

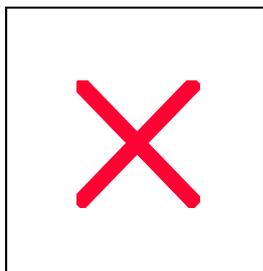
**Commonwealth Secretariat**  
**Human Rights Unit**

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**MODEL  
HUMAN RIGHTS  
CURRICULUM**

*for* **COMMONWEALTH  
UNIVERSITIES AND  
LAW SCHOOLS**

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*“We believe in the liberty of the individual under the law, in equal rights for all citizens regardless of gender, race, colour, creed or political belief, and in the individual’s inalienable right to participate by means of free and democratic political processes in framing the society in which he or she lives.”*

HARARE DECLARATION OF COMMONWEALTH PRINCIPLES  
COMMONWEALTH HEADS OF GOVERNMENT  
HARARE, ZIMBABWE, 20 OCTOBER 1991

*“The use of education to promote values of democracy, human rights, citizenship, good governance, tolerance...as espoused by the Commonwealth in its key declarations of principles, should be strengthened.”*

JOINT STATEMENT, 14<sup>TH</sup> CONFERENCE OF COMMONWEALTH EDUCATION  
MINISTERS, HALIFAX, NOVA SCOTIA, CANADA,  
30 NOVEMBER 2000

*“Everyone has the right to education...Education should be directed to the full development of the human personality and to strengthening of respect for human rights and fundamental freedoms. It shall promote understanding, tolerance and friendship among all nations, racial or religious groups...for the maintenance of peace.”*

UNIVERSAL DECLARATION ON HUMAN RIGHTS  
ARTICLE 26

*“Human rights education should involve more than the provision of information and should constitute a comprehensive life-long process by which people at all levels in development and in all strata of society learn respect for the dignity of others and the means and methods of ensuring that respect in all societies...”*

*...Human rights should become the “common language of humanity”. Human rights education is the means to attain this.”*

UNITED NATIONS [GENERAL ASSEMBLY RESOLUTION 49/184](#) (23 DECEMBER 1994), PROCLAIMING THE UNITED NATIONS DECADE FOR HUMAN RIGHTS EDUCATION, COMMENCING 1 JANUARY 1995, AND J. PACE (DIRECTOR, UN CENTRE FOR HUMAN RIGHTS), KEYNOTE ADDRESS ON THE DECADE PROCLAMATION, OSAKA, JAPAN, JULY 1995

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## **Foreword**

by the Commonwealth Deputy Secretary General

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Through accessible programmes of education and awareness, we have all seen how societies can overcome many of the obstacles to enhanced respect and understanding of others, to peace and equitable justice. Ignorance and prejudice are the enemies of our collective progress.

There is therefore a responsibility and a challenge on teachers and educators in the Commonwealth to motivate, inform and respond to their young people and students. This challenge also represents an opportunity for teachers to develop and channel the enthusiasm, intellect and energy of young people and students, in pursuit of the Commonwealth's vision for stable, prosperous and equitable societies based on democracy, the rule of law, and respect for fundamental human rights.

With this in mind it is a pleasure for me to introduce this comprehensive model curriculum. It has been developed by our Human Rights Unit for legal and other educators in the tertiary sector in the Commonwealth. It is my hope that it will be of assistance to teachers in developing interesting and stimulating courses for their students, and so plant in these future leaders a solid understanding of the significance, for long term peace and progress, of respecting and protecting human rights of all persons, in keeping with the principles on which the modern Commonwealth is based.

**Florence Mugasha**  
**Marlborough House, London**  
**December 2006**

## **Introduction: Objectives of the Curriculum**

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The commitments made and expressed by all member countries of the Commonwealth reaffirm that we all enjoy some basic rights. But not everyone is equally aware of the extent of their rights, or how to articulate or access these. And not everyone is equally enabled to understand the nature of their duty to provide for the protection and upliftment of others. In keeping with its mandate to assist Commonwealth countries to promote awareness and understanding of human rights, the Human Rights Unit of the Commonwealth Secretariat (HRU) undertakes a range of capacity-building programmes. The basis of this work is that while there is a right to education. There is also a pressing need for 'education about rights'.

The objective of this teaching resource is to provide a model for Commonwealth law schools, law colleges and other faculties interested in offering a course on human rights to their undergraduate students (or in developing and strengthening existing courses). It is hoped that this will facilitate the establishment and development of such courses throughout the Commonwealth and in this way contribute to making a detailed grasp of human rights standards, mechanisms, debates and issues more widely available to students. It is also hoped that, in addition to the establishment of specific courses in human rights, the curriculum will assist in integrating human rights components, perspectives and principles into other subject courses.

It is most important to note that this resource is a *model* only. It is intended as a teacher's planning resource, to suggest and describe what might be possible components of a notional course in human rights. It provides a recommended structure and offers some teaching methodology ideas, but it remains for the teacher to plan and provide the substance and content. Thus while it contains references and links to many useful instruments, treaties, cases, materials and resources, the model curriculum is not intended as a textbook or a comprehensive research and learning resource on human rights.

The HRU intends to update the model course from time to time. It is partly for this reason that the resource is designed primarily to be hosted and accessed electronically via a website. It has been designed in a simple format to ensure it is readily accessible. It can be used to form the template document of a course outline. It is also available in CD-ROM. We will welcome comments and input from tertiary educators in Commonwealth countries.

The HRU thanks Professor John Hatchard of the Commonwealth Legal Education Association (CLEA) who undertook for it the task of compiling a model curriculum in 1999. The revision of the model curriculum was undertaken for HRU by Jolyon Ford (then of the Australian National University) with Max du Plessis (University of KwaZulu-Natal).

**Rabab Fatima, Head of Human Rights  
Commonwealth Secretariat  
December 2006**

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## 1. Human Rights Education in the Commonwealth: An Overview

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### BACKGROUND

Throughout the Commonwealth, the need for tertiary educators to provide adequate and systematic education in human rights (especially for undergraduate students studying law) has increased dramatically. This reflects greater awareness of human rights generally and the increased legal and political significance of human rights at the international and domestic levels.

Today, knowledge of human rights (by which is meant knowledge of the concepts, ideals, vocabulary, principles, institutions and systems, and the limits of human rights) is essential for those involved in the study and practice of law. It is equally essential, of course, to anyone involved in government service, the media and public affairs more generally. The human rights ideal expressed in many of the founding international instruments is that the norms and standards become part of the language, practices, habits and values of States, governments, individuals, and groups of all kinds. Instilling an awareness of human rights can have the effect of enhancing the growth of a human rights culture and a strong community of civil and governmental professionals and other experts dedicated to positive national human rights outcomes, and to spreading awareness in the community of the significance of human rights.

It is possible to discern a shifting focus in the field of human rights from ‘standard setting’ to ‘implementation’. That is to say the challenge now lies in promoting established norms and ideals, ensuring they are respected, and ensuring that any violation of these is subject to fair review and possible remedy. This involves building a human rights culture and the socialisation of all elements of society into that culture. As Commonwealth Education Ministers have recognised, education of young people and adults in human rights norms and practice is a vital part of this wider project. In particular, it relates to the preventative, promotional aspects of human rights awareness so that duties to others and care for others’ rights is internalised (by individuals and institutions) and so as to integrate a tolerant rights-consciousness into all everyday activities and administrative and other decision-making.

### THE WORLD PROGRAMME FOR HUMAN RIGHTS EDUCATION

The international community has recognised and articulated the significance of human rights education in a number of international human rights instruments including the *Universal Declaration of Human Rights* (Article 26), the *International Covenant on Economic, Social and Cultural Rights* (Article 13), the *Convention on the Elimination of all Forms of Discrimination Against Women* (Article 10(c)) and the *Convention on the Rights of the Child* (Article 29). Also relevant is the UN *Vienna Declaration and Programme of Action*

1993 (Section D), calling on States to become involved in human rights education, and the *Paris Integrated Framework on Action on Education for Peace, Human Rights and Democracy* (UNESCO 1995). The Vienna Declaration led to the proclamation of United Nations [General Assembly Resolution 49/184](#) of 23 December 1994, which proclaims the ten-year period beginning on 1 January 1995 the United Nations Decade for Human Rights Education (see generally <http://www.ohchr.org/english/issues/education/training/decade.htm>).

The outcome of the Decade has been the proclamation by the UN General Assembly of the UN World Programme for Human Rights Education ((UNGA Resolution 59/113B) and the drawing up of a comprehensive Plan of Action for human rights education by the Office of the UN High Commissioner for Human Rights (OHCHR), adopted by all members of the UN General Assembly on 14 July 2005 (UNGA Resolution 59/113B). The first phase of this deals with human rights education in schools.

<http://www.ohchr.org/english/issues/education/training/docs/planaction-inbrief.pdf>

## THE COMMONWEALTH APPROACH

The Commonwealth has rightly recognised the importance of human rights education, and this curriculum is a reflection and outcome of this growing emphasis. Paragraph 9 of the Bangalore Principles (first formulated at the *Commonwealth Judicial Colloquia on the Domestic Application of International Human Rights Norms* in Bangalore, India, 1988) emphasises the point as follows:

*"It is essential to redress a situation where, by reason of traditional legal training which has tended to ignore the international dimension, judges and practising lawyers are often unaware of the remarkable and comprehensive developments of international human rights norms. For the practical implementation of these views it is desirable to make provision for appropriate courses in universities and colleges, and for lawyers and law enforcement officials; provision in libraries of relevant materials; promotion of expert advisory bodies knowledgeable about developments in this field; better dissemination of information to judges, lawyers and law enforcement officials; and meetings for exchanges of relevant information and experience."*

In 1989 a Commonwealth Government Group of Experts recommended the development of human rights training curricula at different levels of education. The group also recommended the creation of a bank of human rights training materials. Further, at their meeting in Auckland in 1995, Commonwealth Heads of Government requested the Commonwealth Secretariat to assist member governments to promote greater awareness, education and training in human rights. In a report by Richard Bourne (and others) entitled *Commonwealth Values in Education: Young People's Understanding of Human Rights*, the authors point out that:-

*"... Commonwealth countries need to review how they are carrying forward at the national level their commitments in international and regional human rights instruments to which they are a party."*

It was thus considered appropriate to seek to develop a model curriculum on human rights for those undergraduates studying law either as a major or minor subject, in the hope that it will encourage and assist educators in Commonwealth law schools to devise their own courses on human rights. The first model curriculum was produced in 1999, the 50th anniversary of the modern Commonwealth and the 25th anniversary of the *Commonwealth Law Bulletin* (published by the Commonwealth Secretariat).

In 2000 in Nova Scotia, Canada, Commonwealth Education Ministers pledged at their 14<sup>th</sup> Meeting to make full use of the unique advantages of Commonwealth agencies active in the area of education and training for development and promotion of Commonwealth values, which include human rights values. At their 15<sup>th</sup> Meeting in Edinburgh in 2003 to review progress in education since Nova Scotia, the Ministers jointly affirmed that "education is central to the Commonwealth and fundamental in developing democratic values and good governance" and that "in an increasingly divided and insecure world, education has a critical role in creating a culture of peace, tolerance and mutual respect." (See [http://www.col.org/programmes/reporting/15ccem\\_message\\_to\\_CHOGM.htm](http://www.col.org/programmes/reporting/15ccem_message_to_CHOGM.htm)).

The interest of the members of the Commonwealth in human rights education, promotion and awareness is related, then, to the wider objectives and ideals of the Commonwealth. There is a widely-recognised right to access to education. To educate someone is to emancipate and empower them, and this is particularly so when one is dealing with human rights education. That is, to educate someone is to enable them to realise and enjoy full and free participation within and as a member of their existing community and the wider human society:

*"We must not believe the many, who say that only free people ought to be educated, but we should rather believe the philosophers who say that only the educated are truly free."* Epictetus *Discourses*

It is in this spirit and to meet these objectives that the Model Curriculum has been produced.

## **THE PRESENT POSITION**

There are currently over five hundred law schools and law colleges in the Commonwealth which offer undergraduate law degrees. There appears to be no systematic programme for the teaching of human rights to undergraduates in most Commonwealth law schools (and this is not counting non-law courses such as politics and sociology). One reason for lack of systematic programmes for teaching human rights is the nature and structure of legal studies generally, which often include compulsory subjects addressed to the needs of the legal profession. Where human rights issues arise throughout the law syllabus they may be dealt with piecemeal: for example, issues relating to the right to a fair trial may be covered in courses on criminal law or criminal procedure and evidence. Students in Commonwealth law schools are invariably required to take a course in Public Law or Constitutional Law. This will normally include some material on aspects of the relationship between citizen and state, human rights or civil liberties, for example on the fundamental rights and freedoms

enshrined in the national constitution. Within such courses, material on international human rights may also be covered but frequently this is dealt with as a separate optional subject or as part of a course on International Law.

Thus it would be quite possible for law graduates to have had little or no exposure to human rights in their degree programme. If students have some exposure to human rights, it is often as part of other law courses and there are few courses that examine human rights at the international and national level comprehensively. The risk is that the student may well graduate without a developed grasp of the origins, nature and operation, and limitations on human rights. It is to help teachers to address this, by designing and developing courses in human rights, that this resource has been designed.

Significantly, there is greater scope for recourse in studies (as indeed in practice) to comparative Commonwealth jurisprudence, particularly from developing countries. One of the strengths of the Commonwealth is the richness of the comparative jurisprudence of its member states. This legal co-operation is a unique feature of the Commonwealth and is made possible because members have similar legal systems, most based on, or greatly influenced by, the common law. The Human Rights Unit of the Commonwealth Secretariat supports the publication by Interights of its *Commonwealth Human Rights Law Digest* (see [www.interights.org](http://www.interights.org) – a comprehensive searchable case law database, referred to in the Model Curriculum). And increasingly, decisions of superior courts in the Commonwealth are also available on the Internet, and this resource provides details of how to access such decisions from several Commonwealth countries. All this emphasises the potential value of the comparative study of the protection and promotion of human rights from around Commonwealth and for this to be reflected in the curriculum. Therefore, developing a model curriculum that focuses particularly on the contribution of the Commonwealth towards the development of human rights is both entirely appropriate and useful.

## **FURTHER DEVELOPMENT OF THE CURRICULUM**

As noted, the objective of the curriculum is to provide a model for Commonwealth educators to facilitate the establishment and development of human rights courses throughout the Commonwealth.

It is also important to recognise that the model curriculum will, in a sense, never be "complete" since it is simply a base from which to selectively build a course in human rights: there is no objective, notional course in human rights. Making the curriculum available in an electronic format means that the curriculum and materials can be developed and regularly updated.

The tone, content and volume of any course based on the curriculum model will depend on the proposed student audience, country circumstances, course type, etc. The aim of the curriculum is to enable educators to fashion a course that suits their students' needs. Human rights education is an ongoing process, of socialisation into a tolerant rights culture.

This resource is available in the following formats:

- On the web-site of the Commonwealth Secretariat [[www.thecommonwealth.org](http://www.thecommonwealth.org)] and from the Commonwealth Legal Education Association [[www.cleonline.org](http://www.cleonline.org)].

- On CD-Rom available from the HRU. Contact details appear at the beginning of this document.

## **2. Constructing a Course in Human Rights – some considerations**

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This resource is directed to Commonwealth educators seeking to establish new courses in human rights. Before one approaches the task of designing a course using the model curriculum set out in this document, it is useful to reflect on what is at stake in *human rights* education in particular, and to note the experience of others in this field. Thus what follows in this section is a brief outline of certain considerations, followed by links to recommended resources (several of them of excellent quality) devoted to better human rights teaching.

Since construction of any single human rights course is a highly selective process (“not every human right or rights issue can be covered”), it is useful for users of this model curriculum to begin with reflection on the intended purpose and outcomes of any course being constructed (see also ‘Objectives of an Undergraduate Course in Human Rights’ in the body of the curriculum, below).

### **WHY HUMAN RIGHTS EDUCATION?**

One suggested starting point in constructing or developing a course is to first ask broad questions about the nature and purpose of the intended activity (these might be questions students themselves have). Why educate law students in human rights? What learning outcome are students being guided to? How open is the course to a variety of viewpoints? What personal, subjective and value-based assumptions is the course-creator, even unconsciously, bringing to the course by designing it? Does the teacher advocate certain positions, or rather leave students to make their own minds up, from the range of possible moral and legal responses to a problem? Can unreflective or assertive education in human rights mean that human rights themselves become an imposed ideology rather than a learned common language for expressing fundamental human entitlements? Does the course allow for exploring criticisms of rights ideology and practice? Does the course engage with real peoples’ problems in the world? Does the course adequately encourage debate by refraining from merely imposing conclusions on students on open and controversial topics on which reasonable people can reasonably disagree?

As noted earlier, this broad purposive question is answered by a recognition that human rights education itself declares a commitment to those human rights expressed in the main instruments, and education of undergraduates in human rights – tomorrow’s leaders and policymakers – is a strategy for ensuring respect for human rights.

Some other answers to the ‘Why’ question include that good human rights education:

- examines human rights issues without bias and from diverse perspectives through a variety of educational practices;

- helps to develop the communication skills and informed critical thinking essential to a democracy;
- provides multicultural and historical perspectives on the universal struggle for justice and dignity;
- engages the heart as well as the mind, by challenging students to ask what human rights mean to them personally, and challenging them to take responsibility for human rights situations; and
- promotes understanding of the complex global forces that create abuses, as well as the ways in which abuses can be abolished and avoided.<sup>1</sup>

A succinct handling of the ‘Why?’ question is set out in the Plan of Action proclaimed in 2005 following the UN Decade for Human Rights Education:

*“Human rights education can be defined as education, training and information aimed at building a universal culture of human rights. A comprehensive education in human rights not only provides knowledge about human rights and the mechanisms that protect them, but also imparts the skills needed to promote, defend and apply human rights in daily life. Human rights education fosters the attitudes and behaviours needed to uphold human rights for all members of society.*

*Human rights education activities should convey fundamental human rights principles, such as equality and non-discrimination, while affirming their interdependence, indivisibility and universality. At the same time, activities should be practical—relating human rights to learners’ real-life experience and enabling them to build on human rights principles found in their own cultural context. Through such activities, learners are empowered to identify and address their human rights needs and to seek solutions consistent with human rights standards. Both what is taught and the way in which it is taught should reflect human rights values, encourage participation and foster a learning environment free from want and fear.”<sup>2</sup>*

### **PURPOSE OF THE COURSE: ITS EFFECT ON STRUCTURE, TONE AND CONTENT OF COURSE**

The ‘approach’ question to course construction becomes one of adapting the model curriculum to perceived needs and desired outcomes, within the overall idea of the course as part of a wider rights education project. The subject of human rights is a massive one, with many aspects. There are very many possible ways to structure an undergraduate course in human rights (the model curriculum also contains some ideas for integrating human rights into existing law and non-law courses, as a supplement to free-standing courses entirely in human rights). As noted, the character of the course can depend upon whether the course is a core compulsory, or a smaller elective subject with less contact hours or credit-weighting.

1 Statement, Amnesty International (USA), Human Rights Educators Network, 1991 [www1.umn.edu/humanrts/edumat/hreduseries/hereandnow/Part-2/whyhre.htm](http://www1.umn.edu/humanrts/edumat/hreduseries/hereandnow/Part-2/whyhre.htm).

2 <http://www.ohchr.org/english/issues/education/training/docs/planaction-inbrief.pdf>

The content will also depend on whether, for example:

- The emphasis is on the substantive norms, standards and institutions of the international human rights system, or instead on procedural matters of international monitoring, enforcement and remedying of human rights violations.
- The course might attempt to paint a broad picture of the range of recognised rights, and the way in which they relate to each other and limit each other, and the duties that correspond to them. However, it might be preferred that a few select rights are chosen and their nature and operation studied in depth.
- The course might concentrate on assessing the past performance and effect of international systems to promote and protect human rights, or instead focus prospectively on reform to the human rights system, or combine such enquiries.
- The course might focus away from the international human rights system and on the national implementation and interpretation of international norms, or even look only at national mechanisms and standards for the protection of human rights, with only a description of the international rights system. However, it is difficult to conceive of a human rights course that does not cover the international standards.
- It might take a highly abstract, theoretical and philosophical approach to rights – their jurisprudential justification, their historical development, their nature and operation and limitation. On the other hand, it might be an intensely practical and politically-astute course, focussing on delivery by government and other actors, advocacy and strategy in human rights activism, monitoring and enforcement.
- If a course based on international human rights rather than human rights as embodied in national law, it might be taught to students who have studied international law and so are familiar with core concepts such as sovereignty, equality of states, international legal personality, the limited status of individuals, treaties and reservations, etc. On the other hand, students might have no background at all in these core issues.

It is important to bear these selection issues in mind when deciding what aspects of the model curriculum one wishes to include in the new course.

### **HUMAN RIGHTS COURSES – A UNIQUE APPROACH TO TEACHING?**

One approach to the development of a course using this resource might also be to ask whether the actual subject matter – human rights – dictates that a certain style of course is constructed. This is what is meant above when it is stated that good (justifiable) human rights education “examines human rights issues without bias and from diverse perspectives through a variety of educational practices”. Hence the proposition, also above, that “both what is taught and the way in which it is taught should reflect human rights values.”

Course designers might want to give thought to designing a course that itself (in addition to its actual subject matter content) puts into practice certain human rights ideals – respect for others, fairness, non-discrimination, inclusion and participation (including in topic-setting), small-group work, and tolerance of dissenting voices. The course might be designed to allow for advocacy, negotiation, compromise and consensus-building as skills inherent in resolving

rights conflicts in practice (see also ‘Objectives of an Undergraduate Course in Human Rights’, below).

Many rights issues raise questions of historical interpretation, morality or ‘the individual – community’ balance that are very much open to debate. The often disputed and unsettled nature of issues under examination in any human rights topic is best revealed not by simple delivery of information by the teacher, but by controlled and directed group discussion. In their Methodology discussion entitled "How you Teach is What you Teach", Flowers and Shiman (eds) suggest the following additional principles which might be adopted to inform teaching methods (and here, course construction and development) in human rights (summarised from "Human Rights Here and Now", <http://www1.umn.edu/humanrts/edumat/hreduseries/hereandnow/Part-2/howteach.htm>):

- Human rights courses should be *open-minded* with opportunities for students to hold positions different from the teacher on moral and rights issues.
- “Avoid too much focus on human rights abuses” – the idea being to emphasise human rights as a positive value system, and one which individuals can use to arrive at real reform outcomes.

So, if an appropriate course and classroom environment is promoted with sensitivity and tolerance, the course itself becomes a model of human rights ideals in practice. This is perhaps partly what is meant by those who describe teaching not just *about* human rights, but *for* human rights. Shiman writes:

*“Human rights is not a subject that can be studied at a distance. Students should not just learn about the Universal Declaration, about racial injustice, or about homelessness without also being challenged to think about what it all means for them personally. As human rights educators, we must ask our students and ourselves, ‘How does this all relate to the way we live our lives?’ The answers to this question will tell us much about how effectively we have taught our students.”* (Teaching Human Rights, University of Colorado Press, Denver 1993, “Introduction”)

This partly suggests not only that the course be directed to current issues, but also that persons constructing a course in human rights might themselves be personally committed to the wider ideals of the human rights movement and system. Provided, perhaps, that the teacher remains appropriately neutral and does not impose his or her own value-judgments on students, the idea is that education *for* human rights involves the teacher positively inspiring, persuading and generally advocating the values of the human rights system (which may involve criticising the faults of the existing system so as to open up avenues for reform).

The effect of adopting such an approach to teaching human rights gives people a sense of responsibility for respecting and defending human rights and empowers them through skills to take appropriate action; recognizing that human rights may be promoted and defended on an individual, collective, and institutional level; developing critical understanding of life situations; analysing situations in moral terms; realising that unjust situations are not despairing and can be improved; recognising a personal and social stake in the defence of human rights; analysing factors that cause human rights violations; knowing about and being able to use global, regional, national, and local human rights instruments and

mechanisms for the protection of human rights; strategising appropriate responses to injustice; acting to promote and defend human rights (see ‘Here and Now’, above).

Again, care needs to be taken, when adopting a “pro human rights” approach to course presentation, not to unreasonably impose one’s views and ideals (however positive) on students. The longer-term strengthening of respect for human rights might in fact point to a predominantly ‘negative’ or critical tone to the course, designed to get students to critically analyse the field of human rights.

On questions of teaching techniques and style, there is much that can be learnt (by way of workshops, etc) from the experience of others about how teaching in human rights differs from teaching in other substantive law or other subjects.

What now follows are web-links to the best human rights educational resources in addition to this curriculum.

### **Education and Curriculum Development in Human Rights: Some Recommended Materials**

An excellent resource for an introduction to human rights issues, law and constitutionalism is the Commonwealth’s ‘*Introduction to Law and Human Rights for Young People in the Commonwealth*’ (Commonwealth Secretariat, 2003). This is a 90+ page PDF document which can be obtained from the main Secretariat web page (go to ‘What we do’ then ‘Human Rights’):

<http://www.thecommonwealth.org/>

The University of Minnesota’s Human Rights Resource Centre (Education Materials) is a fantastic (and free) resource. The site provides links to many teaching aids, curriculum guides, and even download-able model lecture presentations in Powerpoint and PDF format (the producers invite teachers to use and modify these as they wish, with appropriate acknowledgement / citation):

<http://www.hrusa.org/>

The related Minnesota Library human rights curricula resource is worth browsing for input on course design:

<http://www1.umn.edu/humanrts/links/curricula.html>

A most useful site is the free on-line Human Rights School, produced by the Asian Human Rights Commission. The ‘Teaching Modules’ section of this site contains very full, planned model lectures on many topics in human rights, and is of considerable interest to anyone designing a course in human rights. It is so complete that it should be referred to in conjunction with this curriculum. It does not appear to be directed to schools only, and is certainly of a high enough level for undergraduate courses:

<http://www.hrschool.org/>

The United Nations “Database on Human Rights Education” provides a range of teaching support materials, curricula and a good bibliography on academic articles on experiences and challenges in human rights education (particularly in developing countries):

<http://www.unhchr.ch/hredu.nsf/>

See generally the Office of the High Commissioner for Human Rights on this topic:

<http://www.ohchr.org/english/issues/education/training/>

UNESCO's Social and Human Sciences website is a rich and useful site dealing with many aspects human rights education, including course development. It has sections discussing 'What is Human Rights Education?' international instruments on education, publications on human rights education, etc:

<http://www.unesco.org> (follow the links Social Sciences – Human Rights – Promotion – Human Rights Education)

Related to this is another UNESCO site on Human Rights Education, which includes the Final Report of the UNESCO "Committee on Education for Peace, Human Rights, Democracy, International Understanding and Tolerance" but also including a Select List of Civics Education Materials, which includes curriculum resources:

<http://www.unesco.org/education/hci/>

The 'Human Rights Internet' resource (HRI, hosted in Ottawa, Canada) provides a wonderful searchable database: the Human Rights Education Directory gathers information on human rights education courses around the world, course outlines and syllabi relevant to human rights education. Search is by type (course outline, syllabi, textbook), by discipline (law included, but everything from 'Arts' to 'Teaching', and by topic (very comprehensive drop-down menu of topics, from A to Z e.g. Academic Freedom to Women's Rights):

<http://www.hri.ca/education/>

Another very rich model teaching resource for human rights law is the one managed by the University of California, Berkeley (with Amnesty International, USA), which has collated "classroom-proven" hard copy (web linked) actual course outlines and syllabi in human rights from many leading (mainly US) law schools (including Yale, Harvard, Chicago, UC Berkeley, Columbia) in an accessible form. It includes both general undergraduate courses and outlines on particular topics. Like the above HRI resource, this is an invaluable resource for teachers wishing to get an idea of how other human rights courses are structured, or particular topics presented by lecture:

<http://globetrotter.berkeley.edu/AIUSA-syl/>

The HRE Library "contains over 1000 full-text guides, curricula, textbooks and other documents that can be used for both formal and non-formal education in human rights". It is a comprehensive resource, including not only models for course delivery, but observations and analyses of teaching methodology in human rights education (see especially "Resources – Library – Curriculum and Methodology"):

<http://www.hrea.org/erc/Library/>

The scale of the present curriculum is to some extent dwarfed by the review of human rights curricula undertaken in India recently (2001) by the Universities Grants Commission (Curriculum Development Committee), and the model curriculum set out there. What was produced was a model Foundation Course on Human Rights and Duties at Undergraduate Level, and certain other model courses including a Certificate course, a Degree (undergraduate) course, a Postgraduate Diploma course, and a Postgraduate Degree course in human rights. While much of the material is very India-specific, what is of especial value is the model designs for optional papers / seminars (rather like the present model curriculum) on twenty-two particular discrete topics. The resource is recommended to Commonwealth teachers designing courses in human rights at any tertiary level:

<http://www.ugc.ac.in/policy/human.html> (these reports are substantial in volume and in PDF form, requiring the Adobe Acrobat program to view)

The “Peace Resource Centre” *Introduction to Human Rights Education* (hosted by the University of Minnesota human rights library) sets out a model human rights course, including an elaborate historical timeline of significant dates in the evolution of the human rights movement. The resource is useful as it gives a list of arguments For and Against the teaching of human rights, and a very useful methodology and technique tips for teaching: role-playing, creating a respectful class environment for discussion of controversial, identity-related issues, increasing the inclusiveness of seminars and discussion, etc., so as to inculcate human rights ideals of tolerance and diversity into the presentation as well as the content of the course:

<http://www1.umn.edu/humanrts/peace/peaceedu/binder2.html>

**Other sites devoted to education in human rights, many containing syllabus and curriculum advice, materials and ideas, include:**

This is a good compilation of human rights education websites (University of Minnesota):

<http://www1.umn.edu/humanrts/links/education.html>

Also recommended is the Human Rights Education links page of the Human Rights Research and Education Centre, the University of Ottawa:

[http://www.cdp-hrc.uottawa.ca/links/hreint\\_e.html](http://www.cdp-hrc.uottawa.ca/links/hreint_e.html)

The United States National Centre for Human Rights Education:

<http://www.nchre.org/>

Asian Regional Resource for Human Rights Education:

[http://www.arrc-hre.com/home\\_frameset.html](http://www.arrc-hre.com/home_frameset.html)

Amnesty International (United States) has a site devoted to human rights education:

<http://www.amnestyusa.org/education/>

Columbia University (New York) teaching site (human rights education materials):

<http://dlp.tc.columbia.edu/teachin/curriclinks.html>.

See also the Human Rights Project at Columbia, who have produced a very advanced web resource that includes a number of teaching tools, further links and ideas for courses:

<http://www.humanrights.columbia.edu/>

The Minnesota site below also sets out some general thoughts about the nature and purpose of human rights education:

[http://www.hrea.org/erc/Library/curriculum\\_methodology/flowers03.pdf](http://www.hrea.org/erc/Library/curriculum_methodology/flowers03.pdf)

<http://www.hrea.org/erc/Library/rosemann03.pdf>

<http://www1.umn.edu/humanrts/edumat/introduction.shtm>

Human Rights Education Associates’ “Global Human Rights Education List-serve” is a forum on which activists and educators exchange information on upcoming trainings and conferences; studies and “lessons learned”; human rights education resources; and new projects from around the world. Almost 3,000 organisations and individuals from approximately 150 countries are members of this forum:

<http://www.hrea.org/lists/hr-education/markup/maillist.php>

The Human Rights and Equal Opportunities Commission of Australia offers comprehensive links to its own, federal and State curriculum tools (many are country-specific, but all useful):

[http://www.hreoc.gov.au/info\\_for\\_teachers/index.html](http://www.hreoc.gov.au/info_for_teachers/index.html)

The Commonwealth of Learning is an intergovernmental organisation created by the Commonwealth Heads of Government to improve and share open education / distance learning technologies, resources and knowledge. Significantly, it includes Guidelines for Remote Delivery of Courses and a Sample Course Writer's Style Guide that instructors wishing to design a distance or correspondence course in human rights may wish to explore:

<http://www.col.org/>

UNICEF's teachers' support site is worth exploring for ideas on innovation in teaching:

<http://www.unicef.org/teachers/>

An example of an outline curriculum for a human rights course is the MA course offered by the Centre for International Human Rights at the Institute of Commonwealth Studies, SOAS, University of London:

[http://commonwealth.sas.ac.uk/ma\\_human.htm#structure](http://commonwealth.sas.ac.uk/ma_human.htm#structure)

### **3. A MODEL COMMONWEALTH HUMAN RIGHTS CURRICULUM**

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Upgrading the model course to Post-Graduate level; simplifying it to Schools level

## **INTRODUCTION TO THE DRAFT CURRICULUM**

The purpose of the curriculum is not to prescribe, as such, a model course, but to allow educators in localised contexts to select elements from the model course according to their own needs and objectives. It is important in general that global and international human rights issues (and universal human rights themselves) be translated (and not simply transmitted) from the international to the local, so that people situated locally identify with and internalise these values. The process of local construction of human rights courses can be seen as part of this important wider process.

The curriculum is thus divided into relatively discrete modules so as to allow individual course convenors in different Commonwealth countries to tailor their courses to individual interests, needs and circumstances. The outline of this draft curriculum is based on a plan for a most comprehensive overview undergraduate course in human rights, of ordinary length (directed to Commonwealth countries' needs).

Such a course would perhaps ideally want to cover three broad subject areas (the relative emphasis on these topics will vary):

- The history, theory and ideology of human rights (where are they from, what gives them validity? How do rights operate as protective norms? Are all rights the same everywhere for everyone?);
- Current internationally accepted standards (the substantive norms of human rights themselves, both civil and political rights and socio-economic rights; the main instruments enshrining these);
- The international, regional and national institutions and mechanisms for protecting, reviewing, enforcing and remedying rights and violations (who decides when a right is breached, what is the effect of this legally and politically?).

In this model curriculum, the approach adopted is as follows: after an introduction to current topical issues and the history, theory and ideology of rights, the model examines the main instruments and the substantive norms that they enshrine, using selected rights (the right to life – civil and political rights; the right to basic housing – socio-economic rights) to illustrate some features of these sorts of instruments and rights, including justifiable limits on rights. The 'Enforcement' section looks at how, where and by whom, procedurally, such rights are reviewed and their violation remedied. There is a special section on national courts since much human rights legal activity is that before national forums and to the extent that, in interpreting any rights included in their countries, national courts might be understood to sometimes be giving effect to the same values protected by international human rights law. The final sections include: various critiques of rights; a number of Case Studies on Current Issues and certain Specific Rights (in the form of outline plans for lectures on these topics); and practical considerations on assessment and specialist course design.

## **WHETTING STUDENTS' APPETITES: CURRENT ISSUES IN HUMAN RIGHTS**

### **General**

One danger with human rights courses is that they become abstract, theoretical and divorced from the hard policy choices and issues surrounding them. One idea, set out below, is to commence any course in human rights with a series of rhetorical questions about human rights, or examples or scenarios (preferably related to current events) which may or may not raise issues labelled as 'human rights' issues. If this is done with an eye to how human rights issues relate to other social, political, strategic, religious and other issues, the effect is (early in the course) to thrust the subject immediately into the controversies and problems of the day.

What follows below is a select list of questions that might be used by a course constructor to open the course, or even to simply list in the course materials outline. Starting a course with a list of current issues or questions, or factual scenarios, whets the students' appetite for the course, and sparks their interest and engagement, situating the course in current events. One idea for starting is to think of internationalised rights issues and to find a local issue of equivalence, even if hypothetical, or request students to cut out a media story they think raises issues of human rights and to discuss it. This can be useful in providing an opportunity for the teacher to tease out and test assumptions, misconceptions, unknowns, etc., that students bring into the course with them.

### **List of Current Issues or Questions about Human Rights**

*General 'perpetual' questions (there are always others!)*

- What does it mean – in theory and in practical effect – to label something as concerning human rights?
- What makes something a 'human' rights issue (and not just another kind of legal right issue)?
- What type of legal problem is 'human rights' problem or issue?
- What is the nature and source of such rights? What, or who, determines their status, their binding-ness, when they are breached, or the consequence of their breach? Are rights indivisible or inevitably limited by other rights? Are some rights more important than others? Are rights absolute? How do we deal with conflicting rights?
- Who is (or should be) protected or restrained by these norms?
- When we say someone has a right, what does that tell us about the nature of any duty corresponding to it, and the identity of the duty-bearer? Where is the remedy to be found for the breach of human rights, what does / ought the remedy consist of?
- When is something that happens within a country an *international* human rights problem or issue? When is the treatment by a government of its citizens a matter of legitimate concern to other countries? What does 'national sovereignty' mean in this context? How can the concept be abused to deflect valid concern?

- Are a State's obligations negative ('do not as the State breach citizens' rights unjustifiably') or are these obligations more demanding and positive ('take steps to ensure that citizens' rights are protected and fulfilled, even if the State is not itself the violator')?
- How do 'rights' really operate in the political, economic and social world? Can human rights observance be unrelated to respect for rights themselves?
- What is the relationship between the violation of human rights and instability and unrest in the world?
- Are rights things or ends valuable in themselves, or is their value mainly instrumental i.e. rights are important because observing others' rights usually means peace and stability?
- Does the language of human rights unduly privilege the interests of individuals over the group or the community? Do individuals' human rights complaints unduly restrain necessary conduct by governments intended for the greater good? Does a rights-based system undermine societal co-operation and reform? Does it produce conflict between individuals and their community or promote the welfare of the community? Would society be better served by having recognition of individual responsibilities?
- If human rights protect human values, and values are perceived differently in parts of the world, can we talk about 'universal' rights, can they be valid everywhere, is their content definite and universal, whatever the society in which they exist? How significant are claims that human rights are 'Western' in origin and content and not applicable to other societies?
- How does one judge whether a measure constitutes discrimination or merely an acceptable distinction? What sort of considerations will validly permit distinctions to be made between individuals/groups?
- Why do we value 'equality' and what do we mean by that? Is it enough to treat all people equally, or should 'equality' mean taking steps to correct existing inequalities? Is it sometimes justified to give some people special assistance?
- What criticisms may be made of human rights-related discourses or strategy? Does framing a claim in terms of rights help or hinder someone's cause? Does it create antagonism to claim rights, and is this a reason to use alternative strategies than rights-claims?

#### *Current topical issues*

- In an insecure world, with a threat of civil unrest or international terrorism, how does an open and democratic society properly protect its people by making strong laws for national security, without undermining the freedom of movement, speech and association valued in a democracy? Where does the difficult balance between freedom and security lie?
- Can one ever justify using armed force or economic sanctions (which might lead to innocent persons' rights being affected) to secure the rights and freedoms of a group of

persons? What might the criteria be for legitimate ‘humanitarian interventions’, and how does one prevent abuse of this doctrine?

- What can be done about massive violations of human rights where many people are implicated? Is criminal prosecution a preferable avenue to reconciliation and amnesty? Can you see any tension between ensuring justice and securing peace?

- Is there such thing as a universal (human) right to a democratic government? What is the relationship between human rights and democratic governance? Does full respect for human rights require a working democracy to be in place; does the definition of a ‘democracy’ require a certain standard of rights protection? Should membership of the Commonwealth include conditions of human rights observance?

- The continuing tension between domestic jurisdiction and concern of the international community: when is the treatment of one’s nationals the world’s business, and when is it purely a matter of domestic concern, not to be interfered with?

- Are the current international mechanisms for rights protection in need of reform? Are they too politicised? How would reform take place? How much influence should independent civil society (NGO) organisations have in the international rights system?

- What is the relationship between increased globalised trade and human rights standards? What problems and possibilities does the international trading and financial system hold for human rights? How does the complex relationship and sometimes tension between economic development and human development issues relate to human rights? Are global inequities in development and trade capable of description as issues of human rights, and of law?

- If corporations and other non-State actors have so much influence in the world, should their legal accountability be greater? Would increasing the legal accountability of multinational corporations (MNCs) for their conduct abroad deter vital foreign investment in developing countries?

- What does human rights law as system and discourse have to contribute to global public health issues such as HIV/AIDS? Are human rights concerns implicated in the human genome project, and other bio-medical research ethics matters?

- What is the effect of including a court-enforceable bill of rights in a new or reformed domestic constitution? Does such a bill of rights give too much power to the (unelected) judiciary (against the parliament)? Should courts look at the decisions of courts in other countries in interpreting their own constitutions?

- What rights should minority ethnic and other groups have against the majority? Does creating a regime of special minority rights lead to a divided society? What special claims should indigenous persons have, and how does one define identity of these groups and their members?

- What does ‘citizenship’ mean in terms of access to rights protection? What duties or rights does a State have in relation to protecting or prosecuting its nationals abroad where there is a human rights violation? What restrictions on human migration are justified, and how should the international community define who is a ‘refugee’?

- Do States have a duty to provide certain social and economic benefits and services? Does this mean an enforceable right to claim particular services? Who determines whether a State has done enough to fulfil any duty? Can a court decide issues requiring allocation of money and resources?

The following are links to brief but somewhat simplified lists of some of the most significant issues in human rights today, with brief commentary, which may assist in getting started in sketching the issues in this area:

<http://www.un.org/cyberschoolbus/humanrights/about/topics.asp>

<http://www.unhchr.ch/html/menu2/hrissues.htm>

**OBJECTIVES OF A COURSE IN HUMAN RIGHTS**

A course outline should contain a statement of the course objectives that explains to students what they should aim to attain by the end of the course. Some objectives that might be selected include:

(1) Reaching a critical understanding of:

- the extent and main elements of the debate over the theoretical and philosophical foundations of human rights;
- the historical development of thinking and speaking in terms of rights, and the evolution of the international legal framework relating to human rights; the context in which international standards of human rights have developed through the United Nations and regional systems since World War Two; the concept of universality.
- the fundamental basic concepts of equality and non-discrimination;
- the fundamental international human rights guarantees contained in the primary instruments (*Universal Declaration of Human Rights* (UDHR), *International Covenant on Civil and Political Rights* (ICCPR), *International Covenant on Economic, Social and Cultural Rights* (ICESCR) and the limitations to rights;
- the structure of major and specialist institutions and actors of the international and regional human rights system;
- the strengths and limitations of enforcement mechanisms, strategies and remedies applicable at an international level, including formal treaty bodies, international criminal law, international humanitarian law, domestic criminal prosecutorial and civil law compensation remedies, and restorative, quasi judicial options as remedies;
- the extent to which international human rights law influences the content and interpretation of national law
- the structure and operation of the Commonwealth, the Secretariat and the role of Commonwealth agencies in the protection and promotion of human rights;
- the constitutional, court-related promotion and protection of key areas of human rights in Commonwealth countries and the non-judicial commissions, mechanisms and institutions established in Commonwealth countries for the protection and promotion of human rights;
- the content, controversies and implications of selected individual human rights guarantees.

(2) By completion of a form of assessment, demonstrating an undergraduate level of critical engagement and reflective discussion on the general elements of human rights law, or a selected topic or sub-topic of human rights.

(3) By attendance and participation in seminars / lectures, be comfortable in articulating and criticising or defending human rights-related arguments and opinions (often on highly controversial topics) or reaching consensus on a human rights issue, in a group setting.

## **PART A**

### **Basic Concepts in Human Rights**

Any course would need to sketch initially the Basic Concepts, Actors, Vocabulary, Instruments, and Institutions of human rights. Like the Course Objectives section, this can be an opportunity to paint the picture with pointers to issues which will be revisited in more detail through the course. Experience shows that an introduction to human rights can be quite a daunting task, since the topic is very large, deals with fundamental issues of humanity, and at each step one is likely to be discussing overlapping moral issues.

If the course is not to dwell in more detail later on historical and theoretical issues of rights, these topics should be dealt with here. The "Issues in Human Rights" section above sets out a number of basic questions about the nature of rights that might form the basis of an introductory exploration of what is meant by "Human Rights". The basic concepts one may wish to cover are:

- General definitions of rights, and why they are 'human' rights.

Here the Preamble to the *Universal Declaration of Human Rights* is always a useful, authoritative and impressive starting point for students to discuss:

#### ***PREAMBLE***

*Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world,*

*Whereas disregard and contempt for human rights have resulted in barbarous acts which have outraged the conscience of mankind, and the advent of a world in which human beings shall enjoy freedom of speech and belief and freedom from fear and want has been proclaimed as the highest aspiration of the common people,*

*Whereas it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law,*

*Whereas it is essential to promote the development of friendly relations between nations,*

*Whereas the peoples of the United Nations have in the Charter reaffirmed their faith in fundamental human rights, in the dignity and worth of the human person and in the equal rights of men and women and have determined to promote social progress and better standards of life in larger freedom,*

*Whereas Member States have pledged themselves to achieve, in cooperation with the United Nations, the promotion of universal respect for and observance of human rights and fundamental freedoms,*

*Whereas a common understanding of these rights and freedoms is of the greatest importance for the full realization of this pledge,*

*Now, therefore,*

*The General Assembly*

*Proclaims this Universal Declaration of Human Rights as a common standard of achievement for all peoples and all nations, to the end that every individual and every*

*organ of society, keeping this Declaration constantly in mind, shall strive by teaching and education to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance, both among the peoples of Member States themselves and among the peoples of territories under their jurisdiction.*

Any exercise that throws forward rights issues for discussion in a contextualised way is likely to be an effective and energising start to a course.

One common way to start is to ask “What are the basic human needs?” and to discuss whether there are core common ideals and values and freedoms that the class would agree on (perhaps the ‘Four Freedoms’ being ‘freedom from want and freedom from fear, freedom of religion and freedom of speech’). This enables a discussion of how fundamental rights (both political and economic) are aimed at ensuring these basic conditions to meet human needs, and also as a consequence of the inherent dignity of humans by virtue of their common humanity. Thus they are ‘human’ rights.

- Mention might be made of the source of rights, and the basic division between natural rights theory and positivism, and the debate over the universality / cultural relativism of rights might be mentioned (for later elaboration – this may generate substantial discussion and should not at this early point take on too much significance). This ‘sources’ introduction might include an overview of international law as a source of binding rights. Basic concepts of treaty law, and the obligations of States who have signed up to international rights treaties (including the widespread practice of reservations to human rights treaties), and of customary international law, might be outlined.
- The general idea of rights as protective norms attaching to individuals and groups, claimed against the State. That is, the idea that the State is both the best guarantor of rights but also (given its coercive power) perhaps the greatest threat to rights.
- The nature and classification of human rights as Civil and Political Rights, Social, Economic and Cultural Rights, and Group Rights, perhaps using the two main instruments (ICCPR and ICSECR) as examples.

In sketching these rights, some mention might be made at this stage of the basic concept that some rights (mainly civil and political rights) mainly require the State to *not* act, i.e. to refrain from acting in a way that will affect citizens’ rights (‘negative duties to not...’) while some rights (mainly socio-economic rights) mainly require the State to *act* positively to ensure that rights are fulfilled and protected (‘positive duties to...’). That is, the duty of the State is to ‘protect, promote and fulfil’ human rights guarantees, and these three ideas entail different levels of obligations. The more positive conduct a duty requires, the more difficult it becomes to decide whether a State has failed to meet a minimum standard in any one case. This negative / positive idea is fundamental to a conceptual grasp of rights. The core obligation of Article 2 of the ICCPR and ICSECR might be referred to (although not in detail at this stage).

- The fundamental concept of equality and non-discrimination that runs through all human rights law. The distinction between formal (equal treatment) and substantive equality should be explained. Students should be introduced immediately to the idea of the distinction between ‘discrimination’ and ‘justifiable differentiation’. Students

should be asked what grounds (race, religion, etc) are impermissible criteria for differentiation, and what grounds might be permissible. This idea is fundamental to human rights.

- The distinction between the public sphere (the exercise of public power by the State, and the relationship between the State and the citizen, with which human rights law is mainly concerned) and the private sphere (the relations between private individuals, who still have capacity to affect each other's human rights, but where human rights law is less concerned)
- Article 2(7) of the UN Charter (principle of non-interference in domestic jurisdiction and affairs) and the idea of understanding the post-World War II human rights experience really as a progressive erosion of national sovereignty – as human rights developed in significance, the scope of what was legitimately purely 'a domestic matter' became smaller. The maturing system of rights meant that it came to be seen as acceptable for the international community to be concerned with some aspects of human rights within a national jurisdiction.

Related to this is to establish an understanding that a State's duties in human rights are owed both to its citizens, but also to the rest of the international community, for example where the State has bound itself in a treaty. This is what may create legitimate international concern in domestic affairs of other states.

- The notion of state responsibility in international law.
- A very general outline of the basic international institutions that monitor human rights performance, and basic description of the limiting effect of a bill of rights on the powers of national parliaments in making laws and national governments in executing them.

The UN *Human Rights at Your Fingertips* list of 50 questions about human rights is a useful resource to note to students early in a course: <http://www.un.org/rights/50/game.htm>

This site provides an idea of a simple overview of the geography and features of human rights:

<http://www.un.org/cyberschoolbus/humanrights/about/understanding.asp>

## **PART B**

### **Human Rights Background (1) : History and Theory**

*With so many actual human rights problems in the world, why should a course include or dwell on history and theory?*

While much of the focus of human rights movement is on strengthening the enforcement of existing accepted standards (rather than analysis of the standards themselves), and while students might be impatient to learn of practical mechanisms for enforcing rights, the truth is probably that the credibility, and thus the effectiveness, of the rights project is undermined to the extent that lawyers do not have a sound grasp of the history, theory and nature of the building blocks and raw materials of the human rights system – that is, rights themselves. The very concept of a human right (does it have universal validity and content, what is the relationship of an individual's rights to his/her duties to the community) is sometimes highly

contested. Thus a course emphasising these so-called 'background' issues in fact deals with issues that must be resolved for the sake of the legitimacy and effectiveness of rights.

### ***The Historical Evolution of Human Rights***

The prevalence of human rights language and practice should be explained historically. The main theme might be to trace the evolution of a recognition of rights as rights *of man as man* rather than other legal rights held because of one's status (as a Roman citizen; as a landowner, etc). There are two main objectives for students:

1 A time-line form of understanding of how the present concern for human rights and the present institutions and rights evolved.

2 A critical appreciation of the history of the rights 'discourse' – for example, are human rights concepts born in and inherently tied to the particular history of certain Western democracies? Does their particular history undermine their legitimacy or relevance? If they express universally valid concepts for all societies, does the fact that they were first articulated in historical power struggles in Western societies really matter today? Were the rights expressed by US and French revolutionaries limited to their societies or were they articulating timeless, universal truths? If the UN Charter and fundamental rights treaties have very wide adherence in many societies today, does it really matter that the first rights-talk is found in a European context? Does the fact that major developments in human rights usually followed massive conflicts tell us anything about why we protect rights (do we value rights *per se*, or do we protect them because we really value peace, and violation of rights leads to breach of peace?)

One would perhaps want to cover some the following events / eras:

- The classic philosophers and the divine or natural "rights of man" (see theory below);
- The Magna Carta 1215, Bill of Rights 1689 as early examples of protective instruments limiting the power of sovereigns over their subjects;
- American Declaration of Independence 1776 and the Bill of Rights
- French Revolution 1789 and the Declaration of the Rights of Man
- The increased focus on the individual and of minimum standards in the Anti-Slavery / Anti-Slave Trade movement.
- The early development of Humanitarian Law (the law of armed conflict) in 19<sup>th</sup> century Europe
- The International Labour Organisation
- The League of Nations
- The Charter of the United Nations and the drafting of the Universal Declaration of Human Rights 1948
- The focus on individual rights and duties in international law as result of World War II war crimes trials (Nuremberg and Tokyo) and the 1949 Geneva Conventions
- The post-war process of decolonisation and the evolution of the national right to self-determination, as a lead up to the historical, Cold War context in which the ICCPR and ICSECR (1966) were initiated (see below).

It is very important to note that a thorough human rights course will not only sketch out an ‘orthodox’ history of the current international human rights system, but encourage students to question the historical aspects of this system, and address directly issues sometimes raised in a critique of rights – that they are historically contingent and derived from a peculiarly Western and European perspective. Since this is a common criticism affecting the legitimacy of the international system, it might be addressed, in order to demonstrate that while human rights *discourse* may have ties to particular historic events, and appear to have a ‘Western’ origin, the foundation of the international system, based around Article 1 of the UN Charter, is the universality of fundamental rights.

The evolution of human rights in the regional context (the African, European, Inter-American systems) might be looked at briefly, although their evolution could also be dealt with in noting their present operation (UN and Regional Systems, below). Likewise with the history of the Commonwealth standards and mechanisms (below). Of course, one may wish to include the historical evolution of rights in the national legal system and constitution of one’s own country. This is very much to be encouraged – as a model resource, this curriculum does not attempt to set out national contexts, but these need to be covered. For a good (if simplified) timeline of the history of the Universal Declaration and the United Nations human rights system, try these two UN sites:

<http://www.unhchr.ch/chron.htm> and

<http://www.un.org/cyberschoolbus/humanrights/about/history.asp>

The following are free resources (be sure to acknowledge any use) dealing with a basic model for explaining the history of rights:

<http://www1.umn.edu/humanrts/edumat/background.shtm>

<http://www1.umn.edu/humanrts/edumat/shorthistory.shtm>

### ***Theories of Rights***

This topic will introduce students to the main theoretical debates on the nature and operation of rights – what are rights, where do they come from, what makes them ‘binding’, how do they operate if in conflict with one another, what are the nature of any limits to their content and operation? What is the relationship of rights to duties, etc? (*See also the ‘Perpetual issues in human rights questions’ above*). Familiarity with these fundamental issues is vital to anyone seeking a university-level grasp of rights.

A basic theoretical disagreement (it is difficult to simplify a nuanced debate) should be canvassed – that between natural lawyers and positivists concerning the source of rights (and the ‘binding-ness’ of rights). The lessons of the influential legal realists should also be mentioned.

- **Natural law theory** – that by virtue of our human nature, inherent dignity and capacity for reason, we are entitled to certain protective claims (rights) against others. These fundamental rights are self-evident to all rational people. So fundamental human rights and duties exist and are valid independently of any treaty setting them out. Positivism is an inadequate explanation for source of rights.

- **Positivist theory** – the only validity that rights can have is when an authorised body (like a State) binds itself (by treaty, for example) to act or not act in a particular way. So, the only international human rights obligations that exist are those that States by treaty or customary practice have agreed to. Natural rights theory does not tell us what rights exist, nor their content, etc.

- **Realist theory** – the legal realists argue that rights are indeterminate in content – they have no meaning in the abstract, but take their content from the context in which they are sought to be applied. Other realists, denying objective meaning to rights, stress the importance of personal subjective value assumptions in interpretation of rights by judges.

How much theoretical detail is entertained depends on the focus of the course.

### **Human Rights Background (2): Universalism and Cultural Relativism; other perspectives on rights**

A lecture on this topic would aim to explore further some objections and criticisms made of the universality of the international human rights system – in particular it would look at the supposed universality of rights (are they valid everywhere or does their existence or content depend on history or the values of the local culture in which they are invoked?), the emphasis on rights over duties, whether rights are really an ideology or cloak for power, or invisibly incorporate of gender-based models of behaviour; whether ‘universal’ rights fail to appreciate other perspectives. The purpose of critically examining issues such as ‘universality’ is to give a sophisticated grasp of human rights to students, rather than asserting that certain things are the case, and to encourage examination of national circumstances.

1 *Universalism – v – Cultural Relativism* – this topic is ideal for a class debating exercise, using a challenging and provocative title such as “It is possible to label some conduct as ‘uncivilised’ and universally wrong?” . It is an important topic to consider in any human rights course, since a major point of debate is always whether all rights have equal relevance and validity to all peoples in all cultures, or whether there is room for local variation in the content of rights. It might be mentioned that some local interpretative content to rights is inevitable for example where an internationally protected right is interpreted and applied by a local court. Are ‘universal’ rights a form of (Western) cultural imperialism? If rights protect values and values differ between cultures, how can rights be the same everywhere? What is ‘culture’, what qualifies as a ‘cultural’ practice, is culture simply power? Does respect for ‘local culture’ become a smokescreen for unequal power relations in a community? What scope does this open for abuse by localised elites in the name of local customs and conditions?

An example of a class exercise is to take a particular example and ask for arguments for and against universality of rights: e.g. a practice such as Female Genital Circumcision of juveniles is defended by some who say it has important societal functions and cultural validity and importance and is not ‘wrong’ in the culture in which it is practised. Thus human rights have no relevance (cultural relativists). However the practice is attacked by others (universalists) who say that it is possible to describe some practices as universally condemnable, represent power relations

dressed up as culture, and that cultures that follow these practices should be pressurised to abandon them.

There is a vast literature on this debate. See as a beginning Ferdinand Teson 'International Human Rights and Cultural Relativity' 25 *Virginia Journal of International Law* 869 (1985); Makua Mutua 'Savages, Victims and Saviours: the Metaphor of Human Rights' (2001) 42 *Harvard ILJ* 201 (2001); Alison Renteln, *International Human Rights: Universalism v Relativism*, Sage Publishing, 1990.

**2 Feminist perspectives on rights** – A course might mention the influence of feminist theory which basically argues that despite its claim to objective, neutral, general application, human rights law (like law in general, it is said), privileges the interests and life patterns of the male over the female, of the public over the private, of the powerful over the vulnerable. Feminists build on the Marxist tradition of jurisprudence to argue that law must be analysed as constructed to represent and bolster the (male) status quo in society, and inherently excludes certain voices and interests or privileges some over others. Students tend to find these critiques challenging and thought-provoking.

Again, the literature is vast. See, for example, Patricia Grimshaw, Katie Holmes & Marilyn Lake (eds.), *Women's Rights and Human Rights: International Historical Perspectives*, Palgrave, 2001; Julie Peters & Andrea Wolper (eds.), *Women's Rights, Human Rights: International Feminist Perspectives*, Routledge, (1995)

**3 Other perspectives on rights** – Mention might be made of the argument that the existing human rights system is mainly of Western historical origin and that international human rights law has failed to take into account other interests. Do such criticisms really have relevance if few countries are ever heard to deny the validity of international human rights standards (which is not the same as saying that they do not apply in specific circumstances)?

See, for example, Susan Waltz, 'Universalizing Human Rights: The Role of Small States in the Construction of the Universal Declaration of Human Rights' (2001) 23 *Human Rights Quarterly* 44.

## **PART C**

### **Human Rights Standards (1): – Civil and Political Rights**

In dealing with a substantial analysis of actual rights, it might be considered useful to examine the range of civil and political rights standards by considering those enshrined in the International Covenant on Civil and Political Rights 1966 (dealing with mechanisms for their enforcement, procedures for dealing with complaints, etc separately).

The idea is to both give a sense of the range of civil and political rights, and (through use of selected rights) to note the way in which rights create a range of both positive and negative duties. It should be mentioned that many civil and political rights have common law origins and indeed equivalents, and many are built into constitutional guarantees or into legislation (for example, criminal procedure regulations). As the selected norm, one might examine (for example) the contested implications of the international law 'right to life' (Article 6 ICCPR, see Case Studies on Selected Rights, below, for a plan of a lecture). This would provide

actual material to examine the extent to which the State is obliged to take positive steps to protect life as well as to avoid arbitrarily taking life. The limitation of rights also needs to be covered.

Consideration in a lecture might include:

- The basic nature of Civil and Political Rights (They are rights claims held against the State. They enable individual autonomy and freedom within the community, as a citizen, from the State: for example, to be free from arbitrary detention. They also protect the conditions such as freedom of association and speech that are vital to meaningful participation in the political process).
- The concept that Civil and Political Rights (C&P rights) are often seen as the most secure or fundamental rights: freedom from arbitrary death, arrest and detention, of speech and movement, etc.
- The drafting history of the ICCPR; the fact of its near universal acceptance by States (its complaints mechanisms can be dealt with under 'Enforcement').
- The core non-discrimination and equal treatment obligation (Article 3 ICCPR: "The States Parties to the present Covenant undertake to ensure the equal right of man and women to the enjoyment of all civil and political rights set forth in the present Covenant"). Whatever one's list of C&P rights, running through all of them is the idea of equal rights and non-discrimination in the application and protection of rights. This is extended in Article 2(1): "Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognised in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status".
- The core obligations of Article 2 of the ICCPR. Some time should be spent on fleshing this out: the duty to respect but also to ensure the protection of rights, and the duty of the State to take legislative and other measures to ensure protection of C&P rights in its area. The Article 2(3) duty to ensure access to an enforceable remedy for an alleged violation of a right is also a fundamental obligation of States under ICCPR.
- The concept should be fully explained that C&P rights mainly involve a 'negative' duty on the State, a duty of 'non-interference'. That is, by *not* acting, the State respects the right. The State fulfils its duty under the right if it refrains from acting. So, a State complies with its duty to allow or ensure freedom of religion if it refrains from interfering in people's religious worship. Grasp of this is important to a good understanding of rights.
- However, it should be emphasised the States (Party to the ICCPR) also have a more positive obligation in relation to C&P rights than simply refraining from themselves infringing the right. This positive duty is to take steps to ensure that conditions exist for the protection and enjoyment of the right. So, (taking the right to life), the corresponding duty on the State includes taking positive steps to legislate against arbitrary threats to life in its jurisdiction, maintain police forces and a criminal justice system, etc. Students should be asked to explore how far these positive duties extend

(see right to life case study, below) away from the 'core' negative prohibition on arbitrary killing, and how to assess when this more positive duty has not been met.

- Civil and Political rights are not absolute. One should deal with the 'inbuilt' limitations in certain C&P rights (those necessary for public safety, health, order, and the rights of others) such as the inbuilt limitation on freedom of religion in Article 18(3) of the ICCPR. Very important here is Article 29 of the *Universal Declaration*. Article 4 of the ICCPR allows for limitation of C&P rights in certain exceptional circumstances and should be noted. Non-derogability should be explained.

The full text of the ICCPR is available from:

[http://www.unhchr.ch/html/menu3/b/a\\_ccpr.htm](http://www.unhchr.ch/html/menu3/b/a_ccpr.htm)

An excellent resource is Joseph, Schultz & Castan's *Cases, Materials and Commentary on the ICCPR* (Oxford University Press).

See this general resource (links) on some significant civil and political rights:

[http://www.cdp-hrc.uottawa.ca/links/cprint\\_e.html](http://www.cdp-hrc.uottawa.ca/links/cprint_e.html)

## **Human Rights Standards (2): – Social and Economic Rights**

It is useful to take students to the *International Covenant on Economic, Social and Cultural Rights* (1966) to explore the range of social and economic rights (recognised in international law), the nature of the duty they place on the State, and the problems with giving the rights content (again, reporting obligations, complaints etc are dealt with under Enforcement, below).

Considerations in a lecture might include:

- To what extent is the State internationally responsible for guaranteeing in its jurisdiction each individual's enjoyment of adequate housing, food, health?
- What is the real status of social and economic rights, are they really rights or simply (as it sometimes argued) a list of desirables or aspirations? How (if at all) are they different to civil and political rights?
- The Covenants say that C&P rights and social and economic rights (S&E) rights are interdependent and indivisible. What is the relationship of S&E rights to civil and political rights? Is one form of rights more important than the other and as a result take precedence over the other? Does it depend on one's view of the proper role of the State (non-interference or welfare provision)? The drafting history of the ICSECR might be covered, including the Cold War context and the relative emphasis by Soviet-bloc countries on these rights (relative to C&P rights). The core Article 3 non-discrimination obligation (as with ICCPR): "The States Parties to the present Covenant undertake to ensure the equal right of man and women to the enjoyment of all economic, social and cultural rights set forth in the present Covenant")
- The nature of the obligation on States under Article 2, and in particular how this obligation differs from the ICCPR Article 2 obligation, should be fully explained, in particular what is meant by an "undertaking to take steps ... to the maximum of available resources" and the concept of "achieving progressively ... the full realisation". What nature of obligation is this? What 'minimum core' of obligation does it involve?

- When one speaks of a right to (e.g.) shelter, is this simply a right not to be discriminated against in obtaining access to shelter, or is it a more positive idea, of a right to assistance in the provision of shelter?
- If States' duties involve provision of services in order to ensure the fulfilment of rights, are courts or other bodies to consider issues of resource allocation justiciable (ie capable of determination by a court according to law, as opposed to being a policy decision only and not for the court to make)? To what extent are courts equipped to undertake the complex balancing of factors involved in inquiring into a State's efforts to continuously improve individuals' standard of living? How prescriptive can courts be in establishing minimum requirements to be followed in Government policy? What deference is to be given to problems of resource limits and priorities in allocating existing resources in fulfilment of any duty owed?

Useful judicial examinations of the extent and limits of courts enforcing S&E rights, and the content of the duty that they place on the State, are these two cases:

*Treatment Action Campaign v The President of South Africa* 2002 (5) SA 721 (CC), 5 July 2002, Constitutional Court of South Africa CCT 8/2002 (it is a proper court function to interpret the right to health compels a State to at least have in place a national plan for prevention of mother-to-child transmission of HIV and to make orders accordingly)

*Soobramoney v. Minister of Health (Kwazulu-Natal)* 1998 (1) SA 765 (CC) Constitutional Court of South Africa (the right to health does not mean that a court can direct in a particular case that a particular health authority provide treatment to an individual where it has applied its mind to whether or not to do so)

- Perhaps the most useful way to explain S&E rights (once one has covered these main issues and noted the range of rights) is to take an example. Here below, a lecture plan is modelled for a central economic and social right – that of the right to shelter and access to an adequate standard of housing (as protected in a national constitutional bill of rights that is subject to judicial review). For example, students might be asked to respond to the South African court's judgment in *Grootboom* by reference to the list of issues set out above. This can also be a free-standing Case Study.

*Govt Republic of South Africa v Grootboom* 2001 (4) SA 46 (CC), 4 October 2000, Constitutional Court of South Africa CCT 11/2000

See [http://www.lrc.org.za/Judgements/judgements\\_constitutional.asp](http://www.lrc.org.za/Judgements/judgements_constitutional.asp) to access full text judgments in *Grootboom* and *TAC*. Also see the Constitutional Court site [www.concourt.gov.za](http://www.concourt.gov.za), or [www.interights.org](http://www.interights.org) for its search mechanism and case summaries.

A general reference is Sandra Liebenberg and Karrisha Pillay, *Socio-Economic Rights in South Africa, A Resource Book* (The Socio-Economic Rights Project, Community Law Centre, University of the Western Cape, 2000)

The Convention itself is available from: [http://www.unhchr.ch/html/menu3/b/a\\_ceschr.htm](http://www.unhchr.ch/html/menu3/b/a_ceschr.htm)

Useful readings include:

P Hunt, *Reclaiming Social Rights: International and Comparative Perspectives* (1996)  
A Eide, C Krause, A Rosas (eds), *Economic, Social and Cultural Rights: A Textbook* (1994)  
F Commans, F van Hoof (eds), *The Right to Complain about Economic, Social and Cultural Rights* (1995).

A good general web resource on social and economic rights is available at:

[http://www.cdp-hrc.uottawa.ca/links/ecosocint\\_e.html](http://www.cdp-hrc.uottawa.ca/links/ecosocint_e.html)

## **PART D**

### **Enforcement of Rights: – A Note**

The next part of the model curriculum deals with the enforcement of the various standards or norms dealt with above. Care should be taken when speaking about ‘enforcement’, since it is best to conceive of this in a very broad sense. By ‘enforcement’ one can really mean all mechanisms, forums and institutions for the promotion of rights, the investigation and monitoring of rights performance, all the way to actual remedies and punishments for breaches of rights (e.g. criminal prosecution of an individual; economic sanctions on a national scale).

Students should be introduced to the fact that this is because, conceived of broadly, ‘enforcement’ is both *preventative* and *retrospective*. Also, the mechanisms for ‘enforcement’ that exist are both *political* (non-binding reports, delegations and rapporteurs, media exposure etc) and *legal* (eg Security Council Chapter VII sanctions, or a war crimes trial).

Note that on enforcement issues: there are various levels, mechanisms and institutions for the enforcement of rights. Levels include:

- the national level (legislature, executive, judiciary, national human rights commissions, offices of the ombudsman, etc)
- the regional level (e.g. the European Community’s self-contained human rights complaints mechanisms)
- the international level (the UN Human Rights Council, or the International Criminal Court, for example).

There are also mechanisms peculiar to particular treaties, which parties to those treaties might be subject (e.g. the Human Rights Committee of the ICCPR Optional Protocol). Finally, at both the national and international level, less formal ‘institutions’ for the ‘enforcement’ (promotion, awareness, shaming, influence, advocacy etc) exist: these include non-governmental organisations, the media, civil society, universities and colleges.

The objective is to gain an understanding of the institutional geography of existing enforcement mechanisms, but also to examine whether there may be scope for reform or strengthening of these.

**Human Rights Enforcement (1): – Human Rights Violations as Political / Legal Wrongs: The UN Charter and Treaty Systems, Regional Systems**

This topic aims at exploring the Charter-based genesis and objectives of the UN organs and instruments concerned with the protection and promotion of human rights including, human rights reporting obligations of states, procedures for dealing with individual complaints and inter-state complaints, the importance of regional forums for individual complaints and other means of human rights enforcement.

This site is a useful linked collection of the various UN and Treaty rights review and complaints bodies: [http://www.cdp-hrc.uottawa.ca/links/sitesint\\_e.html](http://www.cdp-hrc.uottawa.ca/links/sitesint_e.html)

***The United Nations ‘Charter’ Systems***

This topic would look at the various institutions set up under the Charter, their Charter foundations, their role and functions.

The UN Charter Article 1; Articles 55 & 56. Chapters VI, VII, VIII.

An overview would be given of the educational, implementation, review and enforcement role of the UN Human Rights mechanisms. It would look at the new Human Rights Council (and the reasons for which the former UN Human Rights Commission was discontinued), the role of the United Nations High Commissioner for Human Rights, the Sub-Commission on the Prevention of Discrimination, the Economic and Social Council (ECOSOC), the UN Commission on the Status of Women and the Committee of Experts on Economic, Social and Cultural Rights. To what extent can the UN Security Council also be seen as a UN human rights enforcement body (able to use its powers under Chapter VII of the Charter where it determines the existence of a threat to international peace and security)?

Main attention would be given to the two main reporting and review procedures, both based on ECOSOC Resolutions, which have (for now) been continued under the new Human Rights Council system (but which are interesting to study in any event, to understand how the UN system has worked):

- The ‘Private’ ‘1503 Procedure’ – The Resolution founding the procedure, the emphasis on confidentiality of communications to the Commission, the criteria for acceptance of a communication (including lack of political motivation, reasonable grounds for consistent pattern of gross and reliably attested violations, exhaustion of local remedies requirement), what the Working Group may do once it has reviewed the communication. An assessment of effectiveness of the procedure.

See generally <http://www.ohchr.org/english/bodies/chr/1503.htm>

- The ‘Public’ ‘1235 Procedure’ – The Sub Commission on Human Rights hearing of public complaints and adoption of resolutions on country situations.

Students may like to consider whether the Charter systems are too politicised to be effective, or whether their strength lies in this politicisation. What has been the criticism of the international system? What has been done? How might the system be further reformed?

### **The Treaty System**

Attention might be given to the many human rights treaties that contain (either within them or by way of an optional protocol) complaints and review mechanisms related to the subject area (e.g. the UN *Convention Against Torture* sets up a special procedure for receiving complaints).

Most attention would probably be given to the Human Rights Committee's role in overseeing the implementation by States of their obligations under the ICCPR. This would include: its origins in the ICCPR (Article 28 and following); the receiving of national reports and the annual report to the UN General Assembly; working groups and the panel of experts; and the criteria and procedure for election of persons to the Committee. See

<http://www.unhchr.ch/html/menu2/6/hrc.htm>

Attention would also be given to the individual complaints mechanism under the ICCPR Optional Protocol, and the requirements for a complaint to be brought (including the 'exhaustion of local remedies' requirement).

Issues that might be addressed by students include:

- How responsive are States to adverse findings on national reports by the Human Rights Committee? National examples can be used.
- How effective is reporting as a means of enforcing human rights?
- How do views of the Human Rights Committee compare with those of domestic courts? National examples can be used.
- Is there a need for changes to the existing system of review?

Students might be asked, if they were representative of someone who has suffered a violation of their human rights, what would be the advantages/disadvantages of approaching the UN treaty bodies?

D McGoldrick, *The Human Rights Committee: Its role in the Development of the International Covenant on Civil and Political Rights* (1991).

P Alston and J Crawford (eds), *The Future of Human Rights Treaty Monitoring* (2000)

### **Non-Governmental Organisations in the UN and treaty system**

What vital role do NGOs have to play in the UN and treaty body system? How accountable are NGOs? Do NGOs have too much influence with UN Committees relative to elected member countries?

A comprehensive list of non-governmental human rights organisations can be found at:

[http://www.cdp-hrc.uottawa.ca/links/hroint\\_e.html](http://www.cdp-hrc.uottawa.ca/links/hroint_e.html)

### **The Evolution of Human Rights in the African Context**

This topic centres on human rights in the African context. Since a significant number of Commonwealth member states are in Africa, more detail is included here than for the European and Inter-American system. In order to do so comprehensively, the following list of focus areas/issues is suggested:

- The underpinnings of a human rights culture in Africa

- Analysis of traditional African value systems and the system of human rights through oral tradition, customs and the communal systems
- From Organisation of African Unity to African Union: genesis, objectives and principles
- The *African Charter on Human and Peoples' Rights*
  - Preamble to the Charter – a distinctly 'African' document?
  - Substantive Protections: Civil and Political Rights, Socio-economic rights, Peoples' Rights; duties under the Charter
  - The Problem of Claw-Back Clauses
- Enforcement Mechanisms
  - The African Commission on Human and Peoples' Rights (role and functions)
  - African Charter, Promotion of Human Rights, Article 45
  - Protection of Human Rights: Inter-State Communications, Articles 47-54
  - Other Communications (from individuals/groups/NGOs), Articles 55-59
  - The African Court on Human and Peoples' Rights

*African Charter on Human and Peoples' Rights* (1981)

*African Commission on Human and Peoples' Rights, Rules of Procedure* (1995)

*Protocol to the African Charter on the Establishment of the African Court on Human and Peoples' Rights* (1997)

The instruments referred to above are available online at:

[http://www.pict-pcti.org/courts/ACHPR\\_basic\\_doc.html](http://www.pict-pcti.org/courts/ACHPR_basic_doc.html)

See also the Economic Commission for Africa web site [<http://www.un.org/Depts/eca>] and the web site of the African Union [[www.africa-union.org](http://www.africa-union.org)].

The African Commission on Human and Peoples' Rights site: <http://www.achpr.org/>.

The University of Pretoria's Centre for Human Rights has a unique database of the Constitutions of African states and African human rights materials:

<http://www.chr.up.ac.za/>.

See also this collection of human rights links for Africa:

[www.hrea.org/erc/Links/africa.html](http://www.hrea.org/erc/Links/africa.html)

#### *Further reading:*

Steiner and Alston, *International Human Rights in Context* (2000) pp. 920-937.

AA An-Na'im and FM Deng (eds) *Human Rights in Africa: Cross-cultural Perspectives* (1990)

Issa Shivji (1989), *The Concept of Human Rights in Africa* (1989)

Charles Dlamini, "Towards a Regional Protection of Human Rights in Africa: The African Charter on Human and Peoples' Rights", (1991) 24 *Comparative and International Law Journal of Southern Africa*, 189.

Frans Viljoen and Lirette Louw, "The Status of the Findings of the African Commission: from moral persuasion to legal obligation", (2004), 48(1) *Journal of African Law*, 1.

Makua Mutua, "The African Human Rights Court: A Two-Legged Stool?" (1999) 21 *Human Rights Quarterly*, 342.

Evans and Murray, *The African Charter on Human and Peoples' Rights: The System in Practice, 1986 –2000*, (2002) (especially pp. 305-334 on the African Court)

*Useful cases include:*

*Civil Liberties Organization v Nigeria* (1995) 2 IHRR 616 – independence of the judiciary and ouster of jurisdiction of courts

*Constitutional Rights Project v Nigeria* (1996) 3 IHRR 137 – right to impartial court or tribunal

*Media Rights Agenda and Constitutional Rights Project v Nigeria* (2000) 7 IHRR 265;

*Amnesty International v Zambia* (2000) 7 IHRR 286 - restrictively interpreting clawback clauses

### ***The Evolution of Human Rights in Europe***

This topic would briefly outline the history and operation of the modern European system. Features might examine:

- The historical development of the *European Convention on Human Rights*
- The Role of the European Commission and the institutions established under the European Convention (the European Court of Human Rights <http://europa.eu.int/cj/index.htm> and the European Court of Justice <http://www.dhcour.coe.fr/default.htm>)
- The significance of the jurisprudence of the European Court for the development of human rights jurisprudence generally.

See the bibliography (below) for specialised works on the European rights system.

### ***The Inter-American System***

This topic would briefly outline to students the history and operation of this unique system. Features might examine:

- The Organisation of American States: genesis, objectives and principles in the promotion and protection of human rights
- The *American Convention on Human Rights* (The Pact of San Jose) <http://www.oas.org/juridico/english/Treaties/b-32.htm>
- The powers and functions of the Inter-American Commission on Human Rights: <http://www.cidh.org/>
- The nature, composition, jurisdiction and jurisprudence of the Inter-American Court of Human Rights: [http://www.corteidh.or.cr/index\\_ing.html](http://www.corteidh.or.cr/index_ing.html)

David Harris & Stephen Livingstone (eds.) *The Inter-American System of Human Rights* (Oxford, Clarendon, 1998).

### ***Towards an Asian or Pacific approach to human rights?***

An equivalent to the Inter-American system (Court and Convention) does not exist in the Asian or Pacific context. Mention might be made of the contribution of Asia-Pacific countries and commentators to the evolution of human rights.

Here are some links if further detail is desired:

Asian Centre for Human Rights: <http://www.achrweb.org>

Asian Human Rights Commission: <http://www.ahrchk.net>

Asia Pacific Human Rights Network (APHRN): <http://www.aphrn.org>

A comprehensive resource is: <http://www.hrea.org/erc/Links/asia-pacific.html>

### ***Comparison between the various UN, treaty and regional human rights systems***

Students might undertake a useful assessment of the effectiveness of various regional enforcement mechanisms. The European system is perhaps the most developed. Does the fragmentation of the international human rights system cause concern, or is regional enforcement a preferable strategy? Discussion might take place about the importance of the less formal or legal, more political mechanisms for ensuring human rights compliance, dealing with patterns of non-compliance and more systemic issues, and using political (not legal) methods of influence and persuasion: might these be more effective than individual complaints-based, formal, legal mechanisms?

On the other hand, the wider importance of a successful individual complaint (beyond the complainant's remedy) should not be underestimated. Students might be asked to suggest reforms to the present systems.

## **Human Rights Enforcement (2) – Serious Human Rights Violations as International Crimes**

Outside of the international and regional level of monitoring and review mechanisms (above) and enforcement of international and national human rights standards in ordinary domestic courts (below), another main way to conceive of human rights enforcement is to consider the doctrines, institutions and mechanisms for ‘enforcing’ (preventing, punishing, remedying, redressing) large-scale systematic violations of human rights.

Particular attention might be given to:

- the development of a doctrine of humanitarian intervention as punishment / relief / remedy for mass violations of human rights (e.g. as used to justify the use of force in Kosovo). This topic is ripe for a Case Study.
- the establishment of ad hoc international criminal courts and the creation of the permanent International Criminal Court as a response to gross human rights abuses.
- the development of ‘restorative justice’ strategies such as truth and reconciliation commissions for dealing with violations of human rights.

What follows is a list of possible issues for discussion that might structure classes on these topics.

### ***Humanitarian Intervention as a strategy for human rights enforcement***

*‘In Kosovo, we did the right thing, we did it the right way and we will finish the job. Because of our resolve, the twentieth century is ending not with helpless indignation, but with hopeful affirmation of human dignity and human rights for the twenty-first century’.*

US PRESIDENT WILLIAM J. CLINTON,  
*THE TIMES* (LONDON), 15 JULY 1999

Humanitarian intervention may be the ‘right’ thing to do, but is it lawful? Is the doctrine of humanitarian intervention merely an emerging norm of international law? Or has it already found its lawful place alongside recognised legal grounds for the use of force? If an intervention is unlawful but necessary, do we undermine the basis on which human rights exist (international law and the international legal system) even as we attempt to protect human rights?

How do you judge the benefits/detriments of the use of force to protect human rights? How convincing do you find the arguments in favour of a doctrine of humanitarian intervention? If you agree that humanitarian intervention can be justified, what are the criteria preconditions for a lawful humanitarian mission?

Is the doctrine used selectively and what explains this (compare Rwanda and Kosovo). In evaluating the usefulness of humanitarian intervention, do you think it matters whether the use of force is organised unilaterally, collectively (outside the UN) or is endorsed by the UN Security Council? To what extent do you think that these forms of intervention are the result of political manipulation rather than even handed intervention to protect human rights? To what extent are we shifting attention away from systematic responses within States?

### **International Criminal Law and Human Rights**

*“... the International Criminal Court, with independent prosecutors putting tyrants and torturers in the dock before independent judges, reflects a post-war human rights aspiration come true...the International Criminal Court is a shining example of how human rights might be realised under international law. Certainly the Court is a necessary response to the atrocities which bedevil our claims to ‘humanity’; a means by which we can begin to do justice to those who fall victim to the atrocities that deeply shock the conscience of humanity.”*

CHERIE BLAIR QC, SPEECH DELIVERED AT THE GRADUATE INSTITUTE OF INTERNATIONAL STUDIES, JULY 2004.

To what extent does international criminal law (applied by an international tribunal like the International Criminal Court) offer a means of enforcing international human rights law? Is it necessary for the protection of human rights to ensure criminal liability of those responsible for human rights violations? Do individuals have a right to see a perpetrator of international crimes prosecuted for his/her offences? Is an international tribunal preferable to a local court process, and what are the symbolic, healing, publicity, resource, independence and other factors involved in deciding appropriate venue? Is the price of bringing conflicting parties to the negotiating table, or the price of reconciliation, that one may have to give amnesty and cannot then prosecute violations? Should the primary objective after mass violations be justice (in the form of criminal prosecutions by a domestic or international court) or reconciliation (in the form of a truth commission)?

### **Restorative Justice Methods**

*“The world had expected that the most ghastly blood bath would overwhelm South Africa. It had not happened. Then the world thought that, after a democratically elected government was in place, those who for so long had been denied their rights, whose dignity had been trodden underfoot, callously and without compunction, would go on the rampage, unleashing an orgy of revenge and retribution that would devastate their common motherland. Instead there was this remarkable Truth and Reconciliation Commission ...”.*

ARCHBISHOP DESMOND TUTU, *NO FUTURE WITHOUT FORGIVENESS*, (1999), AT 260

Consider the South African Truth and Reconciliation Commission (TRC) experience. Is this sort of strategy preferable to a prosecutorial one? Justice and political necessity might not suggest the same answer. What other factors, aside from achieving retributive justice, are likely to be at stake in transitional societies?

Is a TRC a lawful option for States to adopt? Does international law not oblige States to prosecute individuals who are guilty of gross human rights abuses? Is there not therefore a conflict between the demands of international law and the choice by States to allow amnesty for those who appear before a truth commission?

If a TRC process is a lawful option for States to adopt, how is such a TRC process to be judged for quality (for purposes of later immunity from international prosecution?). Are

domestic courts of foreign States obliged to respect the amnesty which a TRC affords to the perpetrator of a gross human rights abuse? Is the International Criminal Court obliged to respect such an amnesty?

Are TRC processes and criminal prosecutions irreconcilable? Is it possible and/or preferable to accommodate individual criminal responsibility and national reconciliation within one process?

### **Materials**

#### *Humanitarian Intervention*

Henry Steiner and Philip Alston *International Human Rights in Context: Law, Politics and Morals* (Oxford University Press, 2000) pp. 648-662

Geoffrey Robertson, *Crimes Against Humanity: The Struggle for Global Justice*, 2nd Edition (Penguin, 2002), pp. 427-473

Simon Chesterman, *Just War or Just Peace? Humanitarian Intervention and International Law* (Oxford, Oxford University Press, 2001)

Michael Byers & Simon Chesterman, 'Changing the Rules about Rules? Unilateral Humanitarian Intervention and the Future of International Law' in J.F. Holzgrefe & Robert Keohane (eds), *Humanitarian Intervention: Principles, Institutions and Change* (Cambridge University Press, 2003)

Louis Henkin "Kosovo and the Law of 'Humanitarian Intervention'", (1999) 93 *American Journal of International Law* 824.

Jonathan Charney "Anticipatory Humanitarian Intervention in Kosovo", (1999) 93 *American Journal of International Law* 835.

Christine Chinkin "Kosovo: A 'Good' or 'Bad' War?" (1999) 93 *American Journal of International Law* 841.

Antonio Cassese 'Ex iniuria ius oritur: Are We Moving Towards International Legitimation of Forcible Humanitarian Countermeasures in the World Community?' (1999) 10 *European Journal of International Law* 23.

Antonio Cassese 'A Follow-Up: Forcible Humanitarian Counter-measures and Opinio Necessitatis?' (1999) 10 *European Journal of International Law* 791.

Michael Reisman "Unilateral Action and the Transformations of the World Constitutive Process" (2000) 11 *European Journal of International Law* 3.

Dino Kritsiotis "Reappraising Policy Objections to Humanitarian Intervention" (1998) 19 *Michigan Journal of International Law* 1005.

Marcelo Kohen, "The use of force by the United States after the end of the Cold War, and its impact on international law," in Michael Byers & George Nolte (eds), *United States Hegemony and the Foundations of International Law* (Cambridge University Press, 2003) 197-231.

Thomas Franck, "Terrorism and the Right of Self-Defense." (2001) 95 *American Journal of International Law* 839-843.

Michael Byers, "Terrorism, the Use of Force and International Law after 11 September," (2002) 51 *International & Comparative Law Quarterly* 401-414

#### *International Criminal Law and Human Rights*

Claire de Than and Edwin Shorts, *International Criminal Law and Human Rights*, (Sweet and Maxwell, London, 2003)

Martha Minow, *Between Vengeance and Forgiveness: Facing History After Genocide*, (Beacon Press, Boston, 1998)

Cherie Booth QC and Max du Plessis, "The Impact of the International Criminal Court in Strengthening Worldwide Respect for Human Rights", Issue N°10, Graduate Institute of International Studies (HEI) available at [www.unige.ch/conf/files/ICCGenevaFinalJournal.pdf](http://www.unige.ch/conf/files/ICCGenevaFinalJournal.pdf)

Jonathan Paust, "Individual Criminal Responsibility for Human Rights Atrocities and Sanction Strategies", (1998) 33 *Texas International Law Journal* 631

Diane Orentlicher, "Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime", (1991) 100 *Yale Law Journal* 2568

Naomi Roht-Arriaza, "State Responsibility to Investigate and Prosecute Grave Human Rights Violations in International Law", (1990) 78(2) *California Law Review* 449

#### *Restorative Justice Methods*

*Azapo v. President of the Republic of South Africa* 1996 (4) SA 671 (CC).

Richard Goldstone, *For Humanity - Reflections of a War Crimes Prosecutor* (2001), 120-138.

Henry Steiner and Philip Alston (eds), *International Human Rights in Context* (2nd ed, 2000), 1131-1244.

John Dugard, "Retrospective Justice: International Law and the South African Model", McAdams (ed) *Transitional Justice and the Rule of Law in New Democracies* (1997) 269.

Rotberg and Thompson (eds), *Truth v Justice* (2000).

Wilson, *The Politics of Truth and Reconciliation in South Africa – Legitimizing the Post-Apartheid State* (2001).

McDonald A, "A right to truth, justice and a remedy for African victims of serious violations of international humanitarian law" in *Law, Democracy and Development*, 2, 1999, p.139, especially pp. 164–170.

Villa-Vicencio and Verwoerd, *Looking Back, Reaching Forward – Reflections on the Truth and Reconciliation Commission of South Africa* (2000).

Zihad Motala "The Constitutional Court's Approach to International Law and its Method of Interpretation in the 'Amnesty Decisions': Intellectual Honesty or Political Expediency?" (1996) 21 *South African Yearbook of International Law* 29.

John Dugard, "Possible Conflicts of Jurisdiction with Truth Commissions", in Cassese et al (eds), *The Rome Statute of the International Criminal Court – A Commentary, Vol. 1* (Oxford University Press, 2002), 693-705.

Andreas O'Shea "Pinochet and Beyond: the International Implications of Amnesty" (2000) 15(4) *South African Journal on Human Rights*, 642

Priscilla Hayner, *Unspeakable Truths: Facing the Challenge of Truth Commissions* (Routledge, New York and London, 2002)

Stahn C, "Accommodating individual criminal responsibility and national reconciliation: The UN Truth Commission for East Timor" (2001) 95 *American Journal of International Law* 952

For a database of comprehensive links to institutions and instruments dealing with international criminal law, genocide, crimes against humanity, war crimes, truth commissions, etc, see: [http://www.cdp-hrc.uottawa.ca/links/iccint\\_e.html](http://www.cdp-hrc.uottawa.ca/links/iccint_e.html)

### **Human Rights Enforcement (3) – Human Rights with Legal Remedies: National Constitutions and Courts**

Many national legal systems contain human rights standards and mechanisms for their enforcement and remedy. Sometimes the rights concerned are analogies of human rights, such as certain common law rights. From the national perspective, courts and commissions are the obvious venue for obtaining a vindication of breached rights. However, from the perspective of a universal and international rights system, national constitutions and courts are a primary venue for obtaining human rights relief and for the articulation and development of human rights jurisprudence. That is to say national courts, to the extent that they deal with questions of human rights law, can help ease the 'enforcement' problem of international human rights law. A section on this would examine the scope of human rights specifically provided for in national law in Commonwealth countries and the institutions and mechanisms designed for their protection and promotion. A model curriculum such as this cannot be too specific here, since each country's constitutional geography is different. Other courses in a law curriculum might deal with constitutional law, too.

As an introduction (Part 1), the scope and nature of fundamental rights provisions in the constitutions of selected Commonwealth countries might be noted. Various introductory topics might be included for discussion, such as: the interpretation of constitutional rights; the onus of proof in constitutional cases, and the protection of human rights from abrogation or derogation.

Part 2 could shift to focus on the institutions and mechanisms designed to promote and protect human rights in the Commonwealth, with special attention being given to topics such as the importance of an independent judiciary, and the need for extra-judicial institutions such as human rights commissions and the office of an ombudsman.

Note that certain key topics relating to the enforcement of human rights might also be discussed, including possible remedies and the role of the media, the legal profession and civil society in the protection of human rights. These are covered in section 9 (Human Rights Enforcement IV).

A possible conclusion to the section (Part 3) would be a discussion of the lawful limitation of constitutional rights through, for instance, interpretation of limitation clauses.

### ***Part 1. Fundamental rights provisions in national constitutions***

#### **● Scope of the human rights provisions in selected Commonwealth constitutions**

Selected extracts might be taken from fundamental rights provisions for example from Canada, Fiji, India, Namibia and South Africa. Attention might be drawn to the wide scope of human rights protections in these constitutions.

- Note the extent to which a country's history shapes the content of its constitution. Which of the Commonwealth constitutions under discussion most clearly evidences itself as the product of its country's history?
- Of particular significance is the extensive protection of socio-economic rights in the South African Constitution. Should a constitution contain both civil and political as well as socio-economic rights? To what extent socio-economic rights justiciable by courts (see discussion on S&E Rights above)?
- Perhaps extracts from the United Kingdom's *Human Rights Act 1998* might be taken as a case study of legislative (not constitutional) protection of human rights, including a description of the manner in which the Act incorporates the substantive rights in the *European Convention on Human Rights* into UK domestic law.

These materials are available online – see extracts from the Constitutions of South Africa, India, New Zealand, Namibia and the Canadian Charter of Rights and Freedoms:

[www.charter88.org.uk/links/link\\_cons.html](http://www.charter88.org.uk/links/link_cons.html)

Other useful materials and cases:

Lord Steyn, "Democracy through Law" [2002] *European Human Rights Law Review* 723

*In re Certification of the Constitution of the Republic of South Africa 1996*, 1996 (10) BCLR 1253 (CC) (South Africa CC)

*Thorburn v Sunderland City Council* [2002] 3 WLR 247 (House of Lords, UK)

**● Interpretation of human rights provisions in the constitution**

*“The Bill of Rights lays down general, comprehensive moral standards that government must respect but ... leaves it to statesmen and judges to decide what those standards mean in concrete circumstances”*

RONALD DWORKIN, *LIFE'S DOMINION*, (1993) 119.

A key topic regarding the protection of human rights through domestic constitutions is the interpretation of constitutional rights, and particularly the proper technique and the wide scope given to judges. Under this heading particular attention may be drawn to:

- the importance of constitutional interpretation, being the task of ascertaining the meaning of a provision in the constitution and thereby giving content to the human rights at issue.
- the difficulties related to interpretation of constitutions, the rights being often formulated in general and abstract terms, their application to particular situations and circumstances thus being a matter for argument and controversy.
- the guidelines/tools utilised by courts to interpret constitutions, such as purposive interpretation, generous interpretation, use of foreign and international case law
- whether constitutional provisions should be interpreted to have retrospective application. If so, what about the reach of the constitution in respect of the common law? Does any rule of “non-retrospectivity” prevent courts from applying a constitution to develop the common law, even if the dispute arose before the commencement of the constitution?
- whether constitutional provisions should be construed as exclusively “vertical” in their application (as creating binding and enforceable duties only on the state vis-à-vis individuals) or should they be interpreted to also apply “horizontally” (as also creating binding and enforceable duties on individuals vis-à-vis other individuals)?
- what dangers lie in resorting to foreign and/or international case law when interpreting a domestic constitution? What are the benefits? What guidelines should a court follow to safely reap the benefits of foreign/international case law whilst avoiding the attendant dangers?

*Some useful readings:*

Michael Kirby "The Impact of International Human Rights Norms- A 'Law Undergoing Evolution'" (1996) 22 *Commonwealth Law Bulletin* 1181

McLachlin CJ, "Bills of Rights in Common Law countries" (2002) 51 *ICLQ* 197

The Bangalore Principles and extracts from later Declarations "Implementation of Human Rights Standards at the Domestic/National Level"

Bonner, Fenwick and Harris-Short "Judicial Approaches to the Human Rights Act' (2003) 52 *ICLQ* 549 (*on the relationship between the common law and the Human Rights Act in the United Kingdom*)

L & E Weinrib "Constitutional Values and Private Law in Canada" in *Human Rights in Private Law*, (Portland, Hart Publishing, 2001), 43 (on the relationship between the common law and the Constitution in Canada).

J. Allan in Campbell, Ewing and Tomkins, (eds) *Sceptical Essays on Human Rights* (Oxford University Press, 2001), ch 20 (on the effect of the enactment of a statutory Bill of Rights in New Zealand)

Jolyon Ford, "Some Reflections On A Decade Of International And Comparative Influence On The Rights Jurisprudence Of The Constitutional Court Of South Africa", chapter 2 in Max du Plessis and Stephen Pete (eds) *Constitutional Democracy in South Africa 1994-2004* (Lexis-Nexis Butterworths, South Africa, 2004)

Ackerman, B., 'The Rise of World Constitutionalism' (1997) 83 *Virginia Law Review* 771

Choudry, S., "Globalisation in Search of Justification: Toward a Theory of Comparative Constitutional Interpretation" (1999) 74 *Indiana Law Journal* 819

Tushnet, M., "The Possibilities of Constitutional Law" (1999) 108 *Yale Law Journal* 1225

Jackson, V. C., and Tushnet, M., (eds) *Comparative Constitutional Law* (Foundation Press, New York, 1999)

Jackson, V. C., and Tushnet, M., (eds) *Defining the Field of Comparative Constitutional Law* (Praeger, Westport, 2002)

Nussbaum, M. C., "Introduction to Comparative Constitutionalism" (2002) 3 *Chicago Jnl of International Law* 429

Barak, A. "A Judge on Judging: the Role of a Supreme Court in a Democracy" (2002) 116 *Harvard Law Review* 16 (Foreword)

Williams, D., "Courts and Globalisation" (2004) 11 *Indiana Journal of Global Legal Studies* 57

Justice Kate O'Regan "The Best of Both Worlds? Some Reflections on the interaction between the Common Law and the Bill of Rights in our new Constitution", (1999) No. 1 *Potchefstroom Electronic Law Journal* 3, 9 (available at [www.puk.ac.za/lawper](http://www.puk.ac.za/lawper))

D. Friedman & D. Barak-Erez *Human Rights in Private Law* (Portland, Hart Publishing, 2001).

M. Tushnet, "The Issue of State Action / Horizontal Effect in Comparative Constitutional Law" (2003) 1:1 *International Journal of Constitutional Law* 79 (theoretical discussion of horizontal effect of constitutional rights)

Cases:

**Presumption of constitutionality**

*Public Prosecutor v Pung Chen Choon* [1994] 2 LRC 236 (Malaysia SC)

**Effect of declaratory section in the Declaration of Rights**

*Société United Docks v Government of Mauritius* [1985] LRC (Const) 801 (Mauritius SC and PC)

**General principles of interpretation of a constitution**

*Minister of Home Affairs (Bermuda) v Fisher* [1980] AC 319 (Privy Council)

*Attorney-General of The Gambia v Jobe* [1985] LRC (Const) 556 (The Gambia: PC)

*Ex parte Attorney-General, Namibia: In re Corporal Punishment by Organs of State* 1991 (3) SA 76 (Namibia SC)

*R v Big M Drug Mart* [1986] LRC (Const) 332 (Canada SC)

*S v Makwanyane* 1995 (3) SA 391 (CC) (South Africa CC)

**The importance of the text of the constitution**

*S v Zuma* 1995 (2) SA 642 (CC)

**The Preamble as an aid to the internal construction of the Constitution**

*Kauesa v Minister of Home Affairs* [1994] 2 LRC 263 (Namibia HC)

**The importance of political history in the interpretation of a constitution**

*Brink v Kitshoff NO* 1996 (4) SA 197 (CC) para 40

**The use of background materials compiled during the drafting of the constitution**

*S v Makwanyane* 1995 (3) SA 391 (CC) paras 17-18

**The status and use of directive principles**

*Minerva Mills v Union of India* AIR 1980 SC 1843 (India SC)

*Tellis and Others v. Bombay Municipal Corporation and Others* [1987] LRC (Const) 351

(India SC) *Special Reference No.2 of 1992* [1993] 2 LRC 114 (Papua New Guinea SC)

**The use of foreign case law in construing fundamental rights provisions**

*State v Zuma* [1995] LRC 145 (South Africa CC)

*Mustapha v Mohammed* [1987] LRC (Const) 16 (Malaysia HC & SC)

*Constitutional Reference by the Morobe Provincial Government* [1985] LRC (Const) 642 (Papua New Guinea SC)

*Bell v DPP* [1986] LRC (Const) 392 (Jamaica PC)

**International human rights instruments as an aid to constitutional interpretation**

*A Juvenile v State* [1989] LRC (Const) 774 (Zimbabwe SC)

*Republic v Mbushuu* [1994] 2 LRC 335 (Tanzania CA)

*S v Makwanyane* 1995 (3) SA 391 (CC); *Government of the Republic of South Africa v Grootboom* 2000 (11) BCLR 1169 (CC)

**Dangers of resorting to comparative human rights jurisprudence when interpreting a constitution**

*Sanderson v Attorney-General, Eastern Cape* 1998 (2) SA 38 (CC) (South Africa CC)

**Whether *stare decisis* is applicable to constitutional interpretation**

*Shabalala v A-G of the Transvaal* [1996] 1 LRC 207 (South Africa CC)

**Whether constitutional rights apply to disputes between private entities or persons**

*Teitinnang v Ariong* [1987] LRC (Const) 512 (Kiribati HC)

*Douglas v Hello! Ltd* [2001] 2 WLR 992 (CA), 1013

*Khumalo and Others v Holomisa* 2002 (5) SA 401 (CC)

*Carmichele v Minister of Safety and Security* 2001 (4) SA 938 (CC) (South Africa CC)

**Whether constitutional guarantees have retrospective or retroactive operation**

*Benner v Secretary of State of Canada* [1997] 2 LRC 469 (Canada SC)

*Gardener v Whitaker* 1996 (4) SA 337 (CC) (South Africa CC)

**Who bears the burden of proof in fundamental rights cases?**

*Public Prosecutor v Pung Chen Choon* [1994] 2 LRC 236 (Malaysia SC)

*Republic v Mbushuu* [1994] 2 LRC 335 (Tanzania CA)

*Theophanous v The Herald and Weekly Times Ltd* [1994] 3 LRC 369 (Australia HC)

*Retrofit v Post and Telecommunications Corp* [1996] 4 LRC 489 (Zimbabwe SC)

*Kihoro v A-G of Kenya* [1993] 3 LRC 390 (Kenya CA)

*Kauesa v Minister of Home Affairs* [1994] 2 LRC 263 (Namibia HC)

*Ferreira v Levin NO* 1996 (1) SA 984 (CC) (South Africa CC)

**Protecting constitutional rights against retrogressive amendments**

*Re Thirteenth Amendment to the Constitution* [1990] LRC (Const) 1 (Sri Lanka SC)

*Re Reference by Western Highlands Provincial Executive* [1996] LRC 28 (Papua New

Guinea SC) *Kaseng v Namaliu (Speaker of the National Parliament)* [1996] 2 LRC 1 (Papua New Guinea SC)

*A-G for Trinidad and Tobago v McLeod* [1985] LRC (Const) 81 (Trinidad and Tobago PC)

*Ngui v Republic of Kenya* [1986] LRC (Const) 308 (Kenya HC)

**The basic structure doctrine**

*Kesavananda v State of Kerala* AIR 1973 SC 1461

*SP Gupta v Union of India* AIR 1982 SC 149 (India SC)

*Teo Soh Lung v Minister of Home Affairs* [1990] LRC (Const) 490 (Singapore HC)

*Thirteenth Amendment to the Constitution and the Provincial Councils Bill* 1999 LRC (Const) 1 (Sri Lanka CC)

*Premier of KwaZulu-Natal v President of the Republic of South Africa* 1996 1 SA 769 (CC)

*United Democratic Movement v The President of the Republic of South Africa* 2002 11 BCLR 1213 (CC) (South Africa CC)

**● Enforcing socio-economic rights through domestic courts**

Under this sub-heading particular attention might be drawn to the decisions on socio-economic rights by the South African Constitutional Court (see the case study on S&E rights under 'Standards' above).

**● Remedies for breach of constitutional rights**

Topics for consideration:

- Is there a need for the punitive remedy of constitutional damages in addition to delictual (tort) damages?
- Is the exclusion of evidence obtained in violation of fundamental rights (whether in a civil trial or criminal trial) a form of constitutional remedy?
- Is it enough for a court to declare that a government acted or is acting in violation of a constitutional right without requiring further positive action to remedy such violation?
- Should courts be more proactive in directing (by way of an interdict/mandamus) their government to take such positive steps?
- What difficulties exist for a court when attempting to provide a remedy for the breach of a socio-economic right?

Cases:

**The purpose of constitutional remedies**

*Fose v Minister of Safety and Security* 1997 (3) SA 786 (CC) (South Africa CC)

**Constitutionality of restrictions upon the bringing of cases against the government**

*Pumbun v Attorney-General* [1993] 2 LRC 317 (Tanzania CA)

**Whether monetary compensation is available for a breach of the Bill of Rights**

*Simpson v A-G (Baigent's Case)* [1994] 3 LRC 202 (New Zealand CA)

**Measure of compensation**

*Jamakana v A-G* [1985] LRC (Const) 569 (Solomon Islands HC)

*Kihoro v A-G of Kenya* [1993] 3 LRC 390 (Kenya CA)

**Whether constitutional damages are available for infringement of fundamental rights**

*Nilbati Behera v State of Orissa* [1994] 2 LRC 99 (India SC)

*Fose v Minister of Safety and Security* 1997 (3) SA 786 (CC) (South Africa CC)

**Assessment of damages**

*Makomberedze v Minister of State (Security)* [1987] LRC (Const) 504 (Zimbabwe SC)

**Position where alternative statutory remedy available**

*Windward Properties Ltd v Williams* [1988] LRC (Const) 406 (St Vincent and the Grenadines HC)

**Court's discretion to make such orders as may be appropriate to enforce constitutional rights**

*Masiyiwa Holdings v Minister of Information* [1997] 4 LRC 160 (Zimbabwe SC)

*Hoffmann v South African Airways* 2000 (11) BCLR 1211 (CC) (South Africa CC)

**Court issuing rule nisi obliging Minister to show cause why impugned provision ought not be declared unconstitutional**

*Retrofit (Pvt) Ltd v Minister of Information* [1996] 4 LRC 512 (Zimbabwe SC)

**Court requiring Parliament to amend statute in conflict with the Constitution**

*Park-Ross v Director of Office for Serious Economic Offences* [1995] 1 LRC 178 (South Africa SC)

**Court declaring common law (offence of sodomy) unconstitutional**

*National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 (1) SA 6 (CC) (South Africa CC)

**Whether unconstitutional provisions are severable**

*Coetzee v Government of the Republic of South Africa* 1995 (4) SA 631 (CC) (South Africa CC); *Government of the Republic of Namibia v Cultura 2000* [1993] 3 LRC 175 (Namibia SC)  
*Re President's Reference of the Constitution of Vanuatu and the Broadcasting and Television Bill 1993* [1993] 1 LRC 141 (Vanuatu SC)

**Whether a court is required to read words into a constitutional provision**

*A-G v Kasonde* [1994] 3 LRC 144 (Zambia SC)  
*National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* 2000 (2) SA 1 (CC)

**Exclusion of unconstitutionally obtained evidence**

*R v Collins* 1983 5 CCC (3d) 141 (British Columbia Court of Appeal)  
*People (Attorney-General) v O'Brien* (1965) IR 142 (Irish Supreme Court)  
*S v Marx* 1996 (2) SACR 140 (W) (South African High Court)  
*S v Naidoo* 1998 (1) BCLR 46 (D) (South Africa High Court)

**The use of an interdict (or mandamus) as a constitutional remedy**

*New National Party of South Africa v Government of the Republic of South Africa* 1999 (3) SA 191 (CC)  
*August v Electoral Commission* 1999 (3) SA 191 (CC)  
*Minister of Health and others v Treatment Action Campaign and others* 2002 (5) SA 721 (CC) (South Africa CC)

**Remedies for violation of socio-economic rights**

*Government of the Republic of South Africa and others v Grootboom and others* 2001 (4) SA 46 (CC); *Minister of Health and others v Treatment Action Campaign and others* 2002 (5) SA 721 (CC) (South Africa CC)

## **Part 2. Mechanisms for the protection and promotion of human rights: independent courts**

In Part 2, the focus might shift to the mechanisms available within Commonwealth member states for the protection and promotion of human rights. Perhaps the most obvious mechanism for the protection of human rights is an independent court system. Accordingly, one of the topics for consideration might be the importance of developing and maintaining an independent judiciary. It might be useful to consider the arguments for and against the creation of specialised human rights courts. Students ought to appreciate that courts are not the only mechanism for the protection and promotion of human rights. One further focus topic might be the use of human rights commissions and the offices of ombudsmen within the Commonwealth as human rights guarantors and promoters (see below).

Note: this topic would overlap with and inform the sections below dealing with human rights protection and enforcement in the Commonwealth.

### **● Developing and maintaining an independent judiciary**

Issues for discussion may be drawn from the following sources:

Commonwealth study on the Independence of the Judiciary: <http://jis.ag.gov.au/>

*The Commonwealth Latimer House Principles on the Accountability of and the Relationship between the Three Branches of Government:*

<http://www.thecommonwealth.org/document/34293/35468/37744/latimerhouse.htm>

Gubbay A. "The Independence of the Judiciary with Special Reference to Parliamentary Control of Tenure, Terms and Conditions of Service and Remuneration of Judges: Judicial Autonomy and Budgetary Control and Administration" in John Hatchard and Peter Slinn (eds) *Parliamentary Supremacy and Judicial Independence: A Commonwealth Approach* (Cavendish Publishing, 1999) 47

*All India Judges' Association v Union of India* [1994] 4 LRC 115 (India SC) -- conditions of service for subordinate judges

*Barnwell v A-G* [1994] 3 LRC 30 (Guyana CA) -- removal of judge from office and the right to be heard

*Rees v Crane* [1994] 1 LRC 57 (Trinidad and Tobago PC) -- suspension from judicial duties: application of the rules of natural justice

*Veerawami v Union of India* [1993] 1 LRC 59 (India SC) -- whether the President is empowered to remove judge from office

*Law Society of Lesotho v Prime Minister of Lesotho* [1986] LRC (Const) 481 (Lesotho CA) -- constitutionality of appointing a member of staff of the Director of Public Prosecutions as an acting judge

*Sookoo v A-G of Trinidad and Tobago* [1986] LRC (Const) 629 (Trinidad and Tobago PC) -- extension of tenure of Chief Justice

*Egbe v Adefarasin* [1986] LRC (Const) 596 (Nigeria SC) -- judicial immunity from civil action

*R v Genereux* (1992) 88 DLR (4th) 110 (SCC) (Canada SC) -- judicial control over the court's own administrative decisions a feature of independence

*R v Valente* (1985) CRR 354 (SCC) (Canada SC) -- security of tenure and basic financial security as features of independence

*South African Association of Personal Injury Lawyers v Heath* 2001 (1) SA 883; 2001 (1) BCLR 77 (SA CC) – judicial commissions and separation of powers – judges exercising executive powers

*Van Rooyen and others v S and others* 2002 (5) SA 246 (CC) (South Africa CC) -- institutional independence of magistrates (inferior) courts

*R v Dundon* [2004] EWCA Crim 621 Court of Appeal (England & Wales), March 2004: Conviction quashed on grounds that naval court martial by a Judge Advocate was insufficiently independent and impartial.

Full text at <http://www.bailii.org/ew/cases/EWCA/Crim/2004/621.html>

*Re: Application under s. 83.28 of Criminal Code* [2004] SCC 42 Supreme Court of Canada, 23 June 2004 -- whether provision allowing for gathering of information and investigative hearings to combat terrorism unduly infringed suspect's right to silence and judicial independence and impartiality. Full text at:

[www.canlii.org/ca/cas/scc/2004/2004scc42.html](http://www.canlii.org/ca/cas/scc/2004/2004scc42.html)

*Vancouver Sun v Attorney General & Ors* [2004] SCC 43 Supreme Court of Canada, 23 June 2004 -- whether hearing for determining constitutional validity of investigative hearing provision and validity of order in terrorism case should be conducted in camera or in open court. Full text at:

<http://www.canlii.org/ca/cas/scc/2004/2004scc43.html>

### ● **Facilitating access to the courts**

See also the materials under 'access to justice' as a specific right. Under this heading one might consider:

- *the need for liberal locus standi provisions*

*Retrofit v Post and Telecommunications Corp* [1996] 4 LRC 489 (Zimbabwe SC)

*Hy and Zel's Inc v Ontario (A-G)* [1994] 1 LRC 227 (Canada SC)

*Badejo v Federal Minister of Education* [1990] LRC (Const) 735 (Nigeria CA)

*Student Representative Council of Molepolole College of Education v. Attorney General* [1995] 3 LRC 447 (Botswana CA) -- unregistered society

*Catholic Commission for Justice and Peace in Zimbabwe v Attorney General* [1993] 2 LRC 279 (Zimbabwe SC) -- human rights organisation

*United Parties v Minister of Justice* [1998] LRC 614 (Zimbabwe SC) -- political party

*Van Huyssteen NO v Minister of Environmental Affairs and Tourism* [1994] 4 LRC 340 (South Africa SC);

*Ferreira v Levin NO* 1996 (1) SA 984 (CC) (South Africa CC);

*Department of Welfare, Eastern Cape v Ngxuzo* 2001 (4) SA 1184 (SCA) (South Africa, Supreme Court of Appeal) -- liberal/objective approach to standing in rights cases

- *the provision of legal aid to indigent litigants*
- *public interest litigation and amicus curiae briefs*

Bhagwati "Public Interest Litigation" (1986) 2 *The Commonwealth Lawyer* 61

Bhagwati "Human Rights as Evolved by the Jurisprudence of the Supreme Court of India" (1987) *Commonwealth Law Bulletin* 239

*Hussainara Khatoon v State of Bihar* AIR 1979 SC 1361 (India SC)

*State of Himachal Pradesh v Sharma* 1986 (4) SCC 106 (India SC)

*Tellis v Bombay Municipal Corporation* [1987] LRC (Const) 351 (India SC)

*People's Union for Democratic Rights v Ministry of Home Affairs* [1986] LRC (Const) 546 (India HC)

*Department of Welfare, Eastern Cape v Ngxuzo* 2001 (4) SA 1184 (SCA) (South Africa, Supreme Court of Appeal) -- on class actions

*Hoffmann v South African Airways* 2000 (11) BCLR 1235 (CC) -- description of amicus curiae

### ● **The role of the legal profession and civil society**

Jeremy Sarkin "The Role of the Legal Profession in the Promotion and Advancement of a Human Rights Culture" (1995) 21 *Commonwealth Law Bulletin* 1306

Jeremy Pope "The Impact of Corruption on Human Rights: What Can the Profession Do?" (1997) 23 *Commonwealth Law Bulletin* 1263

[Cyrus Das "The Practising Legal Profession"](#) in John Hatchard and Peter Slinn (eds) *Parliamentary Supremacy and Judicial Independence: A Commonwealth Approach* (Cavendish Publishing, 1999) 81

Ronald Louw, "A Decade of Gay and Lesbian Equality Litigation", chapter 4, in Max du Plessis and Stephen Pete *Constitutional Democracy in South Africa 1994-2004* (Lexis-Nexis Butterworths, South Africa, 2004) -- the importance of civil society involvement

*Minister of Health and others v Treatment Action Campaign and others* 2002 (5) SA 721 (CC) -- the impact of civil society litigation

### **Part 3. Limiting the enjoyment of human rights**

Part 3's focus might be on the non-absolute nature of constitutional rights and the manner in which they might be lawfully limited or derogated from in actual cases in national courts. Attention could also be given to the manner in which some human rights might lawfully be

curtailed during times of emergency and very exceptional situations threatening the life of a nation (see also Civil and Political Rights, and case study on National Security and Terrorism).

- The meaning, nature and content of limitation clauses in international human rights instruments. The distinction between general limitations on rights, and specific derogations in special circumstances.
- Examples of limitations clauses in international rights law (for example Article 29 UDHR, Articles 12-14, 18 & 19 ICCPR) and in constitutional law (for example Article 1 of the Canadian Charter of Rights and Freedoms, Article 36 of the South African Constitution, and the inbuilt limitations in Part III (fundamental rights) of the Constitution of India).
- Focus might be on the elements of the common formula that by a proportionality inquiry (between the aim sought to be achieved in breach of the right, and the extent of intrusion on the right), rights may only be limited by law, generally applying, where the limitation is reasonable and justifiable in an open and democratic society.

Denise Meyerson, *Rights Limited* (Juta & Co Ltd, Cape Town, 1997).

Ronald Dworkin, *Taking Rights Seriously* (1970) chapter 7 -- explaining that in principle, rights are “trumps” held by individuals that outweigh collective goals. If rights can be overridden simply on the basis that the general welfare will be served by the restriction then there is little purpose in the constitutional entrenchment of rights.

*R v Oakes* [1987] LRC (Const) 477 (Canada SC) – the classic formulation of limitations

*S v Makwanyane* 1995 (3) SA 391 (CC) (South Africa CC) -- meaning of "reasonable limits": proportionality test

*Nkomo v A-G* [1993] 2 LRC 375 (Zimbabwe SC) -- derogation from individual fundamental rights to be construed narrowly

*Re Munhumeso* [1994] 1 LRC 282 (Zimbabwe SC) and *Retrofit (Pvt) Ltd v Minister of Information* [1996] 4 LRC 512 (Zimbabwe SC) -- whether legislation reasonably justifiable in a democratic society

*DPP v Pete* [1991] LRC (Const) 553 (Tanzania CA) -- whether provision necessary in the interests of defence, public safety or public order

- Emergency powers

See Article 4 of the ICCPR; also the Case Studies in this curriculum.

Use might be made of the emergencies provision in (for example) the South African Constitution (Article 37) or the Indian Constitution (Part XVIII) for discussion of the necessity that any emergency restriction on rights be by way of law and that there be minimum standards observable even during the emergency.

*Useful sources:*

International Law Association’s ‘Paris Minimum Standards of Human Rights Norms in a State of Emergency’

Steve Ellmann "A Constitution for all Seasons: Providing Against Emergencies in a Post-Apartheid Constitution" (1989), *Columbia Human Rights Law Review*, 163.

John Hatchard *Individual Freedoms and State Security in the African Context: The Case of Zimbabwe* (James Currey, 1993)

John Hatchard, Muna Ndulo and Peter Slinn *Comparative Constitutionalism and Good Governance in the Commonwealth: An Eastern and Southern African Perspective* (Cambridge University Press, 2004)

### Cases

Amicus Curiae submissions on behalf of the Commonwealth Lawyers Association in the US Supreme Court decision of *Rasul v Bush*, 2004, available at

[http://supct.law.cornell.edu/supct/background/03-334\\_ref.html](http://supct.law.cornell.edu/supct/background/03-334_ref.html)

*Law Society of Lesotho v Minister of Defence and Internal Security* [1988] LRC (Const) 226 (Lesotho HC) -- validity of a state of emergency

*Supreme Court Reference (No.3 of 1993): Re the Internal Security Act* [1994] 1 LRC 309 (Papua New Guinea SC) -- validity of statute legislating for an "emergency"

*State v Adel Osman* [1988] LRC (Const) 212 (Sierra Leone SC) -- constitutionality of emergency regulations

*Republic of Kenya v Commissioner of Prisons ex parte Wachira* [1985] LRC (Const) 624 (Kenya HC) -- emergency powers and the derogation of fundamental rights

*Negeri v Lee Gam Lee* [1994] 1 LRC 223 (Malaysia SC) -- approach to be adopted by a court in construing provisions relating to preventive detention

*Sia Kwong Sang v Inspector General of Police* [1992] LRC (Const) 502 (Malaysia SC) -- validity of detention orders

*Chng Suan Tze v Minister of Home Affairs* [1989] LRC (Const) 683 (Singapore CA) -- whether subjective or objective test to be applied in determining the need for the making of a detention order (*Liversidge v Anderson* not followed)

*Karpal Singh v Minister for Home Affairs* [1989] LRC (Const) 648 (Malaysia HC & SC) -- whether a court can inquire into the validity of a detention order

*Lim Chin v Inspector-General of Police* [1988] LRC (Const) 477 (Malaysia SC) -- right of a detainee to obtain grounds for his/her detention

*Minister of Home Affairs v Austin* [1987] LRC (Const) 567 (Zimbabwe SC); and *Rao v A-G* [1989] LRC (Const) 527 (Zambia SC) -- challenging reasons for detention

*Paweni v Minister of State (Security)* [1985] LRC (Const) 612 (Zimbabwe SC) -- test to be applied in assessing adequacy of reasons for detention

*Republic of Kenya v Commissioner of Prisons, ex.p Wachira* [1985] LRC (Const) 624 (Kenya HC) and *State of Punjab v Talwandi* [1985] LRC (Const) 600 (India SC) -- effect of insufficiency of details in the detention order

*A-G v Juma* [1985] LRC (Const) 635 (Zambia SC) -- requirement that the grounds for detention in language the detainee understands

*Austin v Chairman, Detainees' Review Tribunal* [1988] LRC (Const) 532 (Zimbabwe SC) -- onus of proof to justify detention; whether detainees are entitled to have access to the evidence against them

*Minister of Home Affairs v Dabengwa* [1985] LRC (Const) 581 (Zimbabwe SC) -- effect of failure to review detention order timeously

*State of Punjab v Sukhpal Singh* [1991] LRC (Const) 213 (India SC) -- right of a detainee to make representations to detaining authority

*Paweni v Minister of State (Security)* [1985] LRC (Const) 612 (Zimbabwe SC) -- effect of state officials preventing access by detainee to legal representative

*Kihoro v A-G of Kenya* [1993] 3 LRC 390 (Kenya CA) -- who bears the burden of proof where a detainee claims a breach of constitutional rights

*R (on the application of Abbasi) v. Secretary of State for Foreign and Commonwealth Affairs*, [2002] All E.R. (D) (English CA) -- the writ of habeas corpus a fundamental right

**Human Rights Enforcement (4) The Commonwealth and Human Rights.**

This topic would outline the various human rights standards proclaimed by Commonwealth members in resolutions and declarations, and the range of agencies and mechanisms that exist in Commonwealth countries singly and collectively concerned in some way with human rights, e.g. governmental bodies such as Commonwealth Ministerial Action Group (CMAG). Other initiatives such as national human rights commissions, offices of the ombudsman, and civil society and the media might be considered.

Again, a very broad understanding of ‘enforcement’ should be encouraged, since (as with the United Nations system) much of the most valuable human rights activity in the Commonwealth is of an educative, consensus-building, preventative, assistance and consultative nature, rather than ‘enforcement’ in any mandatory sense.

A class on human rights in the Commonwealth system might look at:

- The role of the Secretary-General and the Commonwealth Secretariat and Commonwealth Foundation related to the promotion and protection of human rights.
- Forums such as the Commonwealth Heads of Government Meeting (CHOGM), and the Peoples’ Forum at CHOGM, as forums for the expression of commonly held concerns or values. Commonwealth Ministers at joint meetings also often release statements on issues at the end of meetings. The Commonwealth Ministerial Action Group set up under the *Millbrook Declaration* looks at ‘serious or persistent’ violations of the political values agreed in the 1991 *Harare Commonwealth Declaration*, and issues statements on these.
- The important role of national human rights commissions, with the technical assistance of the Commonwealth, is an important feature of the system. A key issue for students to discuss is what problems and possibilities do national human rights institutions have? At the end of this curriculum is a section devoted to the web sites of various national human rights commissions in the Commonwealth.

Commonwealth Best Practice of National Human Rights Institutions (2001) (available on [www.thecommonwealth.org](http://www.thecommonwealth.org))

B Dickson, “The Contribution of Human Rights Commissions to the Protection of Human Rights” [2003] Public Law 272

Africa Watch “Protectors or Pretenders? Government Human Rights Commission in Africa” <http://www.hrw.org/reports/2001/africa/>

- Commonwealth offices of ombudsmen have a significant dispute resolution function at a localised level, often on issues of human rights.

These Commonwealth cases might be of interest:

*Ombudsman Commission of Papua New Guinea v Ellis* [1993] 2 LRC 250 (Papua New Guinea SC) -- independence of the office of the ombudsman

*Virelala v Ombudsman of the Republic of Vanuatu* [1997] 4 LRC 282 (Vanuatu SC) -- challenging the jurisdiction of an ombudsman

- Commonwealth assistance in the holding of elections and election monitoring (insofar as this is directed to ensuring democratic conditions for the enjoyment of

rights) is part of the matrix of human rights-related activities. An election monitoring report might be a useful class discussion point.

You can get copies of many Commonwealth election observation reports from [www.thecommonwealth.org](http://www.thecommonwealth.org). The Commonwealth Policy Studies Unit also has some excellent material from its Election Observation Project. Its publications [\*Good Practice Guidelines for Commonwealth Observers\*](#) and [\*Good Practice Guidelines for Commonwealth Domestic Observer Groups\*](#) are available free of charge from <http://www.cpsu.org.uk/resource/publications.htm>

- The role of civil society and the media give balance and input to the system. National examples should be used. It is difficult to imagine a human rights course which does not look at the importance of civil society and the media to promoting and protecting human rights. What are the rights necessary for their activities? What are the obstacles? What are their responsibilities?

### ***Commonwealth Declarations relating to human rights***

#### **Declaration of Commonwealth Principles**

Declaration issued at the Heads of Government Meeting in Singapore, 1971

#### **Lusaka Declaration on Racism and Racial Prejudice**

Declaration issued by the Commonwealth Heads of Government Meeting in Lusaka, Zambia in 1979.

#### **Bangalore Principles**

Principles on judicial and legal professional independence released as a summary of issues discussed at a Judicial Colloquium on 'The Domestic Application of International Human Rights Norms', held in Bangalore, India from 24 - 26 February 1988.

#### **Harare Commonwealth Declaration**

Declaration on human rights and governance practice adopted by the Heads of Government Meeting on 20 October 1991 in Harare, Zimbabwe.

#### **Victoria Falls Declaration of Principles for the Promotion of the Human Rights of Women**

Declaration adopted in 1994 at a regional judicial colloquium organised by the Commonwealth, focusing specifically on the promotion of the human rights of women and the girl-child through the judiciary

#### **The Millbrook Commonwealth Action Programme**

Issued by the Heads of Government Meeting at Millbrook, New Zealand, 12 November 1995.

#### **Excerpts from the CHOGM Report 2002**

Human Rights related issues from the Coolum Communiqué, the Coolum Declaration and the High Level Review recommendations adopted by Commonwealth Heads of Government in March 2002 at Coolum, Australia.

#### **Commonwealth (Latimer House) Principles on the Accountability and the Relationship between the Three Branches of Government**

<http://www.thecommonwealth.org/document/34293/35468/37744/latimerhouse.htm>

In terms of research, the obvious starting point is the Commonwealth Secretariat, which comprehensively lists the standards and publications of the Commonwealth in relation to human rights, human rights update documents, and a list of the extent of ratification of major instruments by Commonwealth member countries:

<http://www.thecommonwealth.org/>

The Commonwealth Human Rights Initiative, an NGO, has a source site for Commonwealth human rights issues, focussing on Access to Information and Access to Justice, but with material on diverse issues such as constitution-making, elections, police and prison reforms. It includes full text links to CHOGM reports on human rights issues, and the nature of human rights advocacy within Commonwealth institutions (CHOGM, CMAG, Secretariat, countries), Commonwealth human rights initiatives and instruments / declarations, and generally explains the geography of Commonwealth human rights:

<http://www.humanrightsinitiative.org/> especially at

<http://www.humanrightsinitiative.org/cwhr/>

## **PART E**

### **Assessing human rights: debates about problems with human rights**

Depending on the level of the course, and the degree of comprehension of students of the structure of the human rights system nationally and internationally, thought might be given to including a section that turns to analyse and critique the idea of human rights, the present institutions, or the utility of rights. Care needs to be taken since although there is a place for a critique of rights in a broader rights education project (“only by criticising the system can we see how to improve it”), undue negativity about human rights will not pay sufficient regard for the enormous significance they have in today’s domestic and international social, economic and political systems and decision-making.

This topic would aim to introduce students to some of the critiques of rights, to delve behind the rhetoric of rights and to explore the repercussions of a rights-based system for protecting dignity and liberty. One might question what the human goods are that human rights intend to secure or protect. If human rights are not the most effective strategy to obtaining those goods, are we ‘blinded’ by our faith in rights, do we idolise rights? Does the human rights system mostly assist or mostly hinder the well-being of humanity? Is any ‘emancipation’ gained by acquiring civil rights an illusion? Is it possible to conceive of human rights as ‘part of the problem’? Is it possible to construct a criticism based on the ‘cost of rights’? How have rights strategies been used by both sides in fundamental political struggles? Do we ignore the ‘politics of rights’? Should we understand rights-talk more as a political process or language for contestation and negotiation than the proclamation of supposed eternal truths?

For example, one could challenge students to assess the power of human rights for change, the limits of that power, and the identity of those wielding the power. An example of a question to put in this part of the course might be:

“Phillip Allott has said ‘The reality of the idea of human rights has been degraded...Human rights, a reservoir of unlimited power in all the self-creating of society, became a plaything of governments and lawyers.’ Comment.”

Some readings on critiques of the effectiveness of the human rights language and movement include:

D Kennedy, "The International Human Rights Movement: Part of the Problem?" (2002) 15 *Harvard Human Rights Journal* 99.

M Tushnet, "Symposium: A Critique of Rights" (1984) 62 *Texas Law Rev* 1363.

A Gumann (ed), *Human Rights as Politics and Idolatry* (2001).

Tom Campbell, Keith D. Ewing & Adam Tompkins (eds.), *Sceptical Essays On Human Rights*.

L. Henkin, *The Age of Rights* ('Epilogue: Human Rights and Competing Ideas').

R. Posner "The Cost of Rights" 32 *Tulsa LJ* 1 (1996).

HLA Hart, "Between Utility and Rights" (1979) 79 *Columbia Law Review* 828.

Makau Mutua, "Ideology of Human Rights" (1996) 36 *Virginia Journal of International Law* 589.

Patrick Hayden, *The Philosophy of Human Rights* (Paragon House, 2001).

MJ Perry, *The Idea of Human Rights: Four Inquiries* (1998).

Another suggested aspect to this part of a course is to ask about assessing practical effects of human rights. What counts as a successful human rights outcome? For one thing, can we assume that the practices of a country that has ratified human rights instruments will be better? How do we actually measure the difference made by human rights instruments? What do we really know about the way in which human rights standards influence political and human decisions? Does this gap in knowledge affect our ability to improve the system? On this see:

David Stewart, "Human Rights at the Millennium" (2001) 95 *American Journal of International Law* 227 Oona Hathaway, "Do Human Rights Treaties Make a Difference?" (2002) 111 *Yale LJ* 1935; and response from Goodman and Jinks 'Measuring the Effects of Human Rights Treaties' (2003) 14 *European Journal of International Law* 171; and finally Hathaway, "Testing Conventional Wisdom" (2003) 14 *European Journal of International Law* 185.

## **PART F**

### **Case Studies - Current Debates in Human Rights (various topics)**

This part of the curriculum is designed to assist with developing Case Studies on particular issues of current importance in human rights in Commonwealth countries. In preparing these draft outlines of case studies, attention has been given to what are seen as currently significant issues in human rights such as democracy and human rights, health and human rights.

Of course, any of the earlier topics (such as international criminal law as means of enforcing human rights, or the merits of prosecution over truth commissions) can be adapted into special case studies. Some successful case studies keep the amount of different readings and scenarios to a minimum, the idea being to draw a number of themes out of a single reading. Others provide students with a range of opinions on a matter and ask them to consider the

merits of these. Not only are the topics selective only, the course designer might choose to adopt only part of the guidelines on each discrete topic. A course could select from the Standards and Enforcement sections and then choose a combination of Case Studies on selected rights and Case Studies on Current Debates.

This following link is also recommended as it contains human rights education materials on discrete human rights topics:

<http://www1.umn.edu/humanrts/edumat/topicguides.html>.

### **Case Study 1: Balancing Individual Freedom and Community Security in an Age of Terrorism**

*“We face a nearly unsolvable conflict between two imperatives of modern life - protecting the traditional civil liberties of our citizens and, at the same time, ensuring their safety from terrorist attacks with catastrophic consequences... [but] any sacrifice of freedom or the rule of law within states...is to hand the terrorists a victory that no act of theirs alone could possibly bring.”*

UNITED NATIONS SECRETARY-GENERAL KOFI ANNAN, 2003.

This topic can provide an engaging and stimulating and current Case Study. The focus of a case study is more likely to be on the balance struck in national legislation between empowering authorities to monitor, investigate, apprehend and deal with persons suspected of terrorism, and not unnecessarily undermining core freedoms and civil liberties. There are some minimum protections that apply irrespective of the offence of which someone is suspected. Comparisons can be made between the different legislation in Commonwealth countries. The following is a web-resource of anti-terrorism laws in many countries of the world: <http://jurist.law.pitt.edu/terrorism/terrorism3a.htm>. A study of this topic does not necessarily need to deal with Security Council resolutions and the international law relating to combating terrorism, or problems of defining who may be a ‘terrorist’; for full resources and conventions, etc, see the UN counter-terrorism resource:

<http://www.un.org/Depts/dhl/resources/terrorism/index.html>.

See also: [http://www.cdp-hrc.uottawa.ca/links/terrorismint\\_e.html](http://www.cdp-hrc.uottawa.ca/links/terrorismint_e.html).

There are some useful Commonwealth materials on [www.thecommonwealth.org](http://www.thecommonwealth.org)

There are any number of angles a Case Study might take on this topic.

- Article 29 of the UDHR and Article 4 of the ICCPR should be noted. See also Article 15 of the *European Convention on Human Rights*. These all allow for certain limitations and derogations in times of emergency. (See also national constitutional provisions for emergencies, above). Non-derogable rights (see Article 4) should be discussed, including the absolute prohibition on torture.
- How is the balance to be achieved between civil order and security, and respect for individual rights? What rights are involved? Are issues of privacy of personal communications a human rights issue?
- Is there too much concern with the rights of terrorism suspects, and is this at the expense of the safety of the community? Can providing for community security not

also be described as ensuring the protection of human rights from violation? What danger is there of undermining the fabric of the Rule of Law in taking excessively strong measures to counter a terror threat? Is there a risk of political abuse of anti-terror powers against peaceful political opponents? How have countries dealt with this risk?

- To what extent can the international community challenge a State's decision to make a declaration of a state of emergency? How broad are limitations which provide for limits to protect 'public order' or those necessary in a 'democratic state'?
- If the struggle against terrorism is long-term, can it still be an 'emergency'?
- How does human rights law on detention and interrogation and trial relate to measures taken for national security, such as preventative detention, indefinite detention, extended holding without trial or charge?
- Is it inevitable that human rights supervisory bodies will permit States a 'margin of appreciation' in defining and balancing competing interests? Institutionally, do you think such deference is appropriate?
- What are the dangers for the perceived independence of the judiciary where (for national security reasons) hearings are conducted in closed court, judges are involved in approval of search and phone intercept warrants, accepted evidence obtained under torture, etc?
- Further sub-topics relate to detention, and here the ICCPR and the Convention Against Torture may also be referred to. What is the distinction between detention which is authorised by law and 'arbitrary' detention? What type of considerations can a State take into account in determining whether or not to detain a person? Does a national response to a real threat of terror justify detention of persons suspected of having information about terrorist activities? Should a State be able to declare a state of emergency over the whole State when an insurgency is occurring in a localised area? Would the condition of detention affect whether or not it is considered 'arbitrary'? What standards of care should be imposed on the State where a person has been detained?

Two classic cases (before the current terrorism problem and legislation, but addressing core endemic concerns) that can be used as case studies of what may be appropriate in a democracy in terms of detention of terrorist suspects are

*Brogan v United Kingdom* (1988) <http://www.cajpe.org.pe/rj/bases/excep/brogan.htm>; and *Brannigan & McBride v UK* (1993) <http://www.worldlii.org/eu/cases/ECHR/1993/> (both in the European Court of Human Rights).

Alternatively, a Case Study might be made from a recent UK case which set out clearly the nature of terrorist-related derogations from fundamental rights, reviews recent case law on terrorism legislation, considers the use of evidence obtained under torture, and generally considers the rights at stake in these situations:

*A (FC) & Others (FC) v Secretary of State for the Home Department* [2004] EWCA 1123 <http://www.bailii.org/ew/cases/EWCA/Civ/2004/1123.html> (Court of Appeal) and

<http://www.publications.parliament.uk/pa/ld200405/ldjudgmt/jd041216/a&oth-1.htm>  
(House of Lords)

### **Case Study 2: Democracy and Human Rights**

A highly topical issue is the concept of democracy – what it involves – and the relationship between human rights and democracy. See for example the Part V (Democracy, Human Rights and Good Governance) of the United Nations General Assembly Millennium Declaration September 2000 <http://www.un.org/millennium/declaration/ares552e.htm>.

Some issues include: do human rights require a particular form of democracy? If so, what does international law say about democracy, can there be any normative legal significance in the term? What is the relationship between democracy and human rights?

See also the human rights and democracy links collected here:

[http://www.cdp-hrc.uottawa.ca/links/cprint\\_e.html](http://www.cdp-hrc.uottawa.ca/links/cprint_e.html)

- The end of the Cold War was heralded as the triumph of Western liberal democracy as the final form and ideology of human government. Observers note a wave of ‘democratisation’. If international law supports an idea of democracy, what content does this ‘inherently contested concept’ necessarily involve? A plan for a Case Study might involve tracing the development of any ‘Right to Democratic Governance’ held by peoples, while asking what the content of the right might be. That is, what ‘counts’ as a democracy, or a democratic election process? Does it include a level of human rights observance, and what is that level?

A most comprehensive overview of the debates and literature is Susan Marks "The End of History: Reflections on Some International Legal Theses" (1999) 8:3 *European Journal of International Law*. See also Cherie Booth QC and Max du Plessis, "Common Wealth", (2003), 66, *Modern Law Review*, 837, and more generally Gregory Fox & Brad Roth *Democratic Governance and International Law* (2000).

- Related to this topic are many rich avenues for inquiry into corruption issues, transparency in government, election monitoring, etc, which may seem only incidental or indirectly related to human rights. Sites such as Transparency International [<http://www.transparency.de>] contain resources relating to such issues.

Peter Langseth "The Role of a National Integrity System in Fighting Corruption" (1997) 23 *Commonwealth Law Bulletin* 499

Jeremy Pope "The Impact of Corruption on Human Rights: What Can the Profession Do?" (1997) 23 *Commonwealth Law Bulletin* 1263

*Corruption Case Law Reporter* (contains the latest anti-corruption case law from around the common law world) [www.tiri.org](http://www.tiri.org)

- Human rights, particularly rights of freedom of association and expression, are implicated in the electoral process. Reports of Commonwealth Election Monitors might be used to challenge students to see which civil and political rights might be

implicated. Many such reports are available from Commonwealth ([www.thecommonwealth.org](http://www.thecommonwealth.org)). See also C Dundas "Compendium of Election Law, Practices and Cases of Selected Commonwealth Countries").

Important Commonwealth cases that might form the basis of a Case Study include:

*Reform Party of Canada v A-G of Canada* (1995) 117 DLR (4th) 366 (Canada SC) -  
- protection for minority parties to contest elections

*United Parties v Minister of Justice, Legal and Parliamentary Affairs and Others* [1998] 1 LRC 614 (Zimbabwe SC) -- constitutionality of legislation providing funding to political parties

- The role of the courts in deciding on the constitutionality of an undemocratic change of government might also provide an avenue for discussion of the links between human rights and democracy.

A comprehensive examination of the Commonwealth jurisprudence and Commonwealth response to coups can be found in John Hatchard and Tunde Ogowewo *Tackling the Unconstitutional Overthrow of Democracies: Emerging Trends in the Commonwealth* (Commonwealth Secretariat, 2003) Full text can be downloaded free of charge from [www.thecommonwealth.org](http://www.thecommonwealth.org)

### **Case Study 3: HIV/AIDS and Human Rights Law**

The HIV/AIDS pandemic is a crisis facing many Commonwealth States. The scale of the crisis is such that careful consideration ought to be given to the inclusion of this topic (as a case study or more generally within the course) by any instructor of human rights. The topic of HIV/AIDS and Human Rights Law allows for a range of aspects to be considered and highlights the manner in which human rights issues permeate various areas of the law and discrimination issues, such as insurance law, employment law, medical law, the law relating to prisoners. The topic also allows for an in-depth consideration of socio-economic rights and the difficulties relating to their enforcement.

The following broad topics with relevant readings might be drawn from to compile a case study on HIV/AIDS and Human Rights Law. The outline draws heavily from South African resources since it is one Commonwealth country where responses to the HIV/AIDS challenge have taken a human rights tone.

#### ***Introduction: Medical aspects of HIV/AIDS.***

In order to deal with the subject, details and statistics on HIV/AIDS would be necessary.

#### ***Human rights and people living with HIV/AIDS.***

Civil and political rights of people living with HIV/AIDS.

Socio-economic rights of people living with HIV/AIDS.

Environmental and cultural rights of people living with HIV/AIDS.

See generally [www.alp.org.za](http://www.alp.org.za) (Aids Law Project, Wits University, Johannesburg, South Africa) AIDS Law Project and Lawyers for Human Rights *HIV/AIDS and the Law: A Resource Manual* 2 ed (2001). Also Robert Jarvis (*et al*) *Aids Law* 2<sup>nd</sup> ed (1996); David Webber *Aids and the Law* 3<sup>rd</sup> ed (1997). Also United Nations High Commissioner for Human Rights, *HIV/AIDS and Human Rights: International Guidelines* (1998).

Case:

*Minister of Health and Others v Treatment Action Campaign (Case No 2)* 2002 (5) SA 721 (CC) (South Africa CC) (nature of the government's duty in relation to the right to health)  
*Hoffman v South African Airways* 2000 (1) SA 1 (CC) (South Africa CC) (discrimination on basis of HIV status was a breach of human rights)  
*Bragdon v Abbott* (1998) 524 US 624 (United States Supreme Court) (discrimination)

### ***HIV/AIDS and the right of access to health care for pregnant mothers.***

Meaning of right of access to health care.  
Mother to child transmission of HIV and the right of access to health care.  
The provision of anti-retroviral drugs and the right of access to health care.  
Refusal of treatment by hospitals.

### ***HIV/AIDS and emergency medical treatment for rape survivors***

Meaning of medical emergency.  
Are rape survivors entitled to emergency medical treatment?  
The provision of anti-retroviral drugs to rape survivors.  
Duties of police officers, doctors and hospitals towards rape survivors.

### ***Confidentiality and HIV/AIDS***

Ethical guidelines on confidentiality and HIV/AIDS.  
Legal rules on confidentiality and HIV/AIDS.  
Death certificates and HIV/AIDS.  
Remedies for breach of confidentiality.  
*Jansen van Rensburg v Kruger* 1993 (4) SA 842 (A) (South Africa CA)

### ***Informed consent and testing for HIV/AIDS***

Who may consent to HIV/AIDS testing?  
Exceptions to the rule that consent is required for HIV/AIDS testing.  
*C v Minister of Correctional Services* 1996 (4) SA 292 (T) (South Africa HC).

### ***HIV/AIDS and employment***

Right not to be discriminated against on the grounds of being HIV positive.  
Right not to be unfairly dismissed on the grounds of being HIV positive.  
Right to a safe working environment and to compensation if infected with HIV at work.  
Right to privacy concerning the employee's HIV status at work.

**Reading:**

South African Law Commission *Aspects of the Law Relating to AIDS: Pre-employment HIV Testing of Persons Arrested for Sexual Offences* Discussion Paper 72 (1997).  
*Hoffman v South African Airways* 2000 (1) SA 1 (CC) (South Africa CC).

**HIV/AIDS and Insurance Law**

How insurance works.  
The duty to disclose and consequences of non-disclosure.  
HIV tests, confidentiality and insurance procedures.  
Insurance policies and exclusion clauses regarding HIV/AIDS.

**HIV/AIDS and the rights of prisoners**

Prisoners and their rights.  
Prison policies on HIV/AIDS.  
Medical treatment and the testing of prisoners for HIV.  
Protection of non-infected prisoners.

*Van Biljon v Minister of Correctional Services* 1997 (4) SA 441 (C) (SAHC).

**Case Study 4: Reparations for Gross Violations of Human Rights**

In this case study students might be asked to consider whether States and others are under a duty to provide reparations to victims for serious human rights violations – and what counts as ‘reparation’. Such a case study remains topical in light of recent and ongoing debates about reparations for slavery and apartheid. It can also be linked to studies on prosecutions, truth commissions and other mechanisms for dealing with / remedying large scale gross violations. The literature on this is vast and the topic can be unmanageable but is a stimulating and interesting topic examining whether the largest scale human rights abuses entail any systematic remedies.

**Issues for consideration:**

What are reparations? Do non-pecuniary forms of reparation (such as an apology) count as a remedy? Does the question of time make a difference? The international law doctrine of inter-temporal law says that a State ought only to be held accountable for acts that were outlawed at the time they were committed. Was slavery outlawed during the Atlantic-Slave Trade? Should the question of time matter? In relation to reparations, how should reparations be determined? Should one have regard to past wrongs or current effects, or both? Who should pay reparations and who should claim reparations? In respect of slavery, should the descendants of slave-traders/owners be held accountable? What arguments might be made in support of a present-day Government being obliged to provide reparations for violations that took place many years ago? If reparations for slavery are to be provided, who should be the recipients, descendants of slaves?

For apartheid victims, is there a relationship between the amnesty granted by the South African Truth and Reconciliation Commission and their calls for reparations from the South

African Government? Is a higher duty placed on a State to provide individual reparations where the State, through collective justice measures like a TRC, has denied individuals the right to seek retributive justice in the form of punishment?

If monetary compensation is being sought as reparation for the gross human rights violation suffered, how should the amount be calculated? Should a uniform sum be provided to all victims, or should justice be done as between the victims so that more deserving victims receive more?

### **Case Study 5: Asylum, Refugees and Mass Human Movement as a Human Rights Issue**

Refugee law is a very large topic of its own, but is a useful case study within a general course on human rights, since much refugee movement is as a result of fleeing human rights violations in one area, and the treatment of asylum-seekers sometimes raises issues of human rights. A lecture might look at:

- The mass movement of people in Europe in World War 2, and subsequent repatriation, as historical background to the Convention.
- The *Refugees Convention* 1951 and the Protocol to the Convention 1967 (removing geographical and time restrictions from 1951 Convention)
- The Convention definition of ‘well founded fear of persecution’ and grounds (religious, etc) on which persecution ‘counts’
- The fundamental principle of *non-refoulement* and the safe third country concept
- Who is disentitled to asylum under the Convention?
- Whether the Convention is appropriate for today’s mass human movements, where the reason for movement is not necessarily persecution but may be economic, environmental, natural disasters? Was it intended to be, is too much asked of the Convention? Students might be asked to reflect on whether there is a tendency to forget that the Convention is only intended to alleviate the consequences of events that have forced people to flee, and can never address the root causes of persecution itself.
- Internal displacement, protective zones and looking at shared country solutions.
- What does international human rights law have to say about the detention and conditions of detention of asylum seekers?
- Related to this topic is the specialist topic of extradition and deportation. Most extradition and deportation matters are covered by bilateral treaties. Human rights issues do arise, however, such as where the extraditee alleges he will be subject to a violation of his human rights if extradited.

A great deal of material, including the Convention and Protocol, can be obtained from the United Nations High Commissioner for Refugees (UNHCR): [www.unhcr.ch](http://www.unhcr.ch)

See also these sites for different angles on the issues:

Global Commission on International Migration: <http://www.gcim.org/>

International Organisation for Migration (IOM) <http://www.iom.int>

Asylum Rights Campaign: <http://www.asylumrights.org>

**Case Study 6: Human Rights and Transnational Corporations**

A very topical issue is the degree of accountability of multinational corporations for their conduct / the conduct of their subsidiaries abroad where this conduct affects the human rights of locals. This issue takes on more political significance in where the corporation is involved in a developing country. This is because some corporations are of considerable size and economic influence.

To what extent does the existing system of international human rights regulate behaviour by individuals and by corporations (as opposed to States)? What processes might be devised for increasing compliance by non-State actors with international human rights standards? How might the behaviour of non-State actors be dealt with: domestically? Internationally? What arguments might be raised to limit the legal responsibility of corporations for conduct abroad, for example would increasing the accountability of companies discourage valuable investment abroad if companies were to be vulnerable to law suits? What is the possible negative effect of non-binding, voluntarily assumed 'codes of conduct' for corporations?

A good entry point is the UN's (non-binding) 2003 "Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights" <http://www1.umn.edu/humanrts/links/norms-Aug2003.html>.

See also the comprehensive United Nations 'Global Compact' with business organisations: [www.unglobalcompact.org](http://www.unglobalcompact.org), including the '10 Principles' (most especially principles 1 and 2 – that businesses respect and support the protection of human rights and will not be complicit in the violation of human rights.)

OECD Guidelines for Multinational Enterprises (2000) ([www.oecd.org](http://www.oecd.org))

The International Chamber of Commerce also has a range of related materials: ([www.iccwbo.org/](http://www.iccwbo.org/))

D Kinley & S Joseph, *Multinational Corporations and Human Rights* [http://www.law.monash.edu.au/castacentre/projects/arc\\_kinley.pdf](http://www.law.monash.edu.au/castacentre/projects/arc_kinley.pdf)

M. Addo (ed), *Human Rights Standards and the Responsibility of Transnational Corporations* (Boston, Kluwer, 1999).

C Thomas, A Taylor (eds), *Global Trade and Global Social Issues* (2000).

C Forcese, *Commerce with Conscience? Human Rights and Business Codes of Conduct* (1996).

M. Rogge, (2001) 'Towards Transnational Corporate Accountability' 36 Texas Int'l LJ 299 (2001).

For activist resources see Corporations Watch <http://www.corpwatch.org/> and Human Rights Watch (Corporations) [www.hrw.org/advocacy/corporations/](http://www.hrw.org/advocacy/corporations/)

**PART G**  
**12 Case Studies - Specific Rights**

A course may include not only thematic case studies (such as those above) but also take time to cover a range of specific rights.

## 1. RIGHT TO LIFE

See the section dealing with civil and political rights, for which this right is taken as a study.

Article 6 of the ICCPR

Where killing is lawful under domestic law? The significant issues are the meaning of 'arbitrary' deprivation of life, the status of the death penalty in international human rights law, and the extent to which the right to life creates a more positive duty on the state than simply the negative 'The state shall not kill (arbitrarily)': does the right to life extend to other areas such as the right to food, shelter, health care, employment, education, clean environment, creating a duty on the state in these respects? That is, does the 'right to life', perhaps the most 'sacred' right, include a right of access to the necessary conditions to continue living a normal and healthy life? Does this weaken the force of the 'core' of the right (the negative prohibition on arbitrary deprivation). What are the implications of courts becoming involved in adjudicating *Olga Tellis* type claims (ie determining what the State must do to fulfil the positive aspects of a right to life) see the case reference below)? The lesson should note that the right is interpreted in international law to require the State to take positive steps to minimise threats to life by legislating against murder, investigating and punishing murder, training and equipping of police forces, etc. In this way the right can be used to illustrate the general nature of duties that rights entail.

The following cases flesh out the meaning of the right to life, in particular the extent of positive duty it entails:

*Operation Dismantle Inc and Others v The Queen* [1986] LRC (Const) 421 (Canada SC)

*Olga Tellis and Others v Bombay Municipal Corporation and Others* [1987] LRC (Const) 351 (India SC)

*Krishnan v State of Andhra Pradesh* [1993] 4 LRC 234 (India SC)

*Delhi Development Horticulture Employees' Union v Delhi Administration, Delhi* [1993] 4 LRC 182 (India SC)

*Indian Council for Enviro-Legal Action v Union of India* [1996] 2 LRC 226 (India SC)

*Lawson v Housing New Zealand* [1997] 4 LRC 369 (New Zealand HC)

*Re G* [1997] 4 LRC 146 (New Zealand HC)

B Ramcharan, 'The Right to Life' (1983) 30 *Netherlands International Law Review* 297

Y Dinstein, 'The Right to Life, Physical Integrity and Liberty' in L Henkin (ed), *The International Bill of Rights* (1981).

### **The right to life and capital punishment**

The death penalty is not as such prohibited by international law (see Article 6, see also Article 7 prohibition on cruel, inhuman and degrading punishment), but the constitutionality of the death sentence in various countries is a major human rights topic in those countries. Of the cases below, *S v Makwanyane* in the South African Constitutional Court 1995 is a comprehensive comparative treatment of the status of the death penalty, and could form the basis of special topic study. The Commonwealth Caribbean countries have also generated much jurisprudence on the death penalty.

For other cases see also the Amnesty International web site: <http://www.amnesty.org>

#### CONSTITUTIONALITY OF DEATH SENTENCE

*Mbushuu v. Republic* [1995] 1 LRC 216 (Tanzania CA);

*State v. Makwanyane and Mchunu* (1995) 1 LRC 269 (South Africa CC)

*Boyce & Joseph v R* [2004] UKPC 32 (Privy Council, Barbados); *Matthew v The State* [2004] UKPC 33 (Privy Council, Trinidad & Tobago): mandatory death penalty was not unconstitutional, on grounds that it was saved as an 'existing law' prior to the enactment of the Constitution.

Compare *Watson v R* [2004] UKPC 34 (Privy Council, Jamaica): mandatory death penalty confirmed as an inhuman punishment which could not be saved as an 'existing law'. Full text of these cases at <http://www.bailii.org/uk/cases/UKPC/2004/32.html> (and /33, /34).

(See earlier cases of *Reckley v. Minister of Public Safety and Immigration* [1995] 1 LRC 399 (The Bahamas PC); *Jones v A-G of the Bahamas* [1995] 1 LRC 240 (The Bahamas PC); *Re Applications by Thomas and Paul* [1986] LRC (Const) 285 (Trinidad and Tobago HC)).

#### EFFECT OF DELAY IN EXECUTION OF SENTENCE OF DEATH

*Catholic Commission for Justice and Peace in Zimbabwe v. Attorney General* [1993] 2 LRC 279 (Zimbabwe SC);

*Daya Singh v. Union of India* [1992] LRC (Const) 452 (India SC);

*Pratt v. Attorney General for Jamaica* [1993] 2 LRC 349 (Jamaica PC);

*Guerra v. Baptiste* [1995] 1 LRC 407 (Trinidad and Tobago PC);

*Henfield v. Attorney General* [1997] 1 LRC 506 (The Bahamas PC);

*Bradshaw v. Attorney General; Roberts v. Attorney General* [1995] 1 LRC 260 (Barbados PC);

*Jabar v. Public Prosecutor* [1995] LRC 349 (Singapore CA);

*Wallen v. Baptiste* [1994] 2 LRC 62 (Trinidad and Tobago PC);

*Fisher v. Minister of Public Safety and Immigration* [1997] 4 LRC 344 (The Bahamas PC)

*Triveniben and Others v. State of Gujarat and Others* [1992] LRC (Const) 425 (India SC)

#### PUBLIC EXECUTION

*A-G v Lachma Devi* [1986] LRC (Const) 1 (India SC)

*Extradition to face death penalty:*

*Soering v. United Kingdom* (1989) 11 EHRR 439 (United Kingdom ECHR)

*Kindler v Canada* (Minister of Justice) [1993] 4 LRC 85 (Canada SC)

*Ng v Canada* [1993] 4 LRC 133 (Canada SC)

*Mohamed and Another v President of the Republic of South Africa and Others* 2001 (3) SA 893 (CC).

**The right to life and the debate on euthanasia/assisted suicide & abortion**

An interesting 'twist' to the jurisprudence on the right to life is the extent to which the State has a duty to legislate to prevent deprivation of life by way of assisted suicide. Is State authorised killing ever permissible? Does the right to life oblige States to criminalise suicide and euthanasia? Can international law avoid determining the issue of when 'life' begins?

*Morgentaler and Others v. R* [1990] LRC (Const.) 242 (Canada SC)

*Rodriguez v. Attorney General of Canada, British Columbia Coalition of People with Disabilities intervening* [1994] 2 LRC 136 (Canada SC)

*Gian Kaur (Smt) v. State of Punjab* [1996] 2 LRC 264 (India SC)

G Zdankowski, 'The International Covenant on Civil and Political Rights and Euthanasia' (1997) 20 *UNSWLJ* 170

**2. RIGHTS OF WOMEN AND THE MEANING OF DISCRIMINATION**

Women's rights is a significant topic and opens up opportunities to discuss themes such as discrimination more generally.

Apart from CEDAW 1979, the relevant instruments include the UN Convention on the Political Rights of Women 1952, and various conventions on nationality of married women, consent to marriage, minimum age for marriage, traffic in persons and prostitution, Declaration on the Elimination of Violence against Women 1993, and the very important work of the World Conferences on Women (Mexico 1975, Copenhagen 1980, Nairobi 1985, Beijing 1995).

The Commonwealth Plan of Action for Gender Equality 2005-2015 can be downloaded free of charge from <http://www.thecommonwealth.org>. This website also contains comprehensive materials on Commonwealth action in support of gender rights, including the right to education.

The following web resources are useful:

University of Ottawa Library (Women and Discrimination):

[http://www.cdp-hrc.uottawa.ca/links/discriminationint\\_e.html](http://www.cdp-hrc.uottawa.ca/links/discriminationint_e.html)

University of Minnesota Human Rights Library (womens' rights):

<http://www1.umn.edu/humanrts/edumat/studyguides/womenrights.shtm>

Women's Human Rights Resources (University of Toronto):

<http://www.law-lib.utoronto.ca/diana>

***Gender discrimination and violence against women***

This topic might explore the question of discrimination against women and the struggle for gender equality. There appears to be an entrenched hierarchy of social relations in which an individual's gender, race, class or physical (dis)ability subjects them to different human experiences. It is safe to say that within that hierarchy gender remains one of the characteristics that determine an individual's (largely inferior) social and economic situation. Topics for consideration include:

Clearly not all women are subject to the same forms of disadvantage. That is because social and economic marginalisation of women within various societies differs. Because social and economic marginalisation of women exposes women to particular types of human rights abuses, students might explore whether women from (e.g.) particular communities in a society, or a poor society, or a paternalistic culture, might suffer different and deeper forms of human rights abuses to those from wealthier, more tolerant and egalitarian societies. What forms of exposure to rights-violation do women in all cultures have in common?

In what ways does the structure of international law marginalise women? In what respects might the creation of a separate Convention (CEDAW) for women's rights perpetuate their marginalisation? To what extent is the drafting of separate international instruments like CEDAW helpful? Does it serve to marginalise the rights?

To what extent is the marginalisation of women a cultural issue? A religious issue? An economic issue? Why and how have human rights abuses of women been ignored by the international community for so long? Do arguments of cultural relativism ensure the continuation of practices that keep women in a position of subjection, or are opponents of some cultural practices (e.g. as to women's headwear) making unjustified and paternalist assumptions about the good of women in other cultures?

### **Materials:**

Convention on the Elimination of All Forms of Discrimination Against Women 1979:  
<http://www.un.org/womenwatch/daw/cedaw/> (and see the WomenWatch site of the UN generally for material and ideas for class topics).

Amnesty International (1995) *Human Rights are Women's Rights* (London: Amnesty International, UK)

O'Hare U, "Realising human rights for women", (1999) *Human Rights Quarterly*, 21, 361.

Charlesworth H, Chinkin C, Wright S, "Feminist approaches to international law", (1991) *American Journal of International Law*, 85, 613.

See also: <http://www.women.ca/violence/candle.html>

This report produced by UNIFEM highlights many of the achievements of women's advocates in the area of violence against women:

[http://www.unifem.org/filesconfirmed/207/312\\_book\\_complete\\_eng.pdf](http://www.unifem.org/filesconfirmed/207/312_book_complete_eng.pdf)

### ***Right of women to own and sell land***

*Ephrahim v Pastory* [1990] LRC (Const) 757 (Tanzania HC)

### ***Denial of citizenship***

*Dow v. Attorney-General* [1991] LRC (Const) 574; [1992] LRC (Const) 623 (Botswana HC and SC)

*Benner v Secretary of State of Canada* [1997] 2 LRC 469 (Canada SC)

### ***Sexual harassment in the workplace***

*Vishaka v State of Rajasthan* [1997] 3 LRC 361 (India SC)

### ***Exclusion from college where student pregnant***

*Student Representative Council of Molepolole College of Education v. Attorney General*  
[1995] 3 LRC 447 (Botswana CA)

A case study possibility is discrimination against women in relation to property. Women and girls particularly in the developing world are often denied the right to receive an inheritance, contributing to both their and their children's impoverishment and marginalisation. Poverty can then lead to risky livelihood measures such as prostitution. See this report of the UN on women and property (in the context of AIDS)

[http://www.unaids.org/html/pub/una-docs/gcwa\\_property\\_02febo4\\_en\\_pdf.pdf](http://www.unaids.org/html/pub/una-docs/gcwa_property_02febo4_en_pdf.pdf)

### **3. CHILD RIGHTS**

The *Convention of the Rights of the Child* (CRC) is the most widely ratified international human rights instrument. Despite the unprecedented level of international commitment, children continue to be at heightened risk of human rights violations. Progress in this field can only be achieved if children's rights are properly understood in the context of the entire human rights movement. A lecture on this topic could:

Examine the concept of 'childhood' and the notion of 'children's rights' in relation to international legal norms. Give a brief overview of the structure of the CRC and outline the 'foundation principles' that underpin children's rights. These include: non-discrimination; best interests of the child; right to survival and development; and views of the child. Highlight the challenges associated with balancing the rights of children both to participation and to protection.

What are some cultural perceptions of 'childhood' that may contradict aspects of children's rights? Discuss cultural-relativism through comparing and contrasting the CRC with the first comprehensive regional Child Rights instrument, the 1990 *African Charter on the Rights and Welfare of the Child*.

Focus on issues surrounding the implementation and monitoring of the CRC. Analyse examples of governments' approaches to the process, machinery and politics of implementing and monitoring child rights. Discuss the strengths and weaknesses of the reporting process to the Committee of the Rights of the Child. Encourage students to brainstorm better policy options at the governmental and international levels.

Address the inextricable link between children's rights and women's rights. As primary care-givers for children, women with resources are more likely to pass on the benefits to their children. Illustrate how empowering women is critical to the development of children's rights.

Topical issues could include:

- Child labour – What are the contentions surrounding the category of 'child labour'? Are all economic activities against the best interest of the child? What are the causes and trends of child labour in both First and Third World countries? What is the role of ILO in tackling the problem of child labour? What are the policy approaches needed to eliminate the worst forms of child labour?
- Child soldiers – Introduce the Optional Protocol to the CRC on the involvement of children in armed conflict. What are the underlying factors behind the phenomenon of children engaged in contemporary warfare and genocide? What are the impacts of war

on child soldiers? What are the measures that the international community and national governments must take to protect children's rights to life, education and development?

- Child abuse - How much consensus is there on definitions of child abuse and neglect? What are the challenges governments face in meeting the right to protection from child abuse?
- Child trafficking – Outline the Optional Protocol to the CRC on the sale of children, child prostitution and child pornography. What are the factors contributing to child trafficking? What are the ways to curb both demand and supply of child trafficking at the national, regional and international level?

#### *Web resources*

[www.crin.org](http://www.crin.org)

[www.unicef.org](http://www.unicef.org)

[www.unicef-icdc.org](http://www.unicef-icdc.org)

[www.savethechildren.org](http://www.savethechildren.org)

#### *Readings*

Buck, T (2005), *International Child Law*, London, Cavendish.

China Keitetsi (2004), *Child Soldier*, London: Souvenir

Cunningham H. & Viazzo P., *Child Labour in Historical Perspective 1800-1995*, UNICEF, Paris 1996.

Fottrell, D. (1999) *Children's Rights*, in Hegarty and Leonard (eds.) *Human Rights: An Agenda for the 21<sup>st</sup> Century*, Cavendish, p. 167 et seq.

Kuper, J. (2005), *Using Law: The Impact of HIV/AIDS on Women and Children*, with reference to Uganda, *Interights Bulletin*

Lansdown G. (2001), *Promoting Children's Participation in Democratic Decision-Making*, Florence: UNICEF Innocenti Research Centre

Munro E. (2002) *Effective Child Protection*. London: Sage. Chapters 3-4.

National Research Council (1993) *Understanding Child Abuse and Neglect*. Washington, D.C.: National Academy Press.

Parton N. (2005) *Safeguarding Childhood: Early Intervention and Surveillance in a Late Modern Society*. London: Macmillan.

Parton N., Thorpe D. & Wattam C. (1997) *Child Protection: Risk and the Moral Order*. London: Macmillan.

Save the Children (1999), *Children's Rights: Reality or Rhetoric?* London, Save the Children.

Thompson, B. (1992), *Africa's Charter on Children's Rights. A Normative Break with Cultural Traditionalism*, Vol 41, *International and Company Law Quarterly*, p. 432.

Van Beuren, G (1998) *The International Law on the Rights of the Child*, The Hague : Kluwer Law International

UNICEF (2002), *Adult Wars, Child Soldiers*, UNICEF

UNICEF (2002), *Implementation Handbook for the Rights of the Child*, New York, UNICEF

#### **4. THE RIGHTS OF MINORITY GROUPS**

##### **The Right to Self-determination and International Law**

The primary right pertaining to groups (rather than individuals) is the right of peoples to self-determination and the rights of ethnic, linguistic or religious minorities. These rights raise centrally the issue of diversity within communities, and the rights of individuals versus the rights and interests of groups. The term 'self-determination' has a notoriously open and indeterminate content. And how does one give meaning to the term 'peoples', which is not defined in international law?

For teaching, the topic of self-determination is probably best approached chronologically, since its history is intimately tied to attempts to keep peace in Europe in the early 20<sup>th</sup> century by accommodating the interests of discrete ethnic groups occupying territory, and the post-WWII history of de-colonisation:

- The League of Nations, Protectorates, Trusts and Non-Self Governing Territories and the Minority treaties
- The Atlantic Charter 1941
- UN Charter Article 1(2), Articles 55 and 56
- UN General Assembly Declaration on the Independence of Colonial Countries 1514 (1960)
- The pressures of decolonisation and the call for a right of self-determination; Cold War context
- Common Article 1 to the ICCPR and the ICSECR (1966)
- UN Friendly Relations Declaration 2625 (1970)
- The jurisprudence of the Human Rights Committee on self determination
- The Quebec reference: secession in international law: a human right of a group? [1998] 2 SCR (Supreme Court of Canada)
- The distinction between '*external*' self determination (affects the boundaries of States, for which there is little support in international law except perhaps in cases of ongoing gross oppression of a minority) and '*internal*' self-determination (autonomy regimes for minority groups within the boundaries and control of the State, which do not amount to secession).

The main point to note on the modern right is that there is a lack of clarity on the meaning of the right now that the decolonisation process has occurred. There is very little support now in international law for the right other than in its 'internal' form. In most cases, legal claims for a form of autonomy based on the right to self determination have been dealt with (eg by the Human Rights Committee) by reference to the provision for minority rights in Article 27

of the ICCPR. Does the heritage of the right support an emerging right to democratic governance?

The other main point to cover is the concept of economic self determination, and what this means in terms of a 'right'. Is there a reason that the political aspects of self-determination have generated more attention than the economic aspects?

Article 1(2) of the ICCPR 1966 (A people may freely dispose of their natural resources, etc)

UN General Assembly Declaration on Permanent Sovereignty over Natural Resources 1803 (1962)

UN General Assembly Declaration on the Establishment of a New International Economic Order 3201 (1974)

UN General Assembly Charter of Economic Rights and Duties of States 3281 (1974)

*See generally:*

C Tomuschat (ed), *The Modern Law of Self-Determination* (1993)

A Cassesse, *Self Determination of Peoples: A Legal Appraisal* (1995)

P Thornberry, *International Law and the Rights of Minorities* (1991)

### **Minorities' Rights**

Article 27 of the ICCPR deals with the rights of minorities.

Treatment of the right should note that it is a cultural, linguistic and religious right to be enjoyed in community with others. The topic can be dealt with in a number of ways and national examples are often best. Students should be asked to what extent the rights of members of minority groups can be considered already protected by the rights that attach to them as individuals (eg to freedom of religion or freedom of association). Questions should also be asked of students as to what constitutes a minority group, who is a member of that group, what rights should a group hold, what are the risks of the individual's core protections being overtaken by the group, who is entitled to represent a minority group, etc. Any class on minority rights would overlap with considerations of discrimination and affirmative action more generally, and touch on issues of whether or not it is desirable that the human rights system enables separate regimes to exist for minorities.

The Minority Rights databases contain comprehensive instruments and papers:

<http://www.uel.ac.uk/law/mr/min.html> and <http://www.minority-rights.org/>

This web resource links to materials on discrimination issues (minorities)

[http://www.cdp-hrc.uottawa.ca/links/discriminationint\\_e.html](http://www.cdp-hrc.uottawa.ca/links/discriminationint_e.html)

## **5. RACIAL DISCRIMINATION**

The international law of human rights is founded on the key pillars of equality and non-discrimination. The norms of these two principles were re-enforced by the adoption and entry into force of the *International Convention on the Elimination of All Forms of Racial Discrimination* (ICERD). As the oldest and one of the most widely ratified international conventions, ICERD provided a significant step forward to combat racial discrimination.

However, it is also evident that racial prejudice and discrimination are rooted in wider historical/sociological contexts and legal prohibitions alone are insufficient. Left unchecked, racial discrimination provides fertile ground for ethnic tensions and conflicts.

General questions surrounding racial discrimination could be posed for discussion: Is race a social construct? What constitutes racial prejudice? What is the difference between direct and indirect racial discrimination? How can the tension between affirmative action and the concept of equality be reconciled? What constitutes systemic or institutional racism? What are the difficulties in drawing the line between racial expression and freedom of expression? What are the other forms of discrimination often intertwined with racial discrimination? What other complementary policy responses should be undertaken alongside legal prohibitions to ensure effective prevention of racial discrimination? How does a country's approach to minority groups, ethnic diversity and multiculturalism affect its anti-racial discrimination laws?

The lecture could introduce ICERD as the international standard for combating racial discrimination: What are some of the positive and negative obligations involved in ICERD? Is the separation of different groups on the basis of ensuring equality compatible with the provisions of ICERD? What is the scope of discrimination covered by ICERD? What are ICERD's limitations? How is ICERD enforced?

At the national level, country examples could be selected to illustrate implementation of anti-racial discrimination legislations and policies in the areas of employment, criminal justice, asylum, education, housing and health services to name a few. How does political/media/public discourse on asylum and migration shape racial attitudes, policies and legislations? How effectively are anti-racial discrimination laws in employment, housing or health services enforced? Are migrant workers accorded the same protection? It is useful to highlight cases where other policy objectives conflict anti-racial discrimination laws. Is racial profiling acceptable for reasons of safety, security or public protection?

Banton, M. *Combating Racial Discrimination: the UN and its Member States* (2000)  
London, Minority Rights Group International

## **6. FREEDOM OF EXPRESSION AND ASSOCIATION**

While freedom of expression lies at the heart of a democracy, and is a fundamental human right, for the teacher the topic of freedom of expression is so broad as to be almost unmanageable. Accordingly, one might approach it thematically by considering the following for discussion:

### **An introduction to freedom of expression**

The Commonwealth Secretariat publication *Best Practice: Freedom of Expression, Association and Assembly* provides excellent background material: at

[www.thecommonwealth.org](http://www.thecommonwealth.org)

See also Commonwealth Human Rights Initiative "Rights Do Matter", Chapter 2 "Freedom of Expression" ([www.humanrightsinitiative.org/publications/default.htm](http://www.humanrightsinitiative.org/publications/default.htm))

The Commonwealth Press Union website also contains much helpful material (<http://www.cpu.org.uk/>)

**Freedom of the press, democracy and the media**

*Public Prosecutor v Pung Chen Choon* [1994] 2 LRC 236 (Malaysia SC) -- whether statutory restrictions on freedom of expression lawful

*State v Smith* [1997] 4 LRC 330 (Namibia HC) -- limitations on freedom of expression

*Kauesa v Minister of Home Affairs* 1995 (11) BCLR 1540 (NmS) (Namibian SC) -- freedom of expression facilitates peaceful change in a society

*South African National Defence Force Union v Minister of Defence* 1999 (4) SA 469 (CC) (South Africa CC) -- the importance of freedom of expression in a democracy

*Canadian Broadcasting Corp v A-G for New Brunswick* [1997] 1 LRC 521 (Canada SC) -- whether exclusion from trial of the press is "reasonable and demonstrably justifiable in a free and democratic society"

*Belize Broadcasting Authority v Courtenay and Hoare* [1988] LRC (Const) 276 (Belize CA) - - constitutionality of refusal by broadcasting authority to screen party political programme

*T & T Newspaper Publishing v Central Bank of Trinidad and Tobago* [1990] LRC (Const) 391 (Trinidad and Tobago HC) -- constitutionality of restricting publishers access to foreign exchange in order to purchase imported newsprint

*Masiyiwa Holdings v Minister of Information* [1997] 4 LRC 160 (Zimbabwe SC) -- constitutionality of monopoly over telecommunications

*National Media Ltd v Bogoshi* 1998 (4) SA 1196 (SCA) (South Africa CA) -- no strict liability for the press (defamation)

*Harper v Attorney General* [2004] SCC 33 Supreme Court of Canada, 18 May 2004 -- election advertising scheme and blackout on advertising on polling day infringed freedom of expression; whether the infringement was justifiable:

<http://www.canlii.org/ca/cas/scc/2004/2004scc33.html>

*Jennings v Buchanan* [2004] UKPC 36 Privy Council, 14 July 2004 -- Whether an MP may be held liable for defamation after reaffirming the privileged statement outside Parliament. Full text at <http://www.bailii.org/uk/cases/UKPC/2004/36.html>

*Independent Publishing Company Ltd v Attorney General & Anor* [2004] UKPC 26, Privy Council (Trinidad & Tobago), 8 June 2004 -- constitutionality of non-publication orders issued against the media concerning ongoing high-profile criminal trial; scope of constitutional redress for violation of rights to free expression and due process.

<http://www.bailii.org/uk/cases/UKPC/2004/26.html>

**Freedom of expression and the problem of hate speech and propaganda for war**

D McGoldrick and T O'Donnell, "Hate-speech laws: Consistency with National and International Human Rights Law" (1998) 18 Legal Studies 453.

Mahoney, K "Hate Vilification Legislation and Freedom of Expression – Where is the Balance?" (1994) 1 Australian Journal of Human Rights (available at [www.austlii.edu.au/au/journals/AJHR/1994/1.html](http://www.austlii.edu.au/au/journals/AJHR/1994/1.html))

*R v Keegstra* [1990] 3 SCR 697 (Canada SC)

**Freedom of expression and the rights and reputations of others**

*Lange v Australian Broadcasting Corp* [1997] 4 LRC 192 (Australia HC) -- broadcasting of alleged defamatory material concerning a politician: whether protected by the Constitution

*Theophanous v The Herald and Weekly Times Ltd* [1994] 3 LRC 369 (Australia HC); *Stephens v West Australian Newspapers* [1994] 3 LRC 446 (Australia HC) and *Sata v Post Newspapers Ltd (No.2)* [1995] 2 LRC 61 (Zambia SC) -- defamation proceedings and freedom of expression

*Chihana v Malawi* [1966] 1 LRC 1 (Malawi CA) -- sedition and the right to freedom of expression

**Pornography**

*Case v Minister of Safety and Security* 1996 (3) SA 165 (CC) (South Africa CC)

The following link is a compendium of many resources on freedom of expression:

[http://www.cdp-hrc.uottawa.ca/links/cprint\\_e.html](http://www.cdp-hrc.uottawa.ca/links/cprint_e.html)

**7. ACCESS TO JUSTICE**

A fundamental concern is access to justice in order to be able to seek vindication of other rights, and for this reason a right to access courts is recognised, even if what is included in the right (i.e. what counts as fair trial, whether there is a right to provision of legal services, etc) is not settled.

The starting point for a Case Study on access to justice and fair trial rights is of course to analyse Article 14 of the *International Covenant on Civil and Political Rights*, and the jurisprudence of the Human Rights Committee interpreting this provision.

The following cases from Commonwealth countries may be used to inform teaching on these two significant aspects of the nature and operation of the right:

**The right to legal representation**

*S v Slatter* [1985] LRC (Crim) 66 (Zimbabwe HC) -- importance of the constitutional protection

*Whiteman v. Attorney-General of Trinidad and Tobago and Others* [1991] LRC (Const) 536 (Trinidad and Tobago CA & PC) and *R v Feeney* [1997] 3 LRC 37 (Canada SC) -- right to be informed of the right to access to a lawyer

*R v. Mallinson* [1993] 4 LRC 221 (New Zealand CA); *State v Nombewu* [1997] 4 LRC 116 (South Africa SC); and *R v Narayan* [1993] 1 LRC 603 (New Zealand CA) -- accused to be informed on arrest of right to consult a lawyer without delay

*Re Applications by Thomas and Paul* [1986] LRC (Const) 285 (Trinidad and Tobago HC) -- duty of the State to provide adequate legal representation for indigent accused

*Dietrich v R* [1993] 3 LRC 272 (Australia HC); and *Reference by the Head of State* [1989] LRC (Const) 671 (Western Samoa SC) -- whether indigent accused entitled to legal representation at public expense

*Dunkley v R* [1994] 1 LRC 365 (Jamaica PC) -- whether accused facing capital charge enjoys right to legal representation

*State v Vermaas* [1995] 2 LRC 557 (South Africa CC) -- right to legal representation at state expense

*Balusundaram v Public Prosecutor* [1996] 4 LRC 597 (Singapore HC) -- right of an accused to counsel of his/her choice

*The Queen v Therens (Others Intervening)* [1986] LRC (Const) 455 (Canada SC)

*Robinson v R* [1986] LRC (Const.) 405 (Jamaica PC)

*Centre for Legal Research and Another v State of Kerala* [1987] LRC (Const) 544 (India SC)

*Clarkson v The Queen* [1987] LRC (Const) 533 (Canada SC)

*Hone v Maze Prison Board of Visitors, McCartan v Maze Prison Board of Visitors* [1988] LRC (Const) 762 (United Kingdom HL)

*Ntukidem and Others v Oko and Others* [1989] LRC (Const) 395 (Nigeria SC)

*Charan Lal Sahu and Others v Union of India and Others* [1990] LRC (Const) 638 (India SC) -- exclusive right of government to represent victims: whether a conflict of interest

*R v Edwards* [1992] LRC (Const) 506 (New Zealand HC)

*R v Cullen* [1993] 1 LRC 610 (New Zealand CA)

*R v Narayan* [1993] 1 LRC 603 (New Zealand CA)

*Police v Smith; Police v Herewini* [1994] 1 LRC 252 (New Zealand CA)

*Hallowes v The Yacht 'Sweet Waters'* [1995] 1 LRC 624 (South Africa SC)

*State v Vermaas; State v Du Plessis* [1995] 2 LRC 557 (South Africa CC)

*Balusundaram v Public Prosecutor* [1996] 4 LRC 597 (Singapore SC)

*Robertson v R* [1997] 3 LRC 327 (New Zealand CA)

*R v Feeney* [1997] 3 LRC 37 (Canada SC)

*State v Nombewu* [1997] 4 LRC 116 (South Africa SC)

*Makomberedze v Minister of State (Security)* [1987] LRC (Const) 504 (Zimbabwe SC) -- the response of a court to the denial of access of detainee to his/her legal representative

### **Right to trial within a reasonable time**

*A-G of The Gambia v Jobe* [1985] LRC (Const) 556 (The Gambia PC)

*Martin v Tauranga District Court 2* [1995] LRC 788 (New Zealand CA)

*DPP v Tokai* [1996] 2 LRC 314 (Trinidad and Tobago PC)

*Sookermany v DPP* [1996] 2 LRC 292 (Trinidad and Tobago CA)

*State v Heidenreich* [1996] 2 LRC 115 (Namibia HC)

*Collins v R* [1995] 4 LRC 211 (Canada SC)

*R v B, R v Parkes* [1996] 1 LRC 517 (New Zealand CA)

*R v Hung* [1994] 3 LRC 192 (Hong Kong CA)

*Fisher v Minister of Public Safety and Immigration* [1997] 4 LRC 344 (Bahamas PC)

*Sanderson v Attorney-General Eastern Cape* 1998 (2) SA 38 (CC) (South Africa CC) -- constitutional remedy if not tried within a reasonable time

*Republic v Taabere* [1985] LRC (Crim) 8 (Kiribati HC)

*Bell v DPP* [1986] LRC (Const) 392 (Jamaica PC)

## **PART H**

### **Incorporating Human Rights into other (Law) Courses**

This curriculum is produced as a model for crafting a free-standing, self-contained course in human rights. However, in addition to or instead of such a course, it may be that circumstances or convenience require that existing law courses (most probably constitutional law, civil liberties, criminal law and procedure, family law, social welfare law) have a human rights element added to them. It is hoped that the curriculum might assist with this. Further development of this aspect of the curriculum will hopefully be undertaken, since this will ensure a greater awareness of how human rights considerations inform and even perhaps underpin other settled branches of public, private and commercial law.

### **Incorporating Human Rights into other (Non-Law) Courses**

One highly effective strategy for the wider dissemination of human rights knowledge is to attempt to integrate human rights elements and considerations into non-law subject matter (most significantly, politics and international relations, health and public health, criminology, environmental studies, human geography, trade and economics, development studies). Further development of this aspect of the curriculum will hopefully be undertaken, as the possibilities for rich cross-disciplinary fertilisation in course design are exciting.

### **Ideas for Assessment Regimes**

Institutional-specific rules affect the style of assessment that might accompany a course. This is not to say that imaginative and engaging forms of assessment cannot be considered, consistent with the very human-interest nature of the subject of human rights. While it might be thought that assessment format depends on the structure and content of the course, it is useful to think of assessment format early on, at the stage of course design, and integrate assessment considerations into course design. A form of assessment that is deliberately fashioned and so made relevant to the course content will result in a more satisfying learning experience for students.

### **Developing this Model Course for Postgraduate Use**

This model curriculum is amenable to adaptation or 'upgrading' to postgraduate level, where somewhat different considerations might apply. It is difficult to be prescriptive, since much depends on the degree design. Some postgraduate courses in human rights are only open to students with a law degree, or even only to those who have taken an undergraduate course in

human rights or international law. Such ‘law pre-requisite’ courses can obviously be presented at a more advanced level, assuming student familiarity and without the need for anything but refreshment on some of the building blocks, norms and institutions of human rights. With such courses, time can be devoted to drawing out specific issues or themes in human rights and giving more extensive treatment to these. The Case Studies section of the model curriculum might form the basis for a thematic, selective postgraduate course. It is important to acknowledge the selectivity in the design and content of the course, and to reassure students that this is inevitable – it is still possible to cover a wide range of themes and issues in human rights by treatment of selected topics.

Some postgraduate courses will have no requirement that students have any law background (let alone any human rights or international law knowledge). Here, it becomes more difficult to design and ‘pitch’ the course in a balanced way that is challenging to all students (i.e. if some have studied law and others have not). It is perhaps more difficult to dive straight into discrete significant issues in human rights, since much of the background information is not familiar to students. Having said this, the advanced nature of postgraduate study is such that students might be expected to familiarise themselves with new concepts outside of classes and ‘bring themselves up to speed by their own steam’.

In *content*, a postgraduate-level course essentially would not only seek to describe the substantive norms, the players and the playing field of the subject, but to encourage exploration of and reflection upon the philosophical and conceptual issues and themes underlying human rights, the process by which international human rights norms are given meaning by specialised bodies and within the domestic systems of States, and the implications of international human rights guarantees for the practice of State and non-State actors. If students are familiar with the substance of human rights, for example, the course might focus on practical mechanisms for observance, enforcement and remedy. There might be more deliberate drawing out of thematic issues, and more emphasis on situating human rights issues in a broader strategic, policy and social context. More emphasis might go into critiques of existing human rights mechanisms, rather than simply explaining the mechanisms themselves.

The *assessment* regime might be somewhat different in a PG course, reflecting the level at which the course is presented. For example, consideration might be given to self-selection of topics for student essays, or in-class seminar presentations (with questions), or accounting for participation as part of the overall grade. PG students may be less concerned with actual marks, and more concerned to produce work of interest to them beyond the life of the course.

In *style of presentation*, a post-graduate-level course might allow for more student involvement in recognition that many PG students are of mature age and may have valuable experience in relevant issues. This might involve, for example, students doing mini-presentations on specific researched issues. Guest lectures on particular topics might be welcomed.

### **Developing this Model Course for Schools**

Any model for an undergraduate audience can be modified for school students. Of course, there would need to be a greater emphasis on easily recognisable local examples, interactive exercises, and scenarios, and less emphasis on abstract rights, formal institutions, norms and

systems. The following resources would assist in tailoring this model curriculum for school use:

This United Nations 'cyber school bus' website is an excellent, highly recommended entry-level resource on human rights, suitable for schools, including a 'Classroom Guide' (a model lecture introducing the Universal Declaration on Human Rights, with good advice for teaching human rights to school-age students), questions and answers about human rights, stories of children whose rights have been affected (told by the children), resources and links (including instruments in plain and simple language), quotes, and fact-sheets about human rights:

<http://www.un.org/cyberschoolbus/humanrights/index.asp>

An excellent resource for an introduction to human rights issues, law and constitutionalism is the Commonwealth's 'Introduction to Law and Human Rights for Young People in the Commonwealth' (Commonwealth Secretariat, written by John Hatchard). This is a 90+ page pdf document which can be obtained from the main Secretariat web page (go to 'What we do' then 'Human Rights'):

<http://www.thecommonwealth.org/>

For a very useful list of the various formal, informal and general teaching publications in human rights (mostly aimed at school-level teaching), see the Asia-Pacific Regional Resource for Human Rights Education at:

[http://www.arrc-hre.com/resources\\_frameset.html](http://www.arrc-hre.com/resources_frameset.html)

See also Human Rights Education Associates' sample formal curricula for primary and secondary education in human rights, and a useful source on what the goals of human rights education to school children might be:

<http://www.hrea.org/erc/Library>

[http://www.hrea.org/erc/Library/educational\\_goals.html](http://www.hrea.org/erc/Library/educational_goals.html)

<http://erc.hrea.org/Library/teachers/first-steps.html>

The African Centre for Democracy and Human Rights, Gambia, has produced a Handbook for teaching human rights and peace (the teacher's guide): selected topics for secondary schools and teachers trainers (2000). Columbia University's schools curriculum on human rights, whilst US-focussed, is also worth a visit:

<http://dlp.tc.columbia.edu/teachin/curriclinks.html>

Amnesty International has produced a guide to starting human rights education at school level:

[http://web.amnesty.org/web/web.nsf/pages/hre\\_first](http://web.amnesty.org/web/web.nsf/pages/hre_first)

The International Baccalaureate Organisation (Switzerland) has produced a model schools syllabus for human rights (pdf document):

<http://www.hrea.org/erc/Library/pre-service/syllabus-iboo2.pdf>

See more generally UNICEF's new 'Voices of Youth' resource:

<http://www.unicef.org/voy/>

## 4. Further course materials, links and research resources

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What follows are references to major rights treaties, the best internet resources for human rights, major international organisations in the rights arena (web links), commonwealth countries' case law links (by country, selective), links to national human rights commissions of Commonwealth countries, and a general texts bibliography on human rights as a whole.

### MAJOR UN & COMMONWEALTH INSTRUMENTS ON HUMAN RIGHTS

Basic documentation supporting the curriculum would include the major UN-sponsored human rights instruments (the Universal Declaration, the Convention on Civil and Political Rights, the Convention on Social, Economic and Cultural Rights, as well as the more specialised treaties such as the Conventions on the Elimination of all Forms of Racial Discrimination and Discrimination Against Women, the Torture Convention and the Convention on the Rights of the Child) and the various Commonwealth declarations and Programmes of Action (such as the Singapore Declaration, and others referred to in the section on the Commonwealth and human rights above).

Rather than setting these out here, the Office of the UN High Commissioner for Human Rights maintains a comprehensive database of human rights instruments:

<http://www.unhchr.ch/html/intlinst.htm> and <http://www.ohchr.org/english/law/>

See also University of Minnesota Library <http://www1.umn.edu/humanrts/>

Another excellent one-stop site is the Dag Hammarskjold Library (UN)

<http://www.un.org/Depts/dhl/resguide/spechr.htm>

### SUGGESTED WEB RESEARCH RESOURCES ON HUMAN RIGHTS

Perhaps the most used and cited human rights database / library is that produced by the University of Minnesota, USA. Also useful and very clear is that produced by INTERRIGHTS, which also has extensive Commonwealth case law coverage and domestic constitutions of the world.

<http://www1.umn.edu/humanrts/>

<http://www.interights.org/links/>

We would highly recommend the following two hugely detailed subject links pages: the Human Rights Research and Education Centre, the University of Ottawa, Canada, and the Resources page of Human Rights Education Associates (HREA) (sponsored by a national government – The Netherlands – and the Open Society Institute):

[http://www.cdp-hrc.uottawa.ca/links/sitesint\\_e.html](http://www.cdp-hrc.uottawa.ca/links/sitesint_e.html) and

<http://www.cdp-hrc.uottawa.ca/library/index.html>

<http://www.hrea.org/>

The Commonwealth Legal Education Association website ([www.cleaonline.org](http://www.cleaonline.org)) also has links to a wide range of human rights materials.

Among the very best human rights research resources is that produced in 2002 by the University of Hong Kong's Centre for Comparative and Public Law. It contains very extensive links, edited by the producers to explain which links are most useful for particular purposes. It groups resources (in separate MS Word documents with internet links) under 'General International Law as a Source of Human Rights Law' (the UN Charter, etc); International Human Rights sources; and Regional sources of Human Rights law; it is user-friendly and highly recommended:

[http://www.hku.hk/ccpl/research\\_resources/humanrightsguide/index.html](http://www.hku.hk/ccpl/research_resources/humanrightsguide/index.html)

The United Nations Human Rights Education resource includes ('Materials') a Directory of world human rights organisations, and links to other human rights resources:

<http://www.unhchr.ch/hredu.nsf/>

See also:

<http://www.huridocs.org/> (the Human Rights Documentation Centre)

<http://sim.law.uu.nl/SIM/Dochome.nsf?Open> (the SIM Netherlands Institute of Human Rights Documentation Centre)

<http://www.humanrights.britishcouncil.org> (British Council Human Rights Network)

<http://www.accesstolaw.com/> (an award-winning site, see under 'Legal Subject Areas' then 'Human Rights')

<http://www.humanrights.columbia.edu/> (the Human Rights Project at Columbia University)

<http://www.rightsinternational.org/links.html> (the links page of Rights International, Inc)

<http://www.hrlawgroup.org> (International Human Rights Law Group)

<http://www.nchre.org/resources/documents.html> (National Centre for Human Rights Education) Instruments and Documents.

<http://www.ugc.ac.in/policy/human.html> (the Indian UGC review of human rights curricula general bibliography [pdf file, no web links])

<http://www.chr.up.ac.za/> (The University of Pretoria's Centre for Human Rights)

<http://www.humanrightstools.org/> (a comprehensive human rights site)

### **MAJOR INTERNATIONAL ORGANISATIONS RELATED TO HUMAN RIGHTS ISSUES**

The Commonwealth: <http://www.thecommonwealth.org>

The United Nations <http://www.un.org>

United Nations High Commission for Human Rights <http://www.unhchr.ch>

International Committee of the Red Cross <http://www.icrc.org> and International Labour Organisation <http://www.ilo.org>

The two leading independent human rights investigation, monitoring and advocacy groups are Human Rights Watch <http://www.hrw.org> and Amnesty International <http://www.amnesty.org>. Their websites are comprehensive, always current, and can provide a useful resource for students to track what they are learning through the issues of the day (at least as these NGOs see them).

For more country-specific information of the same kind as appears on these sites, the United States Department of State produces very thorough and current Country Reports on Human Rights Practices, although it should be noted that these reports reflect the views of a particular national government rather than independent observers:

[http://www.state.gov/www/global/human\\_rights/1998\\_hrp\\_report](http://www.state.gov/www/global/human_rights/1998_hrp_report)

The following link represents a web library on institutions and mechanisms for monitoring human rights violations (regional, national)

[http://www.cdp-hrc.uottawa.ca/links/hrvint\\_e.html](http://www.cdp-hrc.uottawa.ca/links/hrvint_e.html)

## **COMMONWEALTH COUNTRIES: SELECTED WEB SITES (CASE LAW)**

### ***All Countries***

A highly recommended and searchable website for Commonwealth countries is Interights.

[www.interights.org](http://www.interights.org)

A primary resource for case law (and legislation) will be the World Legal Information Institute (Worldlii).

[www.worldlii.org](http://www.worldlii.org)

This website groups together case law links of several commonwealth countries:

<http://www.accesstolaw.com/>.

A good starting point is the country-by-country case law and legislation resource on [www.findlaw.com](http://www.findlaw.com) (which may require subscription for some services). Many of the country sites below, such as the Australian Austlii site, contain links to 'World Law' sections where many countries' case law can be accessed.

(Note: for legislation, the Institute of Advanced Legal Studies has a project to catalogue the Commonwealth Law Library: a unique collection of Commonwealth legislation amassed by the Foreign and Commonwealth Office. The on-line catalogue is now available at

<http://library.sas.ac.uk>)

### ***Australia***

LawNet (<http://www.lawnet.com.au>) provides access to Australian High Court and Federal Court cases and various Australian, New Zealand and international directories.

It also provides access to AustLII (<http://www.austlii.edu.au>) which publishes Australian legislation and case law free of charge and SCALE [<http://www.scaleplus.law.gov.au>] which publishes legislation.

### ***Canada***

A good starting point for law reports and law reports and statutes is Jurist Canada at [<http://jurist.law.utoronto.ca>].

Canadian Supreme Court judgments since 1989 can be found at [<http://www.droit.umontreal.ca/doc/csc-scc/en>]

### **Caribbean Commonwealth Countries**

See the various country-specific resources grouped conveniently here:

<http://www.accesstolaw.com/>

### **India**

Two comprehensive sites for Indian courts' case law are <http://www.indlaw.com/> (especially the Supreme Court decisions at <http://www.scjudgments.com/> or <http://www.supremecourtonline.com/> [searchable]) and

<http://www.globallawreview.com/online.html>

### **Malaysia**

See the useful case law site of <http://www.ipsofactoj.com/> dedicated to Malaysian and Singaporean case law.

### **New Zealand**

Court of Appeal judgments since 1995 are available at

<http://brookers.co.nz/legal/judgments/default.htm>

Waikato University has an index of court decisions and law reports at

<http://www2.waikato.ac.nz/lawlib/decisions/menu.html>

### **Pacific Commonwealth countries**

This is an excellent case law source maintained by the University of the South Pacific:

<http://www.pacii.org/>

### **Singapore**

See the useful case law site of <http://www.ipsofactoj.com/> dedicated to Malaysian and Singaporean case law.

### **South Africa**

The Wits Constitutional Repository Web site at the University of Witswatersrand places South African Constitutional Court decisions on-line: <http://www.law.wits.ac.za>

**United Kingdom**

The Stationary Office web site provides the texts of recent statutes

<http://www.hmsso.gov.uk/acts>

Decisions of the House of Lords since 14 November 1996 are available on

<http://www.parliament.the-stationary-office.co.uk>

**Zambia**

The Zambia Legal Information Institute (ZamLII) [<http://www.zamnet.zm>] was established by the Law School of the University of Zambia in 1996. Its aim is to improve access to judgments, statutes and other legal materials of the Republic of Zambia both within Zambia and elsewhere and to connect lawyers, judges, academics, students and others within Zambia with the growing collection of legal information available via the Internet. ZamLII provides on-line research of Zambian and foreign legal information and general information about Zambia. The collection of legal information includes the Constitution of Zambia, rules and selected decisions of the courts, selected Acts, legal commentary, a legal directory and information about the University of Zambia School of Law e-mail [[zamlii@zamnet.zm](mailto:zamlii@zamnet.zm)].

**National Human Rights Commissions in Commonwealth countries:**

The Commonwealth National Human Rights Commissions project (information on which is hosted by the British Council Human Rights Network site) aims to develop an effective network and support system for National Human Rights Commissions across the Commonwealth, in order to increase and improve the impact of their work. The 'links' section links to many national commissions in Commonwealth countries, the UN database on National Institutions for the Promotion and Protection of Human Rights, in accordance with the Paris Principles (1991) (see also <http://www.nhri.net/>), and various regional institutions.

See also

Richard Bourne '[A Strengthened Human Rights Mechanism for the Commonwealth](#)' (CPSU, 2003)(free to download at <http://www.cpsu.org.uk/>)

The Commonwealth National Human Rights Commissions Project contains a wide array of documentation relating particularly to developing and strengthening the work of these commissions: [www.britishcouncil.org/governance/jusrig/CHRC.htm](http://www.britishcouncil.org/governance/jusrig/CHRC.htm)

*Here now are links to national commissions in Commonwealth countries, where these have websites:*

1. AUSTRALIA <http://www.hreoc.gov.au>
2. BERMUDA No website at present
3. CAMEROON No website at present
4. CANADA <http://www.chrc-ccdp.ca>
5. FIJI ISLANDS <http://www.humanrights.org.fj>

6. GHANA <http://www.chrajghana.org>
7. INDIA <http://www.nhrc.nic.in>
8. KENYA <http://www.khrc.or.ke/>
9. MALAWI <http://www.malawihumanrightscommission.org>
10. MALAYSIA <http://www.suhakam.org.my>
11. MALDIVES Website under construction
12. MAURITIUS <http://nhrc.gov.mu/english/index.htm>
13. NEW ZEALAND <http://www.hrc.co.nz>
14. NIGERIA <http://www.nigeriarights.org>
15. NORTHERN IRELAND <http://www.nihrc.org>
16. SOUTH AFRICA <http://www.sahrc.org.za>
17. SRI LANKA <http://www.hrc-srilanka.org>
18. TANZANIA No Website at present
19. UGANDA <http://www.uhrc.org>
20. ZAMBIA No website at present

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