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Background to the Human Rights Regime

State responsibility

The notion that states are responsible for how they treat individuals within their territory – both citizens and aliens. It results from the general legal personality of every State under international law, and from the fact that States are the principal bearers of international obligations.

A person/alien is subject to the territorial legislation of the State they are in, just as a national of that State is. The home state of that alien may intervene if there is a violation of International Law.

Chattin case

Decided under the 1923 General Claims Convention – special arbitration

Facts:

- Chattin was a US citizen who was working on a railroad in Mexico from 1908 to 1910. He was arrested for embezzlement of fares
- Convicted and sent to prison for 2 years
- Escaped and fled to the US
- The US asserted that Chattin was mistreated and claimed \$50k in compensation
- Chattin complained he was not given his right to a fair trial as the hearing on lasted 5 minutes, no examination of witnesses, no oral examination in chief. Essentially, Chattin was not able to present a proper defence
- There were 3 members of the claims commission: 1 US, 1 Mexico and 1 independent

Vollenhoven said there were 3 main complaints:

- Chattin was not informed of charges
- Witnesses not sworn in
- "Trial" only lasted 5 minutes

Neilsen: concurring

- Criticised the nature of the proceeding whereby the Judge who investigates is different to that which conducts the trial

MacGregor: dissenting

- Said the claim that the trial was insufficient was an 'erroneous criticism,' due to the differences between the two countries' procedures. Having Anglo-Saxon procedure in mind will create criticism for the inherently different system of Mexico

At this time, there were no worldwide standards of how people ought to be treated. This now exists in [Article 14 of the ICPPR](#)

- This case established that states do have a responsibility for how they treat citizens and aliens, and that these standards should be universal

Freedom of Expression

Jersild v Denmark ECtHR 1994 - hate speech and freedom of the press

Case Summary and Outcome

The European Court of Human Rights (ECtHR) determined that the conviction of a Danish journalist for aiding and abetting a xenophobic group violated the freedom of expression. Jens Olaf Jersild broadcast over radio and interview with members of the Greenjackets, a radical xenophobic group, in which the interviewees made derogatory statements about racial minorities and immigrants; a Danish court fined Jersild, as well as the head of Danmark Radio's news section Lasse Jensen, for publishing racist statements. The ECtHR ruled that this violated the freedom of expression because the manner in which the statements were presented by the applicant (Jersild) was "sufficient to outweigh the effect, if any, on the reputation of others" and that there was insufficient evidence to show that the restriction was "necessary in a democratic society."

Facts

In May 1985, the Sunday News Magazine ran a story about the growth of a xenophobic and racist group, the Greenjackets, whose members resided in a Copenhagen public housing community. Two months later, the same outlet aired an interview with three members of the Greenjackets, conducted by Danish journalist Jens Olaf Jersild. The five-hour interview was shortened to a few minutes, throughout which the three young group members made derogatory statements about racial minorities and immigrants in Denmark and throughout the world.

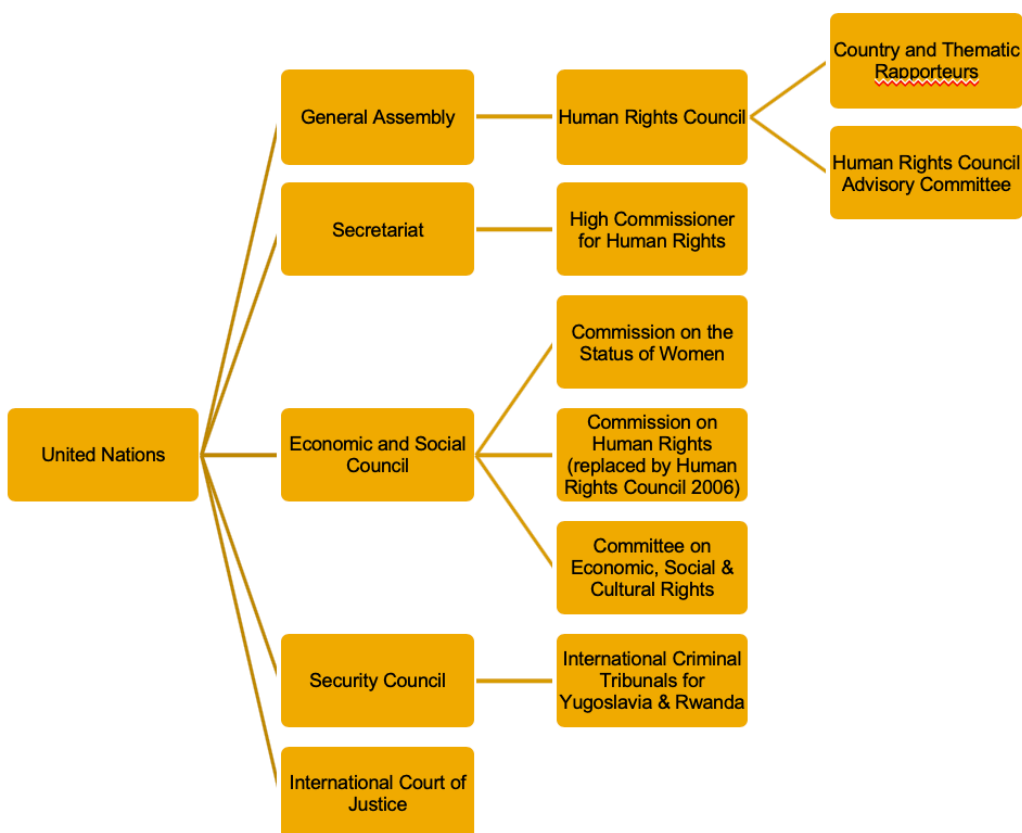
Despite no complaints having been made to the Radio Council or to Danmarks Radio, the Bishop of Ålborg lodged a complaint with the Minister of Justice, who pursued charges against the three young men under [Article 266](#) of the Danish Penal Code. Additionally, charges under [Article 266\(b\)](#) were brought against Jersild, who facilitated the interview and produced the show, and against Lasse Jensen, the head of Danmarks Radio's news section. [Article 266\(b\)](#) states "[a]ny person who, publicly or with the intention of disseminating it to a wide circle ('videre kreds') of people, makes a statement, or other communication, threatening, insulting or degrading a group of persons on account of their race, colour, national or ethnic origin or belief shall be liable to a fine or to simple detention or to imprisonment for a term not exceeding two years."

A Danish lower court determined that Jersild and Jensen were guilty under [Article 266\(b\)](#). Accordingly, Jersild and Jensen were fined 1,000 and 2,000 Danish kroner, respectively, or, alternatively, five days imprisonment. The court asserted that Jersild and Jensen were aware of the racist attitudes of the Greenjackets and had incited the group members to air their views throughout the paid interview, during which the interviewees offered the Greenjackets beer. In addition, the court noted that Jersild and Jensen had edited the interview purposefully and intentionally included a series of offensive statements that the producers then disseminated without any inclusion of alternative views throughout the program. Subsequent domestic appeals to this ruling were dismissed.

International and regional human rights systems

The United Nations is composed of 5 principle organs

- There is no mention of human rights in the principle organs, and the original purpose of the UN was to balance the great powers for the purpose of international security
- Bill of Rights within the Charter proposal was rejected
 - o Instead, a commission of human right was established to draft the bill of rights – Eleanor Roosevelt led this campaign
 - o USSR abstained from the vote as it believed the bill of rights was a western creation



International Criminal Tribunals and Courts

There is a parallel development of international criminal responsibility through International Criminal Courts

- Nuremberg and Tokyo trials – individuals could be responsible for breaches of international criminal law
- Specialist ad hoc tribunals set up by the Security Council
- International Criminal Court set up in 2002

Human Rights Law beyond Treaties

What does it mean for human rights to be recognised outside of treaties?

- International protection and promotion of human rights is largely governed by the Bill of Rights and then specialised treaties, but you can look outside treaties

Sources of Public International Law

Treaties

- International conventions, whether general or particular, establishing rules expressly recognised by the contesting states

Customary International law

- International custom, as evidence of a general practice accepted as law
- State practice element
 - o Customary rule must be in accordance with a constant and uniform usage practised by the States in question (*Asylum case ICJ*)
- Opinio Juris element
 - o “Either the states taking such action or other states in a position to react to it, must have behaved so that their conduct is ‘evidence of a **belief that this practice is rendered obligatory by the existence of a rule of law** requiring it’” (*Nicaragua case ICJ*)

General principles

- The general principles of law recognised by civilized nations

Judicial decisions and legal scholarship

- Judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law

Decisions of international organisations

- E.g. Security Council resolutions

Human rights outside treaty law

Human rights as part of CIL

- Universal Declaration of Human Rights is a declaration (and not originally intended to be legally binding) however has been crystallised as customary international law
- Problem of narrow approach to state practice
- States are often reluctant to condemn other States for their HR violations for fear of being targeted themselves

Human rights as general principles of law

- Less significant than treaty or CIL, but there are some principles that are common, almost universally, to nation States around the world e.g. the right to fair trial, prohibition on discrimination

Human rights treaties and derogation

Theories and approaches to implementation

There is a duty to implement rights

- It has been well recognised by the human rights treaty bodies e.g. the HRC that there is a covenant requirement for states to give effect to the rights within it, so that they are legally binding and not mere ideals
 - o Legally binding international human rights standards should operate directly and immediately within the domestic system of every state
 - o As soon as a state ratifies a treaty, the treaty should apply for the benefit of individuals within the State
 - o This is reinforced by the rule regarding the admissibility criteria for individual applications requiring domestic avenues to be exhausted
 - o This puts the primary responsibility on states themselves to provide remedies for individuals whose rights have been violated
 - o The covenants don't specify how states are to implement the requirements, and how, but it must be done in accordance with the obligation to give effect to the implemented rights
- Each state has its own approach to whether and to what extent and how it implements international law
- There are two *theories* of implementation: monism and dualism

Monism

- Suggests that the national and international legal systems are part of the one whole, and so all people are regulated by both domestic and international law
- The national legal system determines both how and to what extent international law will be admitted or recognised as binding domestic law
- Civil law systems often adopt this approach
 - o E.g. the Dutch Constitution says that international law is binding domestically from moment of publication and it takes precedence over domestic law if there is a conflict
- Civil law systems tend to allow international law and treaties to be directly incorporated into domestic law and therefore provide rights for individuals within those states to challenge state law in the court
 - o Often self-executing

Dualism

- Considers international and national systems as distinct
- Subjects of international law are states, not individuals, as they create international law
- For international law to be a part of national law, it must be incorporated through legislation or case law
- Common law countries often adopt this approach
 - o Generally, treaties are not legally binding domestically without an act from parliament to transfer them into law

Respecting human rights: avoiding interference

Restrictions to human rights

While there are a few absolute rights, most rights come with restrictions or limitations:

- Explicit restrictions or limitations in the wording of the article – e.g. freedom of thought, conscience and religion in [Article 18 ICCPR / Article 9 ECHR](#)
- Restriction or limitation read into the wording by the relevant interpretive body – e.g. [Human Rights Committee's General Comment No. 27](#)

Three main conditions in human rights that are limited:

- Legality
- Legitimacy
- Proportionality

Legality

Siracusa principles prescribes four elements:

- The limitation must be provided by national law of general application which is consistent with the Covenant and in force at the time the limitation is applied
 - o Looks at whether or not the limitation is contained in a national law of general application, thus exclude a law that is specific to one group or person which is discriminatory
- Laws must not be arbitrary or unreasonable.
- Legal rules must be clear and accessible to everyone.
- There should be adequate safeguards and effective remedies against illegal or abusive imposition or application of limitations.

Pinkney v. Canada (HRC 1981)

- Deals with Article 17 – right to privacy. Prisoner claimed his right was subject to unlawful interference as his mail was often censored. The law was too general to provide safeguards against arbitrary application because the regulation gave the warden the power to censor letters on his subjective opinion on the length or content
- Gave too much discretion to be legitimate

Rotaru v. Romania (ECtHR 2000)

- Legislative decree in Romania providing for the intelligence service to store information against persons where it effects national security. Applicant claimed that holding his information which could be used against him breached his right to privacy
- The quality of the law requires it to be compatible with the rule of law
- There were no effective limitations on the exercise of the power
- The law empowered the authorities to interfere, without the grounds for interference having been defined

Protecting Human Rights: regulating private actors

Conduct of non-state actors

Attribution to the State of acts by private entities

International Law Commission, Articles on Responsibility of States for Internationally Wrongful Acts 2001

- Statements of law indicating the circumstances in which the acts of private entities will be attributed to the state
- **Article 4** – State's own organs
- **Article 5** – private entities exercising government authority
- **Article 8** – conduct not authorised by state, but direct by the state
- **Article 11** – state adopted the private actor's conduct of its own

Case of Military and Paramilitary Activities in and Against Nicaragua (ICJ 1986)

- Civil conflict in Nicaragua in the 70s and 80s with conflict between government and political groups/rebels
 - o Rebel group/contra force had support of the US
- N bought claim against US for violations by operating a para-military group (the contras)
 - o US rejected the jurisdiction
 - o ICJ had to consider whether the US was responsible for the rebel actors
- US had equipped, trained and financial supported the contras
 - o To what extent, then, were their acts attributed to the US
- It could not be said that you could equate the contras as an organ of the US government
 - o Cannot demonstrate the total dependence on the US as required for them to be considered organs
 - o Partial reliance may be found due to US' role of electing leaders, training etc.
- The Court said that for the US to be legally responsible, it would have to be proved that the state had effective control of the operations in the course of which the violations were committed
 - o Not enough evidence of effective control

Tadic Case ICTY

- Tribunal relaxed the requirements as they spoke of overall control over the group, not only be equipping and financing the group but by coordinating their activity
- Only then can they be held responsible for the conduct of the group
- Called for a more broad interpretation to make it easier to attribute acts to the state

Genocide Convention Case (ICJ 2007)

- ICJ decided to issue a much clearer statement of legal principle. Talk about the main 2 situations of attribution where a non-state actors is under the complete dependence of the state, or they are acting on the instructions of the state
- Concerned whether Serbia was responsible for the Bosnian Serbs

Economic and social rights: progressive realisation and justiciability

Before having civil and political rights, economic and social rights must first be established

The obligation of implementation: progressive realisation

Comparing [Article 2\(1\) ICESCR](#) with [Article 2 of the ICCPR](#):

ICESCR Article 2(1):

- Each state undertakes to take steps – not ‘the necessary steps’
- The steps taken need only to be the extent of the maximum of the state’s available resources
- To use all appropriate means – not restricted to legislative measures, though not as demanding as ‘necessary’, giving some scope for adopting various approaches
- With a view to achieving progressively the full realisation of the rights – immediate realisation is not required or envisaged

Economic and social rights are more likely to rely on legislation, policy, government implementations than civil and political rights

Committee’s interpretation of covenant obligations

‘Maximum available resources’

- No proper definition of this standard as it is so broad and would differ with each country
- Economist measure it with the GDP compared to government expenditure
- Important to go beyond the purely economic measures
 - o Should also take into account what affects a State’s resources e.g. foreign aid, development assistance, deficits, currency valuation

Minimum core obligations

Minimum core obligations

- **General Comment No 3, paragraph 10**
 - o Using the maximum of a state’s available resources also entails making the best use of them
 - o A state must make choices about their resources, and these choices make a difference as to a person’s rights and how they’re provided for
 - E.g. regressive tax regimes arguably generate inequitable outcomes, and this inequity mitigates the fact that the state appears to have used its available resources
- **General Comment 14** - the minimum core obligation under the right to health includes an obligation:
 - o To ensure the right of access to health facilities, goods and services on a non-discriminatory basis, especially for vulnerable or marginalized groups;

Prohibition of discrimination

Scope of discriminative provisions

ICCPR has three provisions on discrimination:

- **Article 2(1)** provides that the **state** party **undertakes to respect** and ensure the **rights** recognised in the Covenant without distinction of any kind.
 - o Rights that are not in the Covenant are not covered, e.g. employment
- **Article 3** specifically refers to the equal rights of **men and women** to the civil and political rights in the Covenant.
- **Article 26** says that all persons are equal before the law, and that the law shall prohibit any discrimination and guarantee protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status
 - o This article does not refer to the Covenant rights, it just refers to everyone being equal before the law
 - o It is a stand-alone discrimination provision which covers discrimination in any field, even if it is not covered by the ICCPR

ICESR Article 2(2) provides that States Parties undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, etc.

- Limited to the rights in the Covenant

ECHR Article 14 states that 'the enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.'

- Limited to the rights in the Convention

ECHR Protocol No. 12 Article 1 General prohibition of discrimination, which now extends the protection to all laws, not just the Convention rights.

- Provides a general prohibition on discrimination, even if not covered by the ECHR
- As a protocol, not all states are parties, so for many states only **Article 14** will apply

The range of States' obligations

ICCPR Article 26 contains four distinct obligations:

- Guarantee equality before the law
- Guarantee the equal protection of the law
 - o The difference between these first two provision is the factual circumstances in which they would arise
 - o Equality before the law refers to law enforcement authorities as arms of the executive e.g. police, or the judicial arm i.e. the Courts
 - It is the guarantee of equality when facing a legal authority
 - o Equal protection of the law looks at whether the law is discriminatory itself

Self-determination and minority rights

Legal sources

ICCPR and ICESCR Article 1

- Right to self-determination
 - o Signifies how important it was considered when the ICCPR was drafted
 - o Has a limitation
- Unlike most human rights that belong to individuals, this belongs only to peoples
 - o Makes justiciability harder

Declaration on Principles of International Law Concerning Friendly Relations GA Resolution 2625 (1970)

- Discusses self-determination
- In describing what is entailed by the right to self-determination, it says it should not be construed as authorising or encouraging any actions that would dismember or impair the territorial integrity or political unity of states conducting themselves in compliance with equal rights and self-determination of peoples
 - o Imposes a limit, as it shouldn't be used to impair compliance (circular logic)
- Post-colonial states that have afforded equal rights to all may mean that self-determination does not exist
 - o Difference between self-determination and territorial integrity

Human Rights Committee General Comments No 12 (1984)

- Focuses on economic aspect of the right
- In no way can a people be deprived of its own subsistence
- Entails that other states have an obligation to ensure and permit that all states subsist
- This right implicates corresponding duties on each state and the international community
- References positive action to refrain from interfering with internal affairs of the state
- To what extent does the right to self-determination allow a people to undermine an existing political system?

ICJ Advisory Opinion, Israeli Wall (2004)

- The wall, although temporary, it restricted Palestinian access resulting in a de facto annexation of land
- The court recognised the right to self-determination, and that the Palestinian people did hold this right, which is impeded by the construction of the wall
- Higgins J argued that self-determination is a must broader issue than just the building of the wall. It is Israel's unlawful occupation that impedes on this right

Requirements of Statehood

Article 1 of the Montevideo Convention on Rights and Duties of States 1933

- A permanent population