1) HUMAN RIGHTS: INTRODUCTION

The essence of human rights is that they are grounds upon which it is possible to judge a nation's laws. In this respect, the idea of human rights is largely concerned with the relationship of the state and the individual. In a politically organised society, there are institutions of authority, known as the state, whether it be a single individual, such as a king or queen, or a more complex set of institutions, such as exist in most countries today, that exercise power over ordinary citizens. Human rights provide protection for individual citizens from abuse by those that have authority over them, by establishing that every individual has certain rights that cannot be taken away or abused by the state. The state can most obviously do this in two ways. Either the laws created by law makers do not reflect such rights, e.g. as was the case in Nazi Germany, or, alternatively, a regime may have laws that reflect human rights but, in practice, those laws are ignored e.g. there are many countries that have laws that prohibit the use of torture but it, nevertheless, takes place.

Human rights became particularly influential in the 18th century (when it was known as natural rights) and provided the philosophical basis for both the American Revolution of 1776, when British rule was rejected, and the French Revolution of 1789, when the French monarchy and aristocracy were overthrown. In both cases natural rights ideas were used to challenge the legitimacy of the prevailing rulers and their laws.

In the 20th century, human rights has also emerged as a very influential theory. This is largely due to the reaction to the Nazi atrocities in Germany in the 1930s and 1940s, and the use of laws, such as the notorious Nurnberg laws, which were introduced and applied to persecute German Jews, a process that culminated in the Holocaust. Human rights ideas have now been developed in order to provide a basis upon which a nation's laws can be judged, and criticised if found to be in breach of such rights.

The European Convention on Human Rights (ECHR) is one of the most important documents to have emerged in the post-World War Two era, as it was the first international human rights documents to have legal enforcement machinery, namely the European Court of Human Rights (ECtHR). This has resulted in a substantial corpus (or body) of case law that has been developed over a period of more than 60 years.

The *European Convention on Human Rights* (ECHR) 1950 was drafted by taking the United Nations Universal Declaration of Human Rights (created in 1948) as its starting point and with the aim of establishing and further realising human rights. Opened for signature in Rome on 4 November 1950, the ECHR took effect when 10 member states of the Council of Europe (known as *High Contracting Parties* or *HCPs*) had ratified it, coming into force in September 1953. The United Kingdom was the first country to ratify the Convention, yet it was not until the *Human Rights Act 1998* (HRA), the main provisions of which came into effect on 2 October 2000, that any of the rights set out in the ECHR formally became part of UK domestic law.

The following is a list of important points about the European Convention on Human Rights (ECHR):

- The ECHR was conceived in the aftermath of the Second World War

- It was drafted in 1949 by the Council of Europe
- It adopts a largely cautious approach – more so than many other documents, such as the International Covenant on Civil and Political Rights
- It deals mainly with civil and political rights
- Unlike other human rights documents, however, it has a strong enforcement mechanism via European Court of Human Rights (ECtHR) which has been in operation since 1959
- The Court has adopted a dynamic teleological approach to interpretation of Convention rights - this means they have been developed in ways that could not have been envisaged in 1949.

It is also important to recognise that the ECtHR is not, in the usual sense of a court, coercive. Whilst it may deliver rulings adverse to member states it is ultimately up to the state as to how it implements change. Also, the court has developed the doctrine of the *margin of appreciation*, which affords each HCP a degree of discretion on how the ECHR and its articles are applied to its national law, thereby taking into account the different laws and legal traditions that prevail in those countries who have signed up to the ECHR.

2) TERRITORIAL EXTENT OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS

An important issue that has been considered in a number of cases by the *European Court of Human Rights* (aka the Strasbourg Court) concerns the geographical scope of the ECHR, also known as its ‘territorial reach’ or ‘territorial extent’. This has largely arisen as a result of HCPs having undertaken military action outside their own territory. Thus, in the nineties, often as part of NATO, the armed forces of a number of HCPs, including the United Kingdom, were involved in military action in Kosovo and Serbia and this was repeated, in the first two decades of this century, in places such as Iraq and Afghanistan. Such military activity beyond the territorial boundaries of a HCP has led to cases where it has been alleged that various Convention rights have been breached by the armed forces. A key issue, however, has been whether or not these cases, committed outside a state’s national boundaries, come within the jurisdiction of the ECHR, as set out in Article 1.

The following are summaries of some of the most important cases in which the ECtHR has considered the scope of its jurisdiction for actions outside the national boundaries of HCPs (or member states).

Bankovic v Belgium (and 16 others) (2007) 44EHRR SE5

This case concerned the bombing by a number of HCP aeroplanes of the Radio-Television Serbia headquarters in Belgrade, which killed four people. This was part of NATO’s campaign of air strikes during the Kosovo conflict. It was alleged that the air strike constituted a breach of a number of ECHR rights, particularly Article 2 (the right to life). However, the ECtHR concluded that the ECHR did not apply, as the Convention’s jurisdiction was based on a state’s own territory. Events outside its national boundaries did not come within the scope of the ECHR.

Al-Skeini v UK (2011) 53 EHRR 18

In this case, the ECtHR considered whether deaths of Iraqi civilians by British troops on active duty in Iraq were also a breach of Article 2. The case had been considered in British courts, which had concluded that Article 2 only applied to individuals who had died in a British prison in Iraq, which was not the case here. However, when it went to the ECtHR, the Court considered the issue of whether the case came within its jurisdiction to consider. While the ECtHR agreed with its earlier decision, in the Bankovic Case, that the Convention’s jurisdiction was *normally* based on a state’s own territory, there were exceptions. One of these was where armed forces exercised *effective administrative control* over an area of another state as a result of invading it. Here, the court decided that the invading British forces were, in effect, the government of the invaded land and, as such, were in *effective administrative control*. This meant that the alleged breach of the ECHR could be considered by the ECtHR, with the Court deciding that the deaths had, in fact, been a breach of Article 2 (the right to life).

Al-Saadon v UK (2011) 49 EHRR SE11

In this case, it was claimed that a detainee in a British prison in Iraq had been subject to torture, which is a breach of Article 3 (the right not to be tortured or subject to inhuman or degrading treatment). The ECtHR first considered whether or not it had jurisdiction to consider the case, concluding that, following the invasion in 2003, it was clear from an examination of the facts that *de facto* administrative control was retained by the UK armed forces even after UN involvement. It then went on to consider the alleged ill treatment of the detainee, concluding that there had been a breach of Article 3.