INTERNATIONAL HUMAN RIGHTS

AN OUTLINE

by Richard Hustad

PREFACE

This outline was begun in 2001 as course notes in the master's degree program at the Norwegian Centre for Human Rights at the University of Oslo, Faculty of Law. Since then, additions and modifications have been made to include material extracted from numerous courses, lectures, seminars, conferences, discussions, books, and articles. To the individuals behind all of these I am indebted. Wherever necessary, citations to the source of an entry are included.

Comments, suggestions, additions or corrections are welcomed and encouraged.

Warning: Since this is a work in progress within a field that is rapidly changing, the accuracy of the information in this edition may be or quickly become outdated.

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TABLE OF CONTENTS

PART I
INTRODUCTION TO HUMAN RIGHTS

1. ***Definition of HR***–rights belonging to any individual as consequence of being a human being
   A. A person is an end, not a means ("human dignity") [Kant]
      (1) Categorical Imperative (from *Groundwork for the Metaphysics of Morals* , 1875)–"Act in such a way that you always treat humanity, whether in your own person or in the person of any other, never simply as a means, but always at the same time as an end."
   B. Existential definition–relations between individuals who have a duty to act, or refrain from acting, toward other individuals and the relation of individuals to goods required for well-being (Individual–Individual and Individual–Goods, albeit through another individual). [Hanski & Suski, ch.1]
   C. The existence of HR is part of the structure of being, which is considered philosophically objective, although there is no "right" model of personality or human development.
2. ***Nature of HR***
   A. Universal (although there is a plurality of methods of protections and development)–the UDHR may not have *been* universal, but it is in the continual process *toward* universalism. [Vienna Decl. and Prog. of Action, Part 1, Para. 5]
      (1) Minimalism–avoid striving toward more particularly, judicially defined systems of HR, but instead more of a minimal, core version to avoid cracks caused by cultural differences. These can be supplemented by maximalist systems at the local level [see Pogge & Nickel]
         (a) Principle of Subsidiarity – Margin of Appreciation–in the European system, organs should leave certain areas to local determination, giving them a margin or leeway to decide at a local level issues involving morality and political sensitivity. [Handyside Case (1972)]
      (2) Maximalism–attempt to highly define a system of HR with a judiciary.
   B. Inherent–HR are the birthright of all [VC]. They are neither obtained nor granted.
   C. Inalienable–cannot be given away
   D. Equal–if people are equal and not merely means, societal burdens and goods should be distributed equally.
   E. Non-discriminatory–a relationship between the individual and HR. It is violated only when different treatment infringes HR.
   F. Fundamental–there are certain lines that cannot be crossed by individuals, majority of the state–these are the minimum borders of a HR. However, the means to protect these fundamentalisms have a plurality of solutions.
   G. Freedom–not an absolute value in HR protection. Each person does not have the same choices due to circumstances. (But do the availability of choices or the availability of choice determine whether there is freedom–procedurally perhaps, but substantively?)
   H. Individualistic–all individuals hold HR (some groups have rights as well)
3. ***Concept of HR***–the relationship between the individual and the state
   A. ***Beneficiary of HR*** (holders of entitlement)–***every individual*** human being [UDHR, Art. 22]
      (1) The UDHR recognizes humans as social beings that are not competitors to each other or a danger to one another, but in need of each other's companionship.
      (2) Autonomy of the individual–there may be duties to the community, but society exists for the benefit of the individual and cannot sacrifice individual rights for community benefits. Even collective rights have the individual as the ultimate beneficiary.
      (3) Modern HR includes not only the protection of the individual, but also the creation of conditions necessary for an individual to flourish.
      (4) Recognition of individual dignity–this is the basis of justice (thus, also the basis of every legal system that claims to be just).
      (5) The state exists to create conditions for the development of the individual.
   B. ***Provider (duty-holder) of HR***–the state
      (1) The extent of responsibility for each state–everyone within its territory and subject to its jurisdiction (this would preclude a diplomat within a state because that person is not subject to the jurisdiction–although certain basic protections remain). [CCPR, Art. 2 (1)]
         (a) Political rights are limited to those who are citizens [CCPR, Art. 25]

(b) Freedom of movement–only those lawfully within the territory of a state, both citizens and non-citizens so long as the limitations are equal. [CCPR, Art. 12 (1)]
(c) Entry into a state–only nationals and permanent residents [CCPR, Art. 12 (4)]
  (i) Entry can be conditional since it is not a right. Thus limitations on length of stay and right to work are lawful so long as they are not discriminatory.
    - If social security is earned through contributions, the right to actually work is implicated by the right to social security.
(d) Economic rights must be respected even for non-citizen residents. This can be extrapolated from the exception for developing states which need not fulfill such rights for non-citizens. Two factors to examine to determine the extent of such duties are the degree and extent of residence obligations of residents and any reciprocal bilateral agreements. [L9]
  (i) Developing states need not fulfill economic rights of non-citizens. [CCPR, Art. 2 (3)]
(e) Exceptions to the limitations to state responsibility (people to whom a state always has a duty):
  (i) Detainees in mental institutions
  (ii) Prisoners
  (iii) Those effected by armed conflict (humanitarian law) [Geneva Conventions]
(f) International responsibilities–there is an ongoing debate whether a state has a duty to assist another state
  (i) "Joint and separate action in cooperation" to achieve UN purposes required of its members. [UNC, Art. 56]
  (ii) "International cooperation" [CESCR, Art. 11 (1) & (2)]
  (iii) "Cooperation" for just distribution of food [CESCR, Art. 11 (2) (b)]
  (iv) "Free consent"–no requirement on states to accept the assistance of other states [CESCR, Art. 11 (1)]

(2) ***Scope of HR obligations***–Respect, Protect, Fulfill
(a) Civil and political rights–respect (negative prohibition) and ensure (positive duty) without discrimination. [CCPR, Art. 2 (1)]
(b) Economic, social and cultural rights–"take steps" and "achieve progressively" to the maximum extent of a state's ability–obligations of result. This means progressive realization toward a goal, but not necessarily the requirement of attaining the goal. Yet, there is nevertheless an immediate duty to take such steps–to begin walking down the road to achievement–as well as doing so without discrimination. [CESCR, Art. 2 (1); CESCR GC No. 3; see CRC, Art. 4 ("to the maximum extent of their available resources")]
  (i) Objective determination of "available resources"–GNP per capita. However, whether the government or even the private sector has money is determined by policy decisions (esp. taxes).
    - Consistent problem in third world–expenditures of death (military) exceed expenditures of life (combating poverty).
  (ii) Violations can be both commissions and omissions [CESCR, Art. 2 (1) ("all appropriate means")
    - This is not limited to the enacting of legislation.
    - Other means include administrative, financial, educational and social. [CommESCR GC 3 (7)]
    - Duty to monitor and make strategies is not effected by financial constraints. [CommESCR GC 3 (11)]
  (iii) Obligations of Conduct and Obligations of Result (GC***)–following the work of the ILC, there should be both obligations of conduct and obligations of result. "Such steps should be deliberate, concrete and targeted as clearly as possible towards meeting the obligations recognized in the covenant.
(c) General rule–***Respect, Protect, Fulfill (facilitate and provide)***
  (i) Respect–states must respect individual attempts to solve economic, social and cultural problems on their own so long as they're not blocked from doing so by another (discrimination). People must have an opportunity to take charge of their own destiny.

(ii) Protect–states must protect the integrity of the individual so they are free to equally attempt to solve problems (prevent discrimination and threats made by those who attempt to take advantage of others–this normally includes a legal system)
(iii) Fulfill–some will nevertheless require assistance from the state because they lack enough resources (esp. with economic or natural disasters).
- Facilitate individual attempts to solve own problems (e.g. vocational training & technical advice)
- Provide for those who nevertheless cannot achieve rights

(d) Indicators for monitoring human rights
(i) Structural indicators–obligations of conduct
(ii) Process indicators–obligations of conduct
(iii) Outcome indicators-obligations of result

(3) Historical basis of the state as duty-holder–prior to the 1648 Treaty of Westphalia, if HR were protected, the provider would have been the church or empire because the nation-state was not the holder of political power.
(4) A "good state"–a state that respects HR is a democratic state (but not merely the will of the majority) governed by the rule of law and realizing an appropriate social policy. [Hanski & Suski, ch. 1]
(a) "Taking steps" requires no particular form of government or economic system. [Comm.ESCR GC 3 (8)]
(5) The concepts of HR prevent state domestic law from degenerating into legal lawlessness (institutionalized violations of human dignity such as the Nazi era in Germany).
(6) Dichotomy of state in HR–the state is most often the protector of HR, even though it is HR law that protects the individual *from* the state.
(7) Challenges to the state as duty-holder–the Westphalia System is under attack in modern times because of domestically internal pressures for the enforcement of universal rights and external pressures such as economic and legal globalization.

C. The individual as duty-holder
(1) Individuals have a duty to exhaust means of satisfying their own needs before looking to the state. [EK&R, ch. 1]
(2) There have been attempts to create instruments binding on individuals, but Western countries have resisted that as being too collective of an approach (although the ICC and Tribunals enforce individual responsibility).
(3) Gandhi–"The genuine source of law is duty. If we were all to fulfil our duties, the respect of our rights would easily be obtained. If, however, neglecting our duties, we claim our rights, they will elude us."

D. Dimensions of human rights relationships
(1) Vertical dimension–state to individual on a supposed hierarchal ladder
(2) Horizontal dimension–individual to individual (or other private subject) on a supposed equal basis

4. ***Historical Background of Human Rights***

A. Three phases of human rights development
(1) Phase 1. ***Idealization***–concept developed (religions & philosophers)
(2) Phase 2. ***Positivization***–transformation of ideas into actual law
(3) Phase 3. ***Realization***–Attain reality of ideas through implementation.

B. Philosophical Development of Human Rights. The conflict between universalism and relativism.
(1) Natural Law–a Greek/Roman concept
(a) Law for Roman citizens–positively created
(b) Law for all–naturally existing, not created by anyone
(c) Authority of Rulers–derived naturally from God, but evidenced by positive biblical scripture (law).
(2) Social Contract–challenged the natural law theory. There is a state of nature that is harsh, without protections from others. Individuals voluntary give up some freedom in exchange for protection.
(a) Hobbes–much freedom is surrendered with human rights coming only from positive laws
(b) Locke–only that power that is absolutely necessary for the protection of society is surrendered to the state.
(c) Rousseau–State power is limited only to that necessary for the protection of society; therefore, if a

ruler couldn't attain this, there was a right to revolt.

(3) Constitutionalism (18th century)–an outgrowth (formalization) of the social contract theory
   (a) Montesque–state power should be controlled by a division of power between different branches of government and a catalog of rights for the state to protect.
   (b) American Declaration of Independence (1776) & Bill of Rights (1791)
   (c) French Declaration of the Rights of Man & the Citizen (1789)

(4) Secular Realism (early 19th century)–an abandonment of religion as a basis of understanding. Through man's own rational contemplation, wisdom can be achieved (this further eroded the power of divine right of monarchs).

(5) Conservatism (mid-19th century–following the rise and fall of Napoleon and considering the decline of the French revolution into a reign of terror, the universalism of HR was challenged both physically and philosophically.
   (a) Edmond Burke (UK) & Carl von Savigni (Germany)–the reign of terror in France did not occur by accident. It was the abandonment of tradition that caused it. High regard should be paid to national traditions. What was good for one country was not necessarily good for another. Abstract rights were dangerous–they must be culturally rooted.

(6) Popular Sovereignty (late 19th century - 1940's)–democracy. Government by the will of the people. This is an outgrowth of constitutionalism

(7) Nationalism (Nazism) & Communism (Stalinism)–reactions to popular sovereignty

(8) Victory of Universalism? (1989)–the fall of the Berlin Wall has been considered by some as the final victory of democracy (Fukuyama) and universalism; however nationalism has continued to flourish (FYR & African ethnic wars).
   (a) Nationalism may not be entirely opposed to HR–a central theme is the right to self-determination

(9) Vienna Declaration and Program of Action (1993) (adopted by the UN Conference on HR)–allegedly rooted in (obsolete) concepts of natural law.

C. HR document milestones

(1) The Tablet of Hammurabi (ca. 1730 B.C.) – 282 codified laws created by the Sumerian king Hammurabi that contained references to individual rights.

(2) Magna Carta Libertatum (1215)–among other guarantees it prohibited arbitrary arrest and guaranteed a fair trial by peers in accordance with law (to free men only).

(3) Franchises de Geneve (1387)–imposed by prince-bishop Adhemar Fabri on the citizenry and himself excluding arbitrary detention, guaranteeing security of people and belongings, prohibiting the requirement of unpaid service to the city, and prohibiting direct taxation.

(4) Edict of Nantes (1598)–granting Catholics and Protestants the same rights within a Catholic state, including freedom of religion and belief.

(5) Petition of Rights (1628) in England–guaranteed principles of political freedom, respect for legislature and the security of people.

(6) Habeas Corpus Act of 1679 in England–freedom from arbitrary arrest and punishment guaranteeing a procedure to produce the detained with three days to determine the legality of detention.

(7) Bill of Rights of 1689 in England–the monarch is not above the law. Recognized the right to vote, petition for redress and judicial guarantees of individual freedoms.

(8) The Virginia Bill of Rights (June 1776) in the USA–equality, separation of powers, representative government, freedom of the press, subordination of military to civil power, right to justice, and freedom of religion.

(9) Declaration of Independence (July 4, 1776) in the USA–equality, inalienable rights, right to life, right to liberty and right to pursuit of happiness.

(10) Declaration of the Rights of Man and the Citizen (1789) in France–equality, freedom, national sovereignty, representative government, primacy of law, separation of powers, right to resist oppression, presumption of innocence, freedom of opinion and religion, freedom of expression, and right to own property. (Olympe de Gouges drafted a Declaration of the Rights of Women in 1791 that mirrored the document which she believed was sexist. She was guillotined.)
   (a) 1793–added right of assistance, right to work, right of instruction, right of insurrection, unacceptability of slavery.

(b) 1795–attempts to restore balance between rights and duties following the Terror.
(c) 1848 Constitution of the Second Republic–prohibition of slavery, universal suffrage, abolished death penalty for political crimes, reduced work week, freedom of education, freedom to work, right of association, and right to petition.

(11) Post World War I national documents promulgating rights:
(a) Constitution of the United States of Mexico (1917)
(b) Declaration of the Rights of the Working and Exploited People in Russia (1918)
(c) Weimar Constitution in Germany (1919)

(12) Declaration on the Rights of the Child adopted by the League of Nations (1924)
(13) Atlantic Charter (1942) uniting 26 nations to defeat the axis and remain united after the war to create an international organization to achieve peace in the world.
(14) Charter of the United Nations (June 26, 1945 in Paris)
(15) United Nations for Education, Science and Culture Organization Constitution (1945)
(16) Universal Declaration of Human Rights (1948)

5. ***Categories of HR***–all HR are indivisible, interdependent and interrelated. [Vienna Decl. and Prog. of Action, Part 1, Para. 5] T.H. Marshall is attributed the rights development paradigm of civil rights in the 18th century, political rights in the 19th century and social rights in the 20th century.

A. ***1st Generation Rights***–Civil and Political

(1) Historical basis–the Enlightenment and 19th century political and economic liberalism
(a) Religious freedom following the reformation that challenged the control of individuals by the church.
(b) Economic freedom following the struggle to escape from feudalism where there was a hierarchy of control over land and resources.
(c) The social contract theory that evolved from the reformation and anti-feudalism
(i) Hobbes, Leviathan–SC had established a powerful authority with absolute, authoritarian power to which people should submit to because that is the best way to have peace and stability (bad nature of man).
(ii) Locke, Two Treatises on Government (1689)–people only gave up enough power to achieve minimal security that is necessary for happiness. the sovereign should not be a person, but an elected body (but pre-occupied with property so that landless could not vote to avoid diluting the property rights of land owners).
(iii) Rousseau, the Social Contract–the "general will" of society is articulated by the sovereign body and should be submitted to by the individual will so long as it is within an acceptable arena (somewhere between Hobbes & Locke).
(d) Political freedom and participation movement in 1848 was an attempt to include the propertiless, but this was repressed. Yet, by the end of the 19th century there was suffrage to all men, as well as outlawed slavery, torture and arbitrary arrest. By early 20th century there was woman's suffrage.
(e) Employment rights came in the early 20th century with rights of children, social security and labor.

(2) Elements
(a) Immediate rights enjoyed absolutely
(b) Passive rights–things the state (and individuals) cannot do (the state shall *not*)
(i) However, a right stated negatively is still a right that must be enforced and protected by the state (that a person shall not be convicted of a crime without due process requires the positive steps of providing a sufficient court system). Many civil and political rights have implications of a social or economic nature. [Airey Case, 1979 ECtHR 32, note 23, para. 26]
- Positive measures required to fulfill right to life. [HRC GC 6 (reduction of infant mortality); HRC Comments: Canada; Tavares v. France, EuroCommHR; Tanko v. Finland, EuroCommHR]
- Measures required to prevent inhuman treatment [Case of D. v. UK, 1997 EctHR 37 (deportation of seriously ill)]
- Positive action required within a limited time frame. [Lopez Ostra v. Spain, 1994 EctHR 303-C (government tried to prevent closing of power plant that was significantly polluting–commission of state); Guerra v. Italy, 1998 EctHR 64 (state too slow in closing

down polluting plant–omission of state; ECHR, Art. 8 are positive measures)]

(ii) Despite common beliefs, these rights can be costly (courts, public defenders, police training, and judicial systems are not cheap).

(c) Justiciable rights–enforced through domestic courts or internationally which necessitates the requirements of the right be sufficiently clear.

(3) ***Civil Rights***

(a) Integrity rights (life, privacy, no slavery, no torture, some thought and religion)–protection of the individual from the state or others. These are absolute rights that cannot be abrogated.

(b) Freedom of action rights (expression, religion, practice, association, assembly)–right to do something. These rights are limited when infringing upon others.

(c) Due process–guaranteed procedures and substance in court (impartiality, defense)

(4) ***Political Rights***–authority of governments is based on the will of people; therefore, the exercise of power must be based on the authority of those on whom power is exercised. [UDHR, Art. 21 (3)]

(a) Election rights–the right to elect and be elected in free and fair elections (association and expression overlaps here).

B. ***2nd Generation Rights–Economic, Social and Cultural***

(1) Historical basis–the concept of the welfare state–democratic socialism

(a) A German conference in 1890 adopted recommendations for economic and social rights, internationally recognizing them before other types of rights.

(b) International Association for the Legal Protection of Workers formed in 1900 in Basel.

(c) International Conferences in Bern, Germany in 1905 & 1906 adopted conventions.

(d) International Labor Organization formed in 1919

(e) Lord Beverage first coined the term "welfare state" in 1942 referring to the expanded role of the state in the acceptance of duties.

(f) Four Freedoms Address of Franklin Roosevelt in 1941 included "freedom from want."

(g) UDHR first draft completed in 1942 by USA, Canada and other states.

(h) Economic Bill of Rights advocated by Franklin Roosevelt in 1944 stating "Necessitous men are not free men. People who are hungry and out of job are the stuff of which dictatorships are made."

(i) UDHR drafted by UN Commission on Human Rights in 1947-48.

(j) Positivization of economic, social and cultural rights in 1966 with the adoption of the CESCR.

(k) Limburg Principles in 1986 were drafted by the International Commission of Jurists in Limburg, Netherlands as a guide to state obligations under CESCR.

(l) Maastricht Guidelines on Violations of Economic, Social & Cultural Rights in 1997 by distinguished experts drafted and used by monitoring bodies.

(2) Elements

(a) Gradual realization (however, in reality, because the state duty is to take steps, there is an immediate requirement in that regard).

(i) Immediate realization of minimum core obligations–failure to attain core requirements is prima facie evidence of a violation of the CESCR unless a state can prove exhaustion of all available resources, [CommESCR GC 3 (10) & 12 (17)] including having sought international aid. [CommESCR GC 3 (13)]

- Essential foodstuffs
- Essential primary health care
- Basic shelter and housing
- Basic forms of education

(b) Positive action rights–things the state must do (the state *shall*)

(i) However, also found to have protection of the individual from the state as well as the protection of the individual by the state.

(c) Little or no procedure for enforcement (especially by the individual)

(i) Unjusticiable–these rights are too vague to be given a clear and precise definition lent to court enforcement.

(ii) European practice has given justiciability to many 2nd generation rights.

- Purely public, statute-based benefits. [Salesi v. Italy, 1993 EctHR 257-E (social

insurance scheme)]
- Social & welfare assistance [Schuler-Zgraggan v. Switzerland, 1993 EctHR 263 (disability benefits).

(iii) European practice has even given 2nd generation rights precedence over 1st generation rights.
- Margin of appreciation allows securing social justice over strict enforcement of contracts. [James and Others v. UK, 1986 EctHR 98 (tenants with long leases allowed to purchase freehold of property from landowner)]
- Wide margin of appreciation for social and economic policies, even though violative of property rights [Mellachen and Others v. Austria, 1989 EctHR 169 (statutorily-mandated rent reductions)]

(3) Criticisms
- (a) Considered very expensive demands on government (rights to certain objects or programs)
- (b) Argued that not universal because there is an unequal claim to such rights (poor countries cannot provide the same level of protection as rich countries)
- (c) Problems of applicability (these are not problems of validity)
  - (i) political character of treaty obligations
  - (ii) obligations of result rather than of conduct
- (d) Difficulty in justiciability
  - (i) Precise wording of provisions (language of individual rights, not state obligations). However, the Migrant Worker Convention demonstrates the difficulties in this regard because it has precise language, but has not yet entered into force since 1990.
  - (ii) Weak monitoring systems of treaties

(4) Specific Bases
- (a) UDHR Articles 22 to 28–Article 28 provides the necessary bridge from 1st generation rights to 2nd generation rights. It guarantees a "social & international order" in which other civil and political rights can be achieved.
- (b) The four freedoms speech of FDR on January 7, 1941–the "freedom from want"

(5) ***Social Rights***
- (a) Adequate standard of living (substantially includes food & nutrition, clothing, housing and necessary conditions of care). [UDHR, Art. 25; CESCR, Art. 11; CRC, Art. 27]
- (b) Highest possible standard of health (not right to health) [CESCR, Art. 12]
- (c) Right of families to assistance. [CESCR, Art. 10; CRC, Art. 27]

(6) ***Economic Rights***
- (a) Property rights [UDHR, Art. 17]
- (b) Labor rights
  - (i) Right to work [UDHR, Art. 23; CESCR, Art. 6]
  - (ii) Rights in work [UDHR, Art. 23; CESCR, Art. 7]
  - (iii) Right to form trade unions [CESCR, Art. 8]
- (c) Social security [UDHR, Art. 22 & 25; CESCR, Art. 9; CRC, Art. 26]

(7) ***Cultural Rights***
- (a) Take part in cultural rights.
- (b) Enjoy benefits of scientific progress and applications
- (c) Benefit from moral and material interests resulting from any scientific, literary or artistic production of which the beneficiary is the author.
- (d) Education (also linked to economic and social rights) [UDHR, Art. 26; CESCR, Art. 13 & 14; CRC, Art. 28 & 29]
  - (i) Necessary to earn an income
  - (ii) Necessary in order to participate in creativity and development of HR
- (e) Preserve cultural identity of minority groups (a civil and political rights link). [CCPR, Art. 27; CRC, Art. 30]

C. ***3rd Generation Rights–Solidarity or Collective*** (development, peace, environment)

(1) Historical basis–the 1960s and 70s dealing with global structural problems. However, positive group rights existed prior to positive individual rights (rights of peoples under League of Nations).

(2) The beneficiary is not the individual, but a group

D. Problems with classification of rights

(1) There are not clean distinctions between generations

(a) The state must provide a good judicial system to protect civil and political rights–this is very expensive

(b) Some rights have implication in all generations–the right to education

(c) Some occurrences involve all sections (discrimination involves both civil & political and group rights)

6. HR as a diverse system

A. Legal–Courts which deal with individual cases with the strength of impartiality.

B. Political–Security Council making general standard setting by majority rule.

C. Administrative–UN Secretariat executing decisions in a steadfast, loyal manner of a bureaucracy.

PART II
INTERNATIONAL LAW–human rights as law; the legal protection of HR

1. ***Definition of Human Rights <u>Law</u>***
   A. Part of general public international law–interstate law based on state sovereignty where states are the legislatures and "citizens" of the international community. The historical roots of this arrangement is the Westphalia system.
      (1) State-based international law is challenged (like state sovereignty generally):
         (a) Internal challenge–international laws which serve the individual rather than the state (e.g. human rights, humanitarian law, refugee law). This is an internal authority that is superior to the state.
         (b) External challenge–NGOs and international organs such as the UN. These organizations have taken over some state powers as an external authority over the state.
   B. Distinction between human rights law and human rights generally (moral rights)
      (1) HR law *guarantees* HR, but *does not create* HR. It is a positivist means to achieving HR and protecting the individual against threats to development (how to identify and challenge these threats is the challenge to HR law).
      (2) The aim is the well-being of the individual, not abstract values
      (3) Thomas Pogge (*Severe Poverty as a Human Rights Violation*, 8 April 2003)–"Whoever cares about moral human rights will grant that laws can greatly facilitate their realization. And human rights lawyers can acknowledge that legal rights and obligations they draft and interpret are meant to give effect to pre-existing moral rights. IN fact, this acknowledgment seems impliciet in the common phrase "internationally-recognized human rights." It is clearly expressed in the preamble of the UDHR, which presents this declaration as stating moral human rights that exist independently of itself."
2. ***The subject of international law–the state***
   A. ***Definition of a "state"*** [Montevideo Convention on Rights and Duties of States (1933), Art. 1]
      (1) Territory–physical, geographic area with definite borders, although there can be disputes.
      (2) Permanent population–this has been objected to in the case of nomadic peoples
      (3) Government control [<u>Aaland Islands Case, International Committee of Jurists</u> (1920)]
      (4) Capacity to enter into foreign relations or "independence." [<u>Austro-German Customs Unions Case</u>, PCIJ AO (1930)]
      (5) Achievement of statehood in accordance with international law. [UNC, Art. 2 (4) (no use of force and respect for territorial integrity); Friendly Relations Declaration, principle 1 (no terrorism or encouragement of civil strife) & principle 3 (non-intervention militarily, economically and politically)]
      (6) Recognition is <u>not</u> required–neither recognition of the state generally or the government in control.
   B. ***Recognition of states*** in IL
      (1) Declaratory theory (subjective)–other state's recognition is their declaration to have relations with the new state (e.g. Manchuria–Japan attempted to set up a state but it was not recognized; Southern Rhodesia attempted to establish its own state but it was not recognized; Croatia–the EU's early recognition helped the establishment of the state)
      (2) Constitutive theory (objective)
   C. ***State succession***–formation of and changes to a state
      (1) Disintegration of one state into many states
      (2) Unification of states
      (3) A part of a larger state secedes–the mother state keeps rights and obligations while the new states starts with a clean slate, except where rights or obligations have intimate connection to the new state (border agreements along the new state border, IMF loan for something within the new territory, etc.)
   D. ***Sovereignty***–consequence of statehood. This is the right to regulate and control the state territory [see UNC, Art. 2 (1) & (7), but see Art. 13 (1) (b); Friendly Relations Declaration]
      (1) Types of territory
         (a) Land territory
         (b) Sea territory–this was, at first, claimed for possible colonization of the sea, but when this was considered unfeasible, the sea was considered to belong to everyone (because it was also believed that its resources could not be exhausted)

(i) Cannonball rule–there was sovereignty over the sea as far as a cannonball could be fired under the principle of "effective occupation" which was approximately one nautical mile. Around 1800, it was agreed that a definite distance was necessary so it was settled on three nautical miles to give the benefit of the doubt of the ability to effectively occupy.
(ii) Modern development–states recognize that resources can be exhausted and have started to extend jurisdiction beyond shorelines, extending the three-mile boundary to a 12-mile boundary.

(c) Air space–as far as conventional aircraft can fly, but not including outer space which is under no state's jurisdiction.

(2) Types of sovereignty
(a) Internal side–state's have jurisdiction over their own territory and, to some extent, over their own citizens. Jurisdiction is the right to act in a certain geographical area.
(b) External side–the state has an international legal personality. The state is a subject of international law.
(c) Active Side–the right to act both externally and internally (e.g. to enact laws, make agreements).
(d) Passive Side–state's enjoy a status. They have protection from aggression and intervention from other states (territorial integrity). [UNC, Art. 2 (4)]

(3) Values protected by sovereignty
(a) self determination of peoples (but could also protect an authoritarian regime)
(i) Sovereignty can be equated to human rights: while sovereignty protects weaker states from oppression by stronger states, human rights protects the weaker, vulnerable people from those who are stronger. Thus, it is contradictory for a state to claim state sovereignty as a defense to domestic human rights violations; the two go hand in hand.
(b) domestic and international stability
(c) margins of appreciation

(4) Related concepts
(a) Territorial integrity [UNC, Art. 2 (4)]
(b) Non-interference–the Friendly Relations Declaration (1970) placed preeminent importance on non-interference without mentioning HR. [Risse, p. 206]

(5) Limitations of sovereignty
(a) The UN General Assembly may study and criticize internal policies of a state in order to realize HR and fundamental freedoms. [UNC, Art. 13 (1)] It can also make recommendations. [UNC, Art. 14]
(b) ECOSOC can make recommendations regarding internal state issues that are within its mandate. [UNC, Art. 62 (2)]
(c) States must adopt domestic legislation and other measures to give effect to rights. [CCPR, Art. 2 (2)]

(6) History of sovereignty
(a) Sovereignty originated in the thoughts of Machiavelli and Jean Bodin
(b) Treaty of Westphalia–state replacing the church/empire. In the middle ages, the church contended its superiority, that without it there was no salvation (*extra Ecclesiam nulla salus*).

(7) Erosion of sovereignty by HR principles
(a) Certain political systems are considered better than others.
(b) Some systems are not considered legitimate (non-democratic).
(c) Question–If a state does not accept human rights, is it legitimate?
(d) ***UN intervention in domestic affairs may not be a violation of sovereignty*** (sovereignty is conditional on fulfillment of certain criteria–an international social contract):
(i) States have the duty to jointly and separately cooperate with the UN in the promotion and fulfillment of rights. [UNC, Arts. 55 & 56]
- States must be democratic. [UDHR, Arts. 21 (3), 28 & 29 (2)]

(ii) The UN cannot intervene in matters that are within the domestic jurisdiction of a state. [UNC, Art. 2 (7)]
(iii) Gross HR violations (genocide & crimes against humanity) are considered matters not only of

domestic jurisdiction, but also of universal jurisdiction. [ICTY, ICC]

(iv) HR violations have more recently been considered a "threat to the peace" pursuant to UNC, Art. 39, opening up enforcement mechanisms of Chapter VII (which are expressly allowed under Article 2 (7)).

(v) Chapter VII allows for three types of UN responses at the discretion of the Security Council:

- Calling upon a state to comply. [UNC, Art. 40]
- Imposing sanctions. [UNC, Art. 41]
- Use of land, sea, or air forces to demonstrate, blockade or other operations. [UNC, Art. 42]

E. ***State Responsibility***–a consequence of statehood

(1) Articles on State Responsibility–written by ILO, approved by GA

(a) The declaration is the result of 50 years of attempts to form this document

(b) The declaration reflects custom in IL because it was prepared with the input of almost every state.

(2) Obligations of statehood–traditionally, these were paired with 1st, 2nd and 3rd generation rights, but the rights system has been found to be more complicated and interrelated than this.

(a) Obligations of conduct–prohibition of certain activities and requirement of others

(i) Requirements are very detailed

(ii) Little flexibility in how rights are implemented

(b) Obligations of result–requirement to reach certain benchmarks or indicators (possibly vague because there is no time frame)

(i) There is large flexibility to allow different states and cultures to deal with problems in their own way to achieve the end goal (cannot violate other rights, however).

(c) Obligations of cooperation–cooperate in good faith

(3) Attributability–an internationally wrongful act must be attributable to a state. [SR, Art. 2 (a)]

(a) State conduct shall be considered when dictated by international law. [SR, Art. 4 (1)]

(b) Domestic law also determines attributability of any organ whether an individual person or another entity. [SR, Art. 4 (2)]

(4) Wrongful acts–consist of both active commissions and passive omissions. [SR, Art. 2]

(a) International *crimes*–violation of jus cogens (binding international law from which there can be no derogation)

(b) International *dilects*–all international violations

(5) Periods of political turmoil and insurrection

(a) Conduct of an insurrection movement that comes to power is considered state action even prior to formally becoming the new government. [SR, Art. 10]

(6) The complainant

(a) The state that is wronged

(b) Any other state (universal jurisdiction) [SR, Art. 48]

F. ***Jurisdiction***–a state's exertion and application of its law

(1) Civil jurisdiction–private international law (conflict of laws). Each state has its own method of determining which law to apply in international civil cases.

(2) Criminal jurisdiction

(a) Legislative–the right of a state to enact laws

(i) ***Linking approach*** (most important)–a state seeking to enact legislation must have an acceptable link to the subject of the legislation according to the following principles:

- Territorial principle (fully accepted)–a state has jurisdiction over any crime committed within its territory.
  - Objective approach–crime committed where effect occurs
  - Subjective approach–crime where criminal acts, even if just leading up to the effect, is committed
- Active personality principle or nationality principle (fully accepted in public international law)–states have jurisdiction over their citizens or permanent residents (domicile principle)
- Passive personality principle (more controversial)–states have jurisdiction where the

victim of a crime is its own citizen. This especially applies with terrorism, where it is more accepted.
- Protective principle (accepted, but only for clear vital interests)–states have jurisdiction where the state's vital interests are threatened
- Universality principle–all states have jurisdiction over certain crimes. This originated with sea pirates–any state could arrest and prosecute them. This was something that it was felt threatened the international system (grave breaches of HR and humanitarian law–genocide, crimes against humanity; crimes against international communications; and terrorism)
- Flag principle–the registration state of a ship or aircraft has jurisdiction over crimes committed against the vessel

(ii) ***Lotus approach*** (named for the Lotus Case–a collision between a French and Turkish ship in international waters within the Black Sea)–the burden of proof is on the country contesting the linkage of the legislation (rebuttable presumption that the legislation is acceptable under IL)

(iii) ***Balance of interests approach***–equity balancing test determining which state has the strongest interest

(b) Enforcement–the right of a state to take a person into custody

(i) Enforcement jurisdiction is exclusively territorial–no country can enter another to take a person into custody.
- The universality principle has been applied to justify abduction of a criminal from one state by another state–the Israeli Supreme Court used the balancing approach to find that it was more important to achieve justice than to respect territory.

(ii) Public international law gives states much leeway with legislation, but not enforcement.

G. ***Use of force***–a power of statehood

(1) The use of force is prohibited [UNC, Art. 2 (4)]

(2) Only in self-defense is there an exception to the prohibition of force [UNC, Art. 51; Corfu Channel Case, ICJ (1949)]

(a) Armed attack–the general principle is that there must be a traditional, armed military attack on a country. The majority view is that an attack on citizens only is not enough. It is about scale.

(i) Occupation is considered a continuing armed attack justifying a response.

(ii) Not every illegal use of force is an armed attack. [Nicaragua v. United States, ICJ Reports (1986) at paras. 193-95 and 210-11.

(b) Pre-emptive (anticipatory) self-defense (there is no clear majority on this)–a state does not have to wait until the actual armed attack if there is evidence of an impending attack.

(i) With nuclear weapons, if there is evident, overwhelming proof of an impending nuclear attack, a first strike is justified

(c) Reprisals–although this begin and was considered acceptable in the 19th century, the UN Charter does not accept any such right. Reprisals are not self-defense. [Friendly Relations Declaration (1970); UNGA Res. 4.2.2]

(i) If there is a continuing attack, a response is not a reprisal.

(d) Proportionality–any defensive attack must be proportional to the attack or anticipated attack in order to remain self-defense. Anything beyond that point, is unjustifiable use of force.

H. ***Conclusion of treaties***–a power of statehood [VC, Art. 6]

3. ***Locations of international law***

A. Domestic law (since the late 18th century)–national systems are the most important HR defense. [L15]

(1) Source of law–constitutional law-making

(2) Status of rule–constitutional law

B. International law (since the late 19th century)

(1) Source of law–formal sources do not exist, but equivalent is the custom of states (modern, not ancient)

(a) The UN GA has the responsibility for the development of IL. [UNC, Art. 13 (1) (a)]

(b) The International Law Commission has been delegated by the GA much of the substantive work of developing IL.

(2) Status of rule–evidence of custom (nearly all international actions display some evidence of custom. Decision of the ICJ, GA Resolutions and multi-lateral treaties are all evidence of custom. Even actions by third parties, such as the IL Commission cause certain reactions by states which can illustrate custom).

4. ***Sources of international law–evidence of custom*** [Brownlie, ch.1; ICJ, Art. 38]
   A. Preliminary considerations:
      (1) The court is presumed to know the law.
      (2) The party alleging custom has the burden of proof, although there is no particular standard for doing so.
      (3) Some argue that IL is at an early stage of development because custom is still important, something that is historical and neither precise nor well-developed. [L3]
      (4) Note that the first three sources that follow respect state sovereignty because each is merely a reflection of that to which a state has voluntarily consented.
   B. ***International instruments*** (conventions, treaties & declarations) [ICJ, Art. 38 (1) (a)]
      (1) Types of international instruments:
         (a) Convention–a binding document that is multi-lateral (three or more states). A covenant is just a more 'sacred' name for a convention that is extremely important.
            (i) Two types of conventions
               - Particular IL–those binding on only a few states
               - General IL–instruments to which a majority of states are members
            (ii) Statement of reality rather than the creation of something new (places in words that which already is considered to exist). This challenges the positivist approach to IL. [Hanski & Suski, ch.1]
         (b) Declaration–a non-binding document of two or more states ("soft law")
         (c) Treaty–binding bilateral or multi-lateral documents that are more of a business-style contract than a convention. [despite general usage of term, see VC, Art. 2 (1) ("treaty" is just about any agreement between states)]
            (i) Treaty contracts–a business agreement between states (i.e. building a bridge across a river border). In such a case, the treaty does not have a role once the project is complete.
            (ii) Law-making treaties–a contractual relationship that regulates an abstract matter on a long-term basis.
      (2) ***Acceptance*** ("conclusion") of an instrument by a state [VC, Arts. 6-18]
         (a) Who represents a state?
            (i) A person who "produces appropriate full powers" [VC, Art. 7 (1) (a)]
            (ii) Those who practice of the particular state evinces an intention to consider that person as having sufficient authority. [VC, Art. 7 (1) (b)]
            (iii) Heads of state, heads of government and foreign ministers. [VC, Art. 7 (2) (a)]
            (iv) Heads of diplomatic missions with the state to which they are accredited. [VC, Art. 7 (2) (b)]
            (v) Accredited representatives to particular conferences or organizations for instruments concluded in the area of their accreditation. [VC, Art. 7 (2) (c)]
         (b) Becoming a state party [see VC, Art. 11]
            (i) Signing an instrument [VC, Art. 12]
            (ii) Exchanging instruments [VC, Art. 13]
            (iii) Signing subject to ratification (usually by the legislature). [VC, Art. 14] This two-step process is the method used by most states
      (3) Entry into force of an instrument–there is generally a minimum number of states required to ratify a treaty before it enters into force.
      (4) ***Reservations*** to an instrument by a state [VC, Arts. 17, 19-23]
         (a) Arguments for and against reservations
            (i) Critics of reservations–a state must accept an entire treaty or nothing because of the nature of treaty obligations.
            (ii) Supporters of reservations
               - Allowing reservations brings a state within the framework of a treaty that would otherwise not have become a party.

- Reservations are congruent with the concept of state sovereignty where state's may accede to that which that want.

(b) General rule in IL
  (i) *Formulation* of reservations may be made by the reserving state unless: [VC, Art. 19]
    - The reservation is prohibited by the treaty.
    - The treaty articulates specific reservations which are allowed and the reservation made does not fall within that list.
    - The reservation is "incompatible with the object and purpose of the treaty." [see CEDAW, Art. 28 (2)]
    - Generally, it is with regard to procedures within the treaty. [L52]
  (ii) *Acceptance* of reservations may be made by other state parties to the instrument [VC, Art. 20]
    - Acceptance by <u>all</u> parties required–if there is a limited number of parties to the instrument and the purpose is such that agreement between all parties is required.
    - Acceptance by a competent organ of an international instrument–required if the reservation is to a "constituent instrument" to an international organization.
      - The HRC has stated that the USA reservation to the CCPR regarding the minimum age for the death penalty was incompatible with the object and purpose of the CCPR. [UN Doc. CCPR/C/79/Add.47, para. 14]
    - Operability of instrument for a reserving party exists only with accepting states–acceptance of a reservation by any other state party makes the reserving state a party to the instrument *only in relation to the accepting state* and only if the treaty has entered into force. The acceptance of one party does not effect the acceptance of any other party.
    - Acceptance by absentia–acceptance of a reservation is considered to have been made by absentia if no objection has been raised within twelve months (this does not apply to constituent instruments to international organizations).
    - Effect of acceptance–acceptance of a reservation by just one other state effectuates the reserving parties consent to be bound by the instrument.
  (iii) *Objection* to reservations may be made by other state parties to the instrument [VC, Art. 20]
    - No objection allowed–where the reservation is expressly authorized by the treaty.
    - Objection must decry entry into force of instrument between the reserving party and objecting party–an objection is merely a statement of disagreement without consequence unless the objection specifically states that entry into force of the treaty is precluded between the objecting and reserving state.
    - Objections of non-party signatories–simply *advisements* without legal effect until the objecting party has become a party itself. [ICJ Advisory Opinion on Reservations to the Convention on Genocide, 28 May 1951]
  (iv) *Acceptance <u>and</u> Objection* – effect of different positions by different state parties to an instrument. [ICJ Advisory Opinion on Reservations to the Convention on Genocide, 28 May 1951]
    - Objecting party–treat the reserving state as a non-party
    - Accepting party–treat the reserving state as a party to the instrument
    - Reserving party–considered a party to the instrument so long as the reservations are compatible with the object & purpose of the treaty (which raises a second level of objections that not only does objecting party object to the reservation, but it also believes it incompatible with the treaty). Disagreements must be decided by the ICJ or any other procedure proscribed by the instrument itself.

(5) Observance of an instrument
  (a) Pacta Sunt Servanda–every treaty in force is binding and must be performed in good faith. [VC, Art. 26]
  (b) Domestic law cannot be invoked by a state party to a treaty to avoid its obligation under the treaty (except subject to illegal acceptance of a treaty). [VC, Arts. 27,46]
  (c) Methods of changing obligations under an instrument:
    (i) Change the instrument through amendment according to framework of instrument.

(ii) Derogate from provisions in the instrument.
(iii) Withdraw from the instrument (if allowed by procedural articles)

(6) ***Interpretation of an instrument***
(a) Method of interpretation–there is no official method that has priority over another, although each court has its own favorite (most favor the teleological method because international instruments are living documents that must be contemporaneously applied) [VC, Art. 31 (1)]
(i) ***Linguistic (objective) interpretation***–the ordinary meaning of the terms [under U.S. law, see Air France v. Saks, 470 U.S. 392 at 297 (1985); Valentine v. United States ex. rel. Neidecker, 299 U.S. 5 at 11 (1936).
(ii) ***Contextual interpretation***–the context of the instrument in relation to other obligations
(iii) ***Teleological interpretation***–in light of the object and purpose of the treaty (examine the reasons and objectives of the treaty. This can go far beyond linguistic interpretation.
(b) Means of interpretation
(i) Text of instruments includes not only the body, but also the preamble and annexes [VC, Art. 31 (2)]
(ii) Any other agreement made between all the parties at the conclusion of the instrument. [VC, Art. 31 (2) (a)]
(iii) Any subsequent agreement between the parties regarding interpretation of the instrument. [VC, Art. 31 (3) (a)]
(iv) Any subsequent practice of the parties which establishes agreement regarding interpretation. [VC, Art. 31 (3) (b)]
(v) Any relevant rules of IL that are applicable [VC, Art. 31 (3) (c)]
(vi) Preparatory work to a treaty as a supplemental means. [VC, Art. 32]
(vii) Circumstances of the conclusion of the treaty as a supplemental means. [VC, Art. 32]
(c) Supremacy of the UN over other instruments
(i) Charter–it supercedes any contradictory instrument [UNC, Art. 103]
(ii) Security Council resolutions–supercede conflicting instrument provisions [UNC, Art. 25]

C. ***International custom***
(1) Two required elements of custom (both must exist)
(a) Usus (objective)–the de facto practice of a state
(i) *Usage* alone is not custom–usage is a practice by a state simply as conduct. Custom is both usage and the subjective acceptance of the practice as law.
(ii) *General Practice*–this is usage within the area in question. It need not mean universal practice, but simply region practice (e.g. the law of Baltic Sea will be different from that in the Carribean Sea).
(iii) Comity–the principle that state actions are sometimes committed simply for instrumental reasons (e.g. to appear to be nice) without having an effect on and specifically avoiding evidence of opinio juris.
(b) Opinio Juris (subjective)–a legal conviction to consider a custom to be the 'right' thing. This can be inferred from general practice if the point of contention is not the state of the law. [Gulf of Maine Case, 1984 ICJ 293-94]
(2) Elements for determining in totality the existence of custom:
(a) Duration–none in particular is required so long as there is consistency and generality of practice, although longer is better.
(b) Uniformity and consistency of practice–the same custom accepted substantially, but not necessarily completely uniformly. These criteria are very subjective and courts give great leeway in this regard.
(c) Generality–number of states practicing. The problem is when there is silence on the issue without material evidence of one position or another. Silence could been tacit acceptance or just no interest.
(d) Accepted legal principles–practices subjectively considered obligatory rather than simply a courtesy. The problem here is proof; there are two approaches
(i) assume legal principle based on general practice [Gulf of Maine Case, 1984 ICJ 293-94]
(ii) require proof of acceptance–a subjective belief by the state in the obligations of the state

[Lotus Case & Asylum Case]

(3) *Jus Cogens* [VC, Art. 53 ("a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character")]
   (a) Two conclusory elements required: [VC, Art. 53]
      (i) A norm is accepted subjectively and objectively by most states, although this need not include every state.
      (ii) The substance of the norm includes the acceptance by most states that it is to be applied to all states without derogation, even those that have not subjectively or objectively acceded to it.
   (b) Instruments in violation of jus cogens at time of conclusion are void. [VC, Art. 53]
   (c) Any instrument that later comes into conflict with a newly-developed provision of jus cogens is void and terminates. [VC, Art. 64]

D. ***General principles recognized by states*** [ICJ, Art. 38 (1) (c)]
   (1) Source of general principles–domestic law of the states
      (a) Temple Case–in a border dispute, two states had used certain maps officially without objection for many years so they were estopped from claiming any border other than that which had been domestically used by both.
      (b) This was included in the statute of PCIJ and adopted in the ICJ because it was feared that there could be a situation where there was no applicable treaty or custom.
   (2) Persistent Objector Rule–a state can opt out of custom by being a persistent objector in a way that is clear. Otherwise, there is a rebuttable presumption of acceptance of the custom.
      (a) The purpose of this rule is to preserve state sovereignty in the wake of developing custom. While a single state cannot stop the evolution of custom, it can prevent itself from being bound by it.
      (b) 'Persistent' requires stating an objection each time the rule is discussed at the UN, a conference, or any other international forum.
   (3) Subsequent Objector Rule–a state can subsequently depart from custom, but there is an open question whether this requires acquiescence of other states. See the Fisheries Case.

E. ***Judicial decisions*** [ICJ, Art. 38 (1) (d)]
   (1) Although formally considered a secondary source, in practice decisions are used on the primary level [L3]

F. ***Teachings of the highly qualified*** [ICJ, Art. 38 (1) (d)]

G. ***Equity*** [ICJ, Art. 38 (2)]
   (1) Standard–reasonableness in order to achieve a fair outcome
   (2) This basis of ICJ decisions was developed after the ICJ statute in order to avoid making decisions in a vacuum.

H. ***Acts by international organizations*** ("soft law")–non-binding instruments that have general support
   (1) This could be viewed as the development of customary law on the subjective level (opinio juris) [see ICJ, Art. 38 (1) (b)]
   (2) Examples:
      (a) General Assembly resolutions–non-binding
      (b) Security Council resolutions–binding, but not representative of all countries (the SC is not a legislature; even joint (similar) resolutions between the GA and the SC do not create "legislation")

I. ***Unilateral state acts***
   (1) Nuclear Tests Case (1974)–France made unilateral statements that it would not detonate nuclear weapons in the atmosphere, but underground. The court accepted this unilateral statement and terminated the case a result because Australia and New Zealand had based their case on possible fall-out.

5. **Legal Methodology** (***revise this section)

A. Methodologies
   (1) Legal dogmatics–traditional method of attempting to discover the state of the law based on recent cases and research. De lege lata: "what the law is." (see ICJ, Art. 38 & VC)
   (2) Legal realism–not satisfied with stating the (obvious) law as it exists. It aims to understand law deeper by going under the surface and examining interests, ideologies, politics, etc.

(3) Deconstruction–continuation of legal realism. First find under-the-surface values then find connections and contradictions among them.
(4) Comparative method–comparing the various legal systems for differences and similarities in an attempt to understand differences (why do differences exist, not just a survey of differences).
(5) Legal politics–attempt to describe what the law should be and proposals for change to better accomodate the demands of society. Must make distinction between what is and what should be:
  (a) De Lege Ferenda–what should be done to change the formal law (new conventions, treaties, etc.)
  (b) De Sententia Ferenda–what should be done in order to use current treaties and cases in new applications.

B. Historical Schools of Thought
(1) Empirical Skepticism (John Austin, early 19th c.)–look at the facts, not abstract thoughts. There is no international legal system in the formal sense because there is no hierarchal levels and no sanctions. Law is the commanding by superiors of inferiors using sanctions. IL had a system of norms (positive morality), but no legal system.
(2) Scandinavian Realism (William Lundstedt, mid-war & WWII)–a reaction against speculative philosophy of the legal system. Rules matter because there is a threat of force behind them (sanctions).
  (a) Skeptical of the League of Nations because it was just words without enforcement. A military response is what is necessary.
  (b) Positive toward the UN because it satisfied the realisms of "great power" veto and the ability to use force.
  (c) Skeptical of HR because there was no basis of enforcement by force or sanctions. This is somewhat diminished in criticism because there are some mechanisms now.
(3) Positive Realism (Morganthau, cold-war era)–IL can be effective in matters that are not important, but where national interests are involved it is only national interest and power that is relevant.
  (a) Game theory
  (b) Can view perspective from each regime
(4) Post-modernism (Koskenniemi, 1990s–)–international law should be seen from two perspectives. First is international morality (something above states that sets limits on their power) which has descending arguments toward the definition of IL. Yet, if this was all that existed it would simply be utopia. Second is state interests (a reflection of state members) which makes ascending arguments toward the definition of IL. Yet, if this were all there was, IL would simply be "apology" of state acts–tools used to defend and explain state behavior. IL is the combination of these descending and ascending arguments, although it is often shrouded by indeterminacy (IL exists within the window of determinacy).
(5) Classical Legal Dogmatics–the use of force is emphasized by Empirical Skepticism and Scandinavian Realism. Arguments are made in legal terms, not power or political terms. IL is still followed–for the most part–by legal principles and attention is given to the very few instances of breaches of IL.
  (a) Louis Henkin–almost all rules of IL are followed almost all the time–habitually applied.
  (b) States believe in IL and, therefore, follow it.
(6) The Policy Approach (the Yale School)–IL is not rules, but a normative system. Rules that exist are nothing more than past decisions.

PART III
HUMANITARIANISM
Intervention and Humanitarian Law

1. "Right" of humanitarian assistance [see UNC, Art. 39]
   A. Ministerial Declaration of Foreign Ministers of Group of 77 (132 states)–there is ***no such right*** because there is no basis in the UN Charter or IL. [23rd Annual Meeting, 24 Sept 1999, para. 69]
   B. The Red Cross is considered to have a right of "humanitarian initiative" in visiting POWs and political prisoners.
2. Historical justification for intervention (intervention does not have to be military–the USSR claimed that criticism alone was intervention)
   A. "Just wars" in the middle ages (holy wars and crusades)
   B. Protection of citizens abroad–a concept that is open to abuse and often used to achieve other goals (expansion of economic influence, destabilizing of unfriendly governments, etc.)
   C. Reaction to the suffering of people (founding of the International Red Cross)
3. Humanitarian Law–often confused with HR law
   A. Humanitarian law is applicable only during specific circumstances (war or conflict) while HR law is always applicable regardless of the situation.
   B. Humanitarian law involves the *obligations* of individuals (and states) while HR law covers the *rights* of individuals.
4. Humanitarian-related organizations in the UN
   A. Office for the Coordination of Humanitarian Affairs
   B. Office of the High Commissioner for Human Rights
   C. UN High Commissioner for Refugees
   D. UNICEF–ensuring health and education to children and women in conflict
   E. World Food Program
   F. UN Development Program
5. Human rights–humanitarianism dilemma–often a UN agency is the best informed of human rights violations in a particular region, although exposing these violations will often result in restricted access by the government involved with devastating effects for those in need of humanitarian assistance.

PART IV
INSTITUTIONS: THE UNITED NATIONS, IN GENERAL

1. History and formation
   A. Originally it was only the victorious states from World War II
2. Objectives of UN
   A. Primary objective–peace and security in the world, originally just through conflict resolution [Preamble]
   B. Secondary objective–reaffirm the principles of human rights [Preamble]
      (1) HR held an instrumental character in the Charter as a compromise between two camps. First, was those who continued to believe that the League of Nations approach of not including HR at all. Second, was those who wanted HR to be a primary objective of the UN.
3. Supremacy of UN Charter over all other international instruments. [UNC, Art. 103; see also Art. 1 (4); *Aerial Incident over Lockerbie*]
4. The United Nations system
   A. Charter-based Organs [Arts. 7 (2) & 68]–any organ found to be necessary. This includes not only those specifically named in the UN Charter [UNC, Art. 7 (1)], but also those created based on its mandate even though not specifically named. Charter-based procedures have a broader scope because they are not limited by the provisions of a treaty.
   B. Treaty-based Organs–created by treaty that are independent of the UN Charter, but subsequently associated with the UN. Treaty-based procedures are more limited by the mandate of their treaty.
   C. Two types of constitution of organs
      (1) *Intergovernmental bodies*–consisting of member states through appointed representatives (advantage of having more authoritative weight)
      (2) *Expert bodies*–experts in the field who are supposed to be independent of loyalties to any state (advantage of not becoming bogged down by politics)
5. Notable charter provisions
   A. Self determination–the "*principle* of self-determination." [UNC, Art. 1 (2)] A principle is not necessarily a right. The language of rights was not used until the 1960s (esp. the 1966 HR covenants).
   B. Problem solving–solving "problems of an economic, social, cultural or humanitarian character" [UNC, Art. 1 (3)] This is an expansion on the original powers of the League of Nations.
      (a) This is reiterated by Art. 55 which recognizes that these problems are of a human rights character.
   C. Applicability of working principles of UN to both member states and UN organs. [UNC, Art. 2]
   D. Sovereignty of states–democracy is the supreme form of government and such states are better than authoritarian regimes (see sovereignty as a consequence of statehood in HR Law part, above)
      (1) "Sovereign equality" [UNC, Art. 2 (1)]
         (a) States are nevertheless required (they have bound themselves) to promote the goals of HR domestically. [UNC, Art. 56]
      (2) Non-intervention [UNC, Art. 2 (7)] This relates to the relationship between the UN and member states only, not between states (although other instruments extended this principle interstate).
         (a) GA can still criticize a state toward realization of HR [UNC, Art. 13 (1) (b)]
         (b) ECOSOC can make recommendations regarding domestic policies [UNC, Art. 62 (2)]
      (3) "Territorial integrity"–this is basically non-intervention. [UNC, Art. 2 (4)]
      (4) "Political independence" [UNC, Art. 2 (4)]
   E. Prohibition of use of force–violation of peace is an international crime [UNC, Art. 2 (4); Nuremberg Charter]
      (1) Self defense is allowed as an exception, applying both to individual states and collective security agreements. [UNC, Art. 51]
   F. Authorization by the Security Council is another exception. [UNC, Arts. in Chapter VII]
   G. Preeminence of UN Charter over all other instruments–any treaty requirements or obligations that are contradictory to the UN Charter are void. [UNC, Art. 103]
      (1) Security Council Resolutions prevail over all other instruments [UNC, Art. 25]

PART V

INSTITUTIONS: UNITED NATIONS CHARTER-BASED ORGANS

[Arts. 7 (1) & (2) & 68]

1. ***The General Assembly*** [Ch.4]
   A. Powers
      (1) Develop and codify IL. [UNC, Art. 13 (1) (a)]
2. ***The Security Council*** [Ch.5]–15 members with five that are permanent and ten that are rotated by elections.
   A. Purposes of Security Council
      (1) Primary purpose–maintain international peace and security [UNC, Art. 24 (1)]
      (2) Protection and promotion of HR [UNC, Art. 39]
      (3) Alleviation of humanitarian emergencies. [UNC, Art. 39]
      (4) Dealing with refugee problems. [UNC, Art. 39]
   B. Security Council acts on behalf of and with the expressed authority of all UN members.
   C. Powers of Security Council
      (1) Specific powers–those enumerated in the Charter
      (2) General powers–these must be checked against the principles of the UN (Namibia Case, ICJ Reports (1971)
      (3) Principle of Legality–the Security Council must follow the law. [UNC, Art. 24 (2)]
      (4) Presumption of Legality–what the Security Council does is presumed to be legal.
3. ***The Economic & Social Council*** (ECOSOC) [UNC, Ch.10, Arts. 61-72]
   A. Membership--54 members, all rotated by elections.
   B. Mandate–"soft issues," but not peace and security
   C. Powers–ECOSOC and the GA are on equal footings within the UN, but the GA carries more weight.
      (1) Make recommendations to the GA or pass resolutions itself. [UNC, Art. 62]
      (2) Make recommendations generally toward the observance of HR, even regarding the internal policies of a state. [UNC, Art. 62 (2)]
      (3) Coordinate contacts with other UN organs
      (4) No power to take action on complaints as a general rule, although procedures have developed (see below). [ECOSOC Res. 728F (1959)]
      (5) Creation of complaint procedures (see Enforcement Mechanisms part of this outline)
         (a) Resolution 1235 (1967)
         (b) Resolution 1503 (1970)
   D. ***The Commission on Human Rights*** (1946) [see UNC, Art. 68] – the mandate to promote and protect human rights is so broad that is encompasses just about everything.
      (1) Formation–established by ECOSOC pursuant to Article 68 of the UN Charter
      (2) Composition–intergovernmental body of 53 members elected to 3-year terms, plus numerous observer states (approx. 100)
      (3) Major accomplishments–drafting of UDHR, covenants and conventions
      (4) Powers
         (a) 1235 & 1503 procedures–examination of certain gross, large-scale HR violations (see Enforcement Mechanisms part of this outline).
         (b) Initiate a Special Rapporteur to investigate
         (c) Drafting instruments–on its own or from Sub-commission proposals, draft instruments are sent to ECOSOC for approval and eventual submission to the GA.
         (d) Creation of working groups to examine HR situations (Chile after 1973 coup)
      (5) Meetings–annually in March/April in Geneva for six weeks.
         (a) Special sessions with consent of majority of Commission members for urgent reasons.
      (6) Other subsidiary organizations
         (a) Working groups
            (i) Arbitrary detention
            (ii) Enforced or involuntary disappearances
            (iii) Optional protocol to CESCR
            (iv) Draft declaration on indigenous peoples

(v) Structural adjustments programs and economic, social & cultural rights
(vi) Right to development
(vii) Situations (procedures)

(b) Special thematic rapporteurs
(i) Illicit movement and dumping of toxic and dangerous products and effect on HR
(ii) Right to food
(iii) Right to adequate housing
(iv) Summary or arbitrary executions
(v) HR and fundamental freedoms of indigenous peoples
(vi) Torture
(vii) Independence of lawyers and judges
(viii) Use of mercenaries and impeding of the right to S-D
(ix) Freedom of opinion and expression
(x) Freedom of religion and belief
(xi) Education
(xii) Migrants
(xiii) Contemporary forms of racism, discrimination, xenophobia & intolerance.
(xiv) Sale of children, child prostitution and child pornography
(xv) Violence against women

(c) Special working groups
(i) Arbitrary detention
(ii) Enforced or involuntary disappearances

(d) Special country-specific rapporteurs

(e) Experts
(i) Right to development
(ii) Protection of persons from enforced or involuntary disappearance
(iii) Structural adjustment policies and foreign debt
(iv) HR and extreme poverty
(v) Draft protocol to CESCR

(f) Special representatives of the Secretary-General
(i) HR defenders
(ii) Internally displaced peoples

(7) ***Sub-commission on Protection of Human Rights*** (1947)
(a) Formation–created by the Commission on Human Rights
(b) Composition ("think tank" of the Commission)–26 independent experts elected to 4-year terms by the Commission taking into account geographical distribution.
(c) Powers
(i) 1235 & 1503 procedures (see Enforcement Mechanisms part of this outline).
(ii) Drafting instruments–proposals sent for approval to the Commission, then ECOSOC, then the GA.
(d) Meetings–annually in Geneva for three weeks.
(e) Working groups
(i) Communications (1503 procedures)
(ii) Contemporary forms of slavery
(iii) Indigenous populations
(iv) Trans-national corporations
(v) Administration of justice
(vi) Minorities

E. ***Commission on the Status of Women*** (1947)
(1) Studies, reports and recommendation on HR and related issues affecting women.
(2) Complaints charging specific violations–used as a source of information, not an enforcement mechanism.

F. ***Non-governmental Organizations*** in consultative status [UNC, Art. 71]

4. ***The Trusteeship Council***–decolonization
   A. This body took over the mandate system of the League of Nations
   B. Some have argued that countries that have degraded into chaos should be placed back under the control of the Council.
5. ***International Court of Justice***
   A. PCIJ Legacy–the ICJ succeeded the Permanent Court of International Justice which was associated with, but entirely independent of the League of Nations.
   B. Composition–15 independent judges nominated to nine-year terms by the members of the UN and other states that are parties to the ICJ Statute, which are allowed to vote with the General Assembly for this purpose. Both the GA and the SC must "simultaneously and independently" elect a judge by an absolute majority (no right of veto exists in the SC for this vote). It normally takes more than one vote and some bargaining to finally elect a judge.
   C. Advisory opinions on legal questions. [UNC, Art. 96]
      (1) Requests from:
         (a) Security Council
         (b) General Assembly
         (c) Any UN organ or specialized agency within the scope of their activities (the court will examine the scope). [WHO Nuclear Weapons Legality Case]
         (d) Nature of opinion–non-binding only
6. ***Secretariat***–the administrative body, headed by the Secretary General
   A. ***Office of the High Commissioner for Human Rights*** (OHCHR)–part of the Secretariat. It has a Center for HR in Geneva and a Commissioner who not only is the spokesperson of the Center, but an under-secretary level of Secretariat. The post is appointed by the Secretary General and confirmed by the General Assembly.
      (1) Historical background
         (a) Idea first put forward by Uruguay in 1951
         (b) Idea raised again by Costa Rica in 1965
         (c) Recommended in the Vienna Declaration and Program of Action, part II, para. 18 (1993)
         (d) Creation of office by GA Res 48/141 (1993)
         (e) First Commissioner in 1994
      (2) Shift from reactive monitoring HR violations to proactive *preventative measures*.
         (a) Human rights field presences–must be approved by the host state
            (i) Monitoring HR as the primary component–the acquisition of independent information.
               - Information collection–not all primary resources
               - Information analysis
               - Information dissemination
            (ii) Goal–"promote change by reporting facts."
            (iii) Threatened appointment of a Special Rapporteur can prompt a state to allow the opening of a field office (e.g. Columbia in 1996). [H&S, p. 262]
         (b) Technical cooperation–provision of technical assistance such as drafting and implementing legislation, supporting NGOs and training in the administration of justice. Other activities involve cooperation with UNDP for assistance projects
         (c) Human rights education–cooperation with UNESCO for implementation of UN Decade of HR Education, including evaluating domestic education policies, programs and strategies.
      (3) Three branches
         (a) Research and right to development branch–involved in all activities related to the promotion and protection of the right to development, and is also responsible for carrying out research projects. It also supports all thematic mandates and the work of the Sub-commission on the Promotion and Protection of Human Rights
         (b) Support services branch–serves as a secretariat to the six treaty bodies, the voluntary funds and to the Commission on Human Rights and its subsidiary bodies. It also processes the hundreds of thousands of complaints from individuals addressed to the United Nations each year.
         (c) Activities and programs branch–co-ordinates all Advisory Services and Technical Co-operation Projects and the human rights field offices worldwide. It manages the Voluntary Funds for

Advisory Services and Technical Co-operation Projects and for Field Presence, and is responsible for implementing the Plan of Action for the Decade for Human Rights Education. The Branch provides support to the Special Rapporteurs of the Commission on Human Rights, and maintains country desk offices dealing with the human rights situation in specific countries.

(4) Additional duties under UN Secretary-General's Program for Reform (1997)
  (a) Assess HR work in all Executive Committees and participate in conflict situations with a HR dimensions
  (b) Assess UN technical assistance programs relating to HR
  (c) Assess HR machinery in UN and make recommendations to streamline and rationalize it.

B. ***Department of Peace-Keeping Operations*** (DPKO)
  (1) As peace keeping has begun to adopt a HR approach as a means of avoiding violations, peace-keeping forces have become, on occasion, HR monitors.
  (2) Peace-keeping forces are created and mandated by the Security Council, but directed and managed by the Secretary-General.

C. ***Observer Missions***–ad hoc bodies monitoring HR conditions, verifying peace agreements, and participating in various human rights-related development.

D. ***Office for the Coordination of Humanitarian Affairs*** (OCHA) (1997)
  (1) Policy development and coordination
  (2) Humanitarian advocacy
  (3) Coordination of humanitarian action

7. ***Office of the High Commissioner for Refugees***
  (1) Purpose–provide protection to refugees and seeking durable solutions. [H & S, p. 163]
  (2) Strategy [H & S, p. 163]
    (a) Prevention
    (b) Emergency response
    (c) Structures
  (3) Focus [H & S, p. 163]
    (a) Promoting the adoption and implementation of international standards for treatment of refugees.
    (b) Protection of refugee rights in countries of asylum.
    (c) Protection against enforced return to state of origin.

PART VI
INSTITUTIONS: UNITED NATIONS SPECIALIZED AGENCIES

Autonomous entities with independent constitutions and policy-making structures with a special institutional relationship with the UN. [Arts. 57 and 63] ECOSOC and its subsidiary organs coordinate the UN HR effort with these agencies.

1. ***United Nations Economic, Social and Cultural Organization*** (UNESCO)
   A. Committee on Conventions and Recommendations of the Executive Board–individual complaint procedure (see Enforcement Mechanism part of this outline)
2. ***International Labor Organization*** (ILO)
   A. Reporting mechanisms–pioneered this method of enforcement with all ILO conventions requiring periodic reports. [H&S, p. 430]
   B. Bodies
      (1) *Committee of Experts*–independent expert body that makes juridical assessments of compliance in closed sessions.
      (2) *Conference Committee on Standards*–meets annually to publicly discuss the more serious cases raised by the Committee of Experts. A report is considered and adopted after each session.
3. ***World Health Organization*** (WHO)
4. ***Food and Agriculture Organization*** (FAO)
5. ***World Bank Group***–accepted HR responsibilities, although no formal legal obligations
   A. Operational Directives
      (1) Involuntary resettlement
      (2) Indigenous peoples
      (3) Poverty reduction
6. ***International Monetary Fund*** (IMF)–does not accept HR responsibilities, although states it adheres to such principles. It claims that HR are the responsibilities of states only.

PART VII
INSTITUTIONS: UNITED NATIONS TREATY-BASED–ORGANS

1. ***Human Rights Committee***–created by CCPR which entered into force on 23 March 1976
   A. Composition of HRC–18 independent experts, half of whom are elected by states every two years (4-year term). Because of this method of appointment, it can be argued that members represent state interests which makes decision consensus and possible condemnations difficult. Experts are not permitted to address their own state.
      (1) Working groups (convene just prior to HRC meetings)
         (a) Rule 89 Working Group–screens complaints received under the Optional Protocol.
         (b) Rule 62 Working Group–compiles detailed lists of issues concerning state reports to be examined in the next session of the HRC.
   B. Meetings–three times per year for three-week sessions (March in New York and July & November in Geneva)
   C. Purpose of HRC–monitor the implementation of CCPR and Protocols
   D. Mechanisms to oversee compliance (implementation of the CCPR)
      (1) Complaints – see Enforcement Mechanisms part of this outline
         (a) Interstate complaints–there is a certain degree of non-use of this mechanism because states avoid disparaging other states as a matter of international relations. [L11]
         (b) Individual complaints
      (2) Reporting system
         (a) Each state files a report regarding their own compliance with the covenant every five years. [CCPR, Art. 40]
         (b) NGOs participate in fact-finding to illuminate the 'real' facts which states are reluctant to provide–this is limited only to written submissions.
         (c) Examination of reports is conducted in public meetings
         (d) The Committee files "concluding observations" that praises the state's accomplishments, points out what shortcomings exist, and gives suggestions and recommendations of what should be done and what should be reported the next time. [L9]
   E. Powers of HRC
      (1) Comment on reports by state parties to the CCPR
      (2) Render opinions on complaints which are an entirely written process without hearings. This is a quasi-judicial function which receives the same authoritative weight as judicial bodies like the ICJ.
      (3) Issue General Comments interpreting provisions of the CCPR
2. ***Committee on Economic, Social and Cultural Rights*** (expert body)–under CESCR
   A. Composition–18 experts who meet in Geneva each April/May and Nov/Dec
   B. Reports to be filed by state parties within two years of ratifying the treaty
      (1) Detail not only measures taken, but the subjective basis upon which they were begun by the state party. The final, objective determination of appropriateness is a decision of the Committee. [CommESCR GC 3]
   C. NGO involvement, including pre-sessional oral hearings
   D. Comments on reports by state parties to the CESCR
   E. There is no individual complaint system because it is of the opinion that ES & C rights are not suitable for such justiciability.
3. ***Committee on the Rights of the Child*** (expert body)–based on CRC, meets three times per year
   A. Reports–to be filed by state parties every five years
      (1) Public–publication of reports is sometimes "punishment" enough
      (2) NGO Group on the Comm.RC–produced a guide and holds hearings for NGO participation
      (3) Monitored and assistance in reporting by NGOs
         (a) Norway–Forum on the CRC includes over 50 NGOs that prepare and file their own report with the CRC preceded by its own hearings and considered by the government to be very democratic. The Committee commented that the shadow report was more important than the actual country report.
   B. Concluding observations by Committee

(1) States have a moral obligation to implement
(2) Criticism is catered to each state to maintain a constructive dialogue–democratic and open states like Norway receive more harsh criticism because it is taken constructively while other states may not take harsh criticism well and will abandon the process. The tone must be suited to each state in order to keep the channels of communication open.

4. ***Committee on the Elimination of Racial Discrimination***
   A. The first UN body to monitor and review actions by state to fulfill obligations under a convention.
   B. Composition–18 experts elected to four years terms as individuals with fair geographic, ethnic and legal systems distribution.
   C. Autonomy–no outside directives or ability to dismiss members of the Committee.
   D. Meetings–twice annually in New York or Geneva
   E. Procedures
      (1) Reports–every four years with updating brief reports at the two-year interval.
         (a) Anti-Racism Information Service–coordinating role in submitting NGO information to the Committee.
      (2) Complaints – see Enforcement Mechanisms part of this outline
         (a) State-to-state–mandatorily part of instrument (never used)
         (b) Individual and group–states must declare acceptance of Committee competence
   F. Other functions
      (1) Provide opinions and advice to other UN bodies on measures to combat racial discrimination in non-self-governing territories.
      (2) Cooperative agreements with ILO, UNESCO, Trusteeship Council and Special Committee on the Situation with Colonial Countries and Peoples.
5. ***Committee on the Elimination of Discrimination Against Women***–based on CEDAW
   A. Urgent requests–for interim measures to avoid possible irreparable harm. [CEDAW, Opt. Prot., Art. 5]
   B. Complaint procedure from individuals and states – see Enforcement Mechanisms part of this outline.
   C. Reports.
6. ***Committee against Torture*** [CAT, Art. 17]
   A. Composition–ten experts elected by state parties in individual capacity.
   B. Meetings–twice per year, but special sessions as necessary
   C. Mechanisms to oversee compliance
      (1) Reports from state parties–submitted every four years (additional reports can be requests of state parties, as well as NGOs and other UN bodies) [CAT, Art. 19]
         (a) Consideration of reports is not a public meeting
      (2) Investigations of violations [CAT, Art. 20] – see Enforcement Mechanisms part of this outline

PART VIII
INSTITUTIONS: REGIONAL ORGANIZATIONS

1. ***Council of Europe*** (1949) – focus on civil and political rights
   A. Purpose–rule of law and commitment to common spiritual and moral traditions. [H&S, p. 275]
      (1) Achieving greater unity
      (2) "Maintenance and further realization of human rights and fundamental freedoms"
      (3) Democracy
   B. Historical background
      (1) Why drafted–when became clear that UDHR would take a long time to reach agreement on binding conventions.
      (2) Why signed–countries like those in Scandinavia considered their systems to have nothing wrong and, therefore, saw no threat from the organization or its mechanisms.
      (3) "Common heritage"–considered that European states were like-minded
      (4) "Collective enforcement" of rights of the UDHR
   C. "Legislative" activities–proposals for new measures, recommendations (non-binding) and treaties (binding after ratification)
      (1) Legal Affairs Committee prepares
      (2) Parliamentary Assembly proposes
      (3) Acted upon by Committee of Ministers
      (4) Experts requested to write specific texts
      (5) Final texts approved by Committee of Ministers by unanimous approval
      (6) (Treaties are then open for signature and ratification.)
         (a) Some treaties allow non-members to join, including the EU.
   D. International activities–representation at Commission on HR and Sub-commission meetings
   E. Bodies
      (1) Committee of Ministers–governing body of the Council
      (2) Parliamentary Assembly–national parliamentarians from member states
      (3) Committee of Experts-at least nine members elected by the Parliamentary Assembly on the nomination of the States parties.
         (a) Reviews state reports from ESC
      (4) Legal Affairs Committee
      (5) Government Committee–makes findings on ESC state reports
      (6) European Commission of HR–terminated pursuant to Protocol 11 with Court taking over entire amended adjudication proceedings.
      (7) European Court of Human Rights (see Enforcement Mechanisms part of this outline)–number of judges equals that of member states. [ECHR, Art. 38] Elected in individual capacity to six-year terms by the Parliamentary Assembly from a list of three nominees from each state, but need not be nationals of the COE and no restriction on the number of judges from any one state. [ECHR, Prot.11 (the "new" court)]
         (a) Registrar–chief clerk of the court
      (8) Committee ***?–supervision of convention implementation.
         (a) Requests governments to report the measures taken to implement conventions.
   F. Documents
      (1) *European Convention on Human Rights and Fundamental Freedoms* (ECHR) (1950)
         (a) Subsidiary to domestic legislation–domestic courts and legislatures are in a better position to determine social need. [Handyside, para 48]
         (b) Convention should be interpreted as a living document, changing according to the times.
         (c) Reservations are not allowed, although exemption of specified laws is. [ECHR, Art. 57 (1)]
            (i) The Court can rule that a reservation on a specific law is, in fact, a general reservation and hold it to be invalid. [Belilos v. Switzerland, 132 Publ. Eur. Court H.R. 1 (1988)]
         (d) Only member states of the Council of Europe may become parties.
         (e) All member states must become parties to the ECHR. [ECHR, Art. 66 (1)]
         (f) Notable provisions

(i) Non-discrimination in convention rights (not generally). [ECHR, Art. 14]
(ii) Effective remedy before national authority for violations. [ECHR, Art. 13]
(iii) Everyone within jurisdiction is a beneficiary (no relevance of actual nationality). [ECHR, Art. 1]

(g) Domestic law–in many member states the ECHR has status as domestic law; otherwise, implementing legislation has been enacted to enforce its rights.
(h) The Secretary General of the COE can demand an explanation from a party of the manner in which it internal law ensures the effective implementation of any provision of the ECHR. [ECHR, Art. 52]

(2) *European Social Charter* (1961)–approximately one half of COE members are parties
(a) Catalog of "rights and principles" supplemented by the Additional Protocol
(b) Policy objectives–states undertake to make the ESC a "declaration of aims which it will pursue by all appropriate means" to achieve the rights and principles. [ESC, Art. A (1) (a); Part 1, Preamble]
(c) Reporting requirement
(i) Every two years on most important provisions and every four years on lesser provisions. Form is designated by the guidelines for reports provided by the Committee of Experts. Employers organizations and trade unions must be provided the report and their comments included in its submission.
(ii) At regular intervals for those principles not accepted
(iii) Committee of Experts evaluates reports and gives a legal opinion as to compliance by a state and then forwards to the political bodies. The nature of these findings is considered legal interpretations entitled "case law." Oral hearings are very rare and the reports are usually not public.
(iv) The Parliamentary Assembly and the Governmental Committee receive the reports from the Experts. Both report to the Council of Ministers which may make recommendations to parties.
(v) Collective Complaints Mechanism
(d) Reservations are allowed

(3) *Convention for the Prevention of Torture* (1987)
(4) *Framework Convention for the Protection of National Minorities* (1995)

2. ***Organization for Security and Cooperation in Europe*** (OSCE)–large organization–more than 50 states (Formerly the C(onference)SCE, 1973-1994)
A. Historical background
(1) Security focus, played a role in bridging the East-West divide during the cold war (particular interest in minority rights).
(2) The 1975 Helsinki Final Act was hoped by the Soviets to confirm their territorial integrity and claims to conquered areas, yet the HR provisions were used by dissidents to gain legitimacy of HR groups in Eastern Europe.
(3) Originally 35 states, now 56 (May, 2006).
(4) A UNC, Chapter VIII organization
(5) Headquartered in Vienna
B. Purpose
(1) Security
(2) Human dimension–rule of law, pluralist democracy, HR and humanitarianism
C. Normative approach–decisions through consensus (political legitimacy) and non-binding nature of declarations and documents with public attention to failures to uphold documents and summaries included in the "concluding document" of each conference.
(1) Nature of organization–the HFA is not a treaty but a non-binding instrument proclaiming political commitments. It provides legitimacy to dialogue on subjects, especially within the domestic realm of internal politics within a member (consider Risse). Non-compliance has ***political not legal consequences***.
(2) Concluding documents (political supervision)–proclaim new commitments or expand, modify or interpret the scope and meaning of existing ones. This is a blueprint for freedom and democracy where human rights and the rule of law are observed.

(3) Enforcement by formal means–negotiations, mediation and fact-finding
(a) Vienna mechanism–state-to-state complaints (see Enforcement Mechanism part of this outline)
(b) Moscow mechanism–OSCE missions (experts and rapporteurs)
(c) OSCE *Office for Democratic Institutions and HR* (ODIHR)

D. Holistic approach–human rights and fundamental freedoms are best protected in states that respect the ***rule of law and democratic values***.

E. Modern system of HR–minority rights and democracy

F. Internal bodies (***check accuracy of this info)
(1) Three types of bodies
(a) Negotiating and decision-making
(b) Operational (Secretariat and Institutions)
(c) Field (Missions & Personal Representatives)
(2) *Chairman in Office*–the country possessing the rotating chair of the organization
(a) "Troika"–Committee of current, previous & next chair country
(3) *Committee of Senior Officials* (CSE) (Senior Council? or "Summit")
(4) Council of Ministers of Foreign Affairs (Ministerial Council)
(5) Permanent Council–deals with everyday issues. Meet weekly.
(6) Forum for Security and Cooperation–military representatives who decide on military issues. Meet weekly.
(7) *The High Commissioner on National Minorities*
(a) "Early warning" or "early action" at the earliest possible stage of minority issue tensions having a potential to effect peace, stability or inter-state relations.

G. *The Helsinki Final Act* (1975) – four "baskets"
(1) Basket 1–questions relating to security in Europe (political & military)
(a) Principles guiding relations between participating states (HR)
(i) Principle 7–respect for HR and fundamental freedoms, including the freedom of thought, conscience, religion or belief.
(ii) Principle 8–equal rights and self-determination of peoples.
(b) Confidence-building measures and certain aspects of security and disarmament
(2) Basket 2–cooperation in the field of economics, of science and technology and of the environment
(3) Basket 3–cooperation in humanitarian and other fields (media, culture, and some HR)
(4) Basket 4–"follow-up" process (convening of member states at follow-up conferences)
(a) Forum for reviewing compliance with commitments and focusing attention on violating states.
(b) Mechanism for expansion of HR catalog by expanding and amplifying the HFA.

H. *Framework Convention for the Protection of National Minorities*–"first legally binding multilateral instrument devoted to the protection of national minorities in general." [Explanatory Report]

3. ***European Union***–only 15 members
A. Treaty of Maastricht (1992)–incorporation of the ECHR
(1) "[T]he Union shall respect fundamental rights, as guaranteed by the [ECHR] and as they result from the constitutional traditions common to the Member States, as general principles of Community law." [Treaty of EU, Preamble, para. F (2) (1992)]

B. *European Court of Justice*–interpret and apply the Maastricht treaty
(1) Respect for HR and fundamental freedoms forms an integral part of the general principles of law the Court of Justice was required to apply and it would look to the ECHR to ascertain the nature of these rights. [B, p. 149]

C. European Union Monitoring Mission (1991)–established following the break-up of Yugoslavia.

4. ***Organization of American States*** (OAS)
A. Bodies
(1) General Assembly
(a) Supreme policy-making organ of the OAS
(b) Each member state has one vote
(c) Meets once per year or as is necessary in special session.
(2) Permanent Council

(a) Permanent representatives of the member states of the OAS.
(b) Decision-making organ between Assembly sessions

(3) *Inter-American Commission on Human Rights* (1959)–principle function "to promote the observance and protection of HR." [COAS, Arts. 52 (3) and 111]
(a) Composition–seven individual members elected by all member states to the OAS. Based in Washington, D.C. with two meetings per year or as is necessary.
(b) Charter organ
(i) Country studies of all OAS members (OAS Charter-based authority)–investigating the HR conditions within a state after receiving credible evidence (from any source), including on-site investigations and hearings.
- The Commission determines whether to publish the report.

(ii) Receive and act upon individual petitions charging states parties to the Convention with violation of the rights stated in the Declaration.
(iii) Drafts HR documents
(iv) Consultants for other organs of OAS
(v) Sponsors conferences and publications
(vi) Individual charter-based complaints–see Enforcement Mechanism part of this outline
(c) Convention organ
(i) Individual convention-based complaints–see Enforcement Mechanism part of this outline

(4) *Inter-American Court of Human Rights*–see Enforcement Mechanism part of this outline
(a) Composition–seven individual members elected by Convention parties. Based in San Jose, Costa Rica with two meetings per year or as is necessary.

B. Documents
(1) *Charter of the OAS* (1948)–all OAS member states
(a) Notable provisions
(i) Non-discrimination [COAS, Art. 3 (k)]
(ii) State right to develop freely having respect for individual rights and universal morality. [COAS, Art. 16]

(2) *American Declaration on the Rights and Duties of Man* (1948)–a normative document
(a) 27 rights and ten duties, including both 1st and 2nd generation rights.
(b) Formally–a non-binding conference resolution with no legal effect.
(c) Normatively–an authoritative interpretation of the fundamental rights of the individual. "A source of international obligations related to the Charter" [Advisory Opinion OC-10/89 (1989)]

(3) *American Convention on Human Rights* (1969)–mostly Latin American and not the USA
(a) HR are those referred to in the Convention and in the Declaration. [ACHR, Art. 1 (2)]
(b) Non-discrimination
(c) Progressive measures toward full realization of 2nd generation rights of COAS, as amended by the Protocol of Buenos Aires. [ACHR, Art. 26]
(d) Respect and ensure requirements (positive and negative duties)
(e) Derogation of all but the most basic rights in times of war, public danger or other emergencies that threaten independence or security.
(i) Judicial remedies for the non-derogable rights cannot be suspended (unlike the ECHR and CCPR).

5. ***Organization of African Unity*** (OAU) (1963)
A. Historical perspective of HR in Africa–Article 63 of ECHR provided that states could optionally make the instrument binding on its overseas territories (this was actually a limit of HR because otherwise the instrument would have automatically applied to territories). In 1953, the UK extended the instrument to its territories so the European system applied to many African states. The influence of European HR law in African colonies is evident from Nigeria's constitution at independence because it applied the ECHR nearly word for word. Subsequent African constitutions adopted the Nigerian Bill of Rights (French colonies looked to the French Declaration). However, most of these constitutions were never implemented (suspended or ignored) so that when the ACHPR was written it was believed a truly African view of HR was needed. Yet, "Africa is marginalized because of lack of knowledge of the HR system." [L15]

B. Bodies
  (1) Secretariat
  (2) Council of Ministers
  (3) Assembly of Heads of State and Government–meets once per year
    (a) Highest policy-making body of OAU
  (4) *African Commission on Human and Peopless Rights* (1986)
    (a) Purpose–promote HR and ensure their protection. [ACHPR, Art. 30]
    (b) Composition–11 individual members elected for six-year terms by the OAU Assembly from nominees by state parties.
    (c) Powers
      (i) Studies
      (ii) Conferences
      (iii) Publications
      (iv) Information dissemination
      (v) Collaborate with HR institutions
      (vi) Advises government
      (vii) Prepare draft legislation and propose legal solutions to problems
      (viii) Reporting system
        - Reports from OAU states every two years (intraspection)–there is a low level of reporting with half of the members never doing so. There is little authority to require compliance, however, because there is no provision in the Charter about reports.
        - Independent examinations by the Commission (inspection)
        - Concluding observations (new)
        - Assert "interim measure"–give an opinion without any appeal [L15]
    (d) Judicial functions
      (i) Interpretive–interpret the Charter at the request of a party, institution of the OAU, or African organization recognized by the OAU.
        - The Commission shall "draw inspiration" from IL on HR. [ACHPR, Art. 60]
      (ii) Resolution of disputes – see Enforcement Mechanisms part of this outline
        - Inter-state complaints
        - Individual complaints
  (5) *African Court of Human Rights*–protocol to ACHPR adopted in 1999, but not yet entered into force
    (a) Part-time Court, except for a full-time President of the Court
    (b) Jurisdiction to all cases implementing the Charter
    (c) Individual complaints directly to the Court [ACHPR, Prot., Art. 5 (3)]

C. Charter of the OAU–does not mention human rights (53 member states plus Moracco)

D. *African Charter on Human and Peoples Rights* (1981)–the criticism is that this document is too progressive–the Charter is perhaps the most progressive in HR protections, but it is argued that it attempts to do too much which renders it useless.
  (1) Major differences of ACHPR from other HR instruments:
    (a) Rights and duties, although many duties are actually simply limitations
    (b) Individual and peoples rights
    (c) Protection of 2nd generation rights as well as 1st generation rights
    (d) Significant limitations and restrictions on exercise of rights proclaimed
  (2) Notable provisions
    (a) Non-discrimination and equal protection clauses
    (b) Self-determination–there is no explicit right to S-D in the Charter.
      (i) Right to S-D, but not secession–when there are systematic violations and disruptions of peoples. [Kantanga Case]
    (c) Right to development
    (d) Right to peace
    (e) Environmental rights
    (f) Right to have case heard [ACHPR, Art. 7]

(i) Other rights can outweigh the right to remedy–the family of Stephen Beko brought a case challenging the TRC's ability to grant amnesty claiming it violated their ability to bring a case (criminal or civil) against those responsible for Beko's death. After a balancing of rights, the amnesty provision was upheld by the *** (Commission or SA Courts?).

(g) Expression–the Commission has held that Heads of State must have thick skin in tolerating expressions. [ACHPR, Art. 9]

(h) Association–the Commission has held that any association has the right to control itself. [ACHPR, Art. 10]

(i) Participation in political process in existence (although this does not mean free elections). [ACHPR, Art. 13]

(j) Rights to work and in work [ACHPR, Art. 15]

(k) Women's rights are grouped with family, child and aged–this is argued to place women in a traditional role. [ACHPR, Art. 18]

(i) "Promotion and protection of morals and traditional values recognized by the community shall be the duty of the state." [ACHPR, Art. 17 (3)]

(l) Many drawback clauses (or "claw-back")

(i) Article 8–"subject to law and order" (religion)

(ii) Article 10 (1)–"provided that he abides by the law" (association)

(iii) Article 9 (2)–"within the law" (expression)

(m) No derogation clause–although possibly implied by Article 60 and the reference to other HR instruments.

(n) Duties–simply a definition of the rights of others, placing the boundaries where various rights collide. [ACHPR, Preamble § 7]

(3) Implementation–based on negotiation and conciliation avoiding contentious proceedings

(4) Interpretation–the Commission interprets the Charter, even in ways that the framers clearly meant otherwise. In Article 9, the clause "within the law" has been interpreted as within international law. [see ACHPR, Arts. 60 & 61]

(5) Focus–more on massive violations than individual ones.

(6) State obligations

(a) Recognize rights and undertake to implement into domestic legislation

(b) File reports every two years

(c) Educate about ACHPR

(d) Guarantee the independence of courts

PART IX
INSTITUTIONS: OTHER MULTI-LATERAL INSTITUTIONS (MLIs)

1. ***

PART X
INSTITUTIONS: NON-GOVERNMENTAL ORGANIZATIONS (NGOs)

1. ***

PART XI
TREATIES AND INSTRUMENTS
(non-binding and binding)

1. Nuremberg Tribunal Charter (1945) – the first human rights document [Donelly]
   A. Important reference point for principles, but not procedure for criminal tribunals.
   B. Extended norms beyond principle of international enforcement.
2. ***The Universal Declaration of Human Rights*** (UDHR) – the starting point of human rights, but not there inception. The UDHR merely stated what is already in existence.
   A. Preliminary information
      (1) Drafters–Human Rights Commission
         (a) Drafting committee–Eleanor Roosevelt (USA) as chair, Rene Cassin (France), Charles Malik (Lebanon), Dr. P.C. Chang (China), Chile, India, Egypt, and Yugoslavia.
            (i) Rene Cassin (France)–composed the first full draft and eventually won a Nobel prize for his work
            (ii) Charles Malik (Lebanon)–role in shaping the document
            (iii) Dr. P.C. Chang (China), VP of the Comm. on HR–represented Asian perspective
            (iv) John Humphrey (Canada), Director of UN HR Division–prepared a 400-page blueprint to the document
         (b) Three-step process in making HR IL: a non-binding declaration (UDHR), binding document (evt. CCPR & CESCR), consideration of methods of implementation of covenants
            (i) The binding covenants were agreed to be divided into two documents in 1952. The reason for the division was disagreement between the East and West on the type of implementation to be used.
      (2) Adoption–by GA Resolution on December 10, 1948 by a vote of 48-0 with 8 abstentions (Soviet Union, Yugoslavia, Belarus, Czechoslovakia, Poland, Ukraine, Yugoslavia, Saudi Arabia & South Africa).
         (a) During the period of drafting the document, between January 1947 and December 10, 1948, there were a total of 1400 General Assembly votes regarding nearly every clause and word.
      (3) Nature of the UDHR–a non-binding resolution because it was the only way to get it passed without compromising its 'lofty goals.' Binding documents were passed in 1966, divided into 1st and 2nd generation rights because there was a belief that the realization of the two different types of rights was to made in different ways.
         (a) Although a non-binding document, the UDHR has probably become part of custom (or at least considerable parts of it) making it applicable to all states whether or not they are parties to it. This is not because of its adoption per se, but due to subsequent practice of states. One can look to the constitutions of the world to support this argument. [L5; see Comm.ESCR GC 8 (8)]
      (4) Rights included in the UDHR–both 1st (Arts. 3-21) and 2nd (Arts. 22-27) generation rights, but not 3rd generation rights.
   B. Notable provisions
      (1) Philosophical basis of HR is human dignity (all references to gods were deleted) [UDHR, Preamble § 1]
      (2) Historical setting is atrocities of World War II [UDHR, Preamble § 2]
      (3) Universality of rights
         (a) Common understanding [UDHR, Preamble § 7]
         (b) All are entitled to them [UDHR, Arts. 2, 28]
      (4) The nature of the UDHR is a "common standard of achievement" [UDHR, Preamble § 8]
      (5) Duties–everyone has duties to the community [UDHR, Art. 29] (There has been suggestions of a covenant on human duties.)
         (a) Limitations allowed–only to uphold other rights and freedoms
            (i) Derogations–temporary limitations usually in political emergencies
            (ii) Non-derogable rights–those to which there can be no derogation (torture)
         (b) Everyone includes states, groups and person [UDHR, Art. 30] (The question is whether this includes corporations.)
3. ***The Split of the Two Covenants***

A. Reasons for split–implementation not universality
  (1) Justiciability–the ability to test rights in court
    (a) Historical base–a concept of Montesque of the distribution of power between three branches with checks and balances.
    (b) Justiciability as a requirement of the existence of a right–some argue that a right does not exist if it is not enforceable in a legal manner using a previously-created law and having an outcome that is within an acceptable realm. It is claimed that positive duties cannot be dealt with judicially because there are too many political uncertainties.
      (i) But, civil and political rights also have positive duties that are expensive: a judicial system and legal aid (*Airey v. Ireland*, 2 EHRR 305 (1979) ("no water tight division")).
    (c) Justiciability not required for the existence of a right–Economic, social and cultural rights are rights of a different kind in which enforcement is difficult.
    (d) ESCRs are justiciable–See *V v. Einwohrnergemeine X und Regierunsgrat des Kantons Bern* (BGE/ATF 121 I 367, Swiss Federal Court of 27 Oct 1995) (concession of lack of "competence to set priorities in allocating resources," but would intervene if the legislative framework failed to ensure constitutional entitlements). See also UN CESCR, GC 9, para. 10.
  (2) Ideological base
    (a) Two degrees of involvement of the state at polar ends of a spectrum
      (i) Socialist–state control of everything with a planned economy
      (ii) "Nightwatch state" (laissez-faire)–liberal market system with function of state limited to protect against crime.

B. State duties in different covenants
  (1) CCPR, Art. 2–"respect and ensure" (both negative and positive duties)
  (2) CESCR, Art. 2–"take steps" "to achieve progressively" "by all appropriate means" "to the maximum of available resources," "particularly the adoption of legislative measures."
    (a) The last of these requirements, to adopt legislative measures is a requirement to make the rights justiciable. E,S & C rights had not evolved enough to be immediately justiciable, so this provision is a catalyst to encourage evolution while leaving the specific method of achieving justiciability to the state.

C. Historical process of split
  (1) GA Res. 421 in 1950–one convention should be written because all rights are interdependent.
  (2) GA Res. 543 in 1951–two conventions to be drafted, following pressure by Western states, although interdependence and indivisibility still emphasized.

4. ***Covenant on Civil and Political Rights***

A. History–adopted in 1966 and immediately ratified by 35 states

B. Monitoring mechanism for E, S & C rights–in order to measure compliance with the requirement to "progressively achieve," benchmarks are established as goals toward full achievement of a right. This enables the Committee to establish a dialogue with the state and enables the state to set priorities.

C. Priority of E,S & C rights over others–state's are required to set priority for these rights, especially to those who are most marginalized.
  (1) If the core, minimum requirements are not met, there is a prima facie violation of obligations. [HRC GC 3 (10)]

D. Interpretation of CCPR
  (1) HRC General Comments–offer interpretations of provisions
  (2) ICJ Advisory Opinion–if disputes persist, the matter can be referred to the ICJ for a non-binding advisory opinion. [ICJ, Art. 36 (2) (b)]
    (a) There is no independent provision in the CCPR authorizing referral to the ICJ, as in CERD, Article 22, but there is neither a prohibition of it.

E. Notable provisions
  (1) HR transcend domestic jurisdiction (and sovereignty)–there is a duty to implement the covenant on national level which can give rise to violations of the law of state responsibility. [CCPR, Art. 2 (1 & 2)]
  (2) *Right* of self-determination–the basis of democracy, allowing people to determine their own future. [CCPR, Art. 1 (1)]

(3) Non-discrimination (sex discrimination is the only one articulated) [CCPR, Art. 2 (1) & 26]
(4) Equality [CCPR, Art. 3 & 26]
(5) Right of physical integrity [CCPR, Arts. 6,7,8,9 & 12]
(6) Legal personality and judicial integrity [CCPR, Arts. 6,7,8,9,10 & 11]
(7) Mobility rights [CCPR, Art. 13,14 & 15]
(8) Right to family life [CCPR, Art. 16]
(9) Right to property [CCPR, Art. 17]
(10) Freedoms of belief and expression [CCPR, Arts. 18,19,20 & 21]
(11) Minority rights [CCPR, Art 27]

F. *Human Rights Committee*–expert body (see treaty-based bodies section under United Nations part of this outline)
(1) Reports
(2) General Comments
(3) Complaint procedure

5. ***Covenant on Economic, Social and Cultural Rights***

A. Basis of CESCR–a person's condition must maintain their human and equal dignity.
B. Beneficiary–all those to whom available resources will support, but always all nationals of that state. [CESCR, Art. 2 (1) & (3)]
(1) Undeveloped states–this may mean that temporary and permanent residents as well as illegal residents have no claim for support if resources indeed are not capable of providing for them. [CESCR, Art. 2 (3); see CRC, Art. 4 ("to the maximum extent of their available resources")]
(2) Developed states–because of the extent of resources available in the developed world, more or less all people within the territory have a claim for support. [CESCR, Art. 2 (1) & (3); EK&R, p.50 (Swedish court held under European Social Charter that asylum-seekers were entitled to social benefits)]
C. Duty bearer–states (see Concept of HR section of first part of this outline)
D. Self-executing measures requiring the creation of judicial remedies: [Comm.ESCR GC 3 (5)]
(1) Non-discrimination [CESCR, Arts. 3, 7 (a) (i), 8, 10 (3), 13 (2) (a)]
(2) Parental rights over education of children. [CESCR, Art 13 (3) & (4)]
(3) Respect for freedom for scientific research and creative activity. [CESCR, Art. 15 (3)]
E. Notable Provisions
(1) *Right* of self-determination [CESCR, Art. 1]
(2) Equality [CESCR, Art. 3]
(3) Non-discrimination [CESCR, Art. 10 (3) (children)]
(4) Adequate standard of living (food, housing, clothing) [CESCR, Art. 11]
(5) Access to work (opportunity)–vocational training, collective bargaining and good government policies. [CESCR, Art. 6,7 & 8]
(6) Social security [CESCR, Art. 9]
(7) Family as fundamental unit [CESCR, Art. 10]
(8) Paid maternity leave or benefits [CESCR, Art. 10 (3)]
(9) Highest attainable standard of health [CESCR, Art. 12]
(10) Education [CESCR, Art. 13 & 14]
(11) Cultural rights (participate in culture and benefit from creations) [CESCR, Art. 15]
(12) <u>Absence</u> of right to property (land, capital, equipment, etc.)–despite being included in the UDHR, Art. 17, this presented a difficult question because of colonization and establishment of property by force of colonizers, as well as particular problems with land and indigenous populations. Because no compromise could be reached, it was left out. [L9]
F. General Comments
(1) GC No. 3, para 10 (nature of state obligations)–"achieve progressively" means to start work immediately and achieve the most basic rights immediately. [see CESCR, Art. 2 (1)]
(a) The state has the BOP of showing resources were maximized sufficiently or, if not enough resources, that attempt have been made to receive international aid.
(2) GC No. 12 (right to food)
G. *Committee on Economic, Social and Cultural Rights*–expert body (see treaty-based bodies under United

Nations part of this outline)
(1) Reports–due by a state party within 2 years of ratification of the treaty
(2) General comments
(3) No complaints

6. ***Convention on the Elimination of Discrimination Against Women*** (CEDAW)
   A. Goals of Convention
      (1) Prohibit gender discrimination
      (2) Endorse equal opportunities between men and women
      (3) Eradicate conditions that cause discrimination
   B. *Committee on the Elimination of Discrimination Against Women* (see treaty-based bodies under United Nations part of this outline)
7. ***Convention on the Rights of the Child*** (CRC)
   A. General principles of CRC
      (1) Non-discrimination
      (2) Best interest of the child
      (3) Rights of child to express views
   B. Obligations of states
      (1) Respect provisions of the CRC
      (2) Disseminate principles of CRC [CRC, Art 42]
   C. Definition of child–every human being under the age of eighteen unless the law applicable to the child dictates that majority is attained earlier. [CRC, Art. 1]
   D. *Committee on the Rights of the Child* (see Treaty-based bodies section in United Nations part of this outline)
      (1) Reports
      (2) Observations
8. ***Convention on the Elimination of Racial Discrimination*** (entered into force in 1969) (CERD)
   A. States agree to:
      (1) To engage in no act or practice of racial discrimination against individuals, groups of person or institutions, and to ensure that public authorities and institutions do likewise.
      (2) Not to sponsor, defend or support racial discrimination by persons or organizations.
      (3) To review government, national and local policies and to amend or repeal laws and regulations which create or perpetuate racial discrimination.
      (4) To prohibit and put a stop to racial discrimination by persons, groups and organizations
      (5) To encourage intergrationist or multiracial organizations and movements and other means of eliminating barriers between races, as well as to discourage anything which tends to strengthen racial division.
   B. *Committee on the Elimination of Racial Discrimination* – see Treaty-based bodies section of United Nations part of this outline
      (1) Reports
      (2) State-to-state complaints
      (3) Individual or group complaints

PART XII
ENFORCEMENT MECHANISMS

1. Preliminary considerations
   A. Forum shopping
   B. Non bin in Idem–two UN bodies will not simultaneously consider the same case involvng the same persons, subject matter or cause of action.
      (1) Examination Clauses–the parts of treaties that state this limitation
2. ***1235 Procedure*** – charter-based – *public*
   A. Initiation of complaints
      (1) Individual complaints
      (2) State complaints (members & non-members of the Commission)
      (3) NGOs with consultation status at UN
      (4) Sub-commission member placement of issue directly onto agenda.
      (5) Commission transforms a 1503 case into a 1235 case, sua sponte.
   B. Prima facie case–*"consistent pattern" of "gross violations of HR and fundamental freedoms"* (particularly for racial discrimination)
   C. Forum organizations
      (1) Sub-commission on Protection of Human Rights (expert body)–fields complaints and refers proper matters to the Commission on Human Rights.
      (2) Commission on Human Rights–a member may place an issue directly onto the agenda or it may be received as a report from the Sub-commission. The Commission then decides what action is necessary, if any.
   D. Nature of proceedings
      (1) "Thorough study" conducted
      (2) Not confidential–discussed at public meetings of Sub-commission and Commission
   E. Penalties
      (1) Sub-commission–resolutions on HR violations of a specific state
      (2) Commission–take action it deems necessary
         (a) Appointment of a special rapporteur for the state concerned–report annually to the Commission.
         (b) Establishment of a thematic working group or rapporteur–examine relevant information about HR violations within their mandate from anywhere in the world and, with consent of a state, visit that state. Annual reports are submitted to the Commission.
3. ***1503 Procedure*** – charter-based – *private* (as amended by ECOSOC Res. 2000/3)
   A. Initiation of complaints–submitted to the Secretary-General upon "reliably attested" information
      (1) Individuals–need not be a victim, just have "direct and reliable knowledge of those violations."
      (2) NGOs complainants
   B. Components of a sufficient complaint
      (1) Exhaust domestic remedies, unless it is "convincingly" shown that would be ineffective or would result in an unreasonable delay.
      (2) May not be anonymous
      (3) May not be based on media reports
      (4) May not contain insulting or abusive language [Sub-commission Res 1 (1971)]
      (5) Cannot be politically motivated
      (6) Prima facie case–*"Reasonable grounds to believe" "that a consistent pattern of gross and reliably attested violations" of HR have occurred.*
         (a) Describe facts, purpose of petition and rights violated.
         (b) Policies of racial discrimination and segregation in any country. [UN Doc. E/CN.4/1994/42]
   C. Forum organizations
      (1) Fielding of complaints– each is privately evaluated and sent up the chain of evaluation
         (a) Secretariat–screens out "manifestly ill-founded communications"
         (b) Working Group on Communications of the Sub-commission–five members of the Sub-commission appointed for one-year terms and meeting annually immediately after the Sub-commission session.

Refers matters where reasonable evidence is found to support a proper complaint.
(c) Working Group on Situations of the Commission–five members nominated by from the five regions and meeting at least one month prior to Commission session to evaluate complaints.
(d) Commission–determines whether complaint is proper
(e) ECOSOC
(2) Action–if a complaint is considered proper once reaching ECOSOC, it is considered by the Commission at its annual *private* sessions.
(a) Voting is by simple majority

D. Nature of proceedings
(1) Confidential
(a) Not even petitioner is informed of any progress other than receipt of the complaint.
(b) An annual list is issued by the Chair of the Commission publicizing which states have been investigated.
(2) Ability to give prior comments by state subject–prior to evaluation of complaints, the government in question is given the opportunity to reply.

E. "Penalties"
(1) Action by the Commission
(a) Keep the matter under review
(b) Undertake further study
(c) Appoint a special rapporteur–submits a confidential report to the Commission
(d) Convert matter to a 1235 public procedure
(e) Recommendation to ECOSOC
(2) Action by ECOSOC–after having received a recommendation from the Commission
(a) Public condemnation of HR situation in a state

4. ***Complaint to UN Working Groups or Special Rapporteurs*** of UN Commission on HR

A. Complainant (identification of source is confidential)
(1) Governments
(2) Inter-government bodies
(3) NGOs
(4) Individuals

B. Content of complaint
(1) Identification of victim
(2) Identification of perpetrator
(3) Identification of submitting person or organization (anonymous not allowed)
(4) Description of the circumstances of the incident in question & any other relevant information

C. Nature of proceedings
(1) Government given option to refute allegations (facts, comments, observations & investigations)
(2) Complainant given opportunity to comment on government response
(3) Private deliberations resulting in opinion of Working Group
(a) Violation in principle
(b) No violation
(c) Need additional information–case will continue to be pending
(d) Need additional information which cannot be obtained–case closed
(e) Violation in principle and fact
(4) Parties notified of opinion and published in records
(5) Further review or appeal is extremely rare.

D. Possible actions
(1) Recommendations to prevent or ameliorate violations
(2) Establish dialogue with complainants and governments (some mechanisms)
(3) Investigation of allegations (some mechanisms)
(4) Field missions to visit the state concerned in a case
(5) Urgent action requests by the chair of the Working Group or the Special Rapporteur to the government in a case to request it assure rights of an individual without rendering an opinion of a violation.

5. ***Complaint to Human Rights Committee*** pursuant to Optional Protocol of CCPR
   A. Subjects of better protection under the CCPR than the ECHR:
      (1) Minority & indigenous rights [CCPR, Art. 27]
      (2) Non-discrimination [CCPR, Art. 26]
      (3) Rights of political participation [CCPR, Art. 25]
   B. Initiating a complaint
      (1) *Individual* victim of the alleged violation
         (a) Individual must be subject to the jurisdiction of a state that is a party to the Optional Protocol
         (b) Violation must have occurred within the jurisdiction of the respondent state
      (2) Individual on behalf of victim if the victim is unable to submit the communication and the submitting individual proves they are acting on behalf of the victim.
         (a) Third parties with links to the victim cannot make submissions.
      (3) Groups cannot submit complaints (although an injured member of the group can). [Lubicon Lake Band v. Canada, 167 HRC 1984]
      (4) No anonymous submissions
   C. Urgent requests–without prejudging the merits of a complaint, a stay is sometimes requested from the state (this is not automatic).
      (1) This is always the situation in death penalty cases. [HRC Rule of Procedure 86; HRC Secretariat Note 56 (21)]
   D. Substance of an admissible complaint (12 to 18 months for determination of admissibility)
      (1) Exhaustion of all domestic remedies–except when challenging the remedy itself [Lovelace v. Canada]
      (2) The same problem cannot be under investigation by another *international* procedure.
      (3) Further inquiry prior to admissibility decision
         (a) The state may be asked for comments or information. If provided, the complainant is given the opportunity to respond in writing.
         (b) The complainant may also be asked for further information
   E. Nature of proceedings after finding of admissibility (1 to 2 years for process on merits)
      (1) Early dismissal without decision–if complainant withdraws or demonstrates no wish to proceed.
      (2) State concerned asked to explain or clarify the problem and indicate if anything has been done to settle the matter (six month time limit)–general refutation of complaint is insufficient.
      (3) Complainant given option to respond to state comments.
      (4) Parties continually given the opportunity to comment on other's arguments–burden of proof is generally on the complainant, but a rebuttable presumption exists with issues of right to life, torture, arbitrary arrests and disappearances.
      (5) No independent fact-finding by HRC
      (6) Committee decides whether it believes a violation exists–individual opinions can be appended to the Committee decision.
      (7) Parties are notified of decision
   F. Publication of findings–always made *public* immediately following the session where the final decision was made (for those found both inadmissible and admissible). The findings are then included in the Committee's annual report to the GA.
   G. Monitoring effect of final decisions on the merits–follow-up mechanism for determining the domestic effect of decisions (in some states laws have been changed and/or compensation paid to victims).
6. ***Complaint to the Committee against Torture*** [CAT, Art. 21]–"Very Confidential"
   A. Investigations by the Committee–based on reliable and well-founded information from any source of systematic practice of torture. [CAT, Art. 20 (1)]
      (1) Jurisdiction of Committee–the state must be a member of the CAT without having a reservation to the Committee investigative function (something expressly allowed by CAT)
      (2) Nature of proceedings–confidential with pursuit of cooperation with state parties always attempted
         (a) State may voluntary provide additional information [CAT, Art. 20 (1)]
         (b) Committee request of information from state or any other government organization, NGO or person [CAT, Art. 20 (2)]
         (c) If Committee believes information warrants, a Committee member will be appointed to make a

confidential inquiry. [CAT, Art. 20 (2)]
(d) Visit to the state by the Committee member, if agreed by the state. [CAT, Art. 20 (3)]
(e) Committee member may conduct hearings of witnesses while in the state, if state consents.
(f) Committee member submits findings to the full Committee. [CAT, Art. 20 (4)]
(g) Committee transmits findings and any comments or suggestions to the state. [CAT, Art. 20 (4)]
(h) State is invited to inform Committee of action taken on findings.
(i) The Committee may, after all inquiry has ended, make a summary account of the results of the inquiry public by including them in its annual report. [CAT, Art. 20 (5)]

B. State-to-state complaints to the Committee [CAT, Art. 21]
(1) Initiation of complaints–one state party notifies another state party of complaint.
(2) Jurisdiction of Committee–both states must be parties to CAT and have recognized competence of the Committee with respect to inter-state complaints.
(3) Nature of proceedings
(a) State party directly notifies another state party of alleged violations.
(b) Within three months the accused state must explain and clarify matter.
(c) If matter cannot be resolved between two states, either may refer it to the Committee.
(d) Exhaustion of all domestic remedies must have occurred for Committee to have jurisdiction (unless doing so is ineffective or causing unreasonable delay).
(e) Committee will attempt to reach a settlement and may set up an ad hoc commission.
(f) Further information can be submitted voluntarily or at request of Committee
(g) Within 12 months, Committee will submit a report of facts and any friendly solution.
(h) The report will be communicated to the states parties through the Secretary-General.

C. Individual complaints to the Committee–always *confidential* [CAT, Art. 22]
(1) Initiation of complaint
(2) Jurisdiction of Committee–the state party concerned must have expressly recognized the competence of the Committee in such matters.
(3) Substance of an admissible complaint–the complainant is notified whether admissibility is found
(a) Not anonymous
(b) Not an abuse of a communication, especially for political purposes
(c) Has not or is not under another procedure of international investigation or settlement, although previously inadmissible complaints will be accepted if omission is later remedied.
(d) Exhaustion of all domestic remedies (unless useless or unreasonably long)
(4) Consideration of the merits
(a) State party concerned is notified
(b) Within six months of notification, state shall submit explanations and clarification or any measures taken to remedy the situation.
(c) The complainant may also submit additional information
(d) A final decision at a closed meeting, although the complainant and/or the state may be invited to attend to provide clarifications on the merits.
(e) The decision is transmitted to the complainant and the state and can include individual opinions of Committee members.
(f) The state is invited to inform the Committee of any actions in conformity with decision.
(g) The Committee includes a *summary of the case in its annual report.*
(5) Urgent, provisional measures–in the course of any complaint, without prejudging the final decision, the Committee can request the state to take steps to avoid irreparable harm.

7. ***Complaint to Committee on the Elimination of Racial Discrimination***

A. State-to-state complaints
(1) One state party notifies another of an alleged violation
(2) The two parties attempt to come to an agreement
(3) If no agreement is reached, a conciliation commission is established in which the Committee attempts to negotiate a settlement between the parties.

B. Individual complaints [CERD, Art. 14, in effect in 1982]
(1) Initiation of complaint

(a) Individual person
(b) Group

(2) Jurisdiction of Committee–the state concerned must not only be a state party to CERD, but also have expressly recognized the competence of the Committee to receive individual complaints.
(3) Exhaustion of all local remedies–this includes any national body that was sent up pursuant to the Convention to receive petitions claiming violations.
(4) Nature of proceedings–*confidential*
(a) Identity of complainant remains confidential unless otherwise consented to by them
(b) State gives an explanation of its views and perhaps a suggested remedy.
(c) Committee debates the matter and may make suggestions and recommendations.
(d) Final decisions are transmitted to the individual or group and the state.

8. ***Complaint to Committee on the Elimination of Discrimination against Women***
A. Initiation of complaint [CEDAW, Opt. Prot., Art. 2]
(1) Individual or by someone on behalf of an individual
(2) Groups of individuals
B. Jurisdiction of Committee–state concerned must be a party to the Convention and Protocol and the complainant must be subject to that state's jurisdiction. [CEDAW, Opt. Prot., Art. 2 & 3]
C. Substance of an admissible complaint
(1) Exhaustion of domestic remedies (unless proven ineffective or unreasonably delayed). [CEDAW, Opt. Prot., Art. 4 (1)]
(2) The same matter has been or is being examined by a procedure of international investigation or settlement, including the Committee. [CEDAW, Opt. Prot., Art. 4 (2) (a)]
(3) Alleged violation occurred after Protocol entered into force within the state concerned. [CEDAW, Opt. Prot., Art. 4 (2) (e)]
(4) The complaint is not an abuse of a complaint by being political. [CEDAW, Opt. Prot., Art. 4 (2) (d)]
(5) The complaint has some substance. [CEDAW, Opt. Prot., Art. 4 (2) (c)]
D. Nature of proceedings–single violation allegation
(1) State provided with details of complaint (confidentiality of complainant is maintained). [CEDAW, Opt. Prot., Art. 7 (1)]
(2) Committee examines information in non-public meetings. [CEDAW, Opt. Prot., Art. 7 (2)]
(3) Views and recommendations are determined by the Committee. [CEDAW, Opt. Prot., Art. 7 (3)]
(4) State must respond to Committee within six months, including action taken in response. [CEDAW, Opt. Prot., Art. 7 (4)]
(5) Further reporting by state, including in normal reporting, if requested by Committee. [CEDAW, Opt. Prot., Art. 7 (5)]
E. Nature of proceedings–serious violation allegations (always confidential with cooperation sought)
(1) Complaint must contain "reliable information" of "grave or systematic violations." [CEDAW, Opt. Prot., Art. 8 (1)]
(2) States invited to submit observations regarding complaint. [CEDAW, Opt. Prot., Art. 8 (1)]
(3) Committee may request other reliable information
(4) Appointment of committee member to investigate and report. [CEDAW, Opt. Prot., Art. 8 (2)]
(a) Inquiry is confidential. [CEDAW, Opt. Prot., Art. 8 (5)]
(b) Visit to state, if consent is given. [CEDAW, Opt. Prot., Art. 8 (2)]
(5) Committee examines report and may make comments or recommendations. [CEDAW, Opt. Prot., Art. 8 (3)]
(6) Inquiry findings transmitted to state and complainant
(7) Within six months, the state must submit observations to Committee. [CEDAW, Opt. Prot., Art. 8 (4)]
(8) Committee may request further reporting, especially informing of reactionary measures. [CEDAW, Opt. Prot., Art. 9 (1) & (2)]
(9) Summary of activities of Committee included in annual report. [CEDAW, Opt. Prot., Art. 12]

9. ***Complaint to UNESCO*** (<u>not</u> convention-based)
A. Initiation of complaints
(1) Individual

(2) Group of persons
(3) NGO

B. Substance of an admissible complaint
(1) Reliable knowledge of HR violations
(2) Alleged violations must be within competence of UNESCO (fields of education, science, culture & information)–unclear how this provision should be interpreted

C. Nature of proceedings
(1) General rule–confidential, non-public consideration by the Committee on Conventions and Recommendations of the Executive Board.
(2) Exception–"questions of massive systematic or flagrant violations" are considered publicly by the Executive Board and the General Conference.

D. Case history
(1) Confidential proceedings–approximately 30 cases per year, usually involving liberty and security of teachers and researchers.
(2) Public proceedings–none

10. ***Criminal Prosecution in the International Criminal Tribunals for the Former Yugoslavia or for Rwanda***
A. Effect of decision–no other domestic court may rule on same issue once the ICTY has ruled on a case. [ICTY Rule 13]

11. ***Complaint to the European Court of Human Rights***
A. Benefits of ECHR complaint
(1) Oral hearings
(2) Judgment is binding with possible monetary damages
(3) Legal aid system
(4) Standards of interpreting substance of rights appear higher than the CCPR

B. Initiation of complaint [see ECHR, Art. 34]
(1) State parties [ECHR, Art. 33]
(2) Natural or legal persons subject to jurisdiction of a state party and whom have *actually* been affected. [Case of Klass and Others, 28 Publ. Eur. Court H.R. 5 at 17-18 (1979)]
(3) Groups of individuals [Sunday Times Case, 30 Publ. Eur. Court H.R. 5 (1979)]
(4) NGOs
(5) Not anonymous [ECHR, Art. 35 (2) (a)]

C. Jurisdictional requirements
(1) Res judicata (will follow previous decisions)–will not re-examine a substantially similar matter unless there is new relevant information. [ECHR, Art. 35 (2) (b)]
(2) Full Faith and Credit–once submitted to another "procedure of international investigation and settlement" the matter will not be reviewed unless there is new relevant information. [ECHR, Art. 35 (2) (b)]
(a) Collateral Estoppel–this applies only to cases adjudicated on the merits or found to be inadmissible on the *same grounds* the Court would apply.
(b) Also applies to any case still pending before another international institution.
(c) Many parties to the ECHR has made reservations to Optional Protocol of the CCPR that a case already considered by the European Court could not be brought to the HRC. This reservation has been held as valid. [121 HRC 1982 at 32]
(3) Exhaustion of remedies–all domestic remedies must be exhausted. [ECHR, Art. 35] The ECHR is a subsidiary jurisdiction in order to allow states to put things right according to their own legal systems. [DeWilde, Ooms and Versyp Cases, 12 Publ. Eur. Court H.R. 12 at 29 (1971)]
(a) The domestic procedures must be "available and sufficient." [Van Oosterwijck Case, 40 Publ. Eur. Court H.R. 5 at 13 (1981)]
(b) Appeal to the highest court in the domestic jurisdiction is not necessary if prior caselaw suggestions it will be upheld, even if the domestic courts may depart from previous decisions. [Sigurjonsson v. Ireland, 12 Hum. Rts. L.J. 402 (1991)]
(c) The state has the burden of proving a case has not exhausted domestic remedies once the case is found to be admissible. [DeWeer Case, 35 Publ. Eur. Court H.R. 4 at 15 (1980)]

(4) Statute of limitations–the complaint must be filed within six months of the date of the domestic final decision. [ECHR, Art. 35 (1)]
(5) The state respondent must not only be a state party to the Convention, but also have recognized the competence of the Court to hear individual complaint by a special declaration. [ECHR, Art. 25 (1)]
(6) Must be compatible with the Convention by not making false or groundless allegations or defamatory language. [ECHR, Art. 35 (3)]
  (a) Political motives alone is not a ground for finding inadmissibility so long as the complaint otherwise states a valid cause of action. [Lawless v. Ireland, 2 Y.B. 308 (1958-59)]
(7) Prima facie case–it must have some based (not "manifestly ill-founded") [ECHR, Art. 35 (3); Aire Case, 32 Publ. Eur. Court H.R. 4 at 10 (1979)]
  (a) Inadmissibility is determined similar to the standard for a motion for summary judgment. [Air Canada v. UK, 14 Hum. Rts. L.J. 226 (1993)]

D. Nature of proceedings
(1) Adversarial
(2) ***Public***, including all documents filed with court (unless decided otherwise by the Chamber/Grand Chamber for exceptional circumstances)
(3) Counsel not necessary for submission of complaint, but required at hearings and after a complaint is found admissible.

E. Procedure on admissibility
(1) A rapporteur first examines the complaint and will decide whether to recommend it to a committee or can send it directly to a Chamber (complaints by states go directly to a Chamber).
(2) The committee examines the complaint and either sends it to a Chamber or strikes it by a unanimous vote of its three members.
(3) A Chamber examines the complaint and written arguments and documents. If it wishes, it may hold hearings and even inquire on the merits. Important issues of Convention interpretation will be referred to the Grand Chamber.
(4) The Chamber makes a public decision by majority vote of its seven members whether or not a complaint is admissible. If found inadmissible, reasons will be given.

F. Procedure on the merits
(1) Parties to the case are given further opportunity to submit evidence and memorials, as well as claims of just satisfaction.
(2) Other contracting states or any other person may, with permission from the court, intervene and submit written comments and, very occasionally, oral presentations to the court. States of the nationality of the complainant may intervene as of right. [ECHR, Art. 36]
(3) A public hearing is held.
(4) During the case, the office of the Registrar will attempt a friendly settlement which, if achieved, is final and binding. All settlement negotiations are confidential. [ECHR, Art. 38 (2)]
(5) A decision is made by majority vote of the court, with individual judges allowed to append opinions. [ECHR, Art. 45 (2)]
  (a) Decisions must give reasons for the judgments. [ECHR, Art. 45 (1)]
  (b) Decisions may include the award of "just satisfaction," [ECHR, Art. 41] which can be monetary damages if no other relief is available. [Bronisch Case, 103 Publ. Eur. Court H.R. 1 (1986)]
  (c) There is no power to reverse domestic decisions or annul domestic laws. [B, p. 140]
(6) The judgment becomes final after three months or earlier if the parties state their intention not to appeal or a decision for further review is made by the Grand Chamber.

G. Procedure on appeal
(1) Within three months of the judgment, either party may request review by the Grand Chamber. [ECHR, Art. 43]
(2) The Grand Chamber will examine the case and grant further review if there is an interpretation question or one of significant importance. [ECHR, Art. 43 (2)]
(3) If granted, the case will be decided by the Grand Chamber in the form of a judgment. [ECHR, Art. 43 (3)]
(4) Grand Chamber decisions are final. [ECHR, Art. 44 (1)]

H. Procedure on advisory opinions
   (1) The Committee of Ministers may request by a majority vote an advisory opinion from the Court on legal interpretations of the Convention and Protocols.
   (2) The content or scope of rights in Section 1 are outside the competence of the court on advisory opinions. [ECHR, Art. 47 (2)]
   (3) Advisory opinions are given by the Grand Chamber and individual judges may append opinions.

I. Enforcement of judgments
   (1) States are bound to abide by judgments to which they are a party. [ECHR, Art. 46]
      (a) No stare decisis–Court decisions are not formally binding precedent, but the Court traditionally follows its case law. [B, p. 139]
   (2) The Committee of Ministers of COE

J. Sub-bodies of the Court [ECHR, Art. 27 (1)]
   (1) Committees–three judges
   (2) Chamber–seven judges
   (3) Grand Chamber–17 judges

K. ***Standard of Review of the Court*** – discretion to domestic actions–the ***Margin of Appreciation*** (state action must be judged according to local views in order to preserve many voices and avoid the homogenization of all peoples while upholding minimal standards).
   (1) Limits on margin of appreciation–where the essence of a right is eroded. This involves the aim and necessity of law. [Handyside, para. 49]
   (2) Heightened need for margin
      (a) religion and public morals cases. [Johnston v. Ireland]
      (b) social and economic policies. [EK&R, p. 40]
   (3) Requirements on domestic courts [Handyside, para. 47]
      (a) Reasonableness
      (b) Good faith
   (4) Standard of review–abuse of discretion (some minorities opinions have claimed de novo) [Handyside, para. 47]
   (5) The subject of review: is the interference ***"necessary in a democratic society?"*** [Handyside, para. 49; Olsson v. Sweden, 11 EHRR 259 (1988)]
      (a) Legislation
         (i) **Proportionate** [Handyside, para. 49]–the balancing of injury to the individual with the interference against injury to the state without the interference. [Olsson]
         (ii) **Legitimate aim and purpose** [Olsson]
         (iii) **Pressing social need** [Olsson]
      (b) Judicial application of legislation
   (6) Scope of review–not limited to the face of domestic decisions, but must look at it as a whole and deduce whether the interference was "relevant and sufficient." [Olsson]
   (7) Other considerations–decisions of other states as influential, but not binding [Handyside, para. 57; Dudgeon v. UK, 4 EHRR 149 (1981)]

12. ***OSCE State-to-State Complaints*** – the Vienna Mechanism
   A. Complainant–one or member OSCE states
   B. Substance of complaint–accusation of not living up to an OSCE human dimension commitment.
   C. Dialogue between states–diplomatic exchange with certain time limits for responses.
   D. OSCE full membership discussion–if the states cannot come to a resolution, the matter is placed on the agenda of a conference to be discussed by the entire membership.
   E. Expert fact-finding–if a resolution is not reached by the OSCE membership, a mission may be appointed as third-party fact-finders and mediators.
      (1) Visits by consent–as a general rule, consent of state in question is necessary to enter that state.
      (2) Visits without consent–in serious situations, a mission can be sent without consent. This occurs when either a group of states or the OSCE Senior Council considers it necessary.

13. ***Complaints to the OAS Commission & Court*** (organ-based and convention-based)
   A. Complainant

(1) Individuals "petitions" (not corporations, but groups and NGOs)
(2) States "communications"

B. Jurisdictional requirements–inadmissibility is not subject to appeal
(1) State-to-state communications–both states must be parties to the Convention and recognized the competence of the Commission
(2) Individual complaints–the state need not be a party to the Convention, but must be an OAS member. However, if not a Convention party, the case can proceed no further than a finding by the Commission and publication to the General Assembly (no Court mechanism)–this is the Charter-based complaint system.
(3) Exhaustion of remedies–"in accordance with the generally-recognized principles of international law."
(4) Statute of limitations–six months from the final judgment of the state respondent (unless no domestic remedy for violation at issue; there has been denial of access to remedy; or the remedy involves unwarranted delay).
(a) The respondent state has the burden of proving otherwise. [Commission Regulation, Art. 37 (3)]
(5) Prima facie case–not "manifestly groundless or obviously out of order." [ACHR, Art. 47]
(6) Res judicata–the complaint cannot be "substantially the same as one previously studied by the Commission." [ACHR, Art. 47 (d)]
(7) Full faith and credit–the complaint cannot be "substantially the same as one previously studied . . . by another international organization." [ACHR, Art. 47 (d)]
(8) Non bin in idem–the complaint cannot be the subject of a pending petition in another international proceeding for settlement. [ACHR, Art. 46 (c)]

C. Attempts at settlement [see OAS/Ser.L.V./II.83,Doc. 14 at 35 (1993)]
(1) Commission "places itself at the disposal of the parties concerned."
(2) If settlement is reached, Commission prepares a repot describing facts and settlement.

D. Procedure on the merits to the Commission
(1) Commission examines the allegations and investigates the facts, which may include hearings.
(2) Information is sought from the respondent state
(3) Commission makes a decision as to a violation by majority vote and writes a report setting out facts and conclusions and, if desired, any recommendations to the state.
(4) If a violation is found, the state has three months to comply or react to the recommendations.
(5) At end of the period, the Commission decides by absolute majority whether adequate measures were taken by the state and whether to publish the report to the OAS General Assembly.

E. Effect of decision by Commission–not formally binding, but an authoritative legal determination

F. Procedure on the merits to the Court
(1) Statute of limitations for "appeal" to court–within three months of a Commission decision, the state or the Commission may refer the case to the Court (an individual cannot–it is not a pure appeal procedure).
(2) Jurisdiction–the state involved must not only be a party to the Convention, but have accepted the contentious jurisdiction of the Court by declaration or special agreement.
(3) The Commission is a party to the Court proceeding, presenting its views on the case as "ministerio publico."
(4) Exhaustion of Commission–cases cannot skip the Commission, even by request of the state because the process is important in developing the case because, while an individual may have standing before the Commission s/he has none before the Court. [In the Matter of Viviana Gallerdo, Case No. G1/01/81, para. 25]
(5) De novo review–the Court examines the Commission findings of fact and law.
(6) Judgment of the Court must include reasons and judges may append opinions [ACHR, Art. 66]–it is final and not subject to appeal. [ACHR, Art. 67]
(a) Whether there is a violation
(b) Ruling that the right or freedom violation must be remedied to provide for enjoyment.
(c) Award of monetary damages

G. Enforcement of judgment–the states undertake to comply [ACHR, Art. 68], but the Court submits an annual report to the General Assembly specifying the cases in which a state has not complied with a judgment and making any recommendations. [ACHR, Art. 65] General Assembly may pass condemnatory resolutions that

translate into normative pressure.

H. Advisory opinions by the Court–at the request of any OAS organ or any OAS member. [ACHR, Art. 64]
   (1) OAS organs can request opinions only "within their spheres of competence" and must demonstrate a "legitimate institutional interest" on the subject matter. [Advisory Opinion OC-2/82]
   (2) These are non-binding, but strong normative weight as judicial pronoucements.

I. Temporary restraining orders–in certain circumstances only at the request of the Commission

14. ***Complaint to African Commission on Human Rights***
   A. Complainants
      (1) Individuals (NGOs & entities) [B, p. 245]
      (2) States
   B. Preliminary procedure of inter-state complaints–can be skipped and proceed directly to the Commission.
      (1) Complaining state notifies violating state of alleged violation, copying the communication to the Commission.
      (2) Respondent state has three months to reply.
      (3) Bilateral negotiations can attempt to resolve the matter.
      (4) Either state may submit the matter to the Commission within three months of receipt of the original complaint by the respondent state. [ACHPR, Art. 48]
   C. Procedure of inter-state complaints before the Commission
      (1) Exhaustion of remedies–any existing remedies must be exhausted unless they would be "unduly prolonged." [ACHPR, Art. 50]
      (2) Investigation by Commission to obtain all relevant information for which the Commission is free to draw on "other sources." [ACHPR, Art. 52]
      (3) Hearings may be conducted where states have the right to make written and oral submissions.
      (4) Decision by Commission on whether there is a violation is prepared in a report "stating the facts and findings" [ACHPR, Art. 52] and any recommendation the Commission "deems useful." [ACHPR, Art. 53]
      (5) States and OAU Assembly are provided copies of the report.
      (6) Nothing further is required, although the matter could be taken up by any state in the Assembly.
   D. Procedure of individual complaints on admissibility
      (1) Secretariat prepares a list of the complaints received by individuals.
      (2) Jurisdiction [ACHPR, Art. 56]
         (a) Exhaustion of domestic remedies unless they would be "unduly prolonged."
         (b) No anonymous complaints
         (c) State of limitations–within a "reasonable period" from exhaustion of local remedies.
         (d) Res judicata/Full faith and credit–case may not have been "settled" by "these States" according to principles of the UN Charter or the Charter of the OAU or the ACHPR.
         (e) No complaint based on media reports alone.
      (3) The Commission can take up any case on the list by a majority vote. [ACHPR, Art. 55 (2)]
      (4) Prima facie case–the claim must amount to either a series of serious violation or massive violations. [ACHPR, Art. 58 (1); it is argued that this article is dead as it has never been applied]
   E. Procedure of individual complaints on the merits
      (1) The state is notified prior to any considerations. [ACHPR, Art. 57]
      (2) The matter is referred to the Assembly which decides whether to request the Commission to investigate and make a report. [ACHPR, Art. 58 (2); argued to be a dead article]
      (3) If the Commission is requested, an investigation is conducted.
      (4) Decision whether a violation exists is determined and a report made
      (5) The matter is sent back to the Assembly for action.
      (6) Annual report of the Commission may include the matter, but is to be published only after "considered by the Assembly" giving it the ability to suppress even public opinion. [ACHPR, Art. 59 (2)]

15. ***Complaint to the Commission on the Status of Women***–allegations of specific violations are accepted, but this is not an enforcement mechanism as the information is used only as a source of information.

PART XIII
SPECIFIC HUMAN RIGHTS

1. ***Aliens, Rights of*** – see also Rights of Refugees
   A. IL References
      (1) UDHR, Art. 14
      (2) CCPR, Art. 13 (and 12 (1) & (2))
      (3) ECHR, Art. 16; Prot. 4, Art. 2; Prot. 7, Art. 1
      (4) ACHPR, Art. 12 (4)
   B. Definition of alien–anyone living outside of the state of their nationality
      (1) Exception to general rule–a person who, for reasons of border changes, no longer lives within his state of nationality without having moved continues to enjoy every right save to vote and be elected. [Migrant Workers Convention (1990) (not yet in force); EK&R, ch. 1]
   C. Substance of rights
      (1) Freedom of movement within state of residence. [ECHR, Prot. 4, Art. 2]
      (2) Expulsion from state of residence only in accordance with law and with right to appeal (except where compelling reasons of national security). [CCPR, Art. 13; ECHR, Prot. 7, Art. 1; ACHPR, Art. 12 (4)]
      (3) Form and join trade unions. [Decl. on HR of Indivs. who are not Nationals of the Country in which they Live, Art. 8 (1) (b)]
   D. Limitations on aliens
      (1) Restrictions on political activity, including freedom of speech, association and assembly. [ECHR, Art. 16]
2. ***Association & Assembly, Freedom of***
   A. IL References
      (1) UDHR, Art. 20 (assembly, association & negative association–not to be compelled to join)
      (2) CCPR, Arts. 21 & 22
      (3) ECHR, Art. 11 (includes trade unions)
      (4) ACHR, Art. 15-16 (assembly without arms)
      (5) ACHPR, Art. 10-11 (solidarity duties to join an organization)
   B. Historical background
      (1) UDHR proposals that were <u>not</u> included in the final draft were Soviet suggestion to prohibit Nazi and war-advocating organizations and mention of trade unions.
   C. Assembly Issues
      (1) Protection of lawful demonstrations–states have a positive duty to protect this exercise of rights.
   D. Association Issues
      (1) Closed-shop agreements (exclusive trade union deals where no others will be employed)–this is not a per se violation, but in those cases brought it has been found to be a violation.
      (2) Required membership in an organization
         (a) Costa Rica Case (OAS)–required membership in journalist organization to be a journalist was not a violation.
         (b) ECHR–There is no HR violation for required membership in an organization, only when there is an exclusionary policy.
      (3) Banning organizations
         (a) Euro Ct–Banning of the communist party in West Germany was found to be lawful because the aim of the party was the destruction of rights (later practice may have found a violation–most Turkish cases of banning groups have been violations).
         (b) <u>Berefsforbund Case</u>–prohibiting individual association with a party is prohibited, even where the organization is banned. This is because individual rights are more important than organization rights.
3. ***Belief, Freedom of (Thought, Conscience & Religion)*** – see also Right to Non-discrimination
   A. IL References
      (1) UDHR, Art. 18 (“to change...”)
      (2) CCPR, Art. 18 (“to have or to adopt...”)

(3) HRC GC 22
(4) ECHR, Art. 9
(5) ACHR, Art. 12
(6) ACHPR, Arts. 8 & 12 (no right of nor prohibition on conversion)
(7) CD, Arts. 1 & 9 (b) (non-discrimination and religious education)
(8) CERD, Art. 5
(9) Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, GA Resolution 36-55 (1981)
(10) UNESCO Convention against Discrimination in Education (1960), Arts. 1 (1) & 5 (1) (b) (religious & political opinions)
(11) ILO # 111 concerning Discrimination in Respect of Employment and Occupation, Art. 1 (1) (a) (1958)
(12) OSCE Helsinki Final Act (1975), Chapter 1, Principle 7
(13) Historically
(a) Treaty of Westphalia of 1648–protection of religious minorities
(b) Code of Rhode Island in 1647

B. Difficulties of state control–it is problematic for states to control what is in the mind
C. Positive duties of state to secure this rights. [Religion and Belief Declaration, Art. 4]
D. Freedom to change religion–this provision was objected to by many third-world countries for two reasons:
(1) Muslim states because Islam does not allow one to convert away from it
(2) Other states because of what they considered imperialism through missionaries.
E. Manifestations of religion protected, but subject to limitations for public safety, moral or protections of rights and freedoms of others. [Religion and Belief Declaration, Art. 6]
F. Educating children
(1) Parents have prior right to choose type of education [UDHR, Art. 26 (3); CCPR, Art. 18 (4) (liberty of parents); CESCR, Art. 13 (3); CRC, Art. 14 (2) (state respect for parents); Religion and Belief Declaration, Art. 5]
(2) Right to and right from education–children have right to access religious education and right to avoid religious education. [Religion and Belief Declaration, Art. 5 (2)]
(3) Courses describing general principles of religion and ethics should be implemented. [HRC GC 18]
(a) Hartikainen v. Finland, HRC 40/1978–Finnish schools changed Lutheran classes to the history of religion and ethics which was challenged as still being Lutheran-based. The HRC agreed in principle, but found that this particular course curriculum was OK as not advocating religion.
(4) School participation in a war memorial parade was not a violation of pacifist principles of Jehovah's Witnesses because the parade did not advocate war, but only remembered it as an historical event. [Greek Case, Euro Ct]
G. Exemption from military service
(1) Reasons for exemption–religious or pacifist principles
(2) HR Commission Resolution–there should be non-combatant alternatives. [See CCPR, Art 8 (3) (c) (ii) (this is not forced labor although this line of reasoning concerns personal liberty, not conscience)]
H. Use of public funds
(1) Churches–there is no violation where one who objects to public funds going to a church can opt out of the church membership and no tax money in his case will go to the church. [Euro Ct]
(2) Military–a pacifist cannot prohibit his tax money going to the military. [Dr. J.P. v. Canada, 446 HRC 1991; UK Case, Euro Ct]
I. Public health
(1) A state may enforce regulations for public health purposes that may breach religious principles. [Netherlands Case, Euro Ct]
J. Work obligations–this is normally examined on the basis of contract law with some flexibility
(1) Clothing at work–lots of Muslim turban cases. Courts have decided these on the basis of the limitations clause of UDHR and CCPR, Art. 18 (3).
(2) Wearing a veil–Turkish university requirement that all, including women, provide a photograph showing the face was not a violation because it is needed to control who has degrees, like an identification card. [Euro Ct]

4. ***Care, Right to Adequate*** – see Right to Adequate Standard of Living & Right to Health
   A. Definition of care–it has grown beyond merely the health sphere to include the "provision in the household and the community of time, attention and support to meet the physical, mental and social needs of the growing child and other family members. It leads to the optimal use of human, economic and organizational resources." [UN Administrative Committee of Coordination, Sub-committee on Nutrition (1990) and International Conference on Nutrition (1992)]
5. ***Citizenship, Right to***
   A. Children–have a right to a nationality when they are born [UDHR, Art. 15; CCPR, Art. 24 (3); CRC, Art. 7 (1)]
6. ***Crimes Against Humanity, Freedom from*** – see Freedom from Torture
   A. Definition–torture and ill-treatment on a certain scale, rape and sexual assault in a certain pattern, extra-judicial killings and enforced disappearances.
7. ***Democracy, Right to***
   A. IL References
      (1) UDHR, Art. 21 (everyone . . . in his country)
      (2) CCPR, Art. 25 (every citizen)
      (3) CESCR, GC 3, para. 8
      (4) CEDAW, Art. 7 (a)
      (5) ECHR, Prot. 1, Art. 3 (very limited–no access to public office)
      (6) OSCE, Charter of Paris (1990)
      (7) ACHR, Art. 23 (with articulated limitations)
      (8) ACHPR, Art. 13 (no limitation on access to public property or services)
      (9) AU Declaration on the Principles Governing Democratic Elections in Africa (2002)
      (10) OSCE Copenhagen Document, paras. 7.1-7.9 & 8 (1990)
      (11) Council of Europe, Venice Commission
      (12) Commonwealth Harare Declaration
   B. Main rights at issue
      (1) Right to vote (elections)
      (2) Access to public office
      (3) Participation in periodic free & fair elections
      (4) Freedom of speech
      (5) Freedom of association
      (6) Education
      (7) Social inclusion (meaningful role in society) [Martin Scheinin, Copenhagen, May 2006]
      (8) Non-discrimination (in relation to participation)
      (9) Right to self-determination
      (10) Human rights as conditions and restrictions on the majority will [Geir Ulfstein, Oslo, Oct 2006]
   C. Democracy as the favored political system–UDHR, Article 21 favors democracy as the best system with the underlying principles of rule of law, sovereign equality, non-intervention and self-determination.
      (1) Democracy as an excuse to intervene–despite the sovereign equality and non-intervention, the absence of or establishment/restoration of democracy is often used as a pretext for foreign intervention.
   D. Limiting democracy through constitutionalism–pure democracy is the will of the majority, which J.S. Mill described as the "tyranny of the majority." In order to protect certain core principles from erosion by the majority, a constitution establishes core principles that cannot be violated and judicial review to protect them and the balance of power between the executive and the legislature.
   E. Special measures to achieve factual equality–special measures should be taken to counter factual discrimination in political participation. [CEDAW, ***; see MD, Art. 4 (1)]
   F. Regional concepts of democracy (are these within a margin of appreciation?)
      (1) Education-based representation–Confucianism
      (2) Tribal elders as representatives–respectable in age and experience
      (3) Hereditary monarchy–a violation if the monarch has any real political power
      (4) One-party system–would require good reasons and a democratic structure to avoid a violation [L42]
      (5) Unelected president–not a violation so long as the position holds no independent power

G. Judges and democracy–sufficient measures must be taken to assure that appointment decisions relate to the will of the people (in some places this means direct election while in others it is appointment by elected representatives).
H. Elections and states of emergency–a free election is not possible in a state of emergency. [L45]
I. Democracy cannot be used to pass undemocratic laws (the rule of law cannot undermine itself) [UDHR, Art. 30]
J. Inter-state democracy
   (1) Voting--is one-state, one-vote system of UN truly democratic? Consider a small state like Iceland with 250,000 people has the same vote as a state like China with over 1 billion.
   (2) Rule of law at international level–would this justify interventions where the rule of law is not upheld?
   (3) Constitutionalism–is there an international system of checks and balances? (GA, SC, ICJ and Secretariat?) In the Lockerbie Case, Libya tried unsuccessfully to judicially overturn a decision of the Security Council in the ICJ.
K. Election Systems
   (1) First past the post
   (2) Proportional
      (a) Single transferrable vote system–"the most proportional of proportional systems"
   (3) Federal system–small groups end up pulling the strings
   (4) Minority seats–secures representation to certain groups, but dilutes the legitimacy of the seat
L. Historical background
   (1) Roots in documents of the American and French revolutions
   (2) Positive law of democracy came about at the end of the 19th century
      (a) Universal suffrage (removal of race and gender restrictions)
      (b) Originally, suffrage was also limited by income. It was considered that only those who contributed to the tax fund had the right to say how it was spent.
   (3) UDHR drafting
      (a) "Will of the people"–French proposal
      (b) "Universal and equal suffrage"–Soviet proposal
      (c) "Pluralist" or "multi-party" system–a Belgian proposal that was defeated

8. ***Development, Right to and Rights in*** – see also Right to Self-determination
A. IL References
   (1) UNC, Art. 55 (a) (right to) & 55 (c) (include rights in)
   (2) CCPR, Art. 1 (S-D = rights in)
   (3) CESCR, Art. 1 (S-D = right to)
   (4) ACHPR, Art. 22 (people not individuals hold this right)
   (5) Declaration to the Right to Development
B. Right to development as Jus Cogans–at the World Conference on HR in Vienna (1993) virtual universal consensus was reached (including Western states) that development was a fundamental and universal right. [H&S, p. 179]
C. Basis of right to development–basic needs and social justice–human dignity (consider Pogge & Rawls).
D. Distinction between right *to* and rights *in*–the right to development is the substantive development of an area or people so that the conditions of living meet the minimum standards of human dignity. Rights in development refers to the method by which the minimum standards are achieved–dignity on the way from point A to point B (also known as the rights-based approach in which the tools of HR instruments are used to determine if a state has fulfilled its obligations).
E. Holder of right–individual person [DD, Art. 1 (2); compare ACHPR, Art. 22 (peoples)]
   (1) Inalienability [DD, Art. 1(1)]
F. Duty holder–states
   (1) International duty between states?–much of the developed world is skeptical of the Development Declaration because it is not entirely clear whether the duty holder is the state in which the individuals live or all states internationally. Furthermore, advocates of the right are looking for moral authority for duties at the state level. [L53]
   (2) Developed states have obligations to non-nationals where developing states do not. [CESCR, Art. 2 (3)]

G. Substance of right
   (1) National policies toward development. [DD, Arts. 2 (3), 3, 4 (1) & 7]
   (2) International cooperation. [DD, Arts. 3 & 4 (2)]
   (3) Social justice. [DD, Arts. 2 (3)]
   (4) Adherence to all other human rights as an inseparable web (including rule of law and democratization). [DD, Arts. 1(1)]

H. "Value-added"–emphasis on development has "widened the ownership of the HR project, especially in the poorer state that had believed they were being ignored.

I. Historical background
   (1) Foreign Minister of Senegal in 1966 called for development of issue of right to development.
   (2) A general declaration was made in 1969 that included the threats of modernization framework of development (which was top-down economic development by national elites supported by donors)
   (3) Foreign Minister of Senegal in 1970s conceived of idea for a declaration on right to development.
   (4) Working groups on this right were created and is now a permanent Working Group.
   (5) Declaration on the Right to Development in 1986 adopted by vote of 146-1-8.
   (6) ACHPR, Art. 22 included right to development.
   (7) Vienna Conference on Human Rights in 1993 confirmed right as inalienable.
   (8) Special Rapporteur appointed.

9. ***Education, Right to***

A. Instrument References
   (1) UDHR, Art. 26
   (2) CESCR, Arts. 13 & 14
   (3) Comm. ESCR, GC 13
   (4) CRC, Arts. 28 & 29 (191 states)
   (5) CERD, Art. 7
   (6) UNESCO Convention Against Discrimination in Education
   (7) Vienna Declaration and Programme of Action, Part I (33) & Part II (80) (171 states)
   (8) World Declaration on Education for All (1990) (155 states)
   (9) Plan of Action for the United Nations Decade for Human Rights Education
   (10) ECHR, Prot. 1, Art. 2
   (11) ACHR, Protocol of San Salvador, Art. 13
   (12) ACHPR, Art. 17, 25
   (13) CIS, Art. 27
   (14) AL, Art. 34
   (15) Other–Special Rapporteur for Education

B. Historical Context
   (1) Church dominance of education and morals until the early 19th century
   (2) Rights of parents overpowering rights of children–perpetuation of bigotry [John Stuart Mill, *On Liberty* (Pelican Classics, 1974), p. 175; Jean-Jacques Rousseau, *Emile* (aim of education is the liberation of the child)]
   (3) State socialization through public school systems–Nazi Germany
      (a) State duty to educate in contrast to individual right to receive education was first explicitly established in the 1936 Soviet Constitution, Art. 121.

C. Education and its interrelatedness with and indivisibility from other rights [Comm.ESCR, GC 13 (1) ("indispensable means of realizing other human rights")]
   (1) Education relies on other rights–freedom of assembly, association, expression, information.
   (2) Education is relied upon by other rights
      (a) Civil and Political Rights–Freedom of information, expression, assembly, and association; the right to vote and to be elected; equal access to public service, fair trial, etc.
      (b) Economic, Social, and Cultural Rights–Right to work, equal pay for equal work, right to form trade unions, to take part in cultural life, to enjoy the benefits of science, etc.

D. Levels of Education
   (1) Primary education–first level of education. Generally from 1st grade to between 5th and 10th grade.

(2) Secondary education–second level of education. Generally from between 6th grade and 13th grade. This includes "technical and vocational education." [CESCR, Art. 13 (2) (b); Comm.ESCR, GC 13 (15) & (16); CRC, Art. 13 (1) (b) & (d)]
(3) Tertiary education--university level of education
(4) Fundamental education–simply attaining "basic learning needs" by anyone, irregardless of age (e.g. adult education). [Comm.ESCR, GC 13)]

E. Education as a Right–"right with a compulsory element" (Nordic) or "right with a duty" (Chinese)
(1) Right of Education
(a) All human beings are entitled to education
(i) State has positive obligations to respect, protect, and fulfill (facilitate and provide) education. [CESCR, Art. 13 (2); Comm.ESCR, GC 13 (50); Valsamis v. Greece, 24 EHRR 294, para. 27 ("positive obligations on the part of the state")]
(ii) States must cooperate internationally to eliminate ignorance and illiteracy and spread knowledge and teaching methods. [CRC, Art. 28 (3)]
(iii) The test of any education program is "the best interests of the student." [Comm.ESCR, GC 13 (7)]
(b) Educators are entitled to academic freedom (this includes private schools) [Comm.ESCR, GC 13 (38-40); see CCPR, Art. 15 ("freedom indispensible for scientific research and creative activity")]
(i) This includes the material conditions of the teaching staff. [CESCR 13 (2) (e); Comm.ESCR, GC 13 (27)]
(c) Parents (guardians of students) are entitled to determine the substance of their child's education.
(2) Duty of Education–All human beings have a duty to attain education. Primary education is required. [UDHR, Art. 26 (1), CESCR, Art. 2 (a); CRC, Art. 28 (1) (a)]
(a) States have a positive duty to "take measures" to achieve attendance. [CRC, Art. 28 (1) (e)]

F. Issues in education
(1) Economic access to education [Comm.ESCR, GC 13 (6) (b)]
(a) Free primary education [CESCR, Arts. 13 (2) (a) & 14; Comm.ESCR, GC 13 (8-10) & (51); CRC, Art. 28 (1) (a)]
(i) State parties to the CESCR which do not have free and compulsory education agree to establish, within two years of becoming a state party, a plan to progressive realize it within a reasonable number of years. [CESCR, Art. 14; Comm.ESCR, GC 13 (25)]
(ii) "For millions of people throughout the world, the enjoyment of the right to education remains a distant goal [and], in many cases, this goal is becoming increasingly remote." Comm.ESCR, GC 13 (2)
(b) Free fundamental education [CESCR, Art. 13 (2) (d); Comm.ESCR, GC 13 (21-24)]
(c) Progressive introduction of free education at secondary and tertiary levels [CESCR, Arts. 13 (2) (b) & (c), Comm.ESCR, GC 13 (11-14); CRC, Art. 28 (1) (b)]
(2) Physical access to education–education must be within safe physical reach, either geographically convenient or via modern technology. [Comm.ESCR, GC 13 (6) (b)]
(3) Sufficient length of compulsory education
(a) There is no explicit length requirement for compulsory education, but it should be approximately five to seven years, as a minimum. [CESCR, Art. 2 (a)]
(4) Substance of School Curriculum
(a) Fulfillment of human dignity (substantive person). [UDHR, Art. 26 (2); CESCR, Art. 13 (1) (enable participation in a free society); Comm.ESCR, GC 13 (59) (consistent with CESCR); CRC, Arts. 12-15 (child with own views and freedoms of expression/association); CRC, Arts. 29 (1) (a) & (d) and Comm.RC, GC 1 (12) (prepare a responsible life in a free society)]
(i) Comm.ESCR, GC 13 (1)–"a well-educated, enlightened and active mind, able to wander freely and widely, is one of the joys and rewards of human existence."
(b) Education *about/in* human rights, including understanding and tolerance (this leads to furthering the UN and to peace). [UNC, Art. 1 (3); UDHR, Art. 26 (2); CESCR, Art. 13 (1) ("strengthen the respect for HR . . . promte understanding, tolerance, and friendship . . . and further the activities of the UN"); CRC, Art. 29 (1) (b) & (e) (respect for environment); ACHPR, Art. 25; OAS Prot. of

San Salvador, Art. 13; Vienna Declaration, Para. 33]

(c) Develop respect for parents. [CRC, Art. 29 (1) (c)]

(d) Develop respect for cultural values (including the child's own culture, the culture where the child is living, and other cultures). [CRC, Art. 29 (1) (c); MD, Art. 4 (4); ACHPR, Art. 17 (3)]

(e) Moral Issues in School Curriculum

(i) Instruction in religion at a public school is a rights violation.

- Kjeldsen, Busk, Madsen and Pedersen Case (ECHR 23/1976)–"the state is forbidden to pursue an aim of indoctrination."

(ii) Instruction *in* religion at a public school is not a rights violation when exemptions or alternatives are available. [Comm.ESCR, GC 13 (28)]

- Angelini v. Sweden, (ECHR 10491/1983)–religious instruction on a particular state religion is not a violation as long as there are exceptions available.

(iii) Instruction *about* religion at a public school need not have exemptions or alternatives. [Comm.ESCR, GC 13 (28), see also HRC, GC 18]

- Hartikainen v. Finland, (HRC 40/1978, decided under CCPR, Art. 18 (4) on freedom of belief)–a required course in Finland about various religions and religious principles did not infringe on freedom of belief when the instruction was given in "a neutral and objective way and respects the convictions of parents."
- Kjeldsen, Busk, Madsen and Pedersen Case (ECHR 23/1976)–in Denmark, required teaching on sex education throughout a number of courses was not a violation of ECHR, Prot. 1, Art. 2 because it dealt with the moral issues in a very general way and in no way attempted to indoctrinate or advocate a specific type of sexual behavior. The information was presented in "an objective, critical and pluralistic manner."
- Valsamis v. Greece (ECHR 2187/1993)–the case involved compulsory attendance at a school parade away from the school grounds and outside of school hours in order to mark the national day in Greece. A student who was a Jehovah's Witness refused to attend claiming the parade violated her (and her parents') pacifist views. She was punished by the school. The majority held that the parade did not advocate anything contrary to pacifism and didn't find a violation.

(f) Education *about* minorities

(i) States "should" encourage knowledge about minorities [CRC, Art. 29 (1) (c); MD, Art. 4 (4)]

(5) Balancing Right to Education with the Rights of Parents Regarding their Children [CESCR, Art. 13 (3); CRC, Art. 5 (parents are "to provide . . . appropriate direction and guidance"); ECHR, Prot. 1, Art. 2]–the main purpose of this provisions, as reflected from the preparatory discussions to the UDHR, was the historical context of Nazi socialization of bigotry in the pre-war German schools.

(a) Education Venue

(i) The choice of education venue belongs primarily to parents. [UDHR, Art. 26 (3), CESCR, Art. 13 (2)]

(ii) Home schooling and private schooling are allowed, but must still fulfill minimum requirements (the problem is monitoring this for fulfillment). [CESCR, Art. 13 (3) & (4); Comm.ESCR, GC 13 (28-30); CRC, Art. 29 (2)]

(iii) No schooling is not an allowable alternative. [CESCR, Art. 13 (3) (must choose schooling, but not between school and no school)]

(b) Education Substance

(i) Parents have the freedom of educating their children religiously and morally. [CESCR, Art. 13 (3); ECHR, Prot. 1, Art. 2]

(ii) Parents' freedom is limited by constraints of promoting understanding and tolerance. [See CESCR, Art. 13 (1) & (4); Comm.ESCR, GC 13 (4) ("educational objectives reflect the fundamental purposes and principles of the UN as enshringed in Articles 1 and 2 of the Charter"); CRC, Art. 29 (2)]

(6) Discipline of Children at Schools

(a) States have an affirmative duty to "take all appropriate measures" to ensure that discipline does not violate the human dignity of children. [CRC, Art. 28 (2)]

(i) Campbell and Cosans v. United Kingdom (ECHR 48/1982)–requiring students to submit to corporal punishment without an educational alternative is a denial of the right to education.

(b) Corporal punishment is inconsistent with human rights law which protects the dignity of the individual. [Comm.ESCR, GC 13 (41)]

(7) Equal Access to Education through Non-discrimination [UDHR, Art. 26 ("equal access to all"); CCPR, Art. 26; CESCR, Art. 2 (2) "in light of" UNESCO Convention against Discrimination in Education; Comm.ESCR, GC 13 (6) (b), (19) & (31); CRC, Art 2 (1), 28 (1) ("equal opportunity") & 28 (1) (c) ("basis of capacity")]

(a) Non-discrimination applies fully and immediately, not being subject to progressive realization or the availability of resources. [Comm.ESCR, GC 13 (31) & (43); CERD, Art. 7; see CCPR, Art. 18 & 4 (2) (non-derogable)]

(b) Non-discrimination applies to all school age persons in the territory of a state party, including non-nationals and those without legal status. [Comm.ESCR, GC 13 (34); Refugee Conv. (refugees also entitled to education)]

(c) Difference between Secondary and Higher Education–secondary education must be "generally available and accessible to all" while higher education must be "equally accessible to all, on the basis of capacity." Higher education has the additional element of capacity of potential students, which "should be assessed by reference to all their relevant expertise." [Comm.ESCR, GC 13 (19)]

(i) Access to higher education can be conditional on certain qualifications. [Glasewska v. Sweden (EcommHR 11655/85)]

(d) Gender Distinction in Admission–all-boys and all-girls schools are not a HR violation as long as there is equality in choice, opportunity, facilities, and quality.

(e) Special Measures (temporary)

(i) States *must* take special measures where discrimination exists. [Comm.ESCR, GC 13 (55) ("gender") & (59)]

(ii) Special measures are not a HR violation in education if they are adopted to bring about de facto equality, they do not maintain unequal or separate standards and are discontinued when the objective is achieved. [HRC, GC 18 (13) (legitimate purpose with reasonable and objective criteria); Comm.ESCR, GC 13 (32); CERD, Art. 1 (4) & 2 (2); MD, Art. 8(3)]

(f) Blom v. Sweden (HRC 191/1985)–it is not discrimination for a state which does offer a free education alternative to deny additional benefits to a parent who does not wish to use the free system.

(g) Belgian Linguistics Case (ECHR 6/1968)–it was discrimination for Belgium to refuse to provide a French-language school in a unilingual Dutch area when Dutch-language schools existed in unilingual French areas.

(h) USA Legal System

(i) Regents of the University of California v. Bakke–race and ethnicity can be considered in the application process, but specific quotas are not allowed. Admissions programs must be "narrowly tailored" to injure as few people as possible.

(ii) Grutter v. Bolinger–special measures are still necessary in America, but "we expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today." The appellate court (prior to the U.S. Supreme Court) had not addressed the issue of special measures, but held that a ethnically diverse student body has its own benefits.

(8) Instruction *about* a Language/Instruction *in* a Language

(a) Minorities–states are obliged to provide the opportunity to learn *about* a mother tongue and to be instructed *in* a mother tongue. [MD, Art. 4 (3)]

(b) Belgian Linguistics Case (ECHR 6/1968)–no right to be taught in language of parents' choice at public school (but lack of that language of instruction cannot be discriminatory).

(c) Cyprus v. Turkey (ECHR 25781/1994)–discontinuing the language of instruction when there are students requesting that language and it was integrally part of the territory is a violation of rights.

(d) Meyer v. Nebraska (262 U.S. 390 at 401-403 (1923))–an affirmative law stating the language requirement for all schools, public or private, is an unconstitutional. violation of rights to education

even though there might be a legitimate reason for the law.

10. ***Equality, Right to*** – see non-discrimination
    A. Three types of equality
        (1) Equality *before law*–procedural in judiciary
        (2) Equality *in law*–non-discriminatory legal status (protected by right to non-discrimination)
        (3) Equality *in fact*–non-discriminatory actual treatment (achieved through special measures because a simple prohibition of discrimination is not enough to eradicate it).
11. ***Expression, Freedom of***
    A. IL References
        (1) UDHR, Art. 19
        (2) CCPR, Art. 19 (Limitable under Art. 4)
        (3) ECHR, Art. 10 (Limitable under Art. 15)
        (4) ACHR, Art. 13-14 (prohibition of private control over media & right of reply)
        (5) ACHPR, Art. 9 (receipt of info has priority & right of effective remedy under Art. 7)
        (6) CD, Art. 22
    B. Two sides of freedom of expression
        (1) Active side–provide information (right of expression)
        (2) Passive side–right to receive information (right to information)
            (a) U.S. Chief Justice Burger noted in the Red Lion Broadcasting Company v. FCC, 395 U.S. 367 (1969) that the primary protection of the U.S. first amendment is the right to listen.
            (b) Unfair access to information widens the rich-poor gap.
    C. Two justifications of the importance of expression:
        (1) Intrinsic–innate value due to the human need for expression
        (2) Instrumental–important in its ends as a tool
            (a) Cornerstone of democracy–freedom of expression ensures that the will of people serves as the basis of authority of government (popular sovereignty)
            (b) Testing of ideas–the marketplace of ideas (J.S. Mill)
    D. Limitations to expression:
        (1) "Fighting words"–words that prompt imminent physical retaliation are a criminal violation subject to criminal sanctions.
        (2) Defamation (libel or slander)–words that are proven not to be true are civil violations subject to civil sanctions.
    E. Specific Issues:
        (1) Commercial speech
        (2) Different protections for different groups
            (a) Public figures
                (i) Lingnes Case (Euro Court)–public figures must be thick-skinned because they have placed themselves in the public arena. The question still remains, however, whether this extends outside the public arena to private life.
            (b) Judges
                (i) Barford v. Denmark (Euro Court)–judges enjoy higher protection than public figures because they are not political and the need to preserve respect for the judiciary.
        (3) Press responsibility and balanced reporting
            (a) Declaration of the Establishment of a New International Information Order (1974) by the GA and subsequent UNESCO studies and recommendations
            (b) Declaration of Talloires (1981)–western and some global media response to the new order, affirming the freedom of the press and calling on UNESCO to abandon its attempts to regulate news content and formulate rules for the press.
        (4) Internet [see Comm.ESCR GC 14]
            (a) Good for freedom of expression–revitalization of democracy by returning to pure democracy of open discussions and access to information. The criticism to this argument is that there is too much information so that it drowns out debates in noise.
            (b) Bad for freedom of expression–through the registering and profiling of information, the state will

control individuals (Orwell, 1984).

F. Regional approaches
   (1) The European System–focuses on when a public interference with expression may be permissible under Article 10, presupposing that expression cannot be protected absolutely. Sometimes speech ought to be prevented.
      (a) Handyside v. UK–in addressing a sex education book that was banned in the UK, the court posed the question was the interference "necessary in a democratic society." It answered that question in the affirmative primarily because the UK court had found that it had within its "margin of appreciation." Secondarily, the book was found to deprave morals, undermine parents, churches & youth groups and it was without balance having no opposing viewpoints.
      (b) Olsson v. Sweden, 11 EHRR 259 (1988)–the state interference was found to correspond to a pressing social need and was proportionate to the legitimate aim, making is "necessary within a democratic society."
      (c) The Spycatcher Case (Observer & Guardian v. UK)–the banning of a book that was claimed to be destructive to national security was unreasonable because much of the content of the book was published in newspapers anyway and the entire book had been published overseas and was available to UK readers. The banning of the book was, therefore, disproportional and unnecessary.

G. Historical background
   (1) British Bill of Rights in 1688–guaranteed immunity for any statements made in parliament in order to encourage free exchange of information.
   (2) John Locke–nobody should be forced to renounce their opinion because it will not accomplish anything.
   (3) Freedom of Print Decree (1766) in Sweden-Finland–based on the opinion of Chydenius to find out the truth through the exchange of opinions. Even false writings are beneficial to help root the truth (the Marketplace of Ideas).
   (4) U.S. Bill of Rights (1791)–first amendment (no laws abridging speech or press)
   (5) French Declaration of Rights of Man and the Citizen (1789)–subsequent restraint through libel
   (6) John Stuart Mill–if not critiqued, established opinions transform into stereotypes. No real opinion if not questioned. (MPI)

H. Philosophical considerations
   (1) Objectivism within Liberalism (Martti Kuskenniemi)–liberalism cannot make reference to certain objective values without contradicting itself. The illusion of neutrality makes liberal principles empty of content. Kantian ethics lure us to believe that all want to be treated as we would–compare to the "Golden Rule." (This also leads to the judicial criticism that the outcome of law is not subjective).

12. ***Fair Trial, Right to***

A. IL References
   (1) UDHR, Art. 10
   (2) CCPR, Art. 14
   (3) ECHR, Art. 6, Prot 7, Arts. 2 & 4
   (4) ACHR, Art. 8
   (5) ACHPR, Art. 7
   (6) CD, Art. 19

B. Main aspects of the right
   (1) Principle of equality of arms
   (2) Principle of audiatur et altera pars–the other side must be heard. [Feldbrugge v. Netherlands, 1986 ECHR 99 (health insurance allowance denied without participation of applicant)]
   (3) Legal assistance provided free of charge
      (a) Criminal offense–a social dimension of right. [Airey Case, 1979 ECHR 32, 2 EHRR 305]
      (b) "Determination of civil rights and obligations." [ECHR, Art. 6 (1)]
   (4) Oral hearing generally required, but not absolute
   (5) Length of case–limited to a reasonable period. [Deumeland v. Germany, 1986 ECHR 100 (11-year civil case by a widow over husband's pension); Salesi v. Italy, 1993 ECHR 257-E (6-year civil rights case)]

C. Cost–this is a civil right (so-called 1st generation right) which requires the allocation of a significant amount of resources for a court system and legal aid. This blurs the historic line between civil and political rights

(so-called 1st generation rights) and economic, social & cultural rights (so-called 2nd generation rights). [See Airey v. Ireland, 2 EHRR 305 (1979)]

D. European Practice
   (1) Distinction between criminal cases and disciplinary cases (and taxation cases)–the court will make its own autonomous decision of the nature of the charge (de novo review). Three-part test:
      (a) Presumption that the law is defined according to the local categorization.
         (i) Adolf v. Austria–a criminal case even though very minor because that was the definition of the local statute.
      (b) Euro Court will make its own determination, especially where local classification is non-norm compliant.
      (c) The severity of "punishment" (not only imprisonment but fines, etc.). The greater the punishment, the great the likelihood of the case being "criminal."
         (i) Contempt of court fines are not criminal.
   (2) Distinction between administrative cases and those involving civil rights (social benefits, licenses, permits, etc.)
      (a) Principle of "well-foundedness"–Euro Court will examine the case autonomously to determine if rights are involved. To involve civil rights, the claim must be based on some genuine dispute., not merely an abuse.
      (b) Otherwise administrative issues that involve discrimination are well-founded.
      (c) Administrative decisions that involve benefits where there is a prima facie right to benefits is well-founded.

13. ***Family Life, Right to*** – see Right to Privacy
   A. IL References
      (1) CESCR, Art. 10
      (2) CRC, Art. 27

14. ***Food, Right to Adequate*** – see also Right to Adequate Standard of Living
   A. IL References
      (1) UDHR, Art. 25 (1)
      (2) CESCR, Art. 11 (1) ("adequate food") & 11 (2) ("freedom from hunger and malnutrition")
      (3) CRC, Art. 27
      (4) CommESCR GC 12 (1999)
      (5) Protocol of San Salvador, Art. 12 (1) (nutrition)
      (6) FAO Voluntary Guidelines on the Right to Food (2005)
      (7) World Food Summit Plan of Action (1996)
      (8) ICC Statute, Art. 8 (2) (b) (xxv) (starvation of civilians as warfare is illegal)
   B. The only "fundamental" right–without food all other rights and freedoms become useless. One lives in a state of half life (practically sub-human because of decreased capacities) and eventually dies. [CommESCR GC 12 (4)]
   C. The problem–lack of access to food, *not* lack of food itself. [CommESCR GC 12 (5)]
      (1) Social justice connection–fulfillment of right requires appropriate economic, environmental and social policies at national and international levels. [CommESCR GC 12 (4)]
      (2) Sustainability–"food security"
      (3) 820 million people worldwide suffer from malnutrition (1/6 of world population)
   D. Point of fulfillment–when everyone has physical and economic access at all times to adequate food and means of procurement. [CommESCR GC 12 (6)]
      (1) Food free from adverse substances.
      (2) Food acceptable to a given culture.
   E. Duties of states
      (1) Improve methods of production, conservation and distribution of food. [CESCR, Art. 11 (2) (a)]
      (2) Ensure equitable distribution of world food supplies in relation to need. [CESCR, Art. 11 (2) (b)]
      (3) Create a national strategy to ensure food security. [CommESCR GC 12 (21) & (23)]
      (4) Never use food as an instrument of political or economic power. [CommESCR GC 12 (37)]
   F. Cyclical problem–pre-natal and youth malnourishment is a particular problem because it permanently

deteriorates substantive abilities which result in poverty which results in the next generation being malnourished and the continuation of this cycle.

G. Women's issue–women are particular vulnerable because of cultural discrimination of men and boys first. This perpetuates the cycle of poverty because children are born undernourished, brain damaged and without full capacities.

H. Issues

(1) Corporate responsibility–TNCs were aggressively marketing breast milk substitutes in the third world, despite the fact that this required mixing the food with water that was often contaminated and caused children to die. A Swiss NGO ran ads that the largest company, Nestle, was killing children. While Nestle won a lawsuit, it was admonished by the court and led the WHO to adopt a "code of conduct."

(2) Cultural sensitivity–genetically-modified labeling of food. Is there an entitlement to know (consumer choice)? Does this have right to health implications?

15. ***Genocide, Freedom from*** – see also Freedom from Torture & Minority Rights (cultural genocide)

A. Definition–obliteration in whole or in part of an ethnic, racial or religious group by 'causing bodily or mental harm,' including killings, regardless of whether these acts take place in times of war or peace. [A&E, p. 124]

B. Prohibition of genocide is part of jus cogens due to GA Resolutions, ICJ decisions, the Genocide Convention and Geneva Conventions, Common Art. 3 applying them to all individuals in all states regardless whether that state is a party to any instrument [A&E, p. 124; see VC, Art. 53]

C. Remedy for genocide–1253 procedure to the HR Comm. due to a gross and massive HR violation.

D. Genocide as HR on a collective basis–rather than deal with rights in an individual context, genocide considers them in a collective basis.

E. Purpose of crime of genocide

(1) Protect the existence of entire groups. [ICJ Advisory Opinion (1951)]

(2) Recognize the greater injury committed–the future ramifications of a genocidal act are much more far-reaching than an ordinary criminal act. The danger of future violence is intensified making the crime much more severe.

(3) Restore peace and security.

(4) Assist in transition to democracy

(a) Court proceedings create an historical record of events for writings of history books and news articles.

(b) Isolation of individually responsible participants alleviates hatred toward an entire group and a general desire for revenge.

F. Nature of the crime of genocide

(1) Single crime–made up of one or more acts toward that single crime.

(2) Complicity–a separate offense which can be charged in addition to genocide itself.

(3) Elements

(a) Objective element (actus reas)–not what the person intended, but only what actually occurred.

(b) Subjective element (mens reas)–mental state; the intent of the accused to commit the conduct.

(i) Must "seek" destruction of a group–this must be the "goal" of the accused.

- Destruction in whole or "in part"–this interpreted case-by-case. Localized genocide is included; thus, intent to destroy a part of a part of a group is still genocide.
- "Destory"–physical or bodily destruction is required. [ICTY, Art. 4 (2) (b)]
  - Serious bodily harm includes forcible, large-scale deportation (this can be used to infer intent).

(ii) Discriminatory intent–not just intent to kill, but intend to kill in order to destory.

(iii) Motive is not a requirement–hatred of a group is not an element of the crime.

(c) Contextual element–a certain social context (this is difficult to prove because the methods of doing so are different from other crimes)

(i) A wider-spread systematic attack against a certain population, although there need not be a genocidal plan

(ii) The acts of the accused has a nexus to the systematic attack.

- Acts are part of manifest pattern of genocidal conduct.
- Acts had the ability to bring about similar conduct of genocide or crimes against

humanity.

(iii) Accused knew conduct was part of systematic attack.

G. Jurisdiction for genocide
   (1) Complementary jurisdiction with instruments–the instrument body must allow domestic proceeding to be brought before prosecuting internationally (or showing such proceedings are a sham).
   (2) Universal jurisdiction–in a domestic court in any state which has enacted universal jurisdiction provisions in their own law. Acts of torture or ill treatment create an obligation on all states to punish or extradite an accused. [Genocide Convention]
   (3) No immunity for present or former heads of state. [ICJ Case, (2002)]

16. ***Health, Right to Highest Attainable Standard of***
   A. IL References
      (1) CESCR, Art. 12
      (2) CRC, Art. 24
      (3) CEDAW, Arts. 11.1 (f) & 12
      (4) Comm.ESCR GC 14
      (5) Euro Soc Charter, Art. 11
      (6) ACHPR
   B. Substance of right
      (1) Necessary medical assistance and health care. [CRC, Art. 24 (2) (b)]
      (2) Combat disease and malnutrition. [CRC, Art. 24 (2) (c)]
      (3) Basic health care education. [CRC, Art. 24 (2) (e)]
      (4) Develop preventative health care. [CRC, Art. 24 (2) (f)]
   C. Conflicts with other rights
      (1) Property rights–right to life-saving drugs vs. material interests held by developers of scientific productions. [see UDHR, Art. 27 (2)]
      (2) Privacy rights–of population and especially those with diseases if compulsory disease testing is implemented. [see Privacy section]
      (3) Privacy rights–of mothers regarding vs. health rights of children as breast feeding reduces the risk of death of babies in developing states.
   D. Implication of other rights:
      (1) Children orphaned by death of parents who received substandard medical attention. [see Family Life section]
      (2) Discrimination against orphaned children due to the cause of parental death (AIDS) is a chronic problem in Africa. [see Non-discrimination section]

17. ***Housing, Right to Adequate***
   A. IL References
      (1) UDHR, Art. 25 (1)
      (2) CESCR, Art. 11 (1)
      (3) CommESCR GC 7
      (4) CERD, Art. 5 (e) (iii)
      (5) CRC, Art. 27
      (6) CEDAW, Art. 14 (2)
      (7) Convention Relating to the Status of Refugees (RC), Art. 21
      (8) ILO Recommendation # 115 on Workers' Housing
      (9) ILO Convention # 117 on Social Policy
      (10) ESC, Art. 31 & Additional Protocol, Art. 4 (elderly rights to housing)
      (11) ADRDM, Art. 11
      (12) OAS Charter, Art. 31 (k)
      (13) OSCE Vienna Document (1989), Principle 14
      (14) OSCE Copenhagen Document (1990), Art. 23
      (15) See generally, ECHR, Art. 8 & Prot. 1, Art. 1 (mostly eviction law) [Cyprus v. Turkey, 6780 EctHR 74 (1976)]
   B. Causes of housing crisis [UN Special Rapporteur on the right to housing (1992)]

(1) Failures of government and development policies
(2) Housing discrimination
(3) Environmental health
(4) Disasters and housing
(5) Withholding of information crucial to housing
(6) Exploitation in the housing sphere
(7) Speculation and the commodification of housing
(8) Forced evictions
(9) Armed conflict
(10) Criminalization of housing
(11) Structural adjustment programs and debt
(12) Poverty and the deprivation of means
(13) Perpetuation of homelessness

C. State obligations–legislative and other steps within resources to progressively achieve. [CESCR, Art. 2 (1)]
(1) The existence of any significant number of individuals deprived of basic shelter and housing is, prima facie, a violation of CESCR. [CommESCR GC 3, para. 10]

D. Housing is a "prime social need." [James and Others, 1986 EctHR 98, para 47]

18. ***Indigenous Rights*** –rights of *peoples* – see also Tribal Rights and Minority Rights

A. IL References
(1) CCPR, Art. 27 (minority rights)
(2) CESCR, Art. 15 (take part in culture)
(3) CRC, Art. 3 (1) (best interest of child) & 3 (2) (take into account rights and duties of parents)
(4) Draft Declaration on the Rights of Indigenous Peoples (1993) (not finalized due to S-D & land)
(5) ILO # 107 (1957)
(6) ILO # 169 – Convention Concerning Indigenous & Tribal Peoples in Independent Countries (1989)
(7) World Bank Operational Directive 4.20 on Indigenous Peoples (pariticpation)

B. Definition of indigenous (requires the existence of *both* conditions)
(1) Population inhabited country or geographical region prior to its conquest/colonization *or* prior to the establishment of modern boundaries. [ILO # 169, Art. 1 (b)]
(2) Retention of some or all of cultural, social, economic or political institutions. [ILO # 169, Art. 1 (b)]
(3) Self-identification of group as indigenous. [ILO # 169, Art. 1 (2)]

C. Determining which groups are indigenous–the Working Group takes an official position. [L40]

D. Purpose of indigenous rights
(1) Prevent discrimination
(2) Preserve culture
(3) Resolve land-use issues because indigenous group cultures are interconnected with land use and their "ownership" has been of a different type than "private property" which has led to taking of the land without compensation. [ILO # 169, Part II]

E. Limitation on indigenous rights
(1) Not self-determination [ILO # 169, Art. 3]
(2) Indigenous rights cannot be used to violate another's human rights and freedoms. [UDHR, Art. 30, [ILO # 169, Art. 3 (2)]

F. State duties
(1) Developing systematic action to protect rights and guarantee respect. [ILO # 169, Art. 2 (1)]
(2) Ensuring non-discrimination in benefits provided by state programs and laws [ILO # 269, Art. 2 (2) (a)]
(3) Consult peoples concerned before considering legislative or administrative measures that would affect the peoples. [ILO # 169, Art. 6 (1) (a)]
(4) Respect importance of land to peoples. [ILO # 169, Art. 13 (1)]

G. Specific rights
(1) Non-discrimination [ILO # 169, Art. 3 (1); see Art. 2 (2) (a), 4 (3) & 26]
(2) Autonomous prioritization of processes that affect their lives and lands. [ILO # 169, Art. 7] (Consider Pogge's human flourishing.)
(3) Special measures to safeguard persons, institutions, property, labor, culture and environment of the

peoples concerned. [ILO # 169, Art. 4 (1) & 6 (1) (b)]
(4) Legal mechanisms for enforcement of rights. [ILO # 169, Art. 12]
(5) Ownership of land which they traditionally occupy. [ILO # 169, Art. 14 (1)]
(a) This includes both cultivated and pastoral lands
(6) Natural resources to land. [ILO # 169, Art. 15 (1)]
(a) This includes, among others, subsoil minerals, water, freshwater fish and saltwater resources.
(7) Education [ILO # 169, Part VI; see also UDHR, Art. 2 & 26; CCPR, Art. 27; CESCR, Art. 13; HRC GC #18 & 23; UNESCO Convention Against Discrimination in Education]
(a) Equal access [ILO # 169, Art. 26]
(b) Equal quality [ILO # 169, Art. 29]
(c) Own education system and resources [ILO # 169, Art. 27 (3)]
(d) Taught in indigenous or language most used by group [ILO # 169, Art. 28 (1)]
(e) Opportunity to attain fluency in national or official language(s) of country [ILO # 169, Art. 28 (2)]
(f) Fair and accurate textbooks [ILO # 169, Art. 31]

H. Alternative use of minority rights–all indigenous groups are minorities, although all minorities are not indigenous groups. Thus, where ILO # 169 is not ratified, other instruments such as CCPR, Art. 27 or the Minority Declaration can be invoked.
I. Historical background
(1) Sub-Commission Study on Indigenous Peoples–focused on prevention of discrimination of indigenous peoples and recognized the work of the ILO since 1930s that indigenous groups were poorly treated in labor market, especially because their land had been taken, displacing the people and their method of subsistence.
(2) ILO Convention 107 in 1957–addressed in part one discrimination against indigenous in the labor market (including education) and in part two land rights as a cause of vulnerability.
(a) Criticized by indigenous NGOs as too integrative. They wanted control of their own destiny without having to enter the market-driven, individualistic, "Western" society.
(3) Working Group on Indigenous Peoples in 1982 (Eide as chairman)
(4) Draft Declaration on the Rights of Indigenous Peoples in 1993–(by the Working Group) submitted to the Commission on HR (political body) which set up its own working group which is still debated.
(5) ILO Convention 169 in 1989–addressed the criticisms of ILO # 107 by making the land issue the focus in part one and the labor issue subsidiary in part two.
(6) *Permanent Forum on Indigenous Peoples* in March 2002, directly under ECOSOC
(a) Composition–16 experts
(i) Eight nominated by governments and elected by ECOSOC
(ii) Eight independent individuals appointed by the President of ECOSOC after consultation with members and groups–these are intended to be indigenous people. However, if ECOSOC considers a group indigenous, but a state does not, ECOSOC will not give approval to that person because of its duty to consult with member states. Thus, in effect, any person nominated in this section must be from an indigenous group that is recognized by both ECOSOC and the states.

19. ***Information, Right to*** – see Freedom of Expression
20. ***Labor Rights*** (Right *to* Work, Rights *in* Work & Trade Unions) – see also Right to Social Security
A. IL References
(1) UDHR, Art. 23 (work)
(2) CESCR, Arts. 6 (right to), 7 (right in) & 8 (trade unions)
(3) ILO # 87 – Convention on the Right to Organize (1948)
B. Difference between "to" and "in"–right to work is the opportunity to work in chosen manner while rights in work and substantive requirements on conditions existing in the working environment.
C. Rights to work
(1) Opportunity to work–this means that the state cannot force a particular job on someone, but each person does not have the right to work in a particular job of choice. [CESCR, Art. 6 (1)]
(a) The state may attempt to entice voluntary acceptance of a job outside of those of choice through unemployment compensation benefit policies.

(2) Duty of state to facilitate work. [CESCR, Art. 6 (2)]
(a) Policies and techniques to achieve full employment.
(b) Globalization has been attributed as a policy that does not fulfill this requirement.
(c) China–freedom of movement enhances employment problems.

D. Rights in work [CESCR, Art. 7]
(1) Standards of employment–safe working environment
(2) Minimum wage [CESCR, Art. 7 (a)]
(a) Self employment is something that is being used to get around minimum wages, health benefits, etc.
(3) Promotion–must be based on seniority and competence. [CESCR, Art. 7 (c)]

E. Trade unions [CESCR, Art. 8; ILO # 87]
(1) Aliens–enjoy the right to form and join trade unions in their host state. [Decl. on HR of Indivs. who are not Nationals of the Country in which they Live, Art. 8 (1) (b)]

F. Non-discrimination [ILO # 169, CEDAW, CRC, Art. 32]

21. ***Liberty, Right to*** – ability to move about freely

A. IL References
(1) UDHR, Art. 3 & 4-11, esp. Art. 9 (develops right–expanding it)
(2) CCPR, Arts. 9-12 (limitable under Art. 4)
(3) ECHR, Art. 5 (limitable under Art. 15)
(4) ACHR, Art. 7 (liberty must be incorporated in state constitution)
(5) ACHPR, Art. 6
(6) CD, Art. 20 (substantive, not procedural)

B. Slavery and servitude prohibited [UDHR, Art. 4]
(1) Historical developments against slavery
(a) Treaty of Paris (1814)–agreement to abolish slavery
(b) Slavery Convention (1926)–abolition of slavery
(2) Degrees of required service
(a) Slavery–juridical concept where a person's legal personality is destroyed. [see UDHR, Art. 6 (right to legal personality)]
(b) Servitude–non-juridical where a person is technically free, but has chosen to submit to another's authority
(c) Government forced labor–compulsory work as punishment (in prisons) or in times of emergencies.
(3) Contemporary forms of forced labor:
(a) Child labor–not only prohibition, but the poor conditions of work
(b) Sexual traffic
(c) Debt bondage–forced to work off a debt in cases of illegal immigration
(d) Exploitation of women in household work

C. No arbitrariness–both procedurally within the law and substantively (having acceptable grounds) [CCPR, Art. 9 (1)]

D. During derogation–proportionality and necessity required [Lawless v. Ireland; Ireland v.UK]

E. Time constraints in denial of liberty
(1) Informed of reason for arrest–at time of arrest
(2) Informed of charges–promptly
(3) Brought before judiciary–promptly
(a) Judiciary means independent of police or prosecutor
(b) EctHR–4 days, but can be interpreted as longer in severe cases such as those involving terrorism or have a derogation. [ECHR, Art. 5 (3); see Art. 15]
(i) Seven days too long without a declaration of emergency. [Brogen v. UK]
(4) Brought to trial–within a reasonable time (much more generous than promptly)
(5) Challenge to unlawful detention (habeas corpus)–without delay
(a) No derogation allowed on habeas corpus in ACHR.

F. European Practice
(1) Record keeping procedural duty on states [Cyprus v. Turkey; Kurt v. Turkey]

(2) Right to judicial review of detention [Van Droogenbroeck v. Belgium]
(3) Right to conditional release (with exceptions) [Van Droogenbroeck v. Belgium]
(4) Asylum detention–states must have a machinery of good quality that prevents long-term detention.

22. ***Life, Right to*** (ability to survive and protection from inhuman living conditions) – **NON-DEROGABLE**
A. IL References
(1) UDHR, Art. 3
(2) CCPR, Arts. 6,7,8,9 & 12, Prot. 2
(3) HRC GC 6
(4) ECHR, Art 2, Prots. 6 & 13
(5) ACHR, Art. 4
(6) ACHPR, Art. 4
(7) CD, Arts. 2 & 3
(8) AL, Art. 5
(9) CIS, Art. 2 (2) & (3)
B. Nature of right to life–this is an inherent right of substance with positive duties, not simply a legal duty on the state not to interfere with this right. [CCPR, Art. 6 (1); HRC GC 6 (5); ECHR, Art. 2 (1)]
C. Sub-issues
(1) ***Death penalty***–not specifically prohibited in either UDHR or CCPR, but aim toward abolition in the CCPR Second Optional Protocol. All death penalty components of the CCPR must be restrictively interpreted. [HRC GC 6 (16)]
(a) UDHR Drafting–prohibition of death penalty amendment defeated by a vote of 21-9.
(b) Limitations to execution of the death penalty
(i) DP cannot be reintroduced where abolished [CCPR, Art. 6 (2) & (6), 2nd Optional Protocol]
(ii) Right to assistance from consulate when DP sought against a foreign citizen. [VC for Diplomatic Relations; LaGrand Case, 2001 ICJ 105]
(iii) No DP for those under 18 at time of crime. [CCPR, Art. 6 (5); USA has a reservation to this provision]
(iv) DP cannot be carried out on a pregnant woman. [CCPR, Art. 6 (5)]
(v) Appeal is an automatic stay. [CCPR, Art. 6 (4)]
(vi) Only for the "most serious crimes" meaning it should be applied only in the exceptional circumstance. [CCPR, Art. 6 (2); HRC GC 6 (6) & (7)]
(vii) No discrimination in connection with DP [CCPR, Art. 2]
(viii) Rights to fair trial must be upheld [HRC GC 6 (7); see CCPR, Arts. 14-16]
(ix) Should be right subsequent to sentencing to seek pardon or commutation. [HRC GC 6 (7)]
(x) No painful methods of execution. [CCPR, Art. 7 & ECHR, Art. 3]
(c) Abolitionist trend
(i) Abolition is strongly suggested and to be considered progress in enjoyment of right to life. [HRC GC 6 (6); see CCPR, Arts. 2 (2) & (6)]
(ii) CCPR, Protocol 2 prohibits the DP and requires positive measures to change the law of state parties to reflect that prohibition.
(d) Extradition and the DP–European states need not extradite to a jurisdiction where the penalty could be death. [European Convention on Extradition, Art. 11]
(e) European System–ECHR, 6th Protocol moves toward abolition, the 13th Protocol (2002) completely abolishes the death penalty without exception.
(i) DP allowed where provided by law [ECHR, Art. 2 (2)]
(ii) DP prohibited except during times of war or imminent threat of war [ECHR, Prot. 6 (1985)]
(iii) DP prohibited without exception [ECHR, Prot. 13, not entered into force]
(2) ***Euthanasia***–when is the moment of death and how is it achieved
(a) Historical background–originally this was a right against forced termination of life of non-'whole' people (Nazi extermination of handicapped), but has become a right to voluntary termination of one's own life–the right *to* die.
(b) Possibly there are additional required safeguards for doctors who are state employees because of the economic interest of the state to have few older people who require social security benefits and

medical treatment.

(3) ***Abortion***–when does life begin?
  (a) Historical background
    (i) UDHR Drafting–Chile suggested that right to life extend to the moment of conception, but this was rejected.
    (ii) GA discussion of CCPR, Art. 6 (1)–discussed this provision as protecting life "from the moment of conception. [GA 3rd Session (1950), GA 6th Session (1957)]
  (b) European System
    (i) Bruggman and Schentan v. FRG, 6959/75, 10 DR 100–decided under ECHR, Art. 8 (right to family life) that abortion is lawful due to privacy of the mother (considering also that national legislatures recognized the extent of this privacy by allowing abortions), but not every regulation on abortion is unlawful because the fetus becomes connected with the mother's private life (the fetus does not have rights itself, but are connected to those of the mother).
    (ii) Petrus v. UK, 8416/78, 19 DR 244–No absolute right of the fetus because this would infringe on the rights of the mother, noting that at signing of ECHR, all member states had right to abortion to some degree.
    (iii) Convention on HR and Biomedicine (1997)–Article 18 protects the human embryo so that none can be created for research purposes only.
  (c) ACHR 4 (1)–stronger words against abortion due to Catholic influence in Latin America, but no prohibition.
    (i) Baby-boy Case, Case 2141, Res. no. 23/81 of 6 March 1981–protection is merely "in general" and protects only from "arbitrary" abortions or other terminations of life. This means that abortion is prohibited only in very few, rare cases.
  (d) China–argues that rights of the next generation require the limitation of the number of births on the present generation (balancing conflicting rights).

(4) ***Use of Deadly Force by the State*** – see also use of force as a sub-issue under the right to security
  (a) State responsibility–states must strictly control and limit circumstances where a person is deprived of life by state authorities. [HRC GC 6 (3)]
  (b) European System–ECHR, Art. 15 (2)
    (i) McCann, Farrell & Savage v. UK–use of deadly force must be "absolutely necessary" and must have sufficient state level of control over police policies and methods.
    (ii) X v. UK, 7154/75–acts with an aim toward health that result in death are not violations of right to life nor deadly force.

(5) Propaganda & Incitement to Violence–a state has a positive duty not to cause and to prevent disturbances that result in loss of life. [HRC GC 6 (2), see CCPR Art. 20]

23. ***Minority Rights*** (rights of persons based on the principle of non-discrimination) – see also Indigenous Rights

A. IL references
  (1) CCPR, Art. 27
  (2) CESCR, Art. 15 (take part in cultural life)
  (3) HRC GC 23
  (4) CRC, Art. 30 (preserve cultural identity of minorities)
  (5) Minority Delcaration ("inspired by" CCPR, Art. 27 was originally "based on," but was amended so that the CCPR would not limit the scope of the Minority Declaration by its own scope–the Minority Declaration goes farther than the CCPR, being inspired by it)
  (6) Council of Europe Framework Convention for the Protection of National Minorities (1995)
  (7) Declaration on the Right to Development (beneficiaries include individuals, groups and peoples" according to the Working Group on the Right to Development)
  (8) UNESCO Convention on Elimination of Discrimination in Education, Art. 5 (c)

B. Definition of minority–there is no formal definition of minority because states want to define it so they will not have any because, historically, they have been a destabilizing factor.

C. Elements of Minority Rights
  (1) *Holder* of rights
    (a) A group is required to "exist" for minorities rights to apply [CCPR, Art. 27, MD, Art. 1]

(i) Existence of 'communities' is a question of fact, not of law. [PCIJ, ***Case?]
- Objective standard of existence (accepted legally)–ethnicity, religion and language existing on the state level, not an individual level (color alone is not a minority group)
- Subjective standard of existence–self-identification as a group

(ii) Recognition is irrelevant to existence of a group–whether or not a state recognizes the existence of a minority, they remain protected under IL.

(b) "Persons belonging to" a group are the holders of minorities rights (these are rights of individuals) [CCPR, Art. 27; MD, Art. 2]

(i) Collective right not group right–a collective right is one that is claimed by individuals as members of a collective which is a protected group. Group rights are those that can be claimed by the group only–not individuals. [CCPR, Art. 27 ("rights in community with others")]

(ii) Individuals must *claim* minority rights. They cannot be forced upon someone. [L23]

(2) *Duties* of states in upholding rights

(a) Negative duties–rights "shall not be denied" (tolerance) [CCPR, Art. 27]

(b) Positive duties–states must "protect" and "encourage conditions" and "adopt legislation" and "other measures" [MD, Art. 1]

(c) Recommended duties–cooperate with other states on minority issues. [MD, Art. 6 & 7]

(3) *Substance* of rights ("states shall")

(a) Cultural rights

(i) Enjoy own culture [MD, Art. 2 (1)]

(ii) Take part in culture [CESCR, Art. 15 (1) (a)]

(iii) Economic rights [Lubicon Lake Band v. Canada, 167 HRC 1984; Kitok v. Sweden, 197 HRC 1985 (regulation of an economic activity that is an essential cultural element of an ethnic group may fall under Article 27); Ilmari Lansman v. Finland, 511 HRC 1992 (economic activities are within Article 27 if an "essential element of the culture")]

(b) Religious rights

(i) Profess and practice own religion [MD, Art. 2 (1)]

(c) Linguistic rights

(i) Use own language [MD, Art. 2 (1)]

(ii) State must communicate in the language people understand. [L39]

(d) Non-discrimination [MD, Arts. 3 (1) & (2) & 4 (1)]

(e) "Favorable conditions"–in the expression and development of traditions and customs (except where in violation of other rights–see Limitations below). See also *Special Measures* under Non-discrimination section of this part of this outline. [MD, Art. 4 (2)]

(f) Right to participation

(i) Effective participation in public life [MD, Art. 2 (2); see UDHR, Art. 21 (1) & CCPR, Art. 25 (a) & (b) (take part in government and vote); UDHR, Art. 21 (2) & CCPR, Art. 25 (c) (equal access to public services)]

(ii) Effective participation in decisions about minority and region [MD, Art. 2 (3)]

(g) Freedom of association [MD, Art. 2 (4)]

(i) Contacts with other groups nationally and internationally [MD, Art. 2 (5)]

(4) *Recommended* additions to rights ("states should")

(a) Right to education

(i) Establish educational activities [UNESCO CEDE, Art. 5 (c)]

(ii) Education of minorities in their mother tongue [MD, Art. 4 (3); UNESCO CEDE, Art. 5 (c)]

(iii) Education of minorities about society as a whole [MD, Art. 4 (4)]

(iv) Education of society about minorities [MD, Art. 4 (4)]

(v) Educational dilemma between educating in own language or that which is generally used–when there is low literacy and resulting unemployment, should an indigenous person be taught in their indigenous language which will preserve cultural heritage or in the commonly-used language in the region that will enable the person to get a job? There is a conflict between the recommended measures of educating in mother tongue and measures to include minorities in economy progress.

- Instrumental use of language–useful in leading to a career or future.
- Premonial use of language–useful in maintaining cultural heritage.

(b) Appropriate measures to include minorities in economic progress and development of the state. [MD, Art. 4 (5)]

D. Limitations on minority rights
  (1) Where a minority practice is *both* in violation of national law *and* contrary to international standards. [MD, Art. 4 (2)]
  (2) There is no legal right to secession (the right to S-D is distinct)
  (3) There is no right to autonomy, either territorial or functional
  (4) Cannot be contradictory to other HR. They must be congruent with the entire HR system. [UDHR, Art. 30]
    (a) States must take measures to ensure that persons belonging to minorities may exercise rights and freedoms without any discrimination and in full equality. [MD, Art. 4 (1)]

E. Implementation and monitoring
  (1) *Working Group on Minorities* of the UN Sub-commission on HR
    (i) Minority groups and NGOs speak at meetings. Most funding is provided by the umbrella NGO Minority Rights International (www.minorityrights.org) which effectively acts as a filter for those groups who are able to speak.
    (b) Information gathering
    (c) Published manual on minority rights & seminars
    (d) Databases of good practices, procedures and mechanisms
    (e) HRC Complaint by individuals (not groups)
  (2) Complaints procedures (see Enforcement Mechanisms part of this outline)
    (a) HRC
    (b) CERD
    (c) UNESCO
    (d) ILO
    (e) 1503 where consistent pattern of violations
  (3) Reports
    (a) Special report requests from the HRC
    (b) CommESCR
    (c) CERD
    (d) CRC

F. Historical background–minority protection is a means of stabilizing politics.
  (1) Treaty of Westphalia (religious minority protection)–protected religious differences as a result of religious fighting.
  (2) Post-1800–emergence of national self-determination concept against the empire system.
  (3) Wilson's 14 Points–including right of national S-D
  (4) League of Nations (national minority protection)–the inter-war years focused on controlling nationalism by giving minority rights rather than independent statehood. However, this was not a general principle or right, but one that applied only to specified peoples named in treaties (trust territories). One reason for this was that many populations were significantly interspersed with other peoples.
  (5) Pre-WWII–the kin-state problem (one state becoming agitated against another because of the treatment of ethnics from the first who live in the second where they are a minority).
  (6) UDHR (ethnic and linguistic minority protection)–from 10 December 1948 there has been the recognition of minority rights for all minorities. Because of wariness of kin-state problem and destabilization of states, rights of collectives were not established, but rights of individuals (minority rights are those claimed by individuals who are part of a group).
  (7) Sub-Commission for the Elimination of Discrimination and Protection of Minorities–recognized the difference between the two problems:
    (a) Non-discrimination–an individual right
    (b) Protection–a group right to preserve and cultivate culture
  (8) Cancellation of Sub-Commission in 1950–in a political decision, ECOSOC believed it focused too

much on protection. The GA reinstated it, but it was much more conservative afterwards toward protection.

(9) CCPR, Article 27 of 1966–"persons belonging to minorities *should not* be denied the right...." This was a passive restriction.

(10) Sub-Commission Study–on the implications of Article 27 and how it could be used to implement minority rights. States were solicited for their views and a report made in 1979:
   (a) Distinguish minorities from indigenous issues
   (b) Draft a declaration on rights of minorities

(11) Minority Working Group in 1978–a draft proposal for a declaration was submitted by Yugoslavia, but there was little interest until the USSR broke up.

(12) OSCE Minority Document in 1990

(13) Minority Declaration in 1992–passed by the GA

(14) Lund Recommendation of OSCE–deals with the problem of effective participation because minorities will usually be outvoted by the majority.[see MD, Art. 2 (2) & (3)]

G. Genocide of Minority Groups–in the debate leading up to the Genocide Convention it was first considered to include cultural genocide. The instrument does include not only physical genocide, but also the taking away of children, even without killing them, because this terminates the culture. Forced assimilation invokes collective and group rights. [Genocide Convention, Art. 2 (e)]

H. Relationship of minority rights with indigenous rights–indigenous people can claim minority rights although such people who are in the majority can regulate through democracy.

I. ***Protection of minority rights–the right of non-discrimination and equality*** (see independent entry in this part)

24. ***Mobility, Right to***
   A. IL References
      (1) UDHR, Art. 13 (movement), 14 (asylum) & 15 (nationality)
      (2) ECHR, Prot. 4
25. ***Nationality, Right to*** – see Right to Citizenship
26. ***Non-discrimination, Right to & Principle of*** (see Minority Rights)–the means to a substantive right of equality (before the law, in the law, and in fact)
   A. IL references
      (1) UNC, Art. 1 (3) (general prohibition) & 55 (expansion of equal rights principle)
      (2) UDHR, Arts. 1 (equality in dignity & rights), 2 (general) & 7 (in/before law)
      (3) CCPR, Arts. 2 (1) (general in CCPR), 3 (equality), 4 (in limitations of rights), 20 (2) (prevent incitement to discrimination), 14 (equality before courts), 24 (children), 25 (equality in public life), 26 (general and in/before law in endless scope outside the CCPR) & 27 (minorities)
      (4) CESCR, Art. 2 (2) (general)
      (5) CRC, Art. 2 (2) (general)
      (6) HRC GC 18
      (7) ECHR, Art. 14
      (8) Euro Social Charter, Art. 7
      (9) COAS, Art. 3 (k)
   B. Nature of the Right of Non-Discrimination
      (1) ***Independent, Autonomous Right of Non-Discrimination***–when a government acts in relation to the government action. [CCPR, Art. 26, HRC GC 18 (2 & 12), ECHR, Prot. 12(1)]
      (2) ***Accessory Right of Non-Discrimination***–attaches to other rights within the mandate of those rights. [CCPR, Art. 2 (1), ECHR, Art. 14]
   C. Definition of discrimination–any distinction, exclusion, restriction or preference which is based on any ground such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, and has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms (distinction made on unreasonable grounds that deprives a right of another). [HRC GC 18 (6) & (7); CERD, Art. 1; CEDAW, Art. 1]
      (1) CCPR has no definition of discrimination or indication what constitutes it. [HRC GC 18 (6)]

(2) Compare CCPR, Art. 2 (1) which uses the word 'distinction' with CESCR, Art. 2 (2) which uses the word 'discrimination.' No substantive difference is implied, however.
(3) Not every differentiation is discrimination–a state action or law is not discrimination if it has an ***objective and reasonable ground with a legitimate aim***. [HRC GC 18 (13); Broeks v. the Netherlands, HRC 172/1984, 9 April 1987; Zwaan-de Vries v. the Netherlands, HRC 182/1984, 9 April 1987; see ILO # 111]
(a) Reasonableness relates to proportionality. [Belgian Linguistics Case (1968)]
(b) Burden of proof on state to pass this test.
(c) Distinctions on race or gender are virtually impossible to support (per se unreasonable). [L11]

D. Prohibition of discrimination [see IL references above]
(1) Non-discrimination is an autonomous right not limited only to those rights enumerated in the covenants. HRC GC 18 (12)
(2) Specific bases articulated–race, color, sex, language, religion, political or other opinion, national or social origin, property, birth, or other status. [UNC, Art. 1 (3) (limited list); UDHR, Art. 2; CCPR, Arts. 2 (1) & 26; ECHR, Art. 14]
(a) The list is exemplary, not exhaustive ("such as" and "or other status"). [Zwaan-de Vries v. The Netherlands, HRC 182/1984, 9 April 1987, Gueye, et. al. v. France, HRC 196/1985 (nationality)]

E. Duties of the state:
(1) When there is state action, not discriminate itself. [Zwaan-de Vries v. The Netherlands, HRC 182/1984, 9 April 1987; Braeks v. the Netherlands, HRC 172/1984]]
(2) Combat discrimination–positive obligations [MD, Art. 2 (1) ("right to enjoy"); HRC GC 18 (5) & (10); EK&R, p. 378; Special Rapporteur Study on the Rights of Persons Belonging to Ethnic, Religious and Linguistic Minorities, UN Doc. E/CN.4/Sub.2/384/Rev.1, para. 588]

F. ***Special Measures***–where discrimination still exists in fact, special measures deals with it by compensating the effects of discrimination in order to achieve equality in fact
(1) Goal of special measures–achieve equality in fact by eradicating discriminatory circumstances. [see CERD, Art. 2 (2)]
(a) UDHR, Article 1 equality in 'dignity' is used as a basis for the creation of special measures.
(2) Requirement on states–positive duties to act (there are no international special measures)
(a) States shall take "special and concrete measures" for the development and protection of racial groups and individuals belonging to them. [CERD, Art. 2 (2); ILO # 169, Art. 4; MD, Art. 4]
(b) States shall modify social and cultural patters that are discriminatory. [CEDAW, Art. 5 (a)] However, the preparatory notes to CEDAW say this applied only to education.
(i) Modify social and cultural patters could clash with preservation of minority culture, such as those in Guatemala that are not congruent with HR law. [L11]
(3) Focus of special measures: [CEDAW, Art. 2 (3)]
(a) Individuals
(b) Organizations
(c) Enterprises
(4) Special measures are not discrimination if: [CERD, Art. 1 (4); HRC GC 18 (13) (legitimate purpose with reasonable and objective criteria)]
(a) the measure leads to equal enjoyment of rights
(b) the measure is not continued after equal enjoyment is achieved
(c) the measure does not consequently lead to separate rights for different groups
(d) Political problems–special measures can be used to fuel hatred between ethnic groups by creating a perception of favoritism. These are political problems that cannot be addressed by the law itself (see international organizations section for complaint procedures).
(5) Ending special measures–should not be maintained after their objectives have been achieved. [HRC GC 18 (10); CERD, Art. 2 (2)]
(6) Two types of special measures which are more generally defined as positive measures [definitions used by ML]
(a) *Special measures*–means of bringing equality to minorities. The minority culture is preserved while enabling members of it the ability to interact with the remainder of society without

discrimination. Goal of *compensating* for inequality with a realization that it will never go away.
(i) In principle, these are not temporary, although they need to be regularly re-examined to adjust to the living phenomenon of culture.
(ii) Critics say this creates a privileged group that itself is violative of non-discrimination.
(b) *Affirmative action*–means of bringing minorities to equality. Integration of minorities into the rest of society as a whole. Such minorities generally have no cultural distinction from the rest of society. Goal of *making the inequality go away*.
(7) HRC to be informed of special measures [HRC GC 18 (4)]

G. Regional practice
(1) European System
(a) Accessory right only–ECHR, Art. 14 is equivalent to CCPR, Art. 2 (1) in that it prohibits discrimination only in regard to the rights in the instrument. The ECHR has no self-standing right of non-discrimination like that of CCPR, Article 26. Therefore, in the ECHR there must be a violation of another right before there can be a violation of Article 14.
(i) ECHR, Prot. 12 will create an independent, autonomous right to non-discrimination once it enters into force.
(ii) Gaygusuz v. Austria 1996 ECtHR 14–distinction based on nationality required first the showing of a violation of another right; in this case, property right of Protocol 1.

27. ***Order, Right to Economic & Social***
A. IL References
(1) UDHR, Art. 28
(a) UDHR, Art. 3–a draft proposal was defeated by a vote of 21-20 that would have added to the right to life, liberty and property, the right "to economic, social and other conditions necessary to the full development of the human personality."

28. ***Physical Integrity, Right to*** – life, liberty and security (see these specific rights in this part)

29. ***Privacy & Family Life, Right to*** – See also the issue of abortion as a sub-issue under the Right to Life
A. IL References
(1) UDHR, Art. 12 & 16
(2) CCPR, Art. 17 & 23; HRC GC 16
(3) CESCR, Art. 10
(4) ECHR, Art. 8 (privacy & family life) & 12 (marry)
(5) ACHR, Art. 11 (privacy) & 17 (family life)
(6) ACHPR, Art. 18 & 29 (duties to family)

B. Limitations on privacy rights–privacy can be limited especially for reasons of public morals. [Dudgean Case]

C. Privacy Issues
(1) Phone-tapping–lawful, but in conformity with the law–not arbitrary
(2) Private correspondence (esp. prisons)–there must be a legitimate reason for intrusion

D. Family Life Issues
(1) Definition of family
(a) EctHR–don't have to live together, close relatives included and need not be married
(2) Positive obligations of the state–legislate in the area of adoption, succession, social benefits and removal of children from parents.
(3) Marriage
(a) Inter-race marriages–no state prohibits this by law
(b) Inter-religion marriages–Islamic states (some) forbid this. Israel will not sanction it in church, but tolerates it civilly.
(c) Homosexuals–not original to documents, but gaining support
(d) Age of majority–GA Resolution has set 15 years as the minimum age.
(i) Many states have a lower age for women than for men. Is this discriminatory?
(e) Consent–by individual to be married (no forced marriages)
(i) Parental consent–question whether parents should have right to consent for minor children.
(ii) Capacity to consent (mental or physical grounds)–no physical force or threat and not mentally ill or temporarily incompetent.

- Restrictions on mentally ill must be restricted to necessity and proportionality.

(f) Close family bonds–for medical reasons, states can make a distinction prohibiting relatives from marrying (siblings & cousins).

(g) Polygamy & Bigamy–no HR violation, but may be discriminatory against women (usually only men can have many wives).

(4) Divorce

(a) Contact after divorce (child to parent and parent to child)–there is a right to contact, but it is not absolute. The CRC requirement of the best interest of the child prevails.

(5) Definition of family

(a) EctHR–don't have to live together, close relatives included and need not be married

(6) Adoption of children

(a) EctHR–only traditional family units (men & women) may adopt according to the original reasoning of the treaty, but the law is developing.

(7) Environmental quality–in the Hattam Case [cite***], airport noise was considered an issue effecting family life.

30. ***Property, Right to***

A. IL References

(1) UDHR, Art.17

(2) See CESCR, Art. 15 (b) (benefit from creations) vs. 15 (c) (material interests in one's creations)

(3) Not in CESCR–could not reach agreement

(4) ECHR, Prot. 1, Art. 1 (enjoyment of possessions)

B. Historical background

(1) John Locke (1632-1701) was very interested in land because he was challenging the feudal system of the 17th century.

C. No "arbitrary deprivation"–there must be due process and compensation for the taking of property. [UDHR, Art. 17 (2); ECHR, Prot. 1, Art. 1]

31. ***Refugees, Rights of*** – see also Rights of Aliens; UNHCR section of a previous part of this outline

A. IL References

(1) UDHR, Art. 14 ("enjoy")

(2) CCPR, Art. 13

(3) Refugee Convention (1951)

(4) Declaration on Territorial Asylum (1967)

(5) CAT, Art. 3 (no refoulement)

(6) GC, Art. 3

(7) ACHR, Arts. 22 (7) ("be granted") (& 7)

(8) ACHPR, Arts. 12 (3) ("be granted") (& 3)

(9) African Refugee Convention

(10) ECHR, Art. 3 (no refoulement due to torture)

(11) Declaration of 13 December 2001 (ministerial meeting)

B. Definition of refugee–a person who is outside his own country due to persecution and is unable or unwilling out of fear to return. [RC, Art. 12]

(1) Articulated list of reasons for persecutions–race, religion, nationality, membership of a particular social group or political opinion. [RC] This list fails to include sex, color, property, birth or other status.

(2) "Outside country of nationality"–this excludes IDPs (are IDPs victims of persecution or simply fleeing bad situations?)

(3) Non-politically persecuted–not considered refugees, especially if fleeing criminal prosecution (see guidelines to terrorist vs. freedom fighter in the following part of this outline). [UDHR, Art. 14]

(4) War refugees–not included, although there have been efforts to expand the definition in the Refugee Convention which have been defeated due to fear of an enormous flood of refugees.

C. Rights as refugees

(1) No right to *obtain* asylum

(2) Right to *apply* for asylum (to put forward a request)

(3) Enter another state to apply for protection. [A&E, p. 280]

(4) "Enjoy" asylum–once asylum is granted, the provision for enjoyment of it provides more guarantees than the initial granting:
  (a) Work
  (b) Social security
  (c) Housing
  (d) Movement within state of asylum [ECHR, Prot. 4, Art. 2]
(5) "***Non-refoulement***"–prohibition on the expulsion or return of a refugee [RC, Art. 33; Declaration on Territorial Asylum, Art. 2; CAT, Art. 3; ECHR, Prot. 4 (no collective expulsion)]
  (a) Part of customary international law [A&E, p. 285]

D. Reason for refugees–human rights violations are the general cause for the flight of most from their own homes. [H&S, p. 163]

E. Purposes of asylum
(1) Encourage domestic human rights activists by giving them an escape clause in case their activities endanger them (can be equated to bankruptcy).
(2) Provide a substantive means of implementing "freedoms from" that were denied/violated in the home state. [H&S, p. 163]

F. Effect of granting asylum on international relations–granting of asylum is a "peaceful and humanitarian act" that should not be regarded as unfriendly by another state. [Declaration on Territorial Asylum]

G. Schemes aimed at avoiding asylum cases (policy of non-admission)–real politikk plays a major role in refugee policy because of political deals and preferences to various states over others. Burden-sharing hardly exists today.
(1) Security zones within the persecuting state
(2) International zones at most airports (especially Moscow–notorious because it has even declared part of hotel international where people are left for years in limbo)
(3) Processing asylum application at military bases abroad
(4) Requiring a valid passport and visa and lawful entry from the refugee
(5) Carrier sanctions–requiring transport carriers to check documents and fining them for failure.
(6) Safe third country–the traveling route of a refugee is examined to see if they passed through any safe state prior to arrival at the state of asylum application. If they have, they will be returned to that country irregardless of any other factors. [Dublin Convention (1990) in EU]

H. HR Refugees vs. Humanitarian Refugees–the former are those discussed here with rights under the RC. The latter is based on other IL principles that are not as strong as HR (GC and humanitarian law).

I. Regional practice
(1) ***European System*** –no right to asylum, only the issue of refoulement in the context of torture
  (a) Court–ECHR, Article 3 prohibiting torture has been interpreted as prohibiting expulsion to a country where the individual will be subjected to torture or inhuman or degrading treatment or punishment. [Chahal v. UK, 70/1995, 15 Nov. 1996; Ahmed v. Austria, 71/1995, 17 Dec. 1996; H.L.R. v. France, 11/1996, 29 April 1997]
  (b) Euro Committee for the Prevention of Torture and Inhuman or Degrading Treatment–addresses the treatment of asylum seekders
  (c) Dublin Convention (1990)–safe third country principle and full faith and credit to all other EU state decisions on asylum.

J. Historical background [A&E, pp. 279-281]
(1) High Commissioner for Russian Refugees Fridthjof Nansen appointed by League of Nations in 1921 and mandate extended to other categories of refugees.
(2) High Commissioner appointed for refugees from Nazi Germany in 1933
(3) UN Relief and Rehabilitation Administration established during WWII and, in 1946, the International Refugee Organization.
(4) UDHR, Article 14 in 1948, which was influenced by the non-admission policies of many states in relation to German Jews in the 1930s that resulted in the death of thousands.
  (a) The original wording was the right "to seek and *be granted* asylum," but this was abandoned because dictating the right to be granted asylum would require a state to do something in contradiction of its sovereignty. [A&E, p. 282-83]

(5) UN High Commissioner for Refugees in 1950
(6) Refugee Convention in 1951
(7) New York Protocol of 1967 removed time limitations of pre-1951 from Refugee Convention
(8) UN Human Rights Conference in Vienna in 1993 reaffirmed right to seek asylum and the concept of international responsibility.

32. ***Religion, Freedom of*** – see Freedom of Belief
33. ***Remedy in Court, Right to***
    A. IL References
        (1) UDHR, Art. 8
34. ***Security, Right to***
    A. IL References
        (1) UDHR, Art. 3
    B. Historical background
        (1) UDHR drafting–amendments to include physical and moral integrity to the protection of security were defeated. E. Roosevelt explained that security included integrity. Article 3 adopted 36-0-12.
    C. Issues in right to security
        (1) State use of force (police) – see also state use of deadly force as a sub-issue under right to life
            (a) ECHR–the court requires proportionality and necessity
        (2) Protection of personal information (esp. EU, CofE & OECD) [CCPR, Art. 17; HRC GC 16 (10)]
35. ***Self-determination, Right to*** – **NON-DEROGABLE** [EK&R, p. 115]
    A. IL References
        (1) UNC, Art. 1 (2)
        (2) UDHR, Art. 21 (take part in govt.)
        (3) CCPR, Art. 1 & 25 (political rights)
        (4) CESCR, Art. 1
        (5) HRC GC 12
        (6) ACHPR, Art. 20 (1) ("unquestionable and inalienable right")
        (7) ILO # 169 concerning Indigenous and Tribal Peoples, Preamble, para. 5 & Art. 1 (3) (recognition of aspirations of peoples to exercise control over their lives, but giving no meaning to 'peoples')
        (8) OSCE Helsinki Final Act (1975), Chapter 1, Principle 8
        (9) Colonial Declaration (1960)
        (10) Friendly Relations Declaration (1970)
        (11) Vienna Declaration and Program of Action, Part I, para. 2 (S-D linked to territory not people so long as the "a Government [is] representing the whole people belonging to the territory without distinction of any kind")
        (12) Draft Declaration on Indigenous People (1993), Arts. 3 & 4 (indigenous right to S-D, but not necessarily right to separate state)
    B. Two types of S-D
        (1) Internal S-D–rights of people against its own government (right to democracy). The relationship between individual people of a state and their government (this right emerged in the 1950s and 1960s).
        (2) External S-D–rights of people against a foreign government. The collective right of people to be free from foreign occupation (the group is the population within the state borders).
            (a) Usually, these issues arise in the context of state borders
            (b) This is where there is conflict between S-D and the principle of non-intervention (territorial integrity)–criticism is not a violation, but what about sanctions against or isolation of a state? What about humanitarian assistance?
    C. "Peoples"– S-D is a collective right of the people rather than an individual right. [Western Sahara Advisory Opinion, ICJ Reports 1975, p. 31; Kitok v. Sweden, 1987 HRC 88; Lubicon Lake Band v. Canada, 1989 HRC 90]
        (1) Subjective criteria (generally accepted by states)
            (a) Colonized peoples [Colonial Declaration, Arts. 1 (peoples under "alien subjugation") & 5]
            (b) Peoples subject to a racist regime (e.g. apartheid South Africa) [Colonial Declaration, Art. 1 (peoples under "domination and exploitation")]

(c) Peoples under foreign occupation

(2) Objective criteria (some argue for this method, although it is generally rejected by states–see E.H. Carr's book)
   (a) linguistics
   (b) culture
   (c) history

(3) Examples of those not considered 'peoples' under the subjective criteria, but arguably so under the objective: Kurds, Kashmir, and Sami.

D. Substance of the right to S-D: [Rosas, "Internal S-D;" handout on 24 Oct 2001]
   (1) Determine status freely without outside interference
   (2) To free oneself from occupation or domination (the illegal taking of territory usually by force)
   (3) The right of resistance against tyranny and oppression. [N, pp 23-25]
   (4) Secession from one state to establish a new state or join a third state (usually requires "grave and systematic violations")
   (5) Determine own constitution, including autonomous status within another state
   (6) Democratic system of government [EK&R, p. 114]
   (7) Notion of participation (related to right to development) [EK&R, p. 114]

E. Rights effected by S-D
   (1) Political status
   (2) Economic, social & cultural development–non-interference and freedom
   (3) Control over natural wealth and resources [CCPR, Art. 1 (2); GA Res. 1803 (1962)]
      (a) Issues of foreign investment are open for discussion. [consider ECHR, Prot. 1, Art. 1 (no one deprived of property except as provided by law and by principles of IL, which is interpreted as protection of foreign property only–probably including compensation]
      (b) Nationalization of property should not be arbitrary or without compensation. [EK&R, p. 117]
   (4) Not to be deprived of means of subsistence [CCPR, Art. 1 (2)]

F. State obligations with S-D
   (1) Promote the realization of the right to S-D
   (2) Respect the right to S-D in accordance with the Charter (non-intervention and territorial integrity)

G. Limitations on S-D:
   (1) Disruption of national unity or territorial integrity of a country, which is incompatible with the UN Charter. [Colonial Declaration, Para. 6; Vienna Decl. & Prog. of Action (1993), Part I, para. 2]

H. Historical development of S-D
   (1) League of Nations parallel methods of dealing with S-D
      (a) Containment–maintain the existing state system, but grant *minority rights*.
      (b) Granting independence (mandate system)–the colonized areas were made into mandates in which a slow process toward independence would be achieved.
         (i) Southwest Africa (Namibia)–South African mandate
         (ii) Palestine–British mandate
   (2) The UN Charter–recognized the *principle* of S-D of peoples [UNC, Art. 1 (2)]
      (a) Trusteeship System was established [UNC, Arts. 73-91]
   (3) Colonial Declaration (1960) of UN GA Res. 1514–recognized the *right* of S-D
   (4) Declaration on the Right to S-D (1962)–extended the right of S-D to economics which was required for any meaningful political S-D.
      (a) Balancing of private enterprise with economic S-D–the Declaration gave the right to resources, but compensation had to be paid for confiscated property.
   (5) The Covenants (1966)–reiteration of the *right* of S-D, not just the *principle*
   (6) Friendly Relations Declaration (1970) of UN GA Res. 2625 (1970)–exercising the right of S-D enabled a people to:
      (a) Establish a new state
      (b) Associate with another state
      (c) Some other alternative solution
   (7) Charter on Economic Rights and Duties of States–the establishment of a "new international economic

order." This was supported by the third world and the radical first world, but very much opposed by the industrialized states).

I. Regional developments of S-D
   (1) The Helsinki Process–the Conference on Security and Cooperation in Europe (later the OSCE). This organization includes all of Europe plus Canada and the United States. It was instrumental in East European claims to S-D.
   (2) The African Charter on Human and Peoples Rights–not only was S-D included, but also the right to give and receive assistance in liberation struggles.
      (a) This additional right weakened the international principle of non-intervention.
      (b) The ANC in South Africa received support from other governments under this charter provision.
   (3) Canadian Supreme Court–S-D is so widely recognized it has acquired the status of "general principle of IL." [Reference re Secession in Quebec, 2 S.C.R. 217 (1998)]

36. ***Social Security, Right to*** – see also Labor Rights
   A. IL References
      (1) UDHR, Art. 22 & 25
      (2) CESCR, Art. 9
      (3) CRC, Art. 26
37. ***Standard of Living, Right to an Adequate*** – see also Right to Food, Right to Housing & Right to Health
   A. IL References
      (1) UDHR, Art. 25 (1)
      (2) CESCR, Art. 11
      (3) CESCR/COM, GC 15
      (4) CRC, Art. 24 & 27
      (5) ESC, Art. 4 (1) (fair remuneration providing a descent "standard of living")
   B. Definition of adequate standard of living–living above the poverty line of the society concerned [World Development Report 1990, p. 26]
      (1) The cost to buy a minimum standard of nutrition and other basic necessities.
      (2) The cost of participating in the everyday life of society, varying from country to country.
   C. Obligations of states – respect, protect & fulfill
      (1) Positive measures–take steps toward progressive realization of right. [CESCR, Art. 2; PSS, Art. 2]
      (2) Achieve most efficient development and utilization of natural resources. [CESCR, Art. 11 (2) (a)]
      (3) Assist parents in implementation of rights, including provision of material assistance and support programs. [CRC, Art. 27 (3) (but parents have primary duty in this regard under 27 (2)]
      (4) Duty to assess the current situation without delay and regular assessment thereafter.
      (5) Entitlements–respect freedom of individuals and groups to make use of their entitlements, protect entitlements against third parties; obligation to provide conditions for effective entitlements; and obligation to be the provider.
      (6)
38. ***Thought, Freedom of*** – see Freedom of Belief
39. ***Torture, Freedom from*** – see also Freedom from Genocide
   A. IL References
      (1) UDHR, Art. 5
      (2) CCPR, Art. 7
      (3) CRC, Art. 37
      (4) Genocide Convention, Art. 2
      (5) GCs, Common Article 3
      (6) CAT
      (7) ECHR, Art. 3
      (8) European Convention for the Prevention of Torture (1987)
      (9) ACHR, Art. 5
      (10) ACHPR, Art. 5
      (11) CD, Art. 20 (near the end of the document in comparison to other instruments where near start)
   B. Definition of torture–intentional "cruel, inhuman or degrading treatment or punishment," although what falls

within this definition has a wide range of opinion. [CAT]
(1) "Degrading"–mental [Tyrer v. UK]
(2) "Inhuman"–physical [Tyrer v. UK]

C. Torture on a great scale = ***Crimes Against Humanity*** (as well as rape and sexual assault in a certain pattern, extra-judicial killings and enforced disappearances) [Genocide Conv., Art. 2]
D. Positive duties of states–not only refrain from torture but positive measures to prevent it. [CAT, Art. 2 & 10]
E. Torture of children–particularly prohibited because the CRC has near-universal acceptance [CRC, Art. 37]
F. Remedies to Violations
(1) 1503 Procedure–where violations are gross and massive – see UN Organs sub-section under international organizations
(2) CAT Committee (expert)--optional ability of state parties to CAT to accept inter-state and individual complaint [CAT, Art. 21]
G. European System
(1) Euro Torture Convention–state will open prisons to committee inspection which can create a confidential report. If there is state refusal to cooperate, the report will be made public. [L21]
(2) Ireland v. UK–In determining whether the techniques used were torture or some other, not-so-serious form of degrading treatment both objective criteria and subjective opinion should be analyzed.
(3) Tyrer v. UK–the determination of torture is the totality of the circumstances, including institutionalized factor, purpose of procedure (deterrent?), public opinion (judicial integrity is a balance of public opinion and judicial principles), psychological affect (emphasized). The case concerned a 15-year-old boy who was caned three times for assaulting other students at a primary school. He was caned at a police station with his father and a doctor present. 2 EHRR 1 (1978).
(4) Tomasi v. France–burden of proving torture is one of rebuttable presumption on state after demonstrating a prima facie case.
(5) Case of D. v. UK, 1997 EctHR 37–deportation of seriously ill can be inhumane treatement.
H. Reasons for torture
(1) Obtain information or secure a confession
(2) Destroy personality to influence future behavior (often religiously motivated)
(3) Instill fear and obedience in the population to maintain power
(4) Revenge

40. ***Tribal Rights*** – see also Indigenous Rights
A. Definition of "tribal peoples"
(1) Within an independent state whose social, cultural and economic conditions distinguish them from other sections of the national community. [ILO # 169, art. 1 (1) (a)]
(2) Status is regulated wholly or partially by own customs or traditions or by special laws or regulations. [ILO # 169, Art. 1 (1) (a)]
(3) Self-identification of group as tribal people. [ILO # 169, Art. 1 (2)]
B. All substantive rights, duties and limitations are identical to those discussed in the Indigenous Rights section of this outline.

41. ***Warfare, Laws of*** (jus in bello) – See Freedom from Genocide, Right to Life, Freedom from Torture
A. IL Referances
(1) ACHPR, Art. 3 (no killing non-belligerents, wounded and sick, POWs, bodies)
B. Humanitarian law is usually considered part of the laws of warfare.

42. ***Women's Rights*** – see Right of Non-discrimination and Minority Rights
A. IL References
(1) UNC, Art. 1 (2) (equal rights)
(2) CCPR, Art. 3 & 26 (equality)
(3) CESCR, Art. 3 (equality)
(4) CEDAW
B. Related rights–violence against women involves right to life, security, equality in law, equality in fact
C. This is a systematic problem made more complex because many states discriminate against women on the basis of religion principles.

PART XIV
ISSUES IN HUMAN RIGHTS OF PARTICULAR IMPORTANCE

1. ***Conflicts*** of rights
   A. Two different kinds of conflicts:
      (1) Conflict between two rights–this requires the prioritization of rights
         (a) There is no hierarchy of rights
            (i) But what about non-derogable rights [see CCPR, Art. 4]
            (ii) But what about Jus Cogens [see VC, Art. 53 & 64]
         (b) A large portion of Euro Court of HR practice is the priority of rights
      (2) Conflict between rights and public interests
         (a) General rule–rights take precedence over public interests, but not always. Limitations of HR are allowed; this is the fulfillment of individual duties.
2. ***Limitations*** on rights
   A. Two different types of limitations
      (1) ***General limitations***
         (a) Those determined by domestic law, but must only to recognize rights and freedoms of others (conflicts between rights). [UDHR, Art. 29 (2)]
            (i) Limitation on freedom to manifest religion or beliefs when necessary for public safety, order, health, morals, or fundamental rights and freedoms of others. [CCPR, Art. 18 (3)]
         (b) When dictated by the "just requirements of morality, public order and the general welfare in a democratic society" (conflicts between rights and public interests) [UDHR, Art. 29 (2)]
         (c) When against the principles of the UN [UDHR, Art. 29 (3)]
      (2) ***Temporary limitations (derogations)***–limitations in times of public emergency
         (a) Procedural requirements for derogations: [CCPR, Art. 4 (1)]
            (i) The life of the nation must be threatened
            (ii) Official proclamation of the public emergency
            (iii) Derogation strictly necessary
            (iv) There is no subservient violation of IL
            (v) Non-discrimination continues to be upheld
            (vi) Inform the Secretary-General of the UN of the provisions to be derogated from and the reasons (a further communication terminates the derogation). [CCPR, Art. 4 (3)]
         (b) Certain rights are non-derogable [CCPR, Art. 4 (2)]
   B. Restraint on limitations: [Nowak, Art. 27]
      (1) Cannot be discriminatory
      (2) Cannot discourage democracy
      (3) The core of the right must still exist
   C. Evaluating the legality of a limitation – ***discretion (the margin of appreciation)*** – see also European Convention on Human Rights under international organizations part of this outline
      (1) This is especially relevant to issues that involve values and morals
      (2) While not explicit in the CCPR, practice involves discretion
      (3) The margin of appreciation doctrine is normally not associated with derogations, but it is essentially the same discretionary review.
      (4) European Practice–states have a margin of appreciation in determining the relevant facts and the need for a derogation, there is an accompanying "European supervision" to determine whether the derogation was "strictly required by the exigencies." [Lawless Case, Series A: Judgements and Decisions 1960-61 at 24 (1961)]
3. Definition of terrorist –while there is no specific definition of terrorist there are a number of factors which, considering the totality of the circumstances, provides guidance in the differentiation between a terrorist and a freedom fighter:
   A. Attacking civilian targets
   B. Violence even though there are democratic means of change (political solutions)
   C. International legal basis of claims

(1) Whether the group can be considered "peoples" entitled to S-D.
(2) Minorities must have a "tolerance threshold" where violence can be acceptable under IL if the state goes beyond it.

4. Sanctions
   A. IL References
      (1) UNC
      (2) CommESCR GC 8
      (3) Friendly Relations Declaration
   B. Purpose of sanctions
      (1) Ensure compliance with IL
      (2) Punishment for violations of IL
      (3) Symbolism–demonstration that there is a price to pay for non-compliance with IL
   C. Side-effects of sanctions–non-fulfillment of HR [Annual Report of the Secretary-General (1998), note 13, para 64]
      (1) "Collateral damage" experienced by the most vulnerable groups in the targeted state. [H&S, p. 161]
      (2) "Lawlessness of one kind [should not be] met by lawlessness of another kind." [CommESCR GC 8 (16)]
   D. The subjects of sanctions–usually states, but sometimes "smart sanctions" are aimed toward individuals or entities, although this is still in connection with state action.
   E. Those responsible for sanctions
      (1) UN Security Council–on the global level [UNC, Art. 24 (1) & 41 (peace & stability) & 39 (HR)]
         (a) UN Sanctions Committee–sub-organ of the Security Council
      (2) General Assembly (South Africa sanctions)
      (3) Regional bodies (EU, OAS, OAU) [UNC, Art. 52 (1)]
      (4) Unilateral sanctions–in the exercise of its own sovereignty, no state has an obligation to trade with another state.
   F. Problems with sanctions
      (1) Legality
      (2) Legitimacy–whether Security Council resolutions are an expression of international will or is it power politics dominated by the permanent members (self-interest rather than international interests)
      (3) Efficiency–whether sanctions actually achieve their goal
         (a) Whether compliance with IL is attained
         (b) Whether symbolic statement is made and heeded.
      (4) Norms conflicts (between UNC, Security Council, IL & domestic law)
         (a) The targeting of non-state actors results in, among other things, loss of property without a remedy and denial os association by banning organizations.

5. Indicators of HR fulfillment
   A. Purpose of indicators is to capture two key factors [EK&R, p. 532]
      (1) Willingness (commitment to protect and promote HR)
         (a) Explicit commitments to HR instruments
         (b) Explicit departures from universal standards
      (2) Capacity to protect and promote HR
         (a) National capacity
         (b) International capacity

PART XV
PHILOSOPHY OF HUMAN RIGHTS: A GENERAL INTRO

1. History
   A. **Positive Law**–Human rights is a concept that has been constantly evolving throughout human history. They have been intricately tied to the laws, customs and religions throughout the ages. One of the first examples of a codification of laws that contain references to individual rights is the *Tablet of Hammurabi*. The tablet was created by the Sumerian king Hammurabi about 4000 years ago. While considered barbaric by today's standards, the system of 282 laws created a precedent for a legal system . This kind of precedent and legally binding document protects the people from arbitrary persecution and punishment. The problems with Hammurabi's code were mostly due to its cause and effect nature, it held no protection on more abstract ideas such as race, religion, beliefs, and individual freedoms.
   B. **Natural Law & Natural Rights**–It was in ancient *Greece* where the concept of human rights began to take a greater meaning than the prevention of arbitrary persecution. Human rights became synonymous with natural rights, rights that spring from natural law . According to the Greek tradition of *Socrates and Plato*, natural law is law that reflects the natural order of the universe, essentially the will of the gods who control nature. A classic example of this occurs in Greek literature, when Creon reproaches Antigone for defying his command to not bury her dead brother, and she replies that she acted under the laws of the gods. This idea of natural rights continued in ancient *Rome*, where the Roman jurist *Ulpian* believed that natural rights belonged to every person, whether they were a Roman citizen or not.
   C. **Individualism**–Despite this principle, there are fundamental differences between human rights today and natural rights of the past. For example, it was seen as perfectly natural to keep slaves, and such a practice goes counter to the ideas of freedom and equality that we associate with human rights today. In the middle ages and later the renaissance, the *decline in power of the church* led society to place more of an emphasis on the individual, which in turn caused the shift away from feudal and monarchist societies, letting individual expression flourish.
   D. **Positive Law for Utilitarian Needs**–The next fundamental philosophy of human rights arose from the idea of positive law. *Thomas Hobbes*, (1588-1679) saw natural law as being very vague and hollow and too open to vast differences of interpretation . Therefore under positive law, instead of human rights being absolute, they can be given, taken away, and modified by a society to suit its needs. *Jeremy Bentham*, another legal positivist sums up the essence of the positivist view:
      > “Right is a child of law; from real laws come real rights, but from imaginary law, from "laws of nature," come imaginary rights…….Natural rights is simple nonsense.” [J.Bentham, Anarchichical Follies, quoted in N.Kinsella, “Tomorrow's Rights in the Mirror of History” in G. Gall (ed.), *Civil Liberties in Canada* (Toronto:Butterworths, 1982), p.17.

      (1) This transfer of abstract ideas regarding human rights and their relation to the will of nature into concrete laws is exemplified best by various legal documents that specifically described these rights in detail:
         (a) British Magna Carta 1215
         (b) French Declaration of the Rights of Man 1789
         (c) American Bill of Rights 1789
         (d) The Geneva Convention 1864
2. The Great Debate: **Universalism vs. Cultural Relativism** (individual vs. community)
   A. One of the most pertinent issues of the past twenty years has been the conflict between two different ideologies of human rights on a national scale, universalism, and cultural relativism. Universalism holds that more ““primitive”” cultures will eventually evolve to have the same system of law and rights as Western cultures. Cultural relativists hold an opposite, but similarly rigid viewpoint, that a traditional culture is unchangeable.
   B. In universalism, an individual is a social unit, possessing inalienable rights, and driven by the pursuit of self interest. In the cultural relativist model, a community is the basic social unit. Concepts such as individualism, freedom of choice, and equality are absent. It is recognized that the community always comes first. This doctrine has been exploited by many states, which decry any impositions of western rights as cultural imperialism. These states ignore that they have adopted the western nation state, and the goal of

modernization and economic prosperity. Cultural relativism is in itself a very arbitrary idea, cultures are rarely unified in their viewpoints on different issues, it is always those ""who hold the microphone [that] do not agree""(http://www.aasianst.org/Viewpoints/Nathan.htm). Whenever one group denies rights to another group within a culture, it is usually for their own benefit. Therefore human rights cannot be truly universal unless they are not bound to cultural decisions that are often not made unanimously, and thus cannot represent every individual that these rights apply to.

C. Even though cultural relativism has great problems and a potential for abuse, universalism in its current state is not the ideal solution. Universalism is used by many Western states to negate the validity of more ''traditional'' systems of law. For example, if a tribe in Africa is ruled by a chieftain and advised by the twelve most senior villagers, is this system any less representative than the supposedly more liberal societies of the West?. It is not possible to impose a universal system of human rights if the effects of social change stemming from modernization are not understood or worse yet, ignored. In non-Western societies, industrialization, capitalism, and democracy might not have been the eventual outcome of the process of cultural evolution. These ideologies have been shaped and created by Western imperialism, the slave trade, colonialism, modernization, and consumerism.

D. Today's world shows signs of positive progress towards the universal system of human rights. The declaration of human rights occurred immediately after the atrocities committed during WWII. The globalization of human rights began when the world was awakened to the crimes committed under one government (Hitler), and the need for a more universal system of accountability and responsibility. Through a forum such as the United Nations, cultural differences are better able to be resolved, thereby paving the way for universalism while at the same time recognizing and compromising on the needs of certain cultures. The recent adoption of the International criminal court in June 1998 is an important step in enforcing and promoting the values agreed upon by the member nations. As the world becomes a smaller place with the advent of globalization, universalism makes more sense as a philosophy of human rights. In a world where many people might not be governed by national borders, having fundamental human rights instead of ones bound to certain cultures provides the best solution.

PART XVI
PHILOSOPHY OF HUMAN RIGHTS: INDIVIDUAL PHILOSOPHERS IN DETAIL

1. **ST. THOMAS AQUINAS**--He saw that basic human needs such as self preservation require fundamental human rights.
2. **ARISTOTLE** (different classes with different rights)–Aristotle''s view of the world included the existence of different social classes, accepting that there will always be an underclass, and even a slave class and that this is perfectly normal.
3. **CRANSTON, MAURICE**. *Human Rights, Real and Supposed*
   A. Concept of HR is detrimentally effected by addition of social and economic rights to political and civil rights (life, liberty, and a fair trial). [43]
      (1) Philosophically–does not make sense
      (2) Politically–hinders effective protection of civil and political rights
   B. Two concepts of rights
      (1) Human rights/rights of man/natural rights
      (2) Positive rights
   C. Rights in history
      (1) 19th century criticisms
         (a) Burke (a conservative)–natural rights are nonexistent (abstractions) beyond rights derived from a state. Natural rights incited revolution, injected vain expectations into men destined for obscure laborious lives. [96]
         (b) Bentham (a radical)–natural rights are "nonsense upon stilts." They distract serious attempts toward effective legislation for the public welfare and produce insignificant declarations and manifestos. [44]
      (2) Revival in 20th century [45]
         (a) Reason for revival
            (i) Demand for equality
            (ii) Nazism, fascism, total war, and racism
         (b) Positive rights
      (3) The United Nations System
         (a) West wanted a positivist bill of rights. Soviet Union wanted a principled manifesto. [45]
         (b) HR Committee struck compromise of manifesto first followed by a binding covenant. [45]
         (c) UDHR includes political & civil rights (Arts. 1-20) and economic & social rights (Arts. 21-30)
            (i) The economic and social rights are "rights of a new and different kind" [46]
               - The 'new' rights were included by pressure from the left and humanitarians. [46]
         (d) The two types did not mix and were, therefore, broken into two covenants. [47]
            (i) Impossible to translate economic and social rights into positive rights with judicial enforcement. [47]
      (4) Council of Europe (European Convention on HR–1950) [47]
         (a) Only civil and political rights were included in treaty.
         (b) A judicial system was created.
         (c) This is a tangible, positive rights system (with the exclusion of those not granting jurisdiction to the court system)
   D. Two categories of rights
      (1) Legal rights [48]
         (a) General positive rights–enjoyed and fully assured to everyone under jurisdiction
         (b) Traditional rights–having historical roots
         (c) Nominal 'legal' rights–those that may exist in word, but only nominally in practice (these are not positive rights, but there are demands for making them such–there is a existed system that only needs application)
         (d) Positive rights limited to a class of persons–those rights that are reserved for a privileged few, but which are demanded by all.
         (e) Positive rights of a single person–those rights that are reserved to a single person (i.e. the President

of the USA)

(2) Moral rights [49]

(a) Moral rights of a single person–entitlement claims to certain things arising from deeds (own house and, therefore have a right know what is going on in house). The question here is not whether the moral right is legally binding, but whether there is a just claim to it. The issue is justification.

(b) Moral rights of anyone in a particular situation–rights of those entering a category (parent, teacher, etc.). Claims to such rights are made by proving membership in the category.

(c) Moral rights of all people at all times in all situations–***very few and highly generalized rights that differ according to the meanings attached to them by various people and cultures***. THESE ARE HUMAN RIGHTS.

E. Human rights are moral rights applying to all people at all times (category B.3., above).

(1) HR do not depend on the station or situation of the individual. [50]

(2) Tests of authenticity of a HR

(a) Test of Practicability–examine the duties of a right. If duties can be fulfilled, it can be a HR. If it is impossible to do a thing, it is absurd to claim it as a right. [50]

(i) Holidays with pay in the third world is a vain and idle claim and, therefore, not a HR.

(ii) Duties of civil and political rights can be fulfilled through legislation and simply doing nothing–government restraint.

(b) Test of Universality–right must be genuinely universal in that it applies to everyone. [51]

(i) Because everyone is not an employee, holidays with pay cannot be universally claimed and, therefore, is not a HR. This is a moral right of a particular group (category B.2., above).

(ii) The UDHR uses the term "everyone" in regards to who enjoys rights.

(c) Test of Paramount Importance–what is essential, not merely better. [51]

(i) Essential is empirical by nature–know it when you see it (common sense). Fire engines and ambulances are essential while holiday camps and fun fairs are not.

(ii) There are certain things that should never be done–these are human rights (holidays with pay invokes sympathy, but not a feeling of gross invasions of rights). [52]

(iii) Kant's categorical imperative–what is *demanded* by norms of morality and justice, not just what would be nice. [53]

F. Effect of discourse on Economic and Social Rights as HR.

(1) Bring the whole concept of human rights into disrepute. [52]

(2) Pushes all talk of HR out of the realm of morally compelling and into the "twilight world of utopian aspiration." [52]

(a) Moral rights are not ideals or aspirations [52]

(b) Ideal is something to be aimed at, but cannot be immediately realized. [53]

(c) Right–something that can and must be respected here and now. [53]

G. Conclusion (thesis) – Extension of privileges and entitlements is a problem of socialization and democratization, but not a problem about universal rights of all humans. The case for other entitlements should be argued on other grounds.

4. **DWORKIN, RONALD--**rights are not absolute, but political creations; they are trumfs that generally prevail. Dworkin''s philosophy disagrees with Bentham''s rejection of natural rights. He sees human rights not as being absolute and universal, but as being a creation of politics that try to treat all people equally. Therefore all members of society have the same voice, which is not dependent on their social status. Utilitarianism, with its idea of ignoring the rights of minorities in the name of the greatest good for the majority threatens to destroy the entire concept of individual human rights.

5. **HABERMAS, JURGEN**. General intro.

A. **Sources for Habermas and His Work–**Habermas was a student of Theodor Adorno, and a member of the Frankfurt School of critical theory which pioneered the relationship of the ideas of Marx and Freud. He is perhaps the last major thinker to embrace the basic project of the enlightenment, a project for which he is often attacked. When compositionists and rhetoricians pay attention to Habermas, it is usually to pair him in a theoretical debate over issues surrounding postmodernism. Foucault, Gadamer, Lyotard, etc. are often set up as his opponents. Yet the debate always seems to be a racasting of the debate between Kant and Hegel. Habermas is decidedly Kantian in his dedication to reason, ethics, and moral philosophy. At the center of

Habermas's controversial project, as it is outlined in his written work, are the contested and problematic areas of universality and rationality. Of his theoreitcal intent and his debt to important German sociologists like Marx and Weber, Jefferey Alexander notes: “To restore universality to critical rationality and to cleanse the critical tradition from its elitism, Habermas seeks to return to key concepts of Marx's original strategy.” [*Habermas and Critical Theory*, p. 50]

(1) In many ways, Habermas is engaged in the restoration of philosophical and sociological work which has been descredited or harshly criticised. Among these are theorists such as Karl Marx, Max Weber, Wilhelm Dilthey, Georg Lukacs, Sigmund Freud, G. H. Mead, and Talcott Parsons (Foss, et. al. 241) as well as contemporary critics such as Stephen Toulmin and Jean Piaget.

(2) Habermas has no shortage of critics. His work is routinely criticized by postmodernists, poststructuralists, and feminists. A particularly damning dismissal of the political nature of contemporary critical theory is given by Edward Said, who uses Habermas as a spokesman for theory's anti-political stance.

B. Habermas and the Public Sphere--Habermas's most complete exploration of the notion of the public sphere is found in *The Structural Transformation of the Public Sphere: An Inquiry into a Category of Bourgeois Society*. (1989). Central to many theorists in the area of print culture, the public sphere is further elaborated by Habermas in Volume Two of *The Theory of Communicative Action* as he discusses the distinction between lifeworld and system.

(1) As Johanna Mehan notes: “This distinction between public and private parallels, but is not identical to, the distinction he draws between system and lifeworld. On the one hand, action in the modern world is coordinated by sytems which function according to means-end rationality; the market is a paradigmatic example of such a system... On the other hand, actions are coordinated primarily by communicatively mediated norms and values, and by the socially defined ends and meanings which constitute the fabric of the lifeworld. [*Femnists Read Habermas* , p. 6-7]

(2) Mehan further states that Habermas sees the differentiation and structure of the public and private spheres as “essential to the character of modernity.” [*Femnists Read Habermas*, p. 6]

C. Habermas and Communication Theory

(1) Habermas's main contribution to communication theory is the elaborate theoretical apparatus he described in the two volumes of *The Theory of Communicative Action*, published in 1981. Power is a key concept in Habermas's conception of communicative rationality. Axel Honneth and Hans Joas note that the publication of this work, "brought to a provisional conclusion the intellectual efforts of twenty years of reflection and research." They see the large work by Habermas as addressing the following four general themes:

(a) a meaningful concept of the *rationality* of actions
(b) the problem of an appropriate *theory of action*
(c) a concept of *social order*
(d) the *diagnosis of contemporary society*

(2) Honneth and Joas argue that the basic idea behind the two volume treatise is "that an indestructable momnet of communicative rationality is anchored in the social form of human life." This thesis "is defended in this book by means of a contemporary philosophy of language and science, and is used as as the foundation for a comprehensive social theory" (*Communicative Action: Essays on Jüürgen Habermas's* The Theory of Communicative Action).

(3) In *Moral Consciousness and Communicatative Action* Habermas defines the concept of communicative action: Communicative action can be understood as a circular process in which the actor is two things in one: an *initiator*, who masters situations through actions for which he is accountable, and a *product* of the transitions surrounding him, of groups whose cohesion is based on solidarity to which he belongs, and of processes of socialization in which he is reared. [135]

(a) Central to this social notion of language and human reason is the concept that Habermas terms *validity claims*, the idea by which he connects speech acts to the idea of rationality.

D. Discourse Ethics–Habermas defines discourse ethics as a "scaled down" version of Kant's categorical imparative--a kind of moral argumentation. Discourse ethics is built from Habermas's understanding of constructivist models of learning.

(1) Discourse ethics is:

(a) deontological
(b) cognitivist
(c) formalist
(d) universalist

(2) The primary sticking point for all of us in this class will be the last category, the univeral or what Habermas refers to as U. Central to his concept of discourse ethics is the domain Habermas terms practical discourse, which owes much to the work of Stephen Toulmin and the "informal logic" movement in philosophy.

E. The Debate over Modernity–When he was awarded the Adorno Prize in 1980, Habermas wrote his important essay "Modernity--An Incomplete Project."

(1) In his introduction to the essay, Thomas Docherty notes: “The occasion of the essay aligns Habermas with Adorno; yet the content of the lecture aligns him with precicely that rationalist tradition in Enlghtenment of which Adorno was enormously sceptical. Here, as in his later work of the 1980s, Habermas sees the possibility of salvaging Enlightenment rationality. The project of modernity done by eighteenth-century philosophers 'consisted of their efforts to develop objective science, universal morality and law, and autonomous art according to their inner logic', their aim being, according to Habermas here, 'the rational organization of everyday social life.' “ [*Postmodernism*, p. 95]

(2) Habermas appears to be the only contemporary theorist willing to defend the tradition of modernity, and he is frequently called to do so in debates with theorists like Lyotard, Gadamer, and Foucault. Rhetoricians often cast Habermas as *the* modernist in a debate over modernity. His course, entitled "Major Figures in Rhetoric: Habermas, Lyotard, and the problem of the Ethical Subject," explores the problems of ethics and postmodernism.

F. Habermas' Three Generic Domains of Human Interest–Habermas differentiates three primary generic cognitive areas in which human interest generates knowledge. These areas determine categories relevant to what we interpret as knowledge. That is, they are termed 'knowledge constitutive' -- they determine the mode of discovering knowledge and whether knowledge claims can be warranted. These areas define cognitive interests or learning domains, and are grounded in different aspects of social existence -- work, interaction and power.

G. Work Knowledge–Work broadly refers to the way one controls and manipulates one's environment. This is commonly known as instrumental action -- knowledge is based upon empirical investigation and governed by technical rules. The criterion of effective control of reality direct what is or is not appropriate action. The empirical-analytic sciences using hypothetical-deductive theories characterize this domain. Much of what we consider 'scientific' research domains -- e.g. Physics, Chemistry and Biology are classified by Habermas as belonging to the domain of Work.

H. Practical Knowledge–The Practical domain identifies human social interaction or 'communicative action'. Social knowledge is governed by binding consensual norms, which define reciprocal expectations about behaviour between individuals. Social norms can be related to empirical or analytical propositions, but their validity is grounded 'only in the intersubjectivity of the mutual understanding of intentions'. The criterion of clarification of conditions for communication and intersubjectivity (the understanding of meaning rather than causality) is used to determine what is appropriate action. Much of the historical-hermeneutic disciplines -- descriptive social science, history, aesthetics, legal, ethnographic literary and so forth are classified by Habermas as belonging to the domain of the Practical.

I. Emancipatory Knowledge–The Emancipatory domain identifies 'self-knowledge' or self-reflection. This involves 'interest in the way one's history and biography has expressed itself in the way one sees oneself, one's roles and social expectations. Emancipation is from libidinal, institutional or environmental forces which limit our options and rational control over our lives but have been taken for granted as beyond human control (a.k.a. 'reification'). Insights gained through critical self-awareness are emancipatory in the sense that at least one can recognize the correct reasons for his or her problems.' Knowledge is gained by self-emancipation through reflection leading to a transformed consciousness or 'perspective transformation'. Examples of critical sciences include feminist theory, psychoanalysis and the critique of ideology, according to Habermas.

J. Habermas' Critical Theory compared to that of Marx and Freire–Critical Theory agrees with that of Karl Marx in that '...one must become conscious of how an ideology reflects and distorts ... reality ... and what

factors ... influence and sustain the false consciousness which it represents -- especially reified powers of domination.' Habermas' 'perspective transformation' or transformed consciousness is similar to that of Marx and is akin to that experienced by research into the way that 'sexual, racial, religious, educational, occupational, political economic and technological' ideologies create or contribute to our dependency on 'reified powers'. Habermas differs from Marx in that Marx revised Hegelian thought to claim that a transformed consciousness should lead to a predictable form of action -- for example (Marx & Engels, 1969), the abolition of private property (p 96). Habermas posits no predictable outcomes (Mezirow, 1981).

(1) Paulo Freire's 'pedagogy of the oppressed' (1970) is also centred upon such a transformed consciousness, but is devoted to empowering the oppressed (impoverished Central American peons) by a variety of methods including self-directed, appropriate education. He also refers to the false consciousness of the oppressor, and emphasizes the need to lead the oppressor to see how 'reification' dehumanizes the oppressor as well as the oppressed. Freire's principal concern lies with the social transformation of Central American political oligarchies by educating both the oppressors and the oppressed through critical self-reflection ('conscientisation').

K. Habermas and Action Research–It is important to note that the educational action research movement predates Habermas considerably. Action research can readily be traced back to the end of World War II in the US when social psychologist Kurt Lewin (1946) developed the methodology.

(1) It has been surmised that action research dates back to the ideas of John Dewey (1929): “The answer is that (1) educational practises provide the data, the subject-matter, which form the problems of inquiry... These educational practises are also (2) the final test of value of the conclusions of all researches... Actual activities in education test the worth of scientific results... They may be scientific in some other field, but not in education until they serve educational purposes, and whether they really serve or not can be found out only in practise.” [33]

(2) Habermas has provided a theoretical background to the methodologies advocated by action research advocates (Kemmis & McTaggert, 1990), not vice-versa. Kemmis (1990) states that there is considerable '...debate about the extent to which action research is a research methodology or technique on one hand or a broad approach to social research and reform on the other'. Kemmis also raises the issue of where action research should be located, either as '...part of the wider field of social theory or in the narrower focus of education and the development of educational theory.' This can be readily seen by the different schools of action research, where some are concerned with '...the development of teacher's (or others') theories of education and society versus questions of social and educational change -- improvement, reform and innovation'.

6. **HOBBES, THOMAS** (1588-1679) and **Jeremy Bentham** (1748-1832)–positive law from the state. Positive law is the idea that law and human rights come from the state. Hobbes and Bentham were positive law theorists who believed that human rights needed strong laws to protect them. One difference from previous viewpoints is that these rights can be given and taken away by the state, they are not universal. Bentham believed in utilitarianism, that there should always be the greatest amount of good for the greatest number of people.
7. **KANT, IMMANUEL** (1724-1804) (freedoms that do not impinge on each other–the categorical imperative) Kant proposed that everyone should act in such a way that all would be well if everyone else acted like them. Each individual freedom should not impinge on the freedom of others.
8. **LINDHOLM, TORE**. *Ethical Justification of Universal Rights*.

A. Moral argument from UDHR founders for establishment of a HR system [3]

(1) Every human being is free and equal in dignity–this implies sufficient reasonableness and conscientiousness to observe a decent public order defined by HR. [3]

(a) Freedom and dignity are the value premise of HR [4]

(b) This is not a commitment to individualism at the expense of communitarianism–it’s only a recognition of equal moral status of everyone. [4]

(c) HR do not celebrate individual autonomy–philosophical grounds for UDHR was removed because it was impossible to reach an agreement on the issue. [4]

(d) Comprehensive normative grounds were not included in the UDHR so that all “reasonable and conscientious” people would be morally bound to it.[5]

(e) Each person is invited to draw on the resources of their own normative tradition as they see fit. [5]

(2) In order to maintain human freedom and dignity (described above) in the diverse sovereign states of the

world, there must be an international regime for domestic protection, which is called “human rights.”

B. Universal application and observance of UDHR
   (1) Social circumstances of universally-binding HR make HR both institutionally feasible and morally necessary. [5]
   (2) Legal & political measures that are morally mandatory for safeguarding a minimum level of freedom and dignity.

C. Human rights call for plural justification [5-6]
   (1) With a commitment to universal application, it necessarily follows that there is universal acceptance.
   (2) An instrumental way of getting universal application is universal endorsement; thus bolstering unforced endorsements of human rights in the various traditions should be a shared public goal.

D. Prospects for consensus on human rights
   (1) Historical cases
      (a) UDHR preliminary discourse–“in systems antagonistic in theory [are] converging in their practical conclusions.” [7]
      (b) 1947 Article–the rights of man cannot be dictated by the standards of any single culture. [7]
   (2) Modern cases
      (a) Catholic church from 1791 to 1963–from denying human rights to embracing them [8-9]
      (b) Impossible cases–some groups have no internally legitimate reasons in support of HR (racist, supremacist groups) [10]
   (3) Diverging theories–discussion of fundamental moral principles and authorities usually will expose more disagreement rather than the elimination of differences. [7-8]
   (4) Agreeing conclusions–there is consensus about the normative validity of HR. [8]
      (a) This is achieved through reinterpretation and reconstruction of a community's authoritative sources and shared commitments (culture, philosophy, and religion).
      (b) It is not successful until it is internally convincing and accepted.

E. Consensus is not justification
   (1) Moral theories
      (a) Do not dictate what is right or wrong. This is done by comparison to fixed points of experience and the moral theory revised accordingly. Thus, something is wrong because it is known to be and morality is complied with that belief. [12]
      (b) Changed through discussion, criticism and learning through mistakes in normative and factual judgments. [13]
   (2) Critical acceptance is justification–the acceptance of HR principles by a consensus is not just justification by numbers. Each of the accepting parties have evaluated–in relation to fixed points of experience–HR and found them acceptable by revised the moral theory to equate to HR. [14]

F. Why plural justification is mandated by ethical reason
   (1) Truth–proponents of HR doctrines should claim their position as truth–or at least the better argument [15], but this should not be publicly announced. [16]
   (2) More than one truth–positive claims of one truth are not a negative denial of opposing claims
   (3) Respect for another's inhereent freedom and equal dignity provides no other option other than respecting competing claims and, thus, being obliged by good reasons to observe HR as universally binding. [17]

G. Summary–my belief that I have attained enlightenment necessarily means that I respect another's opinion that he has attained enlightenment. Because we're all enlightened, we must consider it universally binding.

9. **LOCKE, JOHN** (1632-1704)–constitutionalism as framework of society to protect individuals. The positive law view was changed to include the idea that the state’’s law stemmed from a constitution, the legal framework of the society. The constitution however, was itself based on natural law, which includes a natural right to self preservation. Therefore the power of the state was still subject to inalienable human rights. The state should protect individuals from the actions of other that would impinge on their freedoms. Citizens should be empowered to revolt if they felt that the state was abusing its power. This became the underlying idea behind the French and American revolutions and their subsequent development of new nations.
10. **MILL, JOHN STUART** (1806-1873)–freedoms are limited by conflicts among them–anti-utilitarianism. In his book *On Liberty*, Mill strongly disagrees with utilitarianism, and sees it as a type of tyranny by the majority.

Liberties such as freedom of expression and association should not be absolute, but that they should exist in such a way as not to deprive others of their ability to achieve their own liberties.

11. **MARX, KARL AND FRIEDRICH ENGELS** (1820-1895)–Marx and Engels, the fathers of communism, saw rights in an entirely different view, namely that they were unconnected to the reality of the exploitation of the working class. Unlike Mills, Marx had another definition for liberalism as something to be gained through government, rather than as a freedom from interference. Equality was more important that liberty, especially in the ownership of private property (fundamental tenet of communism). Only one fundamental right existed under their system, that of revolution.
12. **NICKEL, JAMES**. *Making Sense of Human Rights*.
    A. Modern HR
        (1) Historical origins of modern HR
            (a) World War II–Hitler's rule highlighted the lack of concern for people's lives and liberties. [1]
            (b) War against Axis defended in terms of HR–1 Jan 1942 Declaration by United Nations stated that victory was "essential to defend life, liberty, independence and religious freedom, and to preserve human rights and justice." [1]
            (c) FDR's Four Freedoms Address of 7 Jan 1941–freedom of religion, from want, from fear, and of war. [1]
            (d) United Nations–belief was that the likelihood of war was reduced by preventing large-scale violations of people's rights. [1]
            (e) UDHR–due to sovereignty concerns of states, a binding Bill of Rights was dropped from the early drafts of the UN Charter and the UDHR was written separately which "promotes"–not protects HR. This is done through "teaching and education" and "progressive measures." [2]
                (i) Moral rights not legal rights–the UDHR is not a restatement of laws or an enactment of laws, but "common standard of achievement" to define "enlightened moralities." [4]
        (2) Characteristics of modern HR [3-4]
            (a) Rights–these are rights, which are, at least, ***definite and high-priority norms whose pursuit is mandatory.***
            (b) Universal–held by people simply as people.
            (c) Independent existence–do not require recognition or even enforcement.
            (d) Important norms–prevailing over conflicting national norms–although not absolute and exceptionless.
            (e) Duty implications–to individuals and governments
                (i) Linked to rights
                (ii) Exist independent of acceptance, recognition, or implementation
            (f) Minimum standards–of decent social and governmental practice.
        (3) Features of modern HR
            (a) Egalitarianism
                (i) Equality of all with protections against discrimination [7]
                (ii) Welfare rights–positive duties beyond the defense of the nation. [7] This included adding positive benefits to rights that were previously considered only negative restraints on government action:
                - Due process–not just refraining from ruling through terror, but providing a fair trial. [7-8]
                - Privacy and autonomy–protections against police and other government abuses. [8]
                - Political participation–providing free elections. [8]

                (iii) Three reasons why economic and social problems have come to be considered government problems:
                - Poverty and exploitation are threats to human dignity. [8]
                - Misery and inequality result from policy conditions (if government creates it, governments should fix it) [9]
                - Political systems cannot be separated from economic and social systems–it is the system that creates a means by which some benefit and, therefore, should allow all to benefit (if the system creates it, the system is responsible to fix it). [9]

(b) Reduced individualism
  (i) People are conceived as members of families and communities rather than isolated individuals (UDHR declares the family as "the natural and fundamental group unit of society"). [9]
  (ii) Decline of the social contract theory (with the exception of Rawls' Theory of Justice. [9]
(c) International rights
  (i) HR are appropriate objects of international actions and concerns. [10]
  (ii) The decline of sovereignty–so long as there is a continued willingness by states to accept the sovereignty limitations required by the HR system. [10-11]
  (iii) Examples: Euro Court of HR, HRC, & Inter-American Commission & Court [10-12]

B. Nature of Rights – HR are a subset of rights generally. ***Rights are complex, high-priority norms***. [35] The details of a right allows it to provide definite guidance to behavior although many are too vague or abstract to make full use of this potential. [35]
(1) Elements of rights – reflecting the complex relationships
  (a) Holder of a right–this is determined by the "conditions of possession [of the right]" [13]
  (b) Scope of a right (Lindholm calls this a "good" and also focuses on the functional type of the right–claim, freedom, authority or immunity)–the detail of the freedom or benefit as well as its "conditions of operability" (when a rights applies and what must be done–or not done–to trigger or "engage" its applicability). [14]
  (c) Addressee–the party which the scope of the right designates is responsible to make the right available. [14]
  (d) Weight (Lindholm focuses on the source–legal or moral–of the right, but even legal rights and moral rights have different weights in reference to each other)–the rights rank or importance in relation to other norms. This determines whether the right can be overridden by other considerations in cases of conflict).
(2) Functions of rights – what one can do with them (rights are useful)
  (a) Rights serve a goal–they create a "normative category that is binding, high-priority, and definite." [26] Rights are more effective than goals because of their definiteness and binding character (they reflect specific entitlements and duties to specific parties). Goals are more consequentially oriented–the end consequence is the most important. In goals terminology, rights can be described as being both high-priority and definite. [16-18]
  (b) Conferring authority and benefits–rights both confer and protect authority and confer and protect benefits. [23] This combines the Interest Theory and Will Theory:
    (i) Interest theory (utilitarian tradition)–rights promote people's interests by conferring and protecting *benefits*. [19] (An advantage is conferred to the holder by the state.)
    (ii) Will theory (Kantian tradition)–rights promote autonomy by conferring and protecting *authority*, discretion and control in some area of life. [19] (Something concrete given to right holder.)
      - Authority of a right is not the same as full and effective control, which requires: [21] [Morganthauian power versus influence]
        - There must be a means of compliance with the right–usually means of coercion.
        - There must be an ability of the duty holder to comply
        - The right is not overridden by a stronger normative consideration.
  (c) Claiming Things as One's Due–this is something that can be done with rights, but it should not be overemphasized because there are many cultures that frown on such actions as pushy and litigious. [25]
    (i) The ability to claim something (the existence of a guarantee) has a degree of affirmation of human dignity and self-respect. [24]
    (ii) This can be accomplished by one person claiming another person's right on behalf of that person. [25]
  (d) Focusing on the intended good–rights identify the rationale of its various parts–the reason why the right exists and the good it should accomplish. [26]
    (i) Duties do not focus on the intended good, but on the evils–the things that should be changed. [26] While this may all come back to the good, the connection is further removed.

(3) The components of rights in relation to morality and law
  (a) Three types of rights [27]
    (i) Positive legal rights–rights that have been formally made into law; a "paper" right.
    (ii) Accepted moral rights–rights that are accepted within the morality of a group(s).
    (iii) Justified moral rights–rights that are not accepted, but those that believe them can justify their existence and, usually, believe they should become accepted within the group(s).
  (b) The evolution of a right [28]
    (i) Recognize the importance of a good and that people are entitled to it (the holder and benefit)
    (ii) Identify the duties and liabilities of parties that will bring about good (the addressee)
    (iii) Enact law to provide good and enforcement mechanisms (weight)
  (c) The existence of a right. Legal enforcement is often important to making rights effective, but enforcement is not essential to the *existence* of rights.
    (i) Entitlements theory–rights exist whenever one can justify on moral or legal grounds the proposition that people are entitled to enjoy specific goods, even if an addressee is unknown [28&29-30]
      - This would be a positive explanation of rights–people have a right to something–rather than a negative explanation–other people have a duty to do something. [29]
      - "Entitlement"–"a strong set of reason, rooted in the nature of human beings, for ensuring that a certain good is available to people." [29]
      - The danger is that the demand-side of rights will outrun the supply side. [30]
      - This model has a broader cultural appeal because activities such a claiming the rights are not required–they exist because a morally-justified good is accepted. [30]
    (ii) Entitlements-plus theory–rights exist not just when there is an entitlement, but also when there is an addressee that has appropriate moral duties or liabilities. [28&30-33]
      - A full-fledged claim right is a union of a valid claim to and a valid claim against. [31]
      - This model builds in a limitation to a possibly endless list of rights–they must be pegged to an addressee.
      - Entitlement + duty does not equal a right. To be effective, the duty must be based on norms that will direct the conduct of the addressee. [32]
    (iii) Legally-implemented entitlements theory–genuine rights require not only an entitlement and an addressee, but there must be legal implementation of both (positivism). [28&33-35]
      - Bentham–entitlements without law can be conclusions that serve as grounds for wanting corresponding legal rights, but are not themselves rights in the same way that "hunger is not bread." [33] Appeals to non-legal rights are a rhetorical ploy. [34]
      - Nickel–different types of rights are all still rights, just in a different sense.

(4) Summary on the nature of rights [35]
  (a) Rights are complex, high-priority norms.
  (b) The above-stated components of rights enable them to provide very definite guidance to behavior (although many are too vague or abstract to make full use of this potential).
  (c) Legal enforcement is often important to making rights effective, but enforcement is not essential to the *existence* of rights.

C. The nature of *human rights* in the UDHR

(1) The existence of human rights – are they real? – ***"HR exist–at the most basic level–as norms within justified moralities"*** [59]
  (a) Formal, legalistic existence–HR have been enacted into domestic and international legal systems so that they are binding on most states/peoples. This moots most positivist concerns about unenforced moral rights. There is not legal application everywhere, however. [37]
  (b) Moral existence–the UDHR is an international attempt to specify the content of a justified moral theory. [40]
    (i) Independent existence–HR exist independent of acceptance or enactment as law–in order to be binding on all people, HR must be more than wishes or aspirations. [37]
    (ii) Universal existence–to be independent of legal recognition and applicable universally, ***HR must be moral norms***.

(iii) Conception of content–there must be at least a vague construct of the content of a particular moral right for it to be a full-fledged right. [40]

(c) Multiple existence–HR can exist in more than one normative system as the same time (e.g. international law, Euro law, and Norwegian law). [38]

(i) Moral rights can become legal rights–however, moral rights do not necessarily call for the creation of legal rights (some are not enforceable legally). [39]

(d) Effect of HR as a justified morality–humans have sufficient capacity for moral understanding and progress so that it is beneficial to talk and argue about how we ought to behave and organize our societies. [40] [This is basically the argumentative discourse which Risse claims is so powerful]

(2) The addressees of HR – ***HR are implied duties for governments <u>and individuals</u>*** [59]

(a) The concept–cannot be too specific because of the diverse countries, institutions and practices to which it applies. [41]

(i) There must be a rough conception of how governments and individuals will act

(ii) The conception must be compatible with the abilities and resources of at least most countries.

(b) The specific addressees

(i) Governments–this has continued particularly because the HR movement focuses around the UN, an organization of states. [42]

- States have obligation to respect HR of everyone and the protect the HR of those within its territory.
- UDHR Art. 4 prohibition of slavery necessarily restricts states

(ii) Individuals [42]

- UDHR Preamble applies to "every individual and every organ or society."
- UDHR Art. 4 prohibition of slavery by individuals
- Individuals are obligated not to violate rights themselves.
- Obligated to encourage their governments to respect HR
- Because the moral grounds for HR are so strong (enough to justify risks of international conflict), they are likely to generate obligations to individuals in matters subject to their control. [43]

(iii) International organizations–do not have the authority or power to enforce rights [42] (this has changed somewhat since this book was written).

(3) ***Universality and Inalienability – both are qualified*** [59]

(a) HR apply to everyone all the time–universal so they apply to everyone and inalienable so an oppressor cannot claim that the oppressed gave up their rights. [43] ***HR are high-priority, but not absolute***. [59]

(b) Rawls on universality–norms become less abstract and more relevant to the problems of a particular time and place as they move through four phases: *original position, constitutional stage, legislative stage, and judicial stage*. Rights vocabulary can be used at any one of these levels, but most typically in the middle stages. [44] Universality exists at the general constitutional stage.

(c) Non-universal circumstances

(i) A person must possess the mental or physical capacities necessary to utilize a right; one without these and, therefore, without the right do not diminish universality (comatose or insane people cannot vote). [45]

(ii) Noncitizens do not enjoy all the rights of a citizen–this is effected by the "conditions of possession." [45-46]

(d) "Inalienability"–rights that "cannot be permanently forfeited or voluntarily given up." [46]

(i) Inalienability does not imply absoluteness. A right cannot be permanently given up, but can be set aside in particular cases by the holder (e.g. entering the military or a monastery). [44-45]

(ii) Only a very few number of HR are immune from permanent repudiation (i.e. liberty–slavery prohibited). [47]

(iii) The clash of legality and morality–while an otherwise legally-binding contract that surrenders a right may be legally enforceable, it has no "moral effect." [Actually, in law such moral ineffectiveness is recognized in the doctrine of unconsciounability.] Inalienability of a right

occurs when a moral right survives the surrender of a legal right. [46]

(4) Scope of HR and Trade-Offs
  (a) "Scope"–"what a right can do." [48] If a right has exceptions that qualify its engagement, its *scope* is *limited*. On the other hand, if a right is overridden by another concern, its "*weight*" is not absolute–other concerns weigh more. [49]
  (b) It is best to redraw the boundaries of a right to limit its scope where it would otherwise conflict with another right. In this way conflicts are eliminated. [49]
  (c) Three barriers that suggest limitation of the scope of a right is problematic: [49-50]
    (i) Not all conflicts between rights and other concerns (norms and other rights) can be anticipated.
    (ii) A right containing sufficient qualification and exceptions would probably be too complex to be useful or even understood.
    (iii) Relieving a conflict by building in an exception negates the sacrifice of those whose rights were overridden.
  (d) Considering rights to be ***prima facie rights*** ("at first sight"): [50]
    (i) Nullifying criticism because of the absoluteness of rights
    (ii) Provides little practical guidance when the right conflicts with other concerns
    (iii) Preserves moving conflicts arguments to a deeper level of analysis–clarification of facts and concepts of the right and the conflicting concern. Human rights should be seen as part of the moral and political argument, but not the whole thing. [50-51]

(5) The focus of HR: minimally good lives
  (a) Unifying idea of HR–a decent or minimally good life for all people (the realities of limited resources require focusing on the depths of misery to be avoided rather than the heights to be attained). [51]
  (b) Advantages of minimal international standards as HR: [51]
    (i) Sidestep cultural relativity issues [how is this the case?]
    (ii) Increases the likelihood that rights will be affordable in poorer countries.
  (c) ***The most plausible conception of human rights sees them as <u>minimal standards</u> and that the content of the UDHR is generally compatible with this conception***. [51]
  (d) "Minimally good life"–ensuring people decent conditions of life, but not the conditions that would allow them to develop and use their capacities to the fullest possible extent (human flourishing–compare this to Pogge's concept of this term). [52]
  (e) More ambitious human rights regimes should not use the term universal human rights–these are reserved for the minimum standards.

(6) The affect of HR on behavior – "HR are general guidance, but not a road map" [60]
  (a) Stopping HR violations by others–reference to HR is essential, but not enough. Other moral and political principles and deliberation (instrumental bargaining and argumentative discourse) are required. [53]
  (b) Guidance from rights that are not accepted or implemented–guide the behavior of those that believe it is morally justified. [53] Thus, not all guidance provided by a right is found in its scope (conditions of operability)–actions can be justified that are not within that scope (e.g. civil disobedience or protest when there is a perceived violation of a right). [54]
  (c) Stopping systematic HR violations
    (i) Legal implementation–while not essential to moral rights, legal implementation is central to making many rights effective. [54]
    (ii) Governments–the biggest protector and violator of HR. The struggle is to get the government to restrain itself and get it use its power to restrain others. [54]
      - Restraining itself–legal implementation [57]
        - Goal of legislation–often education of the population in moral and political principles. Persuasion and legislation are not mutually exclusive. [58]
        - Two levels of enactment:
          - enactment in abstract terms in a constitution or bill of rights (unfortunately, however, many constitutions are showcase documents)

- enactment in more specific terms in statutes that become part of the day-to-day law of the land.
- HR are general principles–they are guidance to suggest broad outlines of rights and institutions, but ***"HR neither can nor should deal with specific modes of application in different countries."*** [58]

- Restraining others–other consideration besides HR to be used by countries in restraining other countries are the "means (diplomacy, pressure, intervention), the likelihood of success, the weight assigned to the principle of non-intervention in the domestic affairs of the other country [Risse–possible nationalist backlash], and competing claims on national energy and resources [Risse–vulnerability]." [56]

(iii) HR activists strategies–must use political change outside the scope of HR–a consequentialist reasoning toward the goal of HR implementation. [55-56]

- Changing people's moral attitudes through persuasion, consciousness-raising, and education [this sounds like Risse's socialization]
- Legal implementation of rights–"let law lead public opinion" (legislation or constitutional amendment)

D. Justification of rights and HR – reaching a plausible list of abstract HR from several starting points [105]

(1) Basic premise–the premises that are most central to a justification of a right; an acceptable proposition upon which a justification of a right can be built. A starting point is necessary because justification needs to originate somewhere. [82]

(a) Depth of the basic premise (superficiality) [82]

(i) Distant premise–those that are far removed in category or subject

(ii) Close premise–those that are close

(b) Features of a good basic premise [83]

(i) Unproblematic derivation–the BP clearly supports the right

(ii) Problematic derivation–the BP is widely accepted or people can be easily persuaded to it (everyone or nearly everyone must be able to accept the BP)

- This approach leads to controversy about whether the BP really supports the right or digresses along the way (interference).

(c) One looks for overall plausibility and promise rather than invulnerability and hopes that deficiencies can be overcome. [84]

(2) Prudential reasons of acceptance/compliance with rights – reasons relating to a person's own interests [84] – prudential arguments for moral protections. This reasoning has a distant starting point with plenty of room for controversy, but ends in the vicinity of universal HR. [105]

(a) Reasoning–acceptance of a morality that upholds a right is the best means for protecting one's fundamental interests against actions and omissions that endanger them. [84]

(b) "Fundamental interests"–interests that are general in that all have them and strong in that they outweigh other interests. [84]

(c) The utility of morality–it is a social institution used to gain compliance to the system of protecting fundamental interests. [86]

(i) Contractariansim–recognizing interests and 'contracting' to create and maintain a moral system for protecting the interests. [87]

(d) Types of fundamental interests

(i) Security – having a life (physically)–avoiding premature death and obtaining the necessities of life [87]

- Content–having a body that is capable of most normal functions, which means the satisfaction of physical needs for sustenance. [88]
- Positive duties to aid others–people examine this with a cost-benefit analysis to determine if the costs of assisting others will outweigh the worth of the aid that is received in turn. [88]
- Costs are distributed throughout society so they are not burdensome and limited (e.g. caps on aid received) to make them tolerable.

(ii) Liberty – leading a life (substantively)–ability to make and carry out the key decisions about

the kind of life one will live without being made a resource–an end [87]

(e) Problem with this approach–stronger groups can usurp the morality for their own benefit (apartheid South Africa). However, without concepts of divine creation of the moral system, the oppressed will retaliate–this threat alone being enough to bring the stronger group to concede all-inclusiveness. [90]

(f) Universality through prudential reasoning–it may not yield universal HR, but will result in something in the vicinity (most people have similar self-interests in regards to life, liberty and security. [90]

(3) Moral reasons of acceptance/compliance with rights – moral arguments for moral protections

(a) Empirical morality–Rawls claims that if you put people behind a "veil of ignorance" and ask them what primary goods should exist, the same goods will be stated no matter what else they may desire. This converts prudential choice into rational choice because the people are shielded from their own interests, making everone equal in the choice of rights. [91] It becomes a moral argument identifying interests that need moral protections. [92]

(b) Utilitarianism–morality is the path which attains the highest overall level of satisfaction after listening to all interests (nobody is ignored). This converts prudential interests into moral ones because each person's interest may be prudentially constructed, but the process of collective maximization is a moral process with a moral outcome. [92]

(i) "Tyranny of the majority" (Mills)– Utilitarians may not ignore or discount anyone's interests, but it does not assure these interests will not be outweighed by contradicting interests of large numbers of other people.

(c) Secure claims – justified as necessary for effective implementation of principles. [98]

(i) Secure claims–norms that give each person a secure moral claim to life, liberty, and other minimal conditions of a decent life as a person independent of ability to generate utility. [93-94]

- Three secure claims
  - Life (including security)–ability to live a natural life span and obtain the necessities of life. This includes negative duties not to injure or murder as well as the positive duties to protect from harm and assist in obtaining the necessities of life. [95]
  - Liberty–lead a life and exercise capacity for choice for most important decisions that life presents. This entails negative duties not to interfere with this right and positive duties to protect others. [95]
  - Fairness in balancing distribution of costs and burdens
- Denial of claims–impossibility, unbearably high costs to the fundamental interests of others, and reasonable punishment for a serious crime. [96]
- Not entitlements–as claims, there are associated duties. [96]
- Minimal standards–additional claims can be added to satisfy moral criticism. ***"A theory of HR is not a complete moral and political theory"***–just a minimum. [96] [Compare "minimal standards to Franklin D. Roosevelt's "freedom from want."]
- Limited resources–this may cramp responses to these claims, but does not extinguish them. [97]

(ii) Duties–morality should create an abstract obligation to allow and promote other's attainment of minimal conditions of life. [94]

- Addressee–***whomever is capable*** of providing the claim, whether individual, family, group, or state. [97]
- The role of states–in reality, state are the only ones capable of providing protections of these claims. [97]

(iii) Conflicts of claims and duties should strive toward equality. [94]

(d) Scope of liberty – determining what particular freedoms exist

(i) Focus on interests or claims that are already morally endorsed, those that are already recognized in fundamental moral principles. [99]

(ii) Identify liberties that are requisite to carrying out all, or at least almost all, plans of life. [99]

(iii) Conflicts of freedoms–"equal liberty" (Rawls)–basic liberties must be compatible with a

similar liberty for others. [99]

(e) No property right on moral grounds–to the extent that it exists in other rights (life–obtain necessities of life; liberty–possessions that express personality and culture and those in which must time and effort have been placed). Otherwise, property and resources are not protected and subject to expropriation. [100]

(4) Justifying rights from other rights – piggy-backing rights

(a) Three types of piggy-backing – the primary right must provide support for the secondary

(i) The scope of the primary right includes the secondary (penumbras). [101]

- The more essential the secondary right is to the enjoyment of the primary, the more support (justification) the primary lends to the secondary.

(ii) The secondary right serves to make violations of the primary right less likely. [101]

(iii) The effective implementation of the primary right requires the secondary right. [101]

(b) Feasibility test–the cost-benefit analysis of a primary right may need to be reevaluated if the costs of the secondary right were not included in the first instance. Secondary justification of rights effect the feasibility of the primary right. [105] This is important for conflicts of rights evaluations.

(c) Henry Shue (Basic Rights)–with concession of one right, there must be concession to rights of security, subsistence and liberty because these are essential to the enjoyment of all other rights. [102]

(i) There is no enjoyment without these primary three rights

(ii) Sacrificing one of the three primary rights, sacrifices all others.

(d) Linkages between rights increase the stability and coherence of the system. [106]

E. Justifying specific rights

(1) Four requirements for going from an abstract claim to a specific human right:

(a) Importance–the specific right will protect something important [108&109]

(b) The claim has threats–there are substantial and recurrent threats to the abstract [108&112]

(i) Recognizing a right at every point where there is a fundamental interest would lead to a very long list of rights. [112]

(c) There is no alternative–specific political rights is an adequate response–there is no weaker alternative. [108&113]

(i) Strength provided by legal rights: [114]

- Individual character of rights assures that identifiable parties will be charged with provided the protections, rather than volunteers.
- The obligations and responsibilities that attach are definite.
- Rights are usually claimable.

(ii) Weaker alternatives:

- self-help [114]
- social aid–voluntary help from friends, family, neighbors, and charitable organizations [115]
- structural changes–change the social and economic systems (especially of the third world) [116]
  - abundance strategy–produce enough of whatever is lacking so there is no need
  - threat-elimination strategy–modify human traits (i.e. greed, selfishness, conflict, corruption) through enlightenment (i.e. religion) [117]

(d) The burdens are affordable–in relation to resources and fairness [108&120]

F. Rights and resources – determining whether costs of rights exceed the limits of the obligations [120]

(1) Kinds of costs

(a) Conflict costs–that which one right might require to be given up from the normative system that would otherwise be kept (e.g. conflict cost of strong privacy laws may be certain freedoms of the press) [120]

(i) The costs are most severe when it cannot be spread among the members of society. [121]

(b) Costs of using weaker means–the elevated costs of taking alternative actions in order to refrain from rights-violating action (refraining from torture to extract a confession makes attaining the information more costly). [121-22]

(c) Implementation costs–the cost of providing the services to uphold a right (direct) and the negative consequences that follow implementation (e.g. collecting taxes to implement rights decreases venture capital and may even cause higher unemployment). [123]

(2) Counting the costs of HR – budgeting [124]
  (a) Evaluate total resources available
  (b) Determine how much of resources will be made available to rights implementation
    (i) Avoid putting unfair and destructive burdens on particular individuals
    (ii) Avoid undermining economic institutions needed to provide for the general welfare
    (iii) Avoid undermining social, artistic, intellectual, and religious culture.
  (c) Estimate rights costs–a difficult procedure that cannot evaluate all repercussions
  (d) Choose rights to implement according to amount available

(3) Making rights cheaper
  (a) Axing–cutting out the right from the list of justified rights [125]
  (b) Pruning–cutting back several dimensions of a particular right without cutting so deeply that the right ceases to exist as a meaningful norm. [125]
    (i) Change the condition of possession so fewer people have the right [125]
    (ii) Reduce the addressees [126]
    (iii) Lower a right's weight to make it more vulnerable to being overridden and, therefore, operative less often. [126]
    (iv) Limit a right's scope–build more exceptions into the right so it does not extend to situations where it would otherwise conflict with other rights (closely related to lowering the weight) [126]
    (v) Reduce the level of protection of the right–reducing implementation costs by lowering expenditures on those who provide the right. [126]

(4) Are the UDHR's rights affordable? [128]
  (a) The UDHR had to set a high standard in order to be meaningful for the richer countries.
  (b) For less-developed countries:
    (i) The specific rights serve as "standards of aspiration"
    (ii) Rights can be protected and upheld in varying degrees and, therefore, countries can implement them as far as their resources allow.
  (c) Problems with UDHR–the rights are not ranked to provide guidance when not all rights can not be afforded. [129]

(5) Cost as a factor in ranking rights?
  (a) Intrinsic importance–not effected by costs
  (b) Priority–effected by costs
  (c) Margin of affordability–the gray area where a right may be able to be afforded, depending of factors such as priority

G. Human rights during national emergencies
(1) "Exception"–to the *scope* of a right or its benefits (a limitation on its outer boundaries) [132]
(2) "Weight"–the *rank* or power of the right in relation to competing considerations, specifying whether the right can be overridden. [132]
(3) Tests for the priority of rights
  (a) Consistency test–rights that rely on each other for their substantive existence must remain consistent with one another–a right cannot be axed if it is essential to one that is kept or a logical extension of it. [133]
  (b) The importance test–importance can be explained in terms of the weight of the values and norms underlying the specific right, the same consideration that justify the right also provide guidance to when it can be restricted. [134]
    (i) How weighty are the values and principles served?
    (ii) How vulnerable is the freedom or benefit?
    (iii) How effective is the protection?
  (c) Cost efficiency test–rights having the highest ratio of importance to cost (what are the good buys?) [135]

13. **ROUSSEAU, JEAN-JACQUES** (1712-1778)–contract between individual and the state giving equality. Rousseau came up with the social contract theory, that stated that all individuals in a society had entered into a contract to form a civilized society in exchange for the government giving them equality.
14. **PLATO** (Universalism)–Plato believed in universal truth and virtue. This idea has continued on to become universalism, that human rights are universal, and as such are above the laws of individual states.
15. **POGGE, THOMAS**. *Human Flourishing and Universal Justice.*
    A. Pogge frame of reference
        (1) Student of Rawls at Harvard
        (2) Ph.D. Thesis on Kant and Rawls (advised by Rawls)
        (3) Undergraduate thesis on Habermas
        (4) Professor of International Relations at Columbia
    B. Human flourishing
        (1) Definition [333]
            (a) A life is good or worthwhile in the broadest sense
            (b) Flourishing includes everything – pleasure, well-being, welfare, affluence, virtue, accomplishments. It is the sum of all things considered to be good and desirable.
        (2) Substantive conceptualization (See Plato, *The Republic*)
            (a) Components of flourishing–the constitutive definition of what flourishing does or can achieve (the end result). It is subjectively determined what substantively is human flourishing among two categories: [334]
                (i) Personal value components–a life being good for the person living it (individual benefit) [334]
                - relates to a person's ***experiences*** (to their being–enjoyment, wealth, etc.) [335]
                - relates to a person's ***success*** in the world [335]
                    - There can be successes that do not add to personal value because the person does not know about the success or failure.
                    - Successes may dull a life while it can be enriched by failures.

                (ii) Ethical value components–a life being worthy in the ethical sense (non-personal benefits) [334]
                - good ***character***–having admirable aims and ambitions, virtuous maxims and dispositions, and noble feelings and emotions. [335]
                    - affected by one's starting position
                - ethical ***achievement***–significance of a person's conduct [335]
                    - achievements may not be attained through good motives

            (b) Means to flourishing–methods of achieving the components of flourishing (the means to the end) [334]
        (3) Fluidity of concept–this effects the perceived importance of the various dimensions of flourishing [183]
            (a) Personal differences
                (i) Determining flourishing from within–in regards to one's own life
                (ii) Determining flourishing from without–in reference to the lives of others
            (b) Temporal differences
                (i) Prospectively–with practical intent toward the future; searching for normative guidance for how to shape one's life or the lives of others
                (ii) Retrospectively–evaluating past performance
        (4) Subjectivity of what constitutes flourishing
            (a) Each person must be allowed to make their own measure of flourishing [336]
            (b) To respect this individual autonomy is not merely to tolerate an individual conception, but to respect it as being what is correct for that person. [336]
            (c) Furthermore, how another's conception of flourishing is reached must be respected. We cannot apply our own beliefs that it must be determined through deep contemplation and thought. However someone has come to their conclusion of flourishing, their conclusion and methodology must be respected. [337]
        (5) Rule against paternalism in human flourishing–we should promote one's good as they define it for themselves. [340]

C. Social justice [337] [Lindholm defines this as "burden/benefit distribution throughout society"]
   (1) Human flourishing in relation to social justice–what each person considers to be the contents of flourishing is relevant to the political discourse about social institutions and policies. [337]
   (2) "Justice"–associated with the morally appropriate and, in particular, evenhanded treatment of persons and groups. "The moral assessment of social institutions," meaning not the collective agents themselves (governments & physical institutions–Rawls' "basic structure"–or "regime"), but the regime's practices which govern interactions between a person and the collective agents. Thus, justice is an evaluation of whether a regime treats persons and groups in a "morally appropriate" and "evenhanded way."
   (3) Who are affected by social institutions:
      (a) Those living under the institution–those to whom it presently applies (e.g. citizens/residents under a government). [338] It must be recognized that this group is most likely the most significantly affected by the institution as well as the group responsible for shaping the institution policies. [338-39]
      (b) Non-participants in the institution (e.g. the U.S. government, through its foreign investment, trade flows, and distribution of military power affects the lives of many non-citizens throughout the world) [338]
      (c) Future persons–both within and without of the institution (e.g. the impact of pollution, resource depletion, etc.)
      (d) Past persons–both within and without of the institution. A person's own belief that flourishing has or has not been achieved is affected by future regime decisions in which the effect of one's life may be thwarted or in some way altered from that which was expected by the person (a now-deceased person who invented something that they believed would be very useful to humankind and, on that basis, concluded themselves to have achieved a degree of flourishing, would be robbed of their flourishing if a future government prohibited the use of the invention). [338]
   (4) "Paternalism" [340] – unlike in flourishing generally, justice may require paternalism, which is erosion of pure autonomy. Justified institutional assisting people's human flourishing definitions.
      (a) Not everyone can be satisfied–there must be a maximization of flourishing at the expense of some. When choosing or formulating an institution, that which maximizes to the greatest degree the flourishing of those affected.
         (i) However, because there are so many divergent definitions of flourishing, not everyone will be accommodated. [340] There are conflicts with other flourishing definitions.
         (ii) Flourishing is sometimes attained without realization according to the individual's own definition (or vice versa). This complicates the process of maximizing flourishing because of the difficulty in evaluating how various people are affected by the numerous alternative institutional structures. [341]
            - Fulfillment–the actual realization of a person's desires in the world.
            - Satisfaction–a person's belief (or understanding) as to whether desires have been realized.
         (iii) Some people cannot make up their own minds (or stick with a single definition) about flourishing. This also complicates the process of societal maximization of flourishing because of the fluidity of the variables. [341]
            - Desires about desires–there may be a desire for one thing, yet regret for having that desire and a wish that there was not such a regret.
      (b) Individual definitions of flourishing are not independently determined, but are effected by the regime.
         (i) Social systems skew a person's frame of reference so that their 'independent" evaluations favor the system–self perpetuating regimes. There cannot be complete deferment to these "independent" evaluations because that would result in the justification of any totalitarian regime that effectively brainwashes its population. [342]
         (ii) [Autonomy is having critically tested every form of evaluation of self and the determination of flourishing and made an independent choice of world view.]
         (iii) Criteria of social justice evaluation
            - Must consider all those affected by an institution, not just those under its regime.

- Must consider effects of all institutions, including global effects (the institutional interconnections of globalization)
- There must be a "single universal criterion of justice" that assesses all institutions that affect a person.
- This universal criterion, however, should respect the autonomy of cultures. Like individual human flourishing, this connotes respecting not only the autonomous choice of a way of life, but the autonomous recognition of diverging ways of life that are no less "valuable," even if they do not uphold external concepts and discourse of human flourishing. [340]

D. Universal System of Justice [according to Lindholm, the point where paternalism is palatable]
  (1) The requirements of a universal system – a "core" (shared by and required in all conceptions of justice)
    (a) Universal definition of flourishing should focus on thin and unspecific means–not components. Thus, while the definition of flourishing is left open to each individual, it can be agreed that nutrition, clothing, shelter, certain basic freedoms, and education are means to it. [342]
    (b) Universal definition of justice should be a solid threshold that is required to treat affected persons in a minimally decent way while being compatible with an international diversity of institutional schemes. [342-43]
    (c) The universal definition of justice should not be considered exhaustive. Societies should be free to impose their own more demanding criteria and judge others according to it. [343]
    (d) The additional criteria established by some must not replace the universal definition and must yield to it when there is conflict between them. [343]
  (2) The criterion–persons affected by an institutional scheme must have the goods needed to develop and realize a conception of a worthwhile life–personally and ethically. [343] Three questions toward an operational criterion:
    (a) How should these basic goods be defined? Because this is merely a solid threshold and not an optimal attainment criteria, the demand for goods should be limited in four ways: [344-45]
      (i) Only necessarily essential goods should be included–those which are truly needed for conceptualizing a worthwhile life.
      (ii) Only a minimally adequate share of the goods are required (quantitatively and qualitatively)
      (iii) Only access to goods is required. People may choose not to exercise that access (choosing to fast or become a hermit)
      (iv) Goods should be limited probabilistically–100% guarantees cannot be achieved (natural disasters may deprive food access or street punks may deprive access to physical integrity). Systems must deal with external forces only when such occurrences exceed certain limits (state in an earthquake zone should have contingencies and high-crime areas should have more police protection).
    (b) How should the chosen basic goods be integrated into one measure of the standard of living of a *person*? [345] What weight should be given to each element of the basic goods so that determination of standard of living (and degree of shortcomings) can be made when there are shortfalls in certain basic goods.
    (c) How should the measurements of the standard of living of the various individuals or groups be integrated into one measure of the justice of a *social institution*?
  (3) Weighing basic-goods shortfalls in the equation that determines the justness of a society. Moral distinctions must be made regarding *how social institutions relate to shortfalls*.
    (a) *How* changes are achieved is just as important to the justness equation as the results achieved–pure consequentialist or hypothetical-contract theories do not care how a better outcome is achieved through changes to a social system. To the contrary, how changes are achieved must be evaluated to make a true determination of the justness of regime. (Example: a regime that attains less traffic fatalities by executing drunk drivers is not more just than one that allows more total deaths by not having such a drastic penalty. This is so because the ends cannot morally justified the means.) [194-96]
    (b) The *causes* of basic-good shortfalls is a variable in the justness equation. Causes that detrimentally effect justness are (in descending order): [348]

(i) Shortfalls officially mandated by law (it is legally forbidden to sell essential vitamins to a person)
(ii) Shortfalls from private conduct that is legally authorized (sellers of the vitamins lawfully refuse to sell to a person)
(iii) Shortfalls resulting from mismanagement when there are no rules specifically requiring the shortfall (a person is in severe poverty and cannot afford the vitamins because the economic order is in ruin)
(iv) Shortfalls from private conduct that is generally tolerated (sellers of vitamins refuse to sell to a person, but enforcement is lax and penalties mild)
(v) Shortfalls from natural factors which institutions avoidably fail to remedy (a person cannot metabolize vitamins because of a treatable disorder for which they receive no treatment)
(vi) Shortfalls from self-caused factors which institutions avoidably do not remedy (a person cannot metabolize vitamins because of a long-term smoking habit continued in full knowledge of the resultant disorder and for which they receive no treatment)

(c) Institutional *attitude toward shortfalls* is an even more important variable in the justness equation. [349] This reflects not just on the reality of the situation, but the particular way in which a regime is insensitive to shortfalls.
(d) *Social costs* is a further variable. [350] Significant social costs decrease the detrimental effect of an otherwise socially unjust situation.
(e) The *distribution of shortfalls* is a final variable. [350-51] It should not matter whether a person suffering a shortfall is like me or not–the same weight is given the personal shortfall no matter who the sufferer might be. However, if one group is over-represented among the sufferers there is moral relevance to the justness determination.

E. Human Rights (an internationally acceptable core criterion of basic justice) [351]
(1) HR's are *not* moral rights to an effective legal right
(a) Legal rights are not always necessary–there need not be a legal right that corresponds to a moral one if, in fact, secure access to basic-needs is fulfilled. An additional legal remedy would certainly be good, but it does not diminish the substantive fulfillment of the right. [352] [Is this true? Lack of remedy means that there is no method of addressing any future shortfall that arises so that the legal guarantee *protects* continued access.]
(b) Legal rights are not always substantively available to everyone–legal guarantees do not assure access. This is so not only where there are showcase constitutions, but where a person does not have the means or knowledge to enforce an otherwise effective remedy. [352-53]
(2) Definition–a HR is ***a moral claim <u>on</u> social institutions***. [353]
(a) All those that uphold an institution (e.g. all citizens of a state government) are the addressees of rights–there is a moral claim for HR on 'everyone.' [353] It is <u>not</u> governments that HR's require to do something or refrain from doing something. HR govern how everyone together ought to design the basic rules of our common life. [354] [Nickel=all those with influence to help are addressees.]
(b) Since everyone in society cannot provide legal rights, "HR's are not legal rights," but moral rights–moral claims on not only institutions broadly–but all those that make up the institution. [353]
(c) The claim of the holder of rights is "morally binding elementary needs that ought to be fulfilled under any social institutions we design or uphold." [353]
(d) Legal rights are an effective *means* to fulfillment of human rights. [353] [Lindholm says that Pogge is wrong for removing HR as legal claims against states–that this weakens them. I don't think Pogge would disagree that legal rights are necessary–he calls them an effective means.]
(e) Human rights are more accurately described as fulfilled/not fulfilled, rather than violated. [354] This is because it is not the government or individual action that results in a deprivation of HR's, but the failure of all of society–through its institutions–to prevent the action or to protect the basic needs.
(3) What specific human rights are there? To answer this question, we examine everything stated thus far: (1) most people feel a need for a world view (personal and ethical value) to give perspective; (2) there is

a plurality of world views (both independent views and views of other views); (3) basic justice must cater to the plurality of world views (foster their development and respect the outcome). [354]

(a) The following basic goods are, therefore, necessary for autonomous world views: [355-54]
  (i) Liberty of conscience–the right to develop and live in accordance with one's own world view (so long as there are no excessive costs to others). To be substantive, this entails freedom of information and association.
  (ii) Political participation–the ability to take part in the structuring and directing of social systems to which we belong
  (iii) Physical integrity
  (iv) Subsistence–food, drink, clothing, and shelter
  (v) Freedom of movement and action
  (vi) Health care
  (vii) Education
  (viii) Economic participation

(b) These basic goods need not be provided in unlimited quantity. ***Human rights involve only reasonably secure access to a minimally adequate share of goods of minimally sufficient quality***. [356]

(c) A summation of the bundle that are these goods is Article 28 of the UDHR: "Everyone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized."

(4) Individual responsibility for 'foreign,' domestic non-fulfillment of rights. Both domestic and international forces effect the fulfillment of HR within a single country.

(a) Explanatory nationalism–to blame the national factors for failed economic development by ignoring the interdependence of each society and considering each one separately (as did Rawls). This is how Western economists explain continued third world poverty–it is the fault of national mismanagement. [356]
  (i) Without seeing an international causal link between global factors and national oppression, corruption, and poverty, the question is not posed whether those who shape global institutions have a negative moral responsibility for global poverty. [359]

(b) The global context is of crucial importance to explain persistent poverty. Explanatory nationalism fails to examine why national factors are the way they are–global factors influence national policies, particularly in the poorer and weaker countries (e.g. third world leaders need not worry about popular support for their continuance in power if they have foreign economic and military aid; furthermore, it is usually more lucrative to cater to the needs of foreign countries and companies rather than impoverished citizens). [357] ***If global factors contribute to 3rd world misery, then this misery is also our own concern***. [358] Citizens of the developed countries bear some responsibility for the world hunger problem. [359]
  (i) Where both domestic and international institutions share the causal factors and both could do something to remedy the problem, responsibility for under-fulfillment lies with both groups. [358]

(c) Tunnel vision is endemic. We each regret that so many countries have bad institutions, but we do not ask why this is so or, especially, how we might be involved in this sad phenomenon. [358]

(d) Fulfilling *individual responsibility* for institutional causes and effects: [359]
  (i) Possible individual compensations:
    - Stop participating in the institution (not usually a viable option today)
    - Work for reform of the institution
    - Work for the protection of the victims
  (ii) Amount of compensation–contribution relative to how much one is benefitting from the institution (e.g. Nike executives with big bonuses have high compensation liability).

16. **RAWLS, JOHN** (1921-2003?)–creation of a just society before regulating individual action. Rawls presents a more compassionate view of human rights, one with the greatest degree of individual liberty and equality while maintaining these rights for all. The state should distribute everything including benefits equally, unless an unequal distribution would benefit the poorer classes. He sees human rights as being constructed by reasonable

people living together in a society. This view lends itself to cultural relativism, because western industrialized principles might not be appropriate elsewhere.

A. Introduction to Rawls
   (1) Selecting Principles of Justice–Different principles of distributive justice are proposed by different philosophers. Does that mean that we may choose any one of them with equal justification? A "yes" answer to this question would make disputes about fairness impossible to settle. To avoid this, we must find some non-arbitary method of selecting among proposed principles of justice.
   (2) The Uses of Tradition–One method for resolving this issue might be to follow the traditions of various practices that have grown up over time. For example, the practice of grading students for their performance in academic courses now includes a merit principle for determining most grades: the grade a student receives should reflect the quantity and quality of her work. It might be said in defense of such traditions that they have survived because they have proven more satisfactory to the parties affected, considered collectively, than other conceivable alternatives, such as giving everyone the same grade or handing out grades in accordance with the student's ability to pay. To argue this way would be to reinforce the argument from tradition ("we've done it that way for a long time") by a kind of Utilitarian argument ("let's optimize society's satisfaction").
   (3) The Problem of Radically Unjust Traditions–But traditions can be oppressive and unjust. Activities that take place within unjust social systems can themselves be unjust, in spite of their traditional nature. Thus a practice of giving a person that which is "his" can be unjust. Suppose this rule is included within a system of slave property, the "property" in question is a slave, and the practice would require someone meeting an escaped slave to return the slave to his or her master. The fact that the slave system is unjust raises doubts about the justice of activities that occur within that system, such as returning escaped "property" to its "owners." What is needed is a way to determine when social systems, or the rules of justice that govern society as a whole, are just: Such an approach to the selection of rules of distributive justice is provided by John Rawls. Rawls' approach is not Utilitarian and it does not rely heavily on arguments from tradition.

B. John Rawls' Method
   (1) We are to imagine ourselves in what Rawls calls the Original Position. We are all self-interested rational persons and we stand behind "the Veil of Ignorance." To say that we are self-interested rational persons is to say that we are motivated to select, in an informed and enlightened way, whatever seems advantageous for ourselves.
   (2) To say that we are behind a Veil of Ignorance is to say we do not know the following sorts of things: our sex, race, physical handicaps, generation, social class of our parents, etc. But self-interested rational persons are not ignorant of (1) the general types of possible situations in which humans can find themselves; (2) general facts about human psychology and "human nature".
   (3) Self-interested rational persons behind the Veil of Ignorance are given the task of choosing the principles that shall govern actual world. Rawls believes that he has set up an inherently fair procedure here. Because of the fairness of the procedure Rawls has described, he says, the principles that would be chosen by means of this procedure would be fair principles.
   (4) A self-interested rational person behind the Veil of Ignorance would not want to belong to a race or gender or sexual orientation that turns out to be discriminated-against. Such a person would not wish to be a handicapped person in a society where handicapped are treated without respect. So principles would be adopted that oppose discrimination.
   (5) Likewise, a self-interested rational person would not want to belong to a generation which has been allocated a lower than average quantity of resources. So (s)he would endorse the principle: "Each generation should have roughly equal resources" or "Each generation should leave to the next at least as many resources as they possessed at the start."
   (6) The corollary of this, in rights terms, is that all generations have the same rights to resources, future as well as present.

C. John Rawls' principles of justice
   (1) Rawls argues that self-interested rational persons behind the veil of ignorance would choose two general principles of justice to structure society in the real world:
      (a) Principle of Equal Liberty: Each person has an equal right to the most extensive liberties

compatible with similar liberties for all. (Egalitarian.)

(b) Difference Principle: Social and economic inequalities should be arranged so that they are both (a) to the greatest benefit of the least advantaged persons, and (b) attached to offices and positions open to all under conditions of equality of opportunity.

(2) Rawls' evaluation of these two societal structures:

(a) the first is egalitarian, since it distributes extensive liberties equally to all persons.

(b) the second, part b, is also quite egalitarian, since it distributes opportunities to be considered for offices and positions in an equal manner.

(c) the second, part a, is not egalitarian but makes benefit for some (those with greater talents, training, etc.) proportionate to their contribution toward benefiting the least advantaged persons.

(d) the first obviously echoes, without exactly duplicating, libertarianism in its commitment to extensive liberties.

(3) What does the Difference Principle mean? It means that society may undertake projects that require giving some persons more power, income, status, etc. than others, e.g., paying accountants and upper-level managers more than assembly-line operatives, provided that the following conditions are met:

(a) the project will make life better off for the people who are now worst off, for example, by raising the living standards of everyone in the community and empowering the least advantaged persons to the extent consistent with their well-being, and

(b) access to the privileged positions is not blocked by discrimination according to irrelevant criteria.

(4) The Difference Principle has elements of other familiar ethical theories. The "socialist" idea (see Distributive Justice) that responsibilities or burdens should be distibuted according to ability and benefits according to need is partly contained within the Difference Principle. We may reasonably assume that the "least advantaged" have the greatest needs and that those who receive special powers (hinted at under "social inequalities") also have special responsibilities or burdens. However, the merit principle that the use of special skills should be rewarded is also included in the Difference Principle.

(5) What (2a) does not permit is a project which makes life better for those who are already well off but does nothing for those who are already disadvantaged, or makes their life worse.

(a) Example: nuclear power plants which degrade the environment for nearby family farmers but provide jobs for already well-paid professionals who come in from the big cities.

(b) Another example would be a system of international trade, under which transnational corporations (TNC's) can outsource to sweatshops in third world countries in ways that actually make life worse both for workers in those sweatshops and for workers in the originally industrialized countries, but make life better for wealthy stockholders in TNC's, military dictators in third-world countries, and sweatshop managers in third-world countries. Few of those who benefit most from the situation could be described as belonging to the class of the "least advantaged persons."

D. Beyond Rawls–Rawls' theory of justice was set forth in his book *A Theory of Justice* (Harvard University Press, 1971). Since then it has been much discussed, and attempts have been made to improve and clarify it, not least by Rawls himself. One of those attempts at improvement is that of Martha C. Nussbaum (*Women and Human Development*), who has reinterpreted Rawls' argument from the perspective of Substantial Freedom, an idea she gets from Amartya Sen.

(1) For Nussbaum the liberties mentioned in the Principle of Equal Liberty, if they are to be meaningful at all, are capabilities or substantial freedoms, real opportunities based on natural and developed potentialities as well as the presence of governmentally supported institutions, to engage in political deliberation and planning over one's own life.

(2) Likewise, for Nussbaum, the concern of the Difference Principle to raise up those who are least advantaged must be clarified in light of substantial freedoms. What is needed, in her view, is a commitment by citizens and governments to a threshold of real opportunities below which no human being should fall if she is able to rise above it.

17. **RISSE, THOMAS,** ROPP & SIKKINK. *The Power of Human Rights.*

A. Introduction: framing and defining the issue

(1) THE TOPIC OF STUDY: The influence of ideas and norms on the behavior of individuals and states. [1-2] (interplay between norms and actions). Q: How and why do ideas/norms influence behavior.

(a) ***Principled ideas***–"beliefs about right and wrong held by individuals." Ideas are individualistic. [7]

(b) ***Norms–"collective expectations about proper behavior for a given identity."*** Norms have an explicit communally subjective quality because they are *collective expectations* in which a community passes judgments on appropriateness. [7] International law and international organizations are the primary vehicles for stating community norms and for collective legitimation in HR. [8] HR have constitutive effects because good HR performance is a crucial factor in defining a member of the community of liberal states. [8]

(c) States–made up of different institutions and individuals–how do norms influence behavior of individual state actors? [7]

(2) NORMS

(a) Norms have a different quality from other rules or maxims [8]

(i) Rules–"Do X to get Y" (instrumental quality)

(ii) Norms–"Good people do X."

- Even those states that do X simply in order to get Y, this sets into motion a process in which X comes to be considered the "good thing" so that back-tracking is difficult. So "Bad people may do X to get Y, but in the process become good people."
- Self-persuasion–over time people come to believe what they say, particularly when said in public. [15]

(b) HR norms in particular are an excellent type of norm to study because: [4]

(i) HR challenge state dominance so domestic change does not necessarily mean HR change (HR norms are somewhat independent of the changes in government and therefore are sort of like a control group even with surrounding changes).

(ii) HR are widely and internationally institutionalized (this establishes a benchmark upon which to measure action).

(iii) HR are contested and compete with other principled ideas (there independence from other norms makes it easier to single out HR norms and their impact).

(c) The influence/effect of norms – Materialists vs. Social Constructivists [6-7]

(i) Materialist Theories ("what one sees determines where they sit"; "where one sits depends on what they see")–Economic and military conditions or interests determine impact of ideas in international and domestic politics

(ii) Social Constructivist Theories ("where one sits determines what they see"; "what one sees depends on where they sit")–Ideas and communicative processes define in the first place which material factors are perceived as relevant and how they influence understandings of interests, preferences and political decisions. (the perception of material interests is influenced by one's previously-held beliefs) [7] This is the view of the authors because actors make their decisions in social settings and self-definition (what I want depends on who I am). [8-9]

(3) Limited Research Area of Book–the three "most accepted" rights: right to life, freedom from torture and freedom from arbitrary arrest because they are widely institutionalized and have ample data (from UN, AI and other NGOs). [2-3] The Eastern European case studies focus on torture, detention without trial and disappearance. [235]

B. **THE SPIRAL MODEL** – a theory that ideas/norms matter and examining *how* and *why* they matter.

(1) Terminology and definitions

(a) Socialization–"the induction of new members into the ways of behavior that are preferred in a society." [11]

(i) International socialization–the induction of new states into the society of "civilized" nations. This presupposes an international society which–if some states are not yet inducted as members–is a smaller group than the total number of states. [11]

(ii) Domestic socialization–the process of domestically internalizing and implementing international norms. [5]

(iii) The goal of socialization–internalize norms ***so that external pressure in not needed*** to ensure compliance.[11]

(iv) Where socialization occurs–among peer groups and social groups [11]

(v) When socialization begins–when the subject adapts their behavior in accordance with the norm, even if only done for instrumental reasons. [16]

(vi) When socialization is complete–when actors comply with norms irrespective of their own individual beliefs about their validity. [16] Compliance is taken for granted. [17]

(b) The ***"boomerang" effect***–the opposition in the repressive state bypasses their own government and appeal directly to international organizations which in turn place influence on the repressive state. (Rather than hit the domestic government itself–with little impact–the opposition throws the issue out to the international level which comes back and hits the domestic governmental level with much more force). [18]

(i) Domestic groups ally themselves with international networks and INGOs who then convince HR organizations, donor institutions and "great" powers to apply pressure.

(ii) These networks also provide information and money to the domestic groups (part of the boomerang comes back to the opposition).

(c) The "spiral" model–consists of several "boomerang throws" with various effects on the human rights situation in the target country, moving along the path toward improving HR conditions. This ***process is not evolutionary***, however, with returns to repressive practices. [18]

(d) "***World time***"–each historical study takes place in its own time in history with a diverging existence and strength of the actors. There were few NGOs and many did not address HR prior to the 1970s. There were no HR treaties in force prior to 1973. Likewise, prior to that year, no country had a bilateral HR policy. Beginning in 1985, there was a "norms cascade" as the influence of HR norms spread rapidly. [19&21]

(2) **THREE MODES OF SOCIAL INTERACTION**–processes toward enduring change in HR (mechanisms/methods of convincing/coercing/achieving the adoption of the principled ideas that are the basis of international norms). These often take place simultaneously: [5&11]

(i) ***Instrumental adaptation*** and strategic bargaining (rational choice theory)–Adjusting behavior without necessarily believing the validity of the norms. The violating government makes some tactical concessions in order to instrumentally achieve a desired goal.

- Examples of concessions: the release of prisoners, signing HR documents, or "talking the talk" in international forums. [12]
- Examples of desired goals: the lifting of sanctions, receipt of international aide, or strengthening domestic power by stealing the wind of the opposition.

(ii) ***Argumentative discourse***–moral consciousness-raising, "shaming", argumentation, dialogue and persuasion–Emphasizes the process of discourse after actors have accepted the validity and significance of norms (once an actor starts "talking the talk" by caring to justify its actions, it becomes **entangled in dialogue**).

- Accepting the validity of a norm does not necessarily mean it is accepted in the way in which the international society defines it. [13]
  - Subject states may claim the non-applicability of the norm to a particular circumstance (this still challenges the norm)–the action is admitted, but claimed as not being a norm violation because the norm does not apply in that situation.
  - Subject states may claim a different definition of the norm (accepting the shell, but challenging the core)–the details of the norm are claimed to not be as the international community claims (e.g. the Asian debate--our culture and way of life are alien to the norms). [13]
- The discourse is not purely rational in an intellectual sense.
  - Power and interest-based arguments are a part of this discourse–it is not just that the better argument wins in the Habermasian sense. [14]
  - Actors rely on both logic and emotion in their appeals–shaming and denunciations embarrass the target into conformity with the norm (this works only if the subject cares to be included in "civilized community"). [14]
  - Also involved in this "discourse" is conflict in the forms of pressure and sanctions (e.g. apartheid).

(iii) ***Institutionalization*** and habitualization–the "depersonalization" of norm compliance. The more that norms are accepted as valid and the more dialogue that occurs about implementation, the more likely that HR will be institutionalized in domestic practices.

Institutionalization leads to habitualization. [250] This is their incorporation into the standard operating procedures of domestic institutions, independent from changes in individual belief systems (i.e. the enduring bureaucracy). An actor need not believe in the norm itself because there is compliance out of habit (routine or tradition), like when one stops at a traffic light. At this point, changes in governments and leaders matter less and less. [17]

(3) **FOUR LEVELS OF INTERACTION**–the actors involved [17-18]
  (a) ***The international level*** –international organizations and the interactions among them (international NGOs, international HR regimes and organizations--UN and regional HR bodies and treaties--and Western states).
  (b) ***The domestic non-governmental level*** (the "opposition)–the domestic society in the norm-violating state, including the political opposition and domestic NGOs.
  (c) ***The international-domestic link***–links between the domestic non-governmental level and the international level (a & b, above).
  (d) ***The domestic governmental level*** (the "target")–the national government of the norm-violating state.

(4) **FIVE PHASES OF TRANSITION**–the path to HR
  (a) ***PHASE 1: repression and activation of network*** [22]
    (i) Main elements of this phase [22]
      - The establishment of minimal links between the domestic non-governmental level and the international level–this enables domestic access for the international organizations.
      - Information gathering and dissemination enabled by the minimal links.
    (ii) Dominant actors completing this phase
      - transnational HR networks [32]
      - *NOT* domestic societal opposition–it is either too weak or too oppressed to present a significant challenge to the government. [22] Lindholm says this is the essential starting point of the spiral–to make the world aware of the problem.
    (iii) Dominant mode of interaction of this phase
      - instrumental rationality [32]
    (iv) Length of phase–it can last a long time if little contact with the domestic society is possible due to the level of repression. Not enough information can be acquired to place the target government on the international agenda.
    (v) When phase can be completed– ***HYPOTHESIS 1*** [22&237]
      - The placement of the target on the international agenda--INGOs using the information gained through contacts with the domestic level to publicize the repression.
    (vi) Levels of repression–can vary greatly, from genocide to low levels.
  (b) ***PHASE 2: denial***
    (i) Main elements of this phase
      - Continued dissemination of information about the target and its repression, often with the assistance of the domestic HR groups. [22]
        - Shaming–exposing of specific HR violations to the international community [23]
      - Pressure placed on the target
        - The target is a subject on the international agenda with a higher level of public attention toward it. This is often caused by a significant HR violation such as a massacre.
        - Direct pressure from Western states and international HR organizations and regimes.
          - This is often the result of "moral persuasion" in which transnational networks "lobby" international HR organizations and Western states, reminding them of their own standards or previous condemnations for similar conduct. [22-23]
          - This can take the form of threats to economic aide, lucrative economic deals, or military aide.
      - Denial by the target–refusal to accept the validity of the norm or claiming its domestic actions are not subject to international jurisdiction. This is more than merely objecting to

a particular accusation (it's a substantive response, although not in the HR discourse). [23]
- A denial almost never is an open rejection of human rights, but an assertion of the allegedly more valid norm of national sovereignty. [24]
- The government may also mobilize nationalist/anti-colonialist sentiment to solidify itself, resulting in an apparent worsening of the situation. [23]

(ii) Dominant actors completing this phase
- transnational HR networks [32]
- *NOT* domestic opposition because it is still very weak and may be paid off or killed [24]

(iii) Dominant mode of interaction in this phase
- instrumental rationality [32]

(iv) Length of phase–it can last a long time because the conditions must be right in order for the international pressure on the target to have some effect.

(v) Completion of phase–sufficient international pressure on the target to achieve more than outright denials and some sort of concession. ***The transition to phase 3 is the most difficult step. HYPOTHESIS 2*** [24&238]
- Strong and mobilized transnational network
- Vulnerable target government--include both material pressures (financial aide or lucrative economic deals), prior normative commitments (treaties signed) or a desire to remain in good international standing.
- Target state kept on international agenda

(vi) Insurgent groups–prolong this stage by heightening domestic government perceptions of threat and fear. The more success the movement has, the more the government fears are considered justified. Domestic HR organizations are considered accomplices of the militants. [23]

(c) ***PHASE 3: tactical concessions*** (cosmetic changes)

(i) Main elements of this phase
- ***Strengthening of the opposition–this is the key development of this phase***. [25&246] The opposition has the opportunity to gain courage and space to mount a domestic campaign (domestic social mobilization), as well as make more international contacts. This shifts the focus from the international to the domestic level. [25] Only when this has occurred, can the transition toward Phase 4 be achieved. [34]
  - The opposition uses HR both instrumentally (those who use HR as a means of rallying opposition and consolidating opposition power) and argumentatively (those who truly believe in HR). [26]
- Danger of a backlash–***this is the most precarious phase*** because it could either result in lasting changes or in a backlash against the domestic movement, arresting or killing the leaders and paralyzing the rest with fear. Such action would justify the international criticism, however, [25-26] [246]
- The parties take each other more seriously–the INGOs and opposition and the target view each other less skeptically and begin to engage in serious dialogue toward improving the situation. [27]
- The target begins to lose control–states are often surprised by the impact of their initial changes in terms of international processes and domestic mobilization. [26-27]
  - Domestically–repression gradually ceases to serve its purpose of suppression. People lose their fears. [26]
- HR violations are met with pressure from above and below. [26]
  - "From above"–aide or economic incentives become conditional on HR improvements
  - "From below"–domestic protest. The opposition is now a force that cannot be ignored.

(ii) Dominant actors completing this phase [32]
- transnational networks

- domestic opposition–emergence and strengthening

(iii) Dominant mode of interaction [32]
- instrumental rationality [32] – instrumental actions using concessions to regain military or economic aide or to lessen international isolation (release of prisoners, allowing demonstrations, allowing opposition groups). [25]
- rhetorial action (this debate can occur in public and international organizations such as the UN HRC) [27&32]
  - The target government initially denounces critics as "foreign agents" or ignorant
  - This begins a public controversy between the government and critics
  - Critics justify their accusations
  - The government responds
  - "***The logic of arguing takes over***" as well as reputational concerns [28]
  - INGOs begin to take government justifications more seriously and engage in dialogue to improve the situation.
  - The government takes the INGOs and domestic opposition groups more seriously and is receptive to dialogue toward improvement (toward argumentative rationality)
- argumentative rationality [32]–the target government decreasingly denies the legitimacy of the HR norm when making tactical concessions. [26-27]

(iv) When the phase is completed–as long as there is no initial backlash, when the opposition has gained strength until the target is no longer in control resulting in a regime change and the recognition of HR. ***HYPOTHESIS 3*** [28&238]
- One of two paths is taken once the target realizes its limitation of control: [28]
  - Controlled liberalization–the target begins to implement human rights norms domestically, which eventually (sometimes long-term) results in a regime change through election.
  - Increased repression–this strengthens the opposition and alienates any remaining international support of the target, resulting in a regime change (usually peaceful–except Uganda).
- The validity of international norms is no longer contested and domestic institutionalization begins. [238]

(d) ***PHASE 4: "prescriptive status"***

(i) Main elements of this phase
- The target accepts the validity of HR norms. [29] (sustained improvements of HR conditions are preceded by a move toward the rule of law [249])
  - This is considered by the authors to be the case when: [29]
    - HR conventions including optional protocols are ratified (sometimes this may occur earlier in the model, but if such "first steps" are previously taken instrumentally, the adoption of the treaty is now genuine [248])
    - norms are institutionalized in the constitution and/or domestic law and used in practice (public officials and police are trained [30])
    - the creation and institutionalization of an individual complaint mechanism for HR violations
    - the target acknowledges the validity of HR norms irrespective of audience, no longer denouncing criticism as "internal interference," and engage in dialogue with critics. [29-30]
    - Rhetoric is consistent in recognizing HR norms
    - Liberalization is continued even when pressure has decreased
    - Reaction to criticism is constructive (dialogue, legitimize behavior, apologize, deliver compensation)
    - Deeds are followed by words
  - The "true beliefs" of actors are not important so long as their words are matched by their deeds (it is unimportant if a leader does not personally believe in HR, if they are consistently implemented).

- Maintaining international pressure and monitoring–this is a critical problem in this phase because targets might backslide or stagnate without it. [35]

(ii) Dominant actors completing this phase [32]
- national governments (target)
- domestic society (opposition)

(iii) Dominant mode of interaction in this phase [32]
- argumentative rationality
- institutionalization

(iv) Prescriptive status appears to be internationally influenced–many countries reached this phase during the same time period–between 1985 and 1995 (in a "wave-like" quality [38]), despite differences in all other aspects of domestic structures. [31]
- Acceptance of norms seems to require a certain "infrastructure"–it appears that all of the pieces were not in place until the mid-1980s (treaties, NGOs, acceptance, etc.).

(v) When phase is completed ***HYPOTHESIS 4*** [33&238]
- When international HR norms are fully implemented into the law, policy, and institutions of the target.
- Continual pressure on target "from below" and "from above" is necessary.

(e) ***PHASE 5: rule-consistent behavior***

(i) Main elements of this phase
- The "two-level game"–domestic leaders who believe in HR norms take power, but lack strength against their domestic opponents who do not (especially military leaders). This makes implementation problematic. [33]
  - The leaders may use international pressures to gain influence against their opponents (more boomerangs, but originating from the government itself).
- Continued pressure from above and below–this is necessary in order to provide the last push to make HR a consistent reality.
  - NGOs–have realized the problem of easing off pressure and the state declining back down the spiral (e.g. military take-over).
  - International regimes and Western states–are generally satisfied when there is acceptance of the norms and, especially, when the opposition has come to power. [31&33]

(ii) Dominant actors completing this phase [32]
- national governments
- domestic society

(iii) Dominant mode of interaction [32]
- institutionalization
- habitualization

C. **COUNTERING ALTERNATIVE THEORIES** (realism & modernization theory)

(1) Neo-realist/neo-Marxist approach–military and economic power dictate which principled ideas are important or define which actors are important who, in turn, determine which interests are important.

(a) Military power approach–HR interests are promoted and implemented through the interests, pressures and capabilities of the great powers (real politick/Kissinger). This approach fails, however, to explain the shift in US foreign policy in 1973 to make HR a policy pillar. [35]

(b) Economic power approach–HR conditions improve resulting from pressures by the World Bank and donor countries employing "good governance" criteria for aide. This approach fails to explain why these criteria were added over the resistance of the more economically technical staff. [35-36]

(c) These approaches would be a threat to the Spiral Model only if it could be demonstrated that great powers or international financial institutions were the *most significant factor* to inducing sustainable HR improvements or if positive changes ceased as soon as material pressures ended. [36] It is not that these factors have no influence, but that they are not the dominant factor.

(2) Domestic politics approach (the modernization theory)–changes in the target state are the most significant factor in HR changes because of the correlation between economic growth and democratization (economic concerns) and the role of urbanization, literacy and the mass media (social

systems concerns). These combine to increase the middle class who are primarily responsible for political liberalization. [36-37]

(a) This approach ignores the historical empirical evidence and opposite previous theories. During the 1960s and 1970s in Latin America, those states that were the most developed and had the largest middle classes were the most authoritarian, repressive regimes in their histories. Until the 1970s, the theory was that developing states required authoritarianism in order to be economically successful. Thus, there was no correlation between economic growth and democratization, but quite the opposite.

D. **CASE STUDIES** (Chapters 2, 5 & 7)

(1) Uganda and Kenya. The role of transnational HR organizations in political development

(2) Indonesia & The Philippines: Nationalism

(a) Indonesia–the target used nationalism to mobilize support against Western NGOs and states

(i) The state were very anti-Western with no single, dominant Western ally.

(ii) The government portrayed opposition movements as puppets of foreign organizations and ideas and, therefore, justified its continued domination.

(iii) The opposition instrumentally and ideologically (those that were nationalistic) turned to economics as the battleground–claiming that the government was not providing economic benefits to all citizens (mismanagement and corruption) and therefore had no legitimacy.

(iv) The opposition movements eroded the foundation of the government so that the storm that was the economic crisis of the late 1990's knocked it down. The book claims that without the opposition movement, the government may have weathered the storm.

(b) The Philippines–the opposition used nationalism to mobilize support for a regime change.

(i) The state and elites were very pro-Western with the USA the most important ally.

(ii) The opposition portrayed the target government as a puppet of foreign powers and, therefore, justified its rebellion.

(iii) The opposition undermined the government legitimacy by changing peoples opinion of the government to that of foreign and corrupt.

(3) Eastern Europe–the Soviet bloc had articulated rights in various documents and constitutions which the opposition simply demanded to be enforced.

(a) The opposition could claim to be good citizens, supporting the state, because they simply demanded what the state was supposed to provide. It could then portray government officials as corrupting the ideals of the state.

(b) There could be no government claim that the opposition were attempting to inject foreign values or were, in fact, foreign intruders, because they were standing on the stated principles of the government regimes, themselves.

(c) Rather than fight an information war against the totalitarian states, the opposition simply agreed with the totalitarian dogma–agreed that the state was right. It could then attack the non-existence of precisely what the state said was right. The logic was: (1) the state is correct, (2) the state says that people have certain rights, (3) our government does not ensure these rights, (4) the present government must not be just, (5) replace the government with one that ensures the rights.

(d) This movement undermined the government legitimacy so that once the Soviet Union could not afford to militarily support the Communist governments [267] so they collapsed in a cascade.

E. **CONCLUSIONS** (Chapter 8, etc.)

(1) Socialization processes are universal (and generalizable). They are effective across the board (geographically, culturally, politically, religiously, etc.) HR have become “constitutive elements of modern and “civilized” statehood. [238]

(2) International HR are universal. Because there was a common movement in all case studies along the general trajectory of the spiral model, it is demonstrated that HR are not fundamentally alien to any particular cultures or regions of the world. Huntington (Clash of Civilizations book) was wrong) [239]

(3) All systems are subject to change (political, economic, or social). No system is immune from the power of NGOs and opposition movements. Such differences account for the timing of changes rather than the substance of change. [239] No particular type of country skips a spiral model phase simply because of its type. [240]

(4) Ideas (international norms) matter
   (a) Norms matter because of constructivism–"conflicts over human rights almost always involve the social identities of actors," (social constructivism) not just "by objectified material or instrumental power interests." (rational choice theory–power politics) [236] People and states care about how they are perceived by others (and themselves–Moracco). [38]

(5) Both discourse (talking) and instrumental bargaining matter–material pressure on governments is helpful (carrot and stick), but not enough. [38] It is the communicative dimension that heightens the sensitivity to these pressures and leads to habitualization so that there need not be an eternal stick. [37]
   (a) Constructivist thinking–because how one identifies oneself is the battlefield of human rights, "actor's identities can also be reshaped through discursive processes of argumentation and persuasion." [236]
   (b) Rational choice thinking–because conflicts over human rights involve preferences–the decision of what is desired after contemplating the various costs of benefits involved in attaining that desire, actors actions can be altered through strategic bargaining–exchanges that each side perceives will lead them toward their desired goal. [236]

(6) Transnational networks are the single most important group of actors. [5&242]
   (a) Skipping phase 2 (denial) prevents/delays the mobilization of these and domestic networks. [243]

(7) Governments must be vulnerable before any tactical concessions are made by it. [238]
   (a) Material vulnerability–reliance on outside economic or military aid. [245]
   (b) Moral vulnerability–the degree to which states care about their international image and acceptance as a "normal" state. [245]

(8) Great Power pressure is not a necessary, albeit helpful, condition for progress through the spiral model. [244&268]
   (a) It is especially helpful in Phase 4 (prescriptive status) to put the target "over the top." Even here, the Great Powers usually follow rather than lead the NGOs. [247]

(9) Great Powers are, to an extent, socialized by each "boomerang throw" through the spiral model–their resources are only used to promote HR norms after transnational network persuasion through shaming and blaming. [269] NGOs remind Western states of their own identity as a liberal democracy. [271]

(10) There is no causal connection between political liberalization and improving human rights standards. [269]

(11) Democratic consolidation is closely associated with HR progress. [241]

(12) Regime changes after the spiral model have two characteristics: [241]
   (a) Improve HR conditions (or bring domestic HR into power)
   (b) Peaceful or negotiated transition (except Uganda)

(13) Suggested agreement with Fukaymo's evolutionary dichotomy–the present universal institutionalization of HR *norms* (instrumental) suggests that the post-World War II debate between universal HR and state sovereignty is coming to an end with the universal institutionalization of HR *values* (substantive). [249]
   (a) There is universal appreciation of international law. [250]

(14) Domestic systems must change (structurally) in order for their to be enduring implementation of HR norms. This is because HR rely on the rule of law. [3-4]

(15) McSocialization is important (the "resonance" proposition of sociological institutionalism)–the more open a society and culture is to Western ideas and the more liberal the past with recognition of HR, the faster is moves through the spiral model. [271-72]

(16) The spiral model can be applied to any relationship between international norms and domestic change (e.g. democratization and identity politics). [274]

F. TEN LESSONS FOR HUMAN RIGHTS PRACTITIONERS [275]

(1) ***International HR regimes and transnational networks*** (NGOs) are essential. [275]

(2) There must be pressure from a ***domestic opposition*** (internal forces). [275-76]

(3) ***Strengthening domestic opposition externally*** can be accomplished not only directly, but indirectly (extracting concessions that open up political and discursive space in the target. [276]

(4) ***Blaming and shaming*** is only effective at the early stages before discourse begins so it should decline and discourse increases. "The further along the socialization path the process has moved, the more strategies stressing argumentation and persuasion should be used." [276&38]

(5) ***Words matter***. Discourse socializes. It becomes self-sustaining. [276]
(6) ***International law*** is important because it is respected so the signing of human rights instruments is an essential step toward prescriptive status. [276-77]
(7) ***States matter***. Western states apply pressure and the domestic, target state is essential for maintaining the rule of law within the state. Campaigns should be about transforming the state, not weakening or even abolishing it. [277]
(8) ***Foreign policies toward HR should be consistent***. This does not mean that HR concerns must be put before economic or strategic interests, but that their role in policy is established and continually applied. [277]
(9) ***Sanctions work***, but must be implemented cautiously with an eye on the socialization phase so they are not utilized by the target to mobilize strength. [277-78]
(10) ***Constructive engagement <u>can</u> work*** in limited circumstances: (1) only at later phases where real discourse, rather than instrumental, exists and (2) only when a consistent Western HR policy is communicated and to which there is adherence. [278]

18. **TATSUO**. *Liberal Democracy and Asian Orientalism.*
A. "The Asian Way"–a combination of a capitalist economy and "Asian values"–economic modernization without political modernization. [28]
(1) Routes–Asians feel a natural desire to challenge Western hegemony in international norm setting and to require Western respect and attention to the Asian voice–especially because of former colonialism. [28]
(2) There need not be a 'third way' because the 'Asian way' can be liberal democracy:
(a) Liberal democracy is still an unfinished project to which Asian voices can and should be included. [29]
(b) Just because the West may have used liberal democracies first does not make it a Western animal (value dominance critique). [41] (Is electricity a Western or even Edisonian, cultural animal?)
B. "Asian Values" (AV) is anti-West-centric–its justification utilizes the language of the West
(1) State sovereignty–although criticizing HR, AV accepts the Western concept of sovereignty without question. [30]
(a) State sovereignty is closely connected with the concept of human rights. [31]
(i) Sovereignty protects weaker states while HR protects weaker individuals–it is a moral and logical contradiction to support the former (international protection of weak) and not the latter (domestic protection of weak) because they both protect of the weak. [31]
(ii) HR are the functional complement to sovereignty–they provide a check on the power of the state (along with the separation of powers). [32]
(iii) HR are the moral basis for sovereignty–through a social contract of humans beings, the state emerged with the sole purpose of serving the individuals–the protector. [32]
(b) It is not "sovereignty or HR" that should be the debate, but "no sovereignty without human rights." [33] You cannot have the sovereignty without HR.
(2) Types of rights–AV claims economic and cultural rights have preeminence over civil and political rights. [34]
(a) Justification for this ordering of rights [34]
(i) Bangkok Declaration relies on modernization theory.
(ii) "Good governance theory" of Lee Kuan Yew (former Premier of Singapore)–to assure subsistence of population, governments must have strong leadership and efficient management at the cost of civil and political rights.
(b) Criticism of ordering
(i) Civil and political rights are necessary to build an economy to the point where there is enough "social surplus" to pay for economic and social rights. [35]
- Democracy adds legitimacy to requests of citizens for sacrifices and economic growth. [36]
- Authoritarianism is an impediment to economic growth [36]
- Europe took a number of decades concentrating on civil and political before addressing economic and social rights. [35]
- Japan enjoyed a simultaneous democratization and economic boom. [36]

(ii) Because civil and political rights are comparatively cheap to economic and social ones, it is only these that Asia can really afford.[35]
(iii) Economic and social rights do not best lead to democracy. As Alexis de Tocqueville claimed, the best school for democracy is democracy itself. [35]
(c) Preeminence of economic interests over all rights–Asian countries are not even implementing economic and social rights due to impediments and costs for economic benefits (no unions so labor is cheap so can compete with West). [36-37]

C. Orientalism is dominated by West-centrism, using the Western imperialist concept of Orient–Occident (Them and Us) to lump all of the Orient into one basket and all of the West into another (Oriental dualism). [37&42]
(1) Outright rejection of civil and political rights as incompatible with "Asian values" ascribes homogeneity to all of Asia–something that does not exist. [39]
(2) "Asia is Beautiful" discourse undermines Asian self-esteem–having to claim and prove equality with West lends legitimacy to the presumption of inferiority. [40]
(3) Assertion of Asian identity leads to castigation of Asians who 'mimic' whites as "bananas"–that if the West values human rights, an Asian that also does so is a sell-out to his own culture. [40-41]
(a) This conception adopts the Western self-perception of historical rightness even though democracy and human rights were not achieved there until the 20th century. [41]

D. Liberal democracy is well-suited for Asia
(1) Asia is diverse
(a) Asia has every major religion, plus indigenous religions–much too diverse to attribute any one set of values. [43]
(b) Asia's diversity is not compartmentalized by national borders. [43]
(2) Liberal democracy is best suited for legitimizing a diverse country. [44]
(a) Separates politics and religion
(b) Assures all groups equal rights (including minorities)
(c) American paradigm is not the only liberal democracy–other structures could be achieved for legislative power sharing and consensual decision making.
(3) Stability is better secured by a liberal democracy
(a) Oppression does not dissolve discontent, but suppresses it, creating pent up indignation and hatred that will increase instability over the long-term. [44]
(b) Fairness of liberal democracies stabilize systems by resolving rather than suppressing conflict. [44-45]
(4) Justice is based on consensus (Rawls)–a liberal democracy seeks to establish a "overlapping consensus" of world views. [47] This should not simply be a reconstruction of conventional political culture. [48]
(5) Synopsis: diversity in Asia requires liberal democracy to legitimize governments and bring peaceful discourse, which will go hand-in-hand will civil and political rights, which will create economic and social conditions to guarantee economic and social rights.
(6) Individualist and communitarian misconceptions
(7) West in many ways is communitarian–a tradition of civic involvement with community-based cooperation and endeavors. [50]
(8) Asia in many ways is individualistic:
(a) Confuciansim emphasized autonomous thought. Like John Stuart Mill, it requires critical, individual analysis to reach substantively-based, justifiable decisions and opinions. [51]
(b) Buddhism–while rejecting ego, stresses self-reliance in spiritual awakening. Family and community are distractions. Dharma can only be found through independent thought and analysis. [52]
(c) Islam–Sufism (a reform sect from the 8th century). It believes in direct a connection with the deity (through ascetic practices) for a basis of knowledge. [52]
(d) Japanese Merchant Class (4th century to 19th century)–individualistic urban culture emphasizing aesthetic self-expression and a catalyst for social development. Self-disembowelment was a means of civil disobedience–taking personal responsibility for actions. [53]
(9) Individualist-communitarian tensions run not *between* West and Asia, but *within* each of them. [54]

(10) Communitarian aspects of Asian societies is conducive to democracy–it provides a platform for a willingness to undertake responsibility for the common good (beyond the traditional family unit). [54]
  (a) Communitarianism of the American colonies provided the solidarity necessary to promote democracy (despite intolerance & superstitions). [55]

(11) Political participation is necessary in capitalist systems to preserve communitarianism–in authoritarian states like Singapore there is encouragement economically toward self-interest (profit). Without the ability to participate politically that is the only arena. Political participation on the other hand will preserve communitarian heritage by giving it space to operate. [56]

(12) A balance between individualism and communitarianism is necessary for a mature form of cummunality–individual rights enable a person to strike a balance between competing communal responsibilities. [57]

(13) Although individuals may have the right to resist communal coercion, a judicial system is important to make conflict resolution truly consensual. It provides a level playing field that removes as an asset to one over the other an unequal distribution of socioeconomic power. [58]

(14) Liberal democracy is neither individualistic or communitarian, but a combination of the two in a way that makes the tensions between them productive. [58]