
International Law

Discussion Questions

Gleider Hernández, *International Law* (Oxford University Press, 2019)

Chapter 16, International Human Rights and Refugee Law

Question 1. *Identify and analyse the differences, if any, between human rights of ‘civil and political’ character and those of ‘economic and social’ character. What institutions and instruments govern these rights?*

Students will note that there are several components to this question. The first component considers the conceptual difference that has emerged between ‘civil and political’ rights and ‘economic and social rights’. Civil and political rights are sometimes called ‘first-generation rights’ and require States, in theory, to refrain from violating rights such as freedom of conscience or expression, or the right to a fair trial (see e.g. Article 2 ICCPR). Economic and social rights, sometimes called ‘second-generation rights’, protect well-being and thus enshrine rights in respect of food, water, health and education. In theory, they require a degree of concerted positive action in order to ensure the ‘progressive realisation’ of such rights (see e.g. Article 2 ICESCR). The best responses might point out that the conceptual distinction is somewhat artificial, as both sets of rights require a degree of positive and negative action in certain circumstances.

One reason for the distinction is historical. During the Cold War, capitalist developed States centred around the United States favoured civil and political rights, and Communist States centered around the Soviet Union favoured economic and social rights. It is this distinction that led to the adoption of the 1966 ICCPR in relation to civil and political rights and 1966 ICESCR in relation to economic, social and cultural rights: States could be free to recognise one set of rights or both.

The ICCPR is monitored under the UNHRC and the ICESCR by the CESCR, both of which receive regular reports from States and publish 'General Comments' on specific aspects relating to the interpretation and implementation of their respective Covenants.

Question 2. *What is a 'General Comment'? What is its function and purpose? Are they binding sources of international law?*

Eleven human rights 'treaty monitoring bodies', in particular UNHRC and CESCR, publish 'General Comments' in relation to their respective human rights treaty. [Students would do well to name all eleven but it would not be necessary in a reasoned examination answer.] General Comments are written by the treaty bodies in order to provide guidance to States on the implementation of their respective treaty obligations. They are not binding instruments; they merely set out an expert interpretation.

Despite not being binding, General Comments are important. The expertise of most members of treaty bodies on human rights issues means that they are not taken lightly. In addition, General Comments are usually drafted in close consultation with States and civil society. As such, in the *Diallo* judgment the ICJ suggested that the general comments of treaty monitoring bodies should be ascribed 'great weight' in the interpretation of their respective treaties. As such, though not a direct or primary source of international law, they are a subsidiary source that has great law-making potential.

Question 3. *What is the relevance of the criterion of 'persecution' in refugee law? Is it the same in relation to other relevant categories of persons?*

Article 1 of the 1951 Refugee Convention sets out that refugees must be faced with a 'well-founded fear of persecution' in relation to five specific grounds: race; religion; nationality; 'membership of a particular social group' (e.g. gender, victims of human trafficking, sexual orientation, gender identity; or political opinion.

Those five enumerated grounds are exhaustive: one cannot suffer persecution on another basis (e.g. disability) and qualify as a refugee.

Persecution is actually a fairly high standard and intimately related to the other criteria for refugee status. Not only must it be ‘well-founded’ (and thus not just a subjective feeling), but it goes beyond so-called ‘mere’ discrimination and a possible or actual violation of fundamental human rights (such as torture or slavery) must exist (see UK case of *Islam v Home Secretary* case). Finally, the persecution must be of the type that the claimed refugee is unwilling or unable to seek the protection of his/her State of nationality – thus triggering the need to claim refugee status. The best answers will point out that private actors can also cause persecution – it is not limited to State activities.

There is no similar standard for internally displaced persons (IDPs) and other types of migrants. IDPs can be displaced *within* a State for a number of reasons, such as armed conflict or environmental disaster, that have nothing to do with persecution (see Guiding Principles on IDPs, which are not binding but provide general guidance). Stateless persons are those who have been de-nationalised – but besides the obligation to reduce statelessness, they must comply with conditions for refugee status to benefit from protections. Finally, migrant workers are not defined in any way that suggests they are persecuted.