general rule, in weighing the importance of a particular religious practice against the need to protect public health, international tribunals usually accord priority to the latter. This is evident from ECHR case law, where the protection of public health took precedence over religious objections when a Dutch farmer objected to joining the state's animal health-care scheme,[149] and a Sikh prisoner claimed that his faith forbade him from sweeping the floor of his prison cell.[150]

(ii) Public order A second ground on which international human rights law permits the imposition of limits on religious dress or symbols is the maintenance of public order.[151] In many parts of the world religious symbols are especially capable of provoking civil unrest or violence.[152] Thus, for example, it is inconceivable in contemporary Europe that a member of a white supremacist sect would be accorded an unfettered right to display, publicly, an offensive item (for example, a swastika) on the grounds of his/her belief.

The need to maintain public order is often seen most vividly in prisons. For example, it was the rationale for the European Commission of Human Rights refusing a Sikh prisoner's request to wear the clothes of his choice,[153] and was even the basis for a Buddhist prisoner being forbidden from growing a beard.[154] Similarly, the importance of keeping good order in educational institutions explains why curbs have been imposed in schools on the display of 'religious' symbols on the basis of their association with gang culture.[155] Indeed, the need to maintain school discipline may even justify a school's ban on a Muslim pupil from wearing a religious garment that does not conform to its uniform policy.[156]

(iii) Public morals A third ground on which international human rights law permits the imposition of limits on religious dress or symbols is the need to

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149 *X v Netherlands*, Application No 1068/61 (1962) 5 ECHR Yearbook 278.

150 *X v UK*, Application No 8231/78 (1982) 28 DR 5, 38.

151 For example, see Article 9(2) ECHR, Article 12(3) ACHR, and Article 18(3) ICCPR.

152 See *Humphries v Connor* (1864) 17 ICLR 1.

153 *X v UK*, Application No 8231/78 (1982) 28 DR 5, 38.

154 *X v Austria*, Application No 1753/63 (1965) 8 ECHR Yearbook 174. In view of the increasing recognition of prisoners' rights in recent decades, this ruling, given more than forty years ago, seems unlikely to be followed today.

155 See *Stephenson v Davenport Community School District*, 110 F.3d 1303 (8th Cir, 1997), where a cross tattoo, sported in contravention of a school dress code, was not protected speech under the *US Constitution*.

156 See *R (On the Application of Begum) v Headteacher and Governors of Denbigh High School* [2006] UKHL 15, where the House of Lords held that a school acted lawfully when it prohibited a Muslim girl from wearing a garment (jilbab) that fell outside its uniform policy.

protect public morals. Were, for example, a religious emblem to undermine public morality or offend considerations of taste and decency, curbs could be placed on it.[157] Such cases are of course rare. However, just as the state may impose restrictions on what its citizens wear on the grounds of public decency,[158] so too may similar curbs legitimately be placed on items of religious dress or related symbols.

(iv) The fundamental rights and freedoms of others A final (and much more common) reason for imposing restrictions on religious dress is the need to 'protect the fundamental rights and freedoms of others'.[159] This phrase, which (with the exclusion of the word 'fundamental') also appears in Article 9(2) ECHR, provides that societal interests may prevail over those of an individual or group wishing to manifest their religion or belief. As a consequence, a Muslim woman wishing to travel overseas and wearing a *niqab* that only leaves her eyes visible may be required to show her face to a (preferably female) official to proceed through passport control. Similarly, the need to accord respect to the rights of others almost certainly prohibits a Sikh male from being allowed to bring his *kirpan* with him into the cabin of an aeroplane.

Yet it is not always so easy to quantify what is meant by 'the fundamental rights and freedoms of others'. For example, in *Şahin v Turkey*, the European Court upheld curbs on a medical student wearing an Islamic headscarf at her university on the basis that it was necessary to take into account 'the impact which wearing such a symbol . . . may have on those who choose not to wear it'.[160] The need to protect 'others' in such circumstances may apply particularly to children or young people, who are often clearly susceptible to peer pressure when it comes to acting or dressing in a certain way. However, the implication of the Court's ruling in *Şahin*, that rational autonomous adult university students could be pressurised into wearing the headscarf because of the decision to do so by some of their contemporaries, is open to serious question, and appears to take the protection of 'others' criterion too far.[161]

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157 For example, a crucifix of a naked Christ displaying his genitalia would probably fall within this category.

158 For example, in *Boroff v Van Wert City Board of Education* 220 F.3d 465 (6th Cir, 2000); 121 S Ct 1355 (2001), a school acted lawfully in preventing a student from wearing a Marilyn Manson T-shirt on the ground that the attire was 'vulgar, offensive and contrary to the mission of the school'.

159 Article 18(3) ICCPR.

160 *Şahin v Turkey* (2007) 44 EHRR 5, [115] ('*Şahin*').

161 For example, see Lewis, above n 139.

D International human rights law and the challenge of Islamic dress

The criteria listed above for imposing curbs on religious dress are seldom determinative, and the Special Rapporteur has held that situations where the State imposes restrictions on religious dress or symbols must 'be considered on a case-by-case basis [taking] into account the other human rights that may be at stake'.[162] In this context certain forms of Islamic dress raise a number of difficult issues.

First, there is little consensus amongst Muslims themselves as to what constitutes an appropriate form of dress in Islam.[163] The *Qur'an* stipulates that 'believing women' should 'guard their modesty'[164] but, because modesty is a 'relative term',[165] it is open to different interpretations. International human rights tribunals are hardly the best place for resolving such disputes, a point made by Judge Tulkens in her dissenting judgement in *Şahin* when she pointed out that '[i]t is not the court's role to make an appraisal of a religion or religious practice'.

A second problem is the association of Islamic dress with the subordination of women.[166] Whilst some insist that Muslim dress codes characterise the oppression of females,[167] others deny these claims,[168] pointing out that the original purpose of Islamic rules in this area was the protection of women from predatory males.[169] It is in this context that international human rights law, which clearly forbids discrimination or unfavourable treatment on the ground

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162 See Jahangir, above n 9, [70].

163 For example, the views of Irshad Manji, *The Trouble with Islam Today: A Muslim's Call for Reform in Her Faith* (St Martin's Griffin, New York, 2005) can be contrasted with those of Yusuf Al-Qaradawi, *The Lawful and the Prohibited in Islam* (Al-Halal Wal Haram Fil Islam) (Islamic Book Service, 1982).

164 *Surah* XXIV, verse 31.

165 H Afshar, 'Gender Roles and the Moral Economy of Kin Among Pakistani Women in West Yorkshire' (1989) 15 *New Community* 211, 219.

166 Islamic headscarves and veils also touch on issues such as sexual equality and (where girls are concerned) the relationship between schools, parents and children. See generally Committee on the Rights of the Child, *Concluding Observations on the second periodic report of France*, UN Doc CRC/C/15/Add.240 (4 June 2004) [25], [26].

167 See J Entelis, 'International Human Rights: Islam's friend or foe' (1996–97) 20 *Fordham International Law Journal* 1251, 1292.

168 It is argued that traditional Islamic dress offers women greater (not less) freedom, in giving them the confidence to move around in public free from the gaze of men: L Abu-Odeh, 'Post-Colonial Feminism and the Veil: Considering the Differences' (1992) 26 *New England Law Review* 1527.

169 See R Hassan, 'Rights of Women within Islamic Communities' in J van der Vyver and J Witte Jr (eds) *Religious Rights in Global Perspective* (Martinus Nijhoff, The Hague, 1996) 361.

of one's sex, must offer guidance. Such matters are highly contentious,[170] and international courts and officer holders have increasingly found themselves being asked to consider the association of certain forms of Muslim dress with radical Islam. Thus, the Special Rapporteur on religion and belief has condemned the ill-treatment of women for being forced to 'wear what is described as Islamic dress',[171] while the European Court has expressly linked the Islamic headscarf with 'extremist political movements' and the absence of 'gender equality' in Turkey.[172] The Special Rapporteur has recently spoken of the need to 'depoliticise issues relating to religion or belief',[173] but few issues in contemporary Europe are more 'politicised' than that of Islamic dress.

Thirdly, the issue of Muslim dress tends to highlight a number of significant (and seemingly irreconcilable) differences between the Islamic and secular traditions. One such difference is the role of faith in public life. A fundamental tenet of secularism is that, in the exercise of one's religion or belief, there is an important difference between the public and the private realm.[174] As a consequence, religion in the West is typically confined to the 'private' rather than the 'public' sphere. This 'privatisation' of faith has led to claims that religious beliefs are often trivialised or regarded as akin to a 'hobby' by organs of the state.[175] Yet in Islam there is no clear distinction between the public and private aspects of a person's existence.[176] Thus international human rights bodies have the invidious task of formulating rules governing what is appropriate in the public sphere for both Muslims and non-Muslims.

A fourth problem raised by curbs on religious dress is the place of secularism in multi-faith liberal democracies. In the West secular values are generally

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170 For example it has been argued that the principle of sex equality should take priority over considerations of religion or belief: S Mullally, 'Beliefs that Discriminate: A Rights Based Solution?' in Conor Gearty and Adam Tomkins (eds) *Understanding Human Rights* (Mansell, London, 1996) 480.

171 See Jahangir, above n 128, [38].

172 *Şahin* (2007) 44 EHRR 5, [115].

173 See Asma Jahangir, *Report of the Special Rapporteur on freedom of religion or belief*, UN Doc A/HRC/4/21 (26 December 2006) [49].

174 On the place of religion in public life generally see Roger Trigg, *Religion in Public Life: Must Faith Be Privatised?* (Oxford University Press, Oxford, 2007); David Harte, 'Defining the Legal Boundaries of Orthodoxy for Public and Private Religion in England' in R O'Dair and A Lewis (eds) *Law and Religion* (Oxford University Press, Oxford, 2001) 471–95.

175 See generally S Carter (1994) *The Culture of Disbelief* (Anchor, New York, 1994).

176 See A Rahman, *Islam, Ideology and The Way of Life* (Muslim Schools Trust, London, 1980).

seen as being value neutral, in contrast to those of a partisan religious tradition.[177] Thus, Western judges often stress their 'secular' credentials in order to emphasise their commitment to 'serving a multi-cultural community of many faiths'.[178] This suggestion that secularism is synonymous with neutrality is also evident in the jurisprudence of the European Court of Human Rights. For example, in *Dahlab v Switzerland*, the European Court held that a rule prohibiting a Muslim teacher from wearing the Islamic veil in school was justified on the ground that this dress ban was necessary to guarantee religious neutrality in the classroom of a multi-faith society.[179] Yet the assumption that secular values are somehow 'neutral' has been strongly challenged.[180] Some have attacked the rise of what has been variously termed 'secular fundamentalism'[181] or 'ideological secularism'.[182] Indeed, even a senior official at the UN, in warning that 'secularism should not be used to manipulate religious freedom', has recently spoken of the need to strike a balance 'between secularism and respect for freedom of religion',[183] but the practical problems of attaining such a balance remain largely unresolved.[184]

A final challenge facing those responsible for interpreting or formulating international human rights law is the fact that freedom of religion or belief may, on occasion, impose a positive obligation on states. For example, the UN Declaration (1981) stipulates that governments must 'take effective measures to prevent and eliminate discrimination on the grounds of religion or belief',[185] but there is little agreement as to when a liberal state should be required to accommodate the religious practices of an individual or faith community.[186] Given the suspicion that Islamic dress engenders in the West,

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177 See M Evans, **'**Religion, Law and Human Rights: Locating the Debate' in P W Edge and G Harvey (eds) *Law and Religion in Contemporary Society* (Ashgate, Aldershot, 2000) 182.

178 *Sulaiman v Juffali* [2002] 1 FLR 479, [47].

179 Application No 42393/98 (15 February 2001, unreported).

180 Iain Benson, 'Notes Towards a (Re)Definition of the Secular' (1999–2000) 33 *University of British Columbia Law Review* 519.

181 On this generally see P F Campos, 'Secular Fundamentalism' (1994) 94 *Columbia Law Review* 1814.

182 See Tariq Modood, *Multiculturalism* (Oxford University Press, Oxford, 2007) 63–86.

183 See HRC, UN Doc A/HRC/2/SR (25 October 2006) [57].

184 For examples of state-sponsored secularism, see Bohdan Bocieurkiw and John Strong (eds) *Religion and Atheism in the USSR and Eastern Europe* (Macmillan, London, I975).

185 Article 4(1) UN Declaration (1981).

186 For example, one can compare the views of B Parekh, *Rethinking Multiculturalism: Cultural Diversity and Political Theory* ((Macmillan, London, 2000), with those of B Barry, *Culture and Equality* (Harvard University Press, Cambridge, 2002).

it seems that relatively few European nations are likely to follow the lead of the UK's Judicial Studies Board, which recently recommended that religious items of clothing (including the *niqab*) could be permitted to be worn in the courtroom as long as they did not interfere with the interests of justice.[187]

5 Conclusion

The fact that age-old enmities between the Islamic and Western worlds have resurfaced in recent years significantly increases the challenges facing those responsible for formulating and interpreting principles of international human rights law in the field of religion and belief. [188] Indeed, such challenges are made all the more onerous by the fact that elements of what is commonly referred to as 'fundamentalism' can be found in many religions other than Islam, including Christianity,[189] Hinduism,[190] Judaism[191] and Sikhism.[192] Yet, notwithstanding such considerations, international human rights law still has an important role to play in the elimination of religious discrimination and intolerance in the twenty-first century. After all, it is a valuable resource in the practical resolution of international disputes, as well as being of great symbolic value in highlighting the fact that freedom of religion or belief is a fundamental right.

Of course, a strong case can be made that more needs to be done to eliminate the evils of religious discrimination and intolerance.[193] This is evidently the view of the UN Human Rights Council, which recently expressed its concern at the 'slow progress' of states in implementing the terms and provisions of the UN Declaration (1981).[194] One possible way forward would be to reformulate the UN Declaration (1981) and make it a legally binding interna-

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187 Judicial Studies Board, *Equal Treatment Bench Book* (2007) Ch 3.3.

188 On the relationship between the Islamic and Western worlds see Tariq Ali, *The Clash of Fundamentalisms: Crusades, Jihads and Modernity* (Verso Books, London and New York, 2002).

189 See Steve Brouwer, Paul Gifford and Susan D Rose, *Exporting the American Gospel: Global Christian Fundamentalism* (Routledge, New York, 1996).

190 See Sumit Sarkar, *Beyond Nationalist Frames: Postmodernism, Hindu Fundamentalism, History* (Indiana University Press, Bloomington, 2002).

191 See Israel Shahak and Norton Mezvinsky, *Jewish Fundamentalism in Israel* (Pluto Press, London, 2004).

192 See H Oberoi, 'Sikh Fundamentalism: Translating History into Theory', in M Marty and R Appleby (eds) *Fundamentalisms and the State: Remaking Polities, Economies, and Militance* (University of Chicago Press, Chicago, 1993) 256.

193 See David Hodge, 'Advocating the Forgotten Human Right: Article 18 of the Universal Declaration of Human Rights – Religious Freedom' (2006) 49 *International Social Work* 431.

194 HRC, Elimination of all Forms of Intolerance and of Discrimination Based on Religion or Belief, UN Doc A/HRC/Res/6/37 (14 December 2007) [9(k)].

tional Convention, by modelling it on, say, the *Convention on the Elimination of All Forms of Racial Discrimination*. Such a new Convention would not merely supplement existing rules under international human rights law (such as Article 18 ICCPR), but might also lead to the creation of a new Committee (similar to the Committee on the Elimination of Racial Discrimination) that could monitor the activities of states parties in the field of religion and belief. Although a former Special Rapporteur has called for the introduction of a Convention to tackle the problem of intolerance and discrimination based on religion or belief,[195] there is little enthusiasm within the international community for reform in this area. As Malcolm Evans has pointed out, the general view is that 'the time is not yet right for a Convention' outlawing discrimination on the grounds of religion or belief.[196]

Given the formidable problems of reconciling conflicting ideologies in the field of religious human rights, it is hard to imagine when the time will be right for radical reform in this area. The UN has long called on states to eliminate religious discrimination and related intolerance.[197] Yet all too often its fine words fall on deaf ears because, as the Special Rapporteur has observed, religious freedom is still 'far from being a reality' for many people in the world today.[198]

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[195] See Angelo Vidal d'Almeida Ribeiro, *Implementation of the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief*, UN Doc E/CN.4/1988/45 (6 January 1988) [55], [66].

[196] Evans, above n 4, 261. See also Bhiyyah G Tahzib, *Freedom of Religion or Belief: Ensuring Effective International Legal Protection* (Martinus Nijhoff, Dordrecht, 1996) 441.

[197] For example, over a decade ago 'religious intolerance' was listed alongside other social evils (such as torture, summary executions, disappearances, racism, apartheid, terrorism and discrimination against women) as constituting 'serious obstacles to the full enjoyment of all human rights': *Vienna Declaration and Programme of Action*, UN Doc A/CONF.157/23 (12 July 1993) [30].

[198] See Jahangir, above n 173, [48].

19. DRIP feed: the slow reconstruction of self-determination for Indigenous peoples

*Melissa Castan**

1 Introduction

After centuries of wavering between benign neglect and outright hostility, the international arena, and in particular the institution of the United Nations, has now turned its attention to the needs and desires of Indigenous peoples. Three decades of increasing interest in Indigenous peoples, their issues, needs and human rights, have culminated in the adoption of the *Declaration on the Rights of Indigenous Peoples* ('the Declaration' or 'DRIP') by the United Nations General Assembly in late 2007.[1] The adoption of the Declaration is seen by many as a fundamental affirmation of the identity and protection of Indigenous people, and indeed necessary to their very survival.[2] However, the adoption of the Declaration is not the conclusion of an era of focus and development of international law but, rather, the culmination of a period of dynamic change; the transition from 'object' to 'subject' of international law is complete.[3] Many outstanding areas of debate about Indigenous peoples' rights are not concluded, and some debates are still evolving, particularly on those issues revolving around the meaning of self-determination, the emerging standard requiring full prior and informed consent and the relationship between collective and individual rights.

In many respects, the ongoing tension over the obligations of states to accord full recognition of these human rights for their Indigenous people centres on the challenges presented by the different meanings attributed to the

* The author would like to thank David Yarrow and Jay Tilley for their invaluable assistance in the preparation of this chapter. Thanks also for the comments and suggestions provided by the editors of this book.

1 GA Res 61/295, UN GAOR, 61st sess, 107th plen mtg, UN Doc A/Res/61/295 (13 September 2008). The resolution was adopted in the 61st session of the United Nations General Assembly on Thursday 13 September 2008.

2 J Gilbert, 'Indigenous Rights in the Making: The United Nations Declaration on the Rights of Indigenous Peoples' (2007) 14 *International Journal on Minority and Group Rights* 207.

3 With apologies to R Barsh, 'Indigenous People in the 1990s: From Object to Subject of International Law' (1994) 7 *Harvard Human Rights Journal* 33.

right of self-determination, both by Indigenous communities and the settler states that have long asserted sovereign power over them.

This chapter will examine some of these issues through the vehicle of an evaluation of the process towards and the content of the recent UN General Assembly *Declaration on the Rights of Indigenous Peoples*. This framework is adopted because the Declaration is a wide-reaching, long-negotiated expression of international consensus, which seeks to address most major issues of debate in the area of recognition and protection of Indigenous peoples' rights at international law. This chapter will consider the meaning and consequences of recognising rights to self-determination and the challenge to state sovereignty (if any), the protection of land, traditional economies and cultural practices, and the emerging requirement of free prior and informed consent when dealing with development in Indigenous lands.[4] Whilst these themes are captured in the Declaration, much of the international jurisprudence and debate has developed out of the UN treaty bodies and work that predates the Declaration. These treaty bodies are fundamental to the architecture of international human rights law, and the rights of Indigenous peoples.

2 Background

Reviewing the entire landscape of international instruments and organs that address matters of concern to Indigenous peoples would test the reader's patience, and has been done elsewhere in many excellent reviews.[5] In short, it

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[4] There are a plethora of other issues still under debate in this context, such as the appropriate definition of who is 'Indigenous', what are the collective rights of Indigenous people as opposed to their individual rights, and the role of other human rights concepts such as equality and non-discrimination. These issues are only dealt with in passing in this chapter, but are well ventilated in the contemporary literature on the nature of Indigenous rights at international law; see, for example, B Kingsbury, 'Five Competing Conceptual Structures of Indigenous People's Claims at International Law' (2001) 34 *New York University Journal of International Law and Politics* 189; W Kymlicka, 'Theorising Indigenous Rights' 29 (1999) *University of Toronto Law Journal* 281; D Ivison, 'The Logic of Aboriginal Rights' (2003) 3 *Ethnicities* 321; A Lokan, 'From Recognition to Reconciliation: The Functions of Aboriginal Rights Law' (1999) 23 *Melbourne University Law Review* 65.

[5] S J Anaya, *Indigenous Peoples in International Law* (Oxford University Press, Oxford, 2nd ed, 2004); S Weissner, 'Rights and Status of Indigenous Peoples: A Global, Comparative and International Legal Analysis' (1999) 12 *Harvard Human Rights Journal* 57; C Charters, 'Indigenous Peoples and International Law and Policy' (2007) 18 *Public Law Review* 22; B Morse, 'The rights of indigenous and minority peoples' in E Perakis (ed) *Rights of Minority Shareholders: XVIth Congress of the International Academy of Comparative Law* (Brisbane, 2002) General Reports; J Gilbert, 'Indigenous Rights in the Making: The United Nations Declaration on the Rights of Indigenous Peoples' (2007) 14 *International Journal on Minority and Group Rights* 207.

is worth observing that the development of most issues of international law regarding Indigenous peoples has occurred through the United Nations structures and processes,[6] which has certain mechanisms that address the particular concerns of Indigenous peoples, whether as part of general human rights law or by specifically addressing Indigenous issues. For example, the long-standing Working Group on Indigenous Populations,[7] the newer Permanent Forum on Indigenous Issues,[8] and the work of the Special Rapporteur on human rights and indigenous peoples[9] and other related Special Rapporteurs[10] and Independent Experts all contribute to the burgeoning jurisprudence on Indigenous peoples and their rights. In addition there are a number of well-known declarations and protocols which also incorporate the rights, concerns and input of Indigenous peoples.[11]

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[6] Although it should be noted that some steps have been taken through the ILO's *Convention concerning Indigenous and Tribal Peoples in Independent Countries*, opened for signature 27 June 1989, ILO Convention No 169 (entered into force 5 September 1991) ('*ILO Convention No 169*'), which has been ratified by 20 Member States. The list of these States can be found at: http://www.ilo.org/ilolex/cgi-lex/ratifce.pl?C169 at 4 February 2009.

[7] This body addressed Indigenous issues from 1982 until the dismantling of the United Nations Commission on Human Rights in 2006, when the Working Group was disbanded. Its new manifestation is known as the 'Expert Mechanism on the Rights of Indigenous Peoples' pursuant to HRC Res 6/16, UN Doc A/HRC/Res/6/16 (28 September 2007).

[8] Established in 2000 by the United Nations Economic and Social Council ('ECOSOC') in ECOSOC Res 2000/22, UN Doc E/Res/2000/22 (28 July 2000). The Permanent Forum first convened in 2002, and meets annually.

[9] For example see the 'Country Reports' available at http://www2.ohchr.org/english/issues/indigenous/rapporteur/ at 4 February 2009.

[10] See, for example, Special Rapporteur Erica-Irene Daes, *Indigenous People's Permanent Sovereignty over Natural Resources: Final Report*, UN Doc E/CN.4/Sub.2/2004/30 (13 July 2004), and Special Rapporteur on Treaties, Agreements and Constructive Arrangements between States and Indigenous Populations, Mr Miguel Alfonso Martínez, *Study on treaties, agreements and other constructive arrangements between States and indigenous populations: Final Report*, UN Doc E/CN.4/Sub.2/1999/20 (22 June 1999).

[11] *International Covenant on Economic, Social and Cultural Rights*, opened for signature 19 December 1966, 999 UNTS 3 (entered into force 3 January 1976) ('ICESCR'); *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990); *Convention on Elimination of all forms of Discrimination Against Women,* opened for signature 18 December 1979, 1249 UNTS 13 (entered into force 3 September 1981); *Convention on the Elimination of All Forms of Racial Discrimination*, opened for signature 21 December 1965, 660 UNTS 195 (entered into force 4 January 1969) ('CERD'); *Declaration on the Rights of Members belonging to National or Ethnic, Religious and Linguistic Minorities*, GA Res 47/135, UN GAOR, 47th sess, 92nd plen mtg, UN Doc

There are, as mentioned earlier, UN human rights treaties and conventions which address the rights of all people, and within those instruments there are specific and general rights which address issues of concern to Indigenous peoples. Best known of these instruments are the *International Covenant on Civil and Political Rights* ('ICCPR'),[12] and the concomitant jurisprudence of the Human Rights Committee ('HRC'), particularly regarding Articles 1 (right of self-determination) and 27 (minority rights). The text of those articles does not address the subject of Indigenous people explicitly, but the HRC has responded to this omission by specifying that these articles have a special role to play in the protection of Indigenous peoples, particularly in *General Comment 23*, elucidating the scope of Article 27 in particular:

> The enjoyment of the rights to which article 27 relates does not prejudice the sovereignty and territorial integrity of a State party. At the same time, one or other aspect of the rights of individuals protected under that article – for example, to enjoy a particular culture – may consist in a way of life which is closely associated with territory and use of its resources. This may particularly be true of members of Indigenous communities constituting a minority.[13]

The CERD likewise applies to all people, but the CERD Committee has specified the role the Convention has for Indigenous people, both in its decisions and country comments and in its *General Recommendation 23*:

> The Committee is conscious of the fact that in many regions of the world indigenous peoples have been, and are still being, discriminated against, deprived of their human rights and fundamental freedoms and in particular that they have lost their land and resources to colonists, commercial companies and State enterprises. Consequently the preservation of their culture and their historical identity has been and still is jeopardised.[14]

A/Res/47/135 (18 December 1992); *Rio Declaration on Environment and Development*, UN Doc A/CONF.151/26 (Vol I) (12 August 1992); *Declaration of the World Summit on Sustainable Development*, UN Doc A/CONF.199/L.6/Rev.2 (4 September 2002); and the *Convention on Biodiversity*, opened for signature 5 June 1992, 1760 UNTS 79 (entered into force 29 December 1993), to name but a few. These are reviewed in C Charters, 'Indigenous Peoples and International Law and Policy' (2007) 18 *Public Law Review* 22, and S Pritchard and C Hednow-Dorman, 'Indigenous People and International Law: A Critical Overview' (1998) 3 *Australian Indigenous Law Review* 437.

[12] Opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976).

[13] Human Rights Committee, *General Comment 23: The Rights of Minorities*, UN Doc CCPR/C/21/Rev.1/Add.5 (8 April 1994) [3.2] (see also [7]). Note too that the Inter-American Court on Human Rights has expanded upon the rights of Indigenous peoples.

[14] Committee on the Elimination of Racial Discrimination, *General*

Although there is a surfeit of other treaties and conventions, the ICCPR and the CERD have dominated the development of international standards concerning Indigenous rights because these treaties have monitoring bodies with a high degree of credibility and wide-ranging participation from the vast majority of member states.[15] Beyond the UN are the other organisations that address Indigenous peoples' rights; the ILO via *Convention 169 on Indigenous and Tribal Peoples*, the Organization of American States (with its proposed *Declaration on Indigenous Peoples*), the Inter-American Human Rights System, the European Union, and the World Bank.

3 Setting the groundwork

After some twenty years development, on 13 September 2007 the United Nations General Assembly finally adopted the *Declaration on the Rights of Indigenous Peoples*, with a majority of 143 of the 158 states voting in favour of its adoption.[16] The Declaration had its origins in the work of the UN Working Group on Indigenous Populations ('WGIP'), established in 1982 under the Sub-Commission on the Prevention of Discrimination and Protection of Minorities,[17] itself a subordinate body to the Commission on Human Rights. The WGIP was the first UN body specifically mandated to deal with Indigenous issues, by reviewing developments in and international standards concerning Indigenous people and their rights.[18] At that time the only international instrument to deal specifically with the rights of Indigenous people was the ILO *Convention 107 on Indigenous and Tribal Populations*.[19] Although important historically, it was not widely accepted by Indigenous people as representing their needs or concerns, and was not broadly ratified by ILO member states.[20] The WGIP became a forum for Indigenous representa-

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Recommendation XXIII: Indigenous Peoples, UN Doc A/52/18 Annex V (18 August 1997).

15 S Joseph, J Schultz and M Castan, *The International Covenant on Civil and Political Rights: Cases, Materials and Commentary (2nd Edition)* (Oxford University Press, Oxford, 2004) 875.

16 Of the 15 states that did not vote in favour of the Declaration, 11 abstained (Azerbaijan, Bangladesh, Bhutan, Burundi, Colombia, Georgia, Kenya, Nigeria, Russian Federation, Samoa and Ukraine;) and 4 cast negative votes (Australia, Canada, New Zealand and the United States of America).

17 This body was renamed the 'Sub-Commission on the Promotion and Protection of Human Rights' in 1999.

18 ECOSOC Res 1982/34, UN Doc E/Res/1982/34 (7 May 1982) sets out the mandate of the WGIP.

19 *Convention concerning the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries*, opened for signature 26 June 1957, ILO Convention No 107 (entered into force 2 June 1959).

20 Only 18 States ratified: http://www.ilo.org/ilolex/cgi-lex/ratifce.pl?C107 at 4 February 2009. See also Anaya, above n 5.

tives who, noting the absence of international and UN principles specific to their needs or developed with their input, began work on a Declaration that reflected their participation and concerns.[21]

In 1993 the WGIP agreed on its final text for the 'Draft UN Declaration on the Rights of Indigenous Peoples' ('Draft Declaration') and it was passed up the UN hierarchy to the Sub-Commission, which adopted the draft in 1994.[22] At this point, the Draft Declaration stalled for 11 years in the hands of the Working Group on the Draft Declaration ('WGDD'), an inter-sessional group created by the Commission on Human Rights to review the draft text. Unlike the WGIP and the Sub-Commission, which were each composed of independent experts, the WGDD comprised representatives from UN member states, and these representatives baulked at most of the Articles of the Draft Declaration, particularly those that enlivened thorny issues of self-determination, land rights, and collective rights.[23] Finally, in 2006, the Chairperson-Rapporteur of the WGDD broke the impasse by proposing a compromise text, which sought to meet some of the objections of the States parties and maintain the integrity of the WGIP text.

The successor to the Commission, the Human Rights Council, adopted the revised text in June 2006, and it was anticipated that the General Assembly would adopt the declaration in the next session at the end of 2006. However, last-minute concerns expressed by the African Group of nations led to a postponement, in order to further consider issues of particular concern. Those issues coalesced under similar impediments that had arisen earlier, such as concerns about the impact of the rights to self-determination and to traditional lands and natural resources, and certain constitutional concerns about maintenance of distinct political, legal and economic institutions, whilst participating in the mainstream institutions.[24] Ultimately, some further amendments to the draft text were made and were accepted by the states that had already voted in

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21 Erica-Irene A Daes, 'An overview of the history of indigenous peoples: self-determination and the United Nations' (2008) 21 *Cambridge Review of International Affairs* 7.

22 This version of the text is found in the Sub-Commission's *Annual Report 1994*, UN Doc E/CN.4/Sub.2/1994/56 (26 August 1994).

23 Gilbert, above n 2, 213. Daes, above n 21.

24 African Commission on Human and Peoples' Rights, *Final Communiqué of the 41st Ordinary Session held in Ghana on 16–30 May 2007* (2007) ACHPR, http://www.achpr.org/english/communiques/communique41_en.html at 4 February 2009. See also W van Genugten, *The African Move towards the Adoption of the 2007 Declaration on the Rights of Indigenous Peoples: The Substantive Arguments Behind the Procedures*, Paper prepared for the Committee on the Rights of Indigenous Peoples of the International Law Association (2008) SSRN, http://ssrn.com/abstract=1103862 at 4 February 2009.

favour of the text.[25] This development paved the way for adoption in mid-September 2007.

The main sticking point in the progress to adoption of the Declaration had always been political sensitivity over the concept of self-determination by states parties, and the challenge to territorial integrity that this right superficially appeared to present. A Declaration is not a legally binding document per se, but some parts of a Declaration may reflect customary international practice or recognition of such practice, and may thus constitute international law.[26] Although the DRIP is not a legally binding document, it captures a number of human rights obligations that States have already embraced, and so to some degree it represents general principles of international law.[27] Article 38 DRIP provides that States shall, in cooperation with Indigenous peoples, 'take the appropriate measures, including legislative measures, to achieve the ends of this Declaration'.[28] Where states abide by Article 38 DRIP, they elect to become bound by their own legislative requirements.[29]

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[25] In essence these amendments revolved around providing explicit recognition that States could adopt different methods for meeting the standards set in the Declaration, as the situation of Indigenous peoples differs across nations and regions. Paragraph 23 of the Preamble to the Declaration addressed the concerns expressed by the African nations. The amendments can be viewed at http://www.un.org/esa/socdev/unpfii/documents/Declaration_IPs_31August.pdf at 4 February 2009.

[26] For example, a wide range of authors have suggested that the *Universal Declaration of Human Rights* GA Res 217A (III), UN Doc A/810, 71 (1948) ('UDHR') has evolved into customary law: A Eide and G Alfredsson, 'Introduction' in A Eide and G Alfredsson (eds) *The Universal Declaration of Human Rights: A Common Standard of Achievement* (Martinus Nijhoff, The Hague, 1999) xxv, xxxi–ii; Louis B. Sohn: 'The new international law: protection of the rights of individuals rather than states' (1982) 32 *American University Law Review* 1 at 15–17.

[27] S J Anaya, *Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people*, UN Doc A/HRC/9/9 (11 August 2008) [43].

[28] The Supreme Court of Belize recently referred to the Declaration as expressing general principles of international law, and of such force that the Government of Belize should not disregard it; *Aurelio Cal and Ors v Belize*, Supreme Court of Belize, No 171/2007. This was the first decision of a state court to apply the UN DRIP, just one month after its adoption by the General Assembly.

[29] The nature of the Declaration was cited by Australia and Canada as reasons for not adopting the Declaration. The specifics of their reasoning will be discussed below. See Australia's concerns as expressed by Australia's Ambassador to the UN, Robert Hill, who said that, although the Declaration 'would not be binding on Australia and other States as a matter of international law, he was aware that its aspirational contents would be relied on in setting standards by which States would be judged in their relations with Indigenous peoples': United Nations Department of Public Information, 'General Assembly Adopts Declaration on Rights of Indigenous Peoples;

4 The legal dimensions of the right to self-determination

The articulation of the right of self-determination is the opening Article in both the ICCPR and the ICESCR, which together with the UNDP are accepted as the primary standards of human rights principles expressed in the UN human rights system. All peoples have the right to self-determination, and Indigenous peoples are 'peoples' for that purpose.[30] The prioritising of the right of self-determination is deliberate; it is a guarantee designed to protect human dignity by protecting full and free participation in civil and political processes and upholding rights to pursue economic, social and cultural development. The right to self-determination is essential to the enjoyment of all human rights.[31]

The debate about the nature of self-determination is often presented as a matter of competing claims to the sovereignty of a territory, particularly in the context of Indigenous rights to self-determination. This false dichotomy has long been discredited, yet it was instrumental in the delay in adoption of the Declaration by the WGDD and the Group of African nations, and the negative votes of the four Anglo-settler nations, Canada, Australia, New Zealand and the United States ('CANZUS'). The threat or fear of challenges to territorial sovereignty may well be a straw man argument, as there is such a wide range of state obligations to minorities and Indigenous people, the vast majority of which fall well short of any sovereign claim.[32] Nevertheless it is an argument that is raised relentlessly, as discussed below. The short answer to these expressions of uncertainty and discomfort with the rights of Indigenous peoples' self-determination may be that the Declaration and its expressions of self-determination (and the other normative standards) are all subject to, and read in conformity with, other UN instruments and articulations of human rights. Self-determination thus is incapable of being elevated to a point that brings it into conflict with international 'hard' law on territorial integrity and state sovereignty, which are essentially the 'dominant paradigms' underpinning the United Nations system.[33]

"Major Step Forward" Towards Human Rights for All, Says President' (Press Release, 13 September 2007).

[30] Anaya above n 5; Gilbert, above n 2, 218; P Thornberry, *Indigenous Peoples and Human Rights* (Manchester University Press, Manchester, 2002) 420.

[31] Human Rights Committee, *General Comment 12: Article 1 (right to self-determination)*, UN Doc HRI/GEN/1/Rev.1 at 12 (13 March 1984); Committee on the Elimination of Racial Discrimination, *General Recommendation 21: The right to self-determination*, UN Doc A/51/18 Annex VIII at 125 (8 March 1996).

[32] For instance consider the concept of 'relational' self-determination, reflecting the need for Indigenous people to assert some control in the relationship with the dominant institutions of the state; for example, M Murphy, 'Representing Indigenous Self-determination' (2008) 58 *University of Toronto Law Journal* 198.

[33] Anaya, above n 5.

This deference to territorial and sovereign integrity is captured by Article 46(1) DRIP:

> Nothing in this Declaration may be interpreted as implying for any State, people, group or person any right to engage in any activity or to perform any act contrary to the *Charter of the United Nations* or construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States.

Article 46 DRIP would appear to mollify those states that fear a reinvigorated decolonisation process for Indigenous people. Indeed, by including the explicit limitation to the meaning of self-determination in this specific context, the General Assembly has arguably acceded to a different (or lesser) quality of self-determination due to Indigenous people, in contrast to that due to peoples generally, as most other expressions of self-determination do not come with such explicit provisos.[34]

Despite its position of prominence as Article 1 ICCPR, the HRC has foreclosed the justiciability of the right of self-determination, whether for Indigenous peoples or others. It did so on the basis that the right attaches to peoples, but the *Optional Protocol*[35] (under which states submit to the complaints procedure of the ICCPR) provides a 'recourse procedure for individuals', and thus is not available for peoples in their collective sense.[36] Concomitantly, the scope of protection accorded by other articles of the ICCPR has been elevated, perhaps in part in response to the inaccessibility of Article 1 ICCPR.

Notably the HRC has emphasised the rights Indigenous people must be accorded under Article 27 ICCPR regarding the rights of minorities to enjoy their own culture. This development manifests in a variety of forms, including the traditional, cultural and economic practices associated with land and other natural resources.[37] Although some aspects of the rights under Article 27

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[34] This development was anticipated by Thornberry, above n 30, 420.

[35] *Optional Covenant 1 to the International Convention for Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 302 (23 March 1976).

[36] *Kitok v Sweden*, UN Doc CCPR/C/33/D/197/1985 (27 July 1988) [6.3]; *Ominayak v Canada*, UN Doc CCPR/C/38/D/167/1984 (26 March 1990) ('*Ominayak v Canada*'); *Marshall (Mikmaq) v Canada*, UN Doc CCPR/C/43/D/205/1986 (4 November 1991); *Mahuika v New Zealand*, UN Doc CCPR/C/70/D/547/1993 (15 November 2000).

[37] See Human Rights Committee, *General Comment 23: The rights of minorities (Article 27)*, UN Doc. CCPR/C/21/Rev.1/Add.5 (8 April 1994). *Ominayak v Canada*, *Länsman v Finland*, CCPR/C/83/D/1023/2001 (15 April 2005) and reiterated by Committee on the Elimination of Racial Discrimination, *General Recommendation 23 (Rights of indigenous peoples)*, UN Doc A/52/18, Annex V at 122 (18 August 1997) ('*General Comment 23*'). For general discussion see Joseph et al, above n 15, 779–89.

ICCPR come close to some aspects of the rights under Article 1 ICCPR (particularly on control of activities carried out on traditional lands), the HRC has warned against confusing the ambit of these Articles; Article 27 ICCPR is an individual right attaching to a person who is part of a minority (or in this case Indigenous group) whereas Article 1 ICCPR attaches to peoples.

> [3.1] The Covenant draws a distinction between the right to self-determination and the rights protected under Article 27. The former is expressed to be a right belonging to peoples and is dealt with in a separate part (Part I) of the Covenant. Self-determination is not a right cognisable under the *Optional Protocol*. Article 27, on the other hand, relates to rights conferred on individuals as such and is included, like the articles relating to other personal rights conferred on individuals, in Part III of the Covenant and is cognisable under the *Optional Protocol*.[38]

The right to participate in decisions concerning one's traditional lands and resources would thus be an aspect of self-determination,[39] but also represents part of the right to protection of a minority's culture and of cultural practices over land.[40] Perhaps the Declaration represents an engagement with Indigenous peoples as peoples rather than minorities, and so opens a wider vista of self-determination recognition without stretching to breaking point the territorial integrity of States.

5 Consent or consult?

A notable development out of the right of self-determination (as opposed to minority rights) is the articulation of the right to free, prior and informed consent ('FPIC'), a standard that is now expressed not only in the Declaration[41] but in a number of international sources (explored below). The Declaration appears to be relatively firm on the need for states parties to secure the consent of Indigenous communities affected by state action, such as development plans, the extinguishment of property rights, or the granting of rights to third parties.

The particular rights that Indigenous peoples have to self-determination include the right to negotiate and participate in decisions relevant to them as Indigenous peoples. Whilst this is no doubt inherent in rights of equality, or non-discrimination and political participation, it also is an expression of modern legal and constitutional concepts such as the rule of law, and

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38 *General Comment 23*, above n 37, [3.1]; see also [3.2] set out above.

39 As explained by A Xanthaki, *Indigenous Rights and United Nations Standards: Self-Determination, Culture and Land* (Cambridge University Press, Cambridge, 2007); Anaya, above n 5.

40 Xanthaki, above n 39; Joseph et al, above n 15.

41 See particularly Articles 10, 19, 28, 29 and 32 DRIP.

democratic rights.[42] Effective participation is an aspect of self-determination (this is often referred to as the 'internal' aspect[43]) and is clearly protected in Articles 1 and 27 ICCPR, Article 5(c) CERD, Article 2(3) of the *United Nations Declaration on the Rights of Members belonging to National or Ethnic, Religious and Linguistic Minorities*,[44] and the *Declaration on Friendly Relations*.[45]

The legal principles regarding participation of and consultation with Indigenous peoples are found in the jurisprudence of human rights bodies, as well as being explicitly set out in their governing instruments. For example the CERD in its General Recommendation 23 emphasised the requirement for 'informed consent' in the context of participation in public life and decisions made concerning their interests.[46] The HRC has similarly expressed the need for 'effective participation' of Indigenous peoples in decisions that impact upon their articulation of cultural practices, including those relating to land and natural resources.[47] This requirement of informed consent arises out of the minority, language and cultural rights expressed in Article 27 ICCPR.[48]

The World Bank, as ostensibly the primary international development institution, must also abide by the requirement to observe the concerns of Indigenous people affected by any development project it finances. The World Bank's *Operational Policy and Bank Procedure 4.10 on Indigenous Peoples* states that finance for development projects can only be provided when the Bank is sure that the borrower has ensured free, prior, and informed consultation, resulting in wide support for the development project by the Indigenous peoples affected by it.[49] The objective underlying this standard was said to be

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42 See, for example, the discussion in Xanthaki, above n 39, 253.

43 R McCorquodale, 'Self-Determination: A Human Rights Approach' (1994) 43 *International and Comparative Law Quarterly* 857, 864.

44 See above n 11.

45 *Declaration on Principles of International Law Concerning Friendly Relations and Cooperation among States in Accordance with the Charter of the United Nations*, GA Res 2625(XV), UN GAOR, 25th sess, 1883rd plen mtg, UN Doc A/8018 (24 October 1970) [7]. Further see Joseph et al, above n 15, Ch 7.

46 See CERD General Recommendation 23, above n 37, [4], which calls on states to make certain that 'Indigenous peoples have equal rights in respect of effective participation in public life and no decisions directly relating to their rights and interests are taken without their informed consent'.

47 UN Human Rights Committee, *General Comment No 23: The rights of minorities (Art 27)*, UN Doc CCPR/C/21/Rev.1/Add.5 (8 March 1994) [7].

48 Joseph et al, above n 15, 782.

49 World Bank, *Operational Directive 4.10 (Indigenous People)*, World Bank Doc OP/BP4/10 (2005) World Bank, http://web.worldbank.org/WBSITE/EXTERNAL/TOPICS/EXTSOCIALDEVELOPMENT/EXTINDPEOPLE/0,,menuPK:407808~pagePK:149018~piPK:149093~theSitePK:407802,00.html at 5 February

to 'ensure that Indigenous peoples do not suffer adverse effects during the development process, particularly from Bank-financed projects, and that they receive culturally compatible social and economic benefits'.[50] Notably this requirement fell well short of requiring Indigenous peoples' 'consent', and at best provides a requirement for negotiation; there is no implicit veto right for Indigenous peoples in the World Bank policy.

The Organization of American States, in the *Proposed American Declaration on the Rights of Indigenous Peoples* ('PADRIP'),[51] expresses the requirement of minimum standards of consultation[52] and sets out an obligation on states parties to ensure that their decisions 'regarding any plan, program or proposal affecting the rights or living conditions of Indigenous people are not made without the free and informed consent and participation of those people' unless there are exceptional circumstances.[53]

This proposed Declaration has already had an impact on the development of international law. The Inter-American Commission on Human Rights, in its decision in the Western Shoshone case, *Dann v United States*, reiterated that general international legal principles included 'the right of Indigenous peoples to legal recognition of their varied and specific forms and modalities of their control, ownership, use and enjoyment of territories and property; the recognition of their property and ownership rights with respect to lands, territories and resources they have historically occupied' and specifically pointed to a requirement of mutual consent in the change to any pre-colonial property rights:

> [W]here property and user rights of Indigenous peoples arise from rights existing prior to the creation of a state, recognition by that state of the permanent and inalienable title of Indigenous peoples relative thereto and to have such title changed only by mutual consent between the state and respective Indigenous peoples when they have full knowledge and appreciation of the nature or attributes of such property.[54]

2009 (OP 4/10). For discussion of the World Bank and its adherence to this requirement see S Errico, 'The World Bank and Indigenous Peoples: the Operational Policy on Indigenous Peoples (OP 4.10) Between Indigenous Peoples' Rights to Traditional Lands and to Free, Prior, and Informed Consent' (2006) 13 *International Journal on Minority and Group Rights* 367.

50 OP 4.10 [1].

51 *Proposed American Declaration on the Rights of Indigenous Peoples*, OAS Doc OEA/Ser/L/V/.II.95 Doc.6 (26 February 1997).

52 See Articles XII, XV, XVII PADRIP.

53 Article XXI(2) PADRIP.

54 *Mary and Carrie Dann v United States*, Case 11.140, Report No 75/02, Inter-Am C HR, Report No 75/02, Doc 5, Rev.1 at 860 (2002) [130], [131]. The Western Shoshone Dann sisters refused to comply with a US grazing permit system, applicable

This decision built on the Inter-American Court's findings in the earlier *Awas Tingni* case, recognising traditional or customary communal title held by the Mayangna community, and finding a violation of their property rights by Nicaragua when a foreign commercial operation was granted felling rights over Indigenous community lands.[55]

In its recent decision of *Saramaka People v Suriname* about a non-Indigenous tribal group,[56] the Inter-American Court expanded upon the standard of 'consultation', identifying three safeguards: states must ensure effective participation of an Indigenous or Tribal group whose rights to lands are to be restricted, the group members must receive a reasonable benefit from the proposal, and an independent report on the risks and impacts of the proposal must be prepared prior to any change to property rights.[57] The Court also stated that where large-scale development projects are planned that would have major impacts on the Saramakan territory, the State will have a duty to do more than consult; it must gain their consent according to their traditions and customs.[58] The decision demonstrates this Court's attempt to balance the needs of the minority group with those of the wider majority, and its decision referred to the DRIP in support of this reconciliation of competing interests.[59]

Another international instrument, outside the UN system, that addresses the requirement for consultation is the International Labour Organisation's *Convention No 169 on Indigenous and Tribal Peoples*, which was (somewhat optimistically) described by Anaya as 'the most prominent and specific international affirmation of Indigenous cultural integrity and group identity' (prior of course to the adoption of the DRIP).[60] Article 6 sets out the requirement that

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to traditional Western Shoshone lands. The Commission found that the US had failed to ensure that the Indigenous people's property rights had been extinguished prior to the granting of the permit in accordance with rights of equality and to property, under the proposed American Declaration. Interestingly the Commission also made reference to the standards arising from the ILO *Convention No 169*, an instrument to which the US is not a party.

55 *Mayagna (Sumo) Awas Tingni Community v Nicaragua*, Inter-Am Ct HR (Ser C) No 79 (31 August 2001).

56 *Case of the Saramaka People v Suriname*, Inter-Am Ct H R (Ser C) No 172 (28 November 2007) ('*Sarmaka People*').

57 *Saramaka People* [129]–[140]; see further *Saramaka People v Suriname*, Inter-Am Ct H R (Ser C) No 172 (8 August 2008).

58 Ibid, [34].

59 Ibid, [131].

60 S J Anaya, 'International Human Rights and Indigenous Peoples: the Move Towards the Multicultural State' (2004) 21 *Arizona Journal of International and Comparative Law* 13, 17.

> [1] Governments shall:
> (a) Consult the peoples concerned, through appropriate procedures and in particular through their representative institutions, whenever consideration is being given to legislative or administrative measures which may affect them directly;
> (b) Establish means by which these peoples can freely participate, to at least the same extent as other sectors of the population, at all levels of decision-making in elective institutions and administrative and other bodies responsible for policies and programmes which concern them;
> (c) Establish means for the full development of these peoples' own institutions and initiatives, and in appropriate cases provide the resources necessary for this purpose.
> [2] The consultations carried out in application of this Convention shall be undertaken, in good faith and in a form appropriate to the circumstances, with the objective of achieving agreement or consent to the proposed measures.[61]

Aside from the requirement of 'consent' expressed in the proposed American Declaration, all major international standards on this issue, including the requirement of participation and consultation expressed in the CERD, the HRC, the World Bank and the ILO, fall short of requiring the full agreement of the Indigenous peoples whose territories, polity, knowledge or other domains are affected by a proposed action, by the state or other third party. Thus in international law, as derived from these international institutions, participation and consultation is not equivalent to 'consent'; only a consultative or participatory standard is required to be met.

In contrast, the Declaration appears to have set a higher standard than the prevailing 'consultative' standard as articulated at international law to require a 'free prior and informed consent' of Indigenous peoples.[62] This might even amount to a power of veto over development on lands and territories understood as belonging to Indigenous people, or similarly over the use of their traditional knowledge, whether it be biological, genetic, medicinal or horticultural in nature.[63] Certainly many Indigenous communities would no doubt

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[61] See Part II of the Convention on standards for dealing with Indigenous people and their traditional lands, and specifically Article 15 on consultation requirements regarding mineral exploration and extraction. Although consultations are required, there is no requirement for consent as such; see M Tomei and L Swenson, *Indigenous and Tribal Peoples: A Guide to ILO Convention 169* (International Labour Organization, 1996, Geneva) [8] cited in Anaya above n 5, 37.

[62] Articles 10, 11.2, 19, 28, 29(2), 32(2) DRIP.

[63] The main areas of development or state intervention where the need for FPIC is likely to arise were considered in an International Workshop convened by ECOSOC in 2005, which identified the following areas (amongst others): Indigenous lands and territories and sacred sites (for example, exploration, such as archaeological explorations, as well as development and use), treaties, agreements and other constructive arrangements between States and Indigenous peoples, tribes and nations, extractive

assert the right to prohibit unwanted incursions into their traditional domain.[64] The consent to having one's rights diminished or extinguished can be seen readily as an expression of self-determination, equivalent to those 'acts of self-determination' that have their origin in consensual transfers of territory.[65]

However, in a workshop convened under the auspices of the UN Economic and Social Council to deliberate on the meaning of 'free, prior and informed consent', the issues were considered at length as follows:

> Consultation and participation are crucial components of a consent process. Consultation should be undertaken in good faith. The parties should establish a dialogue allowing them to find appropriate solutions in an atmosphere of mutual respect in good faith, and full and equitable participation. Consultation requires time and an effective system for communicating among interest-holders. Indigenous peoples should be able to participate through their own freely chosen representatives and customary or other institutions. The inclusion of a gender perspective and the participation of Indigenous women are essential, as well as participation of children and youth, as appropriate. This process may include the option of withholding consent. Consent to any agreement should be interpreted as Indigenous peoples have (sic) reasonably understood it.[66]

The Workshop thus reverted to the consultative standard, already established in international law, and did not embrace the higher requirement for full consent.

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industries, conservation, hydro-development, other developments and tourism activities in Indigenous areas, natural resources including biological resources, genetic resources, traditional knowledge of Indigenous peoples, and policies or programmes that may lead to the removal of their children, or their removal, displacement or relocation from their traditional territories. See ECOSOC, *Report of the International Workshop on Methodologies regarding Free, Prior and Informed Consent and Indigenous Peoples*, UN Doc E/C.19/2005/3 (17 February 2005) [45].

[64] A Carmen, 'Indigenous Peoples, Treaties and the Right to Free, Prior and Informed Consent' (Paper presented at the Symposium on the Implementation of the United Nations Declaration on the Rights of Indigenous Peoples, Vancouver, 19–20 February 2008).

[65] The Savoy Plebiscite of 1860 is an example, but one could point to contemporary examples such as those cited by the Inter-American Court in *Saramaka People*.

[66] ECOSOC, above n 63, [46]–[48]. Other aspects of the term are defined at [45]–[46], for instance: '[f]ree should imply no coercion, intimidation or manipulation; [p]rior should imply that consent has been sought sufficiently in advance of any authorization or commencement of activities and that respect is shown for time requirements of Indigenous consultation/consensus processes.' The term 'informed' is specified to imply that information is provided that covers a series of minimum aspects listed in [46], such as the nature, size, pace, reversibility and scope of any proposed project or activity, the reasons or purpose and the duration of the activity and the localities affected, as well as a requirement to provide an economic, social, cultural and environmental impact assessment, and details about the personnel and procedures involved.

Despite the strong statements of the Inter-American Court, it is unlikely at this stage that international law demands that states gain the full consent of Indigenous communities prior to embarking on actions that extinguish, modify or interfere with their human rights, particularly to lands and natural resources.[67] If this is the case, it must be recognised that international standards, including decisions of juridical committees and monitoring bodies, do require the participation of, and consultation with, Indigenous communities when such state action is anticipated. Consultations conducted in inappropriate fora, with no attempt to gain wide-ranging understanding of the issues and consequences, or without addressing the concerns expressed by the Indigenous community, will amount to *mala fides*, and will, according to prevailing jurisprudence, be in breach of a wide range of international instruments and obligations.[68]

But ultimately the nation state still holds the balance of power, as it is not yet obliged by international human rights law to gain the consent of Indigenous people so long as it satisfactorily constructs mechanisms and processes to engage, negotiate, or consult with the affected peoples.

6 Colonial foundations

Of course self-determination has been a central issue in international law and policy for centuries, and is a wider concept than that applicable to Indigenous people particularly. Numerous opinions of leading jurists and international judicial and treaty bodies have given tangible meaning to the concept of self-determination. Why then have certain states baulked at the prospect of according recognition to Indigenous self-determination, and in particular in the terms expressed in the DRIP?

The reasons expressed for the lack of support for the Declaration fall into a narrow band. Australia stated it had concerns that the references to self-determination could be used to instigate a secessionist movement and were only applicable in a situation of decolonisation.[69] Canada expressed concern

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[67] This is particularly so given the DRIP is a Declaration rather than a legally binding treaty.

[68] Xanthaki, above n 39, 256, suggests the full range of methods and endeavours to meet this standard, including, but not limited to, 'discussions or meetings with local leaders and individuals or with local organisations or communities, establishment of local advisory boards, Indigenous membership on protected area management boards'.

[69] United Nations Department of Public Information, above n 29. Note that Australia recently revisited its position on the DRIP. The Commonwealth Minister for Families, Housing, Community Services and Indigenous Affairs has publicly stated that Australia now supports the Declaration. See J. Macklin, speech at Parliament House, Canberra, 3 April 2009. It remains to be seen whether the government's statements of good intention bring about substantive recognition and protection of the rights expressed in the Declaration.

at the requirement for the concept of free, prior and informed consent, citing incompatibility with Canada's parliamentary system (Australia and New Zealand made mention of similar points).[70] The United States cited the process of developing the Declaration as 'failed' and the text 'confusing', thus risking 'endless conflicting interpretations and debate about its application'.[71]

Nation states most fear self-determination in its 'external' construction, which is the right of peoples to claim certain territory, or secede, as an expression of their right to self-determination. However, this external aspect of the right is only available under limited circumstances in international law, such as when the community in question live under colonial or neo-colonial domination, or when they are severely mistreated and their human rights comprehensively and continuously abused; the external form of self-determination is then enlivened.[72] However, the right of self-determination entails more than this external aspect, and for the most part does not involve any challenge to a state's territorial integrity. Many peoples are not able to assert the external expression of self-determination but are nevertheless able to express the 'internal' construction of that right.

Anaya suggests that self-determination has both 'constitutive' and 'ongoing' aspects. The constitutive element requires that the governing institutional order must develop with the participation and accession of the peoples governed.[73] The 'ongoing' aspect means that the governing order must be one that people can live in, and progress freely within, on an evolving basis. Anaya suggests that the decolonisation process does not require turning the clock back (and thus seeking to return governance arrangements to their previous state), but that remedies responsive to present-day aspirations of the peoples denied self-determination can be developed. Remedying the injustice typically suffered by Indigenous people denied self-determination is both retrospective and prospective in nature. It does not impose any threat to territorial integrity, nor to governmental or constitutional structures.

Murphy, writing about 'relational' self-determination, refers to the inevitable interdependence between the often small and weakened Indigenous communities and their larger, politically and economically empowered settler governments. This relationship necessitates an articulation of self-determination that embraces not only the possibility of Indigenous self-governance (as is often imagined) but also the need for a

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70 Ibid.
71 Ibid.
72 Joseph et al, above n 15, 149.
73 Anaya, above n 5.

variety of opportunities to access political power and decision making at local, provincial and national levels.[74] A diverse permeation of Indigenous influence is a more nuanced but ultimately a more holistic approach to comprehending the true meaning of self-determination for Indigenous people.[75]

Indeed this approach is probably supported by international legal principles, which do not accommodate a rule or practice of permitting assertions of sovereign or territorial independence of Indigenous people from the state in which they are located. As is regularly overlooked, international law often authenticates illegitimate acquisitions of sovereignty, particularly where it occurred in previous centuries.

Why then did the four CANZUS nations resile from their initial support for recognition of Indigenous rights at international law, and particularly in the Declaration? All are successors to the British colonial mission and, unlike other former British colonies such as India, Pakistan and Ghana (or even South Africa, belatedly), none have experienced the internal decolonisation process. All four have histories of legal and illegal dispossession of their Indigenous peoples, and they now face similar crises in the management of policy and governance in these marginalised Indigenous communities, who represent minor proportions of the dominant settler populations. Although some recognition of inherent, aboriginal or native title to lands may be apparent in each of these CANZUS states, closer examination shows that these efforts have been less than wholeheartedly embraced, whether it be by the legislatures, judiciaries or governments, be they provincial or national.[76]

Just at the point where recognition of Indigenous rights was to launch onto the international stage (after too many dress rehearsals), these four liberal democratic and wealthy nations coalesced to work to deflect and reject the claims of Indigenous peoples, their most impoverished and marginalised peoples. Whether this coalition emerged out of a reflection of national anxieties and lack of confidence in their own historical claims to national sovereignty, or domestic electoral politics played an unseen trump card, is left for speculation.[77] Perhaps the fundamentals of international law, its history and architecture are at the core.

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74 Murphy, above n 32, 199.

75 J Borrows, *Recovering Canada: The Resurgence of Indigenous Law* (University of Toronto Press, Toronto, 2002) 140.

76 K McNeil, 'Judicial Treatment of Indigenous Land Rights in the Common Law World' in B J Richardson, S Imai and K McNeil (eds) *Indigenous Peoples and the Law: Comparative and Critical Perspectives* (Hart, Oxford, 2009).

77 D Day, *Claiming a Continent: A New History of Australia* (Harper Collins, Sydney, 1997).

If we accept that the protection of the Westphalian concept of the nation state is probably the paramount construct in modern international law, then it becomes easier to identify the source of the resistance to claims to Indigenous self-determination, whether expressed within the Declaration or beyond it. The origins of modern international law are contiguous with the colonial project; having acquired territory by displacement of indigenous sovereignty, certain states are still unable to reconceptualise their contemporary liberal legal and political structures to accommodate indigenous claims. The fear of fracturing the narrative of settlement means that the colonial project endures.[78]

7 Rebuilding the architecture

Fundamentally, the *Declaration on the Rights of Indigenous Peoples* is significant in at least one very important dimension: it has reinvigorated the right to self-determination as a right with particular meaning for Indigenous people after its enforceability and indeed its meaning were undermined by the HRC decision to deny access to peoples by way of its formalistic approach to the *Optional Protocol to the ICCPR*. The diminution of the role of collective rights weakened the credibility of one of the most valuable sources of international law.

Although in some respects the Declaration does little more than restate many existing human rights principles in their application to Indigenous people, in other respects it goes further. The Declaration represents an advance in international practice in its recognition of Indigenous peoples as collectivities, rather than atomised individuals. The Declaration has particularised the human rights of Indigenous peoples, and by doing so it presents a challenge to the individualistic, liberal conception of rights belonging to people, rather than peoples. This may be an example of new state practice in the elaboration of collective rights; but inherent in this practice is still a reluctance among some nations to face the rearticulation or reconception of their settlement narrative to address the continuing displacement and denigration of their Indigenous communities. The next advance will be the development of appropriate mechanisms and processes to protect these rights; without these tools the Declaration will end up as a worthy but unenforceable statement of human rights principles.

The development of implementation mechanisms is of critical importance to Indigenous communities, because their human rights (and those of many other vulnerable and marginalised groups) are only realisable where strong

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78 See A Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge University Press, Cambridge, 2005).

mechanisms of human rights practice are available to provide enforceable sanctions when states fail in their implementation and protection. Where human rights architecture is strong, protection of rights is more effectively secured. The Declaration is re-establishing the right of self-determination as a foundation stone in international human rights law.

Postscript

The Human Rights Committee recently expressed the view that Article 27 ICCPR requires that states parties gain Indigenous consent to measures that substantively interfere with their traditional economies. It stated in *Poma v Peru*[79] at paragraph 7.6:

> In the Committee's view, the admissibility of measures which substantially compromise or interfere with the culturally significant economic activities of a minority or indigenous community depends on whether the members of the community in question have had the opportunity to participate in the decision-making process in relation to these measures and whether they will continue to benefit from their traditional economy. The Committee considers that participation in the decision-making process must be effective, which requires not mere consultation but the free, prior and informed consent of the members of the community. In addition, the measures must respect the principle of proportionality so as not to endanger the very survival of the community and its members.

Although no mention is made of the Declaration, its impact is implicit in this HRC decision. The expression of support for the notion of Free Prior and Informed Consent from the HRC adds significantly to the notion that meaningful consent is required where the implementation of decisions or projects is likely to cause substantive interruption or interference with traditional Indigenous means of survival.

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79 *Poma v Peru* CCPR/C/95/D/1457/2006 (27 March 2009).

20. Counter-terrorism and human rights

Alex Conte

The relationship between terrorism and human rights is a matter that had been reflected upon well before the events of 11 September 2001. Since 9/11, with events such as the establishment of the detention camp at Guantánamo Bay and the proliferation of security and counter-terrorist legislation throughout the world, more attention has been paid to the issue of the extent to which counter-terrorism impacts upon human rights. As noted by the UN Office of the High Commissioner for Human Rights:[1]

> Some States have engaged in torture and other ill-treatment to counter terrorism, while the legal and practical safeguards available to prevent torture, such as regular and independent monitoring of detention centres, have often been disregarded. Other States have returned persons suspected of engaging in terrorist activities to countries where they face a real risk of torture or other serious human rights abuse, thereby violating the international legal obligation of non-refoulement. The independence of the judiciary has been undermined, in some places, while the use of exceptional courts to try civilians has had an impact on the effectiveness of regular court systems. Repressive measures have been used to stifle the voices of human rights defenders, journalists, minorities, indigenous groups and civil society. Resources normally allocated to social programmes and development assistance have been diverted to the security sector, affecting the economic, social and cultural rights of many.

This chapter first considers the general obligation upon States to comply with human rights when countering terrorism, pointing to relevant international and regional documents on the subject. It then moves to explain the practicalities for achieving human rights compliance while countering terrorism, taking into account the various requirements of that body of law.

1 The requirement to comply with human rights while countering terrorism

In September 2006, the General Assembly adopted the United Nations Global

[1] Office of the High Commissioner for Human Rights, 'Human Rights, Terrorism and Counter-terrorism', Fact Sheet No 32 (United Nations, New York and Geneva, 2008), available online at http://www.ohchr.org/Documents/Publications/Factsheet32EN.pdf, p. 1.

Counter-Terrorism Strategy,[2] as recommended by Kofi Annan in his report entitled *Uniting Against Terrorism*. In this report, the then Secretary-General emphasised that effective counter-terrorism measures and the protection of human rights are not conflicting goals but complementary and mutually reinforcing ones.[3] He identified the defence of human rights as essential to the fulfilment of all aspects of an effective counter-terrorism strategy and identified human rights as having a central role in every substantive section of his report. The Secretary-General stated that 'Only by honouring and strengthening the human rights of all can the international community succeed in its efforts to fight this scourge.'[4]

These sentiments are reflected within the Global Counter-Terrorism Strategy in three ways. First, respect for human rights for all and the rule of law forms one of the four pillars of the Strategy. It is also identified as 'the fundamental basis of the fight against terrorism', thus applicable to all four pillars of the Strategy. Finally, the Strategy's recognition of the importance of respect for human rights while countering terrorism is significantly strengthened through the express assertion that a lack of the rule of law and violations of human rights amount to conditions conducive to the spread of terrorism.[5] While these are very positive steps, however, the language of the Global Strategy is very broad and it does not deal with the question of whether Chapter VII resolutions of the Security Council, including those on counter-terrorism, are capable of modifying or somehow suspending human rights obligations. It is therefore necessary to further consider the question of human rights obligations in the context of countering terrorism.

Not only are counter-terrorism and human rights protection interlinked and mutually reinforcing, but compliance with human rights has practical advantages in bringing the perpetrators of terrorist acts to justice. On a national level, the obtaining of evidence by means which are found to be in violation of human rights may be inadmissible in a prosecution. At an international level, such violations may impact upon the ability of other States to rely on

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[2] *The United Nations Global Counter-Terrorism Strategy*, GA Res 60/288, UN GAOR, 60th sess, 99th plen mtg, UN Doc A/Res/60/288 (8 September 2006). The UN General Assembly reaffirmed the UN Global Counter-Terrorism Strategy in September 2008: see GA Res 62/272, UN GAOR, 62nd sess, 120th plen mtg, UN Doc A/Res/62/272 (5 September 2008).

[3] Report of the Secretary-General, *Uniting Against Terrorism: Recommendations for a Global Counter-terrorism Strategy*, UN Doc A/60/825 (27 April 2006) [5]. See also Part VI thereof.

[4] Ibid [118].

[5] *Global Counter-Terrorism Strategy*, above n 2, Pillar I [preambular].

such evidence through mutual legal assistance.[6] It should also be observed that fighting terrorism in a non-human-rights-compliant way can lead to a decline in a State's own moral and human rights standards and/or a progressive decline in the effectiveness of checks and balances on agencies involved in fighting terrorism. As Frederich Neitzsche wrote in 1886, 'He who fights monsters should be careful lest he thereby becomes a monster. And if thou gaze long into the abyss, the abyss will also gaze into thee.'[7]

Added to the obligation of States to protect those within their jurisdiction from acts of terrorism, an obvious point should be made about the nature of international law obligations. Not only are human rights essential to the countering of terrorism, but States are obliged by law to comply with their international human rights obligations when countering terrorism. This is due to the fact that States have human rights obligations under customary international law (applicable to all States)[8] and international treaties (applicable to States parties to such treaties).[9] This principle is based not only upon a State's international obligations, but also upon directions of the UN Security Council, the General Assembly, the Commission on Human Rights, and the Human Rights Council. It was a clear message of the 2005 World Summit Outcome on the question of respect for human rights while countering terrorism, the General Assembly concluding that[10]

> [i]nternational cooperation to fight terrorism must be conducted in conformity with international law, including the Charter and relevant international conventions and protocols. States must ensure that any measures taken to combat terrorism comply with their obligations under international law, in particular human rights law, refugee law and international humanitarian law.

Before considering applicable documents of the United Nations and others, it should be noted that the universal treaties on counter-terrorism expressly require compliance with various aspects of human rights law. In the context of

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[6] Françoise Hampson, 'Human Lights Law and Judicial Co-operation in the Field of Counter-Terrorist Activities', a paper presented at the *Expert Workshop on Human Rights and International Co-operation in Counter-Terrorism*, 15–17 November 2006, Triesenberg, Liechtenstein.

[7] Frederich Neitzsche, *Beyond Good and Evil* (Penguin Classics, London, 1973), Chapter IV ('Apophthegms and Interludes', Section 146).

[8] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)* (Merits) [1986] ICJ Reports, [172]–[201] ('*Military and Paramilitary Activities*').

[9] See the *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1195 UNTS 311 (entered into force 27 January 1980), Article 34.

[10] *2005 World Summit Outcome*, GA Res 60/1, UN GAOR, 60th sess, 8th plen mtg, UN Doc A/Res/60/1 (16 September 2005) [85].

the International Convention for the Suppression of the Financing of Terrorism, for example, this is illustrated in article 15 (expressly permitting States to refuse extradition or legal assistance if there are substantial grounds for believing that the requesting State intends to prosecute or punish a person on prohibited grounds of discrimination); article 17 (requiring the 'fair treatment' of any person taken into custody, including enjoyment of all rights and guarantees under applicable international human rights law); and article 21 (a catch-all provision making it clear that the Convention does not affect the other rights, obligations and responsibilities of States).[11]

A UN General Assembly

The UN General Assembly has adopted a series of resolutions on terrorism since 1972, initially concerning measures to eliminate international terrorism, and later addressing more directly the topic of terrorism, counter-terrorism and human rights. The second series of General Assembly resolutions began in December 1993, with the adoption of resolution 48/122, entitled *Terrorism and Human Rights*. Both sets of resolutions contain various statements about the need, when implementing counter-terrorist measures, to comply with international human rights standards. A common phrasing of this idea is seen in General Assembly resolution 50/186:

> The General Assembly, . . .
> *Mindful* of the need to protect human rights of and guarantees for the individual in accordance with the relevant international human rights principles and instruments, particularly the right to life,
> *Reaffirming* that all measures to counter terrorism must be in strict conformity with international human rights standards, . . .
> 3. *Calls upon* States to take all necessary and effective measures in accordance with international standards of human rights to prevent, combat and eliminate all acts of terrorism wherever and by whomever committed.[12]

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[11] International Convention for the Suppression of the Financing of Terrorism, opened for signature 10 January 2000, 2179 UNTS 232 (entered into force 10 April 1992).

[12] *Human Rights and Terrorism*, GA Res 50/186, UN GAOR, 50th sess, 99th plen mtg, UN Doc A/Res/50/186 (22 December1995) preambular [13] and [14], and operative [3]. See also *Human Rights and Terrorism*, GA Res 52/133, UN GAOR, 52nd sess, 70th plen mtg, UN Doc A/Res/52/133 (12 December 1997) preambular [12] and [13] and operative [4]; *Human Rights and Terrorism*, GA Res 54/164, UN GAOR, 54th sess, 83rd pln mtg, UN Doc A/Res/54/164 (17 December 1999) preambular [15] and [16], and operative [4]; *Human Rights and Terrorism*, GA Res 56/160, UN GAOR, 56th sess, 88th plen mtg, UN Doc A/Res/56/160 (19 December 2001) preambular [22] and [23] and operative [5] and [6]; *Human Rights and Terrorism*, GA Res 58/174, UN GAOR, 58th sess, 77th plen mtg, UN Doc A/Res/58/174 (22 December 2003) preambular [20] and [21], and operative [7].

A slightly less robust expression of these ideas was seen in resolution 56/88 following the events of September 11, although still requiring measures to be taken consistently with human rights standards.[13] That should not, however, be taken as a signal that the General Assembly was minded to turn a blind eye to adverse impacts of counter-terrorism upon human rights. On the contrary, the issue became the subject of annual resolutions on that subject alone, entitled *Protection of human rights and fundamental freedoms while countering terrorism*.[14] The first operative paragraphs of these resolutions affirm that:

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[13] The preambular returned to the language of combating terrorism 'in accordance with the principles of the Charter', and operative [4] talked of combating terrorism in accordance with international law 'including international standards of human rights'. See also similar statements within *Measures to Eliminate International Terrorism*, GA Res 57/27, UN GAOR, 57th sess, 52nd plen mtg, UN Doc A/Res/57/27 (19 November 2002) preambular [8] and operative [6]; *Measures to Eliminate International Terrorism*, GA Res 58/81, UN GAOR, 58th sess, 72nd plen mtg, UN Doc A/Res/58/81 (19 December 2003) preambular [9] and operative [6]; *Strengthening international cooperation and technical assistance in promoting the implementation of the universal conventions and protocols related to terrorism within the framework of the activities of the Centre for International Crime Prevention*, GA Res 58/136, UN GAOR, 58th sess, 77th plen mtg, UN Doc A/Res/58/136 (22 December 2003) preambular [10] and operative [5]; *Measures to Eliminate International Terrorism*, GA Res 59/46, UN GAOR, 59th sess, 65th plen mtg, UN Doc A/Res/59/46 (2 December 2004) preambular [10] and operative [3].

[14] *Protection of human rights and fundamental freedoms while countering terrorism*, GA Res 57/219, UN GAOR, 57th sess, 77th plen mtg, UN Doc A/Res/57/219 (18 December 2002); *Protection of human rights and fundamental freedoms while countering terrorism*, GA Res 58/187, UN GAOR, 58th sess, 77th plen mtg, UN Doc A/Res/58/187 (22 December 2003); *Protection of human rights and fundamental freedoms while countering terrorism*, GA Res 59/191, UN GAOR, 59th sess, 74th plen mtg, UN Doc A/Res/59/191 (20 December 2004). See also *Measures to Eliminate International Terrorism*, GA Res 59/46, UN GAOR, 59th sess, 65th plen mtg, UN Doc A/Res/59/46 (2 December 2004) preambular [10] and operative [3]; *Strengthening international cooperation and technical assistance in promoting the implementation of the universal conventions and protocols related to terrorism within the framework of the activities of the United Nations Office on Drugs and Crime*, GA Res 59/153, UN GAOR, 59th sess, 74th plen mtg, UN Doc A/Res/59/153 (20 December 2004) preambular [11] and [12]; *Human Rights and Terrorism*, GA Res 59/195, UN GAOR, 59th sess, 74th plen mtg, UN Doc A/Res/59/195 (20 December 2004) preambular [5], [23] and [24] and operative [8] and [10]; *Protection of human rights and fundamental freedoms while countering terrorism*, GA Res 60/158, UN GAOR, 60th sess, 64th plen mtg, UN Doc A/Res/60/158 (16 December 2005) preambular [2], [3] and [7] and operative [1]; *Protection of human rights and fundamental freedoms while countering terrorism*, GA Res 61/171, UN GAOR, 61st sess, 81st plen mtg, UN Doc A/Res/61/171 (19 December 2006) preambular [3] and [5] and operative [1]; *Protection of human rights and fundamental freedoms while countering terrorism*, GA Res 62/159, UN GAOR, 62nd sess, 76th plen mtg, UN Doc

> States must ensure that any measure taken to combat terrorism complies with their obligations under international law, in particular international human rights, refugee and humanitarian law.

These directions on the part of the General Assembly are reasonably strong in the language they use. It must be recalled, however, that resolutions of the General Assembly do not hold the same weight as international conventions, or decisions of the Security Council. Indeed, Article 10 of the Charter of the United Nations specifically provides that resolutions and declarations of the General Assembly are recommendatory only. This principle is equally applicable to resolutions of the Commission on Human Rights, as a subsidiary organ of the Economic and Social Council (which is only empowered to make recommendations), and those of the Commission's replacement, the Human Rights Council (a subsidiary organ of the General Assembly). Thus, the resolutions just discussed, and those of the Commission to be discussed below, represent guiding principles and non-binding recommendations (what might be termed 'soft law'), rather than binding resolutions, treaty provisions or norms of customary international law ('hard law'). Notwithstanding this, having regard to their repeated and consistent approach, these resolutions are very influential and could be described as representative of international comity. It is also relevant to recall that resolutions may constitute evidence of customary international law, if supported by State conduct that is consistent with the content of the resolutions and with the accompanying *opinio juris* required to prove the existence of customary law.[15]

B UN Security Council

In general terms, Security Council resolutions concerning terrorism have confined their attention upon the threat of terrorism to international peace and security, reflecting the role of the Council as the organ of the United Nations charged with the maintenance of peace and security. That role is reflected in

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A/Res/62/159 (18 December 2007) preambular [3], [4] and [9] and operative [1]; and GA Res 63/185, UN GAOR, 63rd sess, 70th plen mtg, UN Doc A/Res/63/185 (18 December 2008), preambular [3], [5], and [10] and operative [1].

[15] An example of the use of resolutions of the General Assembly to determine the content of customary rules can be seen in *Military and Paramilitary Activities*, above n 8, where the International Court of Justice gave consideration to two resolutions of the Assembly as evidence of the content of the principle of non-intervention: those being the *Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States*, GA Res 213 (XX), UN GAOR, 20th sess, 1408th plen mtg, UN Doc A/Res/20/213 (21 December 1965) and the *Declaration on Principles of International Law Concerning Friendly Relations and Co-Operation Among States*, GA Res 2625 (XXV), UN GAOR, 25th sess, 1883rd plen mtg, UN Doc A/Res/25/2635 (24 October 1970).

the language and scope of Security Council resolutions on terrorism, which, compared with General Assembly and Commission on Human Rights resolutions on the subject, are much narrower in focus. In general terms, the Security Council's resolutions are concerned with the adverse impacts of terrorism upon the security of States and the maintenance of peaceful relations, while the General Assembly and the Commission take a much broader approach to the subject, given their plenary roles and mandates.

Apart from two notable exceptions, the main inference that can be taken from Security Council resolutions about counter-terrorism measures and their need to comply with human rights arises from general statements that counter-terrorism is an aim that should be achieved in accordance with the Charter of the United Nations and international law.[16] This means that such measures must themselves be compliant with the principles of the Charter (which, *inter alia*, seeks to promote and maintain human rights) and international human rights law as a specialised subset of international law. Notable is the fact that members of the United Nations have undertaken, under Article 55(c) and through the preamble to the UN Charter, to observe human rights and fundamental freedoms for all without distinction as to race, language or religion.

The first more express exception mentioned is the 2003 Declaration of the Security Council meeting with Ministers of Foreign Affairs, adopted under resolution 1456. This resolution deals with the question of compliance with human rights. Paragraph 6 of the Declaration provides that:

> States must ensure that any measure [sic] taken to combat terrorism comply with all their obligations under international law, and should adopt such measures in accordance with international law, in particular international human rights, refugee, and humanitarian law.

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[16] See, for example, SC Res 1373, UN SCOR, 4293rd mtg, UN Doc S/Res/1317 (2001) (28 September 2001) preambular [5]; SC Res 1438, UN SCOR, 4624th mtg, UN Doc S/Res/1438 (2002) (14 October 2002) preambular [2]; SC Res 1440, UN SCOR, 4632nd mtg, UN Doc S/Res/1140 (2002) (24 October 2002) preambular [2]; SC Res 1450, UN SCOR, 4667th mtg, UN Doc S/Res/1450 (2002) (13 December 2002) preambular [4]; SC Res 1455, UN SCOR, 4686th mtg, UN Doc S/Res/1455 (2003) (17 January 2003) preambular [3]; SC Res 1456, UN SCOR, 4688th mtg, UN Doc S/Res/1456 (2004) (20 January 2003) preambular [8]; SC Res 1535, UN SCOR, 4936th mtg, UN Doc S/Res/1535 (2004) (26 March 2004) preambular [4]; SC Res 1540, UN SCOR, 4956th mtg, UN Doc S/Res/1540 (2004) (24 April 2004) preambular [14]; SC Res 1566, UN SCOR, 5053rd mtg, UN Doc S/Res/1566 (2004) (8 October 2004) preambular [3] and [6]; SC Res 1611, UN SCOR, 5223rd mtg, UN Doc S/Res/1611 (2005) (7 July 2005) preambular [2]; SC Res 1618, UN SCOR, 5246th mtg, UN Doc S/Res/1618 (2005) (4 August 2005) preambular [4]; SC Res 1624, UN SCOR, 5261st mtg, UN Doc S/Res/1624 (2005) (14 September 2005) preambular [2] and operative [1] and [4].

While persuasive in its wording in this regard, the status of the Declaration should be noted. Security Council resolutions, when couched in mandatory language, are binding upon members of the United Nations. In the context of the Declaration adopted under resolution 1456, the text of the Declaration (including the mentioned paragraph 6) is preceded by the sentence: 'The Security Council therefore *calls for* the following steps to be taken.'[17] Such an expression, although influential, is exhortatory and therefore not a binding 'decision' within the contemplation of Article 25 of the Charter.[18]

The second resolution to be considered is, however, both direct and binding in its terms. Security Council resolution 1624 provides, after setting out the obligations of States to counter various aspects of terrorism, that:

> States must ensure that any measures taken to implement paragraphs 1, 2 and 3 of this resolution comply with all of their obligations under international law, in particular international human rights law, refugee law, and humanitarian law.[19]

The latter provision is not preceded by exhortatory language, but instead constitutes a clearly binding decision of the Security Council.

Remaining with the Security Council, mention should be made of the Counter-Terrorism Committee (CTC), which was established under Security Council resolution 1373 of 2001, and is charged with receiving reports from UN member States on their compliance with the counter-terrorist obligations specified within that resolution. In her report and follow-up to the 2001 World Conference on Human Rights, the then United Nations High Commissioner for Human Rights, Mary Robinson, prepared guidelines for the use of the Counter-Terrorism Committee. The Commissioner sought to have the CTC issue these guidelines to States, so that they might be directed in specific and useful terms on how to counter terrorism in a manner consistent with human rights. The Committee ultimately declined to issue the Commissioner's Guidelines, something anticipated from the remarks of the then Chair of the

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[17] SC Res 1456, UN SCOR, 4688th mtg, UN Doc S/Res/1456 (2003) (20 January 2003) preambular (emphasis added).

[18] In the *Namibia Advisory Opinion*, the International Court of Justice took the position that a resolution couched in non-mandatory language should not be taken as imposing a legal duty upon a member State: *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South-West Africa) notwithstanding Security Council Resolution 276 (1990)* (Advisory Opinion) [1971] ICJ Reports 53 ('*Nambia Advisory Opinion*').

[19] SC Res 1624, UN SCOR, 5261st mtg, UN Doc S/Res/1624 (2005) (14 September 2005) [4].

Counter-Terrorism Committee in his briefing of the Security Council in January 2002:[20]

> The Counter-Terrorism Committee is mandated to monitor the implementation of resolution 1373 (2001). Monitoring performance against other international conventions, including human rights law, is outside the scope of the Counter-Terrorism Committee's mandate. But we will remain aware of the interaction with human rights concerns, and we will keep ourselves briefed as appropriate. It is, of course, open to other organizations to study States' reports and take up their content in other forums.

Since that time, however, there has been a significant shift in the approach of the Counter-Terrorism Committee to the role of human rights in its work.[21] In its comprehensive review report of 16 December 2005, the Committee stated that States must ensure that any measure taken to combat terrorism should comply with all their obligations under international law and that they should adopt such measures in accordance with international law, in particular human rights law, refugee law and humanitarian law.[22] It also stressed that the Counter-Terrorism Committee Executive Directorate should take this into account in the course of its activities.

The same approach is found in statements contained in the CTC's 2008 survey of the implementation of Security Council resolution 1373 (2001), where the Committee stated, for example, that domestic legal frameworks on counter-terrorism should ensure due process of law in the prosecution of terrorists, and protect human rights while countering terrorism as effectively as possible.[23] It is an approach also reflected in the Committee's questions under the reporting dialogue between the CTC and UN member States. In response to New Zealand's fourth report to the CTC, for instance, the Committee asked, 'What is New Zealand doing to ensure that any measures taken to implement paragraphs 1, 2 and 3 of resolution 1624 (2005) comply

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[20] Sir Jeremy Greenstock, *Threats to International Peace and Security Posed by Terrorism*, 18 January 2002, UN Doc S/PV.4453, 5.

[21] Recognised by the UN Secretary-General in his report entitled *United Nations Global Counter-Terrorism Strategy: Activities of the United Nations system in implementing the Strategy*, UN Doc A/62/898 (2008), para 42. The Committee's website now includes a page dedicated to the subject of human rights, at http://www.un.org/sc/ctc/rights.html.

[22] Counter-Terrorism Committee, *Report of the Counter-Terrorism Committee to the Security Council for its consideration as part of its comprehensive review of the Counter-Terrorism Committee Executive Directorate*, UN Doc S/2005/800 (2005).

[23] *Survey of the implementation of Security Council resolution 1373 (2001): Report of the Counter-Terrorism Committee*, UN Doc S/2008/379 (2008), paras 141 and 143(a).

with all of its obligations under international law, in particular international human rights law, refugee law and humanitarian law?'[24]

C UN Human Rights Council and the former Commission on Human Rights

Not surprisingly, the United Nations Commission on Human Rights paid considerable attention to the issue of the adverse consequences that counter-terrorism can have upon the maintenance and promotion of human rights. It did so even before the flurry of anti-terrorist legislation that followed Security Council resolution 1373 (2001). In the pre-9/11 resolutions of the Commission and its Sub-Commission on the Protection and Promotion of Human Rights, it was affirmed that all States have an obligation to promote and protect human rights and fundamental freedoms, and that all measures to counter terrorism must be in strict conformity with international law, 'including international human rights standards.'[25] Post-September 11, resolutions of the Commission became more strongly worded. Two resolutions on the subject were adopted in 2004 alone. First, the issue was addressed within the Commission's annual resolution on human rights and terrorism.[26] In a resolution later that month, the Commission again reaffirmed that States must comply with international human rights obligations when countering terrorism.[27] The Commission's resolution 2005/80, pursuant to which it appointed a Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, stated at paragraphs 1 and 6 that it:

> *Reaffirms* that States must ensure that any measure taken to combat terrorism complies with their obligations under international law, in particular international human rights, refugee and humanitarian law;

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[24] New Zealand National Report to the United Nations Security Council Counter-Terrorism Committee, UN Doc S/2006/384 (2006), item 2.6. See also item 2.4 on the report, which reflects the Committee's question: 'What international efforts is New Zealand participating in or considering participating in/initiating in order to enhance dialogue and broaden understanding among civilisations in an effort to prevent the indiscriminate targeting of different religions and cultures?'

[25] *Human Rights and Terrorism*, CHR Res 2001/37, UN Doc E/CN.4/RES/2001/37 (23 March 2001) preambular [18] and [19] and operative [7] and [8]. Preambular [19] was later reflected in *Human Rights and Terrorism*, UN Sub-Commission on Human Rights Res 2001/18, UN Doc E/CN.4/SUB.2/Res/2001/18 (16 August 2001) preambular [13].

[26] *Human Rights and Terrorism*, CHR Res 2004/44, UN Doc E/CN.4/Res/2004/44 (19 April 2004) preambular [24] and operative [10], [11] and [12].

[27] *Protection of human rights and fundamental freedoms while countering terrorism*, CHR Res 2004/87, UN Doc E/CN.4/Res/2004/87 (21 April 2004) [1] and [2].

> *Reaffirms* that it is imperative that all States work to uphold and protect the dignity of individuals and their fundamental freedoms, as well as democratic practices and the rule of law, while countering terrorism.

The 2005 report of the Sub-Commission on the Promotion and Protection of Human Rights Special Rapporteur on Terrorism and Human Rights also addressed the matter.[28] Although the original mandate of the Special Rapporteur was to consider the impact of terrorism on human rights,[29] she commented in her 2004 report that a State's over-reaction to terrorism can itself also impact upon human rights. The Sub-Commission Rapporteur's mandate was therefore extended to develop a set of draft principles and guidelines concerning human rights and terrorism (which are discussed further below). Of note at this point, the first-stated principle under the heading 'Duties of States Regarding Terrorist Acts and Human Rights' reads:

> All States have a duty to promote and protect human rights of all persons under their political or military control in accordance with all human rights and humanitarian law norms.[30]

The report of the Sub-Commission Rapporteur on terrorism and human rights includes a reasonably basic analysis of issues relating to the protection of human rights while countering terrorism. On the question of permissible limitations, the document adopts a more absolute approach than do the other guidelines, paragraph 34 providing that:

> Any exceptions or derogations in human rights law in the context of counter-terrorism measures must be in strict conformity with the rules set out in the applicable international or regional instruments. A State may not institute exceptions or derogations unless that State has been subjected to terrorist acts that would justify such measures. States shall not invoke derogation clauses to justify taking hostages or to impose collective punishments.

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[28] Kalliopi Koufa, Report of the Special Rapporteur on Terrorism and Human Rights, *Specific Human Rights Issues: New Priorities, in Particular Terrorism and Counter-Terrorism. A Preliminary Framework Draft of Principles and Guidelines Concerning Human Rights and Terrorism*, UN Doc E/CN.4/Sub.2/2005/39 (22 June 2005).

[29] This mandate was consequent to the request of the General Assembly for the Commission to do so and through the Commission's own decision to consider the issue: see respectively *Human Rights and Terrorism*, GA Res 49/185, UN GAOR, 49th sess, 94th plen mtg, UN Doc A/Res/49/185 (23 December 1994) [6]; *Human Rights and Terrorism*, CHR Res 1994/46, UN Doc E/CN.4/Res/1994/46 (4 March 1994).

[30] Koufa, above n 28, [25].

(a) Great care should be taken to ensure that exceptions and derogations that might have been justified because of an act of terrorism meet strict time limits and do not become perpetual features of national law or action.
(b) Great care should be taken to ensure that measures taken are necessary to apprehend actual members of terrorist groups or perpetrators of terrorist acts in a way that does not unduly encroach on the lives and liberties of ordinary persons or on procedural rights of persons charged with non-terrorist crimes.
(c) Exceptions and derogations undertaken following a terrorist incident should be carefully reviewed and monitored. Such measures should be subject to effective legal challenge in the State imposing exceptions or derogations.

Appointed as an independent expert, Dr Robert Goldman of the American University completed a very useful report to the Commission on Human Rights in February 2005. This report also adopts a rights-based approach, and again emphasises the need to uphold the rule of law while confronting terrorism. Dr Goldman stated that, 'Properly viewed, the struggle against terrorism and the protection of human rights are not antithetical, but complementary responsibilities of States.'[31] Consequent to the report, the Commission established a Special Rapporteur to monitor counter-terrorism measures worldwide that might threaten human rights.[32] In September 2005, the Special Rapporteur presented his first preliminary report to the General Assembly, setting out the conceptual framework for his work.[33] His first substantive report to the Commission on Human Rights included consideration of the issue of the human rights implications of the definition of terrorism.[34]

In the year 2006, the Human Rights Council was established by the UN General Assembly under its resolution 60/251 as a subsidiary body of the General Assembly and for the purpose of replacing and enhancing the former Commission on Human Rights.[35] However, it was not until March 2008 that

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[31] Robert Goldman, *Protection of Human Rights and Fundamental Freedoms While Countering Terrorism*, UN Doc E/CN.4/2005/103 (7 February 2005) [7].

[32] Professor Martin Scheinin of Abo Akademi University in Finland was appointed to the role of Special Rapporteur by the Chairman of the Commission on Human Rights, pursuant to *Protection of human rights and fundamental freedoms while countering terrorism*, CHR Res 2005/80, UN Doc E/CN.4/Res/2005/80 (21 April 2005).

[33] Martin Scheinin, *Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism: Promotion and Protection of Human Rights*, UN Doc A/60/370 (21 September 2005).

[34] Martin Scheinin, *Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism: Promotion and Protection of Human Rights*, UN Doc E/CN.4/2006/98 (28 December 2005) Part III.

[35] GA Res 60/251, UN GAOR, 60th sess, 72nd plen mtg, UN Doc A/Res/60/251 (15 March 2006). See generally on the Council, Chapter 1, pp. 9–18.

the new Human Rights Council adopted a substantive resolution on the question of human rights compliance while countering terrorism. Resolution 7/7 (2008), and its 2009 restatement, do not add anything new to the already existing statements of the General Assembly and the former Commission on Human Rights, although they assist by reaffirming the principle that any measure taken to counter terrorism must comply with international human rights law.[36]

Past and present UN High Commissioners for Human Rights have been vocal in their criticism of counter-terrorism measures that have restricted the enjoyment of rights in an unnecessary or disproportionate way. Mention has already been made of the guidelines prepared by former High Commissioner Mary Robinson, annexed to her 2002 report (the Commissioner's Guidelines).[37] Commissioner Robinson's report begins with an introduction in which she states:

> An effective international strategy to counter terrorism should use human rights as its unifying framework. The suggestion that human rights violations are permissible in certain circumstances is wrong. The essence of human rights is that human life and dignity must not be compromised and that certain acts, whether carried out by State or non-State actors, are never justified no matter what the ends. International human rights and humanitarian law define the boundaries of permissible political and military conduct. A reckless approach towards human life and liberty undermines counter-terrorism measures.

The Commissioner's Guidelines begin by making statements that go to answering an important ideological question: are the objectives of countering terrorism and maintaining human rights compatible? The Guidelines recognise the counter-terrorist obligations imposed upon States by the Security Council and reaffirm that such action must be in compliance with human rights principles contained in international law.[38] They confirm the notion that human rights law allows for a balance to be struck between the unlimited enjoyment of rights and freedoms and legitimate concerns for national security through the limitation of some rights in specific and defined circumstances.[39] At para-

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[36] HRC Res 7/7, HRC 7th Sess, UN Doc A/HRC/Res/7/7 (20 March 2008), para 1; and HRC Res 10/L.31. HRC 10th Sess, UN Doc A/HRC/Res/10/L.31 (20 March 2009), para 1.

[37] Report of the United Nations High Commissioner for Human Rights and Follow-up to the World Conference on Human Rights, *Human Rights: A Uniting Framework*, ESCOR (58th Sess) UN Doc E/CN.4/2002/18 (2002), Annex entitled 'Proposals for "further guidance" for the submission of reports pursuant to paragraph 6 of Security Council resolution 1373 (2001)'.

[38] Ibid [1].

[39] Ibid [2].

graphs 3 and 4, the Guidelines set out some instructions on how to formulate counter-terrorist measures that might seek to limit human rights:

3. Where this is permitted, the laws authorizing restrictions:
   (a) Should use precise criteria;
   (b) May not confer an unfettered discretion on those charged with their execution.
4. For limitations of rights to be lawful they must:
   (a) Be prescribed by law;
   (b) Be necessary for public safety and public order, i.e. the protection of public health or morals and for the protection of the rights and freedoms of others, and serve a legitimate purpose;
   (c) Not impair the essence of the right;
   (d) Be interpreted strictly in favour of the rights at issue;
   (e) Be necessary in a democratic society;
   (f) Conform to the principle of proportionality;
   (g) Be appropriate to achieve their protective function, and be the least intrusive instrument amongst those which might achieve that protective function;
   (h) Be compatible with the object and purposes of human rights treaties;
   (i) Respect the principle of non-discrimination;
   (j) Not be arbitrarily applied.

Also of relevance, a digest of jurisprudence on the protection of human rights while countering terrorism was prepared by the UN Office of the High Commissioner for Human Rights in September 2003. Its declared aim was to assist policy makers and other concerned parties to develop counter-terrorist strategies that respect human rights. It begins by stating:

> No one doubts that States have legitimate and urgent reasons to take all due measures to eliminate terrorism. Acts and strategies of terrorism aim at the destruction of human rights, democracy, and the rule of law. They destabilize governments and undermine civil society. Governments therefore have not only the right, but also the duty, to protect their nationals and others against terrorist attacks and to bring the perpetrators of such acts to justice. The manner in which counter-terrorism efforts are conducted, however, can have a far-reaching effect on overall respect for human rights.[40]

The digest considers decisions of UN treaty-monitoring bodies, such as the Human Rights Committee, and those of other regional bodies, including the

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[40] United Nations High Commissioner for Human Rights ('UNHCHR'), *Digest of Jurisprudence of the UN and Regional Organizations on the Protection of Human Rights While Countering Terrorism* (United Nations Office of the High Commissioner for Human Rights, Geneva, 2003) 3. The Office of the UNHCHR is currently working on an updated edition of the Digest.

European Court of Human Rights and the Inter-American Court of Human Rights. It looks at general considerations, states of emergency and specific rights. On the subject of general considerations, two types of jurisprudence are relevant here. The first is that which emphasises the duty of States to protect those within their territories from terrorism.[41] The second is concerned with the fact that the lawfulness of counter-terrorism measures depends upon their conformity with international human rights law.[42]

D Other international guidelines and documents

Numerous international guidelines and reports on the relationship between human rights and counter-terrorism have been issued since the events of September 11 and the proliferation of counter-terrorist legislative action that followed. Unlike Security Council decisions, such guidelines and reports are clearly not binding. Nor do they hold the same status as General Assembly or Commission on Human Rights resolutions, which have been adopted with the consent of State representatives. Notwithstanding this, the consistent approach of these guidelines is telling.

As part of its series of occasional papers, the International Commission of Jurists commissioned a paper on terrorism and human rights in 2002.[43] The paper concluded with a list of minimum criteria that States must observe in the administration of justice when countering terrorism, including the observance of the primacy of the rule of law and of international human rights obligations, and maintaining and guaranteeing at all times rights and freedoms that are non-derogable.[44] Moreover, at its biennial conference in August 2004, the International Commission of Jurists was instrumental in the adoption of the Berlin Declaration on Upholding Human Rights and the Rule of Law in Combating Terrorism.[45] The Berlin Declaration recognises the need to combat terrorism and the duty of States to protect those within their jurisdiction.[46] It also affirms that contemporary human rights law allows States a reasonably wide margin of flexibility to combat terrorism without contravening the essence of rights.[47]

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41 Ibid 11–12. See, for example, *Delgado Paez v Colombia*, UN Doc CCPR/C/39/D/195/1985 (12 July 1990) [5.5].

42 UNHCHR, above n 40, 13–15.

43 International Commission of Jurists, *Terrorism and Human Rights* (International Commission of Jurists, Geneva, 2002).

44 Ibid 248–51.

45 International Commission of Jurists, *Berlin Declaration on Upholding Human Rights and the Rule of Law in Combating Terrorism*, International Commission of Jurists, http://www.icj.org/IMG/pdf/Berlin_Declaration.pdf at 24 June 2008.

46 Ibid preambular [2] and operative [1].

47 Ibid preambular [5].

The ICJ also established an Eminent Jurists Panel on Terrorism, Counter-terrorism and Human Rights, which was composed of eight distinguished jurists from throughout the world. The Panel undertook 16 hearings in Argentina, Australia, Belgium, Canada, Colombia, Egypt, India, Indonesia, Israel, Kenya, Morocco, Northern Ireland, Pakistan, the Russian Federation, the United Kingdom, and the United States of America. In early 2009 it released its report *Assessing Damage, Urging Action*, which draws from its hearings and considers the role of intelligence in counter-terrorism and preventive measures such as control orders.[48]

In July 2002, the Committee of Ministers to the Council of Europe issued *Guidelines on human rights and the fight against terrorism*. In the preface to the guidelines, Secretary-General Walter Schwimmer warned that, although the suppression of terrorism is an important objective, States must not use indiscriminate measures to achieve that objective.[49] For a State to react in such a way, Schwimmer said, would be to fall into the trap set by terrorists for democracy and the rule of law. He urged that situations of crisis, such as those brought about by terrorism, called for even greater vigilance in ensuring respect for human rights. Drawing from the jurisprudence of the European Court of Human Rights and the UN Human Rights Committee, the Council's guidelines set out general rules on the interaction between counter-terrorism and human rights, as well as addressing specific rights and freedoms, with commentary on each stated guideline. Five of the more specific guidelines warrant mention.

The first reflects the idea that counter-terrorism is an important objective in a free and democratic society. Guideline I accordingly talks of a positive obligation upon States to protect individuals within their territory from the scourges of terrorism, pointing to decisions of the European Court in which it recognised this duty and the particular problems associated with the prevention and suppression of terrorism.[50] In *Klass v Germany*, for example, the

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[48] Report of the Eminent Jurists Panel on Terrorism, Counter-terrorism and Human Rights, Assessing Damage, Urging Action (International Commission of Jurists, Geneva, 2009).

[49] Council of Europe, *Guidelines on Human Rights and the Fight Against Terrorism* (Council of Europe Publishing, Strasbourg, 2002) 5.

[50] See, for example, *Ireland v The United Kingdom*, ECHR, Application No 5310/71 (18 January 1978) [11]; *Aksoy v Turkey*, ECHR, Application No 21987/93 (18 December 1996) [70] and [84]; *Zana v Turkey*, ECHR, Application No 18954/91 (25 November 1997) [59] and [60]; *Incal v Turkey,* ECHR, Application No 22678/93 (9 June 1998) [58]; *United Communist Party of Turkey and Others v Turkey,* ECHR, Application No 19392/92 (20 November 1998) [59]; *Brogan and Others v The United Kingdom*, ECHR, Application No 11209/84; 11234/84; 11266/84; 11386/85 (29 November 1999) [48].

Court agreed with the European Commission that 'some compromise between the requirements for defending democratic society and individual rights is inherent in the system of the Convention.'[51]

The second and third Guidelines of the Council are directly relevant to the question of compliance with human rights. Guideline II prohibits the arbitrary limitation of rights,[52] and Guideline III requires limiting measures to be lawful, precise, necessary and proportional:[53]

> *Guideline II*
> All measures taken by States to fight terrorism must respect human rights and the principle of the rule of law, while excluding any form of arbitrariness, as well as any discriminatory or racist treatment, and must be subject to appropriate supervision.
>
> *Guideline III*
> 1. All measures taken by States to combat terrorism must be lawful.
> 2. When a measure restricts human rights, restrictions must be defined as precisely as possible and be necessary and proportionate to the aim pursued.

Further guidance on possible derogations is found in Guideline XV, concerning derogations during situations of war or states of emergency threatening the life of a nation. Finally, Guideline XVI underlines that States may never act in breach of peremptory norms of international law.

A report of the Inter-American Commission on Human Rights (IACHR) on terrorism and human rights was issued in late 2002, shortly after the adoption of the *Inter-American Convention Against Terrorism*.[54] Article 15 of the latter Convention specifically requires all States parties to comply with human rights standards:

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[51] *Klass and Others v Germany*, ECHR, Application No 5029/71 (6 September 1978) [59].

[52] Compare Article II with [3] and [4(i)]–[4(j)] of Guidelines issued by the UNHCHR: Report of the United Nations High Commissioner for Human Rights and Follow-up to the World Conference on Human Rights, *Human Rights: A Uniting Framework*, ESCOR, 58th Sess, UN Doc E/CN.4/2002/18 (27 June 2002) Annex entitled *Proposals for 'further guidance' for the submission of reports pursuant to paragraph 6 of Security Council Resolution 1373 (2001), Compliance with international human rights standards*, I General Guidance: Criteria for the Balancing of Human Rights Protection and the Combating of Terrorism.

[53] Compare Article III with [4(a)], [4(b)], [4(e)], [4(f)], and [4(g)] of the Commissioner's Guidelines: ibid.

[54] Inter-American Commission on Human Rights, *Report on Terrorism and Human Rights* (Inter-American Commission on Human Rights, 2002), http://www.cidh.org/Terrorism/Eng/toc.htm at 6 September 2005. See also Inter-American Commission on Human Rights, Recommendations of the Inter-American Commission on Human Rights for the Protection by OAS Member States of Human Rights in the Fight Against Terrorism (Washington, 8 May 2006).

> The measures carried out by the states parties under this Convention shall take place with full respect for the rule of law, human rights, and fundamental freedoms.[55]

The IACHR report undertakes a rights-based approach, focusing upon the scope and potential limitation of particular rights. It also emphasises the general need for any limitation to comply with the doctrines of necessity, proportionality and non-discrimination.[56] As one of its annexes, the report recalls resolution 1906 of the General Assembly of the Organization of American States, the first operative paragraphs resolving:

1. To reiterate that the fight against terrorism must be waged with full respect for the law, human rights, and democratic institutions, so as to preserve the rule of law, freedoms, and democratic values in the Hemisphere.
2. To reaffirm the duty of the member states to ensure that all measures taken to combat terrorism are in keeping with obligations under international law.[57]

Although outside the scope of guidelines on the specific subject of counter-terrorism and human rights, attention is also paid to two generally applicable and very useful documents on the subject of human rights limitations: the *Siracusa Principles on the Limitation and Derogation of Provisions in the International Covenant on Civil and Political Rights*;[58] and General Comment 29 of the Human Rights Committee.[59] The latter document is particularly instructive since none of the States parties to the International Covenant on Civil and Political Rights ('ICCPR') have lodged any objection to General Comment 29 under Article 40(5) ICCPR. One might argue that the document has thereby gained the status of representing subsequent practice in the application of the ICCPR, which establishes the agreement of the parties regarding its interpretation.[60]

2 What does human rights compliance involve?

The discussion up to this point leads to an unambiguous conclusion that States

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[55] *Inter-American Convention against Terrorism*, opened for signature 3 June 2002, 42 ILM 19 (entered into force 10 July 2003) Article 15.

[56] Ibid [51] and [55].

[57] *Human Rights and Terrorism*, OAS General Assembly Resolution 1906, 4th plen sess, OAS Doc AG/Res 1906 (XXXII-O/02) (4 June 2002).

[58] United Nations Economic and Social Council Sub-Commission on Prevention of Discrimination and Protection of Minorities, *Siracusa Principles on the Limitation and Derogation of Provisions in the International Covenant on Civil and Political Rights*, UN Doc E/CN.4/1985/4 (1985) ('*Siracusa Principles*').

[59] Human Rights Committee, *General Comment 29/2001: States of Emergency (Article 4)*, UN Doc CCPR/C/21/Rev.1/Add.11 (31 August 2001).

[60] See *Vienna Convention on the Law of Treaties*, above n 9, Article 31(3).

must comply with their international human rights obligations when countering terrorism. The United Nations has made it clear, through resolutions of three of its principal bodies, that counter-terrorism is not a motive that justifies overriding those obligations. This position can sometimes lead to an adverse reaction on the part of counter-terrorist practitioners, claiming that counter-terrorism cannot be effectively achieved without the limitation of human rights, at which point it is important to consider what 'compliance' with human rights means. It does not mean that all human rights cannot be limited, since human rights law does contain a level of flexibility which is aimed at accommodating challenges such as those posed by counter-terrorism.

The first step in applying this in practice is to identify the nature of the right upon which a proposed, or actual, counter-terrorist provision or measure impacts. Under the international human rights framework, rights are universal and indivisible. Although there is no heirarchy of rights and freedoms, human rights norms and treaty provisions can be categorised as: (a) peremptory rights at customary international law (in respect of which no limitation is permissible); (b) non-derogable rights under human rights treaties (in respect of which no derogation is permissible); (c) rights only derogable in states of emergency (which may only be limited in times of an emergency threatening the life of the nation); or (d) other rights (which, depending on their definition, may be limited when necessary so long as this is proportionate).

A Peremptory rights at customary international law

In determining what human rights compliance means, the first important point to be made is that there is a distinction to be made between rights that are capable of limitation and those that are not. The isolation of particular rights into the category of peremptory norms (those in respect of which no limitation is permitted) is an issue that this chapter cannot delve into too deeply. Least controversial is the status of the prohibition against torture (the commission of which is also an international crime) as falling within this category.[61] The International Law Commission has identified this, together with the prohibition against slavery, as a norm of *jus cogens*.[62] The Committee on the Elimination of Racial Discrimination has said that the principle of non-discrimination on the grounds of race has also become a norm of *jus cogens*.[63]

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61 International Law Commission, 'Commentary on the *Vienna Convention on the Law of Treaties*' [1966] 2 *Yearbook of the International Law Commission* 248.

62 Ibid.

63 Committee on the Elimination of Racial Discrimination, 'Statement on Racial Discrimination and Measures to Combat Terrorism' in *Report of the Committee on the Elimination of Racial Discrimination*, UN Doc A/57/18 (4–22 March 2002, 5–23 August 2002) 107.

B Non-derogable rights under human rights treaties

The distinction between peremptory rights at customary international law and non-derogable rights under applicable human rights treaties is a fine, but important, one.[64] In the case of the ICCPR, Article 4(2) sets out a list of rights that may not be derogated from even when a public emergency is declared by a State party to the Covenant. These non-derogable rights are identified in the ICCPR as the right to life, freedom from torture or cruel, inhuman or degrading treatment or punishment, the prohibition against slavery and servitude, freedom from imprisonment for failure to fulfil a contract, freedom from retrospective penalties, the right to be recognised as a person before the law, and freedom of thought, conscience and religion.[65] Article 4(1) ICCPR requires that any derogating measures must not be inconsistent with a State's other international law obligations, and must not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.

(i) The list of non-derogable rights As just mentioned, Article 4(2) ICCPR sets out a list of rights that may not be derogated from, even during a state of emergency. This list is not, however, exhaustive. The Human Rights Committee has made the point that provisions of the ICCPR relating to procedural safeguards can never be made subject to measures that would circumvent the protection of these non-derogable rights.[66]

The Committee has also pointed out that, because Article 4(1) ICCPR specifies that any derogating measures must not be inconsistent with obligations under international law, the full complement of 'non-derogable rights' includes rights applicable as part of obligations under international human rights law, international humanitarian law, and international criminal law.[67] Expanding upon this position, the Committee identified certain rights under customary international law (applicable to all States) as being non-derogable: the right of all persons deprived of their liberty to be treated with humanity and with respect for the inherent dignity of the human person; the prohibitions against taking of hostages, abductions or unacknowledged detention; the international protection of the rights of persons belonging to minorities; the prohibition against deportation or forcible transfer of population without grounds permitted under international law; and the prohibition against propaganda for

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64 See Human Rights Committee, above n 59, [11].

65 *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 14668 (entered into force 23 March 1976) Articles 6, 7, 8(1) and (2), 11, 15, 16, and 18 respectively.

66 Human Rights Committee, above n 59, [15].

67 Ibid [9] and [10].

war, or in advocacy of national, racial or religious hatred that would constitute incitement to discrimination, hostility or violence.[68]

(ii) The limitation of non-derogable rights The status of a substantive right as non-derogable does not mean that limitations or restrictions upon such a right cannot be justified. In its General Comment 29, the Human Rights Committee makes this point and gives the example of the freedom to manifest one's religion or beliefs, expressed in Article 18 ICCPR.[69] Article 18 ICCPR is listed within Article 4(2) ICCPR and therefore cannot be derogated from under the Article 4 ICCPR procedure. This listing does not, however, remove the permissible limitation upon the right expressed within Article 18(3) ICCPR (such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others). Thus, whereas a peremptory right may not be the subject of any limitation at all, a non-derogable treaty right may be capable of limitation depending on the particular expression of the right. Such a limitation must, however, be proportional to the exigencies of the situation.[70]

C Rights derogable only in states of emergency

The third category of rights are those that are only derogable in times of emergency threatening the life of the nation.[71] By way of illustration, Article 4 ICCPR provides:

> In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.

Assuming that such a state of emergency exists, and that the right in question is one that can be derogated from, four requirements must be noted:

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68 Ibid [13].

69 Human Rights Committee, above n 59, [7]; see also [11].

70 See the international guidelines discussed earlier, and Human Rights Committee, above n 59, [4] and [5].

71 See Article 4 ICCPR; *European Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, 213 UNTS 222 (entered into force 3 September 1953) Article 15; *American Convention on Human Rights*, opened for signature 22 November 1969, 1144 UNTS 123 (entered into force 18 July 1978) Article 27(1).

(i) Determining the existence of a public emergency The ability to derogate under Article 4(1) ICCPR is triggered only in a 'time of public emergency which threatens the life of the nation.' The Human Rights Committee has characterised such an emergency as being of an exceptional nature.[72] Not every disturbance or catastrophe qualifies as such. The Committee has commented that, even during an armed conflict, measures derogating from the ICCPR are allowed only if and to the extent that the situation constitutes a threat to the life of the nation.[73] Whether or not terrorist acts or threats establish such a state of emergency must therefore be assessed on a case-by-case basis.

Interpreting the comparable derogation provision within the *European Convention for the Protection of Human Rights and Fundamental Freedoms*,[74] the European Court of Human Rights has spoken of four criteria to establish that any given situation amounts to a 'time of public emergency which threatens the life of the nation.'[75] First, it should be a crisis or emergency that is actual or imminent. Secondly, it must be exceptional, such that 'normal' measures are inadequate. Next, the emergency must threaten the continuance of the organised life of the community. Finally, it must affect the population of the State taking measures. On this final point, early decisions of the Court spoke of an emergency needing to affect the whole population. The Court appears to have subsequently accepted that an emergency threatening the life of the nation might only materially affect one part of the nation at the time of the emergency.[76]

Outside the immediate aftermath of a terrorist attack, or in the situation where clear intelligence exists of an imminent threat of a terrorist act, it is debatable whether a continual state of emergency caused by the threat of terrorism can exist for the purpose of these derogating provisions.[77]

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72 Human Rights Committee, above n 59, [2].

73 Ibid [3].

74 *European Convention for the Protection of Rights and Fundamental Freedoms*, opened for signature 4 November 1950, 213 UNTS 222 (entered into force 3 September 1953).

75 See *Lawless v Ireland (No 3)*, ECHR, Application No 332/57 (1 July 1961) [28]; and *The Greek Case* [1969] 12 *Yearbook of the European Court of Human Rights* 1, [153].

76 *Brannigan and McBride v United Kingdom*, ECHR, Application No 14553/89; 14554/89 (25 May 1993), although contrast this with the dissenting opinion of Judge Walsh, [2].

77 See, generally, the *Siracusa Principles*, above n 58, [39]–[41]. In the context of states of emergency said to be caused by the threat of terrorism (under the framework of the ICCPR) see Human Rights Committee, *Concluding Observations of the Human Rights Committee: United Kingdom of Great Britain and Northern Ireland*, UN

Ultimately, however, this will normally involve a factual question calling for consideration of the particular circumstances at hand.

(ii) Proclamation and notice of a state of emergency Upon establishing that an emergency exists, a proclamation of derogation must be lodged in accordance with the requirements of the particular treaty.[78] In the case of the ICCPR a State party must, before it can implement any derogating measure(s), officially proclaim the existence within its territory of a public emergency which threatens the life of the nation.[79] Through the intermediary of the UN Secretary-General, a derogating State must also immediately inform other States parties to the ICCPR of the provisions from which it has derogated and of the reasons for which it has done so.[80] The Human Rights Committee has emphasised that notification should include full information about the measures taken and a clear explanation of the reasons for them, with full documentation attached concerning the relevant law.[81] A further communication is required on the date on which the State terminates such derogation.[82] In practice, very few States have declared a state of emergency in relation to acts of terrorism.

(iii) Review Linked to the first requirement that the situation within the derogating State must amount to a public emergency threatening the life of the nation, it will be important for the derogating State to continually review the situation faced by it to ensure that the derogation lasts only as long as the state of emergency exists. In the context of the ICCPR derogations provisions, the Human Rights Committee has repeatedly stated that measures under Article 4 ICCPR must be of an exceptional and temporary nature, and may only continue only as long as the life of the nation concerned is threatened.[83] The restoration of a state of normality where full respect for the ICCPR can again

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Doc CCPR/C/79/Add.18 (1993) [25]; and *Concluding Observations of the Human Rights Committee: Israel*, UN Doc CCPR/C/79/Add.93 (1998) [11]. See also Alex Conte, 'A Clash of Wills: Counter-Terrorism and Human Rights' (2003) 20 *New Zealand Universities Law Review* 338, 350–54; and James Oraa, *Human Rights in States of Emergency in International Law* (Clarendon Press, Oxford, 1992).

78 As an example, see Article 4(3) ICCPR. See, in that regard, Human Rights Committee, above n 59, paras 2 and 17. See also the *Siracusa Principles*, above n 58, paras [42]–[47].

79 Article 4(1) ICCPR.

80 Article 4(3) ICCPR.

81 Human Rights Committee, above n 59, [5], [16] and [17].

82 Article 4(3) ICCPR.

83 Human Rights Committee, above n 59, [2]; and the *Siracusa Principles*, above n 58, [48]–[50].

be secured, the Human Rights Committee has said, must be the predominant objective of a State party derogating from the ICCPR.[84]

(iv) Permissible extent of derogating measures Finally, the extent to which any right is derogated from must be limited 'to the extent strictly required by the exigencies of the situation.' Any derogating measure must therefore be both necessary and proportionate.[85] The General Assembly, in its 2004 and 2005 resolutions on the protection of fundamental freedoms and human rights while countering terrorism, has also reaffirmed that any derogating measures are to be of an exceptional and temporary nature.[86]

D Other rights

The final category of rights are those that are not peremptory, non-derogable, or subject to limitation only in states of emergency. The Human Rights Committee has acknowledged, in this regard, that the limitation of rights is allowed even in 'normal times' under various provisions of the ICCPR.[87] The permissible scope of the limitation of such rights will primarily depend upon their expression within the human rights treaty. This will give rise to two possible means of limitation: (1) by a definitional mechanism; and/or (2) by a rights-specific limitations clause.

Definitional limitations are ones that fall within the meaning of the words contained in the expression of the right itself. For example, the right to a fair and open hearing does not provide a person with the right to a hearing which favours the person in all respects. Rather, it only guarantees that a person be afforded a hearing which is both open and 'fair'.[88] A counter-terrorist measure

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84 Ibid [1] and [2].

85 See the international guidelines discussed earlier. The Human Rights Committee has also emphasised that any derogation must be shown to be required by, and proportionate to, the exigencies of the situation: Human Rights Committee, above n 59, [4] and [5]. When considering States parties' reports the Committee has expressed concern over insufficient attention being paid to the principle of proportionality: see, for example, *Concluding Observations of the Human Rights Committee: Israel*, above n 77, [11]. See also the *Siracusa Principles*, above n 58, [51].

86 *Protection of human rights and fundamental freedoms while countering terrorism*, GA Res 59/191, UN GAOR, 59th sess, 74th plen mtg, UN Doc A/Res/59/191 (20 December 2004) [2]; and *Protection of human rights and fundamental freedoms while countering terrorism*, GA Res 60/158, 60th sess, 64th plen mtg, UN Doc A/Res/60/158 (16 December 2005) [3]. See also *Protection of human rights and fundamental freedoms while countering terrorism*, CHR Res 2005/80, UN Doc E/CN.4/Res/2005/80 (21 April 2005) [3].

87 Human Rights Committee, above n 59.

88 See, for example, Article 14(1) ICCPR, which provides that 'All persons shall be equal before the courts and tribunals. In the determination of any criminal charge

imposing limitations upon the disclosure of information, based upon the need to protect classified security information, might for example be 'fair' if the person's counsel (with appropriate security clearance) is permitted access to the information.[89]

Rights-specific limitations are those that are authorised by a subsequent provision concerning the circumstances in which the right in question may be limited. In the context of the ICCPR, and again using the example of the right to a fair and open hearing, the first two sentences of Article 14(1) express the substance of the right (as just discussed). The next sentence then sets out the circumstances in which it is permissible to limit the right to an 'open' hearing, allowing the exclusion of the press for reasons of morals, public order, or national security.[90]

E Human rights compliance

The nature of human rights compliance is fairly complex and relies on fine, but important, distinctions being made between categories of rights. What is important to note is that, other than in the case of peremptory rights at customary international law and a limited number of 'non-derogable' rights, the human rights law framework incorporates a level of flexibility which is capable of dealing with exigencies such as national security and threats of terrorism. This may be through the interpretation of terms such as 'fair' and 'reasonable', or by application of rights-specific limitation provisions. Even in the case of non-derogable rights, some of those rights are themselves expressed in ways which allow accommodation to pressing needs in a democratic society. Recourse to derogations under mechanisms such as that under Article 4 ICCPR should therefore be rarely needed, hence the tight restrictions applicable to the derogations regime.

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against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a *fair* and public hearing by a competent, independent and impartial tribunal established by law' (emphasis added).

[89] This is the means by which classified information is protected in judicial proceedings by the United Kingdom, through its *Special Immigration Appeals Commission Act 1997* (UK). In a judgment considering a decision made using this mechanism, the House of Lords implicitly accepted the validity of such a limitation: see *Secretary of State for the Home Department v Rehman* [2001] UKHL 47, [62] (Lord Hoffmann).

[90] The third sentence of Article 14(1) ICCPR provides: 'The press and the public may be excluded from all or part of a trial for reasons of morals, public order (ordre public) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgement rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children.'

3 Establishing counter-terrorist measures by proper means

The second step in determining the practical compliance with human rights while countering terrorism concerns the means by which the counter-terrorist provision, or the authority for the counter-terrorist measure, is established: by a prescription of law; respecting the principle of non-discrimination; not conferring an unfettered discretion; and limited to countering terrorism.

A Prescription by law

It is no accident that the former Commissioner's Guidelines used the term 'prescribed by law', this having been subject to examination by both domestic and international courts and tribunals, with clear pronouncements on its meaning. The expression was considered, for example, by the European Court of Human Rights in the *Sunday Times* case of 1978 where the Court concluded that two requirements flowed from it: (1) that the law must be adequately accessible so that the citizen has an adequate indication of how the law limits his or her rights; and (2) that the law must be formulated with sufficient precision so that the citizen can regulate his or her conduct.[91] This test was later reaffirmed by the European Court in the case of *Silver v UK*.[92] The same language is found in the Commissioner's Guidelines, the guidelines of the Council of Europe and the report of the Inter-American Commission on Human Rights.[93] It is likewise reflected in the Human Rights Committee's General Comment 29 and the *Siracusa Principles*.[94] It is notable that, in the particular context of the criminalisation of conduct in pursuit of counter-terrorism, the Special Rapporteur on human rights and counter-terrorism has commented upon the proper characterisation of 'terrorism' and definitional requirements of such proscription.[95]

B Non-discrimination and equality before the law

Although not expressly dealt with by the European Court of Human Rights in determining what is 'prescribed by law', it should be remembered that any

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[91] *Sunday Times v United Kingdom* (1978) 58 ILR 491, 524–7.

[92] *Silver v The United Kingdom*, ECHR, Application No 5947/72; 6205/73; 7052/75; 7061/75; 7107/75; 7113/75; 7136/75 (25 March 1983).

[93] See: the Commissioner's Guidelines, above n 37, [3(a)] and [4(a)]; Council of Europe Guidelines, above n 49, Guideline III; Inter-American Commission on Human Rights report, above n 54, [53].

[94] Human Rights Council, above n 59, [16]; *Siracusa Principles*, above n 58, [15] and [17].

[95] For a detailed discussion of this, see Alex Conte, *Counter-Terrorism and Human Rights in New Zealand* (New Zealand Law Foundation, Wellington, 2007) Ch 16. An electronic copy of this text is available online at http://www.lawfoundation.org.nz/awards/irf/conte/index.html at 16 August 2008.

legal prescription, to comply with the rule of law, must also respect the principle of non-discrimination and equality before the law.[96] Similarly, the Commissioner's Guidelines at [4] demand that any limitation respect the principle of non-discrimination, as does General Comment 29 of the Human Rights Committee.[97] It is relevant to note that Article 4 ICCPR provides that any derogation of rights in time of emergency may not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.[98] It is also significant that recent resolutions of the General Assembly and the Commission on Human Rights have stressed that the enjoyment of rights must be without distinction upon such grounds, and that the Committee on the Elimination of Racial Discrimination has declared that the prohibition against racial discrimination is a peremptory norm of international law from which no derogation is permitted.[99]

C Scope of the prescription

The final aspects of procedural requirements concern the scope of the prescription by which a counter-terrorism measure is established. First, one must consider the conferral of any discretion by the prescription. This in turn brings two matters into consideration. Primarily, any law authorising a restriction upon rights and freedoms must not confer an unfettered discretion on those charged with its execution. This goes for the framing of the discretion. Secondly, any discretion must not be arbitrarily applied. Both requirements call for the imposition of adequate safeguards to ensure that the discretion is capable of being checked, with appropriate mechanisms to deal with any abuse or arbitrary application of the discretion. These two restrictions on the conferral of discretions are reflected within the former Commissioner's guidelines and those of the Council of Europe, as well as the *Siracusa Principles*.[100]

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[96] Consider Albert Venn Dicey's notion of the rule of law, requiring: (1) the regulation of government action, so that the government can only act as authorised by the law, having the consequence that one can only be punished or interfered with pursuant to the law; (2) the equality of all persons before the law (which is the context in which the rule of law is referred to in this article); and (3) the requirement of procedural and formal justice. See Albert Venn Dicey, *Introduction to the Study of the Law of the Constitution* (Macmillan, London, 1885) 175–84.

[97] Human Rights Council, above n 59, [8] and [16].

[98] Article 4(1) ICCPR. See also Article 26 ICCPR.

[99] See *Protection of human rights and fundamental freedoms while countering terrorism*, GA Res 59/191, UN GAOR, 59th sess, 74th plen mtg, UN Doc A/Res/59/191 (20 December 2004) preambular [12]; *Protection of human rights and fundamental freedoms while countering terrorism*, CHR Res 2005/80, UN Doc E/CN.4/Res/2005/80 (21 April 2005) preambular [15]; and Committee on the Elimination of Racial Discrimination, above n 63, 107.

[100] See Commissioner's Guidelines, above n 37, [3(b)] and [3(j)]; Council of

It is also necessary to consider the potential scope of application of any counter-terrorist prescription or authorising provision. The point to be made here is that the objective of countering terrorism must not be used as an excuse by the State to broaden its powers in such a way that those powers are applicable to other matters. This is something expressly dealt with by both the Commission and Sub-Commission Special Rapporteurs.[101] It is also reflected within the guidelines advocated by both the Committee of Ministers to the Council of Europe and the Inter-American Commission on Human Rights, each directing that where measures taken by States to combat terrorism restrict human rights, those restrictions must be defined as precisely as possible and be necessary for the objective of countering terrorism.[102] Application of this principle, posits the author, is relevant at both the creation and the application of the prescription. In other words, the State must ensure that legislative prescriptions enacted for the purpose of countering terrorism do just that, and no more. Secondly, such measures must only be applied for the purpose of countering terrorism, rather than being 'stretched' to fit other objectives of the State. As stated in the latest *Draft of Principles and Guidelines* within the report of the Special Rapporteur to the Sub-Commission on the Promotion and Protection of Human Rights:

> Counter-terrorism measures should directly relate to terrorism and terrorist acts, *not* actions undertaken in armed conflict situations or *acts that are ordinary crimes*.[103]

4 Conclusion

The era of global jihadism, together with the threat of non-conventional terrorism and the need for universal and effective implementation of the international framework on counter-terrorism, has brought with it public pressure for adequate security laws and a consequent proliferation of counter-terrorist legislation and policies. The manner in which some counter-terrorist legislation and policies have developed has in turn seen a growing concern from both non-governmental and inter-governmental agencies about the need to ensure protection of human rights when seeking to combat terrorism. The aim of this

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Europe Guidelines, above n 49, Guideline II; *Siracusa Principles*, above n 58, [16] and [18].

[101] Special Rapporteur's report, above n 33, [47]; and Sub-Commission Rapporteur's report, above n 28, [33].

[102] See Council of Europe Guidelines, above n 49, Guideline III(2); the Inter-American Commission on Human Rights report, above n 54, [51] and [55]; *Siracusa Principles*, above n 58, [17].

[103] Koufa, above n 28, [33] (emphasis added).

chapter has been to assess the various international and regional directions and guidelines on the subject and draw from these a workable set of considerations to be taken into account when attempting to determine the balance to be struck between counter-terrorism and the unlimited enjoyment of human rights.

21. Human rights education: a slogan in search of a definition[1]

Paula Gerber

> The term 'human rights education' is too often used in a way that greatly oversimplifies its connotations.[2]

1 Introduction

In recent times human rights education ('HRE') has become one of the hot topics in international human rights law and numerous books have been written exploring different aspects of HRE.[3] This new-found interest in HRE is no doubt due, in part, to the United Nations' endeavours to promote HRE through initiatives such as the UN Decade for Human Rights Education (1995–2004)[4] and the subsequent World Programme for Human Rights Education (2005–ongoing).[5] Despite these efforts, there is still a great deal of

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[1] Parts of this chapter have been previously published as Chapter 3 in Paula Gerber, *From Convention to Classroom: The Long Road to Human Rights Education* (VDM Publishers, Germany, 2008). My title is a play on Hillary Clinton's infamous statement that '[c]hildren's rights' is a slogan in search of definition': Hillary Rodham, 'Children Under the Law' (1973) 43 *Harvard Educational Review* 1.

[2] Committee on the Rights of the Child, *General Comment 1: The Aims of Education*, UN Doc CRC/GC/2001/1 (17 April 2001) ('*General Comment 1*') [19].

[3] See for example Gudmundur Alfredsson, 'The Right to Human Rights Education' in A Eide, C Krause and A Rosas (eds) *Economic, Social and Cultural Rights: A Textbook* (Kluwer Law International, The Hague, 2nd rev ed, 2001) Ch 15; Amnesty International, *First Steps: A Manual for Starting Human Rights Education* (Amnesty International, London, 1997); George Andreopoulos and Richard Pierre Claude (eds) *Human Rights Education for the Twenty-First Century* (University of Pennsylvania Press, Philadelphia, 1997); Ximena Erazo, Michael Kirkwood and Frederick de Vlaming (eds) *Academic Freedom 4: Education and Human Rights* (World University Service, London, 1996); Rolf Gollob, Edward Huddleston, Peter Krapf, Maria-Helena Salema and Vedrana Spajic-Vrkaš, *Tool on Teacher Training for Education for Democratic Citizenship and Human Rights Education* (Council of Europe, Strasbourg, 2004); Anja Mihr, *Human Rights Education: Methods, Institutions, Culture and Evaluation* (Institut für Politikwissenschaft, Magdeburg, 2004).

[4] *United Nations Decade for Human Rights Education*, GA Res 49/184, UN GAOR, 49th sess, 94th plen mtg, UN Doc A/RES/49/184 (23 December 1994).

[5] *World Programme for Human Rights Education,* GA Res 19/113B, UN GAOR, 59th sess, 113th plen mtg, UN Doc A/RES/59/113B (5 August 2005).

confusion and uncertainty as to what the term 'human rights education' actually means.

The phrase 'human rights education' is infinitely more complex than one might initially think. The combination of these three words conveys different meanings to different people. Why is this so? There appear to be two main reasons. The first is that the position and background of the person interpreting the words influences how the words are understood. UN diplomats and international lawyers tend to view the phrase in political or legalistic terms, while non-government organisations ('NGOs') consider the words in the context of human rights activism. Governments tend to have a narrower focus, concentrating on issues such as democracy and the rights and responsibilities of citizens, while NGOs tend to take a broader approach that incorporates the full gamut of human rights including economic, social and cultural rights ('ESC rights'). Teachers, on the other hand, are focused on inculcating students with ideals such as respect and tolerance, and many teachers see HRE as being interchangeable with moral education or the teaching of ethics. Thus a person's understanding of HRE is very much informed by their institutional allegiances, as well as their own background, experience and bias.

The second reason behind the lack of a common understanding of the term HRE is the vagueness of the words themselves; what are human rights? How do they differ from natural rights and/or civil rights? Is there a universal understanding of what constitutes human rights or is it dependent on culture and context? What does the addition of the word 'education' to the term 'human rights' mean? Is education within schools limited to formal classroom activities? Does it require that human rights be part of the standard curriculum in all schools? Is the term 'education' broad enough to include extra-curricular activities that may be related to human rights? This chapter does not attempt to answer these questions; rather it considers how different contexts, interpretations and understandings can lead to different answers to these questions and therefore different definitions of HRE.

This chapter explores how HRE has been defined by various UN bodies, and how the term is actually understood by key stakeholders such as governments, NGOs and teachers. This analysis reveals that these three groups do not share a common understanding of HRE, and their interpretations of the term are not only different from each other, but also very different from how the UN defines HRE.

The chapter concludes that, while there is no general consensus as to exactly what HRE means, this lack of a clear definition is not fatal to HRE. Although the uncertainty can make it more difficult for those attempting to implement HRE, the absence of a constraining definition can be a liberating force that enables greater inspiration and creativity when it comes to

HRE.[6] However, the lack of a common understanding of what HRE is can make it more difficult for researchers to evaluate the nature and extent of the HRE that is actually occurring.

2 How the UN defines HRE

The first attempt by the UN to address HRE was in the *Universal Declaration on Human Rights*[7] ('UDHR'). Early drafts of the UDHR referred to a right to education but were silent as to the content of such education. However, when the NGO the World Jewish Congress saw early drafts of the article on education, it immediately noted that:

> [T]he Article on education provided a technical framework but contained nothing about the spirit governing education which was an essential element. Neglect of this principle in Germany had been the main cause of two catastrophic wars.[8]

This observation was taken on board by the drafting committee and the end result was Article 26(2) UDHR, which provides that:

> Education shall be directed to the full development of the human personality and to the strengthening of respect for human rights and fundamental freedoms. It shall promote understanding, tolerance and friendship among all nations, racial or religious groups, and shall further the activities of the United Nations for the maintenance of peace.

This article has formed the basis for HRE provisions in many human rights treaties,[9] but the one that is the focus of this chapter is Article 29(1) of the *Convention on the Rights of the Child* ('CROC'), because it is the most widely adopted articulation of HRE, having been ratified by 193 States.[10] Article 29

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6 Nancy Flowers, 'What is Human Rights Education?' in *A Survey of Human Rights Education* (Bertelsmann Verlag, Gütersloh, 2003) 1.

7 GA Res 217A (III), UN Doc A/810, 71 (1948).

8 UN Doc E/CN.4/AC.2/SR.8/p.4 (December 1947).

9 See for example: *UNESCO Convention Against Discrimination in Education*, opened for signature 14 December 1960, 429 UNTS 93 (entered into force 22 May 1962) Article 5; *International Convention on the Elimination of All Forms of Racial Discrimination*, opened for signature 7 March 1966, 660 UNTS 195 (entered into force 4 January 1969) Article 7; *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 999 UNTS 3 (entered into force 3 January 1976) ('ICESCR') Article 13; *Convention on Elimination of all forms of Discrimination Against Women*, opened for signature 18 December 1979, 1249 UNTS 13 (entered into force 3 September 1981) ('CEDAW') Article 10; and the *Convention on the Rights of the Child*, opened for signature 18 December 1979, 1249 UNTS 13 (entered into force 3 September 1981) Article 29(1).

10 http://www2.ohchr.org/english/bodies/ratification/11.htm accessed at 23 November 2008.

CROC breaks down the content of education that children are to receive into five parts, namely:

(a) The development of the child's personality, talents and mental and physical abilities to their fullest potential;
(b) The development of respect for human rights and fundamental freedoms, and for the principles enshrined in the Charter of the United Nations;
(c) The development of respect for the child's parents, his or her own cultural identity, language and values, for the national values of the country in which the child is living, the country from which he or she may originate, and for civilizations different from his or her own;
(d) The preparation of the child for responsible life in a free society, in the spirit of understanding, peace, tolerance, equality of sexes, and friendship among all peoples, ethnic, national and religious groups and persons of indigenous origin;
(e) The development of respect for the natural environment.

The Committee on the Rights of the Child ('the Committee') has attempted to provide greater clarity as to exactly what this provision means by publishing *General Comment 1 on the Aims of Education*,[11] which constitutes the Committee's authoritative interpretation of the normative content of Article 29(1) CROC. As Dianne Otto has noted, although not legally binding, General Comments 'carry enormous political and moral weight'[12] and 'at the very least, they provide persuasive interpretations of the treaty provisions.'[13] Indeed, Thomas Buergenthal, now of the International Court of Justice, has referred to General Comments as having become 'distinct juridical instruments'[14] and likened them to 'advisory opinions' of international tribunals.[15] However, it should be remembered that General Comments are adopted by treaty committees and are therefore consensus documents agreed to after negotiations and compromises by committee members.[16]

General Comment 1 stresses that the paragraphs in Article 29(1) CROC are interrelated and that they reinforce, integrate and complement the other provisions in CROC, and cannot be properly understood in isolation from them.[17]

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11 *General Comment 1*, above n 2.

12 Dianne Otto '"Gender Comment": Why Does the UN Committee on Economic, Social and Cultural Rights Need a General Comment on Women?' (2002) *Canadian Journal of Women and the Law* 1, 11.

13 Ibid 13.

14 Thomas Buergenthal, quoted in Henry J Steiner, Philip Alston and Ryan Goodman, *International Human Rights in Context: Law, Politics, Morals* (Oxford University Press, Oxford, 3rd ed, 2008) 852–3.

15 Ibid.

16 Otto, above n 12.

17 *General Comment 1*, above n 2, [6].

Thus, HRE should be interpreted in a holistic manner that incorporates principles such as non-discrimination (Article 2 CROC), the best interests of the child (Article 3 CROC), and the right to express views and have them taken into account (Article 12 CROC).[18]

Article 29(1)(b) CROC refers to education being directed at 'the development of respect for human rights'. As discussed below, there is a tendency for some governments to equate human rights with civil and political rights. *General Comment 1* makes it clear that this is not what is intended by this provision. It specifically states that 'the education to which every child has a right is one designed to provide the child with life skills, to strengthen the child's capacity to enjoy the *full range* of human rights'.[19] The absence of any discussion in *General Comment 1* about civil and political rights and ESC rights indicates that the reference to human rights in Article 29(1)(b) CROC is to *all* humans rights. Thus, Article 29(1)(b) CROC requires that children learn about human rights as universal and indivisible, in conjunction with the principles in the *Charter of the United Nations*, which promote the maintenance of international peace and security by, inter alia, observing faith in fundamental human rights and in the dignity and worth of the human person and the equal rights of men and women.[20]

Article 29(1)(c) CROC provides that education about national values and respecting different civilisations should form part of HRE. The Committee sees this obligation as fundamental to creating a culture which is infused by human rights values.[21] In many ways the elements in Article 29(1)(c) CROC have a prophylactic role, that is, they are aimed at sowing the seeds of harmonious relationships among all people and helping to prevent the outbreak of violent conflicts and related human rights violations.[22]

Article 29(1)(c) CROC is inextricably linked with Article 29(1)(d) CROC in that respecting difference is a precursor to understanding, peace, tolerance and friendship among all people. Thus, *General Comment 1* emphasises that HRE must combat prejudice, racism, discrimination and xenophobia,[23] in order to promote the ethical values which facilitate peace and harmonious relations among all people.

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18 Ibid.

19 Ibid, [2] (emphasis added).

20 *Charter of the United Nations*, Preamble.

21 *General Comment 1*, above n 2, [7].

22 Upendra Baxi, 'Human Rights Education: The Promise of the Third Millenium?' in G Andreopoulos and R P Claude (eds) *Human Rights Education for the Twenty-First Century* (University of Pennsylvania Press, Philadelphia, 1997) 146.

23 See for example *General Comment 1*, above n 2, [11].

Article 29(1) CROC was augmented by the UN Decade for Human Rights Education ('Decade for HRE') from 1995 to 2004, and it is relevant to consider how HRE has been defined in this initiative, and in particular, whether the definition of HRE developed by the Office of the High Commissioner for Human Rights ('OHCHR') and endorsed by the General Assembly supports the articulation of HRE in CROC, as elaborated upon by *General Comment 1*. As part of the Decade for HRE the OHCHR prepared Guidelines for National Plans of Action for HRE ('Guidelines') and the first section is headed 'Definition of Human Rights Education'.[24] It begins by highlighting references to HRE in international human rights instruments including CROC, before stating that:

> Human rights education may be defined as training, dissemination and information efforts aimed at the building of a universal culture of human rights through the imparting of knowledge and skills and the moulding of attitudes, which are directed towards:
> (a) The strengthening of respect for human rights and fundamental freedoms;
> (b) The full development of the human personality and the sense of its dignity;
> (c) The promotion of understanding, tolerance, gender equality and friendship among all nations, indigenous peoples and racial, national, ethnic, religious and linguistic groups;
> (d) The enabling of all persons to participate effectively in a free society;
> (e) The furtherance of the activities of the United Nations for the maintenance of peace.[25]

There are many similarities between this definition of HRE and Article 29(1) CROC, as well as a few differences that are of less significance. Paragraph (a) of the Guidelines corresponds to Article 29(1)(b) CROC except that it omits the reference to the Charter of the UN. Paragraph (b) above is similar to Article 29(1)(a) CROC except that it is not specific to children. Article 29(1)(d) CROC has been broken down into three separate provisions in the UN Decade for HRE definition, namely paragraphs (c), (d) and (e). The only aspect of HRE in Article 29(1) CROC that is not included in the above definition of HRE is paragraph (c) which, to recap, provides that HRE includes:

> The development of respect for the child's parents, his or her own cultural identity, language and values, for the national values of the country in which the child is living, the country from which he or she may originate, and for civilizations different from his or her own.

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[24] OHCHR, *Guidelines for National Plans of Action for Human Rights Education*, UN Doc A/52/469/Add.1 (20 October 1997) 5.

[25] Ibid.

The first part of this paragraph is specific to children and is therefore understandably not part of a general definition of HRE. This leaves the only substantive difference between Article 29(1) CROC and the definition of HRE developed for the Decade as the references to cultural identity, national values and different civilisations. It is unclear why this provision does not form part of the later definition of HRE. It may be that values education, while relevant to HRE, was not considered to be as important as the other aspects of HRE set out paragraphs (a)–(e) of the definition developed for the Decade. Furthermore, values are referred to in the UN Decade Guidelines in the section immediately following the definition. In particular it refers to HRE as having three dimensions, including 'the development of values, beliefs and attitudes which uphold human rights'.[26] It is suggested that this broadly encompasses the concept contained in Article 29(1)(c) CROC, and thus the definition of HRE in the Guidelines generally reinforces the articulation of HRE in Article 29(1) CROC.

There is however, one significant difference between the HRE set out in the Guidelines and HRE as set out in Article 29(1) CROC. As stated above, the Guidelines refer to HRE as having three dimensions. The third dimension is identified as being 'encouragement to take action to defend human rights and prevent human rights abuses'.[27] *General Comment 1* recommends that HRE be empowering, which is clearly not as strong a directive as taking action. There are two possible explanations for this difference. The first is that the Committee, when developing *General Comment 1*, was mindful of children's different developmental stages and evolving capacities[28] and did not consider it appropriate to encourage young persons to take action to defend and prevent human rights abuses at too early an age. The second is the different provenance of these statements; *General Comment 1* is essentially a consensus document agreed to by an expert body seeking consensus whereas the Guidelines were drafted by the OHCHR. It could be expected that the OHCHR would use stronger language than the Committee.

Overall, the definition of HRE in the UN Decade Guidelines bears a strong similarity to the articulation of HRE set out in Article 29(1) CROC. The only significant difference is not in the definition of HRE, but rather in the guidance of how such HRE should be promoted, that is, by encouraging recipients of HRE to take action, which is not something that *General Comment 1* endorses.

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26 Ibid [12(b)].
27 Ibid [12(c)].
28 *General Comment 1*, above n 2, [1], [9], [12].

When the UN Decade for HRE came to an end in late 2004, the General Assembly decided that the efforts to promote HRE needed to continue and therefore adopted the World Programme for HRE (2005–ongoing) as the vehicle by which to continue the focus on human rights education.[29] The World Programme operates in phases, with each phase concentrating on a different aspect of HRE. The first phase was from 2005 to 2007 and was directed at HRE in primary and secondary schools. The Human Rights Council then extended the first phase for a further two years (2008 to 2009) to give States more time to implement HRE.[30] In late 2009, the Human Rights Council proclaimed that the Second Phase of the World Program will focus on HRE for higher education and on human rights training programs for teachers and educators, civil servants, law enforcement officials and military personnel at all levels, and shall be for a period of five years, from 2010 to 2014.[31]

The Plan of Action for the First Phase ('Plan of Action') was prepared by the OHCHR and transmitted by the Secretary-General to the General Assembly.[32] It includes the following definition of HRE:

> Human rights education can be defined as education, training and information aiming at building a universal culture of human rights through the sharing of knowledge, imparting of skills and moulding of attitudes directed to:
> (a) The strengthening of respect for human rights and fundamental freedoms;
> (b) The full development of the human personality and the sense of its dignity;
> (c) The promotion of understanding, tolerance, gender equality and friendship among all nations, indigenous peoples and racial, national, ethnic, religious and linguistic groups;
> (d) The enabling of all persons to participate effectively in a free and democratic society governed by the rule of law;
> (e) The building and maintenance of peace;
> (f) The promotion of people-centred sustainable development and social justice.[33]

The first three paragraphs are in every respect identical to the first three paragraphs in the definition of HRE used for the UN Decade for HRE. However, the next three paragraphs reveal a further refinement of the definition of HRE. Some of the changes are stylistic rather than substantive including, for example, the deletion of the reference to the UN in the paragraph addressing the maintenance of peace. However, two changes are significant,

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29 Above n 5.

30 Human Rights Council, *World Programme for Human Rights Education*, UN Doc A/HRC/RES/6/24 (28 September 2007).

31 Resolution A/HRC/RES/12/4, 12 October 2009.

32 OHCHR, *Plan of Action for the First Phase (2005–2007) of the World Programme for Human Rights Education*, UN Doc A/59/525/Rev.1 (2 March 2005).

33 Ibid, [3].

namely the addition of a reference to a 'democratic society governed by the rule of law' in paragraph (d) and the inclusion of a new provision addressing sustainable development and social justice.

The mention of the 'rule of law' is a reflection of the new importance placed on this concept. As Thomas Carothers, Director of Research at the Carnegie Endowment for International Peace, noted: '[t]he concept [the rule of law] is suddenly everywhere – a venerable part of Western political philosophy enjoying a new run as a rising imperative of the era of globalization.'[34] It was in the late 1990s that the 'rule of law' re-emerged as an important concept within the notion of a democratic society.[35] Since CROC was drafted during the 1980s, when the 'rule of law' did not enjoy such a high profile in human rights discourse, it is understandable that it did not feature in Article 29(1) CROC. Similarly, sustainable development did not become part of human rights discourse until the 1990s,[36] that is, subsequent to the drafting of Article 29(1) CROC. While the idea of 'social justice' has been around for a long time, there is no authoritative definition of it.[37] Perhaps the notion of social justice has more of a collective element to it than human rights which are vested in individuals, but the terms are clearly closely linked.[38] Thus, the addition of social justice might be seen as slightly expanding the definition of HRE. It is suggested that the changes in the description of HRE between the Decade and the World Programme amount to a refinement of the definition rather than substantive modifications.

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[34] Thomas Carothers, 'The Rule of Law Revival' (1998) 77(2) *Foreign Affairs* 95.

[35] See for example A James McAdams (ed) *Transitional Justice and the Rule of Law in New Democracies* (University of Notre Dame Press, Notre Dame, 1997); Joseph Raz, 'The Rule of Law and Its Virtue' (1997) 93 *Law Quarterly Review 195*; Jennifer Widner, *Building the Rule of Law* (W W Norton, New York, 2001); Guillermo O'Donnell, **'**Why the Rule of Law Matters' (2004) 15 *Journal of Democracy* 32.

[36] See for example *Vienna Declaration and Programme of Action of the World Conference on Human Rights*, UN Doc A/CONF.157/23 (25 June 1993), Section I [20], [27], Section II [17] and [36]; Jack Donnelly, 'Human Rights, Democracy, and Development' (1999) 21 *Human Rights Quarterly* 608; Caroline Moser and Andy Norton, 'To Claim our Rights: Livelihood Security, Human Rights and Sustainable Development' (Paper presented at the Workshop on Human Rights, Assets and Livelihood Security, and Sustainable Development, Overseas Development Institute, London, 19–20 June 2001).

[37] Michael Reisch, 'Defining Social Justice in a Socially Unjust World' (2002) 83 *Families in Society* 343.

[38] See for example Virginia Held, *Rights and Goods: Justifying Social Action* (The Free Press, New York, 1984) and Clare Ferguson, 'Global Social Policy Principles: Human Rights and Social Justice' (DFID Social Development Division, 1999), www.dfid.gov.uk/pubs/files/sdd-gsp.pdf at 23 November 2007.

Like the Guidelines for the Decade for HRE, the Plan of Action follows its definition of HRE with a statement that HRE should include encouraging people to take action to defend and promote HRE.[39] As noted above, this is not something that *General Comment 1* recommends for children's HRE.

Article 29(1) CROC read in conjunction with *General Comment 1* provides a clear definition of HRE, the core elements of which are that HRE must promote respect for all human rights as universal and indivisible standards belonging to all people. It must promote respect for others, and it must actively encourage the development of values relating to peace, tolerance, and equality in an integrated and holistic manner. The international HRE initiatives subsequent to CROC essentially affirm this articulation of HRE. The few differences are minor and stem from a broadening of the definition to suit an audience that comprises more than just children, and an evolution in the understanding of HRE that has occurred since Article 29(1) CROC was drafted in the late 1980s. In particular, the inclusion of concepts such as the 'rule of law' and 'sustainable development' in the more recent articulations of HRE represent an effort to incorporate more modern ideas about what is necessary in order to achieve a culture of human rights.[40] The main area of divergence between CROC and the two subsequent initiatives is the express acknowledgement that HRE should promote action to defend and promote human rights.[41] Overall, there appears to be general consensus at the international level as to the content of HRE, with a small amount of disparity between Article 29(1) CROC and the more recent statements regarding HRE.

3 How governments define HRE

Having seen how HRE has been defined and explained by relevant bodies within the UN, it is important to see how these definitions compare with the definitional attempts of domestic governments. Space does not allow for a comprehensive analysis of all governments, so the Australian Federal Government has been selected for a case study to determine whether it interprets HRE in a manner consistent with the definition of HRE developed at the international level. Its interpretation has been gleaned from an analysis of documents published by the Department of Education, Science and Training ('DEST'),[42] as well as through interviews conducted with DEST staff. This analysis suggests that the Australian Government's understanding of HRE

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39 OCHCR, above n 32, [4].

40 Promoting a culture of human rights is the first objective of the World Programme for HRE, OHCHR, above n 32, [7].

41 OCHCR, above n 24, [13(c)]; above n 32, [4(c)].

42 DEST is now known as the Department of Education, Employment and Workplace Relations ('DEEWR').

emphasises civil and political rights, in particular, citizenship and democracy, rather than ESC rights.

Under the Australian Constitution, education is the responsibility of the state and territory governments, rather than the federal government.[43] Notwithstanding this, the Australian Federal Government has found opportunities to articulate its opinion about what constitutes HRE in its reports to the UN Committee on the Rights of the Child, which include, *inter alia*, activities in Australia pursuant to Article 29(1) CROC. The first report was submitted to the Committee in December 1995,[44] and a combined second and third report was submitted in September 2003.[45] By setting out how it thinks it is complying with Article 29(1) CROC, the Australian government reveals its understanding of its obligations under this article.

The *First Report* indicates that Australia had an understanding of HRE that in many aspects was congruent with Article 29(1) CROC, but at the same time differed in some critical areas. In a lengthy section on HRE in Australia,[46] the Government addressed the majority of issues identified in Article 29(1) CROC. The report referred to the *Hobart Declaration on Schooling in Australia*[47] which sets out ten agreed national goals of education.[48] The goals relevant to HRE include cultivating respect for others; developing a capacity to exercise judgement in matters of morality, ethics and social justice; and acquiring knowledge, skills, attitudes and values which will enable students to participate as active and informed citizens in a democratic society. The *First Report* elaborates on these issues, and specifically identifies that 'the knowledge, experience and interest of women and Aboriginal and Torres Strait Islander peoples are included by the provision of cross-curricula perspectives.'[49] It also recognised that groups with special needs must be addressed, and singled out immigrant groups, children who do not yet speak English, and students with learning disabilities as being in need of additional programs.

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43 *Constitution of Australia* section 51.

44 *Australia's First Report under Article 44(1)(a) of the Convention on the Rights of the Child*, UN Doc CRC/C/8/Add.31 (1 February 1996) ('*First Report*').

45 *Australia's Combined Second and Third Reports under the Convention on the Rights of the Child*, UN Doc CRC/C/129/Add.4 (29 December 2004) ('*Second/Third Reports*').

46 The section of the report relating to Article 29(1) CROC is in excess of 6,000 words.

47 The *Hobart Declaration on Schooling in Australia* is a 1989 report from the Australian Education Council (now the Ministerial Council on Education, Employment, Training and Youth Affairs), a body that is made up of all state, territory and federal Ministers of Education.

48 The agreement on uniform education goals demonstrates the operation of cooperative federalism in the field of education.

49 *First Report*, above n 44, [1237].

The HRE referred to in Australia's *First Report* includes anti-bullying initiatives, school violence based on gender, racism and ethnicity[50] and the cumulative social and cultural effects of colonisation.[51] With the exception of colonisation, these are all expressly identified as crucial aspects of HRE in *General Comment 1*.

The *First Report* provides a comprehensive insight into how the Australian Government of the time understood the HRE required by Article 29(1) CROC. The information provided to the Committee demonstrated a thorough and wide-ranging understanding of HRE that included most of the issues contained in Article 29(1) CROC. However, it failed to include any reference to ESC rights, and made no mention of international human rights laws, the United Nations, or the principles enshrined in its Charter.

Interestingly, the report also managed to largely avoid using the words 'human rights'. The only place they appear is in the section provided by the Australian Capital Territory ('ACT') that related specifically to HRE activities undertaken within the ACT.[52] The only mention of rights in other sections is in the context of the rights and responsibilities of citizens.[53] This suggests that the Federal Government in 1995 was uncomfortable with the term 'human rights'. The language which the Federal Government seemed to prefer was 'anti-discrimination', 'social justice', 'equality', and 'civics and citizenship', all of which are used liberally throughout the *First Report*. While all of these terms are encompassed within the concept of human rights,[54] they do not have the same force and international recognition as the term 'human rights'. The Australian Government's reluctance to expressly include the term 'human rights' in the section dealing with Article 29(1) CROC in its *First Report* to the Committee suggests that the Government either lacked an understanding of what HRE was or was deliberately attempting to obfuscate the issue.

In contrast to the *First Report*, Australia's *Second/Third Reports* are extremely brief in detailing activities pursuant to Article 29(1) CROC. They identify only three issues – anti-racism, child sexual abuse, and school discipline.[55] While anti-racism initiatives clearly fall within the definition of HRE

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50 Ibid [1241].

51 Ibid [1245].

52 Ibid [1279]–[1280].

53 Ibid [1238].

54 For example, 'equality' is referred to in Article 29(1)(d) CROC; 'discrimination' is the subject matter of Article 2 CROC, and *General Comment 1*, above n 2, identifies it as a core part of HRE pursuant to Article 29 CROC. Social justice is about analysing and addressing oppression based on a variety of grounds including racism, sexism, heterosexism, and ableism. See Maurianne Adams, Pat Griffin and Lee Anne Bell (eds) *Teaching for Diversity and Social Justice* (Routledge, Oxford, 1997).

55 *Second/Third Reports*, above n 45, [373].

as set out in Article 29(1) CROC and elaborated on in *General Comment 1*,[56] the other two issues are not generally considered to form part of HRE. While preventing the sexual abuse of children is clearly an aim of CROC,[57] neither Article 29(1) CROC nor *General Comment 1* contemplate it forming part of the HRE that children receive. School discipline practices could well form part of HRE, particularly when it comes to the use of corporal punishment. However, the discipline practices referred to in Australia's *Second/Third Reports* relate to procedural fairness issues when dealing with student suspension and exclusion, and reducing class sizes as a means of managing student behavioural problems.[58] These issues may be tangentially related to the HRE mandated in Article 29(1) CROC, but they are by no means a core part of the norm.

The *Second/Third Reports* failed to comply with the recommendation of the Committee regarding reporting on Article 29(1) CROC. In *General Comment 1*, the Committee requests that State Parties in their periodic reports provide details of what they consider to be the most important priorities concerning HRE, and to outline the activities that they propose to take over the next five years to address the problems identified.[59] This was not done in Australia's *Second/Third Reports*.

The extremely brief narrative about HRE activities in Australian schools set out in the second report is open to a number of interpretations. One is that State Parties' reports to the Committee are about activities not interpretations, and so the Australian Government may recognise that HRE is broader than what it is reporting on, but has only included in the report what it believes it is doing in the field of HRE. Another explanation is that the Government has a very narrow understanding of HRE, namely anti-racism, protecting children from sexual abuse, and school discipline. A third possible explanation for the brevity of reporting on HRE may be that the Government was not willing to commit resources to preparing a comprehensive report to this UN treaty committee. There have, for several years, been tensions between Australia and the UN treaty committees that may account for the apparent lack of effort in reporting.[60] Unfortunately, there is insufficient publicly available information to determine why the most recent report by the Australian Government to the Committee was so brief with regard to Article 29(1) CROC.

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56 *General Comment 1*, above n 2, [11].

57 See Articles 19 and 34 CROC.

58 *Second/Third Reports*, above n 45, [383].

59 *General Comment 1*, above n 2, [26].

60 Hilary Charlesworth, Madelaine Chiam, Devika Hovell and George Williams, 'Deep Anxieties: Australia and the International Legal Order' (2003) 25 *Sydney Law Review* 423.

What explanation is there for this significant difference in reporting style and substance between Australia's *First Report* and *Second/Third Reports* to the Committee? The answer appears to lie in the change of government that took place between the two reports. In March 1996 a conservative Liberal-National Government replaced the Labor Government that had been responsible for the preparation of the *First Report*. That Liberal-National administration prepared the *Second/Third Reports*. The content of the *Second/Third Reports* suggests that the conservative Government did not share the previous Government's understanding of HRE. Governments change, and it is likely that educational policies and priorities will change from one administration to the next. Thus, any government's interpretation of HRE must be understood as representing only the policy or understanding of the current political party holding office. The difference between the Australian Government's *First Report* and *Second/Third Reports* therefore appears to be due to a change of government and a commensurate change in priorities, including in particular a reduced commitment to international human rights laws.[61]

From these two Reports to the Committee, it appears that Australia has an understanding of HRE that is narrower than the definition propounded in Article 29(1) CROC and elaborated on in *General Comment 1*. Interviews with employees of DEST confirm this conclusion. One senior staff member stated in an interview that 'Human rights is a very small part of your education. It's in one sense a very small part of CCE [civics and citizenship education].'[62] This perception that HRE is part of civics and citizenship education is the reverse of the approach adopted in Article 29(1) CROC. Civic and citizenship education involves teaching students about the democratic system of government and civic life. This is merely one aspect of HRE, which encompasses much more than these limited democratic values.

In conclusion, the Australian Government's *First Report* and *Second/Third Reports* to the Committee on the implementation of CROC in Australia, and the interviews with DEST employees, point to the Australian Government having a narrow understanding of HRE that encompasses only limited aspects of Article 29(1) CROC.

4 How NGOs define HRE

The role that non-governmental human rights organisations play in the promotion and implementation of HRE is extremely important since it is NGOs that

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61 For a full discussion on the differences between the human rights commitments of Labor and Liberal governments in Australia see Hilary Charlesworth, Madelaine Chiam, Devika Hovell and George Williams, *No Country is an Island: Australia and International Law* (UNSW Press, Sydney, 2006).

62 Interview conducted on 18 June 2004. Transcript on file with author.

are developing much of the HRE materials that are being used in schools.[63] NGOs' definitions of HRE are therefore being passed on to teachers through the literature and resources they provide to schools.

Three of the more significant NGOs working in the area of HRE have been selected for consideration below, namely Amnesty International, Human Rights Education Associates ('HREA'), and the People's Movement for Human Rights Learning ('PDHRE').[64]

A Amnesty International

> Human rights education is both a lens through which to observe the world and a methodology for teaching and leading others.[65]

Amnesty International began as a movement to help prisoners of conscience (with an article by Benenson in The Observer entitled 'The Forgotten Prisoners' calling for an international campaign to protest against the imprisonment of people purely for their political or religious beliefs) and gradually extended its mandate to include victims of all kinds of discrimination and abuse. Today it is one of the oldest, largest,[66] and most well-respected independent international human rights organisations. While Amnesty International is perhaps best known for its campaigns to free prisoners of conscience, it also does a significant amount of work surrounding human rights education. It defines HRE as:

> A process whereby people learn about their rights and the rights of others, within a framework of participatory and interactive learning. HRE is concerned with changing attitudes and behaviours, learning new skills, and promoting the exchange of knowledge and information. HRE is long-term, and aims to provide an understanding of the issues, and equip people with the skills to articulate their rights and communicate this knowledge to others.

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[63] See for example Amnesty International, *First Steps: A Manual for Starting Human Rights Education* (Amnesty International Publications, London, 1997); Human Security Network, *Understanding Human Rights: Manual on Human Rights Education* (Human Security Network, Graz, 2003); People's Movement for Human Rights Education, *Passport to Dignity* (PDHRE, New York, 2001); Facing History and Ourselves, *Resource Book: Holocaust and Human Behavior* (Facing History and Ourselves, Boston, 1994); and Nancy Flowers (ed) *Human Rights Here and Now: Celebrating the Universal Declaration of Human Rights* (Human Rights Educators' Network and Amnesty International, New York, 1998).

[64] This NGO was previously called the People's Decade for Human Rights Education.

[65] See http://www.amnestyusa.org/education/about.html at 23 November 2008.

[66] It has over 2.2 million members, subscribers and regular donors in over 150 countries. See http://www.amnesty.org/en/who-we-are at 23 November 2008.

HRE . . .

- Recognises the universality and indivisibility of human rights
- Increases knowledge and understanding of human rights
- Empowers people to claim their rights
- Assists people to use the legal instruments designed to protect human rights
- Uses interactive and participatory methodology to develop attitudes of respect for human rights
- Develops the skills needed to defend human rights
- Integrates the principles of human rights into everyday life
- Creates a space for dialogue and change
- Encourages respect and tolerance.[67]

In contrast to the Australian government, considered above, Amnesty International has clearly enunciated its understanding of HRE. Its activist philosophy is very apparent in its definition of HRE. Amnesty International wants students to question, challenge and take action.[68] Its definition of HRE is normative and transformative, in that it seeks to train people to assert and defend their rights and the rights of others, in other words to become human rights activists.

The reference to the 'indivisibility of human rights' and the fact that there is no distinction made between ESC rights and civil and political rights suggest that Amnesty International understands HRE to encompass the full range of human rights. This is congruent with Article 29(1) CROC as elaborated on in *General Comment 1*. Amnesty International's definition of HRE seems to be both narrower and broader than Article 29(1) CROC. Narrower, because it does not appear to cover all the matters addressed in Article 29(1)(b)–(d) CROC. For example, there is no express reference to a child developing respect for his or her parents. This is probably because Amnesty's definition of HRE is not specifically aimed at children, as Article 29(1) CROC is. It will be recalled that the HRE definitions in the UN Decade for HRE and the World Programme for HRE are also silent about human rights education including the development of respect for parents. Thus it is clear that the inclusion of a reference to respecting parents is only relevant where the recipients of that education are children.

Amnesty International's definition of HRE is broader than Article 29(1) CROC, because the treaty provision merely refers to the 'development of respect' for human rights, whereas Amnesty International aims to empower

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[67] Amnesty International, *Make Human Rights a Reality* (2005) Amnesty International, http://www.amnesty.org/en/library/asset/POL32/001/2005/en/dom-POL320012005en.html at 23 November 2008.

[68] Flowers, above n 6.

students to defend and claim their rights, which has more of an activist element to it. Indeed, an Amnesty International staff member responsible for student groups, who was interviewed for this research, stated that she designed 'trainings that will help them to become better human rights activists'.[69] This goes beyond the purpose and intent of Article 29(1) CROC, described in *General Comment 1* as being to enable children to 'enjoy the full range of human rights and to promote a culture which is infused by appropriate human rights values'.[70] The language in Article 29(1) CROC was drafted by State representatives, and the final text had to be agreed to by the majority of States. It is therefore not surprising that it does not encourage human rights activism, as this is not something that is generally favoured by States which support maintenance of the status quo and see activism as a challenge to their power and control.[71] However, this activist approach to HRE is consistent with the other international definitions of HRE in the Guidelines for the Decade and the Plan of Action for the World Programme, both of which refer to HRE as encouraging the taking of action to defend and promote human rights.

Amnesty International relies on the UDHR for guidance on HRE, rather than Article 29(1) CROC. This is not surprising, given that the UDHR is referred to in Amnesty International's mission statement and CROC is not,[72] and that Amnesty International's HRE work is not limited to children. Overall, Amnesty International's understanding of HRE appears to be generally consistent with Article 29(1)(b) and (d) CROC, and the matters set out in Article 29(1)(c) CROC, while not explicitly addressed, may be implicit in Amnesty International's definition of HRE.

B Human Rights Education Associates

Human Rights Education Associates is an international non-governmental organisation that supports human rights learning; the training of activists and professionals; the development of educational materials and programming; and community-building through on-line technologies.[73] It was established in the Netherlands in 1996, and now has offices in Amsterdam and Boston.

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69 Interview conducted on 4 February 2004. Transcript on file with author.

70 *General Comment 1*, above n 2, [2].

71 Michael Ignatieff, *Human Rights as Politics and Idolatry* (Princeton University Press, Princeton, 2001).

72 *Statute of Amnesty International* as amended by the 27th International Council, meeting in Morelos, Mexico (2005) Amnesty International, http://www.amnesty.org/en/library/asset/POL20/001/2007/en/dom-POL200012007en.pdf at 23 November 2008.

73 See www.hrea.org at 23 November 2008.

The Executive Director of HREA was interviewed by the author and, in response to a question asking how HREA defined HRE, stated:

> The way that we define it is that it promotes understanding and the promotion and protection of human rights. So that means that human rights education has to be not only about human rights values, but it has to be done in a way that it creates some sort of a really personal understanding and commitment to human rights.
>
> So it cannot just be purely informational, it has to move people by the ideas, and move them in terms of relating it to their own lives or feeling that they're connecting to human rights, in terms of how they're acting in the world . . .
>
> We look at human rights education in terms of the goals, and not just pure content and we feel that's very important. It's not that everyone that gets human rights education is going to become a human rights lawyer or a human rights advocate, but we think those actually should be the goals, that people feel that at the minimum that the human rights ideas are something that they own and they feel close to, and that they feel the importance of protecting and promoting human rights elsewhere and empowering others. So there's self-empowerment and there's empowering others.[74]

Thus HREA is similar to Amnesty International in requiring, as a core part of HRE, that it motivate and empower individuals to effect positive change within society. The tone, if not the specific language, is adversarial or confrontational. This NGO clearly seeks to create activists who will know and be able to claim and assert their human rights. Its understanding of HRE is expressed in significantly stronger language than that used in Article 29(1) CROC; there is a clear distinction between the goal of developing respect for human rights, as Article 29(1) CROC mandates, and the goal of producing human rights lawyers and activists, as HREA advocates.

This interviewee did not seek to define the 'human rights' part of the term: she did not feel the need to elaborate on whether human rights means just civil and political rights, or the whole range of human rights. However, from the overall tone of the interview, and from a review of the literature on HREA's web page,[75] it is clear that HREA has an inclusive understanding of the term 'human rights'. However, like Amnesty International, its focus appears to be on the matters addressed in Article 29(1)(b) and (d) CROC, and it does not explicitly address the issues set out in 29(1)(c) CROC.

C The People's Movement for Human Rights Learning

Founded in 1988, PDHRE is a small international NGO based in New York that works to develop and advance pedagogies for HRE relevant to people's daily lives in the context of their struggles for social and economic justice and

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74 Interview conducted on 2 December 2003. Transcript on file with author.

75 See http://www.hrea.org at 26 November 2008.

democracy.[76] This NGO was one of the prime instigators of the UN Decade for Human Rights Education, and in 2003 the Executive Director, Shulamith Koenig was awarded the prestigious UN Human Rights Award[77] for her work for PDHRE in the field of HRE.

The People's Movement for Human Rights Learning perceives HRE as:

> A process of learning that evokes critical thinking and systemic analysis, with a gender perspective, with the learners . . . learning to analyse their situations within a holistic framework of human rights about political, civil, economic, social and cultural concern relevant to the learners' lives . . . to result in a sense of ownership of human rights . . . leading to equal participation in the decisions that determine our lives and taking actions to claim them.[78]

Like the other NGOs considered in this chapter, PDHRE has a broad understanding of HRE that is inclusive of ESC rights. It also adopts an activist approach, asserting that HRE should not just be about disseminating information about human rights, but also about developing skills of analysis and critical thinking that will lead the recipients of HRE to become human rights advocates. This is consistent with the HRE articulated in the Decade and the World Programme, but not Article 29(1) CROC and *General Comment 1*.

All three NGOs understand that HRE should be about empowerment and encouraging recipients of HRE to become human rights activists. While *General Comment 1* refers to empowerment twice,[79] it is not its focus. All three NGOs embrace the full range of human rights, as recommended in *General Comment 1*, but they all fail to perceive HRE as including the entirety of matters referenced in Article 29(1) CROC. In particular these NGOs did not identify the issues set out in Article 29(1)(c) CROC as being part of their understanding of HRE. These NGOs' understanding of HRE, while generally

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[76] See http://www.pdhre.org/about.html at 26 November 2008.

[77] The Human Rights awards were instituted by *Annex: International Year for Human Rights: further programme of measures and activities recommended by the Commission on Human Rights*, GA Res 2217(XXI), UN GAOR, 21st sess, 1498th plen mtg, UN Doc A/RES/2217(XXI) (19 December 1966). They are intended to 'honour and commend people and organizations which have made an outstanding contribution to the promotion and protection of the human rights embodied in the Universal Declaration of Human Rights and in other United Nations human rights instruments'. They were first awarded in 1968, and have been given out at five-year intervals since then.

[78] Posting by Shulamith Koenig on behalf of PDHRE on the HREA Listserv (1 January 2002): see https://hrea.org/lists/hr-education/markup/maillist.php at 25 November 2008.

[79] *General Comment 1*, above n 2, [2].

similar to how HRE has been defined in Article 29(1) CROC and *General Comment 1*, are much more congruent with the other two international definitions of HRE analysed above, namely those of the UN Decade for HRE (1995–2004) and the World Programme for HRE (2005–ongoing). This is because of their aim of provoking people to take action to protect human rights.

5 How teachers define HRE

Since teachers are the ones ultimately charged with teaching students about human rights, it is important to understand what they actually think HRE means. As part of a doctoral research project, a number of secondary school teachers in Melbourne, Australia, and Boston in the United States were surveyed and interviewed by the author.[80] Teachers were invited to state in their own words what they understand is meant by the term human rights education. Several themes emerged from these data, and are considered below.

A Use of UN documents in defining HRE

While the UN, governments and even NGOs perceive human rights in a very legalistic manner, teachers do not. Teachers see a clear distinction between 'human rights' and 'human rights law'. While the UN, governments and NGOs rely on international instruments such as the UDHR when defining HRE, teachers do not tend to do so. In schools the influence of UN documents diminishes considerably.

Of the 30 teachers in Melbourne who completed and returned the survey, ten mentioned UN instruments (most often UDHR) in their definition of HRE. In addition, a further seven teachers were interviewed who had not completed the survey and, of these, two referred to the United Nations when defining HRE. Thus 32 per cent of participating Melbourne teachers defined human rights education using a framework of international human rights law. By contrast, of 33 Boston teachers surveyed and interviewed, only three (or 9 per cent) mentioned the UN or international human rights instruments in their definition of HRE. This clearly suggests that Boston teachers' understanding of HRE is not informed by international proclamations or definitions of human rights. The idea that there is a relationship between HRE and international human rights instruments was something that was understood by Melbourne teachers to a significantly greater degree than their Boston counterparts. However, the Melbourne proportion was still not high, with less than one-third including UN documents in their definition of HRE.

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[80] In Melbourne, 30 teachers completed and returned surveys and 20 were interviewed. In Boston, 19 completed and returned surveys and 21 were interviewed. All data were collected by the author in 2004.

B Use of national documents in defining HRE

While Boston teachers did not refer to international instruments when defining HRE, many did place emphasis on national instruments, in particular documents such as the US Bill of Rights and the Declaration of Independence, which are firmly embedded in American culture. It was clear from both the interviews with Boston teachers and the survey responses that domestic laws strongly influenced their understanding of HRE. Examples of this attitude are clear from the following extracts:

> *Teacher 1*: As human beings we are entitled to certain 'unalienable' rights. Our Declaration of Independence includes among them life, liberty, and the pursuit of happiness. When we are denied these, it may be considered a violation of human rights.[81]

> *Teacher 2*: I suppose if I was going to make it a definition, I'd have to call upon the American Declaration of Independence which says that we have the right to life, liberty and the pursuit of happiness and that rights of citizenship should be offered equally to all. That's what it says in our Fourteenth Amendment, equal protection under the law.[82]

> *Teacher 3*: We do the Bill of Rights. When I started talking about China, I compared it to the Bill of Rights here in the United States . . . I ask kids if you could only pick one [right] to keep, which one would it be? I guess in some ways we relate it more to American-oriented ideas of liberty and privilege.[83]

The impact of this focus is twofold. Firstly, the existence of a Bill of Rights stimulates teachers to have a dialogue with their students about the whole notion of rights. The Bill of Rights and the Declaration of Independence provide a focal point which teachers are comfortable with, because these domestic documents are a core part of America's history, culture and identity. They are not perceived as too political or challenging, which is something that human rights are sometimes accused of.

The second effect of this focus on domestic instruments is that it narrows the scope of HRE. The rights contained in the American Bill of Rights are in the nature of civil and political rights, and not even all the civil and political rights contained in the ICCPR. Thus Boston teachers' definitions of human rights education are much more limited than those provided by Melbourne teachers, since the latter tend not to restrict HRE to civil and political rights.

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81 Survey respondent B18. Transcript on file with author.
82 Interviewee B19. Transcript on file with author.
83 Interviewee B22. Transcript on file with author.

It is not surprising that CROC did not feature in teachers' definitions of HRE, given that the United States is one of only two States not to have ratified this treaty. Until such time as CROC is legally binding in the United States, it is unlikely to inform educators' understanding of HRE.

C Civil rights versus human rights

Linked to this reliance by Boston teachers on domestic instruments, such as the Bill of Rights, is an equating of civil rights with human rights. For many Boston teachers, human rights and civil rights are one and the same. The following extract from an interview with a Boston teacher exemplifies this.

> *Interviewer*: So how do you see the connection between civil rights and human rights?
> *Teacher*: They are the same thing. If you're not respecting someone's civil rights, you're violating their human rights. If you don't allow them to vote, to practise the religion they choose, to wear the headdress that their religion calls for, you're violating their human rights.[84]

On the other hand, some teachers misconstrue the two, as demonstrated in the following statement from a Boston teacher:

> Human rights are a little more general, maybe a little more like the most basic of rights. And then civil rights are more the laws that go to back up these human rights.[85]

This confusion between civil rights and human rights resulted in Boston teachers having a narrow definition of HRE that excluded a large section of human rights, particularly ESC rights. The majority of teachers gave as examples of HRE, their lessons on Martin Luther King, free speech and slavery. This is in stark contrast to Melbourne teachers, who generally included ESC rights in their definitions of HRE and gave examples of lessons on Aboriginal reconciliation, the 'Rugmark' label,[86] and the Fairwear campaign.[87]

Those Boston teachers who did see a distinction between civil rights and human rights made an interesting distinction between the two. A number of teachers expressed views similar to that voiced by the following teacher:

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[84] Interviewee B30. Transcript on file with author.

[85] Interviewee B18. Transcript on file with author.

[86] Rugmark is a global non-profit organisation working to end illegal child labour through encouraging consumers to buy carpets with the Rugmark label, which guarantees that no child labour was used in the manufacture of the carpet.

[87] This is an initiative that aims to end the exploitation of outworkers in the Australian clothing industry.

> People know about civil rights and social justice and racism and equality, but the concept of human rights seems to be something that happens 'over there'. Something that happens in Africa or Iraq.[88]

Thus, there were a number of Boston teachers who did not perceive HRE as relating to events or circumstances within America. It is difficult to have widespread HRE across schools if the very people entrusted with delivering it do not understand one of the fundamental principles of human rights, namely that they are universal, and apply as much to people living in the United States as people living in every other part of the world.

D Positive versus negative definitions of HRE

Another way of analysing teachers' definitions of HRE is to classify their responses according to whether they consider HRE in negative terms – that is, violations of human rights, for example genocide, slavery, torture – or whether they viewed human rights in more positive terms – that is, empowering students to become aware of and defend human rights. The following quotes highlight this distinction.

(i) Negative definitions

> *Teacher 1*: I would consider human rights education to mean teaching people about human rights violations throughout history and throughout the world. I would define human rights violations as any instance in which a group of people are singled out and attacked (may include imprisonment, torture, killing, genocide) or just generally denied basic rights (such as freedom of religion.[89]

> *Teacher 2*: I'm teaching it from a historical perspective. So looking at various times in history where human rights have been denied to people and trying to address those issues.[90]

> *Teacher 3*: We have much dirtier air here than just at the town over, and because of that we have the highest asthma rates in the State. And why? Because they put the trash transfer station in our neighbourhood. Because they put the bus parking lots in this neighbourhood. It's unequal. . . . Teaching human rights is first making students aware that the situations they are living in are not by accident, that decisions were made that placed their health or their welfare in jeopardy by the government or big business, and they need to be aware of those forces.[91]

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88 Interviewee B11. Transcript on file with author.
89 Survey respondent B13. Transcript on file with author.
90 Interviewee B5. Transcript on file with author.
91 Interviewee B20. Transcript on file with author.

(ii) Positive definitions

> *Teacher 4*: The teaching of human rights is not confined to teaching students about documents which are supposed to give rights to individuals, but about attitudes to others at age specific times, which broaden their concepts not only of rights, but responsibilities. These ideas should be explored and discussed so that a personal philosophy of inclusiveness should be developed.[92]

> *Teacher 5*: To learn about treating people with respect and compassion on a physical and emotional level within the immediate/local and international areas.[93]

> *Teacher 6*: Human rights education to me is being able to impart a sense of responsibility towards other human beings within your community, and to me it is developing strategies that make us able to see that not everything is in black and white, that there are shades of grey and that not everybody is the same, and that we need to respect and understand those differences. So it's breaking down the barriers between different groups so that we can co-exist.[94]

Thus there was no uniformity amongst the ways teachers defined HRE. When these definitions are contrasted with Article 29(1) CROC, it is apparent that the positive definitions bear a closer resemblance to the HRE mandated in that treaty. Article 29 CROC refers to aims, such as '[t]he development of respect for human rights and fundamental freedoms'[95] and '[t]he preparation of the child for responsible life in a free society, in the spirit of understanding, peace, tolerance, equality of sexes, and friendship among all peoples'.[96] Teaching students about past human rights abuses may be a way of achieving these aims, but it is suggested that the positive definitions align more closely with the objectives of Article 29 CROC.

E Global versus local definitions of HRE

One area where there was a significant disparity amongst teachers was the geographical breadth of their focus on HRE. Boston teachers in particular tended to define HRE by reference to US constitutional documents and focus therefore on local issues, while the Melbourne teachers took a more global approach. The following excerpts from interviews illustrate this.

> *Melbourne Teacher*: [We] look at in Australia, and worldwide, the trend and the reasons for homelessness. And we pose a question to the students, 'where would

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92 Survey respondent M10. Transcript on file with author.
93 Survey respondent M12. Transcript on file with author.
94 Interviewee M16. Transcript on file with author.
95 Article 29(1)(b) CROC.
96 Article 29(1)(d) CROC.

you prefer to be homeless?' In a developing country, a third world country, or a developed country?[97]

Boston Teacher: Americans tend to be very, very nationalistic and see the world from the United States out. So we're concerned with issues here, and we let other people take care of things in their country.[98]

Many more examples could be cited which illustrate how Melbourne teachers tend to think more globally than their Boston counterparts. The quotes above not only ably demonstrate this point, but also illustrate the different focuses that teachers have with regard to HRE. This disparity seems to flow from the above-mentioned emphasis that Boston teachers have on domestic laws rather than international human rights instruments. Melbourne teachers, on the other hand, were more in tune with the notion of universality of rights, and, while not ignoring human rights in Australia, they had a global approach to human rights.

The stark contrast between the definitions of teachers and others may be due to the fact that teachers define HRE in the context in which they are involved, that is, in secondary schools, whereas the UN definition is intended for a much broader audience, that is, it is not necessarily limited to education in the classroom.

Overall the data collected for this research project revealed that there was no common understanding amongst teachers as to what human rights education means or entails. Teachers tended not to define HRE in a way similar to the UN, governments or NGOs, in that they did not frame HRE in legalistic terms, base their understanding on international human rights instruments, or have as their goal creating human rights activists.

6 Conclusion

As indicated at the outset, this chapter did not purport to provide a definitive answer to the question: 'What is HRE?' Rather, it has sought to demonstrate that there are numerous understandings of HRE, which vary widely according to the vested interests of the proponent of the definition. They range from broadly consistent definitions at the international level (in Article 29(1) CROC, the UN Decade for HRE and the World Programme for HRE) to conservative and limited proposals from governments, and from activist definitions promoted by the NGO sector to teachers' non-legal interpretations, which relate more to morals and ethics than to international human rights law.

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97 Interviewee M5. Transcript on file with author.
98 Interviewee B17. Transcript on file with author.

Thus, the term HRE, although widely used, lacks a clear definition that is universally accepted. The relative newness of HRE as a discipline may be a contributing factor to the lack of consensus regarding what it means, and over time a more harmonious approach to what HRE entails may emerge. But, until that happens, one must ask: what are the consequences of this wide disparity in understanding of what HRE is? There are several effects. First, it provides greater freedom for those working in the field; with no widely endorsed mandate about what HRE is, organisations and individuals have extreme latitude to teach whatever they want and call it HRE. They are not constrained by some prescriptive definition.

The second consequence of the lack of a single definition of HRE is that it makes evaluation problematic. With so many different understandings of HRE it is difficult for a researcher to assess what genuine human rights education activities are taking place. Some teachers may not identify their work as HRE, and therefore choose not to participate in a study of HRE, while others may consider their work to be HRE when it does not actually fit within the definition employed by the researcher.

Finally, this lack of a common understanding of what HRE is should be of concern to the UN, which for the last ten years has made HRE one of its priorities, as evidenced by the proclamation of the Decade for Human Rights Education and the World Programme for Human Rights Education. It has devoted considerable resources to advocating HRE, and yet there remains significant confusion and misunderstanding about what HRE entails. The absence of a common understanding should also be of concern to governments, if only because their inactivity in this area is creating opportunities for NGOs to fill the void with their own more radical definitions of HRE.

This chapter has demonstrated that the term 'human rights education' is more complex than one might initially think, and open to numerous different interpretations. While the UN has repeatedly provided consistent definitions of HRE (in Article 29(1) CROC, and as part of the Decade for HRE and the World Programme for HRE), these definitions do not reflect how HRE is understood by others including governments, NGOs and teachers, who all have varied opinions about what constitutes HRE. Until such time as the UN is able to garner more widespread support for its definition of HRE, human rights education will remain a slogan in search of a definition.

Index