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The Making of Bills of Rights: Relevant International Human Rights Law Obligations

An Analysis of the United Kingdom's Obligations

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FACULTY OF LAW

Bonavero Institute of Human Rights

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EXECUTIVE SUMMARY

Significant reform of human rights law is underway across the UK. In Westminster, the Secretary of State for Justice has indicated that he proposes persisting with the British 'Bill of Rights' Bill which will repeal the Human Rights Act, 1998. The Bill was initially introduced in June 2022 when Boris Johnson was Prime Minister. Amongst other things, the Bill proposes a set of restrictive tests judges must apply in determining the application of the rights in the European Convention on Human Rights. In contrast, the Scottish Government has announced that it is seeking to deepen human rights protections in Scotland and proposes to introduce a Human Rights Bill to incorporate into Scots law four leading international human rights treaties that have not yet been domesticated into UK law. The Welsh Government has also announced it intends to introduce a Welsh Human Rights Bill. As with the Scottish Bill, the Welsh Bill will also seek to give effect to human rights contained in international human rights law not currently given statutory recognition in UK law. In Northern Ireland, the Good Friday Agreement/Belfast Agreement contemplated the enactment of a bill of rights for Northern Ireland but this has never happened. In February 2022, an ad hoc committee of the Northern Ireland Assembly reported that there was agreement that a bill of rights for Northern Ireland should be enacted by the Westminster parliament, although the Democratic Unionist Party has since expressed its disagreement with the report.

Just as the proposed Westminster human rights reforms differ in their substance from the reforms proposed by the Scottish and Welsh governments, the processes by which the reforms are being introduced also differ. The reform proposals in Wales and Scotland follow extensive public consultations, the Westminster to repeal the Human Rights Act and replace it with a bill of rights has not been the subject of consultation. Indeed, the recent Independent Review of the Human Rights Act, which reported in December 2021, was premised on the basis that government did not propose to repeal the Human Rights Act.

This report explores international human rights standards, particularly those arising from the UN Covenant on Civil and Political Rights and the UN Covenant on Economic, Social and Cultural Rights. The UK has ratified both these covenants, as have more than 160 other countries across the world.

The report examines five international human rights law obligations that are relevant both to making and amending domestic bills of rights. The first is the obligation to respect, protect and fulfil human rights. Effective implementation of this obligation requires States constantly to evaluate national laws and practices for conformity with international human rights law.

Secondly, states are under an obligation to provide an effective framework of remedies. In this regard bills of rights may create specific remedies for alleged violations of human rights. Thirdly, states bear an obligation to monitor and report on the protection of human rights in their jurisdiction. To this end, the treaties require periodic monitoring by States Parties. The report highlights steps states can take to improve their national monitoring system, including enhancing the role of Parliament.

Fourthly, states are under an obligation to ensure public participation in legislative processes. In comparison to the other obligations considered, which are concerned with the substance of a bill of rights, this obligation is more explicitly procedural. It requires the process of drafting or amending domestic bills of rights to afford members of the public an opportunity to contribute to the process. Several steps can be taken to ensure effective participation including, providing civic education on human rights, public consultation processes, and employing methods such as citizens' assemblies to assist in either the drafting of the bill or the options of reform. Finally, states must not regress in their human rights protection. States bear an obligation to show that any changes to the system of human rights protection do not weaken the current levels of protection.

These five sets of obligations, this report argues, should guide policy makers across the UK when drafting or amending domestic bills of rights. If these principles guide the processes of domestic reform currently under way, it is likely that the reforms will contribute to the promotion, protection and fulfilment of human rights in the UK.

INTRODUCTION

This report is the result of collaboration between three research institutions working on human rights issues in the United Kingdom ('UK'): the Bonavero Institute for Human Rights, the Bingham Centre for the Rule of Law, and the Centre for the Study of Human Rights Law, University of Strathclyde. The institutions have been assisted by the advice of an expert advisory committee.

The aim of this report is to draw together five well known international human rights law obligations that are relevant to the domestic protection of human rights and should be considered when enacting or reforming domestic bills of rights. The report is not comprehensive in its coverage of international human rights law. Rather, it seeks to explain five of the most relevant obligations derived from settled understandings the International Covenant on Civil and Political Rights ('ICCPR') and the International Covenant on Economic, Social and Cultural Rights ('ICESCR').[1] These principles are:

- The obligation to respect, protect and fulfil human rights;
- The obligation to provide an effective framework of remedies;
- The obligation to monitor and report on human rights;
- The obligation to ensure public participation in shaping bills of rights; and
- The obligation of non-regression in rights protection.

The collaborating institutions believe a succinct summary of relevant obligations of international human rights law will be valuable for parliamentarians, policymakers and civil servants in the UK for two broad reasons.

Firstly, in the past five years, the Westminster Government has proposed to replace the Human Rights Act ('HRA') with a bill of rights and the Scottish Governments has

[1] International Covenant on Civil and Political Rights (adopted 19 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR); International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3 (ICESCR).

initiated a plan to introduce a Scottish Human Rights Bill. The Welsh Government has also committed itself to investigating a Welsh Human Rights Act. Since 1998 there has also been recognition that a Northern Ireland Bill of Rights ought to be enacted.[2]

Secondly, in recent years international treaty monitoring bodies have expressed concerns regarding the UK's compliance with its international human rights law obligations. Principal amongst these concerns is that the legislative machinery protecting human rights in the UK may be weakened.[3] This, however, is not the only concern raised. The United Nations ('UN') Committee on Economic, Social and Cultural Rights has raised concerns about the "disproportionate, adverse impact that austerity measures introduced in 2010 are having on the enjoyment of economic, social and cultural rights by disadvantaged and marginalized individuals and groups", as well as the impact that reforms to legal aid are having on access to justice.[4] These comments were recently reiterated by Philip Alston, the UN Special Rapporteur on Extreme Poverty and Hunger. In 2019, the Special Rapporteur expressed concern that 14 million people in the UK were living in poverty, and commented that the "sustained and widespread cuts to social support [...] pursued since 2010 amount to retrogressive measures in clear violation of the country's human rights obligations".[5]

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[2] The Belfast Agreement/Good Friday Agreement stipulated the creation of a Northern Ireland Human Rights Commission, with functions which include advising the UK government on the adoption of a Bill of Rights for Northern Ireland.

[3] HRC, Concluding observations on the 7th periodic report of the United Kingdom of Great Britain and Northern Ireland, 17 August 2015, CCPR/C/GBR/CO/7, at para 5; CESCR, Concluding observations on the sixth periodic report of the United Kingdom of Great Britain and Northern Ireland; 14 July 2016; E/C.12/GBR/CO/6 at para 9.

[4] CESCR, Concluding observations on the sixth periodic report of the United Kingdom of Great Britain and Northern Ireland; 14 July 2016; E/C.12/GBR/CO/6 at paras 18, 20.

[5] Human Rights Council, Report of the Special Rapporteur on Extreme Poverty and Hunger, 23 April 2019, A/HRC/41/39/Add.1 at p. 8. Available at: https://www.ohchr.org/en/documents/country-reports/ahrc4139add1-visit-united-kingdom-great-britain-and-northern-ireland. The Report of the Special Rapporteur relied on the assessment by the Social Metric Commission in its report*, A New Measure of Poverty for the UK,* September 2018. The Social Metric Commission relied on the following

This report seeks to highlight the UK's international human rights law obligations and show how they ought to inform both the processes for making domestic bills of rights and the content of such legislation. This report also seeks to draw parliamentarians and policymakers' attention to the wealth of knowledge and expertise relating to human rights protection that exists at the international level.

This report is organised into three parts. Part 1 explains the processes on-going in the UK concerning domestic bills of rights. Part 2 gives an overview of the international human rights law framework that is applicable to these processes. Part 3 explains the five obligations chosen for investigation and their relevance in the UK context.

principle as underpinning their concept of poverty: the situation where a person's available material resources are insufficient to adequately meet their immediate material needs.

PART 1: DOMESTIC BILLS OF RIGHTS PROCESSES UNDERWAY

i. The Existing Framework

The UK has ratified seven of the nine core international human rights law treaties,[6] as well as European Convention on Human Rights ('ECHR').[7] The obligations these treaties impose apply throughout the UK.

The Human Rights Act 1998 ('HRA') gives effect to the rights in the ECHR in the UK.[8] The UK was an early signatory to the ECHR, with Winston Churchill acting as a significant advocate for the ECHR in Europe.[9] Prior to the enactment of the HRA, the rights in the ECHR were not justiciable in the UK. This meant individuals had to take their case to the European Court of Human Rights (ECtHR) to enforce their rights.[10] This was both costly and time-consuming. The Labour Government's White Paper on the Human Rights Bill noted that the average cost of taking a case to Strasbourg was £30,000.[11]

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[6] The seven treaties are: UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171 ('ICCPR'); UN General Assembly, *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, United Nations, Treaty Series, vol. 993, p. 3 ('ICESCR'); UN General Assembly, *Convention on the Rights of Persons with Disabilities: resolution / adopted by the General Assembly*, 24 January 2007, A/RES/61/106 ("CRPD'); UN General Assembly, *Convention on the Rights of the Child*, 20 November 1989, United Nations, Treaty Series, vol. 1577, p. 3 ('UNCRC'); UN General Assembly, *International Convention on the Elimination of All Forms of Racial Discrimination*, 21 December 1965, United Nations, Treaty Series, vol. 660, p. 195 ('ICERD'); UN General Assembly, *Convention on the Elimination of All Forms of Discrimination Against Women*, 18 December 1979, United Nations, Treaty Series, vol. 1249, p. 13 ('CEDAW'); UN General Assembly, *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 10 December 1984, United Nations, Treaty Series, vol. 1465, p. 85 ('CAT').

[7] The UK was one of the States that drafted the ECHR and was one of the first States to ratify it in 1951. The Convention came into force in 1953.

[8] The Human Rights Act 1998 came into force on 2 October 2000.

[9] M. Duranti, *The Conservative Human Rights Revolution*, (OUP, 2017), at 4.

[10] F. Cowell (ed), *Critically Examining The Case Against The Human Rights Act*, (Routledge, 2018), at 3.

[11] Home Office, Rights Brought Home: The Human Rights Bill, at 1.14 (CM 3782) (HMSO, October 1997). See also J. Straw MP, Hansard, HoC, 16 February 1998, Vol. 307, col. 769, in J. Cooper & A.

The HRA requires all public authorities, including courts to act compatibly with the ECHR rights and creates a cause of action for breach of the rights in UK courts.[12] The Labour Government also hoped the introduction of the HRA would generate a 'human rights culture' in the UK. This would be achieved by requiring Parliament, the executive and public authorities to consider to the ECHR rights when legislating, designing policy and taking action.[13] A report by the Equality and Human Rights Commission ('EHRC') in 2009 investigated this issue and found that the HRA had helped create such a human rights culture.[14]

The devolution settlements in Scotland, Northern Ireland and Wales require the devolved legislatures to legislate consistently with the HRA and the rights in the ECHR.[15] Whilst a detailed examination of how the devolution settlements and human rights protections in the UK interact is beyond the scope of the present report, it is important to emphasise that any changes to the operation of the HRA are liable to have significant impacts on devolution and need to be carefully considered.[16] Similarly, further consideration would also need to be given to the

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Marshall-Williams, Legislating for Human Rights – The Parliamentary Debates on the Human Rights Bill (Hart, 2000) at 4.

[12] Parliament is not required to act compatibly with the ECHR. If legislation is found incompatible with the ECHR, the legislation remains valid and of full effect. It for Parliament to decide amend the legislation; in nearly all cases of incompatibility Parliament has amended legislation.

[13] The Independent Review of the Human Rights Act (December 2021). Available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1040525/ihrar-final-report.pdf at pp. 23-4.

[14] Equality and Human Rights Commission, Human Rights Inquiry, 1 June 2009. Available at: https://www.equalityhumanrights.com/en/publication-download/human-rights-inquiry-main-report at p. 142.

[15] Scotland Act 1998, s. 29(2)(d); Government of Wales Act, 2006, s. 94(6)(c); Northern Ireland Act 1998, s. 6(2)(c).

[16] This was noted by the Independent Review of the Human Rights Act. The report highlighted comments by the Northern Ireland Bar Association that: *"… a significant dilution of human rights protections will impact on the delicate ecology of the Agreement. There is a need to benchmark any proposals in the review alongside the GFA [Good Friday Agreement] and the 'no diminution commitment'."* Professor Jeff King was also noted to have commented, *"My conclusions are … that weakening the*

Ireland/Northern Ireland Protocol were any changes to be made to the HRA. Article 2 of the Protocol includes a commitment that there is no diminution of the rights, safeguards and equality of opportunity, as set out in the relevant chapter of the Belfast Agreement/Good Friday Agreement 1998, resulting from the UK's withdrawal from the EU.[17] This commitment is part of UK law and binding on both the UK Government and Parliament.[18]

ii. **Westminster**

For some time, it has been apparent that successive the UK's Conservative Governments have wanted to amend the HRA. In the 2010 and 2015 Conservative Party election manifestos pledged to repeal the HRA and replace it with a statutory 'bill of rights'.[19] In 2017, these plans were put on hold while the process of Brexit was underway.[20] In 2019 the Conservative Party election manifesto promised to 'update' rather than replace the HRA.[21]

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overall scheme of the Act risks upsetting devolution arrangements at an already delicate time." See The Independent Review of the Human Rights Act (December 2021). Available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1040525/ihrar-final-report.pdf at pp. 50-51.

[17] The exact terms of the Protocol are as follows: "The United Kingdom shall ensure that no diminution of rights, safeguards or equality of opportunity, as set out in that part of the 1998 Agreement entitled Rights, Safeguards and Equality of Opportunity results from its withdrawal from the Union, including in the area of protection against discrimination, as enshrined in the provisions of Union law listed in Annex 1 to this Protocol, and shall implement this paragraph through dedicated mechanisms."

[18] Northern Ireland Office, 'UK Government Commitment to "no diminution of rights, safeguards and equality of opportunity" in Northern Ireland: What does it mean and how will it be implemented?', (NIO, 2020), at para 5.

[19] Conservative Manifesto 2010, p. 79; Conservative Manifesto 2015, p. 58.

[20] Conservative Manifesto 2017, p. 37.

[21] Conservative Manifesto 2019, p. 48

In December 2020, the Government established an Independent Human Rights Act Review ('IHRAR') to examine the operation of the HRA. Specifically, the review was tasked with looking at two key themes: the relationship between domestic courts and the ECtHR; and the impact of the HRA on the relationship between the judiciary, the executive, and the legislature.[22] The Terms of Reference of the IHRAR made it clear that the Government did not intend to withdraw from the ECHR. The IHRAR accepted a wide range of evidence, including from the devolved governments, who opposed any attempt to weaken the HRA.[23] The IHRAR report, issued in December 2021, mainly proposed maintaining the status quo, with no major reforms to the HRA. It concluded that the HRA did not undermine parliamentary sovereignty and although it recommended some minor changes to s.s. 2, 3 and 4 HRA, it did not recommend the replacement of the HRA.[24]

On the same day that the IHRAR published its report, the Government initiated a consultation on proposals to repeal the HRA and replace it with a Bill of Rights. The consultation ran from 14 December 2021 to 19 April 2022 and received over 12,000 responses.[25] Although the consultation can be commended as a public participation exercise, several commentators expressed surprise at the lack of congruence between the evidence-based conclusions of the IHRAR and the consultation proposals.[26] Lord Carnwath, a former Justice of the UK Supreme Court, noted "there

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[22] The Independent Review of the Human Rights Act: Terms of Reference. Available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/953347/human-rights-review-tor.pdf.

[23] The IHRAR received 150 responses from its Call for Evidence; conducted 14 online round tables; held seven online roadshows and had extended conversations with judges from the ECtHR, German Federal Constitutional Court and the Supreme court of Ireland. For information on Scottish opposition see, See https://www.gov.scot/news/defending-the-human-rights-act/.

[24] The Independent Review of the Human Rights Act (December 2021). Available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1040525/ihrar-final-report.pdf.

[25] https://www.gov.uk/government/consultations/human-rights-act-reform-a-modern-bill-of-rights.

[26] For example, T. Hickman, A UK Bill of Rights?, London Review of Books, 25 March 2022, Vol. 44 No. 6, available at https://www.lrb.co.uk/the-paper/v44/n06/tom-hickman/a-uk-bill-of-rights; N. Barker, The Independent Human Rights Act Review and the government's Bill of Rights, UK Human Rights

is a serious mismatch between the [IHRAR and consultation]. They are almost like ships that pass in the night."[27] Sir Peter Gross, the chair of the IHRAR, told the Justice Select Committee in February 2022 that he would not characterise the Government's consultation as a response to the IHRAR.[28]

On the 22 June 2022, the Government introduced the Bill of Rights Bill in Parliament without pre-legislative scrutiny.[29] The Bill of Rights Bill was published on the same day as the Government's response to the consultation.[30] Again, commentators noted that "the tide of the responses [to the consultation] runs starkly in the opposite direction to the changes in the Bill".[31] A letter from the Joint Committee on Human Rights ('JCHR') to Rt Hon Dominic Raab, the then Justice Secretary, remarked in June 2022 that the "Government's Bill of Rights does not reflect what the Government has heard from Parliament's committees, from its own independent review, nor from its consultation exercise."[32]

In September 2022, following Liz Truss being elected Conservative Party leader and becoming Prime Minister, the progress of the Bill of Rights Bill through Parliament

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Blog, available at: https://ukhumanrightsblog.com/2022/01/24/the-independent-human-rights-act-review-and-the-governments-bill-of-rights/.

[27] The Rt. Hon. Lord Carnwath of Notting Hill, 'Lord Carnwath lecture on Human Rights Act reform – is it time for a new British Bill of Rights?' (Speech for The Constitutional Matters Project, Cambridge, 9 February 2022). Available at: https://constitutionallawmatters.org/2022/02/lord-carnwath-lecture-on-human-rights-act-reform-is-it-time-for-a-new-british-bill-of-rights/.

[28] Justice Select Committee, Oral evidence: Human Rights Act Reform, HC 1087 1 February 2022. Available at: https://committees.parliament.uk/oralevidence/3374/pdf/.

[29] Four select committees wrote to the Government requesting pre-legislative scrutiny but were denied. See https://committees.parliament.uk/publications/22473/documents/165604/default/.

[30] Human Rights Act Reform: A Modern Bill of Rights, Consultation Response. Available at: https://www.gov.uk/government/consultations/human-rights-act-reform-a-modern-bill-of-rights/outcome/human-rights-act-reform-a-modern-bill-of-rights-consultation-response.

[31] D. Lock, Three Ways the Bill of Rights Bill Undermines UK Sovereignty, UK Constitutional Law Association blog, available at: https://ukconstitutionallaw.org/2022/06/27/daniella-lock-three-ways-the-bill-of-rights-undermines-uk-sovereignty/

[32] Joint Committee on Human Rights, Letter to Dominic Raab on the Bill of Rights, 30 June 2022. Available at: https://committees.parliament.uk/publications/22880/documents/167940/default/

was paused although it was not formally withdrawn. Several senior Conservative MPs, including the former Justice Secretary Sir Robert Buckland, had publicly expressed misgivings about the Bill of Rights Bill and this seemed consequential in the decision.[33] The current status of the bill is unclear.

iii. **Scotland**

The Scottish Government recently proposed to introduce a new Human Rights Bill.[34] This Bill intends to incorporate into Scots law, so far as devolved competence allows, four United Nations treaties, alongside the right to a healthy environment and increased processes of accountability and public participation.[35]

A National Taskforce for Human Rights Leadership was established in early 2019 to work on the 2018 recommendations made by the Report of the First Minister's Advisory Group on Human Rights Leadership.[36] The Taskforce was mandated to 'design and deliver detailed proposals for a new statutory human rights framework

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[33] R. Buckland, 'We must urgently review the Bill of Rights' *Telegraph* (7 August 2022). Available at: https://www.telegraph.co.uk/news/2022/08/07/must-urgently-review-bill-rights/. See also, S. Payne and J. Croft, 'Liz Truss scraps proposed British bill of rights' *Financial Times* (London, 7 September 2022). Available at: https://www.ft.com/content/9b0a32fc-980b-4f00-9cf5-6c3f29756800.

[34] Whilst 'international relations' are among the reserved matters of the UK Parliament under the Scotland Act 1998, the power to legislate with the object of 'observing and implementing international obligations' falls within the devolved competence of the Scottish Parliament.

[35] The treaties are: ICESCR CEDAW, CERD and CRPD.

[36] Brexit prompted the First Minister to establish an Advisory Group on Human Rights Leadership to re-ascertain how to best protect human rights within its devolved competence and mitigate the risks posed by leaving the European Union. The First Minister subsequently invited Professor Alan Miller to chair an Independent Advisory Group on Human Rights Leadership (FMAG). FMAG was mandated to formulate, via a participatory process, recommendations on how Scotland could continue to lead by example in human rights leadership. The recommendations were to be in line with three guiding principles. The principles were as follows: non-regression from current levels of human rights protection; keeping pace with future rights developments in Europe and continuing to demonstrate leadership in the promotion and protection of human rights.

for Scotland, together with the associated requirements for a public participatory process and for capacity-building initiatives.'[37]

In March 2021, the Taskforce published its report. It recommended the Scottish Government adopt a statutory human rights framework that included civil and political rights, socio-economic rights and the incorporation of a number of international human rights treaties.[38] This report was a culmination of a broad public engagement and research by the Taskforce.[39]

A new human rights Bill, outlined in the latest Programme for Government, will be introduced this parliamentary session.[40] To support the development of a new human rights law for Scotland, an Advisory Board, led by Equalities Minister, Christina McKelvie, has been established since 9 September 2021, alongside the

[37] Scottish Government, 'National Taskforce for Human Rights Leadership: Terms of Reference' (16 November 2020 at para 6) Available at: https://www.gov.scot/publications/national-taskforce-for-human-rights-leadership-terms-of-reference/.

[38] National Taskforce for Human Rights: leadership report, 12 March 2021, available at: National Taskforce for Human Rights: leadership report - gov.scot (www.gov.scot).

[39] The Taskforce was supported by its own Academic Advisory Panel of the Taskforce, chaired by Professor Nicole Busby of the University of Glasgow. It also received expert reports from the Bonavero Institute of Human rights as well as five Standing Reference Groups, linked to specific UN Human Rights Treaties, or key sectors. Furthermore, on behalf of the Taskforce, the Human Rights Consortium and the SHRC led an online public participation programme entitled 'All Our Rights in Law' to engage with direct lived experiences. Together (Scottish Alliance for Children's Rights) also facilitated discussions with children and young people to ensure their voices were heard. Across all conversations, 'All our Rights in Law' provided suggestions to ensure the proposed new law would lead to real improvements in their lives. In total the Taskforce facilitated over 40 roundtable events, hearing from a breadth of experience and expertise.

[40] Scottish Government, 'A Fairer, Greener Scotland: Programme for Government 2021-2022' (September 2021 page 49) Available from https://www.gov.scot/binaries/content/documents/govscot/publications/strategy-plan/2021/09/fairer-greener-scotland-programme-government-2021-22/documents/fairer-greener-scotland-programme-government-2021-22/fairer-greener-scotland-programme-government-2021-22/govscot%3Adocument/fairer-greener-scotland-programme-government-2021-22.pdf?forceDownload=true.

establishment of a Lived Experience Board, facilitated by Human Rights Consortium Scotland.[41]

Whilst the proposed new Human Rights Bill is the current headline Bill for human rights in Scotland, in parallel the First Minister pledged to incorporate the United Nations Convention on the Rights of the Child ('UNCRC') into Scots law by the end of the parliamentary term 2019-2020. The UNCRC (Incorporation) (Scotland) Bill was introduced in the Scottish Parliament on 1 September 2020 and unanimously passed on 16 March 2021 after receiving full parliamentary scrutiny.

However, in a case before the UK Supreme Court, the UK Government successfully challenged four elements of the UNCRC (Incorporation) (Scotland) Bill on the grounds that it contravened section 28(7) of the Scotland Act 1998. This provision stipulates that the UK Parliament has power to make laws for Scotland, which the Court read to mean that legislation of the Scottish Parliament cannot affect this power.[42] This case serves as an example of the significance between incorporated and unincorporated treaties, which presents challenges for the Scottish Government agenda. Following the judgment, Deputy First Minister John Swinney announced plans to address the Supreme Court's ruling and to engage with stakeholders on changes to the Bill at the Reconsideration Stage.[43]

[41] Human Rights Consortium, 'Lived Experience Board Informs Developments of Scottish Human Rights Bill' (6 May 2022) Available from https://hrcscotland.org/2022/05/06/lived-experience-board-informs-development-of-scottish-human-rights-bill/.

[42] The Reference judgment [2021] UKSC 42.

[43] Scottish Government, 'European Charter of Local Self-Government Bill and the UNCRC Bill- Next Steps: Statement by Deputy First Minister' (24 May 2022).

iv. **Northern Ireland**

In Northern Ireland, the Good Friday Agreement/Belfast Agreement stipulated the creation of a Northern Ireland Human Rights Commission.[44] This Commission was to advise the UK Government on the adoption of a Bill of Rights for Northern Ireland. The Good Friday Agreement/Belfast Agreement intended this Bill of Rights to supplement, or build upon, the rights in the ECHR, "reflect the particular circumstances of Northern Ireland" and draw "as appropriate on international instruments and experience".[45]

The Commission aimed to employ an inclusive process when preparing its advice for the UK Government. The Commission asked the public to comment on different drafts in a range of forums and received over 650 formal submissions from individuals and agencies.[46]

The Commission published its advice in December 2008, recommending the introduction of a comprehensive Bill of Rights. In keeping with the aim of the Bill of Rights supplementing the rights in the ECHR, the Commission recommended the inclusion of some economic, social and cultural rights, in addition to a range of civil and political rights.[47]

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[44] Agreement between the Government of Ireland and the Government of the United Kingdom of Great Britain and Northern Ireland, ITS No. 1/2008 (Ir.).

[45] Agreement between the Government of Ireland and the Government of the United Kingdom of Great Britain and Northern Ireland, ITS No. 1/2008 (Ir.). The inclusion of "reflect the particular circumstances of Northern Ireland" has been subjected to much debate. See C. Harvey, A. Smith, '*Designing Bills of Rights in Contested Contexts: Reflections on the Northern Ireland Experience*' (2020) 44 Fordham Int'l L.J. 357.

[46] In 2006, the Commission also set up a Bill of Rights Forum that included representation from all the main political parties in Northern Ireland.

[47] Northern Ireland Human Rights Commission, *A Bill of Rights for Northern Ireland: Advice to the Secretary of State for Northern Ireland*, 10 December 2008, available at: https://nihrc.org/publication/detail/advice-to-the-secretary-of-state-for-northern-ireland.

It was assumed that when the Commission reported, Westminster legislation would enact the proposals.[48] However, the Northern Ireland Office decided not to take forward the majority of the Commission's recommendations.[49] It considered that protection of many of the rights could be addressed by a UK Bill of Rights, which was being discussed at the time. This was in line with the view of the two main unionist political parties, the Democratic Unionist Party (DUP) and Ulster Unionist Party (UUP), but criticised by the Progressive Unionist Party (PUP) and some nationalist groups.[50] Little progress was made in the ten years that followed.

In 2020, an Ad Hoc Committee of the Northern Ireland Assembly on a Bill of Rights was established.[51] This Committee was to assess the way forward for a bill of rights, including its role in a post-Brexit Northern Ireland.[52] The Ad Hoc Committee reported in February 2022.[53] It reported that "[t]here was consensus on 23 September 2021 among the Committee that a bill of rights should be enacted at Westminster, in line with the provisions of the Belfast Agreement/Good Friday Agreement. This decision was made subject to prospective advice from the panel of experts, which was ultimately not made available as a result of the fact that the

[48] C. Harvey, A. Smith, '*Designing Bills of Rights in Contested Contexts: Reflections on the Northern Ireland Experience*' (2020) 44 Fordham Int'l L.J. 357.

[49] C. Harvey, 'Northern Ireland and a Bill of Rights for the United Kingdom' The British Academy for the humanities and social sciences. Available at: https://www.thebritishacademy.ac.uk/documents/129/NI_BOR_178_0.pdf at p. 11.

[50] C. Harvey, A. Smith, '*Designing Bills of Rights in Contested Contexts: Reflections on the Northern Ireland Experience*' (2020) 44 Fordham Int'l L.J. 357, 377-8.

[51] Unfortunately, political disagreement prevented an expert advisory panel being appointed to assist the Ad Hoc Committee as originally planned. See https://www.irishnews.com/news/northernirelandnews/2021/11/06/news/human-rights-academic-colin-harvey-says-he-saddened-by-speculation-that-his-appointment-to-bill-of-rights-panel-is-being-b-2499802/.

[52] C. Harvey, A. Smith, *Designing Bills of Rights in Contested Contexts: Reflections on the Northern Ireland Experience,* 44 Fordham Int'l L.J. 357 (2020).

[53] 156/17-22 Report of the Ad Hoc Committee on a Bill of Rights, available at http://www.niassembly.gov.uk/globalassets/documents/committees/2017-2022/ad-hoc-bill-of-rights/reports/report-on-a-bill-of-rights/report-of-the-ad-hoc-committee-on-a-bill-of-rights.pdf.

panel was not established. However, subsequently, the DUP in its position paper expressed disagreement with this decision."[54]

v. **Wales**

Over the past decade, in line with the significant reforms expanding the jurisdiction of the Welsh Senedd (Parliament),[55] several steps have been taken to enhance human rights protection in Wales. These include passing the Rights of Children and Young Persons (Wales) Measure 2011, the Social Services and Well-being (Wales) Act 2014, and the Additional Learning Needs and Educational Tribunal (Wales) Act 2018. This legislation requires ministers and duty-bearers to have 'due regard' to human rights and equality in designing policy. In March 2021, the Welsh Government also brought into force Section 1 of the Equality Act 2010 which introduced a 'socio-economic duty' and requires ministers to have 'due regard' to the desirability of reducing socio-economic inequalities of outcome when designing policy.[56]

A report commissioned by the Welsh Government in 2021 noted the weaknesses in the 'due regard' approach to protecting human rights. In particular, it noted the difficulty in holding duty-bearers to account under the model, and the implementation gap in relation to human rights in Wales. As such, the report recommended the introduction of "primary legislation to give effect to international human rights in Welsh law through a Human Rights (Wales) Act to make select international human rights part of Welsh law so that they are binding on Welsh

[54] 156/17-22 Report of the Ad Hoc Committee on a Bill of Rights, available at http://www.niassembly.gov.uk/globalassets/documents/committees/2017-2022/ad-hoc-bill-of-rights/reports/report-on-a-bill-of-rights/report-of-the-ad-hoc-committee-on-a-bill-of-rights.pdf at pp. 47.

[55] Wales Act 2014 (devolving significant fiscal powers); Wales Act 2017 (moving Wales to a "reserved powers" model and expanding the number of devolved areas).

[56] https://gov.wales/sites/default/files/publications/2021-03/a-more-equal-wales.pdf.

Ministers and public authorities in the exercise of devolved functions and may be enforced by a court or tribunal".[57]

In January 2022, the Welsh Government released a statement indicating that they were considering the next steps for adopting a Welsh Human Rights Bill.[58] In May 2022, the Welsh Government's Counsel General and Minister for Social Justice also committed to considering the case for a Welsh Human Rights Bill.[59]

[57] S. Hoffman; S. Nason; R. Beacock; E. Hicks (with contribution by R. Croke) *Strengthening and advancing equality and human rights in Wales*. Cardiff: Welsh Government, GSR report number 54/2021. Available at: https://gov.wales/sites/default/files/statistics-and-research/2021-08/strengthening-and-advancing-equality-and-human-rights-in-wales.pdf.

[58] https://gov.wales/written-statement-uk-government-proposal-reform-human-rights-act-1998.

[59] https://gov.wales/welsh-government-outline-principles-for-a-reformed-justice-system.

PART 2: THE INTERNATIONAL HUMAN RIGHTS LAW FRAMEWORK

This report relies on international human rights law obligations derived from the ICCPR and ICESCR. This section briefly explains the **i**nternational human rights law framework.

i. The International Bill of Rights

The Universal Declaration of Human Rights (UDHR) was adopted by the UN General Assembly of the United Nations on 10 December 1948. It is non-binding but was intended to create "a common standard of achievement for all peoples and nations",[60] which would form the basis of a binding treaty in due course.

The ICCPR and the ICESCR create binding international law obligations for States Parties regarding the implementation of human rights.[61] Together, the UDHR, ICCPR and ICESCR form what is sometimes referred to the as the International Bill of Rights. The UK was an early ratifier of both the ICCPR and the ICESCR and has

[60] Preamble to the Universal Declaration of Human Rights 1948.

[61] When the drafting process for the internationally binding human rights Covenants started, the original intention was to include both civil and political rights, and economic, social and cultural rights in a single treaty. This was in recognition that "the enjoyment of civic and political freedoms and of economic, social and cultural rights are interconnected and interdependent". In its 1950/51 session, the UN General Assembly reversed this decision and determined that the Commission of Human Rights ought to draft two separate covenants. The reasons for creating two separate covenants included concerns about the difference in monitoring mechanisms, how the rights would be implemented, and the implications that implementation of economic, social and cultural rights would have on national budgets. The General Assembly was, however, keen to affirm the connection between the two covenants and in resolution 545 (VI) decided both covenants were to include the right to self-determination. See UN General Assembly, *Draft International Covenant on Human Rights and measures of implementation: future of the work of the Commission of Human Rights*, Res 421 (V) E; UN General Assembly, *Preparation of two Draft International Covenants of Human Rights,* Resolution 543 (VI), para. 1. For discussion, see Chapter 5 of D. Whelan, *Indivisible Human Rights: A History* (Philadelphia, University of Pennsylvania Press, 2011).

regularly submitted state reports to the UN treaty bodies and other human rights mechanisms in line with its obligations.

The overarching international approach to all human rights - civil, political, economic, social and cultural - is that they are understood to be universal, indivisible, interdependent and interrelated.[62]

The core of **universality** is the proposition that the rights in the Covenants belong to all persons by virtue of their being human.[63] This is reflected in the preamble to the UDHR, which proclaims that the rights contained therein are "equal and inalienable" and a "common standard [...] for *all* peoples and nations".[64]

The idea that rights are **indivisible** has come to express the idea that no category of rights enjoys priority over the other.[65]

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[62] Although this statement is not included in the text of the treaties, it is repeated throughout UN General Assembly Resolutions and other soft law instruments. The UN has not, however, ever defined the meaning of the adjectives. See UN General Assembly, *Alternative approaches and ways and means within the United Nations system for improving the effective enjoyment of human rights and fundamental freedoms*: resolution, 16 December 1977, A/RES/32/130; UN General Assembly, *Indivisibility and interdependence of economic, social, cultural, civil and political rights*, 13 December 1985, A/RES/40/114; HRC, *Institution-building of the United Nations Human Rights Council*, 18 June 2017, A/HRC/RES/5/1; Maastricht Guidelines on Violations of Economic, Social and Cultural Rights available at http://hrlibrary.umn.edu/instree/Maastrichtguidelines_.html.

[63] For discussion see J. Donnelly, Universal Human Rights in Theory and Practice (Cornell University Press, 2013).

[64] Preamble to the Universal Declaration of Human Rights 1948 (emphasis added).

[65] The relationship between civil and political rights, and economic, social and cultural rights has changed over the past 75 years. Whilst there seems to have been an initial recognition of the equal importance of the two categories of rights, a narrative that economic, social and cultural rights were less important emerged. In the 1970s there was a push to see economic, social and cultural rights as more important than civil and political rights. This is reflected in the Proclamation of Tehran and the Right to Development. At the end of the cold war, there was a further shift that returned to the idea that rights were 'indivisible' and did not sit in a hierarchical relationship. For discussion see D. Whelan, *Indivisible Human Rights: A History* (Philadelphia, University of Pennsylvania Press, 2011).

Interdependence reflects the idea that the full enjoyment of one category of rights is not possible without the enjoyment of the other rights. As noted by the UN General Assembly: "the full realization of civil and political rights is inseparably linked with the enjoyment of economic, social and cultural rights".[66]

The term **interrelated** captures the idea that civil, political, economic, social and cultural rights "share common characteristics - their provenance from U.N. bodies, their legal character as treaties, that state limitations and obligations are expressed or implied, and so forth".[67]

ii. The Sources of International Human Rights Law

This report principally considers the ICCPR and the ICESCR.[68] There are seven other major human rights treaties that are not considered.[69] These treaties tend to expand the rights and protections provided by the ICCPR and ICESCR.

a. The Treaty Text

The starting point for determining the obligations that flow from these Covenants is the text. The general rules of interpretation for international treaties have been codified in the 1969 Vienna Convention on the Law of Treaties ('VCLT').[70]

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[66] For example, the right to freedom of assembly cannot be fully enjoyed until one has the rights to adequate housing, food or water. UN General Assembly, *Indivisibility and interdependence of economic, social, cultural, civil and political rights*, 13 December 1985, A/RES/40/114.

[67] D. Whelan, *Indivisible Human Rights: A History* (Philadelphia, University of Pennsylvania Press, 2011) p. 4.

[68] The focus on these covenants is driven by the fact that they are the oldest international human rights law treaties, and for interests of time and space, focussing on two covenants was felt to be sufficient.

[69] CRPD, UNCRC, ICERD, CEDAW, CAT, ICMW, CPED.

[70] Customary law is considered to bind all States, regardless of whether they are a member of the treaty or not. The provisions of the VCLT concerning interpretation of treaties are considered to codify international customary law on this topic. *India v Pakistan*, ICJ Reports, 2019, para 71; *Nicaragua v Colombia (Delimitation of the Continental Shelf beyond 200 nautical miles) (Preliminary*

Article 31 VCLT provides the general rule of interpretation, namely that treaties are to be interpreted "in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose".[71]

b. General Comments, Concluding Observations, and Individual Communications

Throughout this report, reference will be made to General Comments and Concluding Observations of both the Human Rights Committee ('HRC') and Committee on Economic, Social and Cultural Rights ('CESCR'), as well as Individual Complaints made to the HRC.

The HRC is established by Part IV of the ICCPR.[72] The purpose of the HRC is to monitor the implementation of the ICCPR. The HRC has 18 members, each of whom serve for four years. States Parties may nominate individuals to serve as members of the Committee, but they are elected by a secret ballot. Members must be "persons of high moral character and [have] recognized competence in the field of human rights", with "consideration given to the usefulness of the participation of some persons having legal experience".[73]

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objections), ICJ Reports, pp. 3, 19; *Croatia v Serbia*, ICJ Reports, 2014, pp. 3, 64; *Peru v Chile*, ICJ Reports, 2014, pp.3, 28; *Application of the Genocide Convention (Merits*), ICJ Reports, 2007, pp. 43, 109-10.

[71] Article 31(3) specifies that, in addition to the context, consideration should be given to any "subsequent agreement between the parties regarding the interpretation of the treaty"; any "subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation; and "any relevant rules of international law applicable in the relations between the parties". Other provisions relevant to treaty interpretation include, Article 32 VCLT which specifies that "[r]ecourse may be had to supplementary means of interpretation [...] in order to confirm the meaning resulting from the application of article 31" or to assist in interpretation where the meaning is "ambiguous" or "absurd".

[72] Articles 28 to 45 ICCPR cover its establishment, functions, and membership.

[73] ICCPR, Article 28.

There are four ways that the HRC fulfils its purpose. The first is through its jurisdiction to consider inter-state complaints.[74] This jurisdiction has rarely been invoked. The second is by examining State Reports, submitted by States Parties, and, following the HRC's assessment of the reports, issuing Concluding Observations. Under Article 40 of the ICCPR, States Parties are obliged to submit State Reports to the HRC every five years explaining the steps they have taken to implement the covenant.[75] The third way the HRC fulfils its purpose is by issuing General Comments. [76] These aim to clarify the obligations that arise from the text of the treaty. General Comments serve as useful guides to the content of the rights and obligations in the ICCPR. The fourth mechanism is the HRC's jurisdiction to consider individual complaints of alleged human rights violations under the Optional Protocol to the ICCPR.[77]

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[74] "A State Party to the present Covenant may at any time declare under this article that it recognizes the competence of the Committee to receive and consider communications to the effect that a State Party claims that another State Party is not fulfilling its obligations under the present Covenant. Communications under this article may be received and considered only if submitted by a State Party which has made a declaration recognizing in regard to itself the competence of the Committee. No communication shall be received by the Committee if it concerns a State Party which has not made such a declaration." ICCPR, Article 41.

[75] The HRC requests the inclusion of a 'core document' which has basic information about the country, and consideration of how each of the articles in the ICCPR are being implemented. State Parties are to describe the factual situation, rather than just the formal position. The HRC examines each State Party Report across two consecutive committee sessions. At these sessions the Committee engages in a public dialogue with representatives from the State Party concerned. This is an opportunity for the Committee to ask representatives for clarification on questions that they have from the State Party report. Gradually, non-governmental organisations (NGOs) and civil society have taken on a greater role in providing the HRC with "shadow reports", which supplement state party reporting by, for example, highlighting issues not raised by states, or misrepresented by them. For more information see OHCHR, Civil and Political Rights: The HRC, Factsheet No. 15 (Rev. 1) available at https://www.ohchr.org/sites/default/files/Documents/Publications/FactSheet15rev.1en.pdf.

[76] The Committee's authority for issuing these General Comments is Article 40(4) which states the Committee may transmit "such general comments as it may consider appropriate" to all States Parties. See, ICCPR, Article 40(4).

[77] The Committee has no fact-finding ability and so usually accepts the evidence submitted by the victim if it is unchallenged by the State Party. If the State party denies particular factual allegations

The CESCR was established in 1985 by the Economic and Social Council (ECOSOC).[78] This means the CESCR authority arises from ECOSOC and is not established in the articles of the ICESCR itself.[79] The main function of the CESCR, like the HRC, is to monitor the implementation of the ICESCR by States Parties. The CESCR has similar modes of monitoring the implementation of the ICESCR to the HRC. State Parties are required to submit State Reports to the CESCR every five years and the CESCR issues Concluding Observations on these reports. The CESCR also has jurisdiction to issue General Comments.

In contrast to the ICCPR, when the ICESCR was first drafted, the UN General Assembly chose not to include an Optional Protocol that allowed for individual communications. The UN General Assembly passed a resolution adopting an Optional Protocol to the ICESCR in 2008. The Optional Protocol came into force in May 2013.[80] The UK has not ratified the Optional Protocol of the ICCPR or ICESCR.

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by the victim, the Committee will accept these denials unless the individual can submit documentary proof. Following consideration of the individual complaint, the HRC provides its views on the complaint to the relevant State Party, and those views are also made public. The View will either find there is a violation or non-violation. As these views detail how rights apply in practice, they are valuable to more than just the State Party concerned. The Committee only has jurisdiction to complaints regarding States who have ratified the Optional Protocol and only 25 States have ratified the Optional Protocol. UN General Assembly, Optional Protocol to the International Covenant on Civil and Political Rights, 19 December 1966, United Nations, Treaty Series, vol. 999, p. 171. For more information, see OHCHR, Civil and Political Rights: The HRC, Factsheet No. 15 (Rev. 1) available at https://www.ohchr.org/sites/default/files/Documents/Publications/FactSheet15rev.1en.pdf.

[78] Economic and Social Council resolution 1985/17, 28 May 1985.

[79] This contrasts to the HRC which was created by the ICCPR. The International Law Commission, at its seventieth session considered that the CESCR was an expert treaty body. See International Law Commission, Chapter IV, 'Draft conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties, with commentaries' A/73/10. Available at https://legal.un.org/ilc/reports/2018/english/chp4.pdf

[80] UN General Assembly, Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, 10 December 2008, A/RES/63/117.

Although they are not strictly binding interpretations of the Covenants,[81] the settled views of the treaty-bodies are considered persuasive authority for the interpretation of the Covenants by the International Court of Justice and the ECtHR.[82]

c. Non-binding human rights law declarations: 'soft law'

There are several other non-binding agreements (or 'soft law') that are relevant to the discussion of the international human rights law principles in Part 3. Although such documents do not create internationally binding law, they can be persuasive.[83] Key instruments are detailed below.

- *UN General Assembly Resolutions*: these are decisions or declarations issued by the UN General Assembly that do not create binding obligations. However, especially when a General Assembly resolution carries the title of a Declaration, it may be intended as expressing a binding norm of customary international law.

- *The 1986 Limburg Principles* and *1997 Maastricht Guidelines on the Violation of Economic, Social and Cultural Rights*:[84] both were drafted by a group of

[81] H Keller, L. Grover L, 'General Comments of the Human Rights Committee and Their Legitimacy' in Helen Keller and Geir Ulfstein (eds), *UN Human Rights Treaty Bodies: Law and Legitimacy* (Cambridge University Press 2012) at p. 129.

[82] For example, *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, Merits, Judgment, I.C.J. Reports 2010, p. 639, at pp. 66*; Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, I.C.J. Reports 2004, p. 136, at p. 179, para. 109. The conclusion is also reinforced by Article 26 of the VCLT which requires compliance in good faith with the obligations imposed by a treaty.

[83] For a discussion on the role of soft law in international human rights law see, M. Olivier, 'The Relevance of Soft Law as a Source of International Human Rights' (2002) 35 Comp & Int'l LJ S Afr 289.

[84] The Maastricht Guidelines on the Violation of Economic, Social and Cultural Rights, available at: http://hrlibrary.umn.edu/instree/Maastrichtguidelines_.html.

international human rights law experts and aimed to clarify the nature of the obligations under the ICESCR.[85]

- *Vienna Declaration and Programme of Action 1993*:[86] adopted by all 171 States present at the Vienna World Conference on Human Rights 1993.[87] The Vienna Declaration and Programme of Action, agreed at the conference, is considered to be one of the most influential and important statements of human rights principles.[88]

- *The Paris Principles relating to the status of national institutions*:[89] the Paris Principles were endorsed by the UN General Assembly in 1993. They set out

[85] The Maastricht Guidelines build upon the Limburg Principles. They were produced following significant developments in the thinking, and practice, surrounding economic, social and cultural rights between 1986 and 1997. For example, the CESCR had started to produce more General Comments which led to more authority on the subject. Furthermore, a number of regional economic, social and cultural rights documents were agreed. These include the European Social Charter of 1996 and the Additional Protocol to the European Charter Providing for a System of Collective Complaints, and the San Salvador Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights of 1988. The 1997 Maastricht meeting had three aims: "to get a better understanding of the concept of violations of economic, social and cultural rights; to compile a catalogue of types of violations of these rights; and to use this catalogue to develop a set of guidelines that may further assist bodies that monitor economic, social and cultural rights, notably the Covenant Committee." For more detail, see D. Victor, C. Flinterman, and S. Leckie 'Commentary to the Maastricht Guidelines on Violations of Economic, Social and Cultural Rights' (1998) 20:3 Human Rights Quarterly 705, 708.

[86] Vienna Declaration and Programme of Action 1993, available at https://www.ohchr.org/en/instruments-mechanisms/instruments/vienna-declaration-and-programme-action.

[87] The Vienna World Conference was the second global conference on human rights. It is considered to mark a significant departure from the previous Tehran Conference in 1968. It restored the commitment to human rights as understood in the Universal Declaration of Human Rights and to have placed democracy at the centre of human rights protection. See D. Whelan, *Indivisible Human Rights: A History* (Philadelphia, University of Pennsylvania Press, 2011).

[88] D. Anthony 'The World Conference on Human Rights: still a guiding light a quarter of a century later' (2019) 25:3 Australian Journal of Human Rights 411.

[89] UN General Assembly, *Principles relating to the Status of National Institutions (The Paris Principles)*, 20 December 1993, A/RES/48/134.

the minimum standards, roles and responsibilities for National Human Rights Institutions.[90]

iii. International Human Rights Law and National Law

The ICCPR and ICESCR are both international treaties that create binding obligations on the UK at the international level. The fact that the UK has ratified these treaties does not mean that they are part of national law.

The UK is a 'dualist state' which means that for an international treaty to form part of national law, it needs to be incorporated by legislation.[91] For example, the HRA has incorporated the rights in the ECHR and therefore given them domestic legal effect.

Although international treaties cannot be considered a source of national law until they are incorporated, this does not mean that they are legally irrelevant. Unincorporated international treaties, like the ICCPR and ICESCR, can still be relevant to the interpretation of national legislation. The UK Supreme Court has also explained that international law is relevant to the interpretation of the rights protected by the HRA.[92]

[90] These are national institutions with a legislative mandate to protect and promote human rights. There are three such institutions in the UK: the Equality and Human Rights Commission; the Northern Ireland Human Rights Commission and the Scottish Human Rights Commission.
[91] See J. Crawford, I. Brownlie, *Brownlie's principles of public international law* (9th ed, OUP, 2019) at p. 45 for a summary of monism and dualism.
[92] *R (SC) v Secretary of State for Work and Pensions* [2021] UKSC 26, [79]-[84]

PART 3: INTERNATIONAL HUMAN RIGHTS LAW OBLIGATIONS RELEVANT TO DOMESTIC BILLS OF RIGHTS

1. The Obligation to Respect, Protect, and Fulfil Human Rights

The obligation to respect, protect and fulfil human rights is the most general of all the obligations considered in this report and is the starting point for considering international human rights law obligations that arise from the ICCPR and ICESCR. As a result, there is also a degree of overlap between this obligation and the others considered in the report.

i. Understanding the Obligation from the Perspective of International Human Rights Law

Article 2 of both the ICCPR and the ICESCR contain the general obligations imposed by each Covenant. Article 2(1) ICCPR requires States Parties to "respect and to ensure to all individuals" the rights contained in the Covenant.[93] This is understood to be an "immediate obligation to respect and ensure all the relevant rights".[94] Article 2(1) ICESCR requires States Parties "to take steps [...] to the maximum of its available resources, with a view to achieving progressively the full realization of the

[93] ICCPR, Article 2(1).

[94] CESCR *General Comment No. 3: The Nature of States Parties' Obligations*, 14 December 1990, E/1991/23, available at: https://www.refworld.org/docid/4538838e10.html at para 9.

rights" in the ICESCR.[95] This is a progressive obligation, indicated by the language "to take steps".[96]

General Comment No. 3 of the CESCR explains that the difference in the drafting of the two articles was intended to recognise the "fact that full realization of all economic, social, and cultural rights will generally not be able to be achieved in a short period of time".[97] However, it adds that "while the full realization of the relevant rights may be achieved progressively, steps towards that goal must be taken within a reasonably short time after the Covenant's entry into force for the States concerned."[98]

Despite the differences in wording, and variation in the specific obligations created by the two articles, in international human rights law, both Covenants are understood to impose three specific obligations on States Parties. These are the obligations to respect, protect and fulfil human rights.[99]

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[95] ICESCR, Article 2(1). General Comment No. 3 introduced the idea that rights in the ICESCR have a "minimum core" that States Parties are to immediately realise. The concept of "minimum core obligations" has been subjected to criticism. Though, in practice, there is support for the view that the CESCR has "developed an approach to minimum core obligations that aligns with "progressive realisation"' found in Article 2(1) ICESCR. For an explanation of the obligation of 'progressive realisation' please see the Bonavero Report '*The Development and Application of the Concept of the Progressive Realisation of Human Rights: Report to the Scottish National Taskforce for Human Rights Leadership'* available at https://www.law.ox.ac.uk/sites/files/oxlaw/bonavero_report_12021_1.pdf.

[96] CESCR *General Comment No. 3: The Nature of States Parties' Obligations,* 14 December 1990, E/1991/23, available at: https://www.refworld.org/docid/4538838e10.html at para 9.

[97] CESCR *General Comment No. 3: The Nature of States Parties' Obligations,* 14 December 1990, E/1991/23, available at: https://www.refworld.org/docid/4538838e10.html at para 9.

[98] CESCR *General Comment No. 3: The Nature of States Parties' Obligations*, 14 December 1990, E/1991/23, available at https://www.refworld.org/docid/4538838e10.html at para 2.

[99] One often-cited reference to this typology of obligations can be found in the Maastricht Guidelines: "Like civil and political rights, economic, social and cultural rights impose three different types of obligations on States: the obligations to respect, protect and fulfil" protected rights. Although the Maastricht Guidelines are directly concerned with the ICESCR, the language of 'respect', 'protect' and 'fulfil' also appears in the HRC's General Comments on the ICCPR.
See, The Maastricht Guidelines on the Violation of Economic, Social and Cultural Rights, available at: http://hrlibrary.umn.edu/instree/Maastrichtguidelines_.html at para 6-7. Following the publication of

a. The Obligation to Respect

The obligation to respect human rights requires States to "refrain from interfering with the enjoyment" of the rights contained in the two Covenants. [100] This is commonly understood as a negative obligation on States Parties not to violate human rights.[101] For example, the HRC's General Comment No. 37 on the Right of Peaceful Assembly states that Article 21 requires "there be no unwarranted interference with peaceful assemblies." The General Comment adds that "States are obliged, for example, not to prohibit, restrict, block, disperse or disrupt peaceful assemblies without compelling justification, nor to sanction participants or organizers without legitimate cause."[102]

b. The Obligation to Protect

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the *Maastricht Guidelines*, the CESCR made use of the tripartite framework in its General Comment No. 12 on The Right to Adequate Food in 1999. The General Comment notes the "right to adequate food, like any other human right, imposes three types or levels of obligations on States Parties: the obligations to *respect*, to *protect* and to *fulfil*." See, CESCR*, General Comment No. 12: The Right to Adequate Food,* 12 May 1999, available at: https://www.refworld.org/docid/4538838c11.html at para 15. For the HRC, see HRC, *General Comment No. 31 [80], The nature of the general legal obligation imposed on States Parties to the Covenant*, 26 May 2004, CCPR/C/21/Rev.1/Add.13, available at: https://www.refworld.org/docid/478b26ae2.html; HRC, *General CommentNno. 34, Article 19, Freedoms of opinion and expression*, 12 September 2011, CCPR/C/GC/34, available at: https://www.refworld.org/docid/4ed34b562.html; HRC, *General Comment No. 37, Article 21, Right of Peaceful Assembly,* 17 September 2020, CCPR/C/GC/37, available at: https://digitallibrary.un.org/record/3884725?ln=en.

[100] *Maastricht Guidelines on Violations of Economic, Social and Cultural Rights*, available at http://hrlibrary.umn.edu/instree/Maastrichtguidelines_.html at para 6.

[101] See also CESCR General Comment No. 12 which states that the "obligation to *respect* existing access to adequate food requires States parties not to take any measures that result in preventing such access". See, CESCR*, General Comment No. 12: The Right to Adequate Food,* 12 May 1999, available at: https://www.refworld.org/docid/4538838c11.html at para 15. F. Mégret, 'Nature of Obligations' in D. Moeckli, S. Sangeeta, S. Sandesh, and D. Harris (eds) *International Human Rights Law* (3rd Edn, Oxford, 2018) p. 97.

[102] HRC, *General Comment No. 37, Article 21, Right of Peaceful Assembly,* 17 September 2020, CCPR/C/GC/37, available at: https://digitallibrary.un.org/record/3884725?ln=en at para 23.

The obligation to protect against human rights violations is understood to require State Parties to protect individuals from non-state actors in circumstances where non-state actors may violate individuals' human rights.[103] The obligation to protect has both a preventative and remedial dimension and is commonly understood as a positive obligation.[104] A detailed analysis of the obligation to provide effective remedies for human rights violations can be found in Part 3.2 of this report.

The HRC's General Comment No. 31(80) explains that, "the positive obligations on States Parties to ensure Covenant rights will only be fully discharged if individuals are protected by the State, not just against violations of Covenant rights by its agents, but also against acts committed by private persons or entities that would impair the enjoyment of Covenant rights."[105]

The obligation to protect also applies to economic, social and cultural rights. For example, CESCR General Comment No. 12 states that "[t]he obligation to protect requires measures by the State to ensure that enterprises or individuals do not deprive individuals of their access to adequate food."[106]

The duty to protect human rights does not render a State responsible for all conduct by a non-state actor that is contrary to human rights.[107] The HRC and

[103] The obligation to protect human rights is distinct from the Responsibility to Protect (R2P).
[104] See for example Human Rights Council resolution A/HRC/RES/17/4 (2011): "States must protect against human rights abuse within their territory and/or jurisdiction by third parties, including business enterprises. This requires taking appropriate steps to prevent, investigate, punish and redress such abuse through effective policies, legislation, regulations and adjudication." See also W. Kälin, J. Künzli, *The Law of International Human Rights Protection* (2nd Edn, OUP, 2019) p. 102.
[105] HRC, *General Comment No. 31 [80], The nature of the general legal obligation imposed on States Parties to the Covenant*, 26 May 2004, CCPR/C/21/Rev.1/Add.13, available at: https://www.refworld.org/docid/478b26ae2.html at para 8.
[106] CESCR, *General Comment No. 12: The Right to Adequate Food,* 12 May 1999, available at: https://www.refworld.org/docid/4538838c11.html at para 15.
[107] The State is only "liable for those failures that can be traced to its shortcomings in protecting individuals from others." As such, an obligation "to exercise due diligence to prevent, punish,

CESCR General Comments make clear that States Parties have some discretion as to how they protect individuals' human rights from interferences by non-state actors.[108]

c. The Obligation to Fulfil

The obligation to fulfil human rights is understood to impose a duty on States Parties to "adopt appropriate legislative, administrative and other measures towards the full realization of human rights."[109]

The full realisation of human rights has been broken up into three separate obligations to "facilitate, promote and provide".[110] The obligation to fulfil human

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investigate or redress the harm" caused by non-state actors falls on the State. There are also some rights that can only be violated by the State. See F. Mégret, 'Nature of Obligations' in D. Moeckli, S. Sangeeta, S. Sandesh, and D. Harris (eds) *International Human Rights Law* (3rd Edn, Oxford, 2018) at p. 98; HRC, *General Comment No. 31 [80], The nature of the general legal obligation imposed on States Parties to the Covenant*, 26 May 2004, CCPR/C/21/Rev.1/Add.13, available at: https://www.refworld.org/docid/478b26ae2.html at para 8.

[108] CESCR, *General Comment No. 9: The domestic application of the Covenant*, 3 December 1998, E/C.12/1998/24, available at: https://www.refworld.org/docid/47a7079d6.html at para 5-6; HRC, *General Comment No. 31 [80], The nature of the general legal obligation imposed on States Parties to the Covenant*, 26 May 2004, CCPR/C/21/Rev.1/Add.13, available at: https://www.refworld.org/docid/478b26ae2.html at para 8.

[109] OHCHR, Principles and Guidelines for a Human Rights Approach to Poverty Reduction Strategies, HR/PUB/06/12 (Adopted 2006) at para 48. Available at: https://www.ohchr.org/sites/default/files/Documents/Publications/PovertyStrategiesen.pdf.

[110] A detailed explanation of the obligation to fulfil is found in the CESCR General Comment No. 15 in relation to the Rights to Water: "*The obligation to fulfil can be disaggregated into the obligations to facilitate, promote and provide. The obligation to facilitate requires the State to take positive measures to assist individuals and communities to enjoy the right. The obligation to promote obliges the State party to take steps to ensure that there is appropriate education concerning the hygienic use of water, protection of water sources and methods to minimize water wastage. States parties are also obliged to fulfil (provide) the right when individuals or a group are unable, for reasons beyond their control, to realize that right themselves by the means at their disposal. The obligation to fulfil requires States parties to adopt the necessary measures directed towards the full realization of the right to water. The obligation includes, inter alia, according sufficient recognition of this right within the national political and legal systems, preferably by way of legislative implementation; adopting a national water strategy and plan of action to*

rights is also characterised as an obligation to create the conditions in which individuals can effectively rely on their rights.[111] For example, in relation to the right to a fair trial, a State may need to provide legal aid or interpreters. It might also require public educational campaigns to ensure that individuals are in a position to take advantage of their rights.

d. Who is the Duty-Bearer?

From the position of international human rights law, "[a]ll branches of government (executive, legislative and judicial), and other public or governmental authorities, at whatever level - national, regional or local - are in a position to engage the responsibility of the State Party".[112] This means States Parties "may not point to the fact that an action incompatible with the provisions of the Covenant was carried out by another branch of government as a means of seeking to relieve the State Party from responsibility for the action and consequent incompatibility".[113] This flows from Article 27 of the VCLT which states "[a] party may not invoke the provisions of its internal law as justification for its failure to perform a treaty".[114]

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realize this right; ensuring that water is affordable for everyone; and facilitating improved and sustainable access to water, particularly in rural and deprived urban areas." CESCR, *General Comment No. 15: The Right to Water (Arts. 11 and 12 of the Covenant),* 20 January 2003, E/C.12/2002/11, available at: https://www.refworld.org/docid/4538838d11.html at paras 25-6.

[111] See UN General Assembly, United Nations Declaration on Human Rights Education and Training (2011), 19 December 2011, A/RES/66/137 available at https://www.ohchr.org/en/resources/educators/human-rights-education-training/11-united-nations-declaration-human-rights-education-and-training-2011.

[112] HRC, *General Comment No. 31 [80], The nature of the general legal obligation imposed on States Parties to the Covenant*, 26 May 2004, CCPR/C/21/Rev.1/Add.13, available at: https://www.refworld.org/docid/478b26ae2.html at para 4.

[113] HRC, *General Comment No. 31 [80], The nature of the general legal obligation imposed on States Parties to the Covenant,* 26 May 2004, CCPR/C/21/Rev.1/Add.13, available at: https://www.refworld.org/docid/478b26ae2.html at para 4.

[114] Vienna Convention on the Laws of Treaties 1969, article 27.

Although all branches of the government are in a position to engage the responsibility of the State, how the performance of the duties created by the Covenants is allocated within the State is a matter of domestic constitutional law.[115]

e. Who are the Beneficiaries of the Rights?

Generally, the beneficiaries of the rights in the ICCPR are not limited to citizens of States Parties. As General Comment No. 31(80) makes clear, "the enjoyment of Covenant rights is not limited to citizens of States Parties but must also be available to all individuals, regardless of nationality or statelessness, such as asylum seekers, refugees, migrant workers and other persons, who may find themselves in the territory or subject to the jurisdiction of the State Party".[116]

There are, however, some notable exceptions where the ICCPR specifically delineates the beneficiaries of the rights. For example, Article 12(1) ICCPR specifies that "[e]veryone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence".[117]

[115] There are a limited range of rights for which the Covenants specify institutions which have the primary duties. For example, article 14 ICCPR makes clear that a judicial organ ought to implement the right to a fair trial, even though the applicability of this right is not limited to these state organs. See HRC, *General Comment No. 31 [80], The nature of the general legal obligation imposed on States Parties to the Covenant*, 26 May 2004, CCPR/C/21/Rev.1/Add.13, available at: https://www.refworld.org/docid/478b26ae2.html at paras 4 and 13; CESCR, *General Comment No. 9: The domestic application of the Covenant,* 3 December 1998, E/C.12/1998/24, available at: https://www.refworld.org/docid/47a7079d6.html at paras 1 and 5.

[116] HRC, *General Comment No. 31 [80], The nature of the general legal obligation imposed on States Parties to the Covenant*, 26 May 2004, CCPR/C/21/Rev.1/Add.13, available at: https://www.refworld.org/docid/478b26ae2.html at para 10.

[117] ICCPR, Article 12. Article 25 also specifies that "every citizen shall have the right … to take part in public affairs".

Although many of the rights in the ICESCR extend to "everyone",[118] it is recognised that States Parties can determine to what extent they would guarantee the economic rights in the Covenant to non-nationals.[119]

ii. Implementing the Obligations to Respect, Protect, and Fulfil Human Rights: The Role of Parliament and Domestic Bills of Rights

Neither the ICCPR nor the ICESCR impose an obligation on the States Parties formally to incorporate the respective Covenants into domestic law. Both the HRC and the CESCR stress that there are many ways States can fulfil their obligations under the Covenants, and indeed States Parties can fulfil their obligations to respect, protect and fulfil human rights without incorporating the treaties.[120] There are, however, two points that can be highlighted here.

Firstly, in a parliamentary democracy it is desirable that Parliament plays a key role in the process of implementing of international human rights law.[121] The Inter-

[118] See ICESCR, Articles 6-13, 14.

[119] See in particular Article 2(3) ICESCR.

[120] HRC, *General Comment No. 31 [80], The nature of the general legal obligation imposed on States Parties to the Covenant*, 26 May 2004, CCPR/C/21/Rev.1/Add.13, available at: https://www.refworld.org/docid/478b26ae2.html at para 13; CESCR, *General Comment No. 9: The domestic application of the Covenant*, 3 December 1998, E/C.12/1998/24, available at: https://www.refworld.org/docid/47a7079d6.html at para 3. For more discussion, also see part 3.2.

[121] An emphasis on the role of Parliament in protecting human rights has been growing over the past decade. Scholars and practitioners have highlighted the 'shared responsibility' between the three branches of the State to protect human rights. Under this notion of shared responsibility, Parliament is called upon to take a more active role than it has done so in the past. See M. Hunt, 'Introduction', in M. Hunt, H. Hooper and P. Yowell (eds) *Parliaments and Human Rights: Redressing the Democratic Deficit* (Hart Publishing 2015). Recent research into this issue of the role of Parliaments and human rights has found that although there is an emerging consensus around the role of Parliaments, there is "not yet a set of agreed standards or guidance about what practices could be adopted for such parliamentary involvement to be effective". See B. Chang, 'Global developments in the in the role of parliaments in the protection and promotion of human rights and the rule of law: An emerging consensus' available at: https://www.law.ox.ac.uk/sites/files/oxlaw/brian_chang_-

Parliamentary Union and Office of the High Commission for Human Rights ('OHCHR') have published a Handbook for Parliamentarians that seeks to offer guidance for parliamentarians on how they can implement international human rights law domestically. The Handbook notes "Parliaments and parliamentarians have a key role to play when it comes to adopting the necessary implementing legislation (civil, criminal and administrative law) in all areas, including health care, social security and education."[122] Indeed, in many instances Parliament is the only body in a State that has the legitimacy and power to effectively implement the necessary measures to ensure human rights are respected, protected and fulfilled.

Where a State chooses not to incorporate the ICCPR and ICESCR, a domestic bill of rights can be used to facilitate Parliament performing a leading role in implementing international human rights law obligations. In this regard, the Commonwealth Latimer House Principles on the Three Branches of Government suggest that there "should be adequate parliamentary examination of proposed legislation" and "[p]arliaments should, where relevant, be given the opportunity to consider international instruments or regional conventions agreed to by governments".[123]

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an_emerging_consensus.pdf; OHCHR, Contribution of parliaments to the work of the Human Rights Council and its universal periodic review, 17 May 2018, A/HRC/38/25; Commonwealth (Latimer House) Principles on the Three Branches of Government, agreed by the Law Ministers and endorsed by the Commonwealth Heads of Government Meeting (Abuja, Nigeria, 2003).

[122] Inter-Parliamentary Union and Office of the High Commissioner for Human Rights, Human Rights: Handbook for Parliamentarians no. 26, HR/PUB/16/4 (UN) 2016. Available at: https://www.ohchr.org/sites/default/files/Documents/Publications/HandbookParliamentarians.pdf at p. 97. The Handbook, in Box 34 on p. 99, gives a useful explanation of how Finland ensures compliance with international human rights law.

[123] Commonwealth Latimer House Principles on the Three Branches of Government, VIII, para 1 and 3. The Commonwealth Principles are not internationally binding law. However, they are agreed by the Heads of State of the Commonwealth and are thus can be used as evidence of state practice and so contribute to international customary law.

The Handbook for Parliamentarians also suggests other ways that Parliaments can contribute to the fulfilment of international human rights law obligations.[124] It is stressed that these are not international human rights law obligations, but suggestions by the OHCHR and IPU on how best to implement human rights at the domestic level. Both the OHCHR and IPU have a wealth of experience in supporting States Parties implementing human rights obligations.

As an example, the Handbook recommends that Parliamentarians can use their role in approving the national budget to ensure adequate resources are allocated to the implementation of human rights obligations.[125] As noted by the OHCHR, "[t]o facilitate the implementation of civil, cultural, economic, political and social rights nationwide it is important for a State's budgetary efforts to be aligned with its human rights obligations. This is only logical as budgets are the principal

[124] The OHCHR Handbook for Parliamentarians also recommends parliamentarians take on an active role in the process of ratifying human rights treaties; in overseeing the executive branch, following up on recommendations and decisions, becoming involved with the universal periodic review; mobilising public opinion and participating in international efforts. Inter-Parliamentary Union and Office of the High Commissioner for Human Rights, Human Rights: Handbook for Parliamentarians no. 26, 2016, HR/PUB/16/4 (UN). Available at: https://www.ohchr.org/sites/default/files/Documents/Publications/HandbookParliamentarians.pdf.

[125] Inter-Parliamentary Union and Office of the High Commissioner for Human Rights, Human Rights: Handbook for Parliamentarians no. 26, 2016, HR/PUB/16/4 (UN). Available at: https://www.ohchr.org/sites/default/files/Documents/Publications/HandbookParliamentarians.pdf at p. 100.
Also note the following: "A rights-based approach to the budget demands that policy choices be made on the basis of transparency, accountability, non-discrimination and participation. These principles should be applied at all levels of the budgetary process, from the drafting stage, which should be linked to the national development plans made through broad consultation, through approval by Parliament, which in turn must have proper amendment powers and time for a thorough evaluation of proposals, implementation and monitoring." OHCHR, Human Rights in Budget Monitoring, Analysis and Advocacy, March 2010. Available at: https://internationalbudget.org/wp-content/uploads/Human-Rights-in-Budget-Monitoring-Analysis-and-Advocacy-Training-Guide.pdf at p. 4.

instrument for a State (Government) to mobilize, allocate and spend resources for development and governance."[126]

In the Westminster Parliament, the Joint Committee of Human Rights ('JCHR') has led the way in facilitating Parliament's engagement with international human rights law.[127] The JCHR conducts thematic reports examining human rights issues in the UK, scrutinises bills for human rights compatibility and conducts post-legislative scrutiny. In the Scottish Parliament, the Equality, Human Rights and Civil Justice Committee has a similar remit. This committee was set up in 2016 with the responsibility for looking at human rights issues in the Scottish Parliament.[128]

Although these committees have played an important role in raising awareness of human rights issues within the UK and Scottish Parliaments, further steps could be taken to strengthen the Parliaments' engagement with the implementation of the obligations to respect, protect and fulfil human rights.[129] When it comes to strengthening the role of Parliament in protecting human rights, there is much scope for the various Parliamentary bodies around the UK to learn from each other.[130]

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[126] OHCHR, Human Rights Indicators: A Guide to Measurement and Implementation, 2012, HR/PUB/12/5. Available at: https://www.ohchr.org/sites/default/files/Documents/Publications/Human_rights_indicators_en.pdf at p. 121.

[127] The JCHR has twelve members. Members can be appointed from both the House of Lords and the House of Commons. See, https://committees.parliament.uk/committee/93/human-rights-joint-committee/. For analysis of the impact of the JCHR on Parliament and its engagement with human rights issues, see A. Kavanagh, 'The Joint Committee on Human Rights: A Hybrid Breed of Constitutional Watchdog' in M. Hunt, H.J. Hooper and P. Yowell (eds) *Parliaments and Human Rights: Redressing the Democratic Deficit* (Hart Publishing 2015).

[128] For more information on the committee see, https://archive2021.parliament.scot/parliamentarybusiness/currentcommittees/106453.aspx.

[129] See M. Hunt, 'Enhancing Parliaments? Role in the Protection and Realisation of Human Rights' in M. Hunt, H.J. Hooper and P. Yowell (eds) *Parliaments and Human Rights: Redressing the Democratic Deficit* (Hart Publishing 2015).

[130] "In Wales, for example, less partisan disagreement about human rights and a stronger consensus about the existing institutional arrangements for their protection appears to have led to the Welsh

The second important point is that it is necessary for States Parties to continually assess their own laws and practices for conformity with their international human rights law obligations.[131] The HRC has expressed the view that Article 2(2) of the ICCPR requires that "States Parties take the necessary steps to give effect to the Covenant rights in the domestic order".[132] Similarly, the CESCR is of the view "States should modify the domestic legal order as necessary in order to give effect to their treaty obligations".[133] It follows that "[w]here there are inconsistencies between domestic law and the Covenant[s], … domestic law or practice [must] be changed to meet the standards imposed by the Covenant[s'] substantive guarantees."[134]

A domestic bill of rights can be used to facilitate this by providing a mechanism for this assessment. Such a mechanism may be court based, parliamentary based, or make use of both the courts and Parliament. [135]

Assembly focusing on the promotion of certain human rights where the relevant substantive areas of law making are within the Assembly's competence, and to the adoption of an explicitly human rights-based approach to policy rather than a focus on negative compliance. This has led, for example, to a ground breaking measure imposing a duty on the Welsh Ministers to have due regard to the requirements of the United Nations Convention on the Rights of the Child (UNCRC) when exercising any of their functions". See M. Hunt, 'Enhancing Parliaments? Role in the Protection and Realisation of Human Rights' in M. Hunt, H.J. Hooper and P. Yowell (eds) *Parliaments and Human Rights: Redressing the Democratic Deficit* (Hart Publishing 2015) at p. 481.

[131] In addition to the detail below, Part 3.3 details the obligation on States to monitor and report on the implementation of their international human rights obligations.

[132] HRC, *General Comment No. 31 [80], The nature of the general legal obligation imposed on States Parties to the Covenant,* 26 May 2004, CCPR/C/21/Rev.1/Add.13, available at: https://www.refworld.org/docid/478b26ae2.html at para 13.

[133] CESCR, *General Comment No. 9: The domestic application of the Covenant*, 3 December 1998, E/C.12/1998/24, available at: https://www.refworld.org/docid/47a7079d6.html at para 3.

[134] HRC, *General Comment No. 31 [80], The nature of the general legal obligation imposed on States Parties to the Covenant*, 26 May 2004, CCPR/C/21/Rev.1/Add.13, available at: https://www.refworld.org/docid/478b26ae2.html at para 13.

[135] Finland has a strong parliamentary method for assessing legislations' consistency with human rights. For more information, see Bonavero Report '*The Development and Application of the Concept of the Progressive Realisation of Human Rights: Report to the Scottish National Taskforce for Human Rights Leadership'* available at https://www.law.ox.ac.uk/sites/files/oxlaw/bonavero_report_12021_1.pdf.

In the UK, the HRA was carefully designed to allow both the courts and the UK Parliament to play a role in assessing the law's consistency with international human rights law. Section 3 of the HRA requires the courts "so far as it is possible to do so" to interpret legislation compatibility with the rights in the ECHR.[136] Section 4 allows the court to issue a declaration of incompatibility where it does not feel able to do this.[137] A declaration of incompatibility does not affect the validity of the legislation but sends a signal to the UK Parliament that the legislation infringes on human rights in some way. It is then for Parliament to decide how to respond.[138] This has enabled the courts to oversee legislation's compatibility with human rights whilst preserving parliamentary sovereignty.[139]

Section 19 HRA has also facilitated Parliament taking a more active role in assessing legislation's consistency with human rights. Section 19 HRA requires the government to issue a statement of human rights (in)compatibility for legislation it introduces to Parliament.[140] Following pressure from the JCHR, the government produces human rights memoranda that justify any statement of compatibility issued. In turn, these memoranda are scrutinised by the JCHR.[141] As noted by

[136] ss. 3 HRA 1998.

[137] "If the court is satisfied that the provision is incompatible with a Convention right, it may make a declaration of that incompatibility." See, ss. 4(2) HRA 1998.

[138] In most instances where the courts have issued a declaration of incompatibility, Parliament has amended the law. The notable exception was in the case of prisoner voting rights.

[139] The Independent Review of the Human Rights Act: Terms of Reference. Available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/953347/human-rights-review-tor.pdf at p. 179

[140] Ss. 19 HRA 1998 "(1)A Minister of the Crown in charge of a Bill in either House of Parliament must, before Second Reading of the Bill—(a) make a statement to the effect that in his view the provisions of the Bill are compatible with the Convention rights ("a statement of compatibility"); or (b) make a statement to the effect that although he is unable to make a statement of compatibility the government nevertheless wishes the House to proceed with the Bill."

[141] For more detail see, A. Kavanagh, 'The Joint Committee on Human Rights: A Hybrid Breed of Constitutional Watchdog' in M. Hunt, H.J. Hooper and P. Yowell (eds) *Parliaments and Human Rights: Redressing the Democratic Deficit* (Hart Publishing 2015).

Kavanagh, mechanisms such as Section 19 are important as they show that "human rights in the UK are not the exclusive domain of the courts".[142]

2. The Obligation to Provide an Effective Framework of Remedies

Both the ICCPR and the ICESCR are understood to require States Parties to provide a domestic framework of remedies for violations of Covenant rights. The origins of this obligation can be found in Article 8 of the UDHR, which states: "Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law."[143]

One important function of many domestic bills of human rights is the provision of effective remedies for human rights that on the level of international law, or through mere ratification by the respective State, may be understood as non-justiciable. Bills of right may transform international rights of programmatic nature

[142] A. Kavanagh, 'The Joint Committee on Human Rights: A Hybrid Breed of Constitutional Watchdog' in M. Hunt, H.J. Hooper and P. Yowell (eds) *Parliaments and Human Rights: Redressing the Democratic Deficit* (Hart Publishing 2015) at p. 116.

[143] Universal Declaration of Human Rights 1948, Article 8. The right to an effective remedy is widely recognised in a number of other international and regional human rights instruments. See, CAT, Article 13; CERD, Article 6; Declaration on the Protection of All Persons from Enforced Disappearance, Articles 9 and 13; UN Principles on Extra-legal Executions, Principles 4 and 16; Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, Principles 4-7; Vienna Declaration and Programme of Action, Article 27; Programme of Action of the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance, Articles 13, 160-162 and 165; ECHR, Article 13; Charter of Fundamental Rights of the European Union, Article 47; ACHR, Article 25; American Declaration of the Rights and Duties of Man, Article XVIII; Inter-American Convention on Forced Disappearance of Persons, Article III(1); Inter-American Convention to Prevent and Punish Torture, Article 8(1); AfrCHPR, Article 7(1)(a); and Arab Charter on Human Rights, Article 9.

into justiciable rights through the use of more concrete and operational language, or they may create specific remedies for alleged violations of human rights.[144]

i. The Source of the Obligation: The ICCPR

The obligation to provide effective remedies domestically for violations of the Covenant finds explicit recognition in Article 2(3) ICCPR:

> *3. Each State Party to the present Covenant undertakes:*
>
> *(a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;*
> *(b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;*
> *(c) To ensure that the competent authorities shall enforce such remedies when granted.*

Article 2(3) of the ICCPR does not specify that every violation of civil and political rights requires a judicial remedy and General Comment No. 31(80) contemplates States Parties may "establish [...] appropriate judicial and administrative mechanisms".[145] However, the HRC has specified in individual communications that serious violations require a judicial remedy.[146] The UN General Assembly Resolution on *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims*

[144] For example, sections 6 and 7 HRA have made the rights in the ECHR actionable in the UK.
[145] HRC, *General Comment No. 31 [80], The nature of the general legal obligation imposed on States Parties to the Covenant*, 26 May 2004, CCPR/C/21/Rev.1/Add.13, available at: https://www.refworld.org/docid/478b26ae2.html at para 15.
[146] *F. Birindwa ci Bithashwiwa and E. Tshisekedi wa Mulumba v Zaire*, Human Rights Committee Communication 241/1987, UN Doc CCPR/C/37/D/241/1987 (1989), para 14.

of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law reiterates this.[147]

Specific General Comments also give guidance on when access to a judicial or an administrative remedy is appropriate. For example, General Comment No. 36, regarding the right to life, states that "[g]iven the importance of the right to life, States parties must generally refrain from addressing violations of article 6 merely through administrative or disciplinary measures".[148]

The HRC considers the obligation to provide an effective remedy as non-derogable. General Comment No. 29 states, "Article 2, paragraph 3, of the Covenant requires a State party to the Covenant to provide remedies for any violation of the provisions of the Covenant. This clause is not mentioned in the list of non-derogable provisions in article 4, paragraph 2, but it constitutes a treaty obligation inherent in the Covenant as a whole."[149]

[147] UN General Assembly, Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, 21 March 2006, A/RES/60/147 at para 12.

[148] HRC, *General Comment No. 36, The Right to Life: article 6,* 3 September 2019, CCPR/C/GC/36 at para 27. Article 14 ICCPR also specifies that "[i]n the determination of … rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law." General Comment No. 32 notes, "rights and obligations in a suit at law" encompasses "(a) judicial procedures aimed at determining rights and obligations pertaining to the areas of contract, property and torts in the area of private law, as well as (b) equivalent notions in the area of administrative law." HRC*, General Comment No. 32, Article 14: Right to equality before courts and tribunals and to a fair trial,* 23 August 2007, CCPR/C/GC/32 at para 16.

[149] The General Comment continues, "Even if a State party, during a state of emergency, and to the extent that such measures are strictly required by the exigencies of the situation, may introduce adjustments to the practical functioning of its procedures governing judicial or other remedies, the State party must comply with the fundamental obligation, under article 2, paragraph 3, of the Covenant to provide a remedy that is effective." See, HRC, *General Comment No. 29: Article 4: Derogations during a State of Emergency*, 31 August 2001, CCPR/C/21/Rev.1/Add.11, available at: https://www.refworld.org/docid/453883fd1f.html at para 14.

ii. The Source of the Obligation: The ICESCR

The CESCR has confirmed the importance of domestic remedies for violations of the Covenant rights. CESCR General Comment No. 9 states, "a State party seeking to justify its failure to provide any domestic legal remedies for violations of economic, social and cultural rights would need to show either that such remedies are not "appropriate means" within the terms of article 2.1 of the Covenant or that, in view of the other means used, they are unnecessary. It will be difficult to show this and the Committee considers that, in many cases, the other "means" used could be rendered ineffective if they are not reinforced or complemented by judicial remedies."[150]

As with civil and political rights, the CESCR has stated the right to an effective remedy under the ICESCR does not always require a judicial remedy.[151] Any administrative measures should be "accessible, affordable, timely and effective", and there should be a "right of judicial appeal from administrative procedures".[152] A judicial remedy is required whenever "a Covenant right cannot be made fully effective without some role for the judiciary".[153]

CESCR, *General Comment No. 9: The domestic application of the Covenant*, 3 December 1998, E/C.12/1998/24, available at: https://www.refworld.org/docid/47a7079d6.html at para 3.. See also CESCR *I.D.G v Spain*, Communication no. 2/2014, Views of 17 June 2015, E/C.12/55/D/2/2014. A number of CESCR general comments also refer to the need to provide effective remedies. For example, General Comment no. 14 states, "[a]ny person or group victim of a violation of the right to health should have access to effective judicial or other appropriate remedies at both national and international levels". See CESCR, *General comment No. 14: The right to the highest attainable standard of health*, 11 August 2000, E/C.12/2000/4, available at: https://www.refworld.org/pdfid/4538838d0.pdf.

[151] CESCR, *General Comment No. 9: The domestic application of the Covenant*, 3 December 1998, E/C.12/1998/24, available at: https://www.refworld.org/docid/47a7079d6.html at para 9.

[152] CESCR, *General Comment No. 9: The domestic application of the Covenant*, 3 December 1998, E/C.12/1998/24, available at: https://www.refworld.org/docid/47a7079d6.html at para 9.

[153] CESCR, *General Comment No. 9: The domestic application of the Covenant*, 3 December 1998, E/C.12/1998/24, available at: https://www.refworld.org/docid/47a7079d6.html at para 9.

The provision of domestic remedies for violations of economic, social and cultural rights has been subject to much debate.[154] In the early years of the ICESCR's operation, it was commonly considered that economic, social and cultural rights were not justiciable.[155] However, an emerging consensus across various sources recognises that economic, social and cultural rights are capable of being justiciable.[156] As General Comment No. 9 notes there is a difference between "justiciability (which refers to those matters which are appropriately resolved by the

[154] See Vierdag EW, 'The Legal Nature of the Rights Granted by the International Covenant on Economic, Social and Cultural Rights' (1978) 9 Netherlands Yearbook of International Law 69; O'Neill, 'The dark side of human rights' (2005) 81 International Affairs 427; S. Liebenberg, 'The Protection of Economic and Social Rights in Domestic Legal Systems' in A. Eide, C. Krause, and A. Rosas, *Economic, Social and Cultural Rights: a Textbook* (2nd edn, Leiden: Martinus Nijhoff, 2001); M. Scheinin, 'Economic and Social Rights as Legal Rights' in A. Eide, C. Krause, and A. Rosas, *Economic, Social and Cultural Rights: a Textbook,* (2nd edn, Leiden: Martinus Nijhoff, 2001); A. Úbeda de Torres, 'Justiciability and Social Rights', in C. Binder, J. Hofbauer, F. Piovesan, and A. Úbeda de Torres *Research Handbook on International Law and Social Rights* (Edward Elgar Publishing, 2020).

[155] The reasons why economic and social rights were considered non-justiciable by courts or other bodies include: indeterminacy of the rights, ESC rights were considered 'programmatic rights' as opposed to legal rights and it was illegitimate for courts to adjudicate violations of these rights. Over the past three decades there has been pushback against these arguments. It has been highlighted that ESC rights are not more abstract nor indeterminate than civil and political rights. The CESCR has also rejected the idea that the rights in the ICESCR are merely 'programmatic' and do not create legal obligations. See CESCR, *General Comment No. 9: The domestic application of the Covenant*, 3 December 1998, E/C.12/1998/24, available at: https://www.refworld.org/docid/47a7079d6.html at para 10; CESCR, Consideration of reports submitted by States parties under articles 16 and 17 of the Covenant : concluding observations of the Committee on Economic, Social and Cultural Rights: Switzerland, 7 December 1998, E/C.12/1/Add.30 at para 10.

[156] The 1987 Limburg Principles clearly contemplated that some of the rights in the ICESCR were justiciable. CESCR General Comment 9 notes "there is no [ICESCR] right which could not, in the great majority of systems, be considered to possess at least some significant justiciable dimensions". Furthermore, the adoption of the Option Protocol to the ICESCR in 2008 which allow individuals to submit complaints of violations of ESC rights to the CESCR is strong evidence that ESC rights are justiciable. For an account of the regional and international ESC adjudicative mechanisms see M. Scheinin, 'Economic and Social Rights as Legal Rights' in A. Eide, C. Krause, and A. Rosas, *Economic, Social and Cultural Rights: a Textbook,* (2nd edn, Leiden: Martinus Nijhoff, 2001). For a comparative account of the justiciability of ESC rights see, M. Langford (ed), *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (Cambridge University Press 2009).

courts) and norms which are self-executing (capable of being applied by courts without further elaboration)".[157]

Despite this emerging consensus, it should be borne in mind that there are still questions over how economic, social and cultural rights are best rendered justiciable at the domestic level. There is no obligation to incorporate the ICESCR into domestic law, and simply reproducing the text of the ICESCR is not the most effective way of protecting the rights it contains.[158] The ICESCR imposes a number of positive obligations on State Parties to provide individuals with a particular benefit, such as education. However, the Covenant leaves it to States Parties to determine the exact contours of that benefit itself – for example, how many years of education – and how it is protected in domestic law. In a democratic society, it is desirable that legislatures have a role in determining the exact content of the benefit. Without a domestic legislative framework already in place delineating the content, it is hard for the courts to determine the scope of such obligations. This is recognised in the Article 2(1) ICESCR which emphasises the importance of the "adoption of legislative measures" to implement the obligations in the ICESCR.[159]

[157] CESCR, *General Comment No. 9: The domestic application of the Covenant*, 3 December 1998, E/C.12/1998/24, available at: https://www.refworld.org/docid/47a7079d6.html at para 10. Though, at para 11 the CESCR does not rule out that the rights in the Covenant are not self-executing.

[158] This is recognised by CESCR General Comment No. 9 at para 8. Though, the CESCR does suggest that it is "desirable" for States to incorporate the ICESCR into their domestic order. CESCR*, General Comment No. 9: The domestic application of the Covenant*, 3 December 1998, E/C.12/1998/24, available at: https://www.refworld.org/docid/47a7079d6.html. For discussion, see Bonavero Report '*The Development and Application of the Concept of the Progressive Realisation of Human Rights: Report to the Scottish National Taskforce for Human Rights Leadership'* available at https://www.law.ox.ac.uk/sites/files/oxlaw/bonavero_report_12021_1.pdf at p. 71. See also, J. King, *Judging Social Rights* (Cambridge University Press 2012).

[159] ICESCR, Article 2(1).

iii. **The Requirements of an Effective Remedy[160]**

a. Independent and impartial organ

Any organ, judicial or administrative, determining claims of a violation ought to be "independent and impartial".[161] The HRC's General Comment No. 32 states that "independence" refers to "to the procedure and qualifications for the appointment of judges, and guarantees relating to their security of tenure, [...] and the actual independence of the judiciary from political interference by the executive branch and legislature."[162]

[160] UN General Assembly, Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, 21 March 2006, A/RES/60/147. There is an extensive discussion of the requirements for an effective remedy in the International Commission of Jurists Handbook for Practitioners, though it should be noted that this also discusses sources other than the ICCPR and ICESCR. See, the *International Commission of Jurists, The Right to a Remedy and Reparation for Gross Human Rights Violations: A Practitioners Guide* (Revised Edition, 2018). Available at: https://www.icj.org/wp-content/uploads/2018/11/Universal-Right-to-a-Remedy-Publications-Reports-Practitioners-Guides-2018-ENG.pdf at 3.3.

[161] HRC, *General Comment No. 31 [80], The nature of the general legal obligation imposed on States Parties to the Covenant*, 26 May 2004, CCPR/C/21/Rev.1/Add.13, available at: https://www.refworld.org/docid/478b26ae2.html at para 15. See also, UN General Assembly, Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms, 9 December 1998, A/RES/53/144, Article 9; UN General Assembly, Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, 16 December 2005, A/RES/60/147; ECHR, Article 13.

[162] HRC, *General Comment No. 32, Article 14, Right to equality before courts and tribunals and to fair trial,* 23 August 2007, CCPR/C/GC/32, available at: *https://www.refworld.org/docid/478b2b2f2.html* at para 19.

Impartiality is understood to have two aspects. Firstly, it requires that "judges must not allow their judgement to be influenced by personal bias or prejudice".[163] Secondly, any tribunal or organ must appear to a reasonable observer to be impartial.[164]

b. The remedy is accessible[165]

Accessibility encompasses many aspects, including that the remedy is transparent;[166] is not unreasonably complicated;[167] and in some cases may require the provision of legal aid.[168]

c. Timely access to a remedy[169]

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[163] HRC, *General Comment No. 32, Article 14, Right to equality before courts and tribunals and to fair trial,* 23 August 2007, CCPR/C/GC/32, available at: *https://www.refworld.org/docid/478b2b2f2.html* at para 21.

[164] HRC, *General Comment No. 32, Article 14, Right to equality before courts and tribunals and to fair trial,* 23 August 2007, CCPR/C/GC/32, available at: *https://www.refworld.org/docid/478b2b2f2.html* at para 21.

[165] HRC, *General Comment No. 31 [80], The nature of the general legal obligation imposed on States Parties to the Covenant,* 26 May 2004, CCPR/C/21/Rev.1/Add.13, available at: https://www.refworld.org/docid/478b26ae2.html at para 15; CESCR*, General Comment No. 9: The domestic application of the Covenant,* 3 December 1998, E/C.12/1998/24, available at: https://www.refworld.org/docid/47a7079d6.html at para 9.

[166] CESCR*, General Comment No. 22: on the right to sexual and reproductive health*, 2 May 2016, E/C.12/GC/22. See also UN General Assembly, Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, 16 December 2005, A/RES/60/147, para 12(a).

[167] CESCR*, General Comment No. 17: The Right of Everyone to Benefit from the Protection of the Moral and Material Interests Resulting from any Scientific, Literary or Artistic Production of Which He or She is the Author* (Art. 15, Para. 1 (c) of the Covenant), 12 January 2006, E/C.12/GC/17, available at: https://www.refworld.org/docid/441543594.html at para 49.h.

[168] CESCR*, General Comment No. 7: The right to adequate housing (Art.11.1): forced evictions*, 20 May 1997, E/1998/22, available at: https://www.refworld.org/docid/47a70799d.html at para 15.

[169] CESCR, *General Comment No. 9: The domestic application of the Covenant,* 3 December 1998, E/C.12/1998/24, available at: https://www.refworld.org/docid/47a7079d6.html at para 9.

A consistent theme in the HRC's General Comments on the substantive rights is that remedies are provided promptly.[170] This may also require that investigation of alleged violations occur in a timely manner.[171]

d. The obligation to provide reparations

The HRC emphasises that "[w]ithout reparation to individuals whose Covenant rights have been violated, the obligation to provide an effective remedy [...] is not discharged".[172] In general, reparation should be proportional to the harm suffered.[173] It may "involve restitution, rehabilitation, and measures of satisfaction, such as public apologies, public memorials, guarantees of non-repetition and changes in laws and practices, as well as bringing to justice perpetrators of human rights violations".[174]

[170] See e.g. HRC, *General Comment No. 37, Article 21, Right of Peaceful Assembly,* 17 September 2020, CCPR/C/GC/37, available at: https://digitallibrary.un.org/record/3884725?ln=en at para 29; UN General Assembly, Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, 16 December 2005, A/RES/60/147.

[171] UN General Assembly, Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, 16 December 2005, A/RES/60/147, para 3(b).

[172] HRC*, General Comment No. 31 [80], The nature of the general legal obligation imposed on States Parties to the Covenant*, 26 May 2004, CCPR/C/21/Rev.1/Add.13, available at: https://www.refworld.org/docid/478b26ae2.html at para 16.

[173] UN General Assembly, Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, 16 December 2005, A/RES/60/147, para 15.

[174] HRC*, General Comment No. 31 [80], The nature of the general legal obligation imposed on States Parties to the Covenant*, 26 May 2004, CCPR/C/21/Rev.1/Add.13, available at: https://www.refworld.org/docid/478b26ae2.html at para 16.

3. The Obligation of Monitoring and Reporting on Human Rights

i. The Treaty Monitoring System[175]

There is an explicit obligation in the both the ICCPR and the ICESCR on States Parties to submit reports to the treaty monitoring bodies on the steps that they have taken to implement the rights contained in the Covenants.[176] The "[r]eports [should] indicate the factors and difficulties, if any, affecting the implementation of the present Covenant."[177]

As noted by the CESCR, the purpose of reporting is not merely procedural but has several objectives all connected to enhancing the enjoyment of human rights within the States Parties. CESCR General Comment No. 1 states that the monitoring and reporting obligation in the Covenant "is to ensure that the State party monitors the actual situation with respect to each of the rights on a regular basis and is thus aware of the extent to which the various rights are, or are not, being enjoyed by all individuals within its territory or under its jurisdiction". It adds that "the essential first step towards promoting the realization of economic, social and cultural rights is diagnosis and knowledge of the existing situation".[178] The same points can be made with respect to the ICCPR monitoring obligation.

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[175] The reporting obligations in the ICCPR and ICESCR are not the only reporting obligations that States have. All members of the United Nations are expected to take part in the Universal Periodic Review which is conducted by the Human Rights Council and aims to review the human rights situation in all 193 UN member states every four year. It is separate to the monitoring under the ICCPR and the ICESCR. The Universal Periodic Review was established by General Assembly Resolution 60/251. Under the universal periodic review process, UN member states also prepare 'national reports' detailing the fulfilment of their human rights obligations.

[176] "All the UN human rights treaties provide that States parties submit reports about the measures adopted in order to implement their treaty obligations. The initial reports are to be submitted within one or two years from the entry into force of the treaty for the State concerned, and thereafter, generally, every four or five years." De Schutter O, *International Human Rights Law: Cases, Materials, Commentary* (3rd Edn, CUP, 2019) at p. 874.

[177] ICCPR, Article 40(2); ICESCR, Article 17(2).

[178] CESCR, *General Comment No. 1: Reporting by States Parties*, 27 July 1981, E/1989/22, available at: https://www.refworld.org/docid/4538838b2.html at para 3.

As the reporting under human rights treaties is periodic and results in a set of concluding observations and recommendations by the respective treaty bodies, it gives rise to a reporting cycle at domestic level, allowing for the involvement of the executive, national human rights monitoring bodies (ombudspersons, commissioners, commissions, etc), legislatures and civil society actors, including NGOs, to engage in a process of stock-taking and benchmarking, towards improving the State's overall fulfilment of its obligations.[179]

To achieve the objectives of monitoring, it is desirable that any monitoring institution has the technical capacity to undertake quantitative and qualitative research to measure the effect policies have on fulfilling international human rights law obligations.[180] This too can be facilitated by rights-protecting legislation.

ii. National Mechanisms for Implementation, Reporting, and Follow-Up (NMIRF)

There is a significant burden on States to report to all relevant human rights bodies (including some of the UN Treaty Bodies discussed in this report, the HRC and the CESCR) and to follow-up and implement their many decisions and recommendations. Some countries have, therefore, created national mechanisms for implementation, reporting and follow-up ('NMIRFs') to centralise and coordinate these processes, and to translate international norms and recommendations into domestic reality.

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[179] CESCR, *General Comment No. 14, The Right to the Highest Attainable Standard of Health (Art. 12)*, 11 August 2000, E/C.12/2000/4, available at https://www.refworld.org/pdfid/4538838d0.pdf, at para 58; see also, OHCHR, Human Rights Indicators: A Guide to Measurement and Implementation, 2012, HR/PUB/12/5, available at: https://www.refworld.org/docid/51a739694.html, in particular p. 2-4, 20.

[180] Bonavero Report '*The Development and Application of the Concept of the Progressive Realisation of Human Rights: Report to the Scottish National Taskforce for Human Rights Leadership'* available at https://www.law.ox.ac.uk/sites/files/oxlaw/bonavero_report_12021_1.pdf at p. 72.

These mechanisms and systems vary across jurisdictions although it is worth noting here some relevant regional and international developments. First, the 'Pacific Principles of Practice' were launched in July 2020 as a guide to "the establishment and strengthening of NMIRFs in the Pacific" and to "contribute to the global conversation on effective implementation of human rights obligations and development commitments".[181] There are three main principles which are explored in more detail in the document: "1. There is no 'one size fits all' approach to NMIRFs; 2. NMIRFs should be permanent and be established by the executive or legislature; and 3. NMIRFs shall been given a structure, mandate and resources to effectively coordinate and track national implementation of human rights and other overlapping frameworks".[182] Second, in 2016, the OHCHR published a "Practical Guide to Effective State Engagement with International Human Rights Mechanisms" and a "Study of State Engagement with International Human Rights Mechanisms".[183] These aim to "identify key ingredients for a well-functioning and efficient national mechanism for reporting and follow-up, drawing on different State practices, while not proposing a one-size-fits-all solution".[184] In addition, earlier this year, the OHCHR submitted a report to the Human Rights Council at its 50th session setting out a summary of five regional consultations on "the

[181] See https://www.spc.int/updates/news/media-release/2020/07/pacific-principles-of-practice-launched-as-a-guide-towards and https://www.universal-rights.org/wp-content/uploads/2020/07/Pacific-Practice-Principles-final.pdf

[182] https://www.universal-rights.org/wp-content/uploads/2020/07/Pacific-Practice-Principles-final.pdf

[183] OHCHR, National Mechanisms for Reporting and Follow Up: A Practical Guide to Effective State Engagement with International Human Rights Mechanisms, 2016, HR/PUB/16/1, available at: https://www.ohchr.org/sites/default/files/Documents/Publications/HR_PUB_16_1_NMRF_PracticalGuide.pdf. OHCHR, National Mechanisms for Reporting and Follow Up: A Study of State Engagement with Human Rights Mechanisms, 2016, HR/PUB/16/1/Add.1, available at: https://www.ohchr.org/sites/default/files/Documents/Publications/HR_PUB_16_1_NMRF_Study.pdf

[184] OHCHR, National Mechanisms for Reporting and Follow Up: A Practical Guide to Effective State Engagement with International Human Rights Mechanisms, 2016, HR/PUB/16/1, available at: https://www.ohchr.org/sites/default/files/Documents/Publications/HR_PUB_16_1_NMRF_PracticalGuide.pdf.

establishment and development of [NMIRFs], and their impact on the effective implementation of human rights obligations and commitments.[185]

The UK does not yet have a formally composed NMIRF, and the UN High Commissioner for Human Rights has encouraged "efforts towards strengthening the national mechanism for comprehensive follow up and reporting in relation to international and regional human rights mechanisms and treaty obligations".[186] Great Britain's NHRI (the Equality and Human Rights Commission (EHRC)) has also called for the UK to establish an NMIRF.

iii. National Human Rights Institutions ('NHRIs')[187]

There is an emerging consensus that NHRIs can play an important role in the monitoring and implementation of human rights norms in States Parties. The adoption of the 'Paris Principles' in 1993 represents recognition that NHRIs are important human rights actors.[188]

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[185] See https://www.ohchr.org/en/treaty-bodies/follow-regional-consultations-national-mechanisms-implementation-reporting-and-follow. See also, Human Rights Council, 'Regional consultations on experiences and good practices relating to the establishment and development of national mechanisms for implementation, reporting and follow-up' 4 May 2022, A/HRC/50/64. Available at, http://undocs.org/A/HRC/50/64.

[186] See Letter from the UN High Commissioner for Human Rights to the UK Foreign Minister (23 October 2017), available at https://www.ohchr.org/en/hr-bodies/upr/gb-index. See similar remarks from the Committee on the Elimination of Discrimination against Women in its 'Concluding observations on the eighth periodic report of the United Kingdom of Great Britain and Northern Ireland' (14 March 2019) (CEDAW/C/GBR/CO/8), at para 26(b) "The Committee recommends that the State party … Consider establishing a national oversight mechanism to coordinate and monitor the implementation of the Convention, with the effective participation of its national human rights institutions and women's organizations", available at http://undocs.org/en/CEDAW/C/GBR/CO/8.

[187] National Human Rights Institutions are independent bodies established by legislation that have a role in human rights protection and promotion in States. NHRIs gain accreditation on the basis of their conformity to the Paris Principles.

[188] UN General Assembly, Principles relating to the Status of National Institutions (The Paris Principles), 20 December 1993, A/RES/48/134.

Several soft law instruments also recognise how these institutions can support Parliaments in their oversight role.[189] In considering the human rights protection framework in a domestic setting, these soft law instruments represent good practice. The Belgrade Principles encourage Parliaments and NHRIs to work together in the monitoring and reporting of human rights under the treaty body systems.[190] Furthermore, the principles recommend that Parliaments and NHRIs cooperate in monitoring the executives' responses to both national and international human rights judgments.[191]

A recent report by the OHCHR, United Nations Development Programme and Development Coordination Office identifies a number of 'good practice' approaches relating to involving NHRIs in the process of monitoring human rights implementation. The report finds that making use of NHRIs is an important way of ensuring that no one is left behind in the implementation and monitoring of human rights obligations.[192]

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[189] For example, the Abuja Guidelines on the Relationship between Parliaments, Parliamentarians and Commonwealth National Human Rights Institutions (adopted in Abuja (Nigeria) 2004).

[190] The Belgrade Principles were adopted by the 2012 International Seminar on the Relationship between National Human Rights Institutions and Parliaments, organized by the Office of the United Nations High Commissioner for Human Rights, the International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights, the National Assembly and the Protector of Citizens of the Republic of Serbia, with the support of the United Nations country team in Serbia. For greater discussion on the relationship between the Parliament and NHRIs see R. Murray, 'The Relationship Between Parliaments and National Human Rights Institutions', in J. Morison, K. McEvoy, and G. Anthony (eds), *Judges, Transition, and Human Rights* (Oxford, 2007; online edn, Oxford Academic, 22 Mar. 2012).

[191] HRC, *National institutions for the promotion and protection of human rights,* 1 May 2012, A/HRC/20/9, Annex, *Belgrade principles on the relationship between national human rights institutions and Parliaments.*

[192] OHCHR, UN Good Practices: How the universal periodic review process supports sustainable development, February 2022, available at: https://www.ohchr.org/sites/default/files/2022-02/UPR_good_practices_2022.pdf.

iv. **The Role of Parliament in Implementation, Monitoring, Follow-Up**

There is a degree of overlap between this section and Part 3.1 covering the implementation of the obligations to respect, protect and fulfil as the process of implementation is closely linked to monitoring.

International human rights law does not require Parliaments to engage in monitoring. However, considering Parliaments' scrutiny role it is desirable that they do. There are many ways that Parliaments can contribute to this process of monitoring.

Firstly, in recognition of the role that Parliaments can, but frequently do not, play in monitoring compliance with international human rights obligations, the International Parliamentary Union and OHCHR's Handbook for Parliamentarians suggests that parliamentarians become more actively involved in the treaty monitoring process. This may be through ensuring Parliament is kept up to date with the monitoring process, or by MPs carrying out "on-the-spot visits to hospitals, schools, prisons, and other places… of detention to ensure that human rights are respected".[193]

Although the engagement of the Westminster Parliament, and in particular the JCHR, with the treaty monitoring systems has increased over the past decade, there is comparatively greater engagement in the devolved administrations than at Westminster. In the 2012 Universal Periodic Review process the devolved administration were "actively involved in and consulted by the Government at all stages of the process, including in the drawing up of the UK's national report, considering how to respond to the recommendations and monitoring their implementation". This contrasted to the Westminster Parliament which did not

[193] Inter-Parliamentary Union and Office of the High Commissioner for Human Rights, Human Rights: Handbook for Parliamentarians no. 26, HR/PUB/16/4 (UN) 2016. Available at: https://www.ohchr.org/sites/default/files/Documents/Publications/HandbookParliamentarians.pdf at p. 102.

"debate about the national report, the Council's recommendations or the Government's response to them".[194]

Secondly, Parliaments can play an important role in holding the executive to account in the implementation of international human rights law obligations. This is recognised in the draft principles on Parliaments and Human Rights prepared by the OHCHR in 2018.[195] These principles recommend the creation of a dedicated Parliamentary human rights committee that can, *inter alia*, "lead the Parliamentary oversight of the work of the Government in fulfilling its human rights obligations"; "review and comment on the Government draft reports which the State is required to submit" to international monitoring bodies; and participate in the sessions of the treaty bodies.[196] The Draft Principles draw heavily from the Paris Principles and represent "another step in the UN's overall push to promote autonomous domestic actors to improve the implementation of international standards".[197] The JCHR and Select Committees, do help fulfil this role but their role could still be strengthened.

4. The Obligation to Ensure Public Participation

The main source of the right to public participation in public affairs and government in international human rights law is Article 25 ICCPR which guarantees an explicit right to public participation in public affairs.

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[194] M. Hunt, 'Enhancing Parliaments? Role in the Protection and Realisation of Human Rights' in M. Hunt, H.J. Hooper and P. Yowell (eds) *Parliaments and Human Rights: Redressing the Democratic Deficit* (Hart Publishing 2015) at p. 477.

[195] See the Draft Principles on Parliaments and human rights annexed to OHCHR, Report on the Contribution of parliaments to the work of the Human Rights Council and its universal periodic review, 17 May 2018, A/HRC/38/25. Available at: https://digitallibrary.un.org/record/1631662?ln=en.

[196] See the Draft Principles on Parliaments and human rights annexed to OHCHR, Report on the Contribution of parliaments to the work of the Human Rights Council and its universal periodic review, 17 May 2018, A/HRC/38/25. Available at: https://digitallibrary.un.org/record/1631662?ln=en.

[197] K. Lyer, 'Parliaments as Human Rights Actors: The Potential for International Principles on Parliamentary Human Rights Committees' (2019) 37(3) Nordic Journal of Human Rights 195, 196.

Other UN human rights conventions also prioritise the participation of particular groups. For example, Article 12(1) of the UNCRC provides that "States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child".[198] Giving children a voice has been central to the Scottish process of incorporating the UNCRC and it is desirable that this is considered in any legislative processes in the UK.[199]

General Comment No. 28 on the equality of rights before men and women also emphasises that "States Parties must ensure that the law guarantees to women the rights contained in article 25 on equal terms with men and take effective and positive measures to promote and ensure women's participation in the conduct of public affairs and in public office".[200]

i. **Article 25 ICCPR: The Right to Take Part in Public Life**

Article 25 of the ICCPR states:

Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions:

- *(a) To take part in the conduct of public affairs, directly or through freely chosen representatives;*
- *(b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors;*
- *(c) To have access, on general terms of equality, to public service in his country.*

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[198] UNCRC, Article 12(1).

[199] For detail on the steps taken to involve children see, https://www.togetherscotland.org.uk/about-childrens-rights/monitoring-the-uncrc/involving-children-and-young-people/.

[200] HRC, *General Comment No. 28: Article 3 (The equality of rights between men and women) (Replaces general comment No. 4),* 29 March 2000, CCPR/C/21/Rev.1/Add.10.

There are at least two parts to the right to political participation recognised in Article 25.[201] Firstly, there is the right to "take part in the conduct of public affairs" in Article 25(a). Secondly, there is the right to "vote and to be elected". The specification that there is a right to both "take part" and "to vote" shows that political participation goes beyond merely providing periodic elections. The present focus is on understanding what the right to "take part in the conduct of public affairs" means for States Parties seeking to introduce a Bill of Rights or other rights-protecting legislation.

Article 25 ICCPR is seen as imposing "an obligation on states to take positive steps to ensure that their citizens have an opportunity to exercise their right to political participation".[202] General Comment No. 25 seeks to clarify the scope of the obligations under Article 25(a). It states the concept of "public affairs" is a "broad concept which relates to the exercise of political power, in particular the exercise of legislative, executive and administrative powers", and extends to constitution-making or amendment.[203]

"Direct" Participation

General Comment No. 25 does not directly address the levels of non-electoral participation that might be appropriate for discussions framing either rights-protecting legislation or bills of rights themselves, but it does highlight several different ways that citizens can participate directly in the conduct of public affairs. Firstly, citizens directly participate when they "choose or change their constitution

[201] For discussion, see H. Steiner 'Political Participation as a Human Right' (1988) 1 Harv Hum Rts YB 77, 85.

[202] *Doctors for Life International v Speaker of the National Assembly and Others* (CCT12/05) [2006] ZACC 11, 91.

[203] HRC, *General Comment No. 25: Article 25 (Participation in Public Affairs and the Right to Vote), The Right to Participate in Public Affairs, Voting Rights and the Right of Equal Access to Public Service*, 12 July 1996, CCPR/C/21/Rev.1/Add.7, available at: https://www.refworld.org/docid/453883fc22.html at para 5. Communication No. 205/1986, *Marshall v. Canada* (CCPR/C/43/205/1986).

or decide public issues through a referendum or other electoral process".[204] Secondly, citizens participate directly when they take part in "popular assemblies which have the power to make decisions about local issues or about the affairs of a particular community and in bodies established to represent citizens in consultation with government".[205] An example of the latter type of body is citizens' assemblies, in which there has been growing interest.[206] Thirdly, General Comment No. 25 suggests citizens can "exert influence through public debate and dialogue with their representative or through their capacity to organise themselves".[207] The

[204] HRC, *General Comment No. 25: Article 25 (Participation in Public Affairs and the Right to Vote), The Right to Participate in Public Affairs, Voting Rights and the Right of Equal Access to Public Service*, 12 July 1996, CCPR/C/21/Rev.1/Add.7, available at: https://www.refworld.org/docid/453883fc22.html at para 6.

[205] HRC, *General Comment No. 25: Article 25 (Participation in Public Affairs and the Right to Vote), The Right to Participate in Public Affairs, Voting Rights and the Right of Equal Access to Public Service*, 12 July 1996, CCPR/C/21/Rev.1/Add.7, available at: https://www.refworld.org/docid/453883fc22.html at para 6; see also, Inter-Parliamentary Union and U.N. High Commissioner for Human Rights Human Rights: A Handbook for Parliamentarians (SADAG, Bellegarde-sur-Valserine 2005) at 121.

[206] Citizens' assemblies are an example of deliberative democracy; they are often used to supplement system of representative democracy. Citizen's assemblies are made up of a group of citizens randomly selected. This group is tasked with deliberating on a topic and coming to a conclusion or proposing options for the way forward. OECD research suggests that they are becoming increasingly popular around the world. Recent examples include: Ontario Citizens' Assembly on electoral reform (2006); Citizens' Assemblies of Ireland (the two most recent citizens' assemblies will look at biodiversity loss, and the system of local government in Dublin); The Citizens' Council, Ostbelgien in Belgium; The Citizens Convention for Climate in France (2019) and the Citizens' Assembly of Scotland (2019). There is a wealth of research into citizens' assemblies. By way of example, see OECD (2020), *Innovative Citizen Participation and New Democratic Institutions: Catching the Deliberative Wave*, OECD Publishing, Paris, https://doi.org/10.1787/339306da-en; HofL Briefing Paper, Citizens' Assemblies: An Introductory Guide, 8 February 2019. For more information into the citizens' assemblies referred to above see, M. Schmidt, C. Aitken, 'Citizens' Assemblies – an International comparison', 1 February 2022, available at https://sp-bpr-en-prod-cdnep.azureedge.net/published/2022/2/1/12a76138-5174-11ea-8828-000d3a23af40/SB%2022-07.pdf; https://www.oireachtas.ie/en/debates/debate/dail/2022-02-22/9/; D. Farrell, J. Suiter and C. Harris "Systematizing' constitutional deliberation: the 2016–18 citizens' assembly in Ireland' (2019) Irish Political Studies 34:1 113.

[207] HRC, *General Comment No. 25: Article 25 (Participation in Public Affairs and the Right to Vote), The Right to Participate in Public Affairs, Voting Rights and the Right of Equal Access to Public Service*, 12 July

connection between Article 25 and the enjoyment of rights of freedom of expression, assembly and association cannot be understated.[208]

OHCHR Guidelines on the effective implementation of the right to participate in public affairs suggest several additional good practice tools to facilitate public participation. These include, "websites, campaigns, multi-stakeholder committees, public hearings, conferences, consultations and working groups".[209] The Guidelines emphasis the fact that different modalities for participation might be appropriate at each stage of decision-making.

Equally important in ensuring the effective implementation of the right to participate in public affairs is empowering rights holders through education and awareness raising-programmes. As noted by the OHCHR, it is helpful for "[c]ivic education programmes [to] include knowledge of human rights, the importance of participation for society, an understanding of the electoral and political systems and of various opportunities for participation, including available legislative, policy and institutional frameworks".[210] It is also worth noting that the IHRAR

1996, CCPR/C/21/Rev.1/Add.7, available at: https://www.refworld.org/docid/453883fc22.html at para 7.

[208] HRC, *General Comment No. 25: Article 25 (Participation in Public Affairs and the Right to Vote), The Right to Participate in Public Affairs, Voting Rights and the Right of Equal Access to Public Service*, 12 July 1996, CCPR/C/21/Rev.1/Add.7, available at: https://www.refworld.org/docid/453883fc22.html at para 12. See also HRC, *General Comment No. 37: Article 21 (The Right of Peaceful Assembly)*, 17 September 2020, CCPR/C/GC/37, paras 1, 9 and 100.

[209] OHCHR, Guidelines for States on the effective implementation of the right to participate in public affairs, 2018, A/HRC/39/28. Available at: https://www.ohchr.org/sites/default/files/Documents/Issues/PublicAffairs/GuidelinesRightParticipatePublicAffairs_web.pdf at p. 14.

[210] OHCHR, Good practices and challenges faced by States in using the guidelines on the effective implementation of the right to participate in public affairs, 2022, A/HRC/49/42. Available at: https://documents-dds-ny.un.org/doc/UNDOC/GEN/G22/242/08/PDF/G2224208.pdf?OpenElement at p. 31.

recommended a comprehensive civic education programme covering human rights.[211]

While international human rights law does not require States Parties to use the above examples in the process of drafting rights-protecting legislation, the OHCHR stresses the desirability of designing processes of public decision-making to be as participatory as possible.[212] The OHCHR also emphasises the importance of ensuring the process allows for the inclusion of those commonly excluded from the political process.[213] This ensures legitimacy, public ownership and understanding of the legislation and the rights it contains.[214]

The process of drafting the Victorian Charter of Human Rights and Responsibilities Act 2006 is a good example of such a participatory process. Prior to enacting the Victorian Charter, an independent Victorian Human Rights Consultation Committee was convened to consult the public and generate proposals for reform. The Committee convened over 130 meetings with the community and received 2,524 written submissions. 84 per cent (or 94 per cent if petitions and group submissions

[211] The Independent Review of the Human Rights Act (December 2021). Available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1040525/ihrar-final-report.pdf

[212] OHCHR, Guidelines for States on the effective implementation of the right to participate in public affairs, 2018, A/HRC/39/28. Available at: https://www.ohchr.org/sites/default/files/Documents/Issues/PublicAffairs/GuidelinesRightParticipatePublicAffairs_web.pdf. See also, OHCHR, Human Rights and Constitution Making, 2018, HR/PUB/17/5. Available at: https://www.ohchr.org/sites/default/files/Documents/Publications/ConstitutionMaking_EN.pdf at p. 14-19.

[213] OHCHR, Human Rights and Constitution Making, 2018, HR/PUB/17/5. Available at: https://www.ohchr.org/sites/default/files/Documents/Publications/ConstitutionMaking_EN.pdf at p. 14-19.

[214] The use of a participatory process in the making of a constitution is not a guarantee of success of that Constitution and it is important for any State using a participatory process to design it carefully. These issues are discussed in A. Hudson, *The Veil of Participation: Citizens and Political Parties in Constitution-Making Processes* (Cambridge University Press 2021).

are included) were in favour of reform.[215] The Committee recommended that the Victorian Charter be implemented, and their views were taken on board in the process of enacting the legislation.[216] Ensuring that the conclusions of any consultation is considered and incorporated into the final result is important if the participation is to be meaningful.

Indirect Participation through "Freely Elected Representatives"

It should be noted that article 25(a) states citizens can take part in the conduct of public affairs "directly *or* through freely chosen representatives". The use of "or" suggests these are alternative ways of fulfilling the obligation in Article 25(a). However, the issue is not addressed in the General Comment or individual communications.[217]

In relation to indirect participation through "freely elected representatives", General Comment No. 25 highlights "it is implicit in article 25 that those representatives do in fact exercise governmental power and that they are accountable through the electoral process for their exercise of that power".[218]

[215] More detail on the process of adopting the Victorian Charter can be found in G. Williams, 'The Victorian Charter of Human Rights and Responsibilities: Origins and Scope' (2006) 30 Melbourne University Law Review 880.

[216] One of the reasons why the Victorian Committee engaged in such extensive consultation in the process of recommending the reforms was that it noted that the public feeling ownership of human rights legislation was crucial due to the wide-ranging implications of such legislation for everyday life. The Committee emphasised that an important way to achieve this was to ensure that people were listened to.

[217] In general, Article 25(a) and the obligations it imposes are underexplored in the literature and by the HRC. There are only a handful of individual communications concerned with Article 25(a).

[218] HRC, *General Comment No. 25: Article 25 (Participation in Public Affairs and the Right to Vote), The Right to Participate in Public Affairs, Voting Rights and the Right of Equal Access to Public Service*, 12 July 1996, CCPR/C/21/Rev.1/Add.7, available at: https://www.refworld.org/docid/453883fc22.html at para 7.

The recognition that "freely elected representatives" provide an important means for public participation suggests that, in a representative democracy, legislatures are a key medium through which citizens can participate politically.[219] As well as representing their electors, Parliaments can engage civil society in the process of governing and in any initiative to introduce a bill of rights or equivalent legislation.[220] Ensuring that parliamentarians themselves have adequate opportunity to participate in the formation of legislation and scrutiny of government conduct is thus critical to the realisation of this right.

[219] The OHCHR has emphasised the role that Parliaments can play in promoting a democratic society. For example, it notes "[a] fundamental element of a vibrant democratic society is the relationship between parliament and civil society, whose work can help to strengthen parliament's oversight role… Parliamentarians can show leadership in that regard and can champion the human rights situations of specific groups and victims of discrimination. They can also investigate alleged human rights violations through parliamentary inquiries, and can hold public hearings on human rights-related issues, or carry out on-site visits. Parliaments also have a key role to play in raising public awareness of important human rights issues through campaigns." OHCHR, Contribution of parliaments to the work of the Human Rights Council and its universal periodic review, 17 May 2018, A/HRC/38/25 at para 26.

[220] In recognition of the underdevelopment of article 25 ICCPR, the Human Rights Council requested the OHCHR to develop guidelines on the effective implementation of the right to participate in public affairs. Firstly, they suggest it is desirable there be participation before decision-making so that right-holders are given the opportunity to shape the "agenda of decision-making processes". Second, "[i]nformation regarding the decision-making process should contain clear, realistic and practical goals in order to manage the expectations of those participating". Third, it is desirable that public authorities "refrain from taking any formal, irreversible decisions prior to the commencement of the process". See, OHCHR, Guidelines for States on the effective implementation of the right to participate in public affairs, A/HRC/39/28, available at https://www.ohchr.org/sites/default/files/2021-12/GuidelinesRightParticipatePublicAffairs_web.pdf.

5. The Obligation of Non-Regression

The obligation of non-regression (also known as non-retrogression) refers to a "strong presumption of the impermissibility of any retrogressive measures" taken in relation to the rights in the Covenants.[221]

The CESCR has derived the obligation of non-retrogression from Article 2(1) ICESCR. Article 2(1) requires States Parties to "take steps [...] to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures." This has been interpreted by the CESCR as an obligation of "progressive realisation".[222] One facet of this obligation is the obligation of non-regression.

Despite the frequent references to this obligation in General Comments, the CESCR has done little to expand on the exact nature of the obligation of non-regression. It has been argued that there are two potential dimensions of non-retrogression: normative and empirical. The normative dimension refers to backward steps in the *de jure*, legal guarantees. The empirical dimension refers to the "de facto, empirical backsliding in the effective enjoyment of the rights".[223]

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[221] CESCR, *General Comment No. 13: The Right to Education (Art. 13 of the Covenant),* 8 December 1999, E/C.12/1999/10, available at: https://www.refworld.org/docid/4538838c22.html at para 45.

[222] CESCR, *General Comment No. 1: Reporting by States Parties,* 27 July 1981, E/1989/22, available at: https://www.refworld.org/docid/4538838b2.html at para 7). Nolan et al argue that support for this categorisation of the two dimensions can be found in the Maastricht Guidelines. See A. Nolan, N. Lusiani and C. Courtis, 'Two Steps Forward, No Steps Back? Evolving Criteria on the Prohibition of Retrogression In economic and Social Rights' in A. Nolan (ed), *Economic and Social Rights after the Global Financial Crisis* (Cambridge University Press 2014) at p. 123.

[223] Nolan et al argue that support for this categorisation of the two dimensions can be found in the Maastricht Guidelines. See A. Nolan, N. Lusiani and C. Courtis, 'Two Steps Forward, No Steps Back? Evolving Criteria on the Prohibition of Retrogression In economic and Social Rights' in A. Nolan (ed), *Economic and Social Rights after the Global Financial Crisis* (Cambridge University Press 2014) at p. 123.

In its 2007 statement regarding the Optional Protocol, the CESCR made clear that the burden for proving that steps have not been regressive "rests with the state party".[224] This is consistent with its General Comments, which have emphasised, "[i]f any deliberately retrogressive measures are taken, the State party has the burden of proving that they have been introduced after the most careful consideration of all alternatives and that they are fully justified by reference to the totality of the rights provided for in the Covenant".[225]

The Optional Protocol to the ICESCR also introduces the idea of "reasonableness" to the assessment of individual complaints concerning a state's compliance with the "progressive realisation" obligation in Article 2(1), requiring that, "[w]hen examining communications under the present Protocol, the Committee shall consider the reasonableness of the steps taken by the State Party in accordance with Part II of the Covenant".[226]

As the obligation of non-retrogression has been derived by the CESCR from the obligation of progressive realisation found in Article 2(1) ICESCR, the HRC has not made the same use of the concept. However, this does not mean the obligation is inapplicable to the ICCPR.

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[224] See CESCR Statement: An evaluation of the obligation to take steps to the 'maximum available resources' under an Optional Protocol to the Covenant, E/C.12/2007/1, 10 May 2007 at para 36.
[225] CESCR, *General Comment No. 13: The Right to Education (Art. 13 of the Covenant)*, 8 December 1999, E/C.12/1999/10, available at: https://www.refworld.org/docid/4538838c22.html at 45.
[226] Article 8(4) Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (OP-ICESCR). The factors which are to be taken into account when assessing the reasonableness of the steps taken include: the extent to which the measures taken were deliberate, concrete and targeted towards the fulfilment of economic, social and cultural rights; whether discretion was exercised in a non-discriminatory and non-arbitrary manner; whether resource allocation is in accordance with international human rights standards; whether the State party adopts the option that least restricts Covenant rights; whether the steps were taken within a reasonable timeframe; whether the precarious situation of disadvantaged and marginalized individuals or groups has been addressed; whether policies have prioritized grave situations or situations of risk; and whether decision-making is transparent and participatory.

The *travaux préparatoires* of both the ICCPR and the ICESCR indicate that the term "progressive realisation" was never considered solely applicable to economic, social, and cultural rights.[227] Moreover, in its concluding observations, the HRC frequently expresses its concern at measures taken by States that risk weakening civil and political human rights, or measures that undermine the enjoyment of human rights previously enjoyed.[228]

It should be noted that what constitutes regression in each case might give rise to complicated questions, particularly if the rights appear to conflict. This can be demonstrated by reference to Article 19 ICCPR, protecting freedom of expression, and Article 20 ICCPR, requiring States Parties to prohibit hate speech.[229] In 'balancing' these rights, there is of course room for differences in achieving the appropriate balance, depending on the context. However, the non-regression obligation requires that there is no regression in the principles used to conduct the 'balancing exercise'.[230]

The implication for States Parties designing or reforming human rights protecting legislation is that caution should be exercised to ensure that no regressive steps are taken. As the burden falls on the State Party to show this, it is desirable that steps are taken to articulate how any changes are at least consistent with existing guarantees.

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[227] See, Bonavero Institute, 'The Development and Application of the Concept of the Progressive Realisation of Human Rights: Report to the Scottish National Taskforce for Human Rights Leadership' at page 10. See further, V. Bílková, 'The nature of social rights as obligations of international law: resource availability, progressive realization and the obligations to respect, protect, fulfil' in *Research Handbook on International Law and Social Rights* (Elgar 2020) at p. 33.

[228] For example, the Concluding Observations on the United Kingdom and Northern Ireland from 2015 expressed concern that any legislation replacing the Human Rights Act 1998 might weaken human rights. HRC, *Concluding observations on the seventh periodic report of the United Kingdom of Great Britain and Northern Ireland*, 17 August 2015, CCPR/C/GBR/CO/7, at para. 5.

[229] ICCPR, Article 19, 20.

[230] From discussions within the advisory committee of the project.

In addition to the obligation of non-regression found in ICESCR and the ICCPR, the Ireland/Northern Ireland Protocol requires the UK ensure that there is no diminution of rights, safeguards or equality of opportunity, as set out in that part of the 1998 Belfast Agreement/ Good Friday Agreement entitled Rights, Safeguards and Equality of Opportunity.[231]

[231] For more information on this commitment see, https://www.equalityni.org/Brexit.

CONCLUSION

This report has outlined five obligations in international human rights law that are binding on the UK and ought to be considered when domestic bills of rights are being drafted or reformed. The report is not comprehensive in its coverage of international human rights law but covers the most relevant obligations for parliamentarians, policymakers and civil servants to consider.

The obligation to respect, protect and fulfil imposes extensive obligations on States Parties to the ICCPR and ICESCR to refrain from violating human rights; to take positive steps to ensure individuals are protected from interferences by non-state actors; and create an environment in which individuals can make use of and enjoy their human rights. It is clear that to comply with these obligations it is necessary for States Parties to have a framework in place that allows for the assessment of domestic law's compliance with international human rights law obligations. It is desirable for legislatures to play a critical role in this process and that this is taken into account in the drafting or reforming of a domestic bill of rights.

Under both the ICCPR and the ICESCR States Parties must provide an effective framework of remedies. This framework need not always provide for judicial remedies, but the institutions tasked with overseeing remedies must be independent and impartial. To comply with international human rights law, the remedies must also be provided in a timely, accessible manner and there must be the availability of reparations where it is needed.

The ICCPR and ICESCR require State Parties to monitor and report on the implementation of their international human rights obligations. It is desirable that States Parties bear in mind that the purpose of this reporting goes beyond keeping the international community informed of the human rights situation in each State Party. For example, domestic monitoring of human rights allows States Parties to assess the implementation of their own policies. Facilitating such monitoring, by

establishing and maintaining the integrity of competent bodies, is an important factor to consider in the domestic protection of human rights.

Compliance with the obligation to ensure public participation is important to realise the commitment to democracy in the UK. This obligation can be fulfilled through engagement by freely elected representatives in the process of enacting domestic bills of rights. It is thus desirable that elected representatives are given the maximum possible opportunity to assess, scrutinise and influence if, and how, domestic bills of rights are implemented in all constituent parts of the UK.

The obligation of non-regression in human rights protection requires State Parties not to take backward steps in the protection of human rights. Thus, in pursuing changes to the machinery of rights protection, care must be taken to ensure that the level of protection given to international human rights does not regress. Considering the most recent concluding observations by the CESCR and the Special Rapporteur's Report on Extreme Hunger and Poverty, which indicated the UK was breaching its obligations of non-regression in relation to economic, social and cultural rights, it is all the more important that consideration is given to this obligation.[232]

The UK has a history of, and prides itself, in helping advance respect for, and the protection and fulfilment of, human rights. The content of this report has highlighted how the current human rights regime in the UK facilitates compliance with international human rights law obligations, though more could be done. As the UK Government and the devolved legislatures of Scotland, Northern Ireland and Wales continue to consider how human rights ought to be protected, effort should be made to ensure proposals for reform promote compliance with the UK's international human rights obligations.

[232] Human Rights Council, Report of the Special Rapporteur on Extreme Poverty and Human Rights, 23 April 2019, A/HRC/41/39/Add.1 at p. 8.