

SESSION 1

INTRODUCTION: ESSENTIAL CONCEPTS

International Protocol on Documenting Violations of Religious Freedom

RELIGIOUS FREEDOM INSTITUTE



THIS SESSION

- Human rights generally
- National and international law
- Responsibility

Why do you need to have some understanding of these?

ACRONYMS

- UN
- HR
- IHRL
- ICCPR
- ECHR
- CAT
- AU
- ICC
- FORB

HUMAN RIGHTS GENERALLY

YOU ALL KNOW ABOUT HUMAN
RIGHTS.

EVERYONE DOES.

WHAT DO YOU ACTUALLY KNOW?

“Then God said,

‘Let us make mankind in our image, in our likeness, so that they may rule over the fish in the sea and the birds in the sky, over the livestock and all the wild animals, and over all the creatures that move along the ground.’

So God created mankind in his own image, in the image of God he created them; male and female he created them” (Gen. 1:26–27).

The Universal Declaration of Human Rights (UDHR) speaks of:

- the inherent dignity and of the equal and inalienable rights of all members of the human family;
- obligations and expectations, including that *“All human beings ...should act towards one another in a spirit of brotherhood”*;
- freedom, justice and peace in the world; and
- the advent of a world in which human beings shall enjoy freedom of speech and belief and freedom from fear and want.

Some appear repeatedly, indicating the weight given to them - for example there are five references to ‘human dignity’.

Using what you know about human rights, can you identify what wrongs have been done in this situation?

Consider this situation

Jesus shared a religious message that was similar to, yet different to what his Jewish audience had come to accept. He performed miracles. He raised the dead to life. He healed the sick. He walked on water. He claimed that God was his father. These brought him into conflict with the leaders of his community. The High Priest turned him over to Pontius Pilate, accusing him of falsely claiming to be the Messiah, the awaited King of the Jews. He was subjected to a proceeding, abused and humiliated, convicted and sentenced to death even though the adjudicator knew he was innocent. He was subjected to further physical and mental cruelty and abuse before being nailed to a cross in a public place, and left to die there.

Human rights reflect the minimum standards necessary for people to live with dignity and equality.

They give people the freedom to choose how they live, how they express themselves, and what kind of government they want to support, among many other things.

They also guarantee people the means necessary to satisfy their basic needs, such as food, housing, and education, so they can take full advantage of all opportunities.

By guaranteeing life, liberty, and security, human rights protect people against abuse by individuals and groups who are more powerful.

- Can be expressed in terms of a 'right to' something and a 'freedom from' something.
- Rights also come with responsibilities. Individuals also have responsibilities: in using their human rights, they must respect the rights of others. No government, group or individual person has the right to do anything that violates another's rights.
- Most rights are individual rights, but some are collective (indigenous rights and minority rights).

ARE HUMAN RIGHTS CONCEPTS REFLECTED IN DOMESTIC LAW?

Example of a human rights concept	Example of a domestic law concept
The right to life	
The prohibition against torture	
The prohibition against slavery	
Equality	
The right to a fair trial with due process	

ARE HUMAN RIGHTS CONCEPTS REFLECTED IN DOMESTIC LAW?

Example of a human rights concept	Example of a domestic law concept
The right to life	Criminalisation of murder, manslaughter etc
The prohibition against torture	Criminalisation of torture, abuse of authority, inflicting severe physical or mental suffering, offence against the person etc
The prohibition against slavery	Criminalisation of slavery, kidnap, forced labour, exercising rights of ownership over another person, trafficking etc
Equality	Laws against discrimination, laws protecting vulnerable groups in all spheres of life (employment, family, property rights etc)
The right to a fair trial with due process	Protected through provisions in the Penal Codes, Penal Procedure Codes, Laws governing the judiciary and prosecution, Rules of Evidence, Police and Criminal Evidence Acts etc

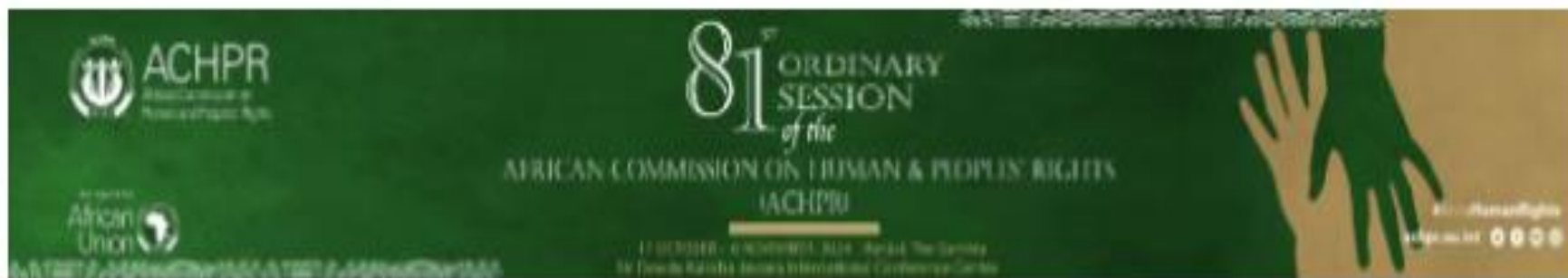
ARE HUMAN RIGHTS A 'WESTERN'
INVENTION?

African States and the human rights doctrine



AFRICAN (BANJUL) CHARTER ON HUMAN AND PEOPLES' RIGHTS

(Adopted 27 June 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), entered into force 21 October 1986)



AFRICAN COURT ON HUMAN AND PEOPLES' RIGHTS

THE CHARACTERISTICS OF 'HUMAN RIGHTS'

Human rights are:

- **Universal** in that they belong to all people equally regardless of status. All people are born free and equal in dignity and rights.
- **Inalienable** in that they may not be taken away or transferred. People still have human rights even when their governments violate those rights.
- **Interconnected** because the fulfillment or violation of one right affects the fulfillment of all other rights.
- **Indivisible** as no right can be treated in isolation. No one right is more important than another.
- **Non-discriminatory** in that human rights should be respected without distinction, exclusion, restriction, or preference based on race, color, age, national or ethnic origin, language, religion, sex, or any other status, which has the purpose or effect of impairing the enjoyment of human rights and fundamental freedoms

We have these rights in peacetime and in armed conflict.

A FEW RIGHTS ARE ABSOLUTE

“No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.”

“No one shall be held in slavery; slavery and the slave-trade in all their forms shall be prohibited. No one shall be held in servitude.”

MOST RIGHTS ARE *NOT* ABSOLUTE

Example: ICCPR Art 18 (3)

Freedom to manifest one's religion or beliefs may be subject only to such **limitations** as are prescribed by law and are necessary to protect public safety, order, health, or morals, or the fundamental rights and freedoms of others.

Example:

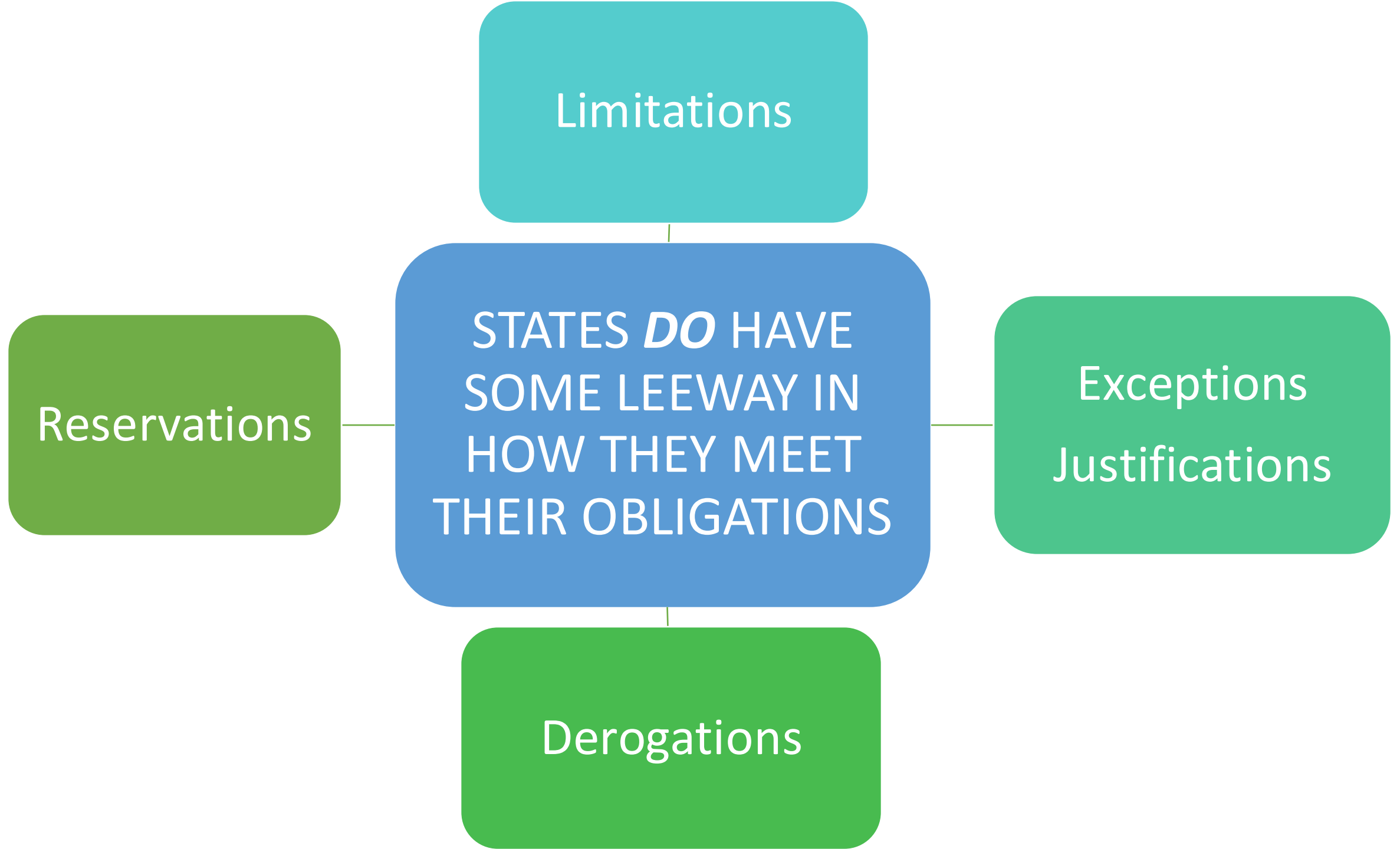
ECHR Art 5

ARTICLE 5

Right to liberty and security

1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:

- (a) the lawful detention of a person after conviction by a competent court;
- (b) the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law;
- (c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;
- (d) the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority;
- (e) the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants;
- (f) the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.



Equality and
Non-Discrimination

Fair
balance

Necessity
including
“necessary in a
democratic
society”

SOME LEGAL
TECHNIQUES
USED FOR
ASSESSING
STATE’S LEEWAY

Proportionality

Margin of
appreciation

Universal Declaration of Human Rights

The power of the Universal Declaration is the power of ideas to change the world. It inspires us to continue working to ensure that all people can gain freedom, equality and dignity.

Preamble

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

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



IN CONCRETE TERMS . . .





International covenant on civil and political rights



AFRICAN (BANJUL) CHARTER ON HUMAN AND PEOPLES' RIGHTS

(Adopted 27 June 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), entered into force 21 October 1986)



General Assembly

Distr.: General
8 January 2016

Seventieth session
Agenda item 106

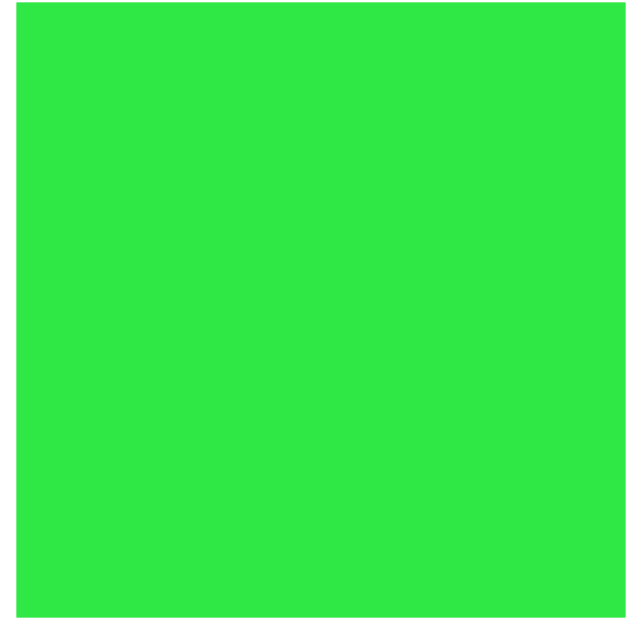
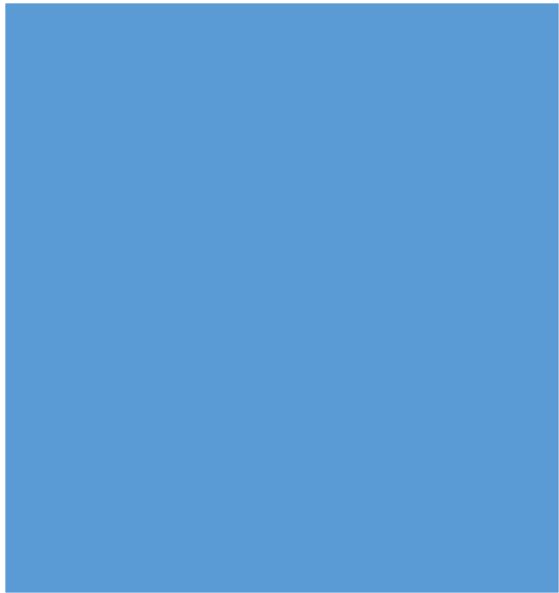
Resolution adopted by the General Assembly on 17 December 2015

[on the report of the Third Committee (A/70/490)]

70/175. United Nations Standard Minimum Rules for the
Treatment of Prisoners (the Nelson Mandela Rules)

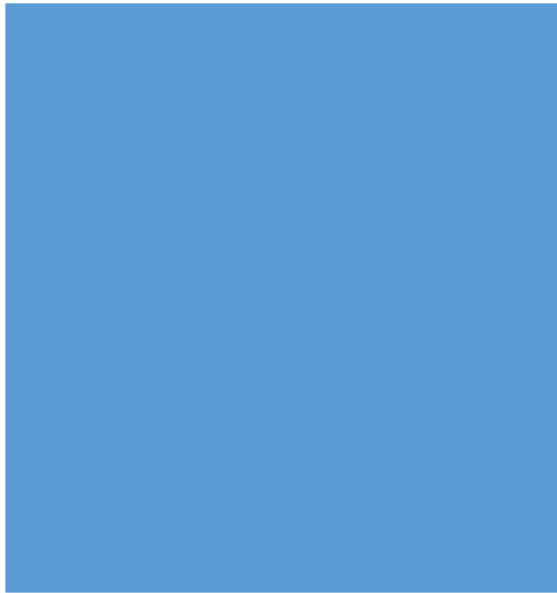


WHAT ARE THE
CONSEQUENCES OF A
STATE BECOMING
'PARTY' TO AN
INTERNATIONAL TREATY
ON HUMAN RIGHTS?

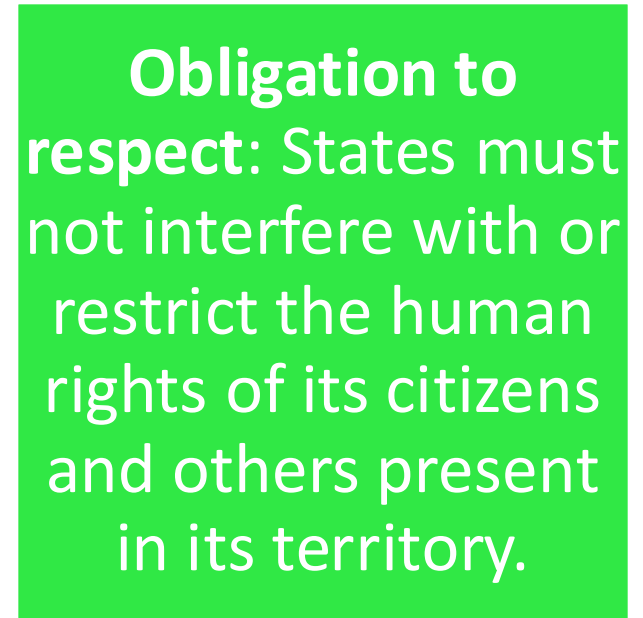




WHAT ARE THE
CONSEQUENCES OF A
STATE BECOMING 'PARTY'
TO AN INTERNATIONAL
TREATY ON HUMAN
RIGHTS?



**Obligation to
respect:** States must
not interfere with or
restrict the human
rights of its citizens
and others present
in its territory.



Obligation to protect: States must protect citizens against violations of their human rights.



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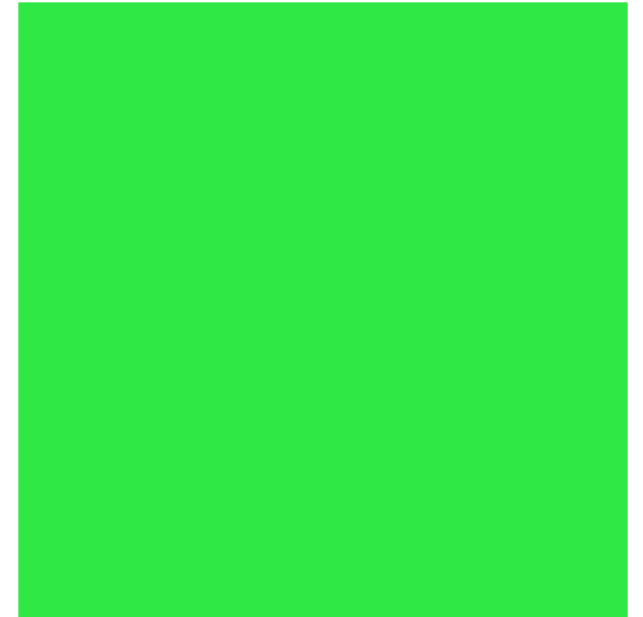




Obligation to fulfil:
States must actively ensure and provide an environment in which its citizens can fully enjoy and access their human rights.



WHAT ARE THE
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ON HUMAN RIGHTS?



Obligation to protect:
States must protect
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Obligation to fulfil:
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ANY QUESTIONS, OBSERVATIONS,
SHARING SO FAR?

EACH RIGHT HAS ITS OWN FEATURES

FORB AS AN ILLUSTRATION

ICCPR Art 18



1

Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.



2

No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.



3

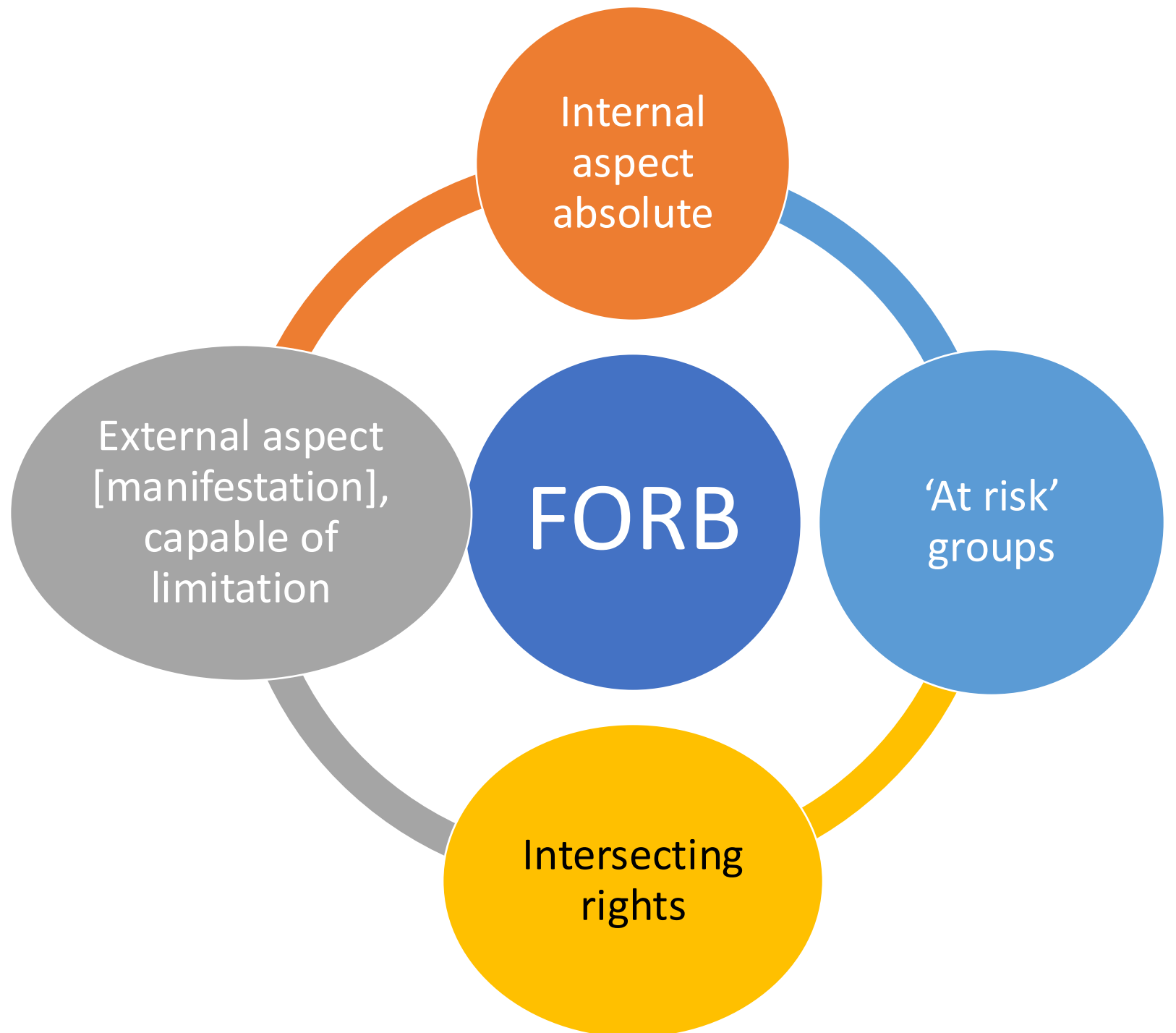
Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.



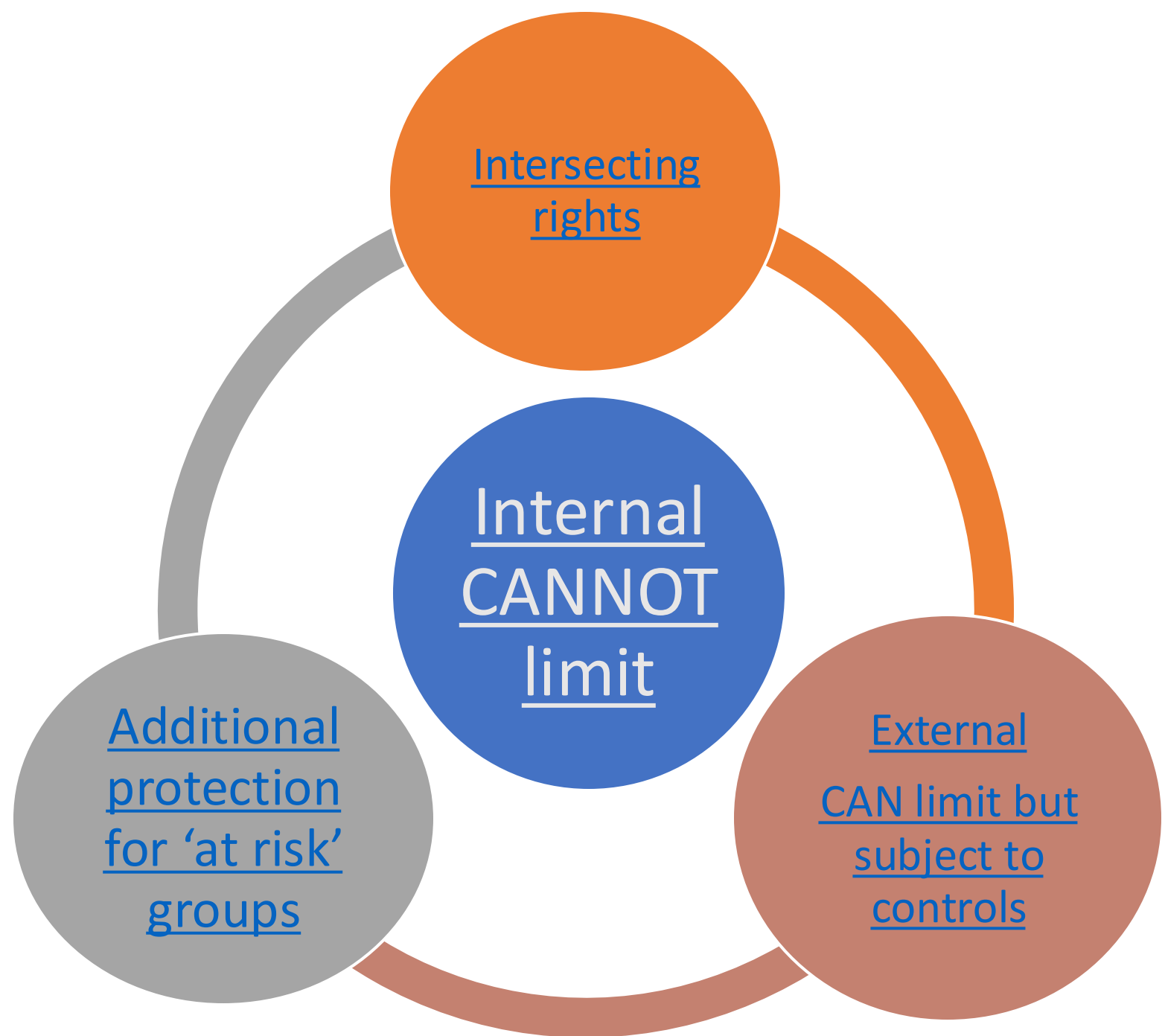
4

The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.

DISTINCTIVE FEATURES OF FORB



BREAKING FORB DOWN INTO ITS CORE ELEMENTS



The internal aspect

CANNOT limit it



- The right to have and to change deeply held inner convictions and beliefs based on faith or conscience
- To enjoy these rights free from coercion

**External
aspects, i.e
manifestation**

**CAN limit it,
but subject
to strict
controls**



- To express one's beliefs and to criticise the beliefs of others in a nonthreatening manner;
- To worship or assemble in connection with a religion or belief, and to establish and maintain places for these purposes;
- To establish and maintain appropriate charitable or humanitarian institutions;
- To make, acquire and use to an adequate extent the necessary articles and materials related to the rites or customs of a religion or belief;
- To write, issue and disseminate relevant publications in these areas;
- To teach a religion or belief;
- To solicit and receive voluntary financial and other contributions from individuals and institutions;
- To train, appoint, elect or designate by succession appropriate leaders called for by the requirements and standards of any religion or belief;
- To observe days of rest and to celebrate holidays and ceremonies in accordance with the precepts of one's religion or belief; and
- To establish and maintain communications with individuals and communities in matters of religion and belief at the national and international levels.

Intersecting rights

- Equality and non discrimination
- Freedom of expression
- Any number of other rights may come into play in a situation where there is persecution – ***what are the common ones that you face in your situations?***



Additional protection for the FORB rights of 'at risk' groups



- Minorities
- Children
- Women
- Migrant workers
- Refugees
- Persons deprived of liberty
- Victims of war, civilians in occupied territory

WHAT IS THE
RELATIONSHIP BETWEEN
INTERNATIONAL AND DOMESTIC LAW?

- Different theories: monism, dualism, mixed
- Different points of entry: incorporation or direct effect
- In practice, it depends on the doctrine adopted the country

Example: South African Constitution

Chapter 14 - General provisions

International Law

231. International agreements

1. The negotiating and signing of all international agreements is the responsibility of the national executive.
2. An international agreement binds the Republic only after it has been approved by resolution in both the National Assembly and the National Council of Provinces, unless it is an agreement referred to in subsection (3).
3. An international agreement of a technical, administrative or executive nature, or an agreement which does not require either ratification or accession, entered into by the national executive, binds the Republic without approval by the National Assembly and the National Council of Provinces, but must be tabled in the Assembly and the Council within a reasonable time.
4. Any international agreement becomes law in the Republic when it is enacted into law by national legislation; but a self-executing provision of an agreement that has been approved by Parliament is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament.
5. The Republic is bound by international agreements which were binding on the Republic when this Constitution took effect.

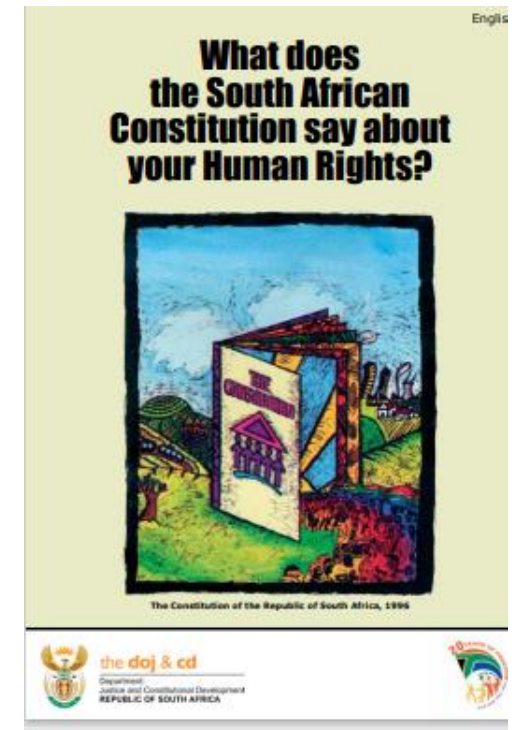
232. Customary international law

Customary international law is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament.

233. Application of international law

When interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law.

The Bill of Rights, contained in Chapter 2 of the final Constitution, guarantees all South Africans basic human rights. Everyone, for example, has a right to life, equality, human dignity and privacy.



Example: Kenyan Constitution

2. Supremacy of this Constitution

- (1) This Constitution is the supreme law of the Republic and binds all persons and all State organs at both levels of government.
- (5) The general rules of international law shall form part of the law of Kenya.
- (6) Any treaty or convention ratified by Kenya shall form part of the law of Kenya under this Constitution.



THE REPUBLIC OF KENYA

When you assess a State's behaviour, should you use domestic law or international law as your benchmark?

- The Documentation Protocol prioritises international law.
- It would be best to use assess that behaviour by the standards of ***both*** domestic law and international law. The State is not above either of these. Both are going to be relevant.
- Your ability to use international law directly in a domestic court will depend on the country's legal system.
- Using international law can be tricky because you will need to know which parts of it are applicable to the State [for example, which treaties the State has consented to be bound by].

RESPONSIBILITY

**TWO MEN IN
COMBAT
FATIGUES:
IS
RESPONSIBILITY
THE SAME FOR
EACH OF THEM?**



RESPONSIBILITY IN THE NATIONAL SYSTEM

Usually:

State/Government/Authorities

Legal entities: corporations, political parties

Individuals

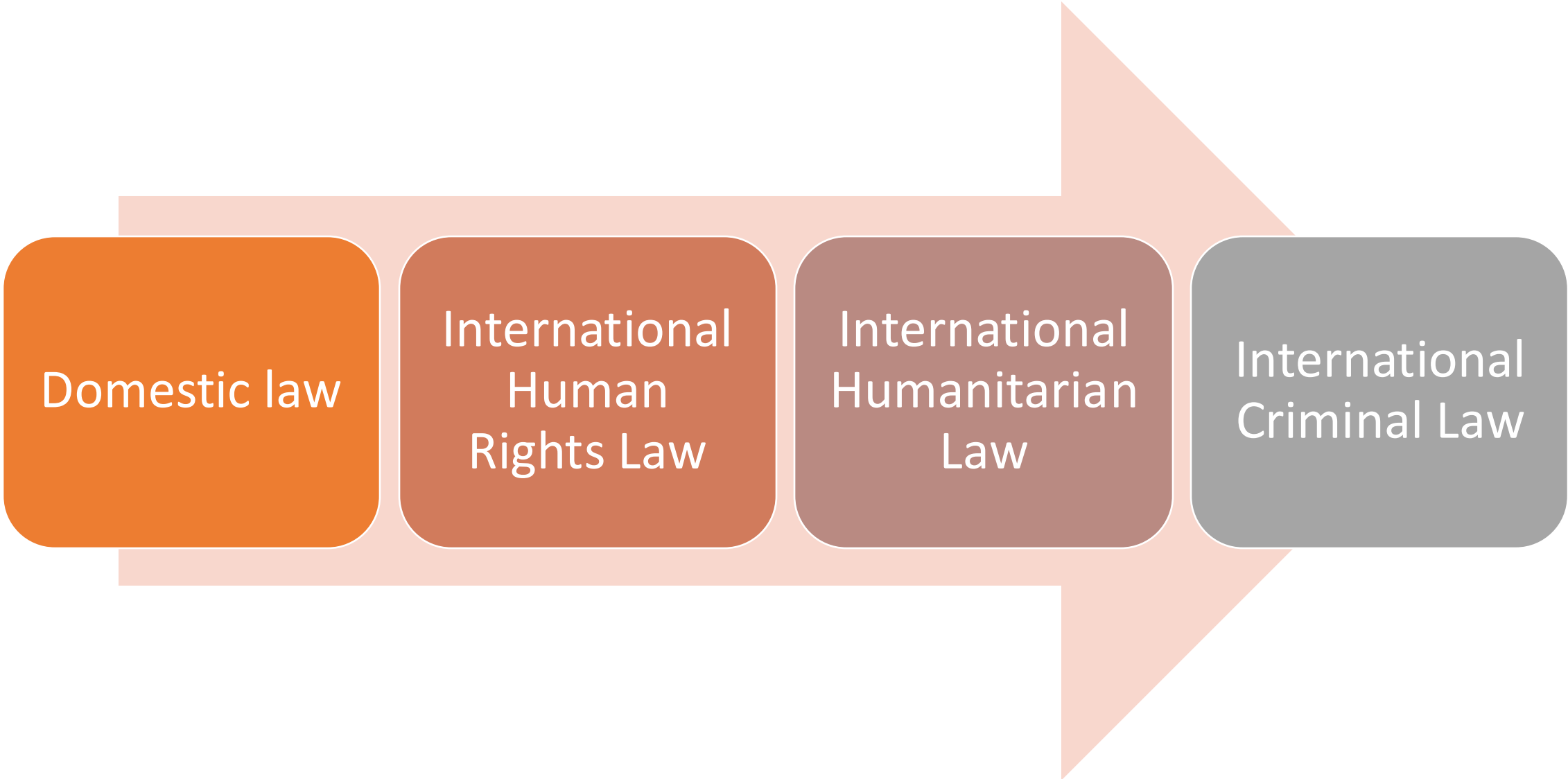
Accountable under Constitutional/Public Law, Administrative Law,
Private law and Criminal law

Venues: national courts or tribunals

RESPONSIBILITY IN INTERNATIONAL LAW

- States
- Individuals
- International organisations

Venues: international courts or tribunals, national courts, treaty monitoring bodies [name-and-shame]



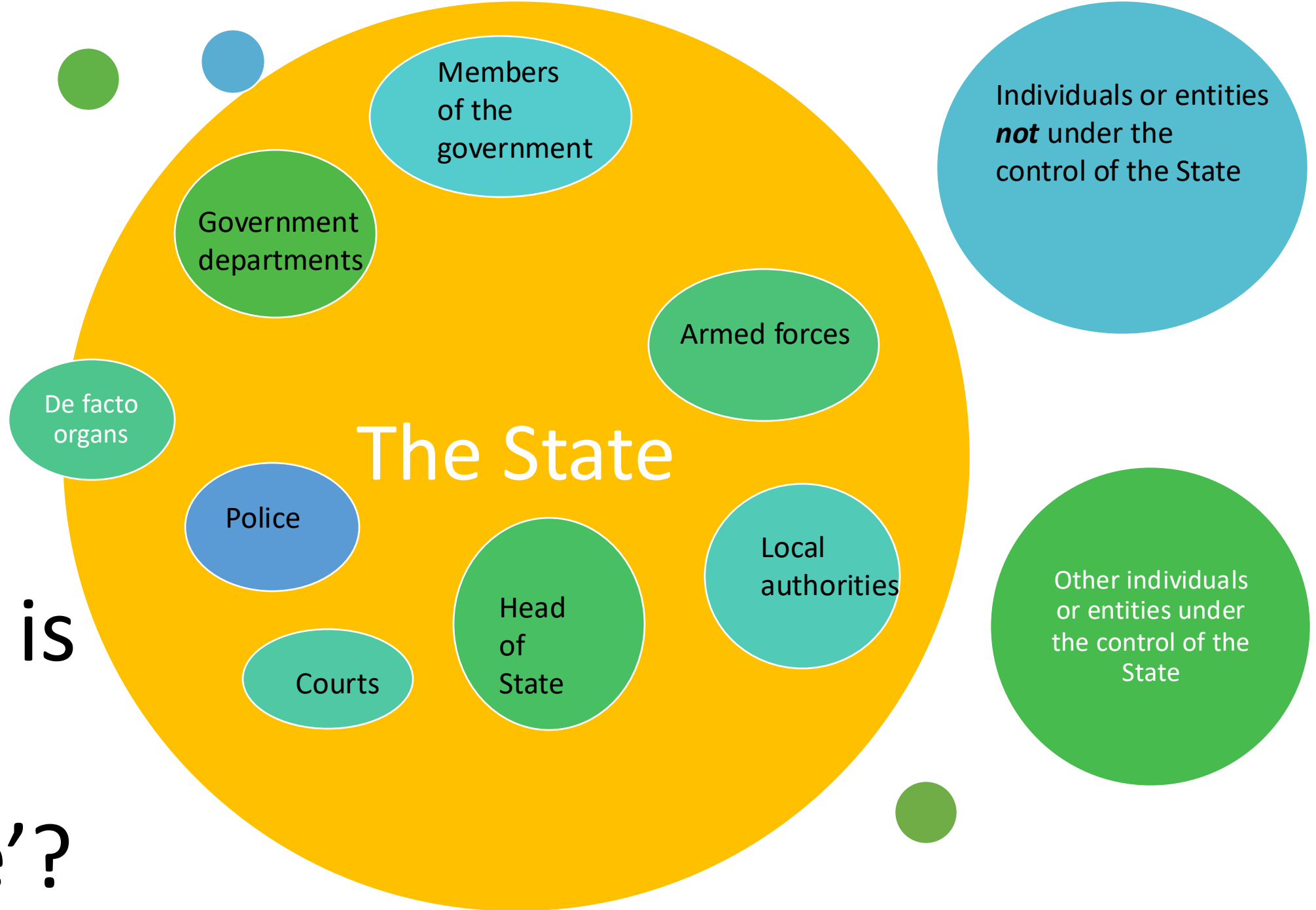
Domestic law

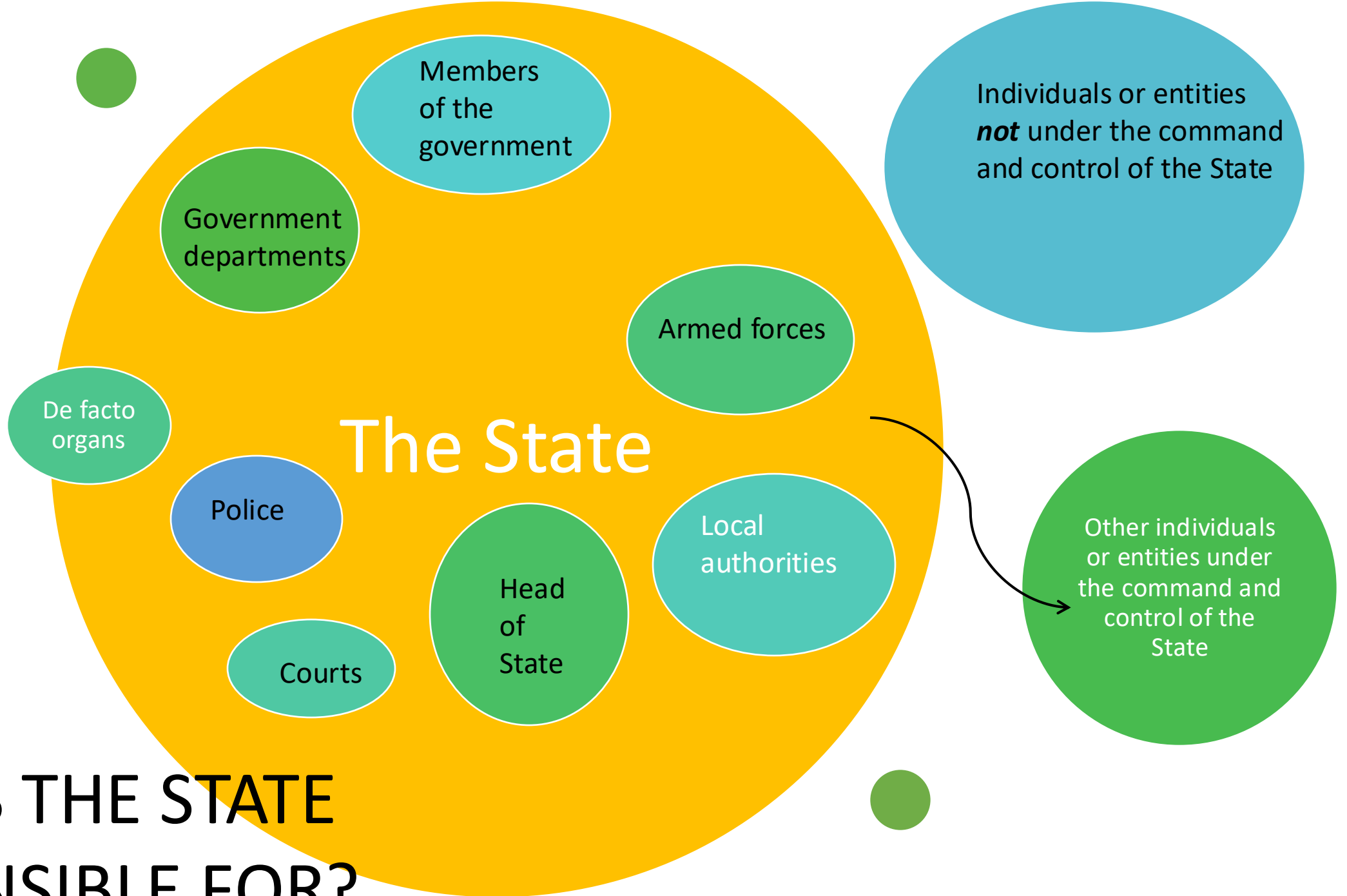
International
Human
Rights Law

International
Humanitarian
Law

International
Criminal Law

What is the 'State'?





WHO IS THE STATE
RESPONSIBLE FOR?

FIRST EXERCISE IN SPOTTING ISSUES

GAMBIA'S MILE 2 PRISON

1. RIGHT TO EQUALITY
2. FREEDOM FROM DISCRIMINATION
3. RIGHT TO LIFE, LIBERTY, PERSONAL SECURITY
4. FREEDOM FROM SLAVERY
5. FREEDOM FROM TORTURE AND DEGRADING TREATMENT
6. RIGHT TO RECOGNITION AS A PERSON BEFORE THE LAW
7. RIGHT TO EQUALITY BEFORE THE LAW
8. RIGHT TO REMEDY BY COMPETENT TRIBUNAL
9. FREEDOM FROM ARBITRARY ARREST AND EXILE
10. RIGHT TO FAIR PUBLIC HEARING
11. RIGHT TO BE CONSIDERED INNOCENT UNTIL PROVEN GUILTY
12. FREEDOM FROM INTERFERENCE WITH PRIVACY, FAMILY, HOME AND CORRESPONDENCE
13. RIGHT TO FREE MOVEMENT IN AND OUT OF THE COUNTRY
14. RIGHT TO ASYLUM IN OTHER COUNTRIES FROM PERSECUTION

15. RIGHT TO A NATIONALITY AND THE FREEDOM TO CHANGE IT
16. RIGHT TO MARRIAGE AND FAMILY
17. RIGHT TO OWN PROPERTY
18. FREEDOM OF BELIEF AND RELIGION
19. FREEDOM OF OPINION AND INFORMATION
20. RIGHT OF PEACEFUL ASSEMBLY AND ASSOCIATION
21. RIGHT TO PARTICIPATE IN GOVERNMENT AND IN FREE ELECTIONS
22. RIGHT TO SOCIAL SECURITY
23. RIGHT TO DESIRABLE WORK AND TO JOIN TRADE UNIONS
24. RIGHT TO REST AND LEISURE
25. RIGHT TO ADEQUATE LIVING STANDARD
26. RIGHT TO EDUCATION
27. RIGHT TO PARTICIPATE IN THE CULTURAL LIFE OF COMMUNITY
29. COMMUNITY DUTIES ESSENTIAL TO FREE AND FULL DEVELOPMENT

Video link: https://youtu.be/FxQCGca_7Nw [3.05 mins]

5 minutes: List as many of the problematic issues arising, and if you can identify them in terms of either human rights or domestic law concepts, or both if you can.

10 minutes: sharing and discussion.



SECOND EXERCISE IN SPOTTING ISSUES

NIGERIA – BOKO HARAM

The centre of Boko Haram activity
- BBC News,
<https://youtube/pzaDGzCSOKY> – 5.20
mins

5 minutes: List as many of the problematic issues arising, and if you can identify them in terms of either human rights or domestic law concepts, or both if you can.

10 minutes: sharing and discussion.



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2. FREEDOM FROM DISCRIMINATION
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