieved persons
- define *locus standi*.

3.0 MAIN CONTENT

3.1 Meaning and Definition of *Locus Standi*

The term *locus standi* defies any definition with all certainty. Several authors have attempted to give a working definition of the term. It has been said that the fundamental aspect of *locus standi* is that it focuses on the party seeking to get his complaint before the court, not on the issue he wishes to have adjudicated *Fawehinmi v Akilu* (no1) (1990) 1 NWLR (pt 127) 450.

The term *locus standi* denotes a legal capacity to institute proceedings in a court of Law or a right of a party to be heard on the question before the tribunal. See *Adesanya v President of Nigeria* (1982)3 NWLR 306. In its common law application, it came into being primarily through the enforcement of public rights. Considering that *locus standi* was based on the document intention of the Romans to ensure the sanctity of their laws through the action popularis, *locus Standi* rather than enhance access to the courts has conscripted same through the requirement that the litigant must show a "special interest or prove that he has been personally aggrieved over and beyond other citizens". In chieftaincy matters, religious associations and political associations, the standard of grievance required has been so high to deprive many litigants of succor. In constitutional matters, *locus standi* has generally been derived on the spurious ground that on matters in the interest of the public in general, only the Attorney-General can sue. See *Attorney General v Hallam Nnaru Hassan* (1985)2 NWLR (pt 8) 483.

In Nigeria, the definition of locus standi and when a person has locus standi is not in doubt. This is so because the Nigeria constitution defined when and who has locus standi in section 46(1) of the 1999 constitution. This section defines a person who has locus standi as *"Any person who alleges that any of the provisions of this chapter has been, is being, or likely to be contravened in any state in relation to him in any apply to a High Court in that state for redress"*.

The fundamental Rights chapter of the Nigerian Constitution avers all the personal and proprietary rights which are capable of enforcement person. Therefore, in Nigeria a person in his capacity as a plaintiff or defendant has *locus standi* if any of his rights has been, is being or likely to be contravened. Therefore, to have remedy or judicial review, the aggrieved party who is applying to court for redress must have the standing, or *locus standi* to go to court. A person who seeks redress in a court of law against a wrongful act must show that he is directly affected by such act before he can be heard. It must be the assertion of a right which is personal to him, and the right must have been infringed or there

is a threat of infringement. A general interest common to all members of the public is not a litigable interest and it is not *locus standi* in a court of law.

For an aggrieved party applying to court to establish *locus standi* he must show:

i) That he has sustained direct injury
ii) That he is in immediate danger of sustaining some direct injury as a result of the law, power, act, omission or issue in question.

It is not sufficient for a person to say that he may suffer in some indefinite way in common with the members of the public in general. He must establish sufficient interest, or right to entitle him to sue based on the existing facts or imminent danger.

Therefore, as a general rule, the simple text is that a person who does not have sufficient interest in a matter cannot obtain judicial relief, as he has no locus standi. In other words a busybody that is not directly concerned or directly affected has no right to sue in law.

SELF ASSESSMENT EXERCISE 1

1. Explain the term locus standi
2. In matter of public interest only the Attorney General sues. Comment.

Ascertainment of *Locus Standi*

In Nigeria, it is constitutional that a litigant must have *locus standi* in order to maintain an action and prosecute a matter in a law court. See *Timothy Adefade and 12 ors v Bello Oyesile and 5 others* (1989)5 NWLR (pt 122) 377

The issue to *locus standi* being an indirect question, the jurisdiction of the court to adjudicate on a matter can be raised at any time, even on appeal. See *Oloride v Oyebi* (1984) 15c NLR 380.

In ascertaining whether the plaintiff in an action has *locus standi* the pleading that is the statement of claim, must disclose a cause of action vested in the plaintiff and the right and obligation or interest of the plaintiff which have been violated. The right way to determine whether a plaintiff has the necessary standing to sue is to examine the statement of claim and the writ of summons. In doing this, the court examines whether that party is a proper party to request for an adjudication under

a particular subject matter. See *Olateru Olagbegi v Oba Ogunnoye II* (Olowo of Owo & ors (1996) NWLR (pt 448) 332 & 352.

Where the competence of the plaintiff to institute an action is challenged or is in issue, the onus is on the plaintiff to establish that he is competent to sue as plaintiff.

In the issue of *locus standi*, the justiciability of the issue for adjudication is immaterial. What is important is whether the plaintiff is proper person to sue. See *Ezeafulukule v John Holt Ltd* (1996)2 NWLR (pt 432) 511 & 219.

A plaintiff must therefore establish that he has some personal interest which has been breached or in imminent danger of being breached to have *locus standi* to sustain a claim. Therefore where a wrong is imminent there will be nothing to redress; only a person with *locus standi* or legal right is a person entitled to sue in law. See *Adesanya v President of the Federal Republic of Nigeria and other* (1981) NCR 1 SC.

The issue in this case was the *locus standi* of the plaintiff appealing to challenge the constitutionality of the appointment of the 2nd defendant respondent (President of Nigeria). The appellant brought action for a declaration that the appointment of the 2nd defendant/respondent as chairman of the Federal Electoral Commission (FEDECO) was unconstitutional as he was at the time of his appointment the chief judge of Bendel State and is therefore disqualified from being appointed a member of the Federal Electoral Commission and also for an injunction restraining the president from swearing in the 2nd respondent as chairman of the Federal Electoral Commission and restraining the 2nd defendant from acting or purporting to act as a member or as chairman of the Federal Electoral Commission. On appeal, the Supreme Court held interalia that the plaintiff appellant had no sufficient interest or *locus standi* in the matter of the appointment of the 2nd respondent as the chairman of the Federal Electoral Commission.

The court held further that the plaintiff had asserted a constitutional point which did not affect him personally. In this case, Obaseki JSC said, " the mere fact that an act of the Executive or Legislature is unconstitutional, without any allegation of infraction of or its adverse effect on one's civil rights and obligations, does not raise question to be settled between the appellant and the respondents as to the civil rights and obligation of the appellant."

The case of *Adesanya v President of Nigeria* among other cases of its kind is an example of 'public interest litigation'. Essentially public

interest litigations are suits brought on behalf of the public to stop an injury or prevent imminent injury to the public. The only drawback of public interest litigation is that they often fail for lack of *locus standi* where the doctrine of *locus standi* is not liberally applied by the court. See *Olawoyin v A. G. of Northern Nigeria* (1961)2 SC NLR 5. In *Fawehinmi v Mrs. Maryam Babangida* (unreported Suit No. CD/533/90), the defendant was the first lady of Nigeria between 1985 and 1993. As the first lady, her office initiated a project known as the Better Life Programme on which a portion of public funds was expended. The plaintiff brought an action to challenge the unauthorized and extra-budgetary expenditure of public funds on the programme. Ope-Agbe J., of in the High Court of Lagos State in line with the narrow interpretation of *locus standi* which ruled that a tax paying citizen of Nigeria lacked the *locus standi* to challenge the expenditure of public funds by the office of the first lady on the programme. Under the narrow and restrictive application of *locus standi* suits including public interest litigation are thrown out of Nigeria courts annually for lack of *locus standi*.

3.2 The Application of the Doctrine of *Locus Standi* in Nigeria

The legal and constitutional basis of the doctrine of *locus standi* in Nigeria is in the Nigerian Constitution; Section 46(1) of the 1999 constitution provides;

"Any person who alleges that any of the provisions of this chapter has been, is being or likely to be contravened in any state in relation to him may apply to a High Court in that State for redress.

In view of section 46(1) of the 1999 constitution, a person who had *locus standi* in Nigeria is "Any person whose right has been, is being or likely to be contravened". The concept of *locus standi* is one legal issue that has generated a lot of controversy in legal history. The nature of *locus standi* is that it focuses on the party seeking to get remedy from court and not on the issue he wishes to have adjudicated. Where a plaintiff fails to disclose his legal right or authority to sue and for the reliefs he seeks or what injury he has suffered or is suffering or will suffer, he lacks *locus standi* to constitute such suit or be heard. Furthermore, where it is a condition precedent required by statute, failure to send a pre-action notice also denies a party of *locus standi* and similarly an infant only has standi when he sues through an admit. *See Sofolahan v Fowler* (2002)14 NWLR (pt 788)664.

3.3 *Locus Standi* is the Foundation of a Suit or Legal Matter

In Nigeria, the common law doctrine of *locus standi* as contained in the provisions of section 46(1) of the 1999 constitution has been interpreted and applied by the court in two main ways. The applications are the;

8. Narrow or restrictive application
9. Legal and expansive application.

3.4 Narrow or Restrictive Application

The supreme court of Nigeria gave a restricted interpretation of the term *locus standi* in the Adesanya's case. Another case that readily comes to mind is *Chief (Dr) Irene Thomas & 5 ors v The most Reverend Timothy Omotayo Olufosoye* (1996)1 NWLR (pt. 18) 669.

In this case, the plaintiffs who were communicants of the Anglican Communion within the Diocese of Lagos challenged the appointment of Rt. Revered Joseph Abiodun Adetiloye as the new Bishop of Lagos and asked the court to declare the appointment void.

The plaintiff filed a statement of claim. They did not say that they had an interest in the office of the Bishop of the Diocese. They also did not say how their interest (if any) had been adversely affected by the appointment of Reverend J. Adetiloye. They infact, conceded that they were not interested in a particular candidate but merely stated that the process of the appointment of Rev. J. A. Adetiloye contravened some provisions of the constitution of the church of Nigeria (Anglican Communion). The defendant by notice of motion argued that the plaintiffs had no *locus standi* to institute the action and that the statement of claim disclosed no reasonable cause of action. The trial court accepted the objection and dismissed the suit. The plaintiff appealed to the Court and further to the Supreme Court. Both appeals were dismissed.

One of the issues submitted for determination at the Supreme Court was whether the appellant had in their statement of claim disclosed their locus standi or standing to institute the action. Supreme Court held *inter alia* that the plaintiffs had no *locus standi* as they had not raised in their statement of claim any question as to their civil rights and obligations. This has been the position after the Adesanya's case. The position of *locus standi* in England and Australia is somehow more liberal.

However recently, the court relaxed the restricted interpretation of locus standi as enunciated in earlier cases and broadened it in *Fawehimi v Akilu & ors* (1987)4 NWLR (pt 67)797. With the decision in this case, a

court in applying the doctrine should consider the purpose for the proceedings.

The facts in this case were as follows; on Sunday the 19th October, 1986 Mr. Dele Giwa, a journalist and editor in-chief of a weekly magazine Newsweek was killed at his residence at Ikeja in Lagos State by a parcel bomb. On the 3rd of November, 1986 the Appellant a friend and legal adviser to Dele Giwa, submitted to the Director of Public Prosecutions (DPP) Lagos a 39-paged document containing all details of investigation he conducted together with information accusing two army officers; Col. Halilu Akilu, the Director of Military Intelligence (DMI) and Lt. Col. A. K. Togun, Deputy Director of the State Security Services (SSS) of the murder of Dele Giwa pursuant to section 342 of the Criminal Procedure Law of Lagos State. The applicant acting as a private prosecutor requested the DPP to exercise his discretion whether or not he would prosecute the said Army Officers and if he declined to prosecute, he should then endorse a certificate to that effect on the information submitted to enable him as a private prosecutor prosecute the concerned Army officers.

On 6th November, 1986, the appellant met with the DPP who informed him that he could not come to a decision whether or not to prosecute the said officer until he received a report of police investigation. Consequently, the appellant filed an application at the High Court of Lagos for leave to apply for an order of mandamus to compel the respondent to decide whether or not to prosecute the two officers and if he decided not to prosecute, to endorse the information for private prosecution. The learned Chief Judge of Lagos State Honourable Justice Ademole Candido-Johnson considered the application for leave and dismissed it on the ground that;

a) The DPP had not refused to do his duty under section 342 of the Criminal Procedure Law.
b) He would not be forced to do so upon limited materials before him.

The appellant appealed to the Court of Appeal on the ground that the he had a *locus standi* in the death of Dele Giwa to bring the application. The application was held to be hopeless, frivolous, improper, ill-timed, and premature. The appellant further appealed to the Supreme Court. This court, in a considered judgment allowed the appeal; set aside the lower courts judgment. The Applicant/Appellant application for leave to apply for order of mandamus was granted.

3.5 The Court held *Inter-Alia*

1) The appellant, as a Nigerian, a friend and a legal adviser to Dele Giwa has a personal right under the criminal procedure law to see that a crime is not committed and if committed, to lay a criminal charge for the offence against any one committing the offence in his view whom he reasonably suspect to have committed the offence.
2) The criminal code and the criminal procedure law do not by their provisions confine complainant in respect of the offence of murder to a particular person or persons. Any person who has sufficient information in his possession to establish the crime can identify an accused person and is entitled to lay the charge. The court therefore decided that the Appellant was eminently qualified under the law to do so.

On the principle of locus standi the court was of the following view; ”Criminal law is addressed to all classes of society as the rule that they are bound to obey on pain of punishment to ensure order in the society and in certain the peaceful existence of society. The rules are promulgated by the representatives of the society who form the government or the legislative arm of government for the benefit of the society and the power to arrest and prosecute any person who breaches the rule is also conferred on any person in the society in addition to the Attorney-General and other law officers for the benefit of the society.

The peace of the society is the responsibility of all persons in the country and as far as protection against crime is concerned, every person in the society is each others keeper. Since we are all brothers in the society, we are our brother’s keeper. If we pause a little and cast our minds to the happenings in the world, the rationale for this rule will become apparent. There have been cases where brothers assault or kill brothers. There are cases where a father assaults or kills his son and vice versa; where a husband kills his wife and vice versa. If consanguinity or blood relationship is allowed to be the only qualification for locus standi, then crimes such as are listed above will go unpunished and anarchy may become order of the day.

This case of *Fawehinmi v Akilu* brought the liberal approval into *locus standi* in Nigeria as against the earlier restrictive view point this time of reasoning was followed in case of *Beko Ransome Kuti & ors v A. G. Federation* (unreported. Suit no M/287/92). The suit was an effort of several Nigeria NGOs to challenge the closure of the Guardian Newspapers by the Federal Government authorities as illegal, and a gross violation of the constitutional rights to freedom of expression and the press. The government challenged the suit on the ground of the *locus*

standi of the applicants. Honponu-Wasu of the High Court of Lagos State held that the plaintiffs as concerned citizens had a right to sue the government in the matter.

SELF ASSESSMENT EXERCISE 2

Identify the main differences between Restrictive approach and Liberal approach to the interpretation of locus standi.

4.0 CONCLUSION

In this unit we have learnt about the doctrine of *locus standi*, the attitude of the court in adopting different types of interpretation. You are now in a position to define and explain what *locus standi* is all about. Similarly you now have a clear idea of the current position of the interpretation of *locus standi* by the courts in Nigeria.

5.0 SUMMARY

We discussed the doctrine of locus standi and the capacity to institute actions. We established that locus standi is focused on the party seeking to get his complaint before the court not on the issues he wishes to have adjudicated. The term denotes the legal capacity to institute proceeding in a court of law.

6.0 TUTOR-MARKED ASSIGNMENT

1. What is the position of a minor in instituting an action in the Law Court in Nigeria.
2. Explain the term *locus standi*
3. Public interest litigation is a waste of time as the courts are a barrier in this respect. Comment.
4. In matters of public interest only the Attorney-General can litigate. Comment.

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MODULE 4 ENFORCEMENT OF HUMAN RIGHTS

UNIT 1 THE ROLE AND FUNCTIONS OF THE NATIONAL COMMISSION ON HUMAN RIGHTS

CONTENTS

1.0 INTRODUCTION

Fundamental human Right have been entrenched into the constitution of Nigeria, and it is an offshoot of the European convention of human Rights (the convention for the protection of Human right and fundamental freedoms (1950) with the addition of some provisions borrowed from India.

2.0 OBJECTIVES

At the end of this unit, you should be able to:

- explain the history of human rights in Nigeria
- the history of willinks commission in Nigeria
- the national human right commission.

3.0 MAIN CONTENT

3.1 Human Rights in Nigeria

The Willinks Commission set up in 1958 by the British colonial government to look into the demands of the minorities recommended the adoption of some of the norms of the 1948 Universal Declaration of Human Rights into the Nigerian constitution as a process for fears expressed by minority groups in the country there now were adopted and introduced into chapter 5 of the Independence constitution of 1960 as fundamental rights. These were subsequently entrenched in the 1963, 1979, 1989 and 1999 constitutions of the Federal Republic of Nigeria. Though Nigeria is a party to many human rights declarations and covenants, certain fundamental human rights arise under the military rule persisted generally until recently. For instance, Nigeria is a party to the International Covenant on Civil and Political Rights (ICCPR) and the International Convention in an Economic, Social and Cultural Right (ICESCR). It has also signed and ratified the Right of the Child (CRC) the conversation on the Elimination of firms of Discrimination (CERD) the convention on the prevention and punishment of genocide, the slavery convention of 1926, the convention and the protect relating to the state of refuges in Nigeria is also a signatory to the convention against Torture and other cruel, inhuman and degrading treatment mentor punishment, Nigerian people are predisposed to the respect and protection of human rights, but the long overwhelming presence of the military in government in the country constrained the implementation of human rights provisions.

In addition, the social relations of protection must not be overlooked in our understanding of rights issues as this affects the organization of power in any particular context. In Nigeria, the political economy of oil production and distribution and its nutifafied contradictions, serves as a locus or explanation. In this context, the struggle for resomes becomes a principal factor responsible for the negation of rights, this is because oil or resomes politics in Nigeria has a tendency, towards centralization, which dovetails invacably into feelings of marginalization or repression. The Ogoni crisis for instance is a specific case of oil contradiction in Nigeria. In the struggle for protection of rights, the civil society is planning in a consolation relationship with the state and those who represent it.

3.2 The Military Dimension to Human Rights in Nigeria

The process of Human Rights abuse in Nigeria cannot be examined without bearing in mind the role of the military in political government and the impact of this on human right issues. Since the military

institution is basically authoritarian and hierarchical in structure, it is not supposing for this to affect the way it relates to the society in general. As expected, a whole range of human rights violations under military regimes followed.

Human right abuses through military regimes were through the following:

1) Retroactive Laws
2) Ouster Clauses
3) Legislative Judgments and
4) Production of appeals.

3.3 Retroactivity

Often decrees where backdated to legitimize illegalities or to make certain persons culpable for specific actions which did not constitute offences at the time they were carried out. Such retroactive decrees were designed to such a manner that the "victim" could not escape punishment and the punishments were usually harsh. Such retroactive decrees were therefore used in the most harmful ways but were intended mostly to take away rights previously granted by contract or public appointment. The suspension of part iv (Human Rights) in the 1979 Constitution made the use of retroactive decrees possible and redress untenable.

3.4 Ouster Clauses

Ouster clauses which had been the hallmark of military regimes limited the regular courts substantially in the adjudication of cases if not completely eroding the powers of the court.

3.5 Legislative Judgment

These were decrees aimed at specific individuals or situations or decrees to create special tribunals for the adjudication of specific cases. These decrees had been in existence since 1983, and one of them was later to serve as a basis for the execution of Kenule Saro-Wiwa. These decrees are clearly unsurpations of judicial powers which transgressed the boundaries of the principle of separations of powers.

3.6 Prohibition of Judicial Appeals

Usually decrees setting up military tribunals did not provide for appeal to regular courts. On some occasions, appeal was possible to the executive power. This was in direct contravention of article 14(4) of the

ICCPR which states that "everyone has the right to his own conviction and sentence being reviewed or appealled by a higher court shall provide a thorough and impartial review of the facts of the case within a reasonable period of time. However, compliance with international standards–Human Rights Regime, the African Charter on Human and people rights and domestic implementation of international human rights really was more subordinate to national security and nation –building as defined by military rulers. Indeed, military rule is an aberration which falls short of the expectation of the basis for the exercise, and protection of human rights.

SELF ASSESSMENT EXERCISE

Military rule is an aberration and against the exercise and protection of human rights. Discuss.

3.7 National Human Rights Commission of Nigeria

The National Human Rights Commission was established by Decree 22 of 1995 by a military regime.

The commission basically has the mandate "to monitor and investigate all alleged cases of human rights violations in Nigeria and make appropriate recommendations to the Federal Military Government.

The commission is also to assist victims of human rights violations and seek appropriate redress and remedies on their behalf. These include those allegations against government. Since the commissions cardinal function is to protect human rights, it is required to facilitate extra judicial recognition, promotion and protection of all rights and all matters relating to the protection of human rights as guaranteed by the constitution.

The General Abubakar administration in Nigeria enhanced the autonomy of the National Human Rights Commission by allowing it to exercise its independence in compliance with acceptable international standards. Since inception, the commission has mapped out a comprehensive plan of action for the promotion of human rights, through workshops, seminars, and training programs for teachers, prison officers, judges and relevant government institutions. If not only seeks to enlighten the civil society on human right issues, but also seeks to extend its human rights awareness campaign to the sub-region level. Through relatively new, the commission has made tremendous and dynamic impact in the Nigeria society. It has also made specific recommendations to the Federal Government based on areas of human rights concern such as submissions on prison reforms and decongestions

after surveys. This has yielded the much designed desired dividends in prison decongestion in Nigeria.

4.0 CONCLUSION

In this unit you have learnt about the national Human Right Commission and its function.

5.0 SUMMARY

The topic the Role and Function of the National Commission on Human Rights has been dealt with in this unit comprehensively.

6.0 TUTOR-MARKED ASSIGNMENT

1) State the functions of the National Human Rights Commission
2) Military rule negates the exercise and protection of Human Rights Discuss.

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UNIT 2 THE PUBLIC COMPLAINT COMMISSION

CONTENTS

1.0 INTRODUCTION

An ombudsman is an independent and non-partisan public agency that receives and investigates complains from members of the public and makes contacts with the alleged wrongdoer to peacefully resolve and obtain remedy for the complainant. An ombudsman remedy system is a type of arbitration and is an alternative to court action in appropriate instances that admits it. Thus, an ombudsman is an official body to which people may come with grievances against government, administrative authorities, private person or bodies.

2.0 OBJECTIVES

At the end of this unit, you should be able to:

- describe the essence of the ombudsman
- list the functions of the ombudsman
- identify, the powers, duties and the method of making a complaint to the ombudsman.

3.0 MAIN CONTENT

3.1 Who is an Ombudsman?

The ombudsman is a body which gives citizens safeguards against maladministration by investigating and pursuing general claims of an

aggrieved party with the relevant public or administrative authority, body or person, whether it is a public or private body with a view to finding solutions to the issues raised. The Public Complaints Commission is the official ombudsman in Nigeria.

3.2 The Reasons for Establishing an Ombudsman

The ombudsman or Public Complaint Commission remedy system has been necessitated worldwide by a number of reasons. These include the following:

1) The need to make persons aggrieved by official conduct to know that someone cares.
2) Inadequacies of the remedies put in place by the legislature, the executive and the judiciary.
3) Abuse of power by public authorities and private bodies and the inadequate control of these bodies.
4) Inadequacies of avoidable internal administrative remedy system or check devices to handle and justly deal with complains of aggrieved parties.
5) Absence of specialized or small claims court systems where minor claims and relatively less significant issues and grievances, can be heard and timeously determined between parties, within a few minutes or within a day etc. in an atmosphere that is devoid of many of the formalities of a regular court.
6) Litigation is often slow, cumbersome, complex, costly and frightening to the average person.
7) Lack of desire or financial inability of a party to undertake the effort and expense of legal prosecution of a matter in court.
8) Lack of interest on the part of the aggrieved party in the apportionment of blame and sanction of the persons against whom he has a grievance and the desire rather to get the issue straightened out quickly without undue publicity.
9) The need to ensure the full protection of the civil rights and liberties of the people.
10) Ombudsman remedy affords a cheaper and relatively easier method of getting issues sorted out on both sides without the expenses and bitterness which legal proceeding may engender.

3.3 Areas of Concern of an Ombudsman

The duty of an ombudsman's to look into issues of refusal, neglect, action motion, oppression, unreasonable behavior, maladministration, or injustice in a government department, or agency or in the laws of public officers, private company or other persons. As an independent body it is empowered to investigate complaints and ensure impartial review of the

administrative decisions or actions which appear unjust and thereby ensure relief or protection for an aggrieved party from any injustice arising from abuse of power; neglect of duty or error of judgment. On the part of the people in authority, or person in a superior position. By the wide nature of its area of concern almost any kind of complaint can be brought to the ombudsman.

SELF ASSESSMENT EXERCISE 1

State the reasons for the attachment of an ombudsman.

3.4 The Factors for an Effective Ombudsman

Some of the factors that will enable an ombudsman remedy system to work efficiently and effectively are:

4) In terms of personality and character, the staff of the ombudsman must be persons of good reputation and integrity, honest, sincere, and simple persons who must be ready to discharge their duties with utmost diligence and impartiality.
5) The commission should be independent and be given sufficient powers to discharge its functions.
6) It should have access to any document or such other evidence that is relevant to his enquiry, require any one to give oral or written evidence before him an ombudsman has the semblance of a judge, but does not usually act as such.
7) Provision of adequate facilities for the discharge of their duties.
8) Provision of good remuneration that the personal would be less susceptible to corrupt influence.
9) Security of office during their tenure of office, except where a personnel is found to be otherwise unfit for his office.

SELF ASSESSMENT EXERCISE 2

Explain the term ombudsman.

3.5 The Methods of Making a Complain

The manner of lodging a complaint with the commission may be determined by the chief commissioner. However, in practice, complaints are usually made by the complainant through;

i) Oral report
ii) Delivery of report by hard
iii) Delivery of report by post
iv) Transmission of report by other means of communication such as telephone.

This public complains commission has power to litigate complaints against public authorities and private bodies and individuals.

3.6 The Public Complaint Commission

The Public Complaint Commission Act, cap P37 2004 is an art to establish the Public Complain Commission with wide powers to inquire into complaints by members of the public concerning the administrative actions of any public authority, company or body or other officials.

Section 1(i) of the Act provides for the establishment of the Public Complaints Commission which has a Chief Commissioner as it head and such number of commissioners as the National Assembly, may from time to time determine. Under section 1(2) the commission may establish such number of branches of the commission in the states of the Federation as the National Assembly may from time to time determine.

3.7 The Powers and Duties of the Commission

Under section 5(i) of the Act all commissioners shall be responsible to the National Assembly but the Chief Commissioner shall be responsible for co-coordinating the work of all other commissioners.

By virtue of section 5(2), a commissioner shall have power to investigate either on his own initiative or following complaints lodged before him by any other person any administrative action taken by:

a) Any department or ministry of the federal or any state government.
b) Any department of any local government authority set up by any state in the federations.
c) Any statutory corporation or public institution set up by any government in Nigeria.
d) Any company incorporated under or pursuant to the Companies and Allied Matter Act.
e) Any officer or servant of any of the afore-mentioned bodies.

Under section 5(3) for the purposes of the Act:

j) The Chief Commissioner may determine the manner by which complaint are to be lodged.
k) Any commissioner may decide in his absolute discretion whether, and if so, in what manner he should notify the public of his action, or intended action in any particular case.
l) Any commissioner shall have access to all information necessary for the efficient performance of his duties under this Act and for

this purpose may visit and inspect any premises belonging to any person or body mentioned in subsection (2).

m) Every commissioner shall ensure that administrative action by any person or body motioned in subsection (2) does not result in the commitment of any act of injustice against any citizen of Nigeria in any other person resident in Nigeria, and for that purpose he shall investigate with special care administrative act which are or appear to be:

i. Contrary to any law or regulations.
ii. Mistaken in law or arbitrary in ascertainment of fact.
iii. Unreasonable, unfair oppressive, or inconsistent with the general functions of administrative organs.
iv. Improper in motivation or based on irrelevant consideration
v. Unclear or inadequately explained.
vi. Otherwise objectionable.

n) A commissioner shall be competent to investigate administrative procedure of any court of law in Nigeria.

o) Where concurrent complaints are lodged with more than one commissioner the chief commissioner, shall decide which commission shall deal with the matter.

p) The commissioner shall not be subject to control of any person in the exercise of his duties.

3.8 Limits of the Powers of the Commission

Section 6 of the Act limits the powers of the commission. By virtue of section 6(1), the commission shall not investigate matters.

a) that are clearly outside their terms of reference
b) that is pending before the National Assembly
c) that is pending before any court of law in Nigeria.
d) that is related to anything done or purported to be done in respect of any member of the armed forces.
e) in which the complainant has not in the opinion of the commissioner, exhausted all available legal or administrative remedy.

3.9 Offences and Penalties

Under section 8:

1) Any complaint lodged before the commission shall not be made public by any person except a commissioner and any person who contravenes the provision of this section shall be guilty of any

offence and shall be liable on conviction to a fine of ₦500 or imprisonment for six months or both.

2) Any person who willfully obstructs interferes with assault or resists any commissioner or any other officer or servant of the commission in the execution of his duty under this Act, or who aids, induces or abets any other person to obstruct interfere with, or resist any such commissioners, officers or servant shall be guilty of an offence and unable on conviction to a fine of ₦500 or imprisonment for 6months or to both such fine and imprisonment.

4.0 CONCLUSION

In conclusion we can say conclusively the function and powers of the Public Complain Commission.

5.0 SUMMARY

In this unit, you learnt about the ombudsman and its function, process and the offences and punishment for the violation of the Public Complaint Commission Act.

6.0 TUTOR-MARKED ASSIGNMENT

1) Mention and explain the powers of the ombudsman
2) What are the limitations to the powers of the ombudsman?
3) What are the offences created under section 8 of the public complain commission act.
4) What are the powers and duties of the ombudsman?.

7.0 REFERENCES/FURTHER READINGS

Prof. I. O. Smith; (2004). Law and Development in Nigeria. ECOWAS: Publishers Nig. (Ltd).

UNIT 3 THE ROLE AND FUNCTION OF THE AFRICAN COMMISSION ON HUMAN AND PEOPLES RIGHTS

CONTENTS

1.0 INTRODUCTION

The African charter was adopted on 1981 by the organization of African Unity (OAU), reconstituted as the African Union (AU). Nigeria ratified the charter in 22 June 1983 and subsequently transformed it into domestic law pursuant to the Ratification and Enforcement Act.

2.0 OBJECTIVES

By the end of this unit, you should be able to:

- explain the reasons for the establishment of the African Commission on Human Rights
- explain their functions and mandate.

3.0 MAIN CONTENT

3.1 Definition of Terms

The African charter was the first major collective effort forwards taking human right seriously in Africa. It was the first significant attempt by African states to defeat the efforts by votaries of sovereignty and the domain reserve to abuse of human right by state officials through the argument that how a state treats its national was its exclusive business. The charter guarantees civil any political rights, economic, social and

cultural rights as will as group or peoples rights. It guarantees to every citizen the right to participate freely in the government of his country, either directly or through freely chosen representatives in accordance with the provision of the law.

The African Commission on Human and Peoples Rights (African Commission) the only existing regional mechanism for the implementation of the African Charter.

3.2 Measures of Safeguard

Establishment and organization of the African Commission on Human and People Rights.

Part II – MEASURES OF SAFEGUARD
Chapter 1- Establishment and Organisaiton of the African Commission on Human and People Rights.

Article 30

An African Commission on Human and Peoples' Rights, hereinafter called "the Commission", shall be established within the Organization of African Unity to promote human and peoples' rights and ensure their protection in Africa.

Article 31

1) The Commission shall consist of eleven members chosen form amongst African personalities of his highest reputation, known for their high morality. Integrity, impartiality and competence in maters of human and peoples right; particular consideration being given to persons having legal experience.
2) The members of the Commission shall serve in their personal capacity.

Article 32

The Commission shall not include more than one national of the same State.

Article 33

The members of the Commission shall be elected by secret ballot by the Assembly of Heads of State and Government, from a list of persons nominated by the States parties to the present Charter.

Article 34

Each State party to the present Charter may not nominate more than two candidates. The candidates must have the nationality of one of the States parties to the present charter. When two candidates are nominated by a State, one of them may not be a national of that State.

Article 35

1) The Secretary General of the Organization of African Unity shall invite States parties to the present Charter at least four months before the elections to nominate candidates.
2) The Secretary General of the Organization of African Unity shall make an alphabetical list of the persons thus nominated and communicate it to the Heads of State and Government at least one month before the elections.

Article 36

The members of the Commission shall be elected for a six year period and shall be eligible for re-election. However, the term of office of four of the members elected at the first election shall terminate after tow years and the term of office of three others, at the end of four years.

Article 37

Immediately after the first election, the Chairman of the Assembly of Heads of State and Government of the Organization of African Unity shall draw lots to decide the names of those members referred to in Article 36.

Article 38

After their selection, the members of the Commission shall make a solemn declaration to discharge their duties impartially and faithfully.

Article 39

7. In case of death or resignation of a member of the Commission the Chairman of the Commission shall immediately inform the Secretary General of the Organization of African Unity, who shall declare the seat vacant from the date of death or from the date on which the resignation takes effect.
8. if, in the unanimous opinion of other members of the Commission, a member has stopped discharging his duties for any reason other than a temporary absence, the Chairman of the

Commission shall inform the Secretary General of the Organization of African Unity, who shall then declare the seat vacant.

9. In each of the cases anticipated above, the Assembly of Heads of State and Government shall replace the member whose seat became vacant for the remaining period of his term unless the period is less than six months.

Article 40

Every member of the Commission shall be in office until the date his successor assumes office.

Article 41

The Secretary General of the Organization of African Unity shall appoint the Secretary of the Commission. He shall provide the staff and services necessary for the effective discharge of the duties of the Commission. The Organization of African Unity shall bear cost of the staff and services.

Article 42

9. The Commission shall elect its Chairman and Vice chairman for a two-year period. They shall be eligible for re-election.
10. The Commission shall lay down its rules of procedure.
11. Seven members shall form the quorum.
12. In case of an equality of votes, the Chairman shall have a casting vote.
13. The Secretary General may attend the meetings of the Commission. He shall neither participate in deliberations nor shall he be entitled to vote. The Chairman of the Commission may however, invite him to speak.

Article 43

In discharging their duties, members of the Commission shall enjoy diplomatic privileges and immunities provided for in the General Convention on the Privileges and Immunities of the Organization of African Unity.

Article 44

Provision shall be made for the emoluments and allowances of the members of the Commission in the Regular Budget of the Organization of African Unity.

Chapter II- MANDATE OF THE COMMISSION

Article 45

The functions of the Commission shall be:

13. To promote Human and Peoples' Rights and in particular.

a) To collect documents; undertake studies and researches on African problems in the field of human and peoples' rights, organize seminars, symposia and conferences, disseminate information, encourage national and local institutions concerned with human and peoples' rights, and should the case arise, give its views or make recommendations to Governments.
b) To formulate and lay down, principles and rules aimed at solving legal problems relating to human and peoples' rights and fundamental freedoms upon which African Governments may base their legislation.
c) Co-operate with other African and international institutions concerned with the promotion and protection of human and peoples Rights.

14. Ensure the protection of human and peoples' rights under conditions laid down by the present Charter.
15. Interpret all the provisions of the present charter at the request of a State Party, an institution of the OAU or an African Organization recognized by the OAU.
16. Perform any other tasks which may be entrusted to it by the Assembly of Heads of State and Government.

Chapter III- PROCEDURE OF THE COMMISSION

Article 46

The Commission may resort to any appropriate method of investigation, it may bear form the secretary General of the Organization of African Unity or any other person capable of enlightening it.

Article 47

If a state party to the present Charter has good reasons to believe that another State Party to this Charter has violated the provisions of the Charter, it may draw, by written communication, the attention of that State to the matter. This communication shall also be addressed to the Secretary General of the OAU and to the Chairman of the Commission. Within three months of the receipt of the communication. The State to

which the communication is addressed shall give the enquiring State, written explanation or statement elucidating the matter. This should include as much as possible relevant information relating to the laws and rules of procedure applied and applicable and the redress already given or course of action available.

Article 48

If within three months form the date on which the original communication is received by the State to which it is addressed, the issue is not settled to the satisfaction of two States involved through bilateral negotiation or by any other peaceful procedure, either State shall have the right to submit the matter to the Commission through the Chairman and shall notify the other States involved.

Article 49

Notwithstanding the provisions of Article 47, if a State party to the present charter considers that another State party has violated the provisions of the Charter, it may refer the matter directly to the commission by addressing a communication to the Chairman, to the Secretary General of the Organization of African Unity and the State concerned.

Article 50

The Commission can only deal with a matter submitted to it after making sure that all local remedies, if they exist, have been exhausted, unless it is obvious to the Commission that the procedure of achieving these remedies would be unduly prolonged.

Article 51

1. The Commission may ask the States concerned to provide it with all relevant information.
2. When the Commission is considering the matter, States concerned may be represented before it and submit written or oral representation.

Article 52

After having obtained form the states concerned and from other sources all the information it deems necessary and after having tried all appropriate means to reach an amicable solution based on the respect of human and peoples rights, the commission shall prepare, within a reasonable period of time from the notification referred to in Aritcle48, a

report stating the facts and its findings. This report shall be sent to the States concerned and communicated to the Assembly of Heads of States and Government.

Article 53

While transmitting its report, the Commission may make to the Assembly of Heads of State and Government such recommendations as it deems useful.

Article 54

The Commission shall submit to each ordinary Session of the Assembly of Heads of State and Government a report on its activities.

Article 55

1. Before each Session, the Secretary of the Commission shall make a list of the Communications other than those of States parties to the present charter and transmit them to the members of the Commission, who shall indicate which communications should be considered by the Commission.
2. A communication shall be considered by the Commission if a simple majority of its members so decide.

Article 56

Communications relating to human and people's rights referred to in Article 55 received by the Commission, shall be considered it they.

1. Indicate their authors even if the latter request anonymity,
2. Are compatible with the Charter of the Organization of African Unity or with the present Charter.
3. Are not written in disparaging or insulting language directed against the State concerned and its institutions or to the organization of African Unity.
4. Are not based exclusively on news disseminated through the mass media.
5. Are sent after exhausting local remedies, if any unless it is obvious that this procedure is unduly prolonged.
6. Are submitted within a reasonable period from the time local remedies are exhausted or from the date the Commission is seized with the matter and
7. Do not deal with cases which have been settled by the states involved in accordance with the principles of the Charter of the

United Nations, or the Charter of the Organization of African Unity or the provisions of the present Charter.

Article 57

Prior to any substantive consideration all communications shall be brought to the knowledge of the State concerned by the chairman of the Commission.

Article 58

1. When it appears after deliberations of the Commission that one or more communications apparently relate to special cases which reveal the existence of a series of serious or massive violations of human and peoples' rights, the Commission shall draw the attention of the assembly of Heads of State and Government to these special cases.
2. The Assembly of Heads of State and Government may then request the Commission to undertake an in-depth study of these cases and make a factual report, accompanied by its finding and recommendations.
3. A case of emergency duly noticed by the Commission shall be submitted by the latter to the Chairman of the Assembly of Heads of State and Government who may request an in-depth study.

Article 59

1. All measures taken within he provisions of the present Chapter shall remain confidential until such a time as the Assembly of Heads of State and Government shall otherwise decide.
2. However, the report shall be published by the Chairman of the Commission upon the decision of the Assembly of Heads of State and Government.
3. The report on the activities of the commission shall be published by its chairman after it has been considered by the Assembly of Heads of State and Government.

Chapter IV- APPLICABLE PRINCIPLES

Article 60

The Commission shall draw inspiration from international law on human and peoples rights, particularly from the provisions of various African instruments on human and people's rights, the Charter of the united Nations, the charter of the Organization of African Unity, the Universal Declaration of Human Rights, other instruments adopted by

the United Nations and by African countries in the field of human and peoples rights as well as from the provisions of various instruments adopted within the Specialized Agencies of the United Nations of which the parties to the present Charter are members.

Article 61

The commission shall also take into consideration, as subsidiary measures to determine the principles of law, other general or special international conventions, laying down rules expressly recognized by member states of him Organization of African Unity, African practices consistent with international norms on human and peoples' rights, customs generally accepted as law, general principles of law recognized by African states as well as legal precedents and doctrine.

Article 62

Each State party shall undertake to submit every two years from the date the present Charter comes into force, a report on the legislative or other measures taken with a view to giving effect to the rights and freedoms recognized and guaranteed by the present charter.

Article 61

1. The present Charter shall be open to signature, ratification or adherence of he member states of the Organization of African Unity.
2. The instruments of ratification or adherence to eh present Charter shall be deposited with the Secretary General of the Organization of African Unity.
3. The present Charter shall come into force three months after the reception by the Secretary General of the instruments of ratification of adherence of a simple majority of the member states of the Organization of African Unity.

PART III- GENERAL PROVISIONS

Article 63

1. After the coming into force of the present Charter, members of the Commission shall be elected in accordance with the relevant Articles of the present Charter.
2. The Secretary General of the Organization of African Unity shall convener the first meeting of the Commission at he Headquarters of the Organization within three months of the constitution of the

Commission. Thereafter, the Commission shall be convened by its Chairman whenever necessary but at least once a year.

Article 65

For each of the States that will ratify or adhere to the present Charter after its coming into force, the Charter shall take effect three months after the date of the deposit by that State of its instrument of ratification or adherence.

Article 66

Special protocols or agreements may, if necessary, supplement the provisions of the present Charter.

Article 67

The Secretary General of the Organization of African Unity shall inform member states of the Organization of the deposit of each instrument of ratification or adherence.

Article 68

The present Charter may be emended if a state party makes a written request to that effect to the Secretary General of the Organization of African Unity. The Assembly of Heads of State and Government may only consider the draft amendment after all the States parties have been duly informed of it and the Commission has given its opinion on it at the request of he sponsoring State. The amendment shall be approved by a simple majority of the States parties. It shall come into force for each State which has accepted it in a accordance with its constitutional procedure three months after the Secretary General has received notice of the acceptance.

4.0 CONCLUSION

Although the emphasis has been on legal and political instrument on the horizon for the defense of human rights, such instrument does not operate in a social vacuum. It is the whole culture of respect for human rights that must be reinforced in Africa. Human rights must not be taken for granted, not only by Heads of states but also by every citizen. The first step in achieving this would be by educating all citizens on their rights and how to protect them.

5.0 SUMMARY

In this unit you have learnt about the African Human and Peoples Rights and the safe guard by establishing the African Commission on Human and Peoples Rights, the mandate of the commission and the procedure embarked on by the commission.

6.0 TUTOR-MARKED ASSIGNMENT

1. State the mandate of the African Commission of Human and Peoples' Rights
2. How can an individual lay complaint before the African Commission on Peoples and Human Rights?

7.0 REFERENCES/FURTHER READINGS

Ray Onyegu; (2001). Legal Protection of Women's Rights, Published by Shelter Rights Initiative.

African Charter on Human and Peoples Rights (Ratification and Enforcement) Act, cap. 10 Laws of the Federation of Nigeria (LFN) 1990.

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MODULE 5

UNIT 1 THE FUNDAMENTAL RIGHTS (ENFORCEMENT PROCEDURE) RULES

CONTENTS

1.0 INTRODUCTION

The 1999 Constitution confers a special jurisdiction on the High Court for the purpose of enforcement of the fundamental rights provisions. It provides that "Any person who alleges that any of the provisions, of this chapter has been, is being or likely to be contravened in any state in relation to him may apply to a High Court in that state for redress. The constitution empowers the Chief Justice of Nigeria to make rules with respect to the practice and procedure of a High Court for the purpose of fundamental human rights enforcement.

2.0 OBJECTIVES

When you have completed this unit, you should be able to:

- identify and explain the enforcement procedure in fundamental human rights cases
- explain ex-parte application
- understand the fundamental rights (enforcement procedure) Rules.

3.0 MAIN CONTENT

3.1 The Enforcement Procedure

There are various stages in processing for enforcement of human rights under the Nigeria law. These stages involve compliance with some adjectival provisions of the human rights rules- the "leave" "time" and "affidavit" provision.

1. The Ex-parte application

The first step in enforcing human rights under the Rules is to bring a motion ex-parte for leave to enforce fundamental human rights. The motion supported by a statement setting out, the name and description of the applicant the relief sought, and the grounds on which the relief is sought and an affidavit verifying the facts relied on.

The purpose of the leave is to determine preliminary matters such as whether, *prima facie*, there are grounds on which it can be assumed that the applicant's rights have been violated and as such, if is necessary to put the prospective respondents on notice so that the court, after hearing both sides to the dispute can consider in details the complaint in the application.

Fawehimi v Akilu (1987)4 NWLR (pt 67) 797. It is not necessary, at the first stage, for the court to comprehensively examine the applicants complaint under to decide whether to grant ex-parts application.

2 Application for Substantive Relief

The next step after obtaining leave is to proceed to get the substantive relief. This may be by motion on notice or by originating summons and there must be a minimum of eight clear days between the service of the notice of motion or summons and the day named for hearing unless the court direct otherwise *ACBPLC V Ngonji* (2002) F. W. L. R. 1893, 1901.

Failure to serve the court process goes to the root of the proper procedure in litigation. The affidavit of service must give the names and addresses of and the place and date of service on all persons who have been served with the motion or summons.

The Motion or Summons must be entered for hearing within fourteen days after the grant of leave. Where, however, personal liberty is involved as is always the case in human right abuses in Nigeria – then the court is given he power to order the release of the detainee even at the ex-parte stage.

3.2 Fundamental Rights (Enforcement Procedure) Rules, 1979 (Date of Commencement: 1 January, 1980)

In exercise of the powers conferred by section 42 subsection (3) of the constitution of the Federal Republic of Nigeria, the Chief Justice of Nigeria hereby makes the following Rules;

Order 1

6) These Rules may be cited as the Fundamental Rights (Enforcement Procedure) Rules, 1979.
7) In these Rules;
a) 'application' includes an application for he leave of the court;
b) 'constitution' means the Constitution of the Federal Republic of Nigeria, 1979.
c) 'judge' means the judge of the court;
d) 'legal representative' means a person admitted to practise in the Supreme Court of Nigeria who has been retained by or assigned to a part to represent him in the proceedings before the court;
e) 'originating summons' means every summons other than a summons in a pending cause or matter;
f) 'prison superintendent' means the person in charge of the prison or any other place in which the complainant is restrained or confines.
g) 'registrar' means the registrar of the court hearing the application or of any court to which an order is directed;
h) 'rules' means these Rules or any amendment thereto and includes the forms appended to these Rules.
i) 'state' means one of the component parts of the Federal Republic of Nigeria.

Application for Leave

1) Any person who alleges that any of the fundamental rights provided for in the Constitution and to which he is entitled, has been, is being, or likely to be infringed may apply to the court in the State where the infringement occurs or is likely to occur, for redress.
2) No application for an order enforcing or securing the enforcement within that State of any such Rights shall be made unless leave therefore has been granted in accordance with this rule.
3) An application for such leave must be made ex-parte to the appropriate court and must be supported by a statement setting out the name and description of he applicant, the relief sought, and the grounds on which it is sought, and by an affidavit verifying the facts relied on.

4) The applicant must file, in the appropriate court, the application for leave not later than the day preceding the date of hearing and must at the same time lodge in the said court enough copies of the statement and affidavit for service on any other party or parties as the court may order.
5) The court or judge may, in granting leave, impose such terms as to giving security for costs as it or he thinks fit.
6) The granting of leave under this rule, if the court or judge so directs, shall operate as a stay of all actions or matters relating to, or connected with, the complaint until the determination of the application or until the court or judge otherwise orders.

Time for Applying for Leave

1) Leave shall not be granted to apply for an order under these Rules unless the application is made within twelve months form the date of the happening of the court, matter, or act complained of, or such other period is so prescribed, the delay is accounted for to the satisfaction of the court of judge to whom the application for leave is made.
2) Where the event, matter, or act complained of arose out of a proceeding which is subject to appeal and a time is limited by law for the bringing of the appeal, the court or judge may adjourn the application for leave until the appeal is determined or the time for appeal has expired.

Order 2

4) When leave has being granted to apply for the order being asked for, the application for such order must be made by notice of motion or by originating summons to the appropriate court, and unless the court or judge granting leave has otherwise directed, there must be at least eight clear days between the service of the motion or summons and the day named therein for the hearing. Form No. 1 or 2 in the appendix may be used as appropriate.
5) The motion or summons must be entered for hearing within 14 days after such leave has been granted.
6) The motion or summons must be served on all persons directly affected, and where it relates to proceedings in or before a court, and the object is either to compel the court or an officer thereof to do any act in relation to the proceedings or to quash them or any order made therein, the motion or summons must be served on the registrar of the court, the other parties to the proceedings and where any objection to the conduct of the judge is made, on the judge.

7) An affidavit giving the names and addresses of, and the place and date of service on all persons who have been served with the motion or summons, must be filed before the motion or summons is listed for hearing, and, if any person who ought to have been served under paragraph (3) has not been served, the affidavit must state the fact and the reason why service has not been effected, and the said affidavit shall be before the court or judge on the hearing of the motion or summons.

8) If on the hearing of the motion or summons the curt or judge is of the opinion that any person who ought to have been served with the motion or summon has not been served, whether or not he is a person who ought to have been served under paragraph (3), the court or judge may adjourn the hearing on such terms, if any, as it or he may direct in order that the motion or summons may be served on that person.

II. 1) copies of the statement in support of the application for leave under Order 1 rule 2(3) of Order 2 and subject to paragraph (2) of this rule, no grounds shall be relied upon or any relief sought at the hearing of the motion or summons except the grounds and relief set out in the said statement.

6) the court or judge may, on the hearing of the motion or summons allow the said statement to be amended, and may allow further affidavits to be used if they deal with new matter arising out of any affidavit of any other party to the application, and where the applicant intends to ask to be allowed to amend his intention and of any proposed amendment of his statement to every other party, and must supply to every such other party, copies of such further affidavits.

7) Every party to the application must supply to any other party copies of the affidavit which he proposes to use at the hearing.

III. Several Applications Relating to the Same Infringement Where several applications relating to the infringement of a particular Fundamental Right are pending against several persons in respect of the same matter, and on the same grounds, the applications may be consolidated by order of the court or judge hearing the applications.

Order 3

I. Application to Quash Any Proceedings

1) In the case of an application for an order to remove any proceedings for the purpose of their being quashed, the applicant may not question the validity of any order, warrant, commitments, conviction, inquisition or record unless before the hearing of the motion or summons he has served a certified copy thereof together with a copy of the application on the Attorney-General of the Federation or of the State in which the application is being heard as the case may be, or accounts for his failure to do so to the satisfaction of the court or judge hearing the motion or summons.
2) Where an order to remove any proceedings for the purpose of their being quashed is made, in any such case, the order shall direct that the proceedings shall be quashed forth with on their removal into the court which heard the application.

Order 4

I. Application for Production and for Release of Person Restrained.

1) In an application where the applicant complains of wrongful or unlawful detention, the court or judge to whom the application is made ex-parte may make an order forthwith for his release from such detention, or may.
a) direct that an originating summons as in the Form 2 in the Appendix be issued or that an application therefore be made by notice of motion, as in the Form 3;
b) adjourn the ex-parte application so that notice thereof may be given to the person against whom the order for the release of the applicant is sought.
2) The summons or notice of motion must be served on the person against whom the order for the release of the applicant is south and on such other persons as the court or judge may direct, and, unless the court or judge otherwise directs, there must be at least five clear days between the service of the summons or motion and the date named therein for the hearing of the application.
3) Every party to an application under Rule 1 must supply to every other party copies of the affidavit which he proposes to use at the hearing of the application.

II. Without prejudice to Rule 1(1), the court or judge hearing an application where the applicant complains of wrongful or unlawful detention may, in its or his discretion, order that the

person restrained be produced in court, and such order shall be a sufficient warrant to any superintendent of a prison, police officer in charge of the police station, police officer or constable in charge of the complainant, or any other person responsible for his detention of the production in court of the person under restraint.

III Where an order is made for he production of a person restrained the court of judge by whom the order is made shall give directions as to the court or judge before whom, and the date on which, the order is returnable.

IV. 1) Subject to paragraphs (2) and (3), an order for the production of the person restrained must be served personally on the person to whom it is directed.

2) If it is not possible to serve such an order personally, or if it is directed, to a police officer, or a prison superintendent or other public official, it must be served by leaving it with any other person or official working in the office of he police officer, or eh prison or office of the superintendent or he office of he public official to whom the order is directed.

8) If the order is made against more that one person, the order must be served in the manner provided by the rule on the person first named in the order and copies must be served on each of the other persons in the same manner.

9) There must be served with the order (in the Form 4 in the Appendix) for he production of the person restrained a notice (in the Form 5 in the Appendix) stating the court or judge before whom, and the date on which the person restrained is to be brought.

V. Return to the Order for Release

1) The return to an order for he release of a person restrained must be endorsed on or annexed to the order and must state all the cause or justifications of the detainer of he person restrained.

2) The return may be amended, or another return substituted thereof, by leave of the Court of judge before whom the order is returnable.

VI. *Proceedings at Hearing of Motion or Summons After Order has been Returned.*

When a return to the order has been made, the return shall first be read in open court and an oral application then made for discharging or reminding the person restrained or amending or

quashing the return, and where that person is brought up in court in accordance with the order, his legal representative shall be heard first, ten eh legal representative for the State or for any other official or person restraining him. The legal representative for the person restrained will then be heard in reply.

VII. An order for the release of a person restrained shall make in clear and simple terms having regard to all the circumstances.

Order 5

Right of Any Other Person or Body to be Heard

Any person or body who desires to be heard in respect of any application motion, or summons, under these Rules, and appears to the court or judge to be a proper person or body to be heard, shall be heard notwithstanding that he or it has not been served with the copy of the application, motion or summons.

Order 6

I. Orders Which the Court Can Make, and Effect of Disobedience

1) At the hearing of any application, motion or summons under these Rules, the court of judge concerned may make such orders, issue such writs, and give such directions as it or he may consider just or appropriate for eh purpose of enforcing or securing the enforcement of any of the Fundamental Rights provided for in the Constitution to which the complainant may be entitled.
2) In default of obedience of any order made by the court or judge under these Rules, proceedings for the committal of the party disobeying such an order will be taken; order of Committal is in the Form 6 of the Appendix.

CASES TO ILLUSTRATE THE PROVISIONS OF THE RULES

At this juncture, it is desirable we examine the provisions of the Fundamental Rights (Enforcement Procedure) Rules, 1979 in the light of decided cases on both sides of the scale. The first example is the celebrated case of *Shugaba Abdulrahaman Darman V. Minister of Internal Affairs and Others.*[5] The facts were that Shugaba Abdulrahaman Darman was a member of the defunct Great Nigeria People's Party (GNPP-a political party) and at the material time the majority leader in the Borno State House of Assembly. The Federal Minister of Internal Affairs, in a purported exercise of powers conferred

on him under the Immigration Act, 1963, issued an order dated January 24, 1980 and published in an extraordinary Federal Government Gazette No. 7 Vol. 67 classified shugaba as a prohibited immigrant. On the same day and in compliance with the order, an official of the Ministry of Internal Affairs proceeded to Shugaba's house and thereupon executed the order by deporting Shugaba from Nigeria. On behalf of Shugaba, his lawyer invoked the jurisdiction of the High Court of Borno State under section 42 of the 1979 Constitution and applied for Order for enforcing and securing the enforcement of his fundamental rights and redress for violation. Counsel for the respondents objected that the proper procedure had not been followed. It was held overruling the objection, that the procedure to be followed is guided by the Fundamental Rights (Enforcement Procedure) Rules, 1979…where leave has been granted to apply for the order being asked for, the application for such order must be made by notice of motion or originating summons to the appropriate court. It was further held that in seeking redress for infringement of his fundamental rights, any person can claim damages- under the Fundamental Rights (Enforcement Procedure) Rules 1979.

In sum, what matters in the circumstances is that the proper procedure as laid down by the Fundamental Rights (Enforcement Procedure) Rules 1979 must be scrupulously followed. Otherwise the application may fail even if the liberty of the applicant is at stake. A good example is the case of *Lawrence Olusegun Adeyemo v. Commissioner of Police Oyo State ,* In this case the applicant requested the court for a writ of habeas corpus under Order 2 of the Fundamental Rights (Enforcement Procedure) Rules, 1979, rather than under the Habeas Corpus Law. Under Order 2(1)(4) of the Fundamental Rights Rules, as we have seen, an applicant is enjoined to serve all parties who are or might be interested in the proceedings. But the applicant in this case failed to comply with the provision. Although the affected party had put up appearance, he raised a preliminary objection to the application for non-compliance with the statutory conditions. *Babalakin J. ,* (as he then was), struck out the application on the ground that Order 2(1) (4) is mandatory whether the application is for mandamus, certiorari or habeas corpus.

It is rather convenient we continue with the discussion from the point of view of the Relief available upon an Application for Judicial Review' before we embark on the analysis of the two other categories of Remedies i.e. Public Law Remedies and Private Law Remedies, as stated above. The ideal situation is to have all the remedies, whether public or private within the reach of a litigant in one action as shown above under the constitutional provision.

4.0 CONCLUSION

In this unit, we have explained the land relating to the fundamental Rights (enforcement) procedure rules, Ex-parte application, the relationship between the provision of the 1999 constitution of the federal republic of Nigeria and the fundamental right (enforcement) procedure rules.

5.0 SUMMARY

You have learnt that in a democratic society the constitution is sacrosanct; the constitution entails and contains essentially the enboduments of the most fundamental rules principle and institution which constitute the fabric of the state. It is the harmonious relationship between all the organs erected by the constitution that helps to bring order, sanity and good government into the society.

6.0 TUTOR-MARKED ASSIGNMENT

1) Identify and explain the enforcement procedure in fundamental human Right cases.
2) Explain Ex-parte-application

7.0 REFERENCES/FURTHER READINGS

The 1999 constitution of the federal Republic of Nigeria.

Individual Rights under the 1999 Constitution Edited M. A. Ajomo and Bolaji Owasanoye.

UNIT 2 RELIEFS AVAILABLE UPON AN APPLICATION FOR JUDICIAL REVIEW

CONTENTS

1.0 INTRODUCTION

On an application for judicial review, in the words of Professor S. A. Smith,

"-----53, it is now possible for a court to award in a single proceeding any one or more of the prerogative orders of certiorari, prohibition or mandamus, a declaration or an injunction including an injunction that statutorily replaced the information in the nature of quo warrant). In addition a claim for damages may also be made, but, it would seem, only when the application includes one or more of the other forms of relief that may be granted on an application for judicial review. The prerogative writ of habeas corpus, which makes occasional appearances in administrative law, may not be sought on an application for judicial review and remains governed by its own rules of procedure.

2.0 OBJECTIVES

At the end of this unit and the relevant readings, you should be able to:

- describe the pasic provision of judicial review
- the steps to take in applying for judicial review.

3.0 MAIN CONTENT

It must be quickly added here that in Nigeria under the Uniform High Court Rules, "Application for Judicial Review" is provided for as in all the provisions of Order 53 of the Rules of the Supreme Court in England quoted above and our own Order 43 of the Uniform High Court Rules in Nigeria. They are identical if not exactly the same in essence. As a matter of fact, some states of the Federation, for example, Bendel *(now Delta and Edo)* and Lagos States have re-enacted the same Order 43 in the Uniform High Court Rules as their own Order 43 whilst Kaduna State makes it Order 43, But in substance they are the same and all the states now have Order 43 in one form or the other.

If the court grants leave it may impose such terms as to costs and as to giving security as it thinks fit.

Where an application for leave is refused by a judge the applicant may appeal or make a fresh application to another court.

i.) If the relief sought is an order of prohibition or certiorari and the court so directs, the grant shall operate as a stay of the proceedings which the application relates until the determination of the application or until the court otherwise orders;
ii.) If any other relief is sought, the court may at any time grant in the proceedings such interim relief as could be granted in an action began by writ.

3.1 Order 43; Rule 4: Delay in Applying for Relief

This rule seems to say that 'Equity aids the vigilant' in that where in any case the court considers that there has been undue delay in making an application for judicial review or in a case for certiorari, the application for leave under Rule 3 above is made after the relevant period has expired, the court may refuse to grant leave for the making of the application or any relief sought on the application, if, in the opinion of the court, the granting of he relief sought would be likely to cause substantial hardships to or substantially prejudice the rights of any person or would be detrimental to good administration. In the case of an application for an order of certiorari to remove any judgment, order, conviction or other proceedings for the purpose of quashing it, the relevant period is three months after the date of the proceedings.

The above is without prejudice to any statutory provision which has the effect of limiting the time within which an application for judicial review may be made.

3.2 Order 43 Rule 5; Mode of applying for judicial Review

When leave has been granted to make an application for judicial review, the application shall be made by originating motion to a judge in chambers or where the court so directs, the application may be made by motion to a Judge sitting in open court.

The notice of motion or summons must be served on all persons directly affected and where it relates to any proceedings in or before a court and the object of the application is either to compel the court or an officer of the court to do any act in relation to the proceedings or to quash them or any other order made therein, The notice or the summons must also be served on the clerk or registrar of the court and where any objection to the conduct of the Judge is to be made, on the judge.

Unless the court granting leave has otherwise directed, there must be at least ten days between the service of the notice of motion or summons and the day named therein for the hearing.

A motion shall be entered for hearing within 14 days after grant of leave. *See Chief B. Akinyede v. Abiola Isikalu & Ors, (1975)1 NMLR 405*. Motion was entered after 28 days; consequently the grant was regarded as lapsed, similarly in *The Queen v. Customary Court Grade A Ilesha and Ors. (1961) WNLR 265,* the motion was to be filed within 14 days but not filed, it was held that time could not be extended; consequently, order decree nits lapsed.

An affidavit giving the names and addresses of, and the places and dates of service on, all persons who have been served with the notice of motion or summons must be filed before the motion or summons is entered for hearing and, if any person who ought to be served under the rule has not been served, the affidavit must state that fact and the reason for it; and the affidavit shall be before the court on the hearing of the motion or summons.

If on the hearing of he motion or summons the court is of the opinion that any person who ought to have been served has not been served, the court may adjourn the hearing on such terms, if any, as it may direct in order that the notice or summons may be served on the person.

3.3 Order 43 Rule 6; Statement and Affidavits

Copies of the statement in support of an application for leave under Rule 3 above must be served with the notice of motion or summons and no grounds shall be relied upon or any relief sought at the hearing except the grounds and relief set out in the statement. The State v. Presidnet,

Ijebu-Igbo & North Grade B Customary Court (1969)1 NMLR 68. the Committal Warrant was not exhibited which is a violation of Order 53 Rule 6(1) RSC which was the applicable Order as of that date.

The court may, however, on the hearing of the motion or summons allow the applicant to amend his statement, whether by specifying different or additional grounds or relief or otherwise, on such terms, if any, as it thinks fit and may allow further affidavits to be used if they deal with new matters arising out of an affidavit of any other party to the application.

Where the applicant intends to ask to be allowed to amend his statement or to use further affidavits, he shall give notice of his intention and of any proposed amendment to every other party.

Each party to the application must supply to every other party on demand and on payment of eh proper charges copies of every affidavit which he proposed to use at the hearing, including in the case of applicant, the affidavit in support of the application for leave under Rule 3.

3.4 Order 43 Rule 7: Claim for Damages

On an application for judicial review the Court may, where the applicant claims for damages as a relief, award damages to the applicant, if:

i) he has included in the statement in support of his application for leave under Rule 3 claim for damages arising from any matter to which the application relates, and
ii) the Court is satisfied that if the claim had been made in an action begun by the application at eh time of making his application, he could have been awarded damages.

3.5 Order 43 Rule 8: Application for Discovery, Interrogation, Cross-Examination etc

Unless the court otherwise directs, an interlocutory for judicial review may he made to the judge notwithstanding that the application for judicial review has been made by motion, in this connection ‘interlocutory application includes an application for an order dismissing the proceedings by consent of the parties.

Where the relief sought is or includes an order of certiorari to remove any proceedings for the purpose of quashing them, he applicant may not question the validity of any order, warrant, commitment, conviction, in-quisition or record unless before the hearing of the motion or summons

he has lodged in the appropriate *(Attorney-General's)* office a copy thereof verified by affidavit or accounts for his failure to do so to the satisfaction of the court hearing the motion or summons.

Where an order of certiorari is made in such a case the order shall direct that the proceedings shall be granted on removal to the court, but eh court may in addition to quashing it, remit the matter to the lower court, tribunal or authority concerned with a direction to reconsider it and reach a decision in accordance with the findings of the court.

Where the relief sought is a declaration, an injunction or damages and the court considers that it should not be granted on an application judicial review but might have been granted if it had been sought in an action begun by writ by the applicant at the time of making the application, the court, may, instead of refusing the application, order the proceedings to continue as if they had been begun by writ; and Order 28 Rule 8, shall apply as if, in the case of an application made by motion, it had been made by summons.

3.6 Order 43 Rule 10: Saving for Person Acting in Obedience to Mandamus

No action or proceedings shall be begun or prosecuted against any person in respect of anything done in the obedience to an order of mandamus.

3.7 Order 43 Rule 11: Consolidation of Applications

Where there is more than one application pending against several persons in respect of the same matter and on the same grounds the court may order the applications to be consolidated.

It is desirable we note at this stage that the above described procedure, especially under the Uniform High Court Procedure Rules, has not changed the scope of or grounds on which each of the remedies may be granted. However, it should be noted that the merit of the new approach is that the Prerogative Orders can now be claimed along with the Private Law Remedies of Damages, Injunction and Declaration. We hardly need to say again that before the new dispensation, especially Order 43, this was not possible in many parts of Nigeria, until 1979 as shown above. A serious defect of prerogative remedy procedure is its incompatibility with the procedure for obtaining private law remedy.[12] a litigant under the Uniform High Court Rules can now ask, as a matter of principle, for all possible remedies in the alternative. That is how it should be. Both the remedies of private law, such as 'declaration, injunction and damages can now be sought in one action with the prerogative remedies

of certiorari, prohibition and mandamus'. One can now say with confidence that the constitutional provisions and the Uniform High Court Procedure Rules have;

> *... created a uniform flexible and comprehensive code of procedure for the exercise by the High Court of its supervisory jurisdiction over proceedings and decisions of inferior courts, tribunal or other bodies or persons charged with the performance of public acts and duties. At the same time the new provisions have eliminated, procedural technicalities relating to the machinery of administrative law, mainly by removing procedural differences between the remedies which an applicant was formerly required to select as eh most appropriate to his case.*[13]

It may be true that the problem of duality of procedure is now behind us in Nigeria in this area of constitutional cum administrative law as shown above, however, it is still necessary to consider the operative conditions for prerogative orders in an application for judicial review, which we now consider anon.

4.0 CONCLUSION

In this unit you have learnt about judicial Review and the procedure for applying for judicial review.

5.0 SUMMARY

In this unit we have explained judicial review as a process and the process of applying for judicial review

6.0 TUTOR-MARKED ASSIGNMENT

1) Describe the term judicial review
2) What is the consequence of delay in applying for judicial review?

7.0 REFERENCES/FURTHER READINGS

Oyemo and Yakubu: Constitutional Law in Nigeria. Ibadan: Jator Publishers 1998.

Ese Malemi: The Nigeria Constitutional Law.

UNIT 3 OPERATIVE CONDITIONS FOR PREROGATIVE ORDERS

CONTENTS

Although we have said, and indeed in an exercise of this nature, we are primarily concerned with the practice and procedural rules rather than substantive law, it is still necessary if we are to get a complete picture of all the issues involved for us to consider each of the prerogative orders to know the operative conditions in an application for judicial review, we shall now start with mandamus[14] and mention its five characteristics.

2.0 OBJECTIVE

When you have studied this course, you should be able to:

- outline the operative conditions for prerogative orders.

3.0 MAIN CONTENT

3.1 Order of Mandamus

Before an applicant for judicial review can succeed in invoking mandamus there must be an imperative public duty imposed on someone and not just a discretionary power to act.[15] secondly, the applicant must have made a request for the performance of the duty and eh request must have been refused. Thirdly the applicant must have a substantial personal interest in the performance of the duty concerned. The fourth is that where there is a remedy equally convenient, beneficial and effectual, an order of mandamus will not be made.[16] ant lastly, eh court

to which application for mandamus is made must itself have jurisdiction to entertain and grant it.[17]

3.2 Order of Prohibition

In an application for judicial review, an order of prohibition will not issue against a body which does not act as a judicial tribunal in any legal sense.18 it will also not issue against a body in respect of a ministerial or legislative act.19

Like mandamus, prohibition will not issue on the application of a stranger. In other words the doctrine of *locus standi*, which is discussed above, has its part to play in an application for an order of prohibition.

3.3 Order of Certiorari

The main characteristic of certiorari is that it issues not because of any personal injury to the applicant, but because of the need to control the machinery of justice in the general public interest. It is meant to ensure that inferior courts or anybody entrusted with the performance of judicial and quasi-judicial functions keep within the limits of the jurisdiction conferred upon them by the statutes which create them. In short it deals with the jurisdiction, [20] of an inferior tribunal. Certiorari will not issue against Superior Court of Record like the High Court, [21] Sharia Court of Appeal and the Customary Court of Appeal[22]

3.4 Quo Warranto (Now an Injunction)

The information in the nature of quo warranto which originally was writ was itself, in 1983 replaced in its home country England by an order of injunction. The essential of quo warranto, l since its essence is to challenge the usurpation of a public office, is that the office in question must be one held under or created by the State. [23] Another essential is that the office must be of a public nature and substantive and not merely the function and employment of a deputy or servant held at the will and pleasure of others. [24] the holder must have exercised the office; a mere claim to it is not sufficient to found a quo warranto. However, an admission to the office is sufficient user to found a quo warranto. [25] As usual, the applicant must have sufficient interest – *locus standi.* This now leads us to what amounts to sufficient interest before applying for leave; in other words the (locus standing of the applicant. And locus *standi* has been sufficiently discussed in Chapter 12. We now treat the question of conduct of applicant for judicial review.

3.5 Conduct of the Applicant for Judicial Review

An applicant who wants judicial review. Must make his application for any of the relief's as soon as he becomes aware of the cause of compliant. As seen under the rule there is time limit within which to apply. Although the court has discretion her, it is always better if the application is made within the time limit. If the applicant is however applying for leave out of time the applicant must be on notice and not ex-parte so as to afford the other parties an opportunity of objecting if they so wish and good reasons for the delay must be advance. It has been held in Alhaji Shittu Ajose v. A. Olateju & Anor. 46 that the fact that the applicant was unaware of the proper channel for bringing his application was not a substantial reason. It should be noted that no application for an extension of time to bring an application for certiorari can be brought in the Court of Appeal or in the Supreme Court because the Rules of those courts do not make provisions for this. [27]

An applicant for judicial review must show utmost *uberrima fides*. He must disclose all material facts and make no false statements to the court when applying for leave. Otherwise on discovery of any false statement after leave has been granted, the court may refuse to make an order. An applicant who has waived an objection that he may have as to the jurisdiction of the court may be refused relief if jurisdiction is concerned only with defects in preliminary procedural requirements. On this principle, a court may refuse a plaintiff an order of certiorari to remove an action to the High Court on the ground of lack of jurisdiction, an action which he has himself initiated in an inferior court.[28].

3.6 Evidence in Application for Judicial Review

We have seen that the practice in an application for judicial review is to first and foremost obtain the leave of the court. The application whether during term or vacation must be supported by a statement, setting out the name and description of the applicant, the relief being sought and the grounds upon which it is being sought and also by an affidavit verifying the facts relied on. If more than one relief is being sought this must be so contained in the statement. It must also be indicated in the alternative; and if damages are being claimed, this must also be contained in the statement. The point of emphasis here is that if the above is scrupulously followed then an application in respect of any of the prerogative orders should be resolved solely on affidavit evidence. If however the affidavits manifest the fact that oral evidence is necessary it will be admitted. [29]

In sum, the foregoing is the procedure by which application is made for judicial review in this country today. We have already dealt with two

methods; application through the constitutional provision as lay down by section 42 of the 1979 Constitution and secondly application for judicial review under the prerogative orders. The third method is application for writ of habeas corpus which is a kind of application for judicial review. In the light of all these we hardly need to say that duality was the bane of our law of procedure in this country before the introduction of constitutional importance because it is an instrument of the protection of the fundamental right to personal liberty with its own procedure quite distinct and different from the one provided under the Fundamental Rights (Enforcement and Procedure) Rules. 1979. Discussed above. Its quality, nature and use were duly expounded by the defunct Court of Appeal of Western State in Commissioner of Police v. Agbaje a case already discussed. Thus:

The writ of habeas corpus is a prerogative process for securing the liberty of the subject by affording an effective means of immediate release from unlawful or unjustifiable detention whether in prison or in private custody. The purpose is to inquire into the causes for which a subject has been deprived of his liberty. By it, the High Court and the Judges of that court, at the instance of the subject aggrieved, command the production of that subject, and inquire into the cause of his imprisonment or detention, if there be no legal justification for the detention; the party is ordered to be release. The writ is applicable as a remedy in all cases of wrongful deprivation of personal liberty. Even where the restraint is imposed on civil grounds under claim of authority, the legal validity of that claim may be investigated and determined.

At this juncture, it is better we set out seriatim the Order under the Uniform High Court Procedure Rules since we are dealing with procedure in this chapter, for convenience, we will take 'Order 41' of Ondo State High Court (Civil Procedure) Rules (O.D.S. No. 18 of 1987) as our specimen which provides.

3.7 ORDER 41

Habeas Corpus Proceedings

1. Where a person is alleged to be wrongfully detained, an application may be made for an order that he be produced in court for the purpose of being released from detention.

2. (i) No application under rule 1 shall be made unless leave therefore has been granted in accordance with this rule.
   ii) Application for such leave shall be made ex-parte to the court and shall be supported by a statement stating out the name and description of the applicant, the relief sought,

and the grounds on which it is sought, it shall also be supported by an affidavit verifying the facts relied on.

11 The affidavit verifying the facts relied on in making the application shall be made by the person detained, but where the person detained is unable, owing to the detention to make the affidavit, the application shall be accompanied by an affidavit to the like effect made by some other person, which shall also state that the person detained is unable to make the affidavit himself.

12 The applicant shall file, in the court, the application for leave not later than the day preceding the date of hearing, and shall at the same time lodge in the court enough copies of the statement and affidavit for service on any party or parties as the court may order.

13 The court or judge may, in granting leave, impose such terms as to giving security for costs as it or he thinks fit.

14 The court or judge may.

a) make an order forthwith for the release of the person being detained the provision of paragraph 1 notwithstanding;
b) direct that an originating summons be issued in Form 2 of the Fundamental Rights (Enforcement) Rules, 1979, or that the application be made by notice of motion in Form 3 of the Fundamental Rights (Enforcement) Rule 1979;
c) adjourn the ex-parte application so that notice thereof for the release of the person detained is sought.

15 The summons or notice of motion shall be served on the person against whom the order for the release of the person detained is sought and on such other persons as the court or judge may direct, and, unless the court or judge otherwise directs, there shall be at least five days between the service of the summons or motion and the date named therein for the hearing of the application.

16 Every party, to an application under rule 1 shall supply to every other party copies of the affidavits which he proposes to use at the hearing of the application.

i. An application for a writ of habeas corpus ad testificandum or of habeas corpus ad respondendum shall be made on affidavit.
ii. An application for an order to bring up a prisoner, otherwise than by writ of habeas corpus, to give evidence

in any cause or matter, civil or criminal before any court, tribunal or justice, shall be made on affidavit.

17 A writ of habeas corpus shall be in Form 95, 96 or 97 in the Appendix, whichever is appropriate.

Perhaps it is desirable we point out here that the 1972 High Court Rule of Lagos State provides for this matter in its Order 53 rules 9-17, which rule are substantially the same as those of Order 54 of the Rules of the Supreme

4.0 CONCLUSION

In this unit we have learnt about procedure for the enforcemental Human Right.

5.0 SUMMARY

The right to damages is an aspect of the issues of constitutional remedies and remedies available as a matter of constitutional rights for redness of constitutional wrongs.

6.0 TUTOR-MARKED ASSIGNMENT

1) Write short note on Habeas corpus.
2) Identify Habeas corpus proceedings.

7.0 REFERENCE/FURTHER READINGS

Oyewo and Yakabu: (1998). Constitutional Law in Nigeria. Ibadan Jato Publishers.

O. Ese Malemi: The Nigeria Constitutional Law.

UNIT 4 ORIGINATING NOTICE OF MOTION

CONTENTS

1.0 INTRODUCTION

An injunction is an order of the court which restrains a person from pursuing a specific course of action or which compels such a person to do an act which he would not otherwise have done voluntarily. An injunction can thus be broadly classified as mandatory and prohibitory. But whichever form it takes, an injunction is either perpetual or interlocutory.

An injunction is perpetual if, according to Professor Jegede, it is based on "a final determination of the rights of the parties and is intended permanently to prevent infringement of a right and obviate the necessity of bringing an action after every such infringement. The order does not necessarily last for ever, contrary to what the description or terminology of the order implies." What the term simply means is that "the order settles permanently the existing dispute between the parties, being an order that is made only after both parties to the dispute have been given the opportunity of being heard and the merits and demerits of the disputants' contentions considered".

2.0 OBJECTIVE

Students should be able to identify:

- the various procedures in instituting an originating summons

3.0 MAIN CONTENT

The order of perpetual injunction is made, therefore, to prevent a continuous infringement of a right and a continuous recourse to the court for suitable remedies for such infringement.

There are other variants of injunction. An injunction may be mandatory or prohibitory. Of particular interest is die use to which injunction is put in the area of public law. The singular importance of an order of injunction is that it is firm, effective and operates in personam. The fact that the order comes within the class descried as 'negative' injunction -that is an order which prohibits an action does not in any way derogate from its efficacy. For even a negative injunction can be ignored only at the risk of going to jail. For courts haw always looked at a disobedience of an injunction as an affront on their authority and the terse but stiff warning of Nwokedi, J. (as he then was) in Godwin Omumuka v. Celetine Ubani & Ors. should remind any prospective contenmor about the risk he is taking.

In that case, the judge had issued an interlocutory injunction against two of the litigants before his court in a civil action. The order was disregarded. It is trite law that a disobedience of an order of injunction constitutes a contempt of the court. In the subsequent trial of the contempt issue, the judge said: "I cannot see how the court can stand by and allow its authority to be verified in such a contemptuous manner by parties to a suit before it." The two contemnors were, therefore, committed to two months' imprisonment for breach of the order.

Iluyomade and Eka observe that doubts have been expressed as to whether an injunction would lie against the government or any of its departments or officers in their official capacity. Professor Wade explains that "the object of this is to prevent the Crown's immunity being stultified by substituting an official as defendant, since the whole point of the immunity is that the machinery of central government shall not be brought to a halt by an injunction." But Lord Denning has taken the view-- that an injunction might issue even if it would result in chaos.

The view expressed by Professor Wade does not, however, mean that it is not in any way possible to direct an injunction against an officer of the state. He himself admits that the reason why injunctive remedies are not extended to the Crown or state is probably because "the statutory duties of the .Crown, as opposed w those of specific ministers and government department, are very few. If they were numerous and important", he adds, "some remedy for their enforcement would be indispensable."

Nothing supports the assertion more than the long list of cases" in which ministers or government officials have been restrained from doing particular acts. The statutory duties are, in fact, becoming "numerous and important". Yet, this trend is hampered by the reluctance of the court to grant an injunction against the state minister when the official is "carrying out functions conferred on him by statute as a representative or as an officer of the Crown."

The position is a little confusing, and in this country we should be careful to what extent we import the English rules into our present constitutional arrangement.
From this confused state of the law, two deductions can be made. First, the role of a minister or commissioner as an individual who derives his authority directly from a statute must be separated from his activities as an agent of the state. In the former case, a minister may be restrained if he acts in a manner inconsistent with the power conferred on him under the enactment. In Attorney-General of Bendel State v. Attorney-General of the Federation Ors. the plaintiff claimed among other reliefs, an injunction restraining all officers, servants and functionaries of the government from operating the Revenue Allocation Act which had been assented to by the president. After declaring the Act a nullity, the learned chief justice said.

> Finally, all officers, servants and functionaries of the government of the Federal Republic of Nigeria or any well as non-statutory origin, where such illegalities tend to injure the public welfare.

The sketchy historical account given so far has been made necessary because Nigeria has been assimilated into the English common law system and has, in fact, received virtually wholesale the English doctrines of equity into the body of its laws.

Section 45(1) of the Law (Miscellaneous Provisions) Act 1939 provided that "the common law of England and the doctrines of equity shall be in force in Lagos and, in so far as they relate to any matter within the exclusive legislative competence of the federal legislature, shall be in force elsewhere in the federation".

But express law as to the authority of the Nigerian courts to grant an injunction is to be found in the Supreme Court Act 1960 and the High Court Laws of the various states of the federation. Section 16(b) of the Federal Supreme Court Act empowers the court, in its original jurisdiction, to grant all equitable remedies. In particular, section 22 of the Act empowers it to "make an interim order or grant any injunction which the court below is authorised to make or grant..." The courts

below are the Court of Appeal and the High Courts and it is to be noted that each high court is vested with the power to grant injunction, either permanently or for a short duration.

Section 8 of the Western Nigeria High Court Law 1955 vests in the state high court "all the jurisdiction, powers and authorities which were vested in or are capable of being exercised by Her Majesty's High Court of Justice in England" and, for avoidance of doubt, section 20 proceeds to say that the court under the Law may "grant a mandamus or injunction... in all cases in which it appears to the court to be just or convenient to do so".
"The combined effect of the above provisions", says Professor Jegede, is to confer on both the Supreme Court and the high courts a wide discretion in the award of injunction".

In the field of public law the hands of the courts have been further strengti1ened by the provisions contained in the Nigerian Constitution which widen the scope of the jurisdiction of all superior courts of record and give them an unambiguous authority to exercise "all inherent powers and sanctions of a court of law". Such inherent powers include the award of equitable remedies, including the granting of a decree of injunction.

3.1 Conditions for Grant of Remedy

Like every equitable remedy, an injunction, whether mandatory or prohibitory, is granted in public law at the discretion of the court. This discretion is, however, exercise on settled principles. Unless certain minimum criteria are satisfied it does not appear that the court will be inclined to decree an order of injunction.

Four criteria can easily be identified. First, an injunction will be granted to protect vested legal rights. This is clear from the decision in A. O. Ibenwelu v Lawal. In that judgment, Madarikan, JSC said:

> The golden rule is that where a plaintiff's legal right has been invaded and there is a continuance of such invasion, he is entitled to an injunction.

The probability that the injury which has occurred is likely to be continued must be a real one; where the injury apprehended or threatened is merely speculative, courts have held themselves unable to decree an order of injunction. In Samuel Oyebanji Ogunsola v S.L. Akintayo & Anor, for instance, where the issue in the claims had been overtaken by events, Ogunbiyi, J. said "the role of the court is to - determine disputes and not to write opinions. That may in the long run

amount not only to a futile academic exercise, but also in all probability lead to further fruitless litigation and a breach of the peace as well".

In Leslie F Tate v The Senior Immigration Officer, however, the plaintiff was able to establish a real threat to his right and he succeeded in obtaining an order in his favour. Tate was an alien resident in Nigeria. For reasons which are not quite material to this discussion, the senior immigration officer served on him a notice of his deportation from the country. He took out a writ to challenge the order and then sought an interlocutory injunction to restrain the defendant from deporting him pending the final determination of his suit then before the court. Coker, J. (as he then was) granted the order, saying that he had "no doubt about the justice of allowing the plaintiff to stay in the country until the determination of his case nor has any evidence of inconvenience to anybody been adduced or argued".

However, in Emmanuel Ojo Wey v Lagos Executive Development Board the court refused to make an order because the interest sought to be protected was prospective and had not crystallised into a real legal right.

Plaintiffs had sought an interlocutory injunction to restrain the defendants from pulling down their houses and ejecting them from occupation therefrom. They thought, from their observations of what was happening around, that the defendants were going to do this, though there was no threat that it would, in fact, be done. The court refused to make the order. Abbott, J. said:

> ...the plaintiffs think or anticipate that their houses may be pulled. That is not enough. The mere prospects of injury does not give a right to the relief asked for here... and I am not satisfied that the injury, if it be done, is anything more than in prospect at the moment".

Legal rights which will support the issuance of an order of injunction include the right to employment, freedom of movement, and the invasion of privacy. The rights to membership of clubs and associations, to hold public offices, and to propagate ideas are among the rights which the courts are inclined to protect by injunction. There are even judicial authorities to the effect that where private interests are especially affected by the execution or non-performance of public duties an injunction might issue to protect such private interests.

Secondly, an injunction will not be granted where the act complained of has been completed", the proceedings now in court have become stale,

or the order will not be enforceable. "A court will not order a person to do that which is impossible".

Thirdly, a court will not also decree an injunction where specific remedies are provided or some other remedies would be equally or more efficacious. Indeed, where damages will meet the justice of the case, the court will not order an injunction.

In an interlocutory injunction, the courts have consistently stated that the balance of convenience is an important element in the consideration whether to grant the order or not. The 'balance of convenience' means no more than that the person who is likely to come off worse if the order is given has the balance of convenience on his side. Thus, in Leslie Tate v Senior Immigration Officer, the court granted the order because the alternative would be that the plaintiff could be bundled out of the country before the substantive case was heard. In the exercise of this discretion, the court might extract an undertaking as a price of the injunction from the applicant.

The court will generally not grant an injunction of an interim nature unless the matter is especially urgent. Even where one has already been granted, it is at the discretion of the court to discharge such injunction. In Federal Electoral Commission v Afolabi Oredoyin the Federal Court of Appeal discharged an interim injunction restraining FEDECO from carrying on the revision of the voters' list in Lagos State because there was no real urgency for it, and moreover, "the order made in court below is far-reaching and has the effect of preventing the FEDECO and its officials from carrying out their constitutional functions".

Fourthly, courts have always felt reluctant to decree an injunction in circumstances in which it is put out of their reach to supervise such order. In Eshugbayi Eleko v Baddeley, one of the grounds on which the refusal of the order was based was that Mr. Baddeley would not be in a position to comply and even if he did the substantive holder of the office of governor would not be bound since the order was to operate in personam. In effect, the order would be rendered nugatory.

This philosophy of the courts is, of course, the main reason why injunction is infrequently made against the state or state functionaries who are in control of all enforcement apparatus of the state. This attitude of the courts is based on the maxim that equity does nothing in vain. Professor Wade comments:

> So far as they go, the decisions suggest that the injunction may now be less tightly tied to personal legal right than is

the declaration and that it may overlap the prerogative remedies which may be awarded on a more liberal basis.

3.2 Its Place in Public Law

The Statement of Professor Wade quoted above explains the apathy of the common law lawyers in seeking an injunction where a job has to be performed or some rights are invaded by public organs of state. "Injunction is not used in this country as a remedy in administrative proceedings", according to Professor Gamer, "because either certiorari or action for declaration will often be more appropriate". But then it does not mean that it is not used.

Perhaps the critical consideration in the choice of remedies is to keep in mind the fact that the main point of contact between citizen and public authorities is in public duties which may more conveniently be enforced by mandamus or bare declaration.

However, the performance or non-performance of public duties by government functionaries and corporate institutions does not constitute the only activity about which the citizen may complain. There is a host of other interests which may need to be protected. Sum interests may include the prevention of a breach of contract, the right not to be libeled or verified by scurrilous writings or literature, the right to protection from the operation of odious laws or by-laws, the prevention of the violation of fundamental and other rights, and prevention of wrongs done to a citizen. These areas of governmental activities where injunction is about the most potent remedy, are beyond the scope of mere declaratory judgments and completely outside the province of prerogative orders.

The citizen can seek injunction to restrain a public body or institution from committing a breach of the contract between them. Conversely, a public authority may, with equal convenience, request for a mandatory injunction which compels a citizen or other bodies to do an act. In Attorney Genera/ v Colchester Corporation a mandatory injunction was sought but was refused because the contract asked to be performed was uneconomical. The court will enforce a contract by injunction only if it is reasonable.

Cases Of enforcement of a contract by an injunction in administrative law are not many. This is because, as already stated, of the case with which the alternative prerogative remedy of prohibition can be obtained. Most reported cases where injunction was sought involved contract of employment in the public service In Ogunye v University of Lagos, the court granted an interlocutory injunction to restrain the defendant from

putting into effect the later written to the plaintiff by the university council purporting to terminate his employment. Similarly, in Dr. Adesegun Banjo v The University of Ibadan Kayode Eso, C.J. (as he then was), in granting an injunction, 1aid:

> I must say straight away that the court would not force an unwilling employer to provide work for his employee.. But so long as the lecturer or employee is prepared to serve the university what will the plaintiff lose if I refuse this 'order? He will lose all the enjoyments... that is, overseas study leave, part-furnished residential accommodation or housing allowance in lieu, superannuating benefits and a car allowance... To my mind, the balance of inconvenience weighs heavily against the applicant if I refuse the order sought... I will exercise my discretion to grant an injunction pending the determination of the suit.

The courts are generally "not deterred by the fact that an injunction against a public authority is a particularly drastic steps, bringing the machinery of government to a halt. They do not lend a ready ear to pleas of administrative inconvenience". Nor are the courts moved by the impecuniosity's of a corporate administrative body or institution. Thus, in Nigerian Supplies Manufacturing Co. v Nigeria Broadcasting Corporation, the high court refused the plea against an injunction to restrain a breach of contract by the corporation. The corporation bad resisted the application for an injunction, contending that it could not fulfill the contract because the financial position of the corporation was precarious. Lewis, I.S.C. said "even if the financial stringency had been proved, which was not, this would, in our judgment not have been a ground for refusing the plaintiffs claims". The Supreme Court restrained the breach of the contract.

Apart from restraining breach of contract, an injunction is known to have beat awarded to prevent injury to the reputation of another. But in this respect the plaintiff must prove an "injury, existing or apprehended. In Sola Soraki v Soleye, where the plaintiff sued the defendant, a permanent secretary in the government of Kwara State the supreme court held that:

> We observe that the defendant is empowered to grant a permit to the applicant to leave the specified area and to such terms and conditions to the permit as he deems expedient… If he does not do so we consider that the applicant has made out a case for being permitted to attend this court…"

Accordingly, the order sought was made by the court.

3.3 The Efficiency of the Remedy

The object of an injunction of whatever kind, as already noted, is to observe performance or non-performance of an act. How effective has this remedy been in the realm of public law?

To be able to answer this question objectively, it is necessary to consider the three classes of parties involved in public administration to whom or to which an order of injunction might be directed. These are public officers, corporations or institutional arms of government, and the chief executive.

With regard to individual officers, it seems that an injunction may be an effective tool to compel or restrain performance of acts which are prejudicial to the interest of individual members of the community. And since an injunction operates in personam, it is within the power of the court to enforce it in form of a committal for contempt if an order is disobeyed when issued against an officer.

In the case of corporation acting Wider some statutory authority the problem has always been one of identifying the appropriate organ against which the order is to be made. This is particularly so where the act to be restrained or done is to be carried out by the corporation in its corporate status. The court may get round the problem by making the order against the officers of the corporation who are considered as the "alter ego" of the body. The Supreme Court has made it plain in Ibadan City Council v Odukale, that the chairman of a local government is the alter ego of that body and his omissions are, therefore, deemed to be those of the council itself.

Until the recent case of A-G. of Bendel State v A-G of the Federation & Ors., it was not clear if an injunction could issue against an officer of the government acting as agent of the governments. But the uncertainty has now been removed. It seems that where an order is directed against a public officer or an ascertainable, class of officers, an injunction may equally be enforced against him or against any member of the class.

The chief executive -the head of state and the state governors-are in a privileged position. By section of the Nigerian Constitution 1999, they are immuned form legal proceedings in their capacities and in consequence, unamenable to the sanctions of all judgments and orders of a court of law. Therefore, where a government is restrained from

doing an act by an order of a court, it would appear that an injunction against a governor, even in a democratic setting, is useless.

Although an injunction issues at the discretion of the court, it is absolutely essential that courts should exercise this discretion in favour of members of the public where an act or omission of government functionaries threatens their vested right. This is particularly necessary when it is noted that the restriction on the courts in decreeing an injunction, which will have the effect of an order of specific performance of a contract, is self-imposed. "It... is not a jurisdictional bar but merely a general principle regulating the exercise of discretion". It is true that Lord Denning said in Bradbury v. Enfield London Borough Council that an injunction would issue even if chaos would result, but that is only in respect of a breach of statute. The learned lord's opinion cannot it seems, be stretched to cover restraint on a breach of contract or other complaints outside the sphere of statute.

There are reasons to believe that a mandatory injunction to pay money or damages may conveniently be enforced against statutory bodies. In the case of government department and other institutional organs created under the constitution, the problem of enforcement of a mandatory injunction is booth practical and legal, where the judgment to be enforced involves payment of money.

The practical aspect takes two dimensions: The first is how the money to satisfy the order is to be found; and secondly, the instrument of enforcement.

With regard to the first, departments and commissions have subvention approved for them by the legislature on an annual basis. Every expenditure is tied to a particular item or project and a department or commission may not spend money on an item not approved by the legislature. Where is the money to satisfy such an order to come from except it is subsequently authorized by the legislature? The plaintiff becomes helpless because the coercive instruments of enforcement belong to the government and it would be to expect it to the means of enforcement against itself. The case of Shugaba Abdulrahaman Darman v. Minister of Internal Affairs & Ors. proves this fact beyond doubt.

The legal aspect flows from the practical one. How can a mandatory order be obeyed when, although the government requests for funds from die legislature, the latter refuses to approve? The court cannot compel parliament to approve particular items of expenditure; neither can it commit any officer of the corporation for contempt, since non-compliance must be deliberate to attract the sanction. In effect, where a

court makes such an order on sucl1 a body in such a circumstance, it would have done so in vain.

An amendment introduced into section 251 of the Constitution 1979 would have opened a channel of enforcement of remedies against the state and its agencies. By a new subsection (4) of section 251 of the constitution it was possible to compel the attorney-general by an order of mandamus to issue a fiat for payment of a judgment by a ministry or extra-ministerial department. Corporations and parastatals were not covered by the new constitutional provision and it appears payment by those bodies might be forced by a writ of attachment. But die provision is not part of the 1999 constitution.

3.4 Specific Performance

Specific performance and mandamus are twin remedies in public law. Both ensure that a positive act is dale. The basic difference between them is that while the former is a remedy available in both private and public law, the latter is confined solely to public law.

The equitable remedy of specific performance is particularly prominent in the realm of the law of contract, but its use a remedy in public law is very much in doubt. This is because most government activities are carried on by public officers as agents of the state and, as we have seen, no action lay to enforce a contract against the Crown except by petition of right.

Therefore, it will be appreciated why Professor Gamer, though conceding that “specific performance... may be obtained against an administrative agency... on the same grounds as against any other defendant”, goes on further to say that it would not lie against the Crown.

The question then is: On what grounds and in what circumstances will court decree order of specific performance against a public body or, to use the words of Professor Gamer, "administrative agency"?

The current edition of Halsbury's Laws of England is completely silent on the availability of the remedy of specific performance in administrative law. This is presumably due to the emphatic provision in the Crown Proceedings Act 1947 that no injunction or order of specific performance shall issue against the Crown.

The present state of the law in England cannot, however, justify an inference that the order will not be decreed in this country against a government department or ministry. In the first place, there is nothing in

any Nigerian statutes equivalent to section 21 of the English Act. Secondly, section 6 and 272 of the Nigerian Constitution empower the courts to entertain actions in relation to "all matters between persons, or between government or authority and any person... for the determination of my questions as to the civil rights and obligations of that person". The grant of an order of specific performance against the government can therefore, not be a remote possibility in Nigeria.

4.0 CONCLUSION

In this unit, you have examined in details the term injunction and specific performance. You have learnt about the functions of each.

The unit also look at the various remedy available to a litigant and the efficacy of that remedy.

5.0 SUMMARY

In this unit we see injunction as an order of the court which restrains a person from pursuing a specific course of action or which compels such a person to do an act which he would not otherwise have done voluntarily.

6.0 TUTOR-MARKED ASSIGNMENT

1) Discuss the efficacy of injunction remedy.
2) What is specific performance

7.0 REFERENCES/FURTHER READINGS

Justus A. Sokefun: Issues in constitutional Law and Practice in Nigeria. An Essay in Honour of Olu Onagoruwa. Ago-Iwoye: (Olabisi Onabanjo Law faculty) 2002.