MLL302 HUMAN RIGHTS LAW EXAM NOTES

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TOPIC ONE: THE INTERNATIONAL BILL OF HUMAN RIGHTS

What are Human Rights

- Human rights are inherent, inalienable rights held by all individuals by virtue of being human.
- They are often grounded in values such as dignity, equality, fairness, and freedom.
- Human rights are universal: they apply equally to all people, without distinction.
- They are interrelated and interdependent: enjoyment of one often depends on others
- The modern human rights framework developed post-WWII, especially in response to the Holocaust
- There is no strangle, universally agreed definition, but they are widely recognised in international law and custom.

Common Terms

- **UN Charter:** Charter of the United Nations
- **UN GA:** United Nations General Assembly
- **UDHR:** Universal Declaration of Human Rights
- **ICCPR and CP rights:** International Covenant on Civil and Political Rights; civil and political rights
- **ICESCR and ESC rights**: International Covenant on Economic, Social and Cultural Rights; economic, social and cultural rights

Key Instruments – The International Bill of Human Rights

Three key instruments form the International Bill of Human Rights:

1: Universal Declaration of Human Rights (UDHR) 1948

- Adopted by **UN General Assembly Resolution 217 (III)**
- **Not legally binding,** but highly influential
- Sets out **universal human rights in plain language**
- Forms the moral and political foundation of human rights law
- Drafting led by key legal figures incl. **Eleanor Roosevelt, H.V. Evatt, Rene Cassin,** and **John Peters Humphrey**
- Based on Cassin's "temple" structure: dignity, liberty, equality, and brotherhood
- The UDHR is a new articulation of an ancient idea rooted in politics, philosophy, and religion, rather than a continuation of older rights traditions.
- A "pragmatic consensus" based on practical convergence of diverse views, rather than a shared philosophical justification.
- Today, supported by **all 193 UN member states**

2: International Covenant on Civil and Political Rights (ICCPR) 1966

- Binding treaty in force since **1976**
- Focus on **CP rights** (e.g., right to life, fair trial, free expression)
- **173 state parties** (incl. Australia, not China)
- Contains **First Optional Protocol** – allows for individual complaints (topic 6)

- Includes the right to self-determination (Article 1)

3: International Covenant on Economic, Social and Cultural Rights (ICESCR) 1966

- Also binding since **1976**
- Focus on **ESC rights** (e.g., right to education, health, work).
- **171 state parties** (incl. Australia, not USA).
- Framed using progressive language ("recognise the right to…") and lacks immediate enforceability
- No express remedy clause like ICCPR Art 2(3); instead, rights are to be "progressively realised" under Article 2

Legal Status and Significance

UDHR: Not a treaty → not legally binding.

- Often described as customary international law or soft law
- Its normative and symbolic importance is profound
- Scholarly opinion varies: some consider it moral, others see parts or all as customary international law, and some as "general principles of law" recognised under ICJ Statute
- Used as a yardstick by governments, UN mechanisms, and the Universal Periodic Review
- Servers as an **authoritative interpretation of the UN Charter** and has been increasingly invoked in international law and domestic practice.
- Adoption of the UDHR helped define the term "human rights", which was previously undefined in the UN Charter
- UDHR is most translated document in the world – over 577 languages/dialects
- Seen as a foundational aspirational document; made concrete through ICCPR and ICESCR

ICCPR and ICESCR: Treaties → legally binding on states that ratify.

- Created separately due to Cold War divisions between Western and socialist states
- Drafting delays reflected disagreements over whether ESC rights were justiciable or required state provision
- Today, both covenants are widely ratified and recognised as complementary, despite initial political divides.
- ICCPR uses rigid rights language ("every human being has…"), while ICESCR uses softer, obligation-based language ("state recognises…").

Vienna Declaration 1993: Rights are "**universal, indivisible, interdependent and interrelated".**

Key Concepts

Historical Development

- Human rights as a response to the **atrocities of WWII**
- **UN Charter 1945** laid groundwork:
    - Preamble and Articles 1, 55, 56 emphasise **human rights and dignity.**
    - Australia played a pivotal role in pushing for human rights to be embedded in the UN Charter (led by H.V. Evatt)
    - UN Charter was influenced by the Atlantic Charter and Dumbarton Oaks Proposals

    - The League of Nations and International Labour Organisation were precursors to international concern with rights
- UN Charter established human rights as a legitimate international concern, even in domestic matters.
- Post-war shift: **From state sovereignty → international accountability**
- **Nuremberg Trials (1945)** established individual criminal responsibility for crimes against humanity and shifted the balance between state sovereignty and international concern for human rights
- Contemporary human rights emerged primarily in aftermath of WWII; pre-war era focused on state sovereignty and internal affairs
- League of Nations treaties and ILO conventions marked early recognition of minority and labour rights.

Philosophical Foundations

- Natural law/natural rights
    - All humans are rational and capable of moral reasoning.
- Marxist/socialist ideas:
    - Emphasis on social justice and ESC rights
- No single philosophy underpins the UDHR – it was a **pragmatic consensus**
- UNESCO survey showed deep divisions between liberal, natural law, and socialist traditions
- Jacques Maritain argued for a "practical convergence" of differing philosophical positions without forcing ideological synthesis
- Humphrey and Cassin's drafting reflected this pragmatism—Cassin's dignitarian model offered moral grounding beyond law itself
- Philosophical diversity was not seen as a weakness; rather, the goal was practical agreement on the content of rights despite theoretical differences.
- The UDHR reflects both liberal (CP) and socialist (ESC) traditions; a new articulation of long-standing ideas
- Final consensus was based on shared outcomes (rights) rather than shared reasons (philosophy)

Western Political Influences

- **Liberal tradition:** emphasised individual freedoms and civil rights (influenced ICCPR)
- **Social democratic tradition:** emphasised social welfare and equality (influenced ICESCR)
- UDHR represents a synthesis of these tradition in a form acceptable across cultures
- Many newly decolonised states (through NAM) and socialist bloc states promoted ESC rights and influenced inclusion of self-determination and development.

Categories of Rights

- **Civil and Political Rights (CP):** negative rights; immediate obligations.
- **Economic, Social and Cultural Rights (ESC):** Positive rights; progressive realisation
- Ongoing tension and perceived hierarchy between the two
- **Formal Position in Law:** Rights are indivisible and must not be given effect to selectively.
- In practice, CP rights are often between protected domestically and internationally due to justiciability and lower cost of enforcement
- ESC rights have become more justifiable over time, especially through treaty body interpretations and regional instruments.
- CP rights after often enforced via courts; ESC rights increasingly recognised in domestic and regional systems but still face challenges of enforceability and resource allocation

Indivisibility and Interdependence

- **Claim:** Rights must be implemented together for full realisation.
- Example: without education (ESC), political participation is undermined.
- Reaffirmed in the **Vienna Declaration (1993)** and 2006 GA resolution establishing Human Rights Council
- UPR process now reviews compliance with both treaty and Charter obligations supporting indivisibility.
- Although formally equal, CP rights still received more consistent legal enforcement in practice, particularly at the domestic level.
- The full enjoyment of CP rights often depends on realisation of ESC rights, and vice versa (e.g., right to vote depends on education, protest depends on food/housing)
- No widely accepted definition of "indivisible and interdependent," but understood to mean rights cannot be ranked or exercised in isolation.

TOPIC TWO: CONCEPTS OF 'HUMAN RIGHTS' AND INTERNATIONAL LAW

Liberal, Natural and Socialist Traditions

Natural Law and Natural Rights

Natural law: law of "right reason" aligned with nature, eternal and universal (Cicero)

- Emerged from Greco-Roman philosophy (Plato, Aristotle), developed by Cicero, Aquinas and the Stoics
- Christian theology preserved natural law via Augustine and Aquinas, emphasising its divine origin.
- Natural law is foundational to the concept of universality, even though historical applications were exclusive and patriarchal.
- Natural law proposes a universal moral order, but remains contested due to cultural and philosophical disagreements on its content.

Shift from natural law to natural rights occurred in the 17th century with Grotius, Hobbes, and Locke.

Natural rights: derived from natural law, rotted in Enlightenment philosophy (e.g., Grotius, Hobbes, Locke).

- Emphasised individual liberty and civil/political participation
- Key themes: freedom from arbitrary interference, freedom of expression, movement, religion, and participation in government
- Political expression revolutions: England (1688), US (1776), France (1791)
- Natural rights assumed a shared view of human essence, particularly rationality – but this excluded women, slaves, and Indigenous people

Criticism of Natural Rights

- **Criticised for lack of universality:** historically applied only to 'rational' beings (e.g., excluding women, slaves)
- **Utilitarianism (Bentham, Mill):** Argued for outcome-based laws: "greatest happiness of the greatest number"
- **Positivist view:** only state-enacted laws count: moral assertions like natural rights lack legal authority.
- **Critiques from feminism and Marxism:** natural rights ignored socio-economic structures of oppression
- Bentham famously called natural rights "nonsense upon stilts."
- Cultural relativists argue natural rights reflect Western philosophical traditions, not universal consensus

Legacy of the UDHR

Natural rights influenced the UDHR but were not adopted wholesale.

Differences:

- **UDHR rights are specific**, not vague
- **Universal**, not selective
- **Derived from human dignity**, not human reason
- UDHR rights extends to all, abolishing exclusions inherent in natural rights frameworks.
- Despite its philosophical ambiguity, consensus on rights in the UDHR emerged as a "practical convergence"

Common Law Rights vs Human Rights

Common law rights:

- Derived from English tradition (e.g. Magna Carta, Bill of Rights 1688)
- Residual, unwritten, and limited in scope
- Do not guarantee protection; subject to repeal
- Recognise fewer rights than modern human rights
- Courts are cautious to develop common law rights; they are vulnerable to statutory abrogation

Human rights:

- Codified, enforceable (internationally)
- Based on dignity and universality
- Expectations of state implementation and accountability at the national level
- Human rights are broader, codified and more comprehensive than common law rights.
- Human rights systems provided structured mechanisms for enforcement and monitoring

Socialist Traditions and Social Rights

Rooted in Marxist critique of capitalism

Emphasis on:

- Communal life
- Material needs (education, health, housing, work)

Influenced:

- Russian Revolution (1917)
- ICESCR
- Western socialism (e.g. Australia's support at the UN Charter negotiations)
- ILO and Article 22 UDHR (right to social security)
- Reflected in Roosevelt's Four Freedoms, notably 'freedom from want'

Modern Human Rights: Dignity and Universality

Human Dignity

Central theme of the UDHR (Preamble, Art 1, 22, 23)

Recognised across political and philosophical traditions to gain consensus in 1948

No agreed definition: various interpretations include:

- Christian theological (imago dei)
- Aristocratic/social status
- Kantian moral autonomy (most aligned with UDHR)

Kant: Dignity arises from humans' capacity for rational, moral reasoning → not to be used as means but as ends.

Habermas: Dignity connects morality and law; violations (e.g. discrimination, torture) explain our understanding of dignity.

Critiques:

- Vagueness, excessive individualism, culturally contingent meanings
- Still, it functions as a rhetorical and normative anchor for international law
- Some view dignity as a shared terminology masking deep philosophical differences
- Utilitarian approaches (e.g., Bentham, Sen) link dignity to human florushing rather than inherent worth

Universality

Claim: Human rights apply to all people by virtue of being human

Contrasts with classical international law (focused on states, not individuals)

- Challenge: Not self-evident without theoretical backing
- Historically, natural rights weren't universal (excluded women, slaves)
- UDHR marks a radical departure: rights belong to all people equally

Critiques: Cultural Relativism

- **Main contemporary critique of universality**
- **Western origins of UDHR** → not reflective of all cultures
- Asian values, African communitarian traditions, postcolonial perspectives challenge application
- American Anthropological Association (1947) raised early concerns

Reconciling Universality and Cultural Relativism

- Acknowledge "relative universalities"
- Margin of appreciation: allows contextual differences in rights implementation
- UDHR drafters were culturally diverse
- High levels of state acceptance of human rights instruments

International Law and Human Rights

Nature of International Law

Branch of public international law; horizontal legal system

Based on:

- State sovereignty (Article 2 UN Charter)
- Voluntarism (states only bound by consent)

Contrasts with vertical municipal law (binding laws enforced top-down)

International law ensures predictability, order in trade, aviation, maritime law.

Sources of International Law (ICJ Statute, Art 38(1))

a. International conventions (treaties)
b. Customary international law

c. General principles recognised by civilised nations
d. Judicial decisions and academic writings (subsidiary sources)

Most relevant to human rights: a. and b.

- Human rights law reliefs heavily on treaties and customs

International Conventions (Treaties)

- Defined by **Vienna Convention on the Law of Treaties**
- Human rights treaties = **multilateral treaties** (e.g., ICCPR, ICESCR)
- States become parties by:
    - **Signature** (non-binding intent)
    - **Ratification / accession** (binding)
    - **Acceptance / succession**
- **Reservations:** legally binding exclusions, subject to object and purpose test
- **Declarations:** interpretative only, no legal effect
- **Derogations:** permitted only during public emergencies
- **Denunciation:** withdrawal allowed if treaty permits (not allowed under ICCPR)
- Optional Protocols extend existing treaties
- **Ratification** gives treaties legal force; signature alone lack enforceability.
- **Accession** refers to joining a treaty after it has entered into force
- **Succession** applies where a new state agrees to be bound by treaties ratified by a predecessor state.
    - **Example:** China signed the ICCPR in 1998 but never ratified it – signalling intent without legal obligation
    - Australia ratified the ICCPR in 1980, with reservations (e.g., Article 10 – segregation of detainees)

General Comment No 24: restricts reservations that conflict with human rights purpose (e.g. right to torture is non-derogable)

Customary International Law

- Formed by:
    - General state practice
    - Opinio juris: belief that practice is legally required
- Binding even without treaty ratification (e.g. prohibition on torture)
- States can avoid customary norms if they are persistent objectors

UN Declarations and Resolutions

- Not legally binding but can indicate opinio juris
- UDHR: originally aspirational, now seen as part of customary international law
- Universal Periodic Review treats UDHR as binding
- Declarations often form precursors to binding treaties

Enforcement of International Human Rights Law

No central enforcement mechanism

Mechanisms include:

- Diplomatic pressure

- Monitoring bodies (e.g. UN treaty bodies)
- Individual complaints
- International opinion
- In rare cases: sanctions, criminal prosecution, or use of force

Challenges:

- Lack of coercion
- Dependence on state cooperation

Interaction Between International and Municipal Law

Monist systems

- Treat international and domestic law as integrated
- International law has direct effect

Example: Netherlands (monist system) – self-executing treaties have direct domestic application upon ratification.

Dualist systems (e.g., Australia)

- Treat as separate legal systems
- Treaties must be incorporated by legislation to be enforceable domestically
- International breach ≠ automatic domestic breach
- International human rights law assumes implementation at national level
- States must modify law/practice/funding to fulfil obligations
- Effective national remedies and justiciability required
- Human Rights Acts or Charters in some countries bridge this gap domestically

General Comment No 9 (ICESCR):

- States must use all appropriate means to give effect to rights
- Judicial remedies, legal standing, and incorporation into domestic law are key