Human Rights Reference Handbook

Sepuldeva, M.; Van Banning, Th.; van Genugten, W.J.M.

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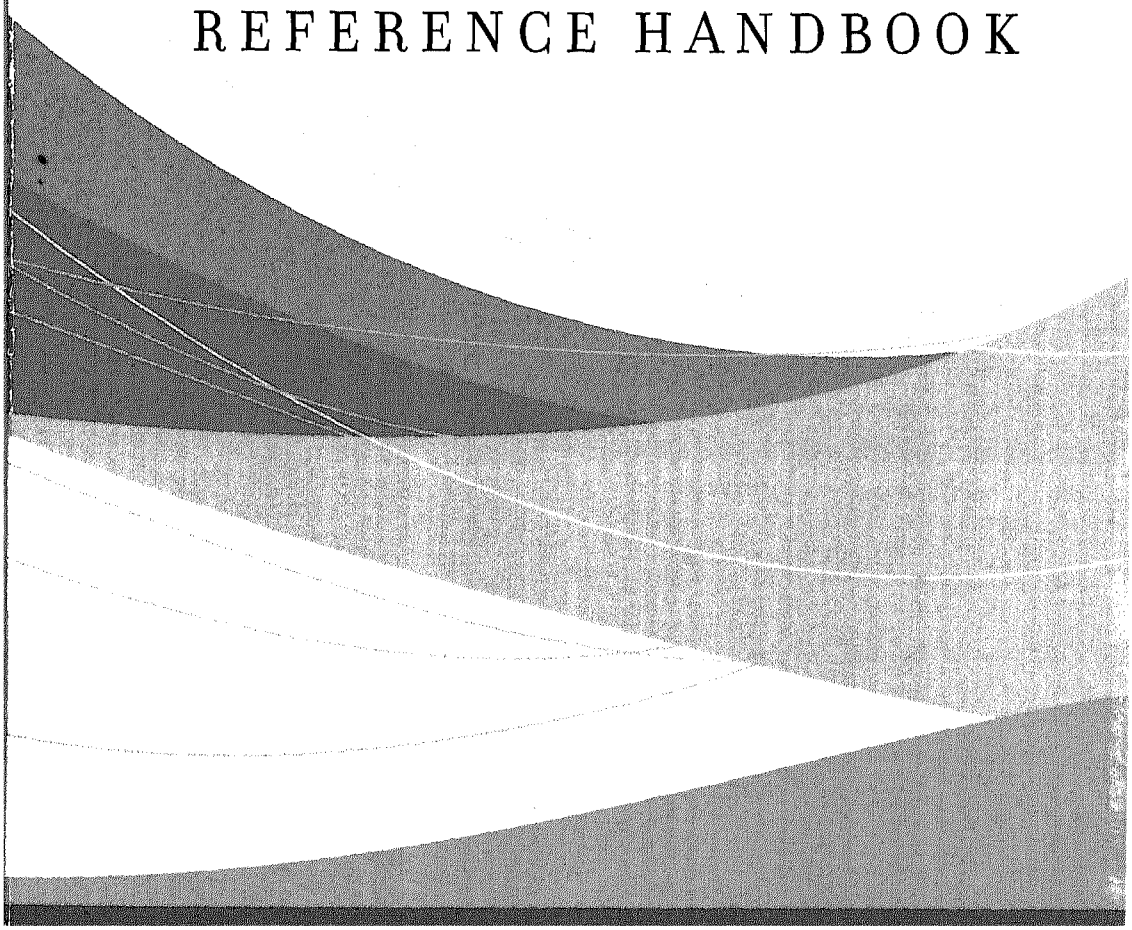
Magdalena Sepúlveda
Theo van Banning
Guðrún D. Guðmundsdóttir
Christine Chamoun
and Willem J.M. van Genugten

HUMAN RIGHTS REFERENCE HANDBOOK



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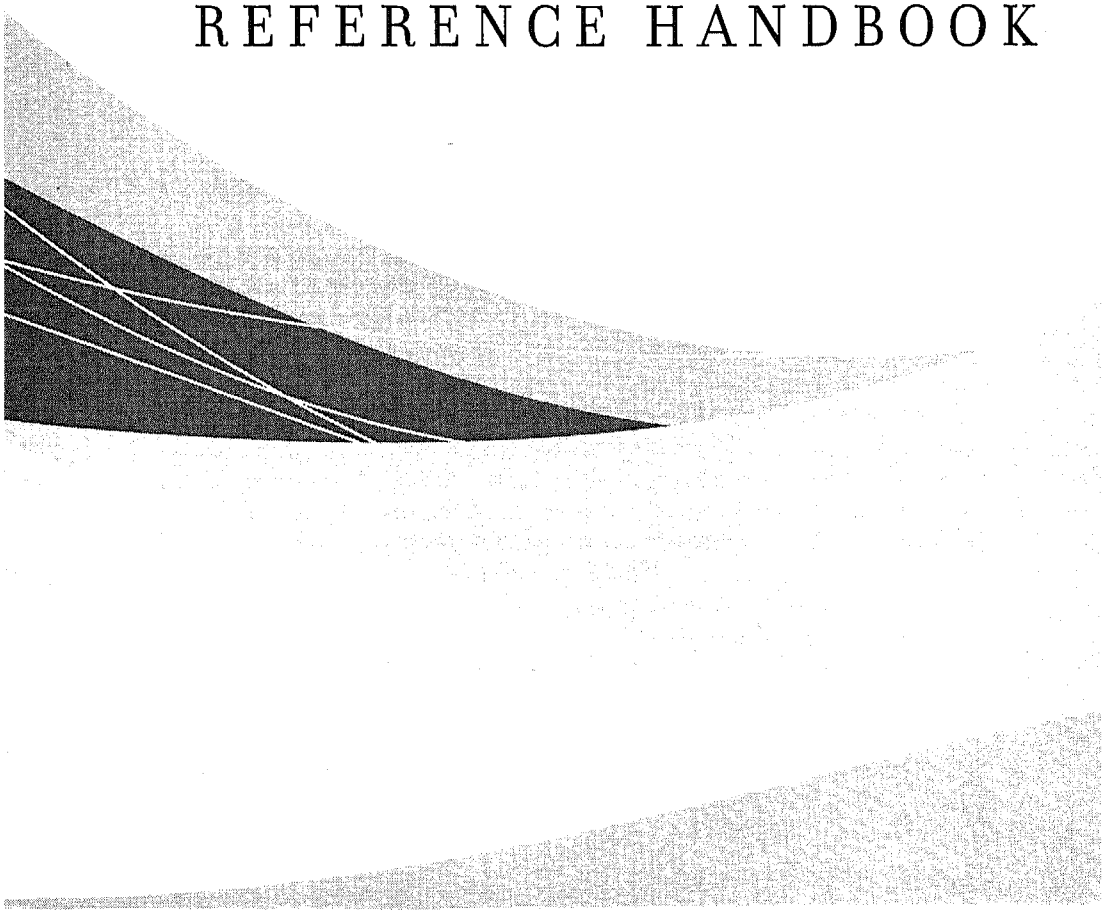

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FOREWORD

The University for Peace is very pleased to present this Human Rights Reference Handbook which provides an overview of the field of human rights in an international perspective.

The publication of the Handbook marks the completion of the first component of the Human Rights Education Project, centred at the headquarters of the University for Peace and carried out with the financial assistance of the Government of the Netherlands.

The other components of the Project are: a reference book with annotated case-law and materials on human rights which compares cases from the three regional human rights systems and the United Nations Human Rights Committee; a compilation of human rights instruments which includes international human rights treaties and other documents; and a CD-ROM which contains materials to supplement the content of these books.

Together, these materials will constitute an 'educational kit' which will be of value to academics, university students, governmental and non-governmental organisations and other interested parties throughout the world, particularly in developing countries.

As an international institution of higher education for peace, the University for Peace uses four basic 'delivery systems' to share and disseminate knowledge related to peace and human rights: graduate courses at its main campus in San José, Costa Rica; delivery of courses at other universities or campuses; sharing and dissemination of course materials, including books and publications such as readers; and distance education courses via the Internet. Human Rights Education Project is designed to support all these four methods of dissemination of knowledge.

The main purpose of the Project is to provide an overview of the most important issues related to human rights and a description of the competences of the major human rights bodies, together with a convenient compilation of all relevant human rights instruments. In particular, the Project constitutes a response by the University for Peace to the substantial deterioration over the past decade in access to library materials for students in resource-poor developing countries.

The rapid and important changes which have taken place in the field of human rights have given rise to the clear need for the constant replacement of books which are the essential foundations of learning and research. At the same time, the price of books has soared while university resources available to purchase books have, in many cases, declined.

Widespread human rights education and the direct promotion of human rights are essential to strengthen human rights protection throughout society. We hope that the Human Rights Education Project and in particular this Handbook will contribute to the dissemination of knowledge about human rights law in civil society, in government and administration and in academia. It will thus make a valuable contribution to the prevention of violence and conflict and to the pursuit of tolerance, understanding and peace which lie at the core of the activities of the University for Peace.

R. Martin Lees
Rector
University for Peace

PREFACE TO 2004 EDITION

This book forms part of the Human Rights Education Project developed by the University for Peace with funding from the Government of the Netherlands. The Project is comprised of three books and a CD-ROM. While this book stands alone and can be read and used independently, it should be seen, nonetheless, as one component of a coherent 'package' or kit for human rights education.

The aim of the project is to provide rigorous, multicultural educational materials for teaching and training in human rights for use by educational institutions, inter-governmental and non-governmental organisations. All three books are designed to be used as a ready reference and tool: easy to read, easy to use, easy to photocopy.

The publications and the CD-ROM should enable students, lawyers, teachers, diplomats and other professional groups, as well as the general public as a whole to inform themselves, with varying degrees of depth, about a broad spectrum of human rights subjects, whether they are related to standards, to supervision, to individual human rights or to fora where human rights are discussed. The publications are structured in such a way that all the instruments and cases referred to in the Human Rights Reference Handbook are included in full text on the CD-ROM. Similarly, extracts of the most relevant instruments are included in the collection of instruments and many of the cases referred to in the Handbook are further discussed in the case-law book.

The Human Rights Reference Handbook has been written from an international human rights and international law perspective, with the purpose of contributing to the understanding of international human rights law and the different systems for the protection of human rights at the international level.

The Handbook is not intended to provide an exhaustive analysis of international human rights law or to explain all topics in great detail. Rather, it is meant to be a practical tool. This book does not make use of footnotes. However,

a table of cases as well as a table of treaties and instruments referred to in the book have been included. Additionally, a selective bibliography, a glossary of terms and Internet resources are included as annexes.

San José

Magdalena Sepúlveda
Theo van Banning
Gudrun D. Gudmundsdottir
Christine Chamoun
Willem J.M. van Genugten

We would appreciate any comments, questions and suggestions regarding the Human Rights Reference Handbook. These should be addressed to hrep@upeace.org. Thank you.

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Supreme Court of India

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ILO Instruments

UNESCO Instruments

ABBREVIATIONS

ACHPR	African Charter on Human and Peoples' Rights
ACHR	American Convention on Human Rights
ACP	African, Caribbean and Pacific (countries)
ADHR	American Declaration of the Rights and Duties of Man
AEC	African Economic Community (AU)
AI	Amnesty International
AU	African Union
CAHTEH	Ad-hoc Committee on Action against Trafficking (CoE)
CAT	Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
CDEG	Steering Committee for Equality between Women and Men (CoE)
CEDAW	International Convention on the Elimination of Discrimination Against Women
CERD	International Convention on the Elimination of All Forms of Racial Discrimination
CESCR	Committee on Economic, Social and Cultural Rights
CFSP	Common Foreign and Security Policy (of the EU)
CHD	Conference on the Human Dimension (OSCE)
CICTE	Inter-American Committee Against Terrorism
CoE	Council of Europe
COHOM	Working Party on Human Rights (EU)
COREPER	Permanent Representatives Committee (EU)
CM	Committee of Ministers (CoE)
CMW	Convention on the Protection of the Rights of Migrant Workers and Members of their Families
CRC	Convention on the Rights of the Child
CSCE	Conference on Security and Co-operation in Europe now OSCE
CSW	Commission on the Status of Women (UN)
CTC	Counter Terrorism Committee (UN)
DAW	Division for the Advancement of Women (UN)
EC	European Community
ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms
ECOSOC	Economic and Social Council (UN)
ECOSOCC	Economic, Social and Cultural Council (AU)

ECPT	European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment
ECRI	European Commission against Racism and Intolerance
EIDHR	European Initiative for Democracy and Human Rights
EEC	European Economic Community
EP	European Parliament
ESC	European Social Charter
ETS	European Treaty Series
EU	European Union
EUMC	European Union's Monitoring Centre on Racism and Xenophobia (EU)
ExCom	Executive Committee of the Programme of the UN High Commissioner for Refugees
FAO	Food and Agriculture Organisation
FGM	Female Genital Mutilation
GAERC	General Affairs and External Relations Council (EU)
GSP	Generalised System of Preference (EU)
HCNM	High Commissioner on National Minorities (OSCE)
HD	Human Dimension (OSCE)
HFA	Helsinki Final Act (OSCE)
HIV	Human Immunodeficiency Virus
HRI	Human Rights Instruments
HRC	Human Rights Committee
HURIDOCS	Human Rights Information and Documentation System
IACHR	Inter-American Commission on Human Rights
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICJ	International Court of Justice
ICPD	International Conference on Population and Development
ICRC	International Committee of the Red Cross
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the Former Yugoslavia
IDP	Internally Displaced Person
IDA	International Development Assistance
IDEA	International Institute for Democracy and Elections
ILC	International Law Commission
ILO	International Labour Organisation
IMF	International Monetary Fund
IOM	International Organisation for Migration
JHA	Justice and Home Affairs (EU)
MDG	Millenium Development Goals
NEPAD	New Partnership for Africa's Development
NGO	Non-Governmental Organisation
OAS	Organisation of American States
OAU	Organisation of African Unity
OCHA	Office for the Co-ordination of Humanitarian Affairs
OHCHR	Office of the United Nations High Commissioner for Human Rights
ODIHR	Office for Democratic Institutions and Human Rights (OSCE)

OECD	Organisation for Economic Co-operation and Development
OSCE	Organisation on Security and Co-operation in Europe
POW	Prisoner of War
TEU	Treaty on European Union (EU)
TRC	Truth and Reconciliation Commission
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNAIDS	Joint United Nations Programme of HIV/AIDS
UNCHR	United Nations Commission on Human Rights
UNCED	United Nations Conference on Environment and Development
UNDP	United Nations Development Programme
UNEP	United Nations Environmental Programme
UNESCO	United Nations Educational, Scientific and Cultural Organisation
UNFPA	United Nations Population Fund
UNGA	United Nations General Assembly
UNHCR	United Nations High Commissioner for Refugees
UNHCHR	United Nations High Commissioner for Human Rights
UNICEF	United Nations Children's Fund
UNSG	United Nations Secretary General
VCLT	Vienna Convention on the Law of Treaties
WFP	World Food Programme
WHO	World Health Organisation
WSSD	World Summit on Sustainable Development
WTO	World Trade Organisation

INTRODUCTION

Human rights are at the core of international law and international relations. They represent basic values common to all cultures, and must be respected by countries worldwide. The aim of this Handbook is to describe the present situation in the field of human rights in theory and practice as well as promote the fundamental values they represent.

The book is divided into six parts:

Part I discusses the concept of human rights from its origins to the broad interpretation given to it today. First, the concept of human rights is introduced as well as general elements of international law, including the application of principles of human rights law. The emphasis is further laid on three major dimensions: standards (the human rights norms as defined in internationally agreed texts); supervision (the mechanisms to monitor compliance with human rights standards); and the ways in which respect for human rights is put into practice.

Part II gives an account of the principal organisations where human rights are discussed. States use these organisations to define new standards, to agree on procedures, and to supervise compliance. First examined is the universal system, meaning, in this context, the United Nations system. Thereafter, regional arrangements are discussed, focusing on the supervisory mechanisms in Europe, the Americas and Africa.

Part III addresses substantive human rights as they are laid down in various international treaties. In order to avoid the traditional categorisations of human rights, they are grouped into twelve clusters of human rights. Each right is explained in detail and the latest developments in standard setting and supervision are set out.

Part IV deals with issues relating to protection of vulnerable groups. Again, twelve particularly vulnerable groups have been identified and it is stressed that the persons belonging to them require special attention. It is not sufficient merely to ensure that there is no discrimination against them: special measures are essential to protect and promote their rights.

Part V discusses relations between human rights and other fields, such as development, economic co-operation, environmental protection, armed conflict and terrorism.

Part VI examines the respective roles of various actors such as states, non-governmental organisations, individual human rights defenders and multinational companies. The aim is to examine their work and ways to enhance respect for human rights. The role of the European Union in the promotion and protection of human rights is discussed.

PART I

THE CONCEPT OF HUMAN RIGHTS: AN INTRODUCTION

CHAPTER 1

DEFINITIONS AND CLASSIFICATIONS

Human rights are commonly understood as inalienable fundamental rights to which a person is inherently entitled simply because she or he is a human being. This chapter examines the concept of human rights since its origins, explaining the different terms and classifications.

A. Historical antecedents

The origins of human rights may be found both in Greek philosophy and the various world religions. In the Age of Enlightenment (18th century) the concept of human rights emerged as an explicit category. Man/woman came to be seen as an autonomous individual, endowed by nature with certain inalienable fundamental rights that could be invoked against a government and should be safeguarded by it. Human rights were henceforth seen as elementary preconditions for an existence worthy of human dignity.

Before this period, several charters codifying rights and freedoms had been drawn up constituting important steps towards the idea of human rights. The first were the *Magna Charta Libertatum* of 1215, *the Golden Bull* of Hungary (1222), the Danish *Erik Klippings Håndfaestning* of 1282, the *Joyeuse Entrée* of 1356 in Brabant (Brussels), the *Union of Utrecht* of 1579 (The Netherlands) and the English *Bill of Rights* of 1689. These documents specified rights, which could be claimed in the light of particular circumstances (*e.g.* threats to the freedom of religion), but they did not yet contain an all-embracing philosophical concept of individual liberty. Freedoms were often seen as rights conferred upon individuals or groups by virtue of their rank or status.

In the centuries after the Middle Ages, the concept of liberty became gradually separated from status and came to be seen not as a privilege but as a right of all human beings. Spanish theologists and jurists played a prominent role in this context. Among the former, the work of Francisco de Vitoria (1486-1546) and Bartolomé de las Casas (1474-1566) should be highlighted. These two men laid the (doctrinal) foundation for the recognition of freedom and dignity of all humans

by defending the personal rights of the indigenous peoples inhabiting the territories colonised by the Spanish Crown.

The Enlightenment was decisive in the development of human rights concepts. The ideas of Hugo Grotius (1583-1645), one of the fathers of modern international law, of Samuel von Pufendorf (1632-1694), and of John Locke (1632-1704) attracted much interest in Europe in the 18th century. Locke, for instance, developed a comprehensive concept of natural rights; his list of rights consisting of life, liberty and property. Jean-Jacques Rousseau (1712-1778) elaborated the concept under which the sovereign derived his powers and the citizens their rights from a social contract. The term human rights appeared for the first time in the French *Déclaration des Droits de l'Homme et du Citoyen* (1789).

The people of the British colonies in North America took the human rights theories to heart. The American Declaration of Independence cf 4 July 1776 was based on the assumption that all human beings are equal. It also referred to certain inalienable rights, such as the right to life, liberty and the pursuit of happiness. These ideas were also reflected in the Bill of Rights which was promulgated by the state of Virginia in the same year. The provisions of the Declaration of Independence were adopted by other American states, but they also found their way into the Bill of Rights of the American Constitution. The French *Déclaration des Droits de l'Homme et du Citoyen* of 1789, as well as the French Declaration of 1793, reflected the emerging international theory of universal rights. Both the American and French Declarations were intended as systematic enumerations of these rights.

The classic rights of the 18th and 19th centuries related to the freedom of the individual. Even at that time, however, some people believed that citizens had a right to demand that the government endeavour to improve their living conditions. Taking into account the principle of equality as contained in the French Declaration of 1789, several constitutions drafted in Europe around 1800 contained classic rights, but also included articles which assigned responsibilities to the government in the fields of employment, welfare, public health, and education. Social rights of this kind were also expressly included in the Mexican Constitution of 1917, the Constitution of the Soviet Union of 1918, and the German Constitution of 1919.

In the 19th century, there were frequent inter-state disputes in connection with the protection of the rights of minorities in Europe. These conflicts led to several humanitarian interventions and calls for international protection arrangements. One of the first such arrangements was the Treaty of Berlin of 1878.

The need for international standards on human rights was first felt at the end of the 19th century, when the industrial countries began to introduce labour legislation. This legislation - which raised the cost of labour - had the effect of worsening their competitive position in relation to countries that had no labour laws. Economic necessity forced the states to consult each other. It was as a

result of this that the first conventions were formulated in which states committed themselves *vis-à-vis* other states in regard to their own citizens. The Bern Convention of 1906 prohibiting night-shift work by women can be seen as the first multilateral convention meant to safeguard social rights. Many more labour conventions were later to be drawn up by the International Labour Organisation (ILO), founded in 1919 (see II.§1.D). Remarkable as it may seem, therefore, while the classic human rights had been acknowledged long before social rights, the latter were first embodied in international regulations.

The atrocities of World War II put an end to the traditional view that states have full liberty to decide the treatment of their own citizens. The signing of the Charter of the United Nations (UN) on 26 June 1945 brought human rights within the sphere of international law. In particular, all UN members agreed to take measures to protect human rights. The Charter contains a number of articles specifically referring to human rights (see II.§1.A). Less than two years later, the UN Commission on Human Rights (UNCHR), established early in 1946, submitted a draft Universal Declaration of Human Rights (UDHR). The UN General Assembly (UNGA) adopted the Declaration in Paris on 10 December 1948. This day was later designated Human Rights Day.

During the 1950s and 1960s, more and more countries joined the UN. Upon joining they formally accepted the obligations contained in the UN Charter, and in doing so subscribed to the principles and ideals laid down in the UDHR. This commitment was made explicit in the Proclamation of Teheran (1968), which was adopted during the first World Conference on Human Rights, and repeated in the Vienna Declaration and Programme of Action, which was adopted during the second World Conference on Human Rights (1993).

Since the 1950s, the UDHR has been backed up by a large number of international conventions. The most significant of these conventions are the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR). These two Covenants together with the UDHR form the International Bill of Human Rights. At the same time, many supervisory mechanisms have been created, including those responsible for monitoring compliance with the two Covenants (see II.§1.C).

Human rights have also been receiving more and more attention at the regional level. In the European, the Inter-American and the African context, standards and supervisory mechanisms have been developed that have already had a significant impact on human rights compliance in the respective continents, and promise to contribute to compliance in the future. These standards and mechanisms will be discussed in more detail throughout this book (see Part II).

B. Defining human rights

Human rights are commonly understood as being those rights which are inherent in the mere fact of being human. The concept of human rights is based on the belief that every human being is entitled to enjoy her/his rights without discrimination. Human rights differ from other rights in two respects. Firstly, they are characterised by being:

- Inherent in all human beings by virtue of their humanity alone (they do not have, *e.g.*, to be purchased or to be granted);
- Inalienable (within qualified legal boundaries); and
- Equally applicable to all.

Secondly, the main duties deriving from human rights fall on states and their authorities or agents, not on individuals.

One important implication of these characteristics is that human rights must themselves be protected by law ('the rule of law'). Furthermore, any disputes about these rights should be submitted for adjudication through a competent, impartial and independent tribunal, applying procedures which ensure full equality and fairness to all the parties, and determining the question in accordance with clear, specific and pre-existing laws, known to the public and openly declared.

The idea of basic rights originated from the need to protect the individual against the (arbitrary) use of state power. Attention was therefore initially focused on those rights which oblige governments to refrain from certain actions. Human rights in this category are generally referred to as 'fundamental freedoms'. As human rights are viewed as a precondition for leading a dignified human existence, they serve as a guide and touchstone for legislation.

The specific nature of human rights, as an essential precondition for human development, implies that they can have a bearing on relations both between the individual and the state, and between individuals themselves. The individual-state relationship is known as the 'vertical effect' of human rights. While the primary purpose of human rights is to establish rules for relations between the individual and the state, several of these rights can also have implications for relations among individuals. This so-called 'horizontal effect' implies, among other things, that a government not only has an obligation to refrain from violating human rights, but also has a duty to protect the individual from infringements by other individuals. The right to life thus means that the government must strive to protect people against homicide by their fellow human beings. Similarly, Article 17(1) and (2) of the ICCPR obliges governments to protect individuals against unlawful interference with their privacy. Another typical example is the CERD, which obliges states to prevent racial discrimination between human beings. State obligations regarding human rights may involve desisting from certain activities (*e.g.*, torture) or acting in certain ways (*e.g.*, organising free elections).

C. Terminology

The term 'human rights', is used to denote a broad spectrum of rights ranging from the right to life to the right to a cultural identity. They involve all elementary preconditions for a dignified human existence. These rights can be ordered and specified in different ways. At the international level, a distinction has sometimes been made between civil and political rights, on the one hand, and economic, social and cultural rights on the other. This section clarifies this distinction. Since other classifications are also used, these will likewise be reviewed, without claiming, however, that these categorisations reflect an international consensus. It is also clear that the various categorisations overlap to a considerable extent.

Although human rights have been classified in a number of different manners it is important to note that international human rights law stresses that all human rights are universal, indivisible and interrelated (*e.g.* Vienna Declaration and Programme of Action (1993), para. 5). The indivisibility of human rights implies that no right is more important than any other.

1. CLASSIC AND SOCIAL RIGHTS

One classification used is the division between 'classic' and 'social' rights. 'Classic' rights are often seen to require the non-intervention of the state (negative obligation), and 'social rights' as requiring active intervention on the part of the state (positive obligations). In other words, classic rights entail an obligation for the state to refrain from certain actions, while social rights oblige it to provide certain guarantees. Lawyers often describe classic rights in terms of a duty to achieve a given result ('obligation of result') and social rights in terms of a duty to provide the means ('obligations of conduct'). The evolution of international law, however, has lead to this distinction between 'classic' and 'social' rights becoming increasingly awkward. Classic rights such as civil and political rights often require considerable investment by the state. The state does not merely have the obligation to respect these rights, but must also guarantee that people can effectively enjoy them. Hence, the right to a fair trial, for instance, requires well-trained judges, prosecutors, lawyers and police officers, as well as administrative support. Another example is the organisation of elections, which also entails high costs.

On the other hand, most 'social' rights contain elements that require the state to abstain from interfering with the individual's exercise of the right. As several commentators note, the right to food includes the right for everyone to procure their own food supply without interference; the right to housing implies the right not to be a victim of forced eviction; the right to work encompasses the individual's right to choose his/her own work and also requires the state not to hinder a person from working and to abstain from measures that would increase

unemployment; the right to education implies the freedom to establish and direct educational establishments; and the right to the highest attainable standard of health implies the obligation not to interfere with the provision of health care.

In sum, the differentiation of 'classic' rights from 'social' rights does not reflect the nature of the obligations under each set of rights.

2. CIVIL, POLITICAL, ECONOMIC, SOCIAL AND CULTURAL RIGHTS

Civil rights

The term 'civil rights' is often used with reference to the rights set out in the first eighteen articles of the UDHR, almost all of which are also set out as binding treaty norms in the ICCPR. From this group, a further set of 'physical integrity rights' has been identified, which concern the right to life, liberty and security of the person, and which offer protection from physical violence against the person, torture and inhuman treatment, arbitrary arrest, detention, exile, slavery and servitude, interference with one's privacy and right of ownership, restriction of one's freedom of movement, and the freedom of thought, conscience and religion. The difference between 'basic rights' (see below) and 'physical integrity rights' lies in the fact that the former include economic and social rights, but do not include rights such as protection of privacy and ownership.

Although not strictly an integrity right, the right to equal treatment and protection in law certainly qualifies as a civil right. Moreover, this right plays an essential role in the realisation of economic, social and cultural rights.

Another group of civil rights is referred to under the collective term 'due process rights'. These pertain, among other things, to the right to a public hearing by an independent and impartial tribunal, the 'presumption of innocence', the *ne bis in idem* principle and legal assistance (see, *e.g.*, Articles 9, 10, 14 and 15 of the ICCPR).

Political rights

In general, political rights are those set out in Articles 19 to 21 of the UDHR and also codified in the ICCPR. They include freedom of expression, freedom of association and assembly, the right to take part in the government of one's country, and the right to vote and stand for election at genuine periodic elections held by secret ballot (see Articles 18, 19, 21, 22 and 25 of the ICCPR).

Economic and social rights

The economic and social rights are listed in Articles 22 to 26 of the UDHR, and further developed and set out as binding treaty norms in the ICESCR. These

rights provide the conditions necessary for prosperity and wellbeing. Economic rights refer, for example, to the right to property, the right to work, which one freely chooses or accepts, the right to a fair wage, a reasonable limitation of working hours, and trade union rights. Social rights are those rights necessary for an adequate standard of living, including rights to health, shelter, food, social care, and the right to education (see Articles 6 to 14 of the ICESCR).

Cultural rights

The UDHR lists cultural rights in Articles 27 and 28: the right to participate freely in the cultural life of the community, to share in scientific advancement, and the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which one is the author (see also Article 15 of the ICESCR and Article 27 of the ICCPR).

The alleged dichotomy between civil and political rights, and economic, social and cultural rights

Traditionally it has been argued that there are fundamental differences between economic, social and cultural rights, and civil and political rights. These two categories of rights have been seen as two different concepts and their differences have been characterised as a dichotomy. According to this view, civil and political rights are considered to be expressed in very precise language, imposing merely negative obligations which do not require resources for their implementation, and which therefore can be applied immediately. On the other hand, economic, social and cultural rights are considered to be expressed in vague terms, imposing only positive obligations conditional on the existence of resources and therefore involving a progressive realisation.

As a consequence of these alleged differences, it has been argued that civil and political rights are justiciable whereas economic, social and cultural rights are not. In other words, this view holds that only violations of civil and political rights can be adjudicated by judicial or similar bodies, while, economic, social and cultural rights are 'by their nature' non-justiciable.

Over the years, economic, social and cultural rights have been re-examined and their juridical validity and applicability have been increasingly stressed. During the last decade, we have witnessed the development of a large and growing body of case-law of domestic courts concerning economic, social and cultural rights. This case-law, at the national and international level, suggests a potential role for creative and sensitive decisions of judicial and quasi-judicial bodies with respect to these rights.

Many international fora have elaborated on the indivisibility and interdependency of human rights. As stated in the 1993 Vienna Declaration and Programme of Action: 'All human rights are universal, indivisible and

interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis.' The European Union (EU) and its member states have also made it clear on numerous occasions that they subscribe to the view that both categories of human rights are of equal importance, in the sense that an existence worthy of human dignity is only possible if both civil and political rights and economic, social and cultural rights are enjoyed. In their Declaration of 21 July 1986, they affirmed that 'the promotion of economic, social and cultural rights as well as of civil and political rights is of paramount importance for the full realisation of human dignity and for the attainment of the legitimate aspirations of every individual.'

The so-called Limburg Principles on the Implementation of the ICESCR also indicate that a sharp distinction between civil and political rights on the one hand and economic, social and cultural rights on the other is not accurate. These principles were drawn up in 1986 by a group of independent experts, and followed in 1997 by the Maastricht Guidelines on Violations of Economic, Social and Cultural Rights. Together, these documents provide a clear explanation of the nature of the state party obligations under the ICESCR. The same can be said of the 1990 General Comment 3 of the UN Committee on Economic, Social and Cultural Rights on the nature of states parties' obligations in relation to the ICESCR.

However, despite continuous declarations at the international level on the indivisibility and interdependency of all rights, the possibilities for petitioning an international body with respect to violations of economic, social and cultural rights, are still very limited. The question of adopting an Optional Protocol to the ICESCR providing for a system of individual and collective complaints has been under consideration by the international community for many years and the Committee on Economic, Social and Cultural Rights has invested much time and energy discussing a draft Optional Protocol.

In general, states have given formal support to the adoption of an Optional Protocol. The Vienna Declaration and Programme of Action (1993) 'encourage[d] the Commission on Human Rights, in co-operation with the Committee on Economic, Social and Cultural Rights, to continue the examination of optional protocols to the International Covenant on Economic, Social and Cultural Rights' (Part II, para. 75). This commitment was reiterated by the UN Commission on Human Rights, which has supported the drafting by the Committee of an optional protocol that grants individuals or groups the right to submit communications concerning non-compliance with the Covenant. During the 60th session of the UN Commission on Human Rights (2004), the mandate of the 'Open-ended Working Group on an Optional Protocol to the International Covenant on Economic, Social and Cultural Rights' was renewed for another two years to 'consider options regarding the elaboration of an Optional Protocol to the ICESCR.'

There is a pressing need to adopt an Optional Protocol to the ICESCR. Firstly, the current situation grants economic, social and cultural rights inferior status, with lesser protection than civil and political rights. Secondly, through an individual complaints procedure the meaning and scope of economic, social and cultural rights will become more precise, facilitating efforts to respect and guarantee their enjoyment. Thirdly, the existence of a potential 'remedy' at the international level could provide an incentive to individuals and groups to formulate some of their economic and social claims in terms of rights. Finally, the possibility of an adverse 'finding' by international bodies would give economic, social and cultural rights salience in terms of the political concerns of governments; which these rights largely lack at present.

Without the adoption of an Optional Protocol, the principles of indivisibility and interdependence of all human rights main remain largely theoretical.

3. FUNDAMENTAL AND BASIC RIGHTS

Fundamental rights are taken to mean such rights as the right to life and the inviolability of the person. Within the UN, extensive standards have been developed which, particularly since the 1960s, have been laid down in numerous conventions, declarations and resolutions, and which bring already recognised rights and matters of policy which affect human development into the sphere of human rights. Concern that a broad definition of human rights may lead to the notion of 'violation of human rights' losing some of its significance has generated a need to distinguish a separate group within the broad category of human rights. Increasingly, the terms 'elementary', 'essential', 'core' and 'fundamental' human rights are being used.

Another approach is to distinguish a number of 'basic rights', which should be given absolute priority in national and international policy. These include all the rights which concern people's primary material and non-material needs. If these are not provided, no human being can lead a dignified existence. Basic rights include the right to life, the right to a minimum level of security, the inviolability of the person, freedom from slavery and servitude, and freedom from torture, unlawful deprivation of liberty, discrimination and other acts which impinge on human dignity. They also include freedom of thought, conscience and religion, as well as the right to suitable nutrition, clothing, shelter and medical care, and other essentials crucial to physical and mental health.

Mention should also be made of so-called 'participation rights'; for instance, the right to participate in public life through elections (which is also a political right; see above) or to take part in cultural life. These participation rights are generally considered to belong to the category of fundamental rights, being essential preconditions for the protection of all kinds of basic human rights.

4. OTHER CLASSIFICATIONS

Freedoms

Preconditions for a dignified human existence have often been described in terms of freedoms (*e.g.*, freedom of movement, freedom from torture, and freedom from arbitrary arrest). United States President Franklin D. Roosevelt summarised these preconditions in his famous 'Four Freedoms Speech' to the United States Congress on 26 January 1941:

- Freedom of speech and expression;
- Freedom of belief (the right of every person to worship God in his own way);
- Freedom from want (economic understandings which will secure to every nation a healthy peace-time life for its inhabitants); and
- Freedom from fear (world-wide reduction of armaments to such a point and in such a thorough fashion that no nation would be able to commit an act of physical aggression against any neighbour).

Roosevelt implied that a dignified human existence requires not only protection from oppression and arbitrariness, but also access to the primary necessities of life.

Civil liberties

The concept of 'civil liberties' is commonly known, particularly in the United States, where the American Civil Liberties Union (a non-governmental organisation) has been active since the 1920s. Civil liberties refer primarily to those human rights which are laid down in the United States Constitution: freedom of religion, freedom of the press, freedom of expression, freedom of association and assembly, protection against interference with one's privacy, protection against torture, the right to a fair trial, and the rights of workers. This classification does not correspond to the distinction between civil and political rights.

Individual and collective rights

Although the fundamental purpose of human rights is the protection and development of the individual (individual rights), some of these rights are exercised by people in groups (collective rights). Freedom of association and assembly, freedom of religion and, more especially, the freedom to form or join a trade union, fall into this category. The collective element is even more evident when human rights are linked specifically to membership of a certain group, such as the right of members of ethnic and cultural minorities to preserve their own language and culture. One must make a distinction between two types of rights, which are usually called collective rights: individual rights enjoyed in association with others, and the rights of a collective.

The most notable example of a collective human right is the right to self-determination, which is regarded as being vested in peoples rather than in individuals (see Articles 1 of the ICCPR and ICESCR). The recognition of the right to self-determination as a human right is grounded in the fact that it is seen as a necessary precondition for the development of the individual. It is generally accepted that collective rights may not infringe on universally accepted individual rights, such as the right to life and freedom from torture.

First, second and third generation rights

The division of human rights into three generations was first proposed by Karel Vasak at the International Institute of Human Rights in Strasbourg. His division follows the principles of *Liberté*, *Égalité* and *Fraternité* of the French Revolution.

First generation rights are related to liberty and refer fundamentally to civil and political rights. The second generation rights are related to equality, including economic, social and cultural rights. Third generation or 'solidarity rights' cover group and collective rights, which include, *inter alia,* the right to development, the right to peace and the right to a clean environment. The only third generation right which so far has been given an official human rights status - apart from the right to self-determination, which is of longer standing - is the right to development (see the Declaration on the Right to Development, adopted by the UNGA on 4 December 1986, and the 1993 Vienna Declaration and Programme of Action (Paragraph I, 10)). The Vienna Declaration confirms the right to development as a collective as well as an individual right, individuals being regarded as the primary subjects of development. Recently, the right to development has been given considerable attention in the activities of the High Commissioner for Human Rights. The EU and its member states also explicitly accept the right to development as part of the human rights concept.

While the classification of rights into 'generations' has the virtue of incorporating communal and collective rights, thereby overcoming the individualist moral theory in which human rights are grounded, it has been criticised for not being historically accurate and for establishing a sharp distinction between all human rights. Indeed, the concept of generations of rights is at odds with the Teheran Proclamation and the Vienna Declaration and Programme of Action, which establish that all rights are indivisible, interdependent and interrelated.

D. Universality of human rights

In the last fifty years the principle of universality has become central to the interpretation of human rights law. The recognition and protection of fundamental rights had already to some extent been codified before Second World War, albeit primarily in national law, and especially in national constitutions. It was, however,

only after the Second World War that politicians and civil society alike came to realise that national schemes for the protection of human rights did not suffice. Since then, human rights have found their way into a wide range of regional and global treaties.

The entry into force of the UN Charter on 24 October 1945 marked the formal recognition of human rights as a universal principle, and compliance with human rights was mentioned in the Preamble and in Articles 55 and 56 as a principle to be upheld by all states. In 1948, it was followed by the adoption of the UDHR, and in 1966 by the ICESCR and the ICCPR and its First Optional Protocol (see II.§1.C).

The UDHR specifies over thirty rights. It regards the protection of these rights as a common standard to be ultimately achieved. Several governments and scholars maintain that a number of human rights in the UDHR have the character of *jus cogens* (a peremptory norm, which states are not allowed to derogate from; a rule which is considered universally valid). Its universality is underlined by the fact that in 1948 it was formulated and agreed upon not only by Western states, but also by representatives from countries such as China, the Soviet Union, Chile, and Lebanon. It was moreover adopted without any objection: no votes against and only eight abstentions.

As noted above, during the 1950s and 1960s, more and more countries became independent and joined the UN. In doing so they endorsed the principles and ideals laid down in the UDHR. This commitment was underlined in the Proclamation of Teheran of 1968. The Proclamation was adopted by 85 states, of which more than 60 countries did not belong to the Western Group. The Proclamation stated: 'The Universal Declaration of Human Rights states a common understanding of the peoples of the world concerning the inalienable and inviolable rights of all members of the human family and constitutes an obligation for the members of the international community.'

The Vienna Declaration and Programme of Action, the results of the 1993 Second World Conference on Human Rights (which was attended by 171 states), once more endorsed and underlined the importance of the UDHR. It stated that the UDHR 'constitutes a common standard of achievement for all peoples and all nations', using the language of the Declaration itself.

The universality of human rights has been, and still is, a subject of intense debate, including in anticipation of, during and after the 1993 World Conference on Human Rights. The Vienna document itself states that the universal nature of human rights is 'beyond question'. It also says: 'all human rights are universal'; adding, however, that 'the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind'. This national 'margin of appreciation', as it is called, does not, however, according to the Vienna document, relieve states of their duty to promote and protect all human rights, 'regardless of their political, economic and cultural systems'.

Also relevant when considering the universality of human rights is the increasing number of ratifications of international human rights conventions.

By June 2004, the ICESCR had been ratified by 149 states and the ICCPR by 152 states. Several other UN conventions, as well as conventions of the International Labour Organisation (ILO), have also been ratified by many states; indeed in some cases by nearly all states. Most strikingly, the Convention on the Rights of the Child (CRC), adopted in 1989, has been ratified by 192 states (July 2004).

E. Human rights and interference in domestic affairs

In earlier times, whenever human rights violations were openly condemned by third states, the authorities concerned countered with references to 'unacceptable interference in internal affairs'. In more recent years, this argument has lost ground when human rights are at stake. The Second World War constituted a turning point in the way the international community regards its responsibility for the protection of and respect for human rights. The long-standing principle of state sovereignty *vis-à-vis* one's nationals has in the course of the years been eroded. The UN Charter explicitly proclaimed human rights to be a matter of legitimate, international concern: '[...] the United Nations shall promote [...] universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language or religion' (Article 55); and 'All Members pledge themselves to take joint and separate action in co-operation with the Organisation for the achievement of the purposes set forth in Article 55.' (Article 56).

These commitments were reaffirmed in the Sixth and Seventh principles of the Helsinki Final Act of the Conference on Security and Co-operation in Europe of 1975 (see II.§5), and during the Vienna World Conference on Human Rights of 1993. The traditional (broad) interpretation of the principle of national sovereignty has thus been limited in two crucial, and related, respects. Firstly, how a state treats its own subjects is nowadays considered a legitimate concern of the international community. Secondly, there are now superior international standards, established by common consent, which may be used for appraising domestic laws, and the actual conduct of sovereign states within their own territories, and in the exercise of their internal jurisdiction.

Thus, whether a state has accepted international human rights norms, laid down in conventions, is relevant but not the only decisive factor: human rights, as formulated in the UDHR, have become a matter of international concern and do not fall within the exclusive jurisdiction of states. As stated in the 1993 Vienna Declaration and Programme of Action: '[T]he promotion and protection of all human rights is a legitimate concern of the international community'. In other words: there is a right to interfere in case of human rights violations. Interference can be defined, in this context, as any form of international involvement in the affairs of other states, excluding involvement in which forms of coercion are used ('intervention'). The distinction between interference and intervention is

relevant: the fact that the principle of non-interference does not apply to human rights questions does not mean that states may react to human rights violations by making use of military means. This could amount to a violation of the prohibition of use of force, as laid down in the UN Charter (Article 2(4)). Some human rights experts claim that the United Nations Security Council should decide that a certain human rights situation poses a threat to international peace and security and on the basis of that decision authorise military action for humanitarian purposes, undertaken under the auspices of the UN.

F. Types of state duties imposed by all human rights treaties: The tripartite typology

The early 1980s gave rise to a useful definition of the obligations imposed by human rights treaties, which blurred the sharp dichotomy between economic, social and cultural rights, and civil and political rights.

Specifically, in 1980, Henry Shue proposed that for every basic right (civil, political, economic, social and cultural) there are three types of correlative obligations: 'to avoid depriving', 'to protect from deprivation' and 'to aid the deprived.'

Since Shue's proposal was published, the 'tripartite typology' has evolved and scholars have developed typologies containing more than three levels. While there is no consensus on the precise meaning of the different levels, the 'tripartite typology' presented by Shue is known today in more concise terms as the obligations *'to respect'*, *'to protect'*, and *'to fulfil'*.

Obligations to respect: In general, this level of obligation requires the state to refrain from any measure that may deprive individuals of the enjoyment of their rights or of the ability to satisfy those rights by their own efforts.

Obligations to protect: This level of obligation requires the state to prevent violations of human rights by third parties. The obligation to protect is normally taken to be a central function of states, which have to prevent irreparable harm from being inflicted upon members of society. This requires states: a) to prevent violations of rights by any individual or non-state actor; b) to avoid and eliminate incentives to violate rights by third parties; and c) to provide access to legal remedies when violations have occurred in order to prevent further deprivations.

Obligations to fulfil: This level of obligation requires the state to take measures to ensure, for persons within its jurisdiction, opportunities to obtain satisfaction of the basic needs as recognised in human rights instruments, which cannot be secured by personal efforts. Although this is the key state obligation in relation to economic, social and cultural rights, the duty to fulfil also arises in respect to civil and political rights. It is clear that enforcing, for instance, the prohibition of torture (which requires, for example, police training and preventive measures), the right to a fair trial (which requires investments in courts and

judges), the right of free and fair elections or the right to legal assistance, entails considerable cost.

The above analysis demonstrates that there is little difference in the nature of state obligations in regard to different human rights. The three levels of obligation encompass both civil and political rights and economic, social and cultural rights, blurring the perceived distinction between them.

CHAPTER 2

SOURCES OF INTERNATIONAL HUMAN RIGHTS LAW

Since time immemorial, states and peoples have entered into formal relationships with each other. Over the ages, traditions have developed on how such relationships are conducted. These are the traditions that make up modern 'international law'. Like domestic law, international law covers a wide range of subjects such as security, diplomatic relations, trade, culture and human rights, but it differs from domestic legal systems in a number of important ways. In international law there is no single legislature, nor is there a single enforcing institution. Consequently, international law can only be established with the consent of states and is primarily dependent on self-enforcement by those same states. In cases of non-compliance there is no supra-national institution; enforcement can only take place by means of individual or collective actions of other states.

This consent, from which the rules of international law are derived, may be expressed in various ways. The obvious mode is an explicit treaty, imposing obligations on the states parties. Such 'treaty law' constitutes a dominant part of modern international law. Besides treaties, other documents and agreements serve as guidelines for the behaviour of states, although they may not be legally binding. Consent may also be inferred from established and consistent practice of states in conducting their relationships with each other. The sources of international law are many and states commit to them to different degrees. The internationally accepted classification of sources of international law is formulated in Article 38 of the Statute of the International Court of Justice. These are:

a) International conventions, whether general or particular;
b) International custom, as evidence of general practice accepted as law;
c) The general principles of law recognised by civilised nations;
d) Subsidiary means for the determination of rules of law such as judicial decisions and teachings of the most highly qualified publicists.

These sources will be analysed below.

A. International conventions

International treaties are contracts signed between states. They are legally binding and impose mutual obligations on the states that are party to any particular treaty (states parties). The main particularity of human rights treaties is that they impose obligations on states about the manner in which they treat all individuals within their jurisdiction.

Even though the sources of international law are not hierarchical, treaties have some degree of primacy. Nowadays, more than forty major international conventions for the protection of human rights have been adopted. International human rights treaties bear various titles, including 'covenant', 'convention' and 'protocol'; but what they share are the explicit indication of states parties to be bound by their terms.

Human rights treaties have been adopted at the universal level (within the framework of the United Nations and its specialised agencies, for instance, the ILO and UNESCO) as well as under the auspices of regional organisations, such as the Council of Europe (CoE), the Organisation of American States (OAS) and the African Union (AU) (formerly the Organisation of African Unity (OAU)). These organisations have greatly contributed to the codification of a comprehensive and consistent body of human rights law.

1. UNIVERSAL CONVENTIONS FOR THE PROTECTION OF HUMAN RIGHTS

Human rights had already found expression in the Covenant of the League of Nations, which led, *inter alia*, to the creation of the International Labour Organisation. At the San Francisco Conference in 1945, held to draft the Charter of the United Nations, a proposal to adopt a 'Declaration on the Essential Rights of Man' was put forward but was not examined because it required more detailed consideration than was possible at the time. Nonetheless, the UN Charter clearly speaks of 'promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language or religion' (Article 1, para. 3). The idea of promulgating an 'international bill of rights' was developed immediately afterwards and led to the adoption in 1948 of the Universal Declaration of Human Rights (UDHR).

The UDHR, adopted by a resolution of the United Nations General Assembly (UNGA), although not a treaty, is the earliest comprehensive human rights instrument adopted by the international community. On the same day that it adopted the Universal Declaration, the UNGA requested the UN Commission on Human Rights to prepare, as a matter of priority, a legally binding human rights convention. Wide differences in economic and social philosophies hampered efforts to achieve agreement on a single instrument, but in 1954 two draft conventions were completed and submitted to the UNGA for consideration. Twelve years later, in 1966, the International Covenant on Economic, Social

and Cultural Rights (ICESCR) and the International Covenant on Civil and Political Rights (ICCPR) were adopted, as well as the First Optional Protocol to the ICCPR, which established an individual complaints procedure. Both Covenants and the Optional Protocol entered into force in 1976. A Second Optional Protocol to the ICCPR, on the abolition of the death penalty, was adopted in 1989 and entered into force in 1991.

The 'International Bill of Human Rights' consists of the Universal Declaration of Human Rights, the ICESCR, and the ICCPR and its two Optional Protocols. The International Bill of Rights is the basis for numerous conventions and national constitutions.

The ICESCR and the ICCPR are key international human rights instruments. They have a common Preamble and Article 1, in which the right to self-determination is defined. The ICCPR primarily contains civil and political rights. The supervisory body is the Human Rights Committee. The Committee provides supervision in the form of review of reports of states parties to the Covenant, as well as decisions on inter-state complaints. Individuals alleging violations of their rights under the Covenant can also bring claims against states to the Committee provided the state concerned is party to the First Optional Protocol. By July 2004, a total of 152 states were parties to the Covenant, 104 to the First Optional Protocol and 53 to the Second Optional Protocol (see II.§1.C).

The ICESCR consists of a catalogue of economic, social and cultural rights in the same vein as the 'social' part of the UDHR. Supervision is provided for in the form of reporting by states parties to the Covenant and review of state reports has been entrusted by the UN Economic and Social Council (ECOSOC) to the Committee on Economic, Social and Cultural Rights. In July 2004, a total of 149 states were parties to the Covenant (see II.§1.C).

Besides the International Bill of Human Rights, a number of other instruments have been adopted under the auspices of the UN and other international agencies. They may be divided into three groups:

a) Conventions elaborating on certain rights, *inter alia*:

- The Convention on the Prevention and Punishment of the Crime of Genocide (1948)
- ILO 98 concerning the Right to Organise and to Bargain Collectively (1949)
- The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984)

b) Conventions dealing with certain categories of persons which may need special protection, *inter alia:*

- The Convention relating to the Status of Refugees (1951), and the 1967 Protocol thereto
- The Convention on the Rights of the Child (1989)

- Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflicts (2000)
- Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography (2000)
- ILO 169 concerning Indigenous and Tribal Peoples in Independent Countries (1989)
- The International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (2000)

c) Conventions seeking to eliminate discrimination

- ILO 111 concerning Discrimination in respect of Employment and Occupation (1958)
- UNESCO Convention against Discrimination in Education (1960)
- The International Convention on the Elimination of All Forms of Racial Discrimination (1965)
- International Convention on the Suppression and Punishment of the Crime of Apartheid (1973)
- The Convention on the Elimination of All Forms of Discrimination Against Women (1979) and its Optional Protocol (2000)

2. REGIONAL CONVENTIONS FOR THE PROTECTION OF HUMAN RIGHTS

The UN Charter encourages the adoption of regional instruments for the establishment of human rights obligations, many of which have been of crucial importance for the development of international human rights law. The Council of Europe adopted the European Convention for the Protection of Human Rights and Fundamental Freedoms in 1950 (see II.§2.C), supplemented by the European Social Charter in 1961(see II.§2.C), the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment in 1987 (see II.§1.C), and the Framework Convention on National Minorities in 1994 (see II.§2.C).

The American Convention on Human Rights was adopted in 1969, under the auspices of the Organisation of American States (see II.§1.C). This Convention has been complemented by two protocols, the 1988 Protocol of San Salvador on economic, social, and cultural rights and the 1990 Protocol to abolish the death penalty. Other Inter-American Conventions include the Convention to Prevent and Punish Torture (1985), the Convention on the Forced Disappearances of Persons (1994), and the Convention on the Prevention, Punishment and Eradication of Violence against Women (1995) (see II.§3.B).

In 1981, the Organisation of African Unity, now the African Union, adopted the African Charter on Human and Peoples' Rights (see II.§4.B). Two protocols to the Charter have been adopted: the Additional Protocol on the Establishment of the African Court on Human and Peoples' Rights (1998), and the Protocol on

the Rights of Women in Africa (2003) (see II.§4.B). Other African instruments include the Convention Governing the Specific Aspects of Refugee Problems in Africa (1969) (see II.§4.B), and the African Charter on the Rights and Welfare of the Child (1990) (see II.§4.B).

B. International custom

Customary international law plays a crucial role in international human rights law. The Statute of the International Court of Justice refers to 'general practice accepted as law'. In order to become international customary law, the 'general practice' needs to represent a broad consensus in terms of content and applicability, deriving from a sense that the practice is obligatory (*opinio juris et necessitatis*). Customary law is binding on all states (except those that may have objected to it during its formation), whether or not they have ratified any relevant treaty.

One of the important features of customary international law is that customary law may, under certain circumstances, lead to universal jurisdiction or application, so that any national court may hear extra-territorial claims brought under international law. In addition, there also exists a class of customary international law, *jus cogens*, or peremptory norms of general international law, which are norms accepted and recognised by the international community of states as a whole as norms from which no derogation is permitted. Under the Vienna Convention on the Law of Treaties (VCLT) any treaty which conflicts with a peremptory norm is void.

Many scholars argue that some standards laid down in the Universal Declaration of Human Rights (which in formal terms is only a resolution of the UNGA and as such not legally binding) have become part of customary international law as a result of subsequent practice; therefore they would be binding upon all states. Within the realm of human rights law the distinction between concepts of customary law, treaty law, and general principles of law are often unclear.

The Human Rights Committee in its General Comment 24 (1994) has summed up the rights which can be assumed to belong to this part of international law which is binding on all states, irrespective of whether they have ratified relevant conventions, and to which no reservations are allowed:

> [A] State may not reserve the right to engage in slavery, to torture, to subject persons to cruel, inhuman or degrading treatment or punishment, to arbitrarily deprive persons of their lives, to arbitrarily arrest and detain persons, to deny freedom of thought, conscience and religion, to presume a person guilty unless he proves his innocence, to execute pregnant women and children, to permit the advocacy of national, racial or religious hatred, to deny to persons of marriageable age the right to marry, or to deny to minorities the right to enjoy their own culture, profess their own religion, or use their own language. And [...] the right to a fair trial [...].

Although this list is subject to debate and could possibly be extended with other rights not in the field of civil and political rights (for instance, genocide and large parts of the Four Geneva Conventions on International Humanitarian Law), the Committee underlines that there is a set of human rights which *de jure* are beyond the (politically oriented) debate on the universality of human rights.

C. General principles of law

In the application of both national and international law, general or guiding principles are used. In international law they have been defined as 'logical propositions resulting from judicial reasoning on the basis of existing pieces of international law'.

At the international level, general principles of law occupy an important place in case-law regarding human rights. A clear example is the principle of proportionality, which is important for human rights supervisory mechanisms in assessing whether interference with a human right may be justified. Why are general principles used? No legislation is able to provide answers to every question and to every possible situation that arises. Therefore, rules of law or principles that enable decision-makers and members of the executive and judicial branches to decide on the issues before them are needed. General principles of law play two important roles: on the one hand, they provide guidelines for judges, in particular, in deciding in individual cases; on the other hand, they limit the discretionary power of judges and of members of the executive in their decisions in individual cases.

D. Subsidiary means for the determination of rules of law

According to Article 38 of the Statute of the International Court of Justice, *judicial decisions and the teachings of the most qualified publicists* are 'subsidiary means for the determination of rules of law'. Therefore, they are not, strictly speaking, formal sources, but they are regarded as evidence of the state of the law.

As for the judicial decisions, Article 38 of the Statute of the International Court is not confined to international decisions (such as the judgements of the International Court of Justice, the Inter-American Court, the European Court and the future African Court on human rights); decisions of national tribunals relating to human rights are also subsidiary sources of law.

The writings of scholars contribute to the development and analysis of human rights law. Compared to the formal standard setting of international organs the impact is indirect. Nevertheless, influential contributions have been made by scholars and experts working in human rights fora, for instance, in the UN Sub-Commission on the Promotion and Protection of Human Rights, as well as by

highly regarded NGOs, such as Amnesty International and the International Commission of Jurists.

E. Other contributions to standard setting

Some instruments or decisions of political organs of international organisations and human rights supervisory bodies, although they are not binding on states parties *per se,* nonetheless carry considerable legal weight.

Numerous international organs make decisions that concern human rights and thereby strengthen the body of international human rights standards. Such non-binding human rights instruments are called 'soft law', and may shape the practice of states, as well as establish and reflect agreement of states and experts on the interpretation of certain standards.

Every year, the UNGA and the UN Commission on Human Rights adopt more than 100 resolutions and decisions dealing with human rights. Organisations such as the ILO and the various political organs of the Council of Europe also adopt such resolutions. Some of these resolutions, sometimes called declarations, adopt specific standards on specific human rights that complement existing treaty standards. Prominent examples include the Declaration on the Human Rights of Individuals Who Are Not Nationals of the Country in Which They Live, adopted by the UNGA in 1985 (Resolution 40/144, 13 December 1985) and the Guiding Principles on Internal Displacement, adopted by the UN Commission on Human Rights in 1999 (Doc E/CN.4/1998/53/Add.2). Numerous declarations adopted by the UNGA have later given rise to negotiations leading to treaty standards. Not all resolutions and decisions aim at standard setting, many deal with concrete situations where diverging political interests come more into play, *e.g.*, nominations of members of UN Commissions are taken in the form of decisions.

1. DECISIONS OF POLITICAL ORGANS

Decisions of political organs involving political obligations play a special role and can have an impact on human rights standard setting, *i.e.* certain documents of the Organisation on Security and Co-operation in Europe (OSCE) (Conference on Security and Co-operation in Europe until 1995). Since 1975, the OSCE has devoted much attention to the so-called Human Dimension of European co-operation. OSCE documents are often drafted in a relatively short period of time and do not pretend to be legally binding. Thus, they offer the advantage of flexibility and relevance to current events exercising influence upon states. For instance, the Document of the Copenhagen Meeting of the Conference of the Human Dimension of the CSCE of 1990 made optimal use of the changes that had taken place in Europe after the fall of the Berlin Wall in 1989. This document

included paragraphs on national minorities, which have been used as standards to protect minorities and as guidelines for later bilateral treaties. Although this kind of document reflects the dynamism of international human rights law, some experts worry that the political nature of these documents may lead to confusion, as newer texts might contradict existing instruments or broaden the scope of attention for human rights excessively by including too many related issues.

2. DECISIONS OF SUPERVISORY ORGANS

Numerous human rights supervisory mechanisms have been established to monitor the compliance by states with international human rights standards. Within the UN context, these supervisory bodies are often called 'treaty bodies'. They interpret international treaties, make recommendations and, in some cases, make decisions on cases brought before them. These decisions, opinions and recommendations may not be legally binding *per se*, but their impact on international human rights law (standards) is significant.

In this context, treaty bodies often prepare so-called General Comments or Recommendations, elaborating on the various articles and provisions of their respective human rights instruments. The purpose of these general comments or recommendations is to assist the states parties in fulfilling their obligations. The Human Rights Committee and the Committee on Economic, Social and Cultural Rights are highly regarded for their practice in this respect. These general comments/recommendations reflect the developments within each Committee as to the interpretation of specific provisions and they aim to provide authoritative guidance to states parties. As such, they have a significant influence on the behaviour of states parties.

GENERAL COMMENTS AND GENERAL RECOMMENDATIONS

UN treaty monitoring bodies have begun the practice of preparing General Comments or Recommendations on the provisions of their respective Covenants.

As indicated by the Committee on Economic, Social and Cultural Rights 'the Committee endeavours, through its general comments, to make the experience gained so far through the examination of States' reports available for the benefit of all States Parties in order to assist and promote their further implementation of the Covenant; to draw the attention of the States Parties to insufficiencies disclosed by a large number of reports; to suggest improvements in the reporting procedures; and to stimulate the activities of the States Parties, international organisations and the specialised agencies concerned in achieving progressively and effectively the full realisation of the rights recognised in the Covenant.'

The General Comments or Recommendations are useful tools to clarify the normative content of the Covenants because they are general in nature and provide an abstract picture of the scope of the obligations. General Comments/ Recommendations enable the Committees to announce their interpretations of the different provisions of the Covenants, and the interpretations of the normative scope of the Covenants set out in the General Comments/ Recommendations have achieved a significant degree of acceptance by states parties.

As of April 2004, the Committee on Economic, Social and Cultural Rights had adopted 15 General Comments; the Human Rights Committee had adopted 31 General Comments; the Committee on the Elimination of Racial Discrimination had adopted 29 General Recommendations; the Committee on the Elimination of Discrimination against Women had adopted 24 General Recommendations; the Committee against Torture had adopted one General Comment; and the Committee on the Rights of the Child had adopted 4 General Comments.

F. Concluding remarks

Most states are bound by numerous international instruments guaranteeing a broad range of human rights. What happens when a state is bound by two international instruments setting out diverging levels of protection of a particular human right? The general rule is that when a state is bound by numerous instruments, it is to implement the most far-reaching obligation or highest standard. Most human rights conventions contain special provisions to this effect. For instance, Article 5(2) ICCPR and Article 5(2) ICESCR state that 'There shall be no restriction upon or derogation from any of the fundamental human rights recognised or existing in any state party to the present Covenant pursuant to law, conventions, regulations or custom on the pretext that the present Covenant does not recognise such rights or that it recognises them to a lesser extent.'

In the same vein, Article 55 ECHR sets out that 'Nothing in this Convention shall be construed as limiting or derogating from any of the human rights and fundamental freedoms which may be ensured under the laws of any High Contracting Party or under any other agreement to which it is a Party.'

Similarly, Article 41 CRC provides that nothing in the Convention shall affect any provisions which are more conducive to the realisation of the rights of the child - either in the law of a state party or in international law in force in that state.

Within the realm of standard setting, the number of ratifications and accessions to conventions merits special attention. Widely ratified human rights conventions have greater value and impact, and reinforce the universal character

of human rights law, as well as the equality of all human beings under that law. Wide accession or ratification (with the least possible number of reservations) contributes greatly to ensuring equal application of human rights standards.

Many scholars contend that much of the standard-setting work has been completed. In addition, it has been argued that in recent decades there has been an excessive proliferation of standards, and what is needed is a means for better implementation of the existing norms. However, although the basic human rights have been roughly defined, it may, for instance, emanate from consistent decisions of supervisory mechanisms that further elaboration is needed. Better legal protection may be necessary for, *inter alia*, human rights defenders and (persons belonging to) indigenous peoples. The UN Commission on Human Rights (UNCHR) has adopted the 'Declaration on the right and responsibility of individuals, groups and organs of society to promote and protect universally recognised human rights and fundamental freedoms' (Resolution 1998/7)), but it is not a legally binding document. Since 1995 a special working group of the Commission has been discussing the rights of indigenous peoples, *inter alia,* their right to self-determination and the right to use their natural resources but there is still no agreement on a legally binding text. Other examples of needs for future standard setting relate to the drafting of an optional protocol to the ICESCR establishing a complaints procedure for individuals whose economic, social or cultural rights have been violated and an International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities, that is currently being considered by the United Nations (UNGA Resolution 56/168, 19 December 2002).

CHAPTER 3

GENERAL PRINCIPLES RELEVANT TO HUMAN RIGHTS LAW

Upon becoming parties to a human rights treaty, states must comply with the obligations enshrined therein. Moreover, when applying human rights treaties, it is important to take into account the existence of general principles which are embedded in international human rights law and which guide their application.

It is relevant to attempt to define a general principle by distinguishing it from a human right. The UN Commission on Human Rights has set out a definition of a human right (Resolution 41/120, December 1986) and stated that a human right must:

a) Be consistent with the existing body of international human rights law;
b) Be of fundamental character and derive from the inherent dignity and worth of the human person;
c) Be sufficiently precise to give rise to identifiable and practicable rights and obligations;
d) Provide, where appropriate, realistic and effective implementation machinery, including reporting systems; and
e) Attract broad international support.

General principles are not human rights but there is a degree of overlap as some general principles, such as the principle of non-discrimination and *non bis in idem* have gradually evolved into substantive human rights by being sufficiently precise and fulfilling the conditions described above.

There is no consensus on general principles, but it is proposed that, to qualify as such, a principle must be:

a) To a degree, universally or in a specific jurisdiction, generally accepted;
b) Distinct from human rights, to the effect that they are insufficiently precise, legally, to give rise to identifiable and practicable rights and obligations;
c) Considered either to limit the margin of appreciation of a state or to guide it, when examining or evaluating human right(s) of an individual; and
d) Relevant for the individual enjoyment of human rights.

General principles form, as such, a substratum of law, which helps in interpreting human rights law, and, for that matter, international law in general. On the one hand, the principles provide guidelines for judges in deciding in individual cases; on the other, they limit the discretionary power of judges and the executive power in decisions in individual cases. As such, general principles have an important place in the application of human rights.

A. The rule of law

The rule of law is a cornerstone of the concept of human rights and democracy. There is, however, no international consensus on its meaning. Different traditions in the Anglo-Saxon world (rule of law) and in Continental Europe (*l'Etat de droit*, *Rechtsstaat*, *Stato del diritto*) attach slightly different interpretations to the term. In official documents, the concept is not always explicitly defined. However, a strong consensus does exist on the rule of law as a fundamental principle.

The rule of law implies that rights must be protected by law, independently of the will of the ruler. Individual rights and freedoms are to be protected against any manifestation of arbitrary power by public authorities. The principle of the 'rule of law' is contained in the Preamble to the Charter of the United Nations, which states its objective:

> [T]o save succeeding generations from the scourge of war, and to reaffirm faith in fundamental human rights [...] in the equal rights of men and women and of nations large and small, and to establish conditions under which justice and respect for the obligations arising from international law can be maintained.

The International Commission of Jurists has proposed the following definition: 'The rule of law is more than the formal use of legal instruments, it is also the Rule of Justice and of Protection for all members of society against excessive governmental power.' In sum, the rule of law means that law shall condition a government's exercise of power and that subjects or citizens are not to be exposed to the arbitrary will of their rulers.

1. HISTORICAL DEVELOPMENT

As the rule of law is an old concept, we must go back to its origins in Medieval England to understand its development. After defeating the last Anglo-Saxon King Harold II (1066), William the Conqueror established a central administration. Two factors were characteristic of the political institutions in England at the time: the undisputed supremacy of the central government throughout the country, and the rule or supremacy of the law. The supremacy of the central government was embodied in the power of the King. He was the

source of all legislation, while the administration of justice and the jurisdiction were his privileges. Yet, this did not mean that the King stood above the law; according to a widely held belief in England - and other countries - in the Middle Ages, the world was governed by rules deriving either from what was considered divine right or from what was popularly considered to be right. Thus, the King was subject to the law, because it was the law that had made him King in the first place (*quia lex facit regem*). This is what was originally meant by the rule of law.

Partly because of the feeling among the English people that some kind of 'higher' law existed and the early development of parliament, and partly because of the efforts of the nobility to secure its ancient rights against the King, attempts to establish absolute authority failed. The common law courts and parliament, which became increasingly powerful, not only preserved the existing order of justice, but also succeeded in giving it a meaning, which reflected the changes taking place in society and the people's value systems. This development marked the beginning of the rule of law, which could be reconciled with the doctrine of parliamentary supremacy (originated in the seventeenth century dispute with the Crown).

A similar development took place on the European continent where, since the time of the Frankish Kingdom (around 500 A.D.) the principles of *l'Etat de Droit* (*Rechtsstaat* in German) were developed. The principle implied that the government could only enact a law or binding regulation on the basis of what is considered right and just. In a substantive sense, the principle implied that the standards and acts of the government must be directed towards the realisation of justice. This principle required not only legislation based on the best possible balance of interests, but also the recognition of freedoms and the existence of an independent judiciary fit to check governmental powers.

2. DYNAMIC CONCEPT

The meaning of the rule of law, since its rise in the early Middle Ages, has gone through a process of change, which runs roughly parallel to evolving views on the role and objectives of a national government. But it is a dynamic concept not only in this respect. It does not stand for an abstract, unchanging set of unambiguous rules, but rather for a range of principles which have to be applied and developed on a case-by-case basis. The rule of law should thus be seen as a whole set of legal standards by which governments and subjects are bound. The exact content of these standards is determined by several factors, including public opinion, political consciousness and the prevailing sense of justice.

The fact that the rule of law is constantly changing does not mean that guidelines cannot be distilled from it. On the contrary, it is, to some extent, possible to identify the rules and principles that follow from the rule of law at a certain point in time. Basically, some principles have been part of the rule of law

right from its origin. These are principles of a universal nature, which have defied change. Some of the most important ones are the following:

- No one may be punished except for a distinct breach of an existing law established in the ordinary legal manner before the ordinary courts of the country (*nullum crimen, nulla poena sine praevia lege*). This principle is enshrined in several national constitutions, and a number of international instruments. See *e.g.* Article 7(1) ECHR and Articles 22 and 23 Rome Statute of the International Criminal Court.
- All individuals are 'innocent until proven otherwise' (presumption of innocence). This principle was included already in Article 9 *Déclaration des Droits de l'Homme et du Citoyen* and it is included in several human rights instruments, such as Article 6(1) ECHR.
- Every human being should be treated equally by the same courts, and should have the same rights. This equality is not absolute, since certain professional groups, such as the military, lawyers and civil servants, are sometimes judged in their professional quality by special courts. This practice is not contrary to the rule of law; within these groups, equality before the law applies to the full.

As mentioned, these three principles have in time developed into substantive rights.

Generally speaking, the view on the rule of law has gradually shifted from a source of rights for the individual to a means of protection against excessive governmental power. Other rules and principles derived from the rule of law are:

- No arbitrary power. This principle includes the separation of powers. It does not only apply in relations between the legislature, the executive and the judiciary. As the state regulates national life in many ways, discretionary authority is inevitable. Yet, this does not mean pure arbitrary power, *i.e.*, power exercised by agents responsible to no one and subject to no control. The way power and authority are delegated to lower state institutions has to be controlled and the way those institutions use their power has to be accounted for. Clearly, a '*carte blanche*' delegation goes against the rule of law.
- Independence of the judiciary. The independence of the judiciary is closely linked to the principle above. Independence of the judiciary implies the control of legislation and administration by an independent judiciary, and the independence of the legal profession. Fundamental rights and freedoms can best be guaranteed in a society where the judiciary and the legal profession enjoy freedom from interference and pressure, and where every person is entitled to a fair and public hearing by a competent, independent and impartial tribunal.

The rule of law has come to be regarded as the symbol of a truly free society. Although its precise meaning differs from country to country, and from one

epoch to another, it is always identified with the liberty of the individual. The rule of law aims to maintain a delicate balance between the opposite notions of individual liberty and public order. Every state has to face the challenge of reconciling human rights with the requirements of public interest. This can only be accomplished through independent courts, entitled to guard the balance between the citizen and the state.

The most powerful entity in any community, and hence the greatest potential violator of human rights, is the state itself, through its public authorities, its officials and agents. Any democratic society needs laws to protect the rights and freedoms of individuals, as laid down in constitutions and treaties or institutionalised as common law. There should be laws enabling individuals to obtain a remedy for any violation, and there should be a legal system that ensures that those remedies will be enforced, especially against the state itself.

In recent years new standards have been developed to strengthen the role of the rule of law, in addition to those already incorporated in international conventions (*e.g.*, Article 14 ICCPR, Article 6(1) ECHR). The International Commission of Jurists has played a significant role in the promotion of these standards. Under the framework of the UN, important standards include a) the UN Basic Principles on the Independence of the Judiciary; b) the Procedures for the Effective Implementation of the Basic Principles on the Independence of the Judiciary; and c) the UN Basic Principles on the Role of Lawyers.

Under the framework of the OSCE, an important document on the rule of law is the document of the Copenhagen Meeting of the Conference of the Human Dimension of the CSCE (1990). This document sets out that states are determined to support and advance those principles that form the rule of law, and that the Rule of Law does not mean 'merely a formal legality [...] but justice based on the recognition of the acceptance of the supreme value of the human personality' and 'reaffirm that democracy is an inherent element of the Rule of Law.'

B. The principle of equality and non-discrimination in the enjoyment of human rights

The principle of non-discrimination is of the utmost importance in international law. Various formulations of prohibition of discrimination are contained in, for example, the UN Charter (Articles 1(3), 13(1)(b), 55(c) and 76), the Universal Declaration of Human Rights (Articles 2 and 7), the ICCPR (Articles 2(1) and 26) and the CRC (Article 2). Some instruments are expressly aimed at addressing specific prohibited grounds for discrimination, such as The International Convention on the Elimination of all Forms of Racial Discrimination (CERD) and The Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW), and other instruments aim at addressing the prohibition of discrimination in the exercise of one or several rights, such as ILO 111, which

refers to discrimination in the exercise of the right to work (employment and occupation), and the UNESCO Convention against Discrimination in Education.

A definition of discrimination is included in Article 1(1) CERD, Article 1 CEDAW, Article 1(1) ILO 111, and Article 1(1) Convention against Discrimination in Education. From the different concepts it is possible to conclude that 'discrimination' refers to:

> Any distinction, exclusion or preference, be it in law or in administrative practices or in practical relationships, between persons or groups of persons, made on the basis of race, colour, sex, religion, political opinion, nationality or social origin, which have the effect of nullifying or impairing the equal enjoyment of any human rights.

In general, human rights instruments require states to respect human rights and ensure that all persons within their territory and subject to their jurisdiction enjoy the guaranteed rights without distinction of any kind. Even when a state is allowed to take measures derogating from its obligations under a human rights treaty, such measures may not be discriminatory.

Today, it is well established in international human rights law that not all distinctions in treatment constitute discrimination. This is summed up by the axiom, 'persons who are equal should be treated equally and those who are different should be treated differently' ('in proportion to the inequality'). As indicated by the Human Rights Committee, 'the enjoyment of rights and freedoms on an equal footing [...] does not mean identical treatment in every instance.' Hence, there may be situations in which different treatment is justified.

Although not all differences in treatment are discriminatory, international law establishes some criteria for determining when a distinction amounts to discrimination. In a nutshell, a distinction is compatible with the principle of equality when it has an objective and reasonable justification, pursues a legitimate aim and there is a reasonable relationship of proportionality between the means employed and the aim sought. These requirements have been stressed by some of the major human rights supervisory bodies. For example, in the words of the Human Rights Committee:

> Not every differentiation of treatment will constitute discrimination, if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the Covenant. (General Comment 18)

As the European Court of Human Rights has stated:

> According to the Court's established case-law, a distinction is discriminatory if it 'has no objective and reasonable justification', that is, if it does not pursue a 'legitimate aim' or if there is not a 'reasonable relationship of proportionality' between the means employed and the aim sought to be realised (*Marckx* v. *Belgium*).

In the same vein, the Inter-American Court of Human Rights has held that:

> Accordingly, no discrimination exists if the difference in treatment has a legitimate purpose and if it does not lead to situations which are contrary to justice, to reason or to the nature of things. It follows that there would be no discrimination in differences in treatment of individuals by a state when the classifications selected are based on substantial factual differences and there exists a reasonable relationship of proportionality between these differences and the aims of the legal rule under review. These aims may not be unjust or unreasonable, that is, they may not be arbitrary, capricious, despotic or in conflict with the essential oneness and dignity of humankind (Advisory Opinion No. 4 'Proposed amendments to the naturalisation provisions of the Constitution of Costa Rica', OC-4/84 of 19 January 1984, para. 57).

Thus, differences in treatment (distinction, exclusion, restriction or preference) that comply with the criteria mentioned above are not discriminatory and do not infringe the principle of equality and non-discrimination. Furthermore, certain preferential treatment, such as the special treatment aimed at protecting pregnant women or disabled persons, is not considered discrimination as the purpose of the preferential treatment is to remedy inherent inequalities. Similarly, affirmative action, defined as measures necessary 'to diminish or eliminate conditions which cause or help to perpetuate discrimination' aimed to benefit historically disadvantaged groups within society, must not be considered 'discrimination' (see textbox below).

1. DIRECT AND INDIRECT DISCRIMINATION

Any discrimination with the 'purpose' or the 'effect' of nullifying or impairing the equal enjoyment or exercise of rights is prohibited under the non-discrimination provisions. In other words, the principle of non-discrimination prohibits 'direct' and 'indirect' forms of discrimination.

The concept of 'indirect' discrimination refers to an apparently 'neutral' law, practice or criterion, which has been applied equally to everyone but the result of which favours one group over a more disadvantaged group. In determining the existence of indirect discrimination, it is not relevant whether or not there was intent to discriminate on any of the prohibited grounds. Rather, it is the consequence or effect of a law or action that matters.

2. VULNERABLE GROUPS AND NON-DISCRIMINATION

The principle of non-discrimination demands that particular attention be given to vulnerable groups and individuals from such groups. In fact, the victims of discrimination tend to be the most disadvantaged groups of society.

States should identify the persons or groups of persons who are most vulnerable and disadvantaged with regard to full enjoyment of all human rights and take measures to prevent any adverse affects on them. (For an analysis on vulnerable groups see Part IV).

3. AFFIRMATIVE ACTION OR PROTECTIVE MEASURES FOR THE MOST VULNERABLE GROUPS

In some circumstances the principle of non-discrimination requires states to take affirmative action or protective measures to prevent or compensate for structural disadvantages. These measures entail special preferences, which should not be considered discriminatory, because they are aimed at addressing structural disadvantages or protecting particularly vulnerable groups, encouraging equal participation.

Through its General Comments, the Human Rights Committee often refers to the requirement of the adoption of affirmative action and it has adopted a definition in General Comment 18, para. 10, which reads as follows:

> The Committee also wishes to point out that the principle of equality sometimes requires states parties to take affirmative action in order to diminish or eliminate conditions which cause or help to perpetuate discrimination prohibited by the Covenant. For example, in a state where the general conditions of a certain part of the population prevent or impair their enjoyment of human rights, the state should take specific action to correct those conditions. Such action may involve granting for a time to the part of the population concerned certain preferential treatment in specific matters as compared with the rest of the population. However, as long as such action is needed to correct discrimination in fact, it is a case of legitimate differentiation under the Covenant.

Affirmative action aims to remove obstacles to the advancement of vulnerable groups such as women, minorities, indigenous peoples, refugees and disabled persons. It is important to stress that affirmative action is of a temporary character; it must not continue after its objectives have been achieved.

4. EDUCATION TO COMBAT DISCRIMINATION

Education plays a pivotal role in the struggle against discrimination. On the one hand, educational campaigns are of key importance for combating stereotypes and promoting tolerance. On the other hand, because most disadvantaged groups are often ignorant of the law and fear retaliation or intimidation, education and awareness of their rights and the mechanisms for redress enhance their protection.

IN SUPPORT OF AFFIRMATIVE ACTION MEASURES

The mechanism of 'affirmative action' is a vital tool within human rights law in tackling some of the historical grievances that underpin inequality in modern societies. The principle can be understood as an elevator mechanism designed to raise a particular segment of the population that is at level zero (in terms of quantifiable indicators, such as access to services, employment within the

private and public sector, political participation, level of education and access to education, and other civil, political, economic, social and cultural rights) to the level that the rest of the population enjoys (level one). The causes for this difference between the target group and the rest of the population *i.e.* 'the gap', is often the result of persistent historical discrimination. However, rather than a revision of history, which is undesirable, an elevator mechanism accepts the need for the focusing of specific measures aimed at the alleviation of a particular disadvantage faced by a specific group. Crucially, however, the mechanism can only be effective if it raises the population to level one, and not to a level higher than the rest of the population, for it would then discriminate unjustly against that portion of the population.

The concept of affirmative action has been defined as 'a coherent package of measures, of a temporary character, aimed specifically at correcting the position of members of a target group in one or more aspects of their social life, in order to obtain effective equality' (Bossuyt, UN Doc. E/CN.4/Sub.2/ 2001/15).

In determining when a particular segment of population is entitled to a package of special measures, it is important to stress empirical grounds. The test to examine the claim for affirmative action should be determined by at least two factors: i) the existence of determinable and persistent status of inequality; and ii) effective articulation of the legal right to special measures by representatives- though the latter argument is subservient to the former. In addition, groups, or individuals belonging to such groups, that choose to assimilate should be enabled a waiver of this right.

Of course there are numerous other issues that are relevant to the determination of affirmative action, including the fact that such measures often create new disadvantaged groups. Besides, beneficiaries of such action often express the sentiment that the perception of availing of special measures often belittles their own achievements. Instead, they are reduced in public perception to being no more than token beneficiaries of policy rather than grants on meritorious bases.

The justification for special measures however outweighs these. First and foremost, it remains an admittedly imperfect legal guarantee through which historical power relationships within a system are sought to be balanced. Second, such measures attempt to remedy social and structural discrimination. Thus, while not necessarily tackling existing prejudice, they seek to create mechanisms combating structural and institutional imbalances. Third, it attempts the creation of diversity or proportional group representation, by fostering new aspirations and expectations within groups with a view towards fuller participation in all aspects of public life.

A fourth argument in favour of affirmative action is the social utility argument stressing that society, as a whole, is better off with all its components participating in processes that affect them. Related to this is the idea that a level of interaction between different groups in a society can calm potential future social unrest by enabling means other than violence for discussions about grievances. Finally, if the public affairs of the state are more inclusive there is a greater likelihood that it will develop a pluralistic attitude that enables greater harmony and equality between groups.

Joshua Castellino

CHAPTER 4

ALTERATION OF HUMAN RIGHTS TREATY OBLIGATIONS

The adoption of the text of a treaty normally takes place by the consent of the states participating in its drafting or by a majority at an international forum. A treaty only binds those states that have consented to be bound by it and for which the treaty has entered into force. There are several procedures whereby states may express their consent to be bound. They can do so by ratification, acceptance, approval, or accession, depending on what the treaty stipulates and on the relevant national practice. It has become increasingly common for states to sign a convention first, subsequently submit it to their legislature for approval and finally ratify it. Several years may pass from the time of adoption until the treaty is ratified.

A convention enters into force only after the minimum number of states specified has expressed consent to be bound by it. For instance, the ICCPR stipulates that the Covenant enters into force three months after the date of deposit of 35 instruments of ratification or accession (Article 49). The ICCPR was adopted by the UNGA on 16 December 1966; it was opened for signature, ratification and accession on 19 December 1966, and entered into force on 23 March 1976; *i.e.*, almost ten years after its adoption.

States are bound by treaty provisions in different ways. Under some treaties a state party may be permitted to limit its legal obligations by entering reservations to some of the provisions of the treaty. A reservation renders the provision concerned non-binding or limits its effects. States may also in some instances enter a declaration concerning the extent to which they wish to be bound by a certain provision or how they interpret the provision. This chapter begins by dealing with the permissibility of reservations and declarations in international human rights treaties.

In addition, most human rights are not absolute; they can be limited in specific circumstances. Many human rights instruments permit the restriction of some rights for reasons of; national security, public order (*ordre public*); public health; or public morality. Examples of rights, which are not absolute, include freedom of movement, freedom of religion, right to peaceful assembly, and freedom of association. But any limits a state places on rights must comply with some

requirements examined in this chapter. Finally, in a legitimate state of emergency that is publicly declared, some human rights instruments allow a state party unilaterally to derogate temporarily from a part of its obligations. These situations are also examined in this chapter.

THE VIENNA CONVENTION ON THE LAW OF TREATIES (1969)

The Vienna Convention on the Law of Treaties (VCLT) is an international treaty adopted on 22 May 1969, which came into force on 27 January 1980. The VCLT codified the pre-existing international customary law on treaties filling some gaps and adding some clarifications. Most states are parties to it. Moreover, even states that are not bound by the Convention itself may be bound by those provisions which reflect customary international law.

The VCLT regulates, *inter alia,* the following aspects of international treaties: a) conclusion and entry into force of treaties; b) reservations; c) observance, application and interpretation of treaties; d) amendment and modification of treaties; and e) invalidity, termination and suspension of the operation of treaties.

A. Reservations and declarations

When becoming party to a treaty, a state may, by formulating reservations, declarations and interpretative statements, seek to limit its domestic application beyond what is permissible under the limitations referred to above. Although it is desirable that states become party to a convention unconditionally, this is often not the case.

1. RESERVATIONS

In general terms, a reservation is a statement made by a state by which it purports to exclude or alter the legal effect of certain provisions of a treaty in their application to that state. A reservation may enable a state to participate in a multilateral treaty that it would otherwise be unable or unwilling to participate in.

The International Court of Justice stated in its Advisory Opinion on the Genocide Convention (1951): 'Object and purpose of the Convention limit both the freedom of making reservations and that of objecting to them.' These words were later codified in Article 19 Vienna Convention on the Law of Treaties which sets out the general rule on reservations:

> A state may, when signing, ratifying, accepting, approving or acceding to a treaty, formulate a reservation unless:
> (a) The reservation is prohibited by the treaty;
> (b) The treaty provides that only specified reservations, which do not include the reservation in question, may be made; or
> (c) In cases not falling under subparagraphs (a) and (b), the reservation is incompatible with the object and purpose of the treaty.

Unless expressly permitted by a treaty, the effectiveness of a reservation is dependent on its acceptance by other states parties, and any other state party may object to it. As a rule, a reservation is considered accepted by another state party if that state party has raised no objection within twelve months after it has been notified of the reservation (Article 20(5)VCLT). Regrettably, silence on the part of other states parties seems to be the common response to reservations; and, unfortunately, this silence is rarely the result of conscious deliberation.

The UN Commission on Human Rights has stated that reservations should be formulated 'as precisely and narrowly as possible (Resolution 1998/9). Reservations often reflect an admission that the country in question cannot, or will not, bring its conduct up to international standards. General reservations may, moreover, encourage other states to follow suit, and thereby reduce the ability of the state making the reservation to complain when other states make similar reservations. Furthermore, extensive limitations may contravene established principles of international law contrary, for instance, to Article 27 VCLT that states: 'A party may not invoke the provisions of its domestic law as justification for its failure to perform a treaty.'

Article 57(1) of the ECHR prohibits reservations 'of a general character'. The European Court of Human Rights discussed the issue of general reservations in *Belilos* v. *Switzerland* (1988). In *Loizidou* v. *Turkey* (1995), the Court held that:

> [A] State may not make a reservation in relation to an article of the Convention that does not deal directly with substantive rights and freedoms, but instead with procedural or formal matters. If [...] substantive or territorial restrictions were permissible under these provisions, Contracting Parties would be free to subscribe to separate regimes of enforcement of Convention obligations [...]. Such a system [...] would not only seriously weaken the role of the [...] Court [...] but would also diminish the effectiveness of the Convention as a constitutional instrument of European public order (*ordre public*).'

The Inter-American Court has dealt with the issue of reservations in its Advisory Opinion No. 2 on the 'Effect of Reservations on the Entry into Force of the American Convention on Human Rights' and Advisory Opinion No. 4 on 'Proposed Amendments to the Naturalization Provisions of the Constitution of Costa Rica', stating that reservations may not lead to a result that weakens the system of protection established by the Convention.

Certain instruments, such as the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), have been subject to many reservations, some of them clearly incompatible with the object and purpose of the treaty. The effect of invalid reservations to human rights treaties, and of objections to reservations, is a continuing debate in international law. In the face of this situation, the independent monitoring bodies, such as the CEDAW Committee and the Human Rights Committee, have taken a view on the validity of reservations, a practice not contemplated by the VCLT. Although the competence of these bodies in this regard has been debated, it seems logical to conclude that their competence derives from their functions. The Human Rights Committee has dealt with this issue in General Comment 24 on issues relating to reservations made upon ratification or accession to the Covenant or the Optional Protocols (CCPR/C/21/Rev.1/Add.6, of 11 November 1994). In this General Comment the Committee stressed that 'reservations must be specific and transparent [...]. Reservations may thus not be general, but must refer to a particular provision of the Covenant and indicate in precise terms its scope in relation thereto.'

2. DECLARATIONS

Some conventions allow or even require states parties to make declarations concerning the extent to which they are bound by a certain provision. Such statements may relate to the competence of a supervisory mechanism. For instance, Article 41 ICCPR stipulates that a state party may choose (not) to recognise the competence of the Human Rights Committee to receive state complaints regarding its human rights performance. This type of declaration, as provided by the instruments, does not pose major problems. However, a state party may also make interpretative declarations, otherwise known as understandings, whereby it does not intend to modify or limit the provisions of the treaty, but indicates merely how it interprets a particular article. Such interpretative declarations may raise certain problems in international law as to their differentiation with reservations.

The VCLT is silent on the question of interpretative declarations. However, the International Law Commission has studied the matter at length and several international human rights bodies have dealt with the issue. One of the major differences between a 'reservation' and an 'interpretative declaration' lies in the author's purpose in making that declaration. While a reservation seeks to exclude or modify the legal effect of the treaty's provisions in their application to the state author, the interpretative declaration seeks only to clarify the meaning or scope of the treaty provisions. Therefore, it is the intention of the state rather than the form or the name or title which matters. Thus, if a statement purports to exclude or modify the legal effect of a treaty in its application to the state, it constitutes a reservation. Conversely, if a so-called 'reservation' merely provides

a state's understanding of a provision, without excluding or modifying that provision, it is in reality not a reservation.

B. Restrictions or limitations

Conventions and other instruments may contain a number of restrictions or limitations to the rights they stipulate. It is generally accepted that only few rights and freedoms are 'absolute'. At the same time, such restrictions must be used only to establish the proper limits of the protected right and not as an excuse for undermining the right itself or destroying it altogether. In general, there must be a proportionate relationship between the restriction of the right as such and the reason for the restriction.

Various international instruments contain provisions allowing restrictions (used interchangeably with the term 'limitations') on human rights. Such provisions may take the form of general limitations. Article 4 ICESCR, for instance, reads:

> The states parties to the present Covenant recognise that, in the enjoyment of those rights provided by the state in conformity with the present Covenant, the state may subject such rights only to such limitations as are determined by law only in so far as this may be compatible with the nature of these rights and solely for the purpose of promoting general welfare in a democratic society.

Another illustration is provided by Article 32(2) American Convention on Human Rights (ACHR): 'The rights of each person are limited by the rights of others, by the security of all, and by the just demands of the general welfare, in a democratic society'.

The African Charter on Human and Peoples' Rights does not contain a specific provision on restrictions but Article 27(2) on 'duties' has come to play the role of a general limitation clause providing: 'The rights and freedoms of each individual shall be exercised with due regard to the rights of others, collective security, morality and common interest.'

In order to prevent abuse, conventions often contain a paragraph prohibiting the abuse of an international instrument to destroy another right. Article 5 ICCPR, for instance, stipulates:

> Nothing in the present Convention may be interpreted as implying for any state, group or person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms recognised herein or at their limitation to a greater extent than is provided for in the present Covenant.

However, apart from these general provisions most human rights treaties contain specific provisions in various individual articles, which specify the limitations and restrictions that are allowed on the particular right. Such specific

limitation clauses include 'prescribed by law', 'in a democratic society', 'public order (*ordre public*)', 'public health', 'public morals', 'national security', 'public safety' and 'rights and freedoms of others'. For a few rights, such as freedom from torture or slavery, no limitations have been formulated.

When a right is subject to a limitation, no other limitations are permitted and any limitation must comply with the following minimum requirements:

- The limitation must not be interpreted so as to jeopardise the essence of the right concerned;
- The limitation must be interpreted strictly in the light and context of the particular right;
- The limitation must be prescribed by law and be compatible with the object and purpose of the instrument;
- The restriction must be based on a law;
- The restriction must be necessary; there must be a pressing social need, assessed on a case-by-case basis. That the law would be useful is in itself not sufficient; it must be consistent with other protected rights. In some treaties, the condition that it be 'necessary' (in a democratic society) is added; and
- The restriction must be justified by the protection of a strictly limited set of well-defined public interests, which usually includes one or more of the following grounds: national security, public safety, public order (*ordre public*), the protection of health or morals, and the protection of the rights and freedoms of others.

Most of these requirements have been developed by academia and the jurisprudence of major human rights bodies. In this regard it is important to bear in mind the Siracusa Principles on the limitation and derogation provision in the International Covenant on Civil and Political Rights. The Siracusa Principles were adopted by a group of 31 distinguished experts in international law convened by the International Commission of Jurists, who met in Siracusa, Sicily in 1984.

The Inter-American Court has dealt with limitation and derogation in Advisory Opinion No. 5 on Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism.

In sum, any restriction on the enjoyment of the rights enshrined in human rights instruments must be legally established, non-discriminatory, proportional, compatible with the nature of the rights, and designed to further the general welfare. Finally, it is also important to stress that the burden falls upon states parties to prove that a limitation imposed upon the enjoyment of the rights is legitimate. This is, of course, a heavy burden of proof, but it is consistent with the object and purpose of human rights treaties to protect the individual.

C. Derogations

Some human rights instruments allow states to take measures derogating temporarily from some of their obligations. Derogating measures must be of an exceptional and temporary nature. There are derogation clauses in, *inter alia*, Article 15 ECHR, Article 27 ACHR and Article 31 European Social Charter. Some human rights instruments, such as the Convention on the Right of the Child, the ICESCR, and the African Charter on Human and Peoples' Rights, do not contemplate any derogation clause.

The rationale for derogation provisions is to strike a balance between the sovereign right of a government to maintain peace and order during public emergencies, and the protection of the rights of the individual from abuse by the state. Thus, the state is allowed to suspend the exercise of some rights when necessary to deal with an emergency situation (*e.g.*, derogation of the right to peaceful assembly), provided it complies with safeguards against any abuse of these derogation provisions.

When derogation measures are allowed, such derogations have to meet several criteria:

- There must be a war or general state of emergency threatening the life of the nation;
- The state of emergency must be officially proclaimed;
- Measures may not go beyond the extent strictly required by the situation;
- Measures may not be inconsistent with other obligations under international law; and
- Measures may not be discriminatory solely on grounds of race, colour, sex, language, religion or social origin.

A state availing itself of the right of derogation must immediately provide justification for its decision to proclaim a state of emergency and also for any specific measure based on such a proclamation.

With regard to derogations and limitations, the Final Document of the 1991 Moscow meeting of the Conference on Security and Co-operation in Europe (CSCE), states:

> The participating states reaffirm that a state of public emergency is justified only by the most exceptional and grave circumstances [...]. A state of public emergency may not be used to subvert the democratic constitutional order, nor aim at the destruction of internationally recognised human rights and fundamental freedoms. [...]
> The participating states confirm that any derogation from obligations relating to human rights and fundamental freedoms during a state of public emergency must remain strictly within the limits provided for by international law, in particular the relevant international instruments by which they are bound, especially with respect to rights from which there can be no derogation.

Limits, in the form of the criteria to be met, have thus been set out on the extent to which states can derogate from their human rights obligations. Moreover, as stipulated in a number of international conventions (*e.g.*, Article 4(2) ICCPR, Article 15(2) ECHR and Article 27(2) ACHR), a number of rights can under no circumstances be limited or derogated from. Such rights are often called *notstandsfest* - a German term - and include the right to life, freedom from slavery, torture and imprisonment for debt, the principle of legality in the field of criminal law, freedom of thought, conscience and religion and the right to juridical personality.

The Human Rights Committee, in its General Comment 29 sets out in detail the conditions that must be met in order to derogate from the rights contained in the ICCPR and refers in length to those rights which are not derogable. The Committee established that the rights contained in Article 4(2) ICCPR are not the only non-derogable rights; there are elements of other rights not listed in Article 4(2) that cannot be subject to lawful derogation.

CHAPTER 5

INTERPRETATION OF HUMAN RIGHTS TREATIES

Human rights law is embedded in the broader field of international law, and therefore, in general, the rules for interpretation, which are applicable under international law, are also applicable to human rights treaties. In general, the principles of interpretation of international treaties contained in the Vienna Convention on the Law of Treaties (VCLT) are considered to be the customary international law principles of treaty interpretation. However, the interpretation of human rights treaties requires that the specific characteristics of these treaties be taken into account.

The rules for treaty interpretation are contained in Articles 31 to 33 of the VCLT. The principal provision for treaty interpretation is found in Article 31(1) VCLT and contains a number of elements. First, it is provided that a treaty shall be interpreted in 'good faith'. This rule stresses the importance of the principle of good faith contained in Article 26 VCLT and applies it to the process of treaty interpretation. It is provided that a treaty shall be interpreted in accordance with the *ordinary meaning* to be given to the terms of the treaty (literal interpretation), in their *context*, that is to say, upon a systematic view of the whole treaty (systematic interpretation). Moreover, this shall be done in light of the *object and purpose* of the treaty (teleological interpretation).

Paragraph 2 of Article 31 provides that for the purpose of interpreting a treaty, the context of a treaty comprises, in addition to the text, including its preamble and annexes, any agreement or instrument in connection with the conclusion of the treaty and related to it and any subsequent agreement and practice regarding its interpretation. Paragraph 3 provides that there shall be taken into account, together with the context, *inter alia,* any relevant rules of international law applicable in relations between the parties.

Article 32 VCLT provides that recourse may be had to supplementary means of interpretation in order to confirm the meaning resulting from the application of Article 31, or to determine the meaning when the interpretation according to Article 31 'leaves the meaning ambiguous or obscure' or 'leads to a result which is manifestly absurd or unreasonable.' According to Article 32, the supplementary means of interpretation include the preparatory work of the treaty and the

circumstances of its conclusion. It is of particular importance that under the VCLT, the *travaux préparatoires* are only a supplementary means of interpretation. As has been established by the International Court of Justice, treaties should be interpreted and applied within the framework of the legal system prevailing at the time of the interpretation, rather than at the time of the drafting or adoption of the text; in the interpretation of human rights treaties, the intention of the drafters does not generally play a major part. For example, it is by no means rare to find decisions of the European Court of Human Rights that are contrary to the express intentions of the drafters.

A. The specific object and purpose of human rights treaties

It is well established that the rules for treaty interpretation provide the framework for interpreting human rights treaties. This is apparent in the jurisprudence of the major human rights supervisory bodies. The Human Rights Committee as well as the regional human rights courts have expressly noted that the rules of interpretation set out in the VCLT contain the relevant international law principles for interpretation. However, as stated above, the application of these rules does not resolve all the problems of treaty interpretation because the rules of the VCLT are not unequivocal. Moreover, the interpretation of human rights treaties requires that the specific characteristics of human rights treaties be taken into account. Already in 1951, the International Court of Justice noted the special character of human rights treaties. In its Advisory Opinion on Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, the Court stated that the parties to such instruments do not have any individual advantages or disadvantages nor interests of their own, but merely a common interest.

One aspect that distinguishes human rights treaties from other international treaties relates to duties of states parties. Human rights treaties are agreements between states which grant specific rights to individuals who are not themselves parties to the instruments and in which the correlative duties fall primarily on states.

The Inter-American Court has explained this special feature of the human rights instruments with clarity, emphasising that:

> Modern human rights treaties in general and the American Convention in particular, are not multilateral treaties of the traditional type concluded to accomplish the reciprocal exchange of rights for the mutual benefit of the contracting states. Their object and purpose is the protection of the basic rights of individual human beings irrespective of their nationality, both against the state of their nationality and all other contracting states. In concluding these human rights treaties, the states can be deemed to submit themselves to a legal order within which they, for the common good, assume various obligations, not in relation to other states, but towards all individuals within their jurisdiction [...].

The European Commission of Human Rights applied the same approach in the case of *Austria* v. *Italy* when it held that:

> [T]he obligations undertaken by the High Contracting Parties in the European Convention are essentially of an objective character, being designed rather to protect the fundamental rights of individual human beings from infringements by any of the High Contracting Parties than to create subjective and reciprocal rights for the High Contracting Parties themselves.

This approach is also apparent in the jurisprudence of the European Court of Human Rights. In the *Wemhoff* v. *Federal Republic of Germany*, the Court noted that because the Convention is a 'law-making treaty, it is [...] necessary to seek the interpretation that is most appropriate in order to realise the aim and achieve the object of the treaty'.

It is important to mention that there are other principles for interpretation that should also be considered, such as the interpretative principle that limitation provisions shall be construed and applied in a restrictive way.

In sum, the object and purpose of human rights treaties play a central and crucial role in their interpretation. The specific object and purpose of human rights treaties is the protection of the individual human person. This not only justifies but also compels interpretation and application of the provisions of human rights instruments in a consistent manner. This object and purpose requires that we take into account, at a minimum, the three following principles:

1. THE EFFECTIVENESS RULE

Because the overriding function of human rights treaties is the protection of individuals' rights, it seems clear that their interpretation should make that protection effective. As the Inter-American Court has noted,

> [t]he object and purpose of the American Convention is the effective protection of human rights. The Convention must, therefore, be interpreted so as to give it its full meaning and to enable the system for the protection of human rights entrusted to the Commission and the Court to attain its '*appropriate effects*'.

The application of this principle is evident in the case-law of the European Court. As the Court has stated:

> In interpreting the Convention, regard must be had to its special character as a treaty for the collective enforcement of human rights and fundamental freedoms [...]. [T]hus the *object and purpose of the Convention as an instrument for the protection of individual human beings require that its provisions be interpreted and applied so as to make its safeguards practical and effective* (*Golder* v. *The United Kingdom*). (Emphasis added).

2. THE EVOLUTIVE INTERPRETATION

The protection of individuals also requires an evolutive interpretation of human rights treaties. Human rights are not static and therefore effective protection of these rights involves taking into account developments in law and society. The necessity of taking into account the changes occurring in society and in law has often been emphasised by the European Court of Human Rights which has frequently underlined that the Convention is a 'living instrument, which must be interpreted in the light of present-day conditions.'

It is again worth noting that, as with the effectiveness principle, the importance of the evolutive interpretation is the consequence of the overriding object and purpose of human rights treaties. The interpretation of the text in light of the object and purpose (Article 31 VCLT) is required to make human rights provisions 'practical and effective' and to take into account 'present-day conditions' for the protection of the individual. This is clear, for example, in *Loizidou* v. *Turkey,* where the European Court held:

> That the Convention is a living instrument which must be interpreted in the light of present day conditions is firmly rooted in the Court's case-law [...]. It follows that these provisions cannot be interpreted solely in accordance with the intentions of their authors as expressed more than forty years ago.

Subsequently the Court added that 'the object and purpose of the Convention as an instrument for the protection of individual human beings requires that its provisions be interpreted and applied so as to make its safeguards practical and effective [...].'

The Inter-American Court also applies the principle of evolutive interpretation. The Court itself has explained that in the interpretation process:

> It is appropriate to look to the Inter-American system of today in the light of the evolution it has undergone since the adoption of the Declaration, rather than to examine the normative value and significance which that instrument was believed to have had in 1948.

More recently, the Inter-American Court has made express mention of the jurisprudence of the European Court of Human Rights and indicated that 'human rights treaties are living instruments, the interpretation of which must evolve over time in view of existing circumstances.' (*Mayagna (Sumo) Awas Tingni Community* v. *Nicaragua*).

3. THE RULE OF AUTONOMOUS INTERPRETATION

Closely related to the rule of evolutive interpretation is the rule of autonomous interpretation, which can best be explained with two examples: A property right

in human rights law is not automatically a property right as defined in national law; under human rights law its concept might be much broader. Similarly a wrongdoing is not automatically a criminal offence because it has been defined as such in a national criminal code. The Inter-American and European human rights courts have insisted on their autonomy in interpreting the meaning of the terms in their respective conventions. In the case of *Mayagna (Sumo) Awas Tingni Community* v. *Nicaragua,* the Inter-American Court of Human Rights explained the concept and the close relationship with the rule of evolutive interpretation:

> The terms of an international human rights treaty have an autonomous meaning, for which reason they cannot be made equivalent to the meaning given to them in domestic law. Furthermore, such human rights treaties are live instruments whose interpretation must adapt to the evolution of the times and, specifically, to current living conditions. [...] no provision may be interpreted as restricting the enjoyment or exercise of any right or freedom recognized by virtue of the laws of any State Party or by virtue of another convention to which one of the said states is a party.

The logic and importance of the concept of autonomous interpretation was explained by the European Court of Human Rights in the case of *Engel* v. *The Netherlands*:

> If the Contracting States were able at their discretion to classify an offence as disciplinary instead of criminal, or to prosecute the author of a "mixed" offence on the disciplinary rather than on the criminal plane, the operation of the fundamental clauses of Articles 6 and 7 [articles providing minimum rights to those who are charged of a criminal offence] would be subordinated to their sovereign will. A latitude extending thus far might lead to results incompatible with the purpose and object of the Convention.

Notably, with the terms included in the articles defining fair trial, the Inter-American and European Courts have, on several occasions, applied the rule of autonomous interpretation in defining, for instance, what the concepts 'penalty' and 'witness' entail.

CHAPTER 6

INTERNATIONAL SUPERVISORY MECHANISMS FOR HUMAN RIGHTS

The numerous human rights conventions under the framework of the United Nations and the regional systems in Africa, the Americas and Europe have led to the creation of a wide range of mechanisms for monitoring compliance with the standards agreed upon. This chapter will examine the different procedures, which have been instituted at the international and regional levels to monitor compliance with human rights treaties.

There are two distinctive types of supervisory mechanisms:

a) Treaty-based mechanisms: supervisory mechanisms enshrined in legally binding human rights instruments or conventions. Within the UN framework these mechanisms are often called 'treaty bodies', *e.g.*, the Human Rights Committee and the Committee on the Rights of the Child. The African Commission and future Court on Human and Peoples' Rights, the European Court of Human Rights and the Inter-American Court and Commission of Human Rights are also treaty bodies.

b) Non-treaty based mechanisms: supervisory mechanisms not based on legally binding human rights treaty obligations. Generally, this type of mechanism is based on the constitution or charter of an intergovernmental human rights forum, or on decisions taken by the assembly or a representative body of the forum in question. Under the UN framework, the non-treaty-based mechanisms are referred to as 'charter-based' mechanisms, which include the 1503 procedure and the country mandates. The European Commission against Racism and Intolerance under the Council of Europe is also an example of a regional non-treaty based mechanism.

The following sections provide an overview first and foremost of the treaty-based mechanisms. The United Nations non-treaty-based mechanisms are dealt with in Part II.

The various supervisory procedures established in human rights treaties can be divided into four main groups:

- Reporting procedures
- Inter-state complaint procedure

- Individual complaint procedure
- Inquiries and other procedures

A. Reporting procedures

Most human rights treaties include a system of periodic reporting. States parties to them are obliged to report periodically to a supervisory body on the implementation at the domestic level of the treaty in question. As formulated, *e.g.*, in Article 40 of the ICCPR, states parties shall 'submit reports on the measures they have adopted which give effect to the rights recognised herein and on the progress made in the enjoyment of those rights'. At the UN level, each treaty body has formulated general guidelines regarding the form and contents of the reports to be submitted by states parties (see HRI/GEN/2/Rev.2), and their own rules of procedures (see UN HRI/GEN/3/Rev.1).

The report is analysed by the relevant supervisory body, which comments on the report and may request the state concerned to furnish more information. In general, reporting procedures under the different treaty-based mechanisms are meant to facilitate and initiate a 'dialogue' between the supervisory body and the state party.

The quality of the reports submitted by states varies. Some reports are reliable and reflect serious efforts to comply with the reporting requirements, while others are lacking in credibility. In any case, the reports generally reflect the view of the respective state. In addition to the government report, the treaty bodies receive information on a country's human rights situation from other sources, including non-governmental organisations, UN agencies, other intergovernmental organisations, academic institutions, and the press. The quality of decision-making throughout the reporting procedure depends to a great extent on this additional information that the experts may receive from the external sources. Additional information provided by, in particular, NGOs and agencies of the United Nations grant a wider perspective as to the actual situation in the country concerned. In an increasing number of countries, NGOs prepare and submit to the treaty bodies alternative reports aimed at counter balancing the information submitted by the state. In the light of all the information available, the Committees examine the reports together with government representatives. Based on this dialogue, the Committees decide on their concerns and recommendations to the state concerned, referred to as 'concluding observations'.

All UN human rights conventions contain a reporting procedure: Article 16 ICESCR, Article 40 ICCPR, Article 9 CERD, Article 19 CAT, Article 44 CRC, Article 18 CEDAW and Article 73 CMW. Under the regional systems, reporting mechanisms are found under Article 21 of the European Social Charter, Article 19 of the Protocol of San Salvador, and Article 62 of the African Charter on Human and Peoples' Rights.

The regular supervision of ILO conventions also encompasses a reporting

mechanism. Each member state of the ILO must submit a report, at regular intervals, on the measures it has taken to give effect to the provisions of conventions, which it has ratified. The Committee of Experts on the Application of Conventions first examines these reports in closed meetings composed of 20 independent legal experts. The comments of the Committee of Experts are made in the form either of observations, which are published in the Committee's report on the Application of Conventions and Recommendations; or of requests dealing with more technical questions, addressed directly to the governments, which remain unpublished. The Committee's report is then considered at the annual session of the International Labour Conference by a tripartite Conference Committee on the Application of Conventions and Recommendations (Committee on Application of Standards). It is worth noting that under the ILO framework member states must also submit reports on conventions they have not yet ratified, showing the position of the law and practice in regard to the matters dealt with in the conventions, and indicating the difficulties which have prevented or delayed ratification. As such this reporting mechanism can be considered a charter-based reporting mechanism.

THE REPORTING PROCEDURES UNDER THE ICESCR

All UN human rights treaties establish a reporting system. Although each Committee has developed its own particular methods, most of them are similar. Under the ICESCR the reporting mechanism works as follows:

The pre-sessional working group and the 'list of issues'

Prior to each Committee session, five members of the Committee meet in order to identify in advance the questions which will constitute the principal focus of discussion with state representatives during the constructive dialogue. This 'pre-sessional working group' prepares a list of issues to be taken into consideration when examining the state party report, which is transmitted to the permanent delegation of the state concerned. The idea is to provide the state with the possibility to prepare answers in advance and thereby to facilitate dialogue with the Committee. The list of issues is not meant to be exhaustive and the dialogue may refer to other points as well. States should provide written replies to the list of issues well in advance of the session, in order to make these available to the Committee members in the respective working languages. Generally, the 'list of issues' of a given country contains the points which are of concern to the Committee or which have not been properly addressed by the state in its report.

The Constructive Dialogue

The Committee strongly encourages states to be present at the meeting when their reports are examined. The discussion between government

representatives and Committee members is called the 'constructive dialogue'. Representatives of specialised agencies concerned such as ILO, WHO and UNICEF and other international bodies may also be invited to contribute at any stage of the dialogue.

The dialogue with state representatives is a valuable opportunity for the Committee to explain the normative content of particular provisions of the Covenant and to comment on difficulties in the implementation of the Covenant. The summary records of such dialogues are made available to the public through printed UN documents and are now also available through the Internet in the database maintained by the OHCHR.

The dialogue is often very open and frank, and state experts frequently recognise the failures of the states they represent and the difficulties encountered in the implementation of the Covenant. Committee experts have the opportunity to provide a clear explanation of the scope of the obligations concerned.

The Concluding Observations

The final phase of the examination of state reports is the drafting and adoption of the Committee's Concluding Observations. The Concluding Observations are usually made public only on the last day of the session and are available to all interested parties. Since 1993, the established structure of the 'Concluding Observations' is as follows: 'introduction,' 'positive aspects,' 'factors and difficulties impeding the implementation of the Covenant,' 'principal subjects of concern,' and 'suggestions and recommendations'. Despite the fact that this structure employs rather diplomatic language, the Committee has become increasingly more adversarial and inquisitive in its work. Nowadays, the Concluding Observations do not merely contain 'suggestions and recommendations' and careful examination reveals that many Concluding Observations are to a greater or lesser extent formal declarations of compliance or non-compliance.

B. Inter-state complaint procedure

Some human rights instruments allow states parties to initiate a procedure against another state party, which is considered not to be fulfilling its obligations under the instrument. In most cases, such a complaint may only be submitted if both the claimant and the defendant state have recognised the competence of the supervisory body to receive this type of complaint.

The possibility to lodge complaints against another state party is contemplated in, *inter alia,* Article 41 ICCPR; Article 21 CAT; Article 11 CERD; Article 33 ECHR; Article 45 ACHR; and Article 54 ACHPR. Within the framework of the

ILO there are two procedures for inter-state complaints (see Article 26 of the Constitution and the procedure for freedom of association).

In practice, inter-state complaint mechanisms are seldom used. Inter-state relationships are delicate and inter-state mechanisms may not be ideal procedures as states bringing complaints may elicit reprisals. In addition, many states have not recognised the competence of the supervisory bodies to receive inter-state complaints. The European Convention for the Protection of Human Rights and Fundamental Freedoms and the African Charter on Human and Peoples' Rights do not require any special authorisation for a state party to be able to bring inter-state complaints. The European mechanism is the only inter-state mechanism that has been employed several times; most recently in 2001 (*Cyprus* v. *Turkey*). One inter-state complaint has been brought to the African Commission on Human and Peoples' Rights (as of July 2004).

C. Individual complaint procedure

It seems reasonable that individuals, on whose behalf human rights were stipulated in the first place, should be enabled to initiate proceedings to protect their rights. Such a procedure, whereby an individual holds a government directly accountable before an international supervisory body aims to afford far-reaching protection to the individual. Several international conventions have created the opportunity for an individual who feels that his or her rights have been violated to bring a complaint alleging a violation of certain treaty rights to the body of experts set up by the treaty for quasi-judicial adjudication or to an international Court (*i.e.* the European Court, Inter-American Court and future African Court on Human and Peoples' Rights). While there are some procedural variations between the different mechanisms, there are three procedures that all conventions have in common. In order for an individual to bring a case/communication/petition under a human rights convention, the following requirements have to be met: a) the alleged violating state must have ratified the convention invoked by the individual; b) the rights allegedly violated must be covered by the convention concerned; and c) proceedings before the relevant body may only be initiated after all domestic remedies have been exhausted.

At the UN level, individual complaint mechanisms are found under five conventions: in the First Optional Protocol to the ICCPR; Article 22 CAT; Optional Protocol to the CEDAW; Article 14 CERD and Article 77 CMW. Individual complaints under one of the above-mentioned treaties can be brought only against a state that has recognised the competence of the committee established under the relevant treaty or become party to the relevant optional protocols. In the case of the ICCPR and the CEDAW, a state recognises the Committees' competence by becoming a party to an optional protocol, which has being added to the ICCPR and the CEDAW. In the case of the CAT and the CERD, states recognise the Committees' competence by making an express

declaration under Articles 22 and 14 respectively. Anyone under the jurisdiction of a state party can lodge a complaint with a committee against a state that satisfies this condition, claiming that his or her rights under the relevant treaty have been violated. There is no formal time limit after the date of the alleged violation for filing a complaint under the relevant treaties, but the victim should submit a complaint as soon as possible after having exhausted domestic remedies.

While there are some procedural variations between the different UN treaties, their design and operation are very similar. In general terms, the system works as follows: Once a complaint (which should comply with some basic requirements) is submitted, the case is registered and transmitted to the state party concerned to give it an opportunity to comment. The state is requested to submit its observations within a set time frame which varies between procedures. The two major stages in any case are known as the 'admissibility' stage and the 'merits' stage. The 'admissibility' of a case refers to the formal requirements that the complaint must satisfy before the relevant committee can consider its substance. The 'merits' of the case are the substance, on the basis of which the committee decides whether or not the rights under a treaty have been violated. Once the state replies to the complaint, the alleged victim is offered an opportunity to comment. Again, the time frames vary somewhat between procedures. At this point, the case is ready for a decision by the relevant committee. If the state party fails to respond to the complaint the committee may take a decision on the case on the basis of the original complaint. There is no appeal against committees' decisions. When a committee decides that the state party has violated a right, or rights, enshrined in the treaty, it invites the state party to supply information within a given time limit on the steps it has taken to give effect to the committee's findings.

Under the European system, an individual complaint mechanism is found under Article 34 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. While under the old system, covered by Article 25 of the European Convention, the individual complaint mechanism was optional for state parties, under the new system, established by Protocol No. 11(entered into force in 1998), the mechanism is compulsory for all states parties to the Convention. Under the European Convention, a group of individuals or a non-governmental organisation may also lodge a complaint (this is likewise possible under the ICCPR and the American Convention). Article 35(1) of the European Convention requires that the petition be lodged within six months after the date on which the last domestic jurisdictional decision was taken.

At the Inter-American level, Article 44 of the American Convention on Human Rights allows petitions to be brought unconditionally before its supervisory body, the Inter-American Commission on Human Rights - *unconditionally* meaning that no separate acceptance by the state of the individual complaint procedure is required. The petitioner under this system does not have to be the victim. The petition must be submitted to the Commission within six months after the local remedies have been exhausted.

Under the African system, Article 56 of the African Charter details the conditions under which the African Commission on Human and Peoples' Rights may receive complaints from individuals. Communications can be submitted by private individuals, non-governmental organisations and various other entities and the petitioner does not have to be the victim. Since January 2004, when the Protocol to the African Charter on Human and Peoples' Rights Establishing an African Court on Human and Peoples' Rights entered into force, individual complaints can be referred to the future African Court by the African Commission, states parties to the Protocol and, where a state party accepts such a jurisdiction, by individuals and non-governmental organisations.

Unlike the complaint procedures under the UN 'treaty bodies', in the European and Inter-American systems oral hearings are a regular part of the complaints procedure. In addition, the decisions of the regional human rights courts are binding upon states.

Some 'non-treaty based procedures', also contemplate the submission of individual complaints. For example, the UN Commission on Human Rights established in 1970 the so-called 1503 procedure, which allows the UN Commission on Human Rights to examine communications received from individuals and other private groups, with the aim to identify those that reveal 'a consistent pattern of gross and reliably attested violations of human rights and fundamental freedoms'. It should be emphasised that even though this procedure allows for individuals and non-governmental groups to file a complaint, no individual redress is possible under this procedure. Instead, the complaints aim at identifying 'a consistent pattern of gross and reliably attested violations'. When the UN Commission on Human Rights receives a communication under procedure 1503, it can adopt several responses; including, *inter alia*, submitting a request for additional information from the concerned government, appointing an independent expert or special rapporteur to investigate the conditions in question, taking the matter up under its public procedure, or dropping the case or keeping it under consideration. All these procedures take place in closed session. However, at the end of the Commission's work, the chair does make a public announcement listing the countries that have been dropped or continued under the 1503 process (see II.§1.C). In the same vein, the Commission on the Status of Women has also developed a complaint procedure. This mechanism is designed to identify global trends and patterns concerning women's rights. It was established pursuant to a series of resolutions of the ECOSOC, under which the Commission considers confidential and non-confidential complaints on the status of women. Like the 1503 procedure, direct redress to victims of human rights violations is not afforded and in both cases complaints may be brought against any country in the world.

For complaints to the Human Rights Committee, the Committee against Torture, the Committee on the Elimination of Racial Discrimination, and the Committee on the Protection of the Rights of All Migrant Workers and Members of their Families correspondence and inquiries should be directed to:

Petitions Team
OHCHR
United Nations Office at Geneva
1211 Geneva 10, Switzerland
tb-petitions.hchr@unog.ch

For complaints to the Committee on the Elimination of Discrimination against Women, correspondence and inquiries should be directed to:

Committee on the Elimination of Discrimination against Women
c/o Division for the Advancement of Women, Department of Economic and Social Affairs
United Nations Secretariat
2 United Nations Plaza
DC-2/12th Floor
New York, NY 10017
United States of America

D. Inquiries and other procedures

The group of supervisory mechanisms now discussed includes all procedures that do not fall under those mentioned above. Most involve inquiries, but others may entail initiatives aimed at preventing violations or promoting compliance with specific human rights. The supervisory bodies discussed in the previous section play a rather passive role as they generally cannot initiate proceedings, and are largely dependent on information submitted by governments, or individual plaintiffs or petitioners. Recently, however, several supervisory mechanisms have been established whereby an independent person or group of persons may raise, on the person's or group's own initiative, issues of non-compliance with human rights. Such a body may, for instance, act upon receipt of complaints or take an initiative itself. It may also initiate a visit *in loco* to gather information, or do so as part of a regular visit-programme. One example of a visit-programme is that of the Inter-American Commission on Human Rights, which has carried out more than 80 on-site visits from its inception in 1961 to date (June 2004). This system of inquiries started as non-treaty based mechanism, but was later

confirmed in Article 41 ACHR. Another example of an enquiry – and *in loco* visits procedure - is that set out in Articles 126 and 132 of the Third Geneva Convention (1949), and the provision in Article 143 of the Fourth Geneva Convention providing for on-site visits to places of internment or detention. Mention should also be made of the International Fact-Finding Commission established under Article 90 Protocol I to the Geneva Conventions.

Under non-treaty-based mechanisms established by the Human Rights Commission, inquiry procedures may be undertaken by thematic rapporteurs, country rapporteurs or working groups. These are often well suited to deal with specific situations or specific rights. The thematic rapporteurs or working groups may receive 'urgent action telegrams' to raise human rights issues; they can also institute fact-finding missions *in loco* and report in public on their findings. Rapporteurs do not need to react to complaints, nor do they have to wait until domestic remedies are exhausted. They may request the governments concerned to provide more information. They may even initiate fact-finding missions for information only. However, fact-finding and *in loco* missions can only take place with the consent of the state concerned (see II.§1.C).

Examples of existing inquiry – and other procedures discussed here in more detail are the following:

- Article 20 of CAT
- Optional Protocol to CAT
- European Committee for the Prevention of Torture (ECPT)
- Article 8 Optional Protocol to CEDAW
- European Commission against Racism and Intolerance (ECRI)
- OSCE High Commissioner on National Minorities

1. ARTICLE 20 OF CAT

In addition to a reporting procedure, the inter-state complaint procedure and an individual complaint mechanism, Article 20 CAT also empowers its supervisory body, the Committee against Torture, to undertake certain investigatory action on its own initiative. The Committee may initiate an inquiry when it receives 'reliable information' that suggests 'well-founded indications that torture is being systematically practised in the territory of a state party'. Although the enquiry is to be confidential and requires the Committee to seek the co-operation of the state party concerned, the Committee is not prevented *ipso facto* from proceeding with the investigation because the state fails to co-operate with the Committee. However, in order for the Committee to investigate the charges in the territory of a given state, it needs the explicit consent of the state concerned. When the proceedings have been concluded, the Committee may include a summary of its findings in its annual report. As of July 2004 the Committee has made use of the

procedure under Article 20 seven times, reviewing the situation for example, in Mexico, Sri Lanka, Peru, Egypt and Turkey (see II.§1.C).

2. OPTIONAL PROTOCOL TO CAT

In 2002, the United Nations General Assembly adopted a new mechanism aimed at preventing torture: the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

The Optional Protocol provides for both international and national visiting mechanisms to prevent torture in places of detention. The Optional Protocol establishes a unique 'two pillar' visiting mechanism to places of detention. First, the Optional Protocol creates an expert international visiting body, a Sub-Committee to the UN Committee against Torture. The Sub-Committee, to be funded by the UN, will conduct periodic visits to all states parties, and maintain a dialogue with both the state party and the national visiting body. Second, under the Optional Protocol, states that ratify the Optional Protocol must establish or maintain a national visiting body to carry out visits to places of detention. The national visiting mechanisms will be able to carry out visits in much greater depth than the Sub-Committee, with the benefit of greater local knowledge and the potential for more effective follow-up.

The Optional Protocol is open for ratification by states parties to the UN Convention against Torture. The Protocol has not entered into force yet. It will enter into force when it has been ratified by 20 states. As of July 2004, the Protocol had been ratified by four states (see II.§1.C).

3. EUROPEAN COMMITTEE FOR THE PREVENTION OF TORTURE

The European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (ECPT) has been created 'to examine the treatment of persons deprived of their liberty with the view to strengthening, if necessary, the protection of such persons from torture and from inhuman or degrading treatment or punishment.' The ECPT has the power to visit places of detention of any kind, including prisons, police cells, military barracks and mental hospitals, with the aim to examine the treatment of detainees and, when appropriate, to make recommendations to states concerned. The Committee is to co-operate with the competent national authorities, and has to carry out its functions in strict confidentiality. The Committee will publish its report if a state refuses to co-operate or fails to make improvements following the Committee's recommendations. The Committee's annual report to the Committee of Ministers of the Council of Europe is made public. The Committee may carry out both periodic visits to all states parties and *ad hoc* visits. If the Committee opts for the *ad hoc* visit, it needs to notify the state concerned of its intention to carry out such visit (see II.§2.C).

4. ARTICLE 8 OF THE OPTIONAL PROTOCOL TO CEDAW

The Optional Protocol to CEDAW, adopted in 1999 (entered into force in 2000), strengthens the enforcement mechanisms available for the rights within CEDAW. As of June 2004, 60 states had ratified the Protocol. In addition to an individual complaint procedure, the Protocol established in Articles 8 and 9 an 'inquiry procedure', which enables the CEDAW Committee to initiate a confidential investigation when it has received reliable information indicating grave or systematic violations by a state party of rights set forth in the Convention.

Moreover, if deemed necessary, and with the consent of the state party, the Committee may visit the territory of the state concerned. Any findings, recommendations or comments are transmitted to the state party, which may respond within six months.

The inquiry procedure allows the CEDAW Committee to respond in a timely fashion to serious violations that are in progress under the jurisdiction of a state party, as opposed to waiting until the next state report is due to be submitted. In addition, the procedure offers a means of addressing situations in which individual communications do not adequately reflect the systematic nature of widespread violations of women's rights. It also addresses the situation where individuals or groups are unable to submit communications due to practical constraints or fear of reprisals. Under Article 10 of the Optional Protocol, states may 'opt-out' of the inquiry procedure at the time of signature, accession or ratification (see II.§1.C).

5. EUROPEAN COMMISSION AGAINST RACISM AND INTOLERANCE

The European Commission against Racism and Intolerance (ECRI) is a non-treaty based mechanism worth mention. It monitors the human rights situation in CoE countries and drafts critical reports with recommendations, meant to contribute to a dialogue with member states on issues of concern. In addition, the ECRI has produced numerous General Policy Recommendations, whereby general comments and conclusions are drawn up on specific subjects related to combating racism. Thereafter, it publishes the reports. All CoE countries are treated on an equal footing. Reports are drafted on all countries over the course of four years (see II.§2).

6. HIGH COMMISSIONER ON NATIONAL MINORITIES

Another European mechanism worth mentioning is the Office of the High Commissioner on National Minorities, established in the final document of the Helsinki Follow-up Meeting (1992). The High Commissioner's role is to identify and try to resolve ethnic tensions that might endanger peace, stability or friendly relations between the participating states of the OSCE. His/her role is above all

a preventive one: identifying potential minority conflicts at an early stage, and seeking solutions together with all parties concerned (see II.§2).

E. Selecting the most appropriate procedure

In order to determine which supervisory mechanism applies in a specific case, the following questions may be used for guidance:

- Which specific human right has been violated?
- Where has the alleged violation taken place?
- Which government is held responsible and to what extent?
- Which convention protects this human right?
- Is the responsible state a party to an applicable human rights treaty? If yes, how does the supervisory procedure work? If no, is there some supervisory procedure outside the relevant convention that could be invoked?

The specific character of a particular procedure has to be taken into consideration. An inter-state mechanism procedure is of a rather political nature, which implies that inter-state relations may be unduly strained. On the other hand, some of the other procedures, especially the individual mechanisms, can have a more confrontational character.

Sometimes, individual complaints are possible both at the universal level (*e.g.*, ICCPR, CAT and CEDAW Optional Protocol) and under a regional system (*e.g.*, European Convention and American Convention). In such cases, there are many reasons in favour of making a complaint under the regional systems in cases where the victim has a choice. The regional individual complaints procedures are decided by human rights courts (*e.g.*, the European and the Inter-American Courts of Human Rights); the final judgements are legally binding on the state party in question and include an explicit decision on compensation or reparation.

Sometimes submitting the same complaint under a universal and a regional system is prohibited by the relevant instrument. For example, the European Convention prevents the admission of a case, which has been dealt with already by the Human Rights Committee (Article 35(2.b)). It is possible, however, to complain before the Human Rights Committee after the European Convention procedure has been exhausted. However, most states parties to the European Convention consider this undesirable and have therefore made a declaration at the time of the ratification of the Optional Protocol to the ICCPR which excludes duplication of procedures in the same case. Other states parties, however, allow persons under their jurisdiction to apply the ICCPR procedure after the ECHR procedure.

F. Effectiveness

The purpose of the various supervisory mechanisms is to combat violations and to promote compliance with human rights treaties. Ideally, such mechanisms should function effectively. There are, however, a number of problems.

Firstly, a large number of countries have either not recognised the competence of the relevant treaty-based mechanisms or have failed to ratify the treaties concerned. Secondly, a number of treaty-based mechanisms, such as the individual complaint mechanism, suffer from their own success. The sometimes overwhelming number of individual complaints has led to a serious delay in the decision procedures, especially under the European Court of Human Rights. Moreover, many procedures for individual communications are plagued by understaffing and under-financing. At the UN level, the major shortcoming of the individual complaints procedure is the absence of legally binding judgements. Although the treaty bodies have developed certain 'follow-up' mechanisms, such as the 'Human Rights Committee Special Rapporteur on Follow-up' there is still much room for improvement.

On the other hand, the most common supervisory mechanism, the examination of reports under the treaty-based reporting mechanisms, also faces problems. The value of the reports depends on the depth of research that underpins them, the clarity of their content, and the timeliness of their production and delivery schedules. The value and promptness of reports affects the quality of decision-making throughout the system. Unfortunately, some states do not seem to take the reporting system seriously and there are a great number of states that have not submitted their reports under the various treaties. In general, the human rights instruments do not provide for reprimanding delinquent states. Additionally, the submission of reports to all the major human rights supervisory bodies creates practical difficulties for many states. At present, the reports are overwhelming in number and tend towards duplication. This creates a serious burden for states, especially for developing countries, which have to submit numerous reports. The same problem is encountered by the Secretariat, which needs to struggle to keep abreast of the growing number of reports requested by the various intergovernmental bodies. The sheer volume of reports is challenging the supervisory bodies' capacity to provide focused and value-added analysis. There have been several proposals to strengthen the reporting system. At the United Nations, a proposal for a 'global consolidated' report for all treaty bodies is under consideration.

The non-treaty-based procedures are also encountering serious difficulties. Not only are the mechanisms political by nature, but the examination of violations often takes a long time. Moreover, these bodies, which act only in annual meetings, are not well designed to respond to situations that require urgent actions. The 'mobilisation of shame'- one of the tools employed by the charter-based procedures - can, however, be very effective.

It could be argued that a centralised system, either for the UN treaties or more generally, would enhance supervision. This, however, would not appear attainable for the time being, given the diversity of the human rights obligations and the institutions charged with the supervision. The supervisory mechanisms are the product of specific decision-making processes, which cannot be simply unified. At the UN level, it is one of the major tasks of the High Commissioner for Human Rights to improve the organisation and co-ordination of the activities of the various supervisory systems.

Finally, it is worth noting that any improvement in the supervisory systems requires the support of states. It is fair to say that such support is often lacking, and states seem reluctant to encourage rigorous scrutiny of their human rights records. In these circumstances, NGOs and civil society are crucial to the strengthening of the human rights supervisory mechanisms. For example, the participation of NGOs in the reporting process may help to ensure that reports are submitted on time and that they are well prepared. In general, NGOs should play an active role in lobbying for states to pay more attention to the human rights supervisory systems.

CHAPTER 7

IMPLEMENTATION

It is often difficult to make a clear distinction between 'supervision' and 'implementation' of human rights, and no consistent international terminology is used. In human rights literature, protection, supervision, monitoring, and implementation are terms used indiscriminately to cover both the mechanisms established to determine whether the standards are adhered to, on the one hand, and actual compliance by states with those standards, on the other. The term 'supervision', discussed in the previous chapter, refers to all procedures that have been instituted at the international level, with the aim of monitoring compliance with human rights standards at the domestic level. The term 'implementation' is used here in reference to actual compliance with human rights standards by individual states as well as all initiatives taken by those states themselves, other states and international organs or other bodies to enhance respect for human rights and prevent violations.

Sometimes there is an overlap between the two terms and some institutions use one and the same process for both supervision and implementation. Two examples illustrate this:

- Advisory services in the UN human rights system address compliance of states with human rights obligations (supervision) and assist states in improving respect for human rights through, for example, the provision of fellowships and expert advice (implementation).
- The UN Commission on Human Rights allows individual states to discuss implementation questions in addition to dealing with supervision (*e.g.*, through the establishment of the position of a country rapporteur).

A. Implementation at the national level

The implementation of human rights law depends to a large extent on the political will of states to comply with international standards (see V.§1). A network of

non-state actors and international institutions should co-operate to ensure the effective implementation of the international norms and standards.

Implementation can cover a wide range of activities. These include primarily activities to improve compliance by the states themselves, such as adaptation of national laws or administrative practices to comply with human rights standards, strengthening of the judiciary, education of the population, establishment of national human rights institutions, improvement of minimum health standards, improvement of prison conditions, and increased participation in government. From the variety of activities that states are to take at the national level to implement human rights standards this section briefly discusses three: the incorporation of international standards into domestic law; the establishment of national human rights institutions and human rights education.

To implement international human rights standards states have to incorporate those standards into domestic law. Generally, international treaties do not stipulate how states should implement human rights standards, leaving it to each state to decide how obligations will be implemented at the domestic level.

There are a great variety of domestic methods for implementation of international human rights instruments. Scholars have classified them, for example, into *adoption, incorporation, transformation, passive transformation* and *reference*. Moreover, states may apply more than one of these methods. In very broad terms, two systems can be identified. In some states there is an automatic incorporation of treaty provisions once they have been ratified and published in the official gazette (*e.g.*, France, Mexico and The Netherlands), while other states require the express legislative enactment of treaty provisions before they become domestic law (*e.g.*, the United Kingdom, other Commonwealth countries, and Scandinavian countries). Regardless of the method states choose to incorporate international human rights law into their domestic systems, what is crucial is whether or not domestic courts and other legal operators apply human rights norms in their decisions; the effect of international human rights law cannot be assessed in the abstract on the basis of the constitution and legislation of a given country only.

If international standards are incorporated into national legislation, it is easier for domestic courts and legal operators to apply them. Even though international human rights treaties have not been formally incorporated into domestic law, national courts can use international human rights standards as guidance in interpreting national law. In other words, national courts and legal operators may look at international and regional human rights norms when interpreting and developing national law, and they may use international human rights law as the minimum standard of protection that national law should attain.

It is important to stress that the domestic implementation of human rights norms requires a joint and co-ordinated effort of all branches of the government (judiciary, legislative and executive). Training and education in human rights is therefore of vital importance for the effective implementation of human rights at the domestic level.

In addition, it is important to note that in order to ensure that human rights are protected and advanced in a sustained manner in the long term, states should encourage and facilitate the establishment of national human rights institutions, such as ombudspersons, '*defensorias del pueblo*', and '*procuradorias de derechos humanos*'. Details of these important components of implementation are discussed (see V.§1.A).

Finally, it is important to mention that at the national or domestic level, states are required to take actions to raise awareness about human rights. They should inform the public about human rights, as well as available resources for redress to those whose human rights have been violated. Information should be accessible to all, in particular to society's most disadvantaged and vulnerable groups; available in a form that can be understood by everybody. States must initiate information campaigns and public education programmes on human rights at all levels, within their own state structures and particular professions, such as judges, lawyers, teachers and social workers must be address.

B. Implementation at the international level

Implementation of human rights standards can be a difficult task for developing countries where the scarcity of resources may impose challenging obstacles to achieve compliance with human rights within a reasonable time. Thus, international co-operation is essential to assist these countries to comply with international standards.

The promotion of human rights standards in another country can take place through a 'positive' approach, whereby support is given to the improvement of conditions that facilitate compliance with human rights, or through a reaction to a violation of human rights. Often a differentiated approach is chosen, as this may often be the most effective way to bring about compliance.

For a comprehensive examination of the role of states as enforcer of human rights standards and in particular the role of the European Union (EU) as an example of the role of states in the promotion and protection of human rights (see VI.§2.C)

1. PROMOTION OF HUMAN RIGHTS - POSITIVE APPROACHES

One way to promote human rights is by promoting the establishment of international organisations aimed to secure an environment conducive to compliance with human rights. Many institutions monitor or assist in the compliance with specific human rights; such as the Office for Democratic Institutions and Human Rights (ODIHR) - established to promote democratic institutions in OSCE countries -; the International Institute for Democracy and Electoral Assistance (International IDEA) - established to promote electoral

systems world-wide - ; and the Inter-American Institute of Human Rights Institute (IIDH) which promotes human rights awareness in Latin America.

Other forms of co-operation include technical assistance, such as that provided under the advisory services system of the UN Commission on Human Rights, or direct bilateral or multilateral technical assistance, for instance to improve the administration of justice. Furthermore, bilateral agreements or international agencies, such as the World Bank and UNDP, may provide financial support so that minimum standards in the sphere of economic and social rights (for instance, primary health care or education) are met.

Positive approaches may also take other forms such as, advocacy efforts directed at government officials and the public for human rights compliance; assistance to human rights organisations; support for the establishment of national institutions, which promote or monitor human rights compliance; support for liberalisation processes; and strengthening and supporting equitable trade arrangements.

It should be emphasised that in developing international co-operation on human rights many factors come into play, so a case-by-case approach should always be followed.

2. REACTIONS TO HUMAN RIGHTS VIOLATIONS - NEGATIVE APPROACHES

The call for positive measures to promote international co-operation to construct an 'international human rights environment' should not minimise the constant need to react to human rights violations. While many countries struggle to meet their human rights obligations, the lack of resources cannot justify violations of fundamental human rights. States should react to human rights violations in other countries, to promote international compliance based on rights and values as opposed to national interests.

A wide range of measures can be resorted to in reaction to human rights violations. Some of the following measures may be taken, depending on the seriousness of the situation at hand:

- Confidential representations with the government concerned, *e.g.* discreetly raising the issue, through enquiries as to the circumstances in specific cases.
- Using visits of political officials (Ministers, diplomats, *etc.*) to a country, to raise the issue confidentially and, in serious cases, publicly.
- Bilateral or joint *démarches* or joint representations with the government concerned - normally taking place in the country concerned through its representatives.
- Parliamentary questions and debates on a specific issue.
- Public *démarches*, statements, or declarations.
- Using multilateral fora to draw attention to the situation (UNGA, ECOSOC, UNCHR, OSCE, *etc.*).

- Changing the content or channels of development co-operation programmes in order to support civil society activities in countries which states are not in compliance with human rights.
- Withdrawing diplomatic personnel.
- Changing trade relationships.
- Sanctions in various forms.

This list is not exhaustive. The suitability of a measure in a given situation depends on the specific characteristics of the case at hand, and the potential impact of the reactions.

3. HOLISTIC APPROACHES

While sometimes the most appropriate approach seems obvious, the available options have to be carefully weighed. Obviously, measures to promote respect for human rights are less controversial than possible steps in response to violations. But, at the same time, one should not overlook the fact that the promotion of human rights through development, economic, or trade co-operation programmes must by its very nature take a structural, long-term form. This frequently implies co-operation with recipient countries over a fairly long period, even if the human rights situation continues to leave much to be desired. Effective human rights promotion is conditioned by the resources available to fund such activities, and on the political will of the government in question. Without a clear and proven political commitment to improvement of human rights, supportive initiatives are likely to fail.

Sometimes a strong reaction is the best option when violations of human rights have taken place. Here again, a case-by-case approach has to be followed. There is, in principle, no 'trigger mechanism' leading to an automatic response from states to violations. States have gradually developed various holistic approaches with regards to human rights, whereby in each situation a concept is developed, consisting of a combination of different measures and responses, both supportive and reactive. Each case will have to be looked at separately in order to avoid stereotypical and often inadequate responses. To allow such holistic approaches, human rights clauses are included in various co-operation agreements, both in the field of development co-operation (*e.g.*, EU Lomé treaties), and in the field of trade and economic relations (see V.§2). It allows for a change in a co-operation relationship in the light of changing circumstances.

Holistic approaches are the more called for, since the number of countries where human rights are systematically violated and in which governments are monolithic entities seems to be declining. In other words: the number of unquestionably repulsive situations, where simple, sometimes highly visible reactive decisions may be taken, is decreasing. Two patterns seem to emerge. On the one hand, there seems to be an increasing number of countries in which there are both in society and the government, bodies, groups and persons engaged,

or prepared to engage, in the improvement of the human rights situation. On the other hand, violations may continue, sometimes despite the generally good intentions of the official authorities. The response of other states is, increasingly, to undertake combined measures, reacting to developments in the society concerned. The increase in human rights violations by non-governmental entities (guerrilla groups, paramilitary groups, *etc.*) is disturbing, and it is sometimes difficult to hold the government responsible for such situations. This element is in some cases further complicated by the spreading of political instability and internal chaos. Nonetheless, also in these cases, the mere denunciation of human rights violations is insufficient and appropriate responses are called for.

It should be noted that besides the governments and parliaments of states, NGOs and individuals play a vital role in the actual implementation process. Not only are NGOs and individuals often more effective in collecting data, and more flexible in raising issues in connection with human rights violations, they also provide the crucial external and evident legitimacy to, and research support for, the actions of states towards third countries.

PART II

HUMAN RIGHTS FORA

In this part, human rights fora will be analysed. First, the universal system for the protection of human rights will be discussed, meaning in this context the United Nations system. Then the three regional systems in Europe, the Americas and Africa will be examined. Finally, Chapter IV turns to the human rights arrangements within the framework of the Organisation on Security and Co-operation in Europe.

This handbook deals with the more developed regional systems. There are, however, other regional arrangements for the protection of human rights. For example, within the framework of the League of Arab States (founded in 1945) there is a Permanent Arab Commission on Human Rights that has adopted an 'Arab Charter on Human Rights'. The original Arab Charter was adopted in 1994 but never entered into force because it failed to obtain a sufficient number of ratifications. Nonetheless, during the Arab Summit held in Tunis in May 2004, a 'modernised' version of the Arab Charter on Human Rights was adopted. The revised document represents a major improvement over the Charter adopted in 1994 and when it comes into force will provide the member states of the League of Arab States with an arrangement comparable to those of other regions examined here. In fact, the new Arab Charter creates a promising monitoring mechanism, similar to the Human Rights Committee established by the International Covenant on Civil and Political Rights. The next step in the process is ratification by states.

In this part, the Asian regional system is discussed briefly (see textbox).

CHAPTER 1

THE UNITED NATIONS

On New Year's Day 1942, twenty-six governments signed the Declaration of the United Nations in Washington, D.C., the United States, and another twenty-one governments followed suit before the end of the Second World War. In 1945, representatives of 50 countries met in San Francisco at the United Nations Conference on International Organisation to draw up the United Nations Charter, an international treaty that sets out basic principles of international relations. The UN Charter was signed on 26 June 1945 by the representatives of the 50 countries, making international concern for human rights an established part of international law.

The United Nations officially came into existence on 24 October 1945, when the Charter had been ratified by China, France, the Soviet Union, the United Kingdom, the United States and by a majority of other signatories. In the Preamble to the Charter, the signatories 'reaffirm faith in fundamental human rights, in the dignity and worth of the human person and in the equal rights of men and women [...]', echoing the belief of the era that the massive human rights violations committed during the Second World War could have been prevented and the hope that they should never be repeated. Today, nearly every nation in the world belongs to the UN; membership totals 191 countries.

The United Nations has six principal organs: the General Assembly, the Security Council, the Economic and Social Council, the Trusteeship Council, the International Court of Justice and the Secretariat (Article 7 UN Charter). In addition, it has several specialised agencies and a number of other specialised bodies dealing with human rights.

Modern international human rights law is to a large extent founded on the standard-setting work of the United Nations; through UN efforts governments have established many multilateral agreements and this comprehensive body of international law, including human rights law, is one of the UN's greatest achievements. With its standard-setting work nearly complete, the UN is shifting the emphasis of its human rights efforts to the implementation of human rights laws.

THE UNITED NATIONS CHARTER

When states become members of the UN they accept the obligations of the UN Charter that sets out the four main purposes of the UN: to maintain international peace and security; to develop friendly relations among nations; to co-operate in solving international problems and in promoting respect for human rights; and to be a centre for harmonising the actions of nations.

The UN Charter refers to human rights in the Preamble and Articles 1, 8, 13, 55, 56, 62, 68 and 76:

Article 1 defines one of the objectives of the UN as: '[...] promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language or religion'.

Article 8 states that 'the United Nations shall place no restrictions on the eligibility of men and women to participate in any capacity and under conditions of equality in its principal and subsidiary organs [...]'.

Article 13 says that the responsibilities, functions and powers of the General Assembly shall include 'assisting in the realisation of human rights and fundamental freedoms for all [...]'.

Article 55 describes the purposes of the UN in international co-operation, which include under (c): 'universal respect for, and observance of human rights and fundamental freedoms for all without discrimination as to race, sex, language, or religion'.

Article 56 contains a pledge by all members 'to take joint and separate action in co-operation with the Organisation for the achievement of the purposes set forth in Article 55'.

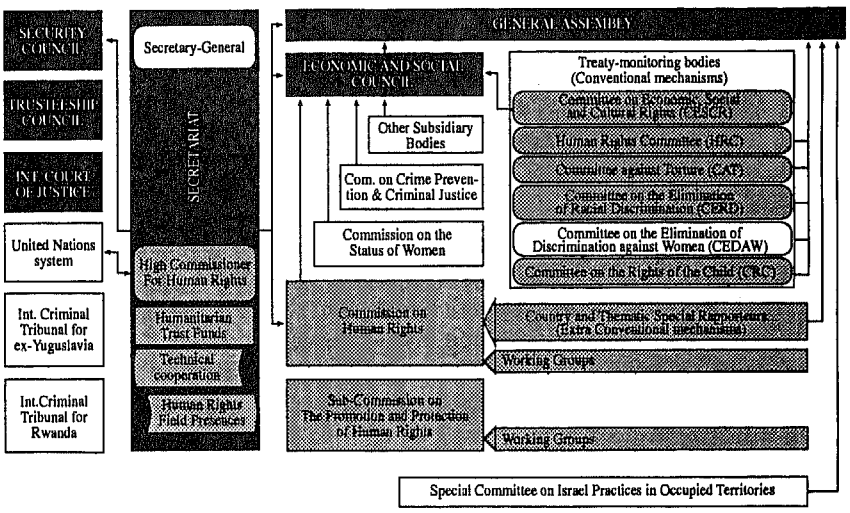
Article 62 contains similar provisions in describing the responsibilities, functions and powers of the Economic and Social Council (ECOSOC).

Article 68 authorises the ECOSOC to set up commissions 'in economic and social fields and for the promotion of human rights'.

Article 76 contains human rights provisions in the description of the international trusteeship system.

A. Main United Nations bodies dealing with human rights

Many UN organs have a role to play in the field of human rights. The most relevant organs are described in this section.



1. THE GENERAL ASSEMBLY (UNGA)

The General Assembly is composed of all member states of the United Nations, each state having one vote. Article 13 UN Charter states that one of the functions of the UN General Assembly is to initiate studies and make recommendations for the purpose of 'promoting international co-operation in the economic, social, cultural, educational and health fields and assisting in the realisation of human rights and fundamental freedoms for all without distinction as to race, sex, language or religion'. Accordingly, the UNGA adopted the Universal Declaration on Human Rights (UDHR) on 10 December 1948 and, since then, a number of other human rights instruments.

Most human rights issues that the UNGA deals with are laid out in reports of the Economic and Social Council (ECOSOC) or in resolutions adopted by the UNGA at earlier sessions. The UNGA refers most issues regarding human rights to its Third Committee, which is responsible for social, humanitarian and cultural issues. The Sixth Committee (Legal Committee) also deals occasionally with human rights issues.

The UNGA has set up a number of subsidiary organs important in relation to human rights: the Special Committee on the Situation regarding Implementation of the Declaration on the Granting of Independence to Colonial

Countries and Peoples ('the Special Committee on Decolonization'), the Special Committee to Investigate Israeli Practices Affecting Human Rights of the Population of the Occupied Territories, and the Committee on the Exercise of the Inalienable Rights of the Palestinian People. For many years, the UN also had a Special Committee on Apartheid.

2. THE ECONOMIC AND SOCIAL COUNCIL (ECOSOC)

In contrast to the UNGA, the Economic and Social Council consists of only 54 members. Article 62 of the UN Charter states that the ECOSOC 'may make recommendations for the purpose of promoting respect for and observance of human rights and fundamental freedoms for all'. The ECOSOC may also submit draft conventions to the UNGA and organise international conferences. Under the provisions of Article 68, the ECOSOC can set up commissions in economic and social fields and for the promotion of human rights. Article 64 empowers the ECOSOC to make arrangements with the UN member states and its Specialised Agencies to obtain reports on the steps taken to put its own recommendations and those of the UNGA into effect.

The ECOSOC debates the reports by the UN Human Rights Commission and deals with the studies and draft resolutions the Commission has submitted to the Council. The ECOSOC takes decisions on the most important organisational matters, but frequently refers policy matters to the UNGA. Organisational matters are important, such as the powers, size and membership of the Commission on Human Rights and other subsidiary organs of the ECOSOC concerned with human rights.

The ECOSOC has established a number of important commissions in the sphere of human rights: a) the UN Commission on Human Rights that has set up the Sub-Commission on the Promotion and Protection of Human Rights; b) the Commission on the Status of Women; c) the Commission for Social Development; and d) the Commission on Crime Prevention and Criminal Justice. Furthermore, under Article 71 of the Charter, the ECOSOC may consult NGOs that are involved with the work of the Council.

3. THE UN COMMISSION ON HUMAN RIGHTS

The UN Commission on Human Rights is a functional commission of the ECOSOC and the main UN organ dealing with human rights. It was provisionally established by the ECOSOC on 16 February 1946, with nine members serving in their personal capacity (chaired by Eleanor Roosevelt), and became a permanent body with members from eighteen countries on 21 June 1946. In 1979, the ECOSOC increased the number of members of the Commission to 43 and extended the duration of its normal session to six weeks, with an additional week for the working groups. In 1990, the ECOSOC further enlarged the

membership of the Commission to 53. The seats are distributed geographically: each of the five regional groups has a fixed number of seats. The Commission meets every year in March and April. The members are elected by the ECOSOC for a period of three years; every year, one-third of the seats are up for election.

Mandate

The original mandate of the Commission was to submit proposals, recommendations and reports to the Council concerning:

a) An international statute on human rights;
b) International declarations or conventions on civil liberties, the status of women, freedom of information and related matters;
c) The protection of minorities;
d) The prevention of discrimination on the grounds of race, sex, language or religion;
e) Any other matters concerning human rights.

The mandate has been extended several times, especially in 1967 and 1970 when the Commission, in addition to its standard-setting task, was given the task to deal with human rights practices all over the world by ECOSOC Resolution 1235. In 1979, its mandate was extended to include supporting the ECOSOC in the co-ordination of human rights activities within the UN system.

Procedures

The Commission works in accordance with the ECOSOC's procedural rules for functional commissions. Only members are entitled to vote, but countries that are not members of the Commission may participate in the Commission's deliberations as observers and may be co-sponsors of draft resolutions submitted to the Commission. Liberation movements recognised by the UNGA, the Specialised Agencies of the UN, and several other inter-governmental organisations may also participate and make interventions. NGOs with consultative status (see VI.§3.A) may send observers with the right to speak to the public sessions of the Commission.

The debate of the Commission is generally open to the public, but the general debate about violations of human rights takes place in open and closed sessions. In the public sessions the Commission, *inter alia*, discusses violations and takes decisions on them (the so-called 1235 procedure). Closed sessions, normally lasting only one day, deal exclusively with situations submitted by the Sub-Commission on the Promotion and Protection of Human Rights (1503 procedure). Both the 1235 and 1503 procedures fall under the agenda item 'violations of human rights and fundamental freedoms in any part of the world'. Every year the Commission adopts around one hundred resolutions, decisions and

Chairperson's statements related to standard setting, supervision, implementation and promotion of human rights.

Activities

As the main UN organ dealing with human rights, the Commission is particularly important with regard to standard-setting; its first task was to draw up the International Bill of Rights consisting of the Universal Declaration of Human Rights (UDHR), the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR). It has also drafted a substantial number of other international human rights conventions and declarations.

The Commission plays a central role in the supervision of human rights. Supervisory mechanisms are set up by decisions of the UNGA, the ECOSOC or the Commission itself. The Commission is authorised to appoint special rapporteurs, representatives, experts and working groups, subject to the approval of the ECOSOC. The appointed persons report in their personal capacity to the Commission on human rights topics and make recommendations. The special rapporteurs are divided into two groups: a) country rapporteurs, whose focus is on violations in a particular country, and b) thematic rapporteurs, who deal with a particular human rights issue worldwide (see II.§1.C).

The Commission plays a vital role in the process of implementation. It is the principal forum where human rights issues can be raised by individual countries and NGOs. Furthermore, it can order studies on specific issues, such as the rights of detainees, and research reports are prepared on its behalf. The Commission has set up numerous working groups or recommended that the ECOSOC do so. The Commission is also a key forum for decisions regarding the promotion of human rights; it has set up various funds to facilitate the work of standard-setting bodies, to assist victims of violations and to promote human rights.

4. THE SUB-COMMISSION ON THE PROMOTION AND PROTECTION OF HUMAN RIGHTS

The Sub-Commission is the main subsidiary body of the UN Commission on Human Rights. It was established by the Commission at its first session in 1947 under the authority of the ECOSOC. Members are nominated by their governments and elected by the Commission for a period of three years. Half the members and their alternates are elected every two years and each serves for a four-year term. The members of the Sub-Commission are expected to be independent experts of 'high moral standing and acknowledged impartiality'.

The Sub-Commission meets every year for three weeks. The sessions of the Sub-Commission are attended by its members and/or their alternates, observers

of UN member states, and representatives of the UN Specialised Agencies, intergovernmental organisations, NGOs holding consultative status with the ECOSOC, and national liberation movements, if there is an item on the agenda which concerns them. In 1999 the ECOSOC changed its title from Sub-Commission on Prevention of Discrimination and Protection of Minorities to Sub-Commission on the Promotion and Protection of Human Rights. The functions of the Sub-Commission are:

a) To undertake studies, particularly in the light of the Universal Declaration of Human Rights, and to make recommendations to the Commission concerning the prevention of discrimination of any kind relating to human rights and fundamental freedoms and the protection of racial, national, religious and linguistic minorities;
b) To perform any other functions entrusted to it by the Council or the Commission.

The Sub-Commission often appoints rapporteurs and establishes working groups to study particular issues. At present, the Sub-Commission has six working groups: the Working Group on Communications; the Working Group on Contemporary Forms of Slavery; the Working Group on Indigenous Populations; the Working Group on Minorities; the Working Group on Administration of Justice; and the Working Group on Transnational Corporations. The Working Group on Communications considers complaints that appear to reveal consistent patterns of gross and reliably attested violations of human rights. The Working Group on the Administration of Justice initially focused on the right of detainees, but extended the scope of its activities to include, for instance, the drawing up of draft principles and guidelines concerning compensation to victims of grave human rights violations. The Sub-Commission adopts resolutions and submits draft resolutions and draft decisions to the Commission and/or the ECOSOC, reporting to the Commission after each session.

5. THE HIGH COMMISSIONER FOR HUMAN RIGHTS AND THE OFFICE OF THE UNITED NATIONS HIGH COMMISSIONER FOR HUMAN RIGHTS (OHCHR)

The High Commissioner is the principal UN official with responsibility for human rights and is accountable to the Secretary-General. The position of the High Commissioner for Human Rights was created in 1993. Earlier efforts to establish the post had failed, chiefly due to the East-West block division in UN decision-making bodies, and the fear of a High Commissioner competent to 'interfere in internal affairs'. The Vienna World Conference on Human Rights revived attempts to establish the post, the debate being led by NGOs such as Amnesty International and Western states. After a lengthy process the Conference decided by consensus to ask the UNGA, when examining the Conference report, 'to begin, as a matter

of priority, [with the] consideration of the question of the establishment of a High Commissioner for Human Rights for the promotion and protection of all human rights' (Vienna Declaration and Programme of Action). On 20 December 1993, the UNGA decided, without a vote, to create the post of High Commissioner for Human Rights.

The High Commissioner for Human Rights has the rank of Under-Secretary-General and reports directly to the Secretary-General. The mandate (UNGA Resolution 48/141) entails, *inter alia*:

a) Promoting and protecting the effective enjoyment by all of all civil, cultural, economic, political and social rights;

b) Carrying out the tasks assigned to him/her by bodies of the United Nations system in the field of human rights and making recommendations to them with a view to improving the promotion and protection of all human rights;

c) Promoting and protecting the realisation of the right to development and enhancing support from relevant bodies of the United Nations system for this purpose;

d) Providing, through the Centre for Human Rights and other appropriate institutions, advisory services, technical, and financial assistance at the request of the state concerned and, where appropriate, the regional human rights organisations, with a view to supporting actions and programmes in the field of human rights;

e) Co-ordinating relevant United Nations education and public information programmes in the field of human rights;

f) Playing an active role in removing the current obstacles and in meeting the challenges to the full realisation of all human rights and in preventing the continuation of human rights violations throughout the world, as reflected in the Vienna Declaration and Programme of Action;

g) Engaging in a dialogue with all Governments on the implementation of his/her mandate with a view to securing respect for all human rights;

h) Enhancing international co-operation for the promotion and protection of all human rights;

i) Co-ordination of the human rights promotion and protection activities throughout the United Nations system;

j) Rationalisation, adaptation, strengthening and streamlining of the United Nations machinery in the field of human rights with a view to improving its efficiency and effectiveness. [...]

The High Commissioner has a special role in the co-ordination of UN activities in the field of human rights, while also co-operating with governments to strengthen national human rights protection. The High Commissioner seeks to lead the international human rights movement by acting as a moral authority and a voice for victims. The High Commissioner makes frequent public statements

and appeals on human rights crises.

The first High Commissioner was José Ayala Lasso from Ecuador. He served from 1994 to 1997, when, after an interim period, in September 1997, the function was taken over by Mary Robinson, the former President of Ireland. The third High Commissioner, Sergio Vieira de Mello, served from 2002 until May of 2003, when he took a leave of absence to serve in Iraq as Special Representative of the Secretary-General. He was tragically killed by a bomb in Baghdad on 19 August 2003. Bertrand Ramcharan acted as High Commissioner from 2003 until February 2004, when Canadian Supreme Court Justice and ex-prosecutor of the United Nations war crimes tribunals for the former Yugoslavia and Rwanda, Louse Arbour, was appointed to the post.

The Office of the High Commissioner for Human Rights, based in Geneva at Palais Wilson, is the main body within the UN Secretariat dealing with human rights. In accordance with the programme reform of the UN (A/51/950 para. 79), the Office of the High Commissioner for Human Rights and Centre for Human Rights were consolidated into a single office (OHCHR) as of 15 September 1997.

The Office assists various UN organs, subsidiary organs and working groups. The Office of the High Commissioner serves as a secretariat for charter-based human rights mechanisms, as well as all treaty monitoring bodies except the CEDAW Committee, which is served by the Division for the Advancement of Women. The Office receives and administers more than 200,000 communications annually. Furthermore, the Office prepares studies, reports and publications on human rights and plays a special role in relation to the Advisory Services Programme organising global and regional seminars and courses on subjects relating to human rights. Finally, the Office provides governments with technical advice. In addition, a number of OHCHR field offices have been established with a view to ensuring that international human rights standards are progressively implemented and realised at country level, both in law and practice. It should be noted that though entrusted with many tasks, the Office of the High Commissioner has very limited funds and manpower at its disposal.

B. Other United Nations organs

1. THE SECURITY COUNCIL

The Council has 15 members; five permanent members and 10 elected by the General Assembly for two-year terms. In accordance with Article 24 of the UN Charter, the Security Council bears primary responsibility for the maintenance of international peace and security. Actions taken by the Security Council will generally impact human rights, as these invariably come to the fore whenever international peace and security are threatened. The link between violations of human rights and threats to international peace and security was discussed by

the Security Council Summit held in January 1992. The Security Council stated that: 'Election monitoring, human rights verification and the repatriation of refugees have in the settlement of some regional conflicts, at the request or with the agreement of the parties concerned, been integral parts of the Security Council's effort to maintain international peace and security.'

The Security Council is increasingly concerned with human rights. With the gradual refocus of the UN on human security as an integrated concept, many decisions of the Security Council have an impact on human rights. Interventions authorised by the Security Council are nominally undertaken in reaction to threats to international peace and security. Examples are, for instance, the intervention in Haiti (2004) or Sierra Leone (1999). The arguments underlying such interventions are often related to human rights. The Security Council, acting under Chapter VII of the Charter of the United Nations, is also the institution that sets up *ad hoc* tribunals such as the ones for former Yugoslavia and for Rwanda (see II.§1.B).

In addition, several standing and *ad hoc* committees under the Security Council are relevant to human rights, such as, sanction committees, the Special Committee on Peacekeeping, and the International Tribunal Committee.

2. INTERNATIONAL TRIBUNALS

International tribunals have traditionally been seen as means to resolving international disputes peacefully, thereby forcing states to obey international law.

The International Court of Justice (ICJ) supervises the rule of law at the international level and is entitled to issue advisory opinions under certain circumstances.

States participating in international law-making tended to see violations of international law as incurring only state responsibility. Since the 1919 Versailles Treaty, however, it has increasingly been accepted that individuals can be held responsible for violations of international law, especially international humanitarian law. Individual criminal responsibility for crimes against peace, war crimes, and crimes against humanity was established at the Nuremberg and Tokyo tribunals, where individuals were tried for war crimes committed during the Second World War. In reaction to the atrocities that took place in Yugoslavia and Rwanda, the Security Council established the International Criminal Tribunals for the Former Yugoslavia and Rwanda, to ensure peace and promote reconciliation by means of prosecution of individuals for genocide, crimes against humanity and war crimes. The *ad hoc* tribunals were severely limited in their jurisdiction, as they are only meant to deal with events that took place within a certain time frame and on specified territory. On the other hand, the recently established International Criminal Court (ICC), has jurisdiction to investigate, prosecute and punish individuals suspected of having committed the most serious

crimes of concern to the international community as a whole in the territory of states parties, or if they are citizens of a state party to the Statute establishing the Court. Experience has shown that international tribunals and supervisory mechanisms generally need a long time to develop, to acquire experience and to gain international legitimacy and effectiveness.

International Court of Justice (ICJ)

The general objective of the International Court of Justice is the administration of justice and the supervision of the rule of law at the international level. The Court, seated at the 'Peace Palace' in The Hague, The Netherlands, is the principal judicial organ of the United Nations. It began work in 1946, when it replaced the Permanent Court of International Justice, and operates under a statute similar to that of its predecessor. The Court has competence to address cases brought by states, and the Security Council. The UNGA, ECOSOC, and other specific organs may request advisory opinions from it. Individuals cannot bring cases before the court. The ICJ has ruled on several cases involving human rights, *e.g.*, *Haya de la Torre* (13 June 1951; asylum), *Nottebohm* (6 April 1955; nationality), *Barcelona Traction Light and Power Company* (5 February 1970; human rights as obligations *erga omnes*), the case on the *Orders on Requests for the Indication of Provisional Measures in the Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia* v. *Serbia and Montenegro)* (8 April and 13 September 1993; genocide) and the *Case Concerning Avena and Other Mexican Nationals (Mexico* v. *United States of America*) (31 March 2004; consular protection). The Court has also addressed human rights issues in its advisory opinions; for example, on genocide, apartheid, and the immunity of UN human rights special rapporteurs.

The International Criminal Tribunal for the Former Yugoslavia (ICTY)

The International Criminal Tribunal for the Former Yugoslavia was established by Security Council Resolution 827 on 25 May 1993. The Tribunal came into being in the face of the serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991, and as a response to the threat to international peace and security posed by those violations.

The purpose of the ICTY is to: a) bring to justice persons allegedly responsible for serious violations of international humanitarian law; b) render justice to the victims; c) deter further crimes; and d) contribute to the restoration of peace by promoting reconciliation in the former Yugoslavia. Such purposes will be achieved by investigating, prosecuting and punishing individuals for the following crimes committed on the territory of the former Yugoslavia since 1991: a) grave breaches of the 1949 Geneva Conventions; b) violations of the laws or customs of war; c) genocide; and d) crimes against humanity.

The ICTY has concurrent jurisdiction with national courts over serious

violations of international humanitarian law committed in the former Yugoslavia. In cases where it proves to be in the interests of international justice, the ICTY may claim primacy over national courts and take over national investigations and proceedings at any stage.

The ICTY Chambers consist of 16 permanent judges and a maximum of nine *ad litem* judges. The permanent judges are elected by the UN General Assembly for a term of four years and can be re-elected. The judges are divided between three Trial Chambers and one Appeals Chamber and represent the main legal systems in the world. They hear testimony and legal arguments, decide on the innocence or the guilt of the accused and pass sentence. Furthermore, they draft and adopt the legal instruments regulating the functioning of the ICTY, such as the Rules of Procedure and Evidence.

As of July 2004, 102 accused have appeared in proceedings before the Tribunal. In rendering judgements the Tribunal has set important precedents of international criminal and humanitarian law as many legal issues adjudicated by the Tribunal have never before been addressed legally, or have lain dormant since the Nuremberg and Tokyo trials. The Tribunal has its seat in The Hague, The Netherlands.

International Criminal Tribunal for Rwanda (ICTR)

The UN Security Council created the International Criminal Tribunal for Rwanda by Resolution 955 of 8 November 1994 to prosecute persons responsible for genocide and other serious violations of international humanitarian law, committed on Rwandan territory between 1 January 1994 and 31 December 1994. The ICTR may also prosecute Rwandan nationals charged with committing such crimes in neighbouring countries during that same period.

The purpose of the Tribunal is, *inter alia*, to contribute to the process of national reconciliation in Rwanda and to the maintenance of peace in the region. The Tribunal consists of the Chambers and the Appeals Chamber; the Office of the Prosecutor and the Registry. The judges of the Tribunal are elected by the UNGA, and should be of different nationalities. Three judges sit in each of the Trial Chambers and seven judges are members of the Appeals Chamber, which is shared with the ICTY. The Office of the Prosecutor is an independent, separate organ that investigates crimes within the Tribunal's jurisdiction, prepares charges, and prosecutes accused persons. The Registry manages the overall administration of the Tribunal. The Registry is headed by the Registrar who provides judicial and legal support services for the work of the Trial Chambers and the Prosecution.

To date, more than 230 witnesses from different countries have testified before the Tribunal which has a special Witness and Victims Support Section that is to ensure the security and provide support for and relocation of witnesses if necessary. The Tribunal has advocated victim-orientated, rehabilitative justice by, for instance, providing legal guidance, medical care and psychological counselling to victims.

As of July 2004, the Tribunal has secured the arrest of over 50 individuals involved in the Rwandan genocide of 1994 and completed the trials of several leaders. Fifteen judgements involving twenty-one accused have been handed down and another twenty-one accused are on trial. Decisions on some 500 motions and different points of law have been given where the Tribunal has laid down important principles of international law, which will serve as precedents for other international criminal tribunals. The Tribunal has its seat in Arusha, United Republic of Tanzania.

The International Criminal Court (ICC)

On 17 July 1998, a UN Diplomatic Conference adopted the Rome Statute of the International Criminal Court (ICC), establishing a permanent international criminal court with its seat in The Hague, The Netherlands. The idea of a permanent court was set in motion by the unsuccessful attempts to establish an international tribunal after the First World War. Following the Second World War, the Nuremberg and Tokyo war crimes tribunals gave impetus for efforts to create a permanent court. It was first considered at the UN level in the context of the adoption of the Convention on the Prevention and Punishment of the Crime of Genocide (1948). Further developments were effectively forestalled by differences of opinions for many years. Finally, in 1992, the UNGA directed the International Law Commission to elaborate a draft statute for an international criminal court. Further public interest was created by the Security Council's establishment of the International Criminal Tribunals for the Former Yugoslavia in 1993 and for Rwanda in 1994. In December 1994, the UNGA established an Ad Hoc Committee of all UN Member States and members of UN Specialised Agencies to review the final version of the International Law Commission's draft statute. In December 1995, the UNGA created a Preparatory Committee to 'discuss further the major substantive and administrative issues arising out of the draft statute prepared by the International Law Commission and [...] to draft texts, with a view to preparing a widely acceptable consolidated text of a convention for an international criminal court as a next step towards consideration by a conference of plenipotentiaries'. The Preparatory Committee submitted for consideration a 13-part, 116-Article draft statute for the ICC. As it concluded five weeks of deliberations, the Diplomatic Conference adopted the Statute for the Court by a vote of 120 in favour to 7 against, with 21 abstentions. As of July 2004, 94 states are party to the Statute.

The Statute establishes the ICC as a permanent institution with power to exercise its jurisdiction over persons for the most serious crimes of international concern, as referred to in the Statute. The jurisdiction of the ICC is of a complementary nature to national criminal jurisdictions. The Statute sets out the Court's jurisdiction, structure and functions and it entered into force on 1 July 2002 after 60 states ratified or acceded to it.

The material jurisdiction of the Court is over four categories of crimes: genocide, war crimes, crimes against humanity, and crimes against the administration of justice of the ICC. The crime of aggression is mentioned in Article 5 of the Rome Statute, but the delegates to the Rome Conference did not reach an agreement on the definition and elements of the crime, nor on the participation of the Security Council in its prosecution. The Court has no jurisdiction over persons under the age of 18. States parties can bring a situation to the Court's attention as well as the UN Security Council. Furthermore, the Prosecutor can initiate an investigation under its *motu propio* powers.

The Court may exercise its jurisdiction over a specific case when either the state in whose territory the crime was committed or the state of the nationality of the accused is a party to the Rome Statute. Non-party states may also accept the Court's jurisdiction on a case-by-case basis. The Security Council may also refer cases to the Court, whether or not the state concerned is a party to the Statute. The Security Council may also prevent the Court from exercising its jurisdiction for a one-year period, in the event that such decision is taken under the provisions of Chapter VII of the UN Charter. In such case, all five permanent members of the Council have to vote in favour or at least abstain from voting, which is not likely to happen easily.

THE INTERNATIONAL CRIMINAL COURT: ACHIEVEMENTS AND CHALLENGES

On 11 April 2004, the Rome Statute (RS) of the International Criminal Court (ICC) was ratified by the 60th state and subsequently entered into force on 1 July 2002. Since then the final steps to build up the ICC are being taken by the international community. For instance, in September 2002, the first session of the Assembly of States Parties (ASP) to the RS approved the *Rules of Procedure and Evidence* and the *Elements of Crimes*, which are the two main accessory documents to the RS, allowing the Prosecutor and the Judges to investigate, prosecute and try the worst crimes of international concern.

Furthermore, the main officials of the ICC have been elected. In February 2003, the ASP elected the first seat of the Court and as required by the RS, regional representation, gender balance and diversity in expertise in the different aspects of law were assured. From the 18 elected judges, four are from the Latin American and Caribbean Group (Bolivia, Brazil, Costa Rica, Trinidad and Tobago), seven from the Group of Western European States and others (Canada, Finland, France, Germany, Ireland, Italy, United Kingdom), three from the African States Group (Ghana, Mali, South Africa), three from the Asian States Group (Cyprus, Republic of Korea, Samoa), and one from the Eastern European States Group (Lithuania). Ten of the eighteen judges have experience in criminal law and criminal procedures and eight are

recognised experts in international law, international humanitarian law and international human rights law. For the first time in the election of judges of an international tribunal, the gender perspective was compulsory, and this resulted in the election of seven women and eleven men. Also, by mid 2003, the ASP elected as Prosecutor of the ICC Dr. Luis Moreno Ocampo, an experienced Argentinean lawyer, former deputy prosecutor for the military juntas in Argentina. Following his election he presented a list of three candidates for the position of Deputy Prosecutor (Investigations) and on September 2003 Serge Bremmetz was elected to the post. The judges elected Mr. Bruno Cathala as Registrar of the Court after considering a list of candidates prepared and presented to them by the ASP. The only pending election of main officials of the ICC is for the position of Deputy Prosecutor (Prosecution), which will take place in September 2004, during the third ASP.

With the main officials in place the ICC is ready to start investigations of genocide, crimes against humanity, and war crimes. Since 1 July 2002, the Prosecutor has received more than 500 communications from non-governmental organisations, individuals and victims' organisations presenting cases of what may constitute crimes under the jurisdiction of the Court.

In December 2003 and March 2004, the Governments of Uganda and the Democratic Republic of Congo, respectively, referred situations to the Court in conformity with Article 13 (a) of the Rome Statute. The two governments referred situations that may constitute crimes under the jurisdiction of the ICC. Both countries issued a special declaration authorising the Prosecutor to investigate all crimes that might have been committed as of 1 July 2002, in their respective territories or by their nationals, regardless of whether such persons were members of the national army or of other armed forces.

The Prosecutor of the ICC recently issued the *Paper on Some Policy Issues before the Office of the Prosecutor* and its *Annex*, in which a set of guiding principles for the Prosecutor's policy for the investigation and prosecution may be found. The Paper sets out that the Court has jurisdiction over the worst crimes of international concern, which are considered as such due to their gravity, but also because of the level of involvement of the presumed perpetrators. High level officials from governments and other political groups bear the greatest responsibility, and therefore the Office of the Prosecutor (OTP) will investigate and prosecute those groups of criminals. Nevertheless, the Prosecutor reminds states of their primary responsibility to investigate, prosecute and punish genocide, crimes against humanity and war crimes; and expresses its willingness to advise and support states that are willing to fight impunity, and cover the 'impunity gap' that the ICC's limited jurisdiction over those who bear the greatest responsibility could create.

Jose A. Guevara

3. FUNCTIONAL UNITED NATIONS COMMISSIONS

The Commission on the Status of Women

The Commission on the Status of Women (CSW) was established by ECOSOC Resolution 11(II) in 1946. It is the main UN organ dealing with women's issues. Its mandate is to prepare reports for the ECOSOC on matters concerning the promotion of women's rights in the political, economic, social and educational fields. The CSW may also make recommendations to the ECOSOC on problems requiring immediate attention in the field of women's rights. The CSW is the forum for evaluation of the implementation of the 1995 Beijing Fourth World Conference on Women. The Commission functioned as the Preparatory Committee for the World Conferences on Women, which took place in Mexico (1975), Copenhagen (1980), Nairobi (1985), and Beijing (1995). The Commission membership consists of 45 states elected by the ECOSOC for a period of four years on a regional basis ensuring equitable geographical distribution. The Commission meets annually for a period of eight days in New York.

Mention should be made of the Division for the Advancement of Women (DAW), part of the Division for Social Policy and Development, the focal point for all activities relating to women. Its programmes relate particularly to monitoring the 'Forward-Looking Strategies' developed during the World Conferences. The DAW acts as a secretariat both for the CSW and for the CEDAW Committee (see II.§1.C and IV.§1). The DAW also undertakes and co-ordinates research; expert group meetings and advisory seminars, particularly on priority themes selected by each CSW session.

The Commission for Social Development

The Commission for Social Development is another functional commission of the ECOSOC. It was originally created in 1964, but its terms of reference were later redefined, when the number of members was increased to 32. In 1996 the membership was expanded again, to 46 members. The Commission advises the ECOSOC on issues of social welfare and the most vulnerable groups in society. It is particularly active in areas lying outside the field of work of the UN Specialised Agencies and seeks to pursue an integrated approach to social and economic development, based on social justice and the distribution of power, responsibility and prosperity among all sections of society. The Declaration on Social Progress and Development, which was approved by the UNGA in 1969, has proved a significant aid to the Commission's programme of work.

The Commission on Crime Prevention and Criminal Justice

Another commission, established by the ECOSOC in 1992, is the Commission on Crime Prevention and Criminal Justice ('Crime Commission'). The Commission's main duties lie in the field of international co-operation on

penitentiary and criminal matters, such as penal justice and crime prevention. Promoting respect for human rights also forms a substantial element in the work programme of the Commission (UNGA Resolution 46/152). The Commission meets annually for a period of ten days in Vienna. The Crime Commission plays an important role in preparing the conferences held every five years by the UN on preventing crime and the treatment of delinquents. Its work, therefore, sometimes spills over into the field of human rights. For example, the first conference (1955) drew up Standard Minimum Rules for the Treatment of Prisoners, while the fifth conference (1975) prepared the text for a Declaration on the Protection of All Persons against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. The Declaration was approved in the same year by the UNGA. The eleventh Congress on the Prevention of Crime and the Treatment of Offenders will be held in Bangkok in 2005.

The International Law Commission

The International Law Commission (ILC), established by the UNGA in 1947 by Resolution 174(III), is mandated to promote the development and codification of international law. It drafts conventions for areas in which international law has not been developed or has been insufficiently developed, or introduces necessary improvements. The Commission is made up of 34 individuals - not being representatives of their governments - who have a proven track record in the field of international law. They are elected by the UNGA for a period of five years from a list of candidates nominated by the UN member states.

As far as human rights are concerned, the Commission is involved, among other things, in preparing international agreements on the problems of nationality and statelessness. The Commission also spends much time developing international criminal law. One of the Commission's most recent activities relates to the adoption of the Statute for the International Criminal Court (1994).

C. Standards and supervisory mechanisms

The UN plays a pre-eminent role in the field of standard-setting. The UN Commission on Human Rights often takes the initiative and does the drafting of human rights standards, frequently in co-operation with the Sub-Commission. Sometimes specific working groups or drafting groups are mandated. It is important to realise that elements for new instruments are often taken from proposals by one country, from final documents of colloquia and round table meetings, and especially from submissions by NGOs. The process has not been standardised. It has become accepted to submit texts for technical review by individual experts or expert bodies. In addition, texts are often submitted to governments after a first reading for comments, after which, in a second reading

procedure, outstanding issues are tackled. After approval by the UN Commission on Human Rights, drafts are then passed on to the ECOSOC and the UNGA.

The drafting of texts can be a very taxing effort, not guaranteeing a flawless process. It took, for example, more than fifteen years to draft the ICCPR and the ICESCR, while one of the latest conventions - the Convention on the Rights of the Child (CRC) - took almost ten years to be completed. Guidelines for drafting may be found in UNGA Resolution 41/120, which stipulates that only clear, meaningful, consistent proposals, commanding large support, should be considered. The CSW and the Crime Commission are also involved in standard-setting within their areas of competence. The CSW drafted, for instance, the Optional Protocol to CEDAW.

To supervise compliance with the standards formulated, a wide range of mechanisms has been established in the UN system in the past fifty years. In the overview that follows, the distinction is made between: treaty-based procedures, such as the Human Rights Committee and charter-based procedures, such as the appointment of special rapporteurs (see I.§6).

Before discussing the treaties, mention must be made of the Universal Declaration of Human Rights, which, together with the Covenants forms the Universal Bill of Human Rights (see I.§1.A) and is considered the major human rights standard, although, as a declaration, it is not accompanied by a specific supervisory procedure.

1. TREATIES AND TREATY-BASED PROCEDURES

The six most well-known human rights treaties are the two Covenants (ICESCR and ICCPR), CERD, CEDAW, CAT and CRC. In addition, mention should be made of the CMW, which entered into force in 2003.

Each of these conventions has a supervisory body. These bodies consist of a number of experts of a high moral character and recognised competence in the field of human rights. They act in their personal capacity, which means that although they are normally nationals of a state party to the treaty in question, they are not acting under instructions from respective governments. The treaty-based procedures are the mechanisms established within the context of a specific human rights treaty. The Convention on the Elimination of All Forms of Racial Discrimination (CERD) (1965) was the first human rights treaty of universal application to provide for a mechanism of supervision. This mechanism subsequently served as a model for other human rights treaties, notably the International Covenant on Civil and Political Rights (ICCPR). The treaty bodies, with the exception of the Committee on Economic, Social and Cultural Rights, derive their status from the convention concerned. To implement these conventions, regular meetings of states parties are held to discuss issues regarding the conventions, mainly in connection with the election of members to the treaty bodies. As mentioned in Part I, there are different types of supervisory procedures:

reporting procedures, inter-state complaint procedures, individual complaint procedures and inquiry procedures.

The ICESCR and the Committee on Economic, Social and Cultural Rights

The International Covenant on Economic, Social and Cultural Rights (ICESCR) was adopted by UNGA Resolution 2200 A (XXI) of 16 December 1966. It entered into force 3 January 1976. In July 2004, 149 states were party to the Convention.

The Preamble of the Covenant recognises, *inter alia,* that economic, social and cultural rights derive from the 'inherent dignity of the human person' and that 'the ideal of free human beings enjoying freedom of fear and want can only be achieved if conditions are created whereby everyone may enjoy his economic, social and cultural rights, as well as civil and political rights'. The Covenant recognises the right to work (Article 6); the right to just and favourable conditions of work (Article 7); the right to form and join trade unions and the right to strike (Article 8); the right to social security including social insurance (Article 9); the right to protection and assistance for the family and the prohibition of child labour (Article 10); the right to an adequate standard of living for oneself and one's family, including adequate food, clothing and housing and to the continuous improvement of living conditions (Article 11); the right to the highest attainable standard of physical and mental health (Article 12); the right to education, the freedom of parents to choose schools other than those established by public authorities (Articles 13 and 14) and the right to take part in cultural life and to benefit from scientific progress (Article 15).

The supervisory body of the ICESCR is the Committee on Economic, Social and Cultural Rights. The Committee is a supervisory body of the ECOSOC, which is responsible for monitoring implementation of the Covenant. Originally, the ECOSOC had delegated this work to a working group of government experts. In 1985, however, the ECOSOC decided to convert the working group into a Committee on Economic, Social and Cultural Rights. The Committee is made up of eighteen experts acting in their personal capacity. The election of members takes place in the ECOSOC by means of a secret ballot based on a list of candidates put forward by the states parties to the Covenant. Even members of ECOSOC that are not parties to the Covenant can vote. Members of the Committee are elected for a period of four years and may stand for re-election. The Committee normally meets twice a year in Geneva, for three weeks at a time. Meetings are held in public. The Committee reports to the ECOSOC and may also make recommendations. The Committee formally took up its duties on 1 January 1987.

The only supervisory mechanism envisaged in the ICESCR is the reporting procedure (see I.§6.A). States that are party to the Covenant are required to submit reports about the realisation of the rights recognised in the Covenant to the UN Secretary-General, who transmits them to the ECOSOC (Articles 16 to 21 ICESCR). The Committee on Economic, Social and Cultural Rights is

responsible for studying the reports. Reporting is based on a five-year cycle whereby all articles have to be dealt with.

Since 1992 the Committee also has so-called 'days of general discussion', leading, among other things, to the adoption of a range of General Comments. So far, the Committee has adopted fifteen General Comments. Currently, an important issue of discussion is the adoption of an optional protocol, providing for an individual complaint procedure (see I.§1.C).

The ICCPR and the Human Rights Committee

The International Covenant on Civil and Political Rights (ICCPR) was adopted by UNGA Resolution 2200 A (XXI) of 16 December 1966. It entered into force 23 March 1976. As of July 2004, 152 states were parties to the Convention.

Part I of the Covenant contains only one article, Article 1, the right to self-determination, which is identical to Article 1 ICESCR. Part II of the Covenant contains Articles 2 and 5, which refer to the nature of obligations, the territorial and personal scope of the Covenant and the principle of non-discrimination (Article 2) which is complemented by Article 3, guaranteeing the equality between men and women in the enjoyment of the Covenant rights. Article 4 allows states to take measures derogating from their obligations under the Covenant and Article 5 establishes a prohibition of abuse of rights (Article 5(1)) and a saving clause (Article 5(2)). Part III of the Covenant contains the following substantive rights: the right to life (Article 6); freedom from torture, inhuman and degrading treatment or punishment (Article 7); freedom from slavery, servitude, and forced labour (Article 8); rights to liberty and security of the person (Article 9); right of detained persons to human treatment (Article 10); freedom from imprisonment for inability to fulfil a contract (Article 11); freedom of movement (Article 12); right of aliens to due process when expelled (Article 13); right to a fair trial (Article 14); freedom from retroactive criminal law (Article 15); right to recognition as a person before the law (Article 16); rights to privacy (Article 17); freedom of thought, conscience, and religion (Article 18); freedom of opinion and expression (Article 19); freedom from war propaganda and freedom from incitement to racial, religious, or national hatred (Article 20); freedom of assembly (Article 21); freedom of association (Article 22); rights of protection of the family and the right to marry (Article 23); rights of protection of the child (Article 24); rights of participation in public life (Article 25); right to equality before the law and rights of non-discrimination (Article 26) and rights of minorities (Article 27).

The supervisory mechanism established in the ICCPR is the Human Rights Committee, which should not be confused with the UN Commission on Human Rights. The Committee is an organ established under Article 28 of the ICCPR. It is made up of eighteen experts who are elected by the states parties to the Covenant in their personal capacity for a period of four years. The Committee meets three times a year, each time for three weeks (once in New York and twice in Geneva).

The Committee is responsible for supervising compliance with the Covenant.

The following supervisory mechanisms exist under the ICCPR and its First Optional Protocol:

a) Reporting mechanism (Article 40). All states parties to the Covenant must submit a report one year after the Covenant has come into effect for them, describing the measures which they have taken to implement the rights recognised in the Covenant and the progress made in the enjoyment of those rights. In addition, the Committee has established that each state party has to submit a report every five years.

b) Inter-state complaint procedure (Articles 41 to 43). The procedure is optional. No party to the Covenant has made use of the procedure so far, partly because most countries that systematically violate human rights have not recognised the competence of the Committee in this respect, and partly because of the political nature of the procedure.

c) Individual complaints mechanism (set out in the First Optional Protocol to the ICCPR). This complaints procedure may only be invoked if the state concerned is a party to the Protocol (as of July 2004, 104 states had ratified it). The main aspects of the procedure are regulated in Articles 2 to 5 of the Protocol, which, *inter alia,* provides that the Committee will make its findings (called 'views') known to the state concerned and to the complainant (Article 5(4)). The Committee has given its views on more than 1,200 individual cases. The views are published in a form that has many of the characteristics of a judgement and may be regarded as 'case-law' of the Committee. In 1990, the Committee created the function of Special Rapporteur for the Follow-Up of Views. In 1995, the Committee approved a follow-up fact-finding mechanism, which was first used during a mission to Jamaica in 1995.

The Committee has a solid and respectable record in examining country reports and individual complaints. When a country report is being considered, representatives of the state concerned get a chance to explain the report at a public session. Members of the Committee then have an opportunity to question the representatives, which they sometimes do in a forceful and critical manner. Over the years, NGOs have begun to play a substantive role in the procedure.

In addition, the ICCPR stipulates that the Committee may formulate General Comments on the reports it has considered (Article 40(4)). The Committee has made highly creative use of these powers by publishing a series of General Comments over the years, which include an authoritative explanation and elaboration of various material provisions of the Covenant. In 2004 more than 30 General Comments have been adopted that relate to the experience gained regarding some articles and provisions of the Covenant.

The CERD and the Committee for the Elimination of Racial Discrimination

The International Convention on the Elimination of All Forms of Racial Discrimination (CERD) was adopted by UNGA Resolution 2106 A (XX) of 21

December 1965. It entered into force on 4 January 1969. As of July 2004, 169 states were party to the Convention.

The CERD contains a number of detailed prohibitions and obligations to prevent discrimination on the grounds of race, colour, origin and national or ethnic background. The Convention particularly condemns racial segregation and apartheid (Article 3) and propaganda and promotion of discrimination are prohibited (Article 4). Furthermore, non-discrimination in relation to specific rights, such as right to equal treatment before tribunals, the right to marriage, the right to housing and freedom of opinion and expression, is set out (Article 5). Finally, states parties shall assure effective protection and remedies against acts of racial discrimination (Article 6) and states pledge to combat prejudices that lead to racial discrimination (Article 7).

The Convention provides for a Committee on the Elimination of Racial Discrimination (Article 8), consisting of eighteen experts elected in their personal capacity by states parties to the Convention for a period of four years. The Committee is the only committee where states parties bear the costs; this can be problematic, as it has occurred that a session has been cancelled because of lack of funds. The Committee meets twice each year for three weeks in Geneva.

The supervisory mechanisms envisaged by the CERD are the following:

a) Reporting mechanism (Article 9). The Committee will consider the reports that the states submit to the Secretary-General on the legislative, judicial, administrative or other measures that they have adopted and that give effect to the provisions of the Convention. These reports have to be submitted one year after entry into force of the Convention for the state concerned, and, thereafter, every four years or whenever the Committee so requests. The Committee is also entitled to request further information from the states. The Committee reports on its activities annually to the UNGA, through the Secretary General, and may make suggestions and general recommendations based on the examination of the reports and information received. The system of reporting has developed into the most important monitoring procedure under the CERD. Again, it can be added that over the years, NGOs started to play a significant role in the procedure.

b) Inter-state complaint mechanism (Article 11). If a state party considers that another state party is not giving effect to the provisions of the Convention, it may bring the matter to the attention of the Committee. The Committee will transmit the communication to the state concerned. Within three months, the receiving state shall submit to the Committee a written explanation or statement clarifying the matter and the remedy, if any, adopted by that state. Articles 12 and 13 refer to an *ad hoc* Conciliation Commission, which the chairman of the Committee shall appoint once the Committee has obtained and collated all the information it thinks necessary in the dispute. The good offices of the Conciliation Commission shall be made available to the states concerned with a view to an amicable resolution of the matter, on the basis of respect for the Convention. So far, there have been no inter-state complaints and, thus, the conciliation procedure has never become operative.

c) Individual complaints mechanism (Article 14). The Article recognises the right of petition ('communications') by individuals or groups of individuals on an optional basis. Around 40 states have opted in. The Committee had reviewed and recommended upon, by mid 2004, some 30 cases. If the state party concerned has recognised the right to petition, a (group of) individual(s) have the right to communicate a matter to the Committee, within six months of the exhaustion of all local remedies. The Committee will bring the communication to the attention of the state accused. The affected state will have three months to submit written explanations to the Committee. The Committee must forward its suggestions and recommendations, if any, to the state concerned and the petitioner.

On the basis of its experiences, the Committee has published some 30 General Recommendations.

The CEDAW and the Committee for the Elimination of Discrimination against Women

The Convention on the Elimination of All forms of Discrimination against Women (CEDAW) was adopted by UNGA Resolution 34/180 of 18 December 1979. It entered into force 3 September 1981. As of July 2004, 177 states were party to the Convention, many with a considerable number of reservations that have significantly undermined the effectiveness of the Convention.

Part I of the Convention contains general standards. Article 2 and 3 set out different measures that states undertake to eliminate discrimination against women and to ensure their full development and advancement. These measures include the adoption of appropriate legislative measures and refraining from engaging in any acts of discrimination against women. Article 4 sets out that 'affirmative action' and measures aimed at protecting maternity will not be considered discriminatory, and Article 5 stipulates that states shall take all appropriate measures to modify cultural patterns that perpetuate discrimination, and ensure that family education includes an understanding of maternity as a social function. Finally, states undertake to suppress trafficking and exploitation of prostitution of women (Article 6). Part II sets out that states must take measures to eliminate discrimination as regards certain fields. States must ensure to women on equal terms with men, *inter alia*: the right to participation in political and public life (Article 7); the opportunity to represent their governments internationally (Article 8); and the right to change and retain their and their children's nationality (Article 9). Part III of the Convention sets out that states must take appropriate measures to eliminate discrimination in regard to certain social and economic issues, *i.e.*: education (Article 10); work, and on grounds of marriage and maternity (Article 11); health (Article 12); and the right to benefits and loans and to participate in cultural life (Article 13). The particular problems faced by rural women and measures that states undertake to eliminate discrimination against this group are also contemplated (Article 14). Part IV establishes equality before the law (Article 15) and that states must undertake

measures to eliminate discrimination in relation to marriage and family relations (Article16).

Under Article 17 of the Convention, the Committee for the Elimination of Discrimination against Women (CEDAW Committee) is responsible for supervising international compliance with the Convention. The Committee is composed of 23 experts (lawyers, teachers, diplomats and experts on women's affairs), acting in their individual capacity. The members are elected for a period of four years by the states parties to the Convention. The CEDAW Committee maintains close contact with the other Committees set up under the terms of UN human rights conventions, with the UN Specialised Agencies and the CSW.

Under the Convention itself the only supervisory mechanism established is the reporting system. In accordance with Article 18 of the Convention, each state party is required to report to the CEDAW Committee on the measures taken to comply with the treaty within one year of its ratification. Subsequently, every four years a periodic report is due. Although the responsibility for drafting the reports lies with the government, NGOs can also be involved in order to produce as complete a picture of the situation in the country as possible.

On 6 October 1999, the UNGA adopted an Optional Protocol to the Convention on the Elimination of all Forms of Discrimination against Women. The Optional Protocol entered into force on 22 December 2000. In July 2004, 60 states were parties to the Optional Protocol.

The Optional Protocol contains two additional supervisory mechanisms:

a) Individual complaints mechanism (Article 1). This procedure allows individual women, or groups of women, to submit claims of violations of rights protected under the Convention to the Committee. The Protocol establishes that in order for individual communications to be admitted for consideration by the Committee, a number of criteria must be met, including that all domestic remedies must have been exhausted. The entry into force of the Optional Protocol has put it on an equal footing with the International Covenant on Civil and Political Rights, the Convention on the Elimination of All Forms of Racial Discrimination, and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, which all have individual complaints procedures. As of July 2004, the Committee has two cases pending.

b) Inquiry procedure (Article 8). The Protocol sets out a unique inquiry procedure that enables the Committee to initiate inquiries into situations of grave or systematic violation of women's rights and carry out country visits. The Protocol includes an 'opt-out clause', allowing states upon ratification or accession to declare that they do not accept the inquiry procedure. This inquiry procedure is similar to that established in the Convention against Torture. As of July 2004, the first inquiry case is nearing completion.

The CAT and the Committee against Torture

The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) was adopted by UNGA Resolution 39/46 of 10

December 1984. It entered into force 26 June 1987. As of July 2004, 136 states were parties to the Convention.

In the Preamble to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, states express their desire 'to make more effective the struggle against torture and other cruel, inhuman or degrading treatment or punishment throughout the world'. To this aim states parties undertake to establish effective legislative or other measures to prevent acts of torture and establish that neither state of emergency nor superior orders can be invoked as justification for torture (Article 2). States undertake to ensure that acts of torture are punishable under criminal law (Article 4) and expulsion or *refoulement* is prohibited when there is danger that torture will be inflicted (Article 3). States parties must establish jurisdiction over offences of torture committed by their nationals, on their territory or against their nationals and universal jurisdiction is set out requiring states to establish jurisdiction in cases where the offender is on their territory or under their jurisdiction and they do not extradite (Article 5). States parties undertake to take alleged offenders into custody, carry out inquiries, prosecute and extradite (Articles 6, 7 and 8) and they pledge co-operation (Article 9). Article 10 sets out that states must ensure that education on the prohibition of torture is provided to law enforcement personnel and others involved with the treatment of individuals deprived of their liberty. States must take preventive measures, such as reviewing rules of interrogation (Article 11), prompt and impartial investigation must be carried out (Article 12), and states must ensure remedy, redress, and reparation to victims of torture (Articles 13 and 14). Finally, Article 15 sets out that statements made as a result of torture may not be invoked as evidence in any proceedings.

Under Article 17 of the CAT, a Committee of ten independent experts is made responsible for supervising compliance with the Convention. The experts are elected for a period of four years by the parties to the Convention. Their election takes account of 'equitable geographic distribution'. The Committee was established on 26 November 1987, and meets twice a year for two weeks in Geneva.

Besides its supervisory mandate, the Committee has drafted an Optional Protocol to the Convention permitting the Committee to visit places of detention within the jurisdiction of states parties to the Protocol (comparable with the ECPT). The Protocol has not entered into force but has been ratified by 4 states (July 2004) (see I.§6.D).

The CAT supervisory mechanisms are the following:

a) Reporting mechanism (Article 19). Within one year after the Convention has come into effect for the state concerned, its government must submit a written report to the Committee describing the measures it has taken to implement its obligations under the Convention. It must submit supplementary reports every four years concerning new measures that have been taken and any other reports requested by the Committee. The Committee may include General Comments

on the country reports in its annual report to the UNGA and to the states parties to the Convention. The governments concerned may respond to the comments with their own observations (Article 19(3)).

b) Inter-state complaint mechanism (Article 21). The Article states that the Committee can deal with communications submitted by a state party to the Convention whereby non-compliance with obligations under the Convention by another state party to the Convention is claimed. It is an optional procedure: it may be only instituted if both states concerned have made a declaration recognising, in regard to itself, the competence of the Committee.

c) Individual complaints procedure (Article 22). The Article contains provisions to deal with complaints submitted by individuals. Also for this procedure, the state party to the Convention against which the complaints are being made must have recognised the right to complain in advance. The procedures have the same features as those of the ICCPR and its First Optional Protocol. As of July 2004, more than 200 cases have been decided.

d) Inquiry procedure (Article 20). If the Committee receives reliable information that suggests 'well-founded indications' that torture is 'being systematically practised' in a state that is a party to the Convention, it may appoint one or more of its members to undertake a confidential investigation. It may visit the country in question with the consent of its government. The Committee sends its findings to the government with its comments or proposals. The Committee's work during the investigation stage is confidential. On the other hand, the Committee may decide to include a brief report of the results of its work in its annual report, on completion of an investigation. This sanction could give weight to the Committee's position in its dealings with the government concerned. However, a state that is party to the Convention may refuse to accept application of Article 20. As of July 2004 seven inquiries have been executed.

The CRC and the Committee on the Rights of the Child

The Convention on the Rights of the Child (CRC) was adopted by UNGA Resolution 44/25 on 20 November 1989. It entered into force on 20 September 1990. This treaty is the human rights treaty with the most numbers of ratifications; as of July 2004, 192 states were parties to the Convention.

Under the Convention on the Rights of the Child, a child is any person below the age of 18, unless under applicable laws, majority is attained earlier (Article 1). The Convention sets out the principle of non-discrimination (Article 2) and that the best interest of the child should be a primary consideration in all actions concerning children (Article 3). States must undertake measures to implement the rights in the Convention (Article 4), and respect the rights and duties of parents or extended family to give appropriate guidance and direction in the exercise by the child of the rights in the Convention (Article 5). The Convention sets out civil and political rights as well as economic, social and

cultural rights: the right to life (Article 6); the right to a name and nationality (Article 7); the right to preserve one's identity (Article 8); the freedom of expression, opinion, thought, conscience and religion (Articles 12, 13 and 14); freedom of association and assembly (Article 15); the right to privacy (Article 16); the right to receive information (Article 17); the right to health (Article 24); the right to benefit from social security (Article 26); the right to an adequate standard of living (Article 27); the right to education (Article 28); the right to rest and to participate in cultural life (Article 31); freedom from torture (Article 37); and the right to due process (Article 40). The Convention also contains provisions prohibiting separation from parents except in exceptional circumstances (Article 9), and the obligation of states parties to aid family reunification (Article 10). States parties undertake to take special measures: to combat illicit transfer and non-return of children abroad (Article 11); to protect children from abuse or neglect, and afford special protection if they are deprived of their families (Articles 19 and 20); to ensure that in systems of adoption, the best interest of the child is paramount (Article 21); to protect children from economic exploitation and hazardous work (Article 32); to protect children from sexual exploitation and abuse (Article 34); to protect children from drug abuse (Article 33); to prevent trafficking in children and all exploitation (Articles 35 and 36); to ensure that children under 15 do not take part in armed conflict (Article 38); and to provide rehabilitative care to children that need it (Article 39). In addition, special protection is set out for particular groups, such as refugee children, handicapped and disabled children and minority and indigenous children (Articles 22, 23 and 30).

Article 43 of the CRC establishes a Committee on the Rights of the Child. The Committee held its first meeting in October 1991. The Committee was originally composed of ten experts, but currently consists of 18 experts elected for a four-year term. The election takes geographical distribution as well as principal legal systems into account. The Committee meets three times a year in Geneva, each time for three weeks. Its task is the supervision of the implementation of the CRC, mainly through a reporting mechanism.

The only supervisory mechanism established by the CRC is the reporting system under Article 44 of the CRC. The initial report is to be submitted within two years after the entry into force of the Convention for the state party concerned, and thereafter every five years. The Committee reports every two years to the UNGA and may submit suggestions and general recommendations to it. At its first session, the Committee formulated general guidelines regarding the form and content of initial reports (see UN Doc. A/47/41). This report has to include, *inter alia*, the definition of a child under national law, application of general principles, and paragraphs on family environment and alternative care, basic health, education and special protection measures.

On 25 May 2000, two additional Optional Protocols to the Convention on the Rights of the Child were adopted; on the Involvement of Children in Armed

Conflict and on the Sale of Children, Child Prostitution and Child Pornography.

The Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict entered into force on 12 February 2002. As of July 2004, 73 states were parties to this treaty. The Protocol prohibits governments and other groups from recruiting people under the age of 18 to the armed forces. It requires that countries raise the minimum recruiting age above the age set by the CRC; do everything possible to keep people under the age of 18 from direct participation in hostilities; take precautions against the voluntary recruitment of people under the age of 18; and report to the CRC Committee on their compliance with the provisions of the Convention and the Protocol.

The Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography entered into force on 18 January 2002. As of July 2004, 79 states were parties to this treaty. It supplements the Convention on the Rights of the Child with detailed requirements for criminalising violations of children's rights in relation to the sale of children, child prostitution and child pornography. The Protocol defines the offences 'sale of children', 'child prostitution' and 'child pornography'. It sets standards for treating violations under domestic law, not just as they relate to offenders, but also as regards preventive efforts and the protection of victims. It also gives a framework for increased international co-operation in these areas, in particular for prosecuting offenders. (For more information on the CRC see IV.§2.

The CMW and the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families

The International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (CMW) was adopted by UNGA Resolution 45/158 of 18 December 1990. Thirteen years passed before it entered into force on 1 July 2003. As of July 2004, 26 states were parties to the Convention.

Part I of the Convention sets out definitions and Part II sets out the principle of non-discrimination. Part III contains the following substantive rights: the freedom of movement (Article 8); the right to life (Article 9); prohibition of torture (Article 10); prohibition of slavery or forced labour (Article 11); freedom of thought, conscience and religion (Article 12); freedom of opinion and information (Article 13); privacy (Article 14); property (Article 15); liberty and security (Article 16); humane treatment under detention and fair trial (Article 17); equality before the courts (Article 18); *nullum crimen, nulla poena sine previa lege* (Article 19); the right not to be imprisoned for debt (Article 20); the right to consular assistance (Article 23); the right to be recognised before the law (Article 24); freedom of association (Article 26); social security and medical care (Articles 27 and 28); cultural identity (Article 31) and the right to transfer earnings and savings (Article 32). In addition, the Convention stipulates that it

is prohibited to destroy identity documents of migrant workers (Article 21) and sets out rules governing the expulsion of migrant workers and their families (Article 22). Furthermore, it contains special provisions on children of migrant workers, establishing that they must have the right to a name, to registration of birth and to a nationality (Article 29), as well as the right to education (Article 30). Finally, the Convention establishes that migrant workers must not receive treatment less favourable than nationals in respect of remuneration (Article 25), and that they have the right to be informed about their rights under the Convention.

The Convention is monitored by the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families. The Committee consists of ten experts in accordance with the procedure set forth in the Convention (Article 72). The first meeting of states parties for the election of the members of the Committee was held on 11 December 2003. When 41 states become parties to the Convention, the number of experts sitting on the Committee will be increased from 10 to 14.

The Convention seeks to prevent and eliminate the exploitation of migrant workers throughout the entire migration process by providing a set of binding international standards to address the treatment, welfare and human rights of both documented and undocumented migrants, as well as the obligations and responsibilities on the part of sending and receiving states. In particular, it seeks to put an end to the illegal or clandestine recruitment and trafficking of migrant workers and discourage the employment of migrant workers in an irregular or undocumented situation.

The CMW supervisory mechanisms are the following:

a) Reporting mechanism (Article 72). States parties accept the obligation to report on the steps they have taken to implement the Convention within one year of its entry into force for the state concerned, and thereafter every five years. The reports are expected to indicate problems encountered in implementing the Convention, and to provide information on migration flows. After examining the reports, the Committee will transmit such comments as it may consider appropriate to the state party concerned.

b) Inter-state communications (Article 77). A state party may recognise the competence of the Committee to receive and consider communications from one state party alleging that another state party is not fulfilling its obligations under the Convention. Such communications may be received only from states parties that have recognised this competence. The Committee will deal with a matter referred to it in this way only after all available domestic remedies have been exhausted, and may propose its good offices in an effort to reach a friendly solution. This procedure requires 10 declarations by states parties to enter into force. In July 2004, no state party had made such a declaration.

c) Individual communications (Article 77). A state party may recognise the competence of the Committee to receive and consider communications from or on behalf of individuals within that state's jurisdiction who claim that their rights

under the Convention have been violated. Such communications may be received only if they concern a state party that has recognised this competence. If the Committee is satisfied that the matter has not been, and is not being, examined in another international context, and that all domestic remedies have been exhausted, it may call for explanations, and express its views. This procedure requires 10 declarations by states parties to enter into force. As of July 2004, no state party has made such a declaration.

SUPERVISORY BODY AND SUPERVISORY MECHANISMS		
ICESCR	Committee on Economic, Social and Cultural Rights. Composed of 18 experts.	State reports every 5 years (Article 16 (1))
ICCPR	Human Rights Committee. Composed of 18 experts (Article 28).	State reports every 5 years (Article 40) Inter-state complaints (Article 41) Individual complaints (First Optional Protocol)
CEDAW	Committee on the Elimination of Discrimination against Women Composed of 23 experts (Article 17).	State reports every 4 years (Article 18) Individual complaints (Optional Protocol) Inquiry procedure (Optional Protocol)
CERD	Committee on the Elimination of Racial Discrimination. Composed of 18 experts (Article 8).	State reports every 2 years (Article 9) Individual complaints procedure (Article14) Inter-state complaints (Article 11)
CRC	Committee on the Rights of the Child. Composed of 18 experts (Article 43).	State reports every 5 years (Article 44)
CAT	Committee against Torture. Composed of 10 experts (Article 17).	State reports every 4 years (Article 19) Inquiry procedure (Article 20) Inter-state complaints (Article 21) Individual complaints (Article 22)

CMW	Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families. Composed at present of 10 experts (Article 72).	State reports every 5 years (Article 73) Inter-state complaints (Article 76) Individual complaints (Article 77)

2. CHARTER-BASED PROCEDURES

This system of supervision has no basis in a specific human rights treaty. The procedures were established by resolutions of the Economic and Social Council (ECOSOC) and, therefore, are ultimately based on the Charter of the United Nations, thus their identification as charter-based procedures.

From the moment of its establishment the United Nations received complaints (communications) of violations of human rights from individuals, groups and non-governmental organisations. In an initial phase, the member states of the United Nations did not empower the Organisation to deal with such complaints. In 1959, the Economic and Social Council adopted a resolution consolidating the situation as it had grown since 1947 (ECOSOC Resolution 728 F (XXVIII) of 30 July 1959). The Secretary-General of the United Nations was requested to compile and distribute two lists to the Commission on Human Rights: the first a non-confidential list of all communications received dealing with the general principles involved in the promotion and protection of human rights; and a second confidential list, furnished in private meeting, giving a brief indication of the substance of other communications. A particular state referred to in such a communication was to receive a copy of it and requested to reply to it, if it wished to do so. From a victim's perspective, however, this procedure produced limited relief. The ECOSOC resolution only requested the Secretary-General 'to inform the writers of all communications concerning human rights that their communications will be handled in accordance with this resolution, indicating that the Commission has no power to take any action in regard to any complaints concerning human rights'.

In the 1960s significant changes took place in the attitude of the United Nations and its member states with respect to dealing with violations of human rights. In 1966, the General Assembly invited the ECOSOC to give urgent consideration to ways and means of improving the capacity of the United Nations to put a stop to violations of human rights wherever they might occur.

Following this invitation, it only took eight months before the ECOSOC approved the arrangements set up by the UN Commission on Human Rights in which it asked its Sub-Commission on Prevention of Discrimination and Protection of Minorities (now Sub-Commission on the Promotion and Protection of Human Rights) to prepare a report containing information, from all available sources, on human rights violations. It also asked to bring to its attention any situation that revealed a consistent pattern of human rights violations in any

country, including policies of racial discrimination, segregation and apartheid, with particular reference to colonial and dependent territories. Furthermore, it approved the request by the Commission on Human Rights for authority for itself and its Sub-Commission on Prevention of Discrimination and Protection of Minorities (now Sub-Commission on the Promotion and Protection of Human Rights) to examine, in public, information contained in communications that was relevant to gross violations of human rights and authority to make a thorough study and investigation of situations which revealed a consistent pattern of violations of human rights. The decisions of the ECOSOC being embodied in Resolution 1235, the procedure has subsequently become known as the 1235 procedure.

1235 procedure

ECOSOC Resolution 1235 (XLII) of 6 June 1967 authorised the UN Commission on Human Rights and its Sub-Commission to study consistent patterns of human rights violations and to investigate gross violations of human rights. In practice, the 1235 procedure has evolved into an annual public debate on human rights violations anywhere around the world. Not only government representatives (as members of the UN Commission on Human Rights or as observers) take part in this debate, but also a very important role is played by non-governmental organisations, providing important information on human rights situations and actively taking part in the discussions.

Towards the end of the 1970s and the beginning of the 1980s, on the basis of the 1235 procedure, the UN Commission on Human Rights gradually developed a practice of appointing special rapporteurs, special representatives, experts, working groups and other envoys competent to study human rights violations in specific countries or competent to study particular human rights violations all over the world. These special experts and working groups have become known as 'country-procedures' and 'thematic procedures' (see textboxes below).

1503 procedure

ECOSOC Resolution 1503 (XLVIII) of 27 May 1970 came into being after a lengthy period of preparation by the ECOSOC and by the UN Commission on Human Rights. The resolution creates a confidential procedure to deal with communications on violations of human rights. Only communications indicating 'a consistent pattern of serious and reliably documented violations of human rights' qualify for consideration under the 1503 procedure. Other communications or copies of 1503 communications are referred to other procedures if the Secretariat considers there are good reasons for doing so. The 1503 procedure is not primarily intended to provide satisfaction for individual complainants, but intends to take action in respect of systematic violations of human rights designated as a 'situation'.

The 1503 confidential communications procedure was reformed during the fifty-sixth session of the UN Commission on Human Rights in 2000. Pursuant to ECOSOC Resolution 2000/3 of 16 June 2000, a Working Group is designated on a yearly basis by the Sub-Commission on the Promotion and Protection of Human Rights from among its members. It is geographically representative of the five regional groups and appropriate rotation is encouraged. This Working Group on Communications meets annually immediately after the Sub-Commission regular session to examine communications (complaints) received from individuals and groups alleging human rights violations, as well as any government responses. Manifestly ill-founded communications are screened out by the Secretariat and are not sent to the governments concerned, nor submitted to the Working Group on Communications.

Where the Working Group identifies reasonable evidence of a consistent pattern of gross violations of human rights, the matter is referred to the Working Group on Situations, which meets at least one month prior to the Commission to examine the particular situations forwarded to it by the Working Group on Communications, and to decide whether or not to refer any of these situations to the Commission. Subsequently, it is for the Commission to take a decision concerning each situation brought to its attention in this manner.

The mandates of special rapporteurs, representatives, experts and working groups

The mandates given to special rapporteurs, special representatives, experts and working groups are either to examine, monitor and publicly report on human rights situations in specific countries or territories (known as country mechanisms or mandates) or on major phenomena of human rights violations in various parts of the world (known as thematic mechanisms or mandates). In carrying out their mandates, special rapporteurs and other mandate-holders routinely undertake country missions and report back to the UN Commission on Human Rights. These missions take place at the invitation of the country concerned. The special rapporteurs are free to use all reliable sources available to them to prepare their reports, and much of their research is done in the field, where they conduct interviews with authorities, NGOs and victims, gathering on-site evidence whenever possible. The special rapporteurs and working groups report annually to the UN Commission on Human Rights, with recommendations for action. Their findings are also used by the treaty-bodies in their work, especially in evaluating state reports.

Examples of 'special procedures'

Country Mandates
Special Representative of the Commission on Human Rights on the situation of human rights in Bosnia and Herzegovina and the Federal Republic of Yugoslavia.
Special Rapporteur of the Commission on Human Rights on the situation of human rights in Burundi.
Special Representative of the Secretary-General on the situation of human rights in Cambodia.
Special Rapporteur of the Commission on Human Rights on the situation of human rights in the Democratic Republic of the Congo (ex-Zaire).
Independent Expert appointed by the Secretary-General on the situation of human rights in Haiti.
Special Rapporteur of the Commission on Human Rights on the situation of human rights in Iraq.
Independent Expert on technical co-operation and advisory services in Liberia.
Special Rapporteur of the Commission on Human Rights on the situation of human rights in Myanmar.
Special Rapporteur of the Commission on Human Rights on the situation of human rights in the Palestinian territories occupied since 1967.
Independent Expert appointed by the Secretary-General on the situation of human rights in Somalia.
Special Rapporteur of the Commission on Human Rights on the situation of human rights in the Sudan.
Thematic Mandates
Special Rapporteur on the question of torture.
Working Group on arbitrary detention.
Special Rapporteur of the Commission on Human Rights on the sale of children, child prostitution and child pornography.
Independent expert of the Commission on Human Rights on the right to development.
Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.
Working group on enforced or involuntary disappearances.
Independent expert of the Commission on Human Rights to examine the existing international criminal and human rights framework for the protection of persons from enforced or involuntary disappearance.
Special Rapporteur of the Commission on Human Rights on the right to education.

Special Rapporteur of the Commission on Human Rights on extrajudicial, summary or arbitrary executions.

Special Rapporteur of the Commission on Human Rights on the right to food.

Special Representative of the Secretary-General on the situation of human rights defenders.

Special Rapporteur of the Commission on Human Rights on adequate housing as a component of the right to an adequate standard of living.

Special Rapporteur of the Commission on Human Rights on the situation of human rights and fundamental freedoms of indigenous people.

Special Rapporteur of the Commission on Human Rights on the independence of judges and lawyers.

Special Rapporteur of the Commission on Human Rights on the promotion and protection of the right to freedom of opinion and expression.

Special Rapporteur of the Commission on Human Rights on freedom of religion or belief.

Representative of the Secretary-General on internally displaced persons.

Special Rapporteur of the Commission on Human Rights on use of mercenaries as a means of impeding the exercise of the right of peoples to self-determination.

Special Rapporteur of the Commission on Human Rights on the human rights of migrants.

Independent expert of the Commission on Human Rights to examine the question of a draft optional protocol to the International Covenant on Economic, Social and Cultural Rights.

Independent expert of the Commission on Human Rights on human rights and extreme poverty.

Special Rapporteur of the Commission on Human Rights on contemporary forms of racism, racial discrimination, xenophobia and related intolerance.

Working group of five independent experts on people of African descent to study the problems of racial discrimination faced by people of African descent.

Working Group on the effective implementation of the Durban Declaration and Programme of Action.

Independent expert of the Commission on Human Rights on structural adjustment policies and foreign debt.

Special Rapporteur of the Commission on Human Rights on the adverse effects of the illicit movement and dumping of toxic and dangerous products and wastes on the enjoyment of human rights.

Special Rapporteur of the Commission on Human Rights on violence against women, its causes and consequences.

Communications and 'Urgent action' procedure under extra-conventional mechanisms

Unlike treaty-bodies, extra-conventional country and thematic mechanisms have no formal complaints procedures. The activities of the country and thematic mechanisms are based on communications received from various sources (the victims or their relatives, local or international NGOs) containing allegations of human rights violations. Such communications may be submitted in various forms (*e.g.* letters, faxes, cables) and may concern individual cases or contain details of situations of alleged violations of human rights.

Occasionally, communications addressed to the extra-conventional mechanisms contain information to the effect that a serious human rights violation is about to be committed (*e.g.* imminent extrajudicial execution, fear that a detained person may be subjected to torture, fear that a detainee may die as a result of an unattended disease or a 'disappearance' has occurred). In such cases, the Special Rapporteur or Chairperson of a working group may address a message to the authorities of the state concerned by fax or telegram, requesting clarifications regarding the case and appealing to the government to take the necessary measures to guarantee the rights of the alleged victim. Such appeals are primarily of a preventive nature and are resorted to on a regular basis by certain thematic mechanisms, in particular the Special Rapporteurs on extrajudicial, summary or arbitrary executions and on the question of torture, and the Working Groups on Enforced or Involuntary Disappearances and on Arbitrary Detention. However, other thematic and country mechanisms occasionally follow a similar procedure. In some instances, when the circumstances of the case justify such an approach, an appeal may be addressed by several special rapporteurs and/or working groups jointly. The criteria for urgent interventions vary from one mandate to another and are described in the methods of work of the respective mechanisms.

ACCESS TO WORKING GROUPS, SPECIAL RAPPORTEURS AND EXPERTS

The study of individual communications has become the main focus of the work of the experts in charge of special procedures, and is subsequently reflected in their reports. As a result, the Working Groups and Special Rapporteurs have felt compelled to include, among their methods of work, appropriate guidelines to aid potential complainants.

The guidelines designed by the Working Group on Enforced or Involuntary Disappearances (WGEID), and the Working Group on Arbitrary Detention (WGAD), can be considered as examples of best practice. These guidelines

are published in WGAD reports and are also posted on the website of the Office of the High Commissioner for Human Rights (OHCHR) under the title 'Communications/Complaints Procedures' (http://www.unhchr.ch/html/menu2/complain.htm#conv). This site also contains the guidelines for the Special Rapporteurs on extrajudicial, summary or arbitrary executions; violence against women; the promotion and protection of the right to freedom of opinion and expression; sale of children, child prostitution, and child pornography; the question of torture; as well as guidelines for the Special Representative of the Secretary-General on human rights defenders.

The use of these guidelines is not mandatory for complaints to be admissible. It is important to note that unlike in other mechanisms, the exhaustion of domestic remedies is not a requirement for the formulation of a complaint. In general, each communication should contain the following minimum information:

- *Identification of the alleged victim:* Under this heading it would be appropriate to present the age and sex of the alleged victim, and whether she/he belongs to a special group (migrant worker, child, minority, indigenous peoples *etc.*).

- *Identification of the alleged perpetrator:* In outlining the circumstances of the violation, it is important to provide evidence of the link between the action of the perpetrator and the ensuring state responsibility (to distinguish it from common crime).

- *Identification of the complainant (person or organisation):* Except for WGEID & WGAD, the experts do not check the relationship between the victim and the complainant. Rather, the representation is presumed as fulfilling the characteristics of an authentic *actio popularis*.

- *Detailed description of the circumstances surrounding the violation*: Under this heading it would be appropriate to submit documents as evidence. This could be in the form of forensic or police reports, and should also include a list of steps taken at national level to deal with the complaint.

Written communications should be addressed to the OHCHR, with an indication of the procedure that is to be invoked. Failing this, the staff of the Office decides what mechanism is appropriate to deal with the

complaint. In this context it is worth noting that the disposition of the thematic mechanisms makes them more likely to take action on individual cases. If the complaint concerns a state that is under examination by a geographic mandate, the staff of the OHCHR is required to transmit the information to that organ also, though it is advisable (to guarantee the participation of more than one organ) that the complainant identifies other organs that might be invoked in relation to the communication.

When the complainant believes that the case should be processed according to the rules of urgent procedure, the words 'urgent action/appeal' should appear at the beginning of the complaint. It is also important that a clear and concrete synopsis precede any communication. This synopsis should, at the very least, be written in one of the working languages of the Secretariat, *i.e.* English, French or Spanish; or in the case of the geographic mandates, in the language of the country concerned.

Elvira Dominguez

Implementation

In general, the UN has a substantial role to play in the field of implementation in terms of strengthening compliance with human rights and maintenance of the rule of law.

Research and information services

The UN Commission on Human Rights has commissioned studies, *inter alia*, on apartheid and the rights of detainees. It has set up numerous working groups, or asked the ECOSOC to do so (see table above). In the field of studies and research, a substantial role is played by the Sub-Commission, which is constantly in the process of elaborating studies on human rights issues.

Another important role in the implementation field carried out by the Commission is the dissemination of information on human rights issues, through the production and distribution of human rights texts and educational materials. In this context, many national institutions working for the promotion of human rights are supported by the Office of the High Commissioner for Human Rights (OHCHR).

Assistance

An Advisory Services Programme was established in 1953 to assist governments in the improvement of their domestic human rights situation. In February 1998,

the OHCHR established an Advisory Services and Field Activities Methodology Team, which has overall responsibility for the technical co-operation programme within the Activities and Programmes Branch of the Office. Assistance for the establishment and strengthening of national human rights institutions is a major component of the technical co-operation programme, and is provided, in particular, by the UN Special Adviser on National Institutions, Regional Arrangements and Preventive Strategies. The activities in support of national institutions can be broadly divided into two areas: the provision of practical advice and assistance to those involved in the establishment of new national institutions or the strengthening of existing ones, and facilitating international and regional meetings of national institutions. In recent years, the OHCHR has implemented activities on national institutions, including advisory missions by the High Commissioner's Special Adviser on National Institutions, Regional Arrangements and Preventive Strategies and/or staff members of the Office to, *inter alia,* Cambodia, Canada, Ecuador, Fiji, Guyana, Jamaica, Jordan, Kenya, Mexico, New Zealand, Nepal, the Philippines, Sierra Leone, St. Lucia, South Africa, Sweden and Thailand.

Over the years, the UNCHR has taken the initiative to set up various Voluntary Funds to facilitate the functioning of standard-setting bodies, to assist victims of violations, and to promote human rights, including:

- 1981: Voluntary Fund for Victims of Torture. It is being used to support initiatives of UN member states and NGOs who assist victims of torture.
- 1985: Voluntary Fund for Indigenous Populations. This fund enables representatives of indigenous populations to attend relevant meetings.
- 1987: Voluntary Fund for Advisory Services, now called Voluntary Fund for Advisory Services and Technical Assistance in the Field of Human Rights (Voluntary Fund for Technical Co-operation). It aims at complementing and strengthening support to governments who promote human rights. In fact, it has developed from the Advisory Services Programme, focusing on larger projects than possible under the original Advisory Services Programme and is to be implemented at the request of the government concerned.
- 1991: Voluntary Fund on Contemporary Forms of Slavery. It enables victims of slavery practices to attend and testify before the Working Group on Contemporary Forms of Slavery (a working group of the Sub-Commission).
- 1993: Voluntary Fund to Support the Activities of the Centre for Human Rights (presently the Office of the High Commissioner for Human Rights). It is an umbrella fund that was established in order to meet the increasing demand for activities by the Centre for Human Rights, as well as its own requirements in terms of staff and computer equipment.
- 1993: Trust Fund for the International Decade of the World's Indigenous Peoples. This trust fund was established by the UNGA to assist the funding of projects, which promote the goals of the Decade.

In addition, several funds have been created in relation to field activities of the High Commissioner.

D. United Nations Specialised Agencies and human rights

The Specialised Agencies of the United Nations are functional intergovernmental organisations affiliated with the UN. They are analogous bodies, working in such diverse areas as health, agriculture, international aviation and meteorology. Related to the UN through special agreements, the specialised agencies co-ordinate their work with the UN, but are separate, autonomous organisations. Several Specialised Agencies of the United Nations are concerned with human rights issues, such as the World Health Organisation (WHO), the Food and Agriculture Organisation (FAO), and the United Nations Human Settlement Programme (UN-HABITAT). Only one UN Specialised Agency will be dealt with in detail here: the International Labour Organisation (ILO). The relevant section will be followed by short notes on the United Nations Educational, Scientific and Cultural Organisation (UNESCO) and the UN High Commissioner for Refugees (UNHCR). Throughout the Handbook other specialised agencies, such as UNICEF and FAO are also going to be examined.

1. INTERNATIONAL LABOUR ORGANISATION (ILO)

The International Labour Organisation (ILO) was founded in 1919. The initial text of the ILO Constitution formed Part XIII of the Treaty of Versailles and was amended and expanded in 1946. The ILO was the first 'specialised agency' to be given that status by the UN, under an agreement with the ECOSOC. It focuses on those human rights related to the right to work and to working conditions, including the right to form trade unions, the right to strike, the right to be free from slavery and forced labour, equal employment and training opportunities, the right to safe and healthy working conditions, and the right to social security. The ILO also provides protection for vulnerable groups, having adopted standards on child labour, employment of women, migrant workers, and indigenous and tribal peoples. As of July 2004 the ILO had 177 member states.

Uniquely, the ILO functions in a tripartite fashion: its organs are composed not only of representatives of governments, but also of representatives of workers' and employers' organisations. The main organ of the ILO is the International Labour Conference, the plenary assembly of the ILO. The Labour Conference meets once a year. Each ILO member state sends four delegates to the conference: two government representatives, one workers' representative, and one employers' representative.

Standards

The ILO establishes international standards in the field of labour relations and the protection of employees, through the adoption of conventions and recommendations. As of July 2004, some 7,200 ratifications had been made regarding the different ILO conventions.

The International Labour Conventions are open to ratification by ILO member states. They are international treaties that are binding on the states that are parties to them. These countries voluntarily undertake to apply their provisions, to adapt their national laws and practices to the requirements of the conventions, and to accept international supervision.

Several important instruments have taken the form of what is called 'promotional conventions'. The states that ratify these conventions undertake to pursue their objectives, within time limits and by methods to be determined according to national circumstances, which, if they so wish, may be developed with the assistance of the International Labour Office. These promotional instruments contain generally accepted and broadly defined economic and social development objectives, in areas that lend themselves particularly well to large-scale technical co-operation projects. By assisting governments in these areas, the International Labour Office co-operates actively with them in seeking out and implementing the most appropriate measures to give effect to the relevant standards.

International labour recommendations do not belong to the collection of international treaties. They stipulate non-binding guidelines that may independently cover a particular subject, supplement the provisions contained in conventions, or spell them out in greater detail.

Approximately two-thirds of the ratifications to the 185 ILO conventions have been made by the governments of developing countries. The most important conventions in the field of human rights are the conventions on:

- Forced Labour (ILO 29; 1930; by July 2004, ratified by 163 states).
- Freedom of Association and Protection of the Right to Organise (ILO 87; 1948; by July 2004, ratified by 142 states).
- Right to Organise and Bargain Collectively (ILO 98; 1949; by July 2004, ratified by 154 states).
- Equal Remuneration (ILO 100; 1951; by July 2004, ratified by 161 states).
- Abolition of Forced Labour (ILO 105; 1957; by July 2004, ratified by 161 states).
- Discrimination (Employment and Occupation) (ILO 111; 1958; by July 2004, ratified by 160 states).
- Minimum Age (ILO 138; 1973; by July 2004, ratified by 134 states).
- Worst Forms of Child Labour (ILO 182; 1999; by July 2004, ratified by 150 states).

- ILO Declaration on Fundamental Principles and Rights at Work (adopted in June 1998).

Supervision

Certain basic provisions of the existing supervisory system were included in the original Constitution of the ILO. The system has, however, been substantially developed over the years. Some of these developments were brought about by amendments to the Constitution. Other important developments resulted from decisions of the Governing Body of the ILO or the International Labour Conference.

Presently, the ILO has a range of mechanisms at its disposal to ensure compliance with the standards the organisation has established. These mechanisms include: a) obligatory reporting procedures, b) complaints procedures and c) inquiries and studies procedures.

Reporting procedures

There are three categories of reports that ILO member states have to submit to the Director-General of the ILO under the organisation's Constitution (Articles 19 and 22). The reports relate to:

a) Information concerning the measures taken to bring the conventions and recommendations to the attention of the competent authorities, no later than twelve or eighteen months after the adoption of those texts by the International Labour Conference. These reports have to be submitted annually.

b) The ratification of conventions or reasons for failing to do so. The relevant rules are designed to secure more frequent reporting for certain conventions, particularly those concerning basic human rights (reports are required every two years). The rules are also applicable in the initial period following ratification, and whenever there are significant problems of implementation, or when comments are received from employers' or workers' organisations. These reports must be drafted on the basis of detailed forms established by the Governing Body of the ILO.

c) For non-ratified conventions and recommendations, reports at intervals requested by the Governing Body, concerning national law and practice, showing the extent to which the state concerned has given effect or intends to give effect to those texts, and stating the difficulties which prevent or delay the ratification of the convention concerned or the application of the recommendation in question.

Governments are also obliged to communicate copies of their reports to national employers' and workers' organisations (Article 23(2) of the Constitution). Any observations made by these organisations must be communicated to the ILO by governments, which may also attach their own comments. More than 2,000 reports are submitted by governments each year.

Two bodies are entrusted with the examination of the above-mentioned reports: a) the Committee of Experts on the Application of Conventions and Recommendations which is an independent body established in 1927; and b) the Conference Committee on the Application of Conventions and Recommendations, a body composed of representatives of governments, employers and workers set up at the International Labour Conference at each of its annual sessions. The supervisory bodies encounter difficulties at two different stages: a) when evaluating national situations and b) when bringing those situations into conformity with international standards.

Complaint procedures

The ILO Constitution provides for three forms of complaints mechanisms that may set in motion contentious procedures relating to the application of a ratified convention:

a) The complaint procedure is provided for in Articles 26 to 34 of the Constitution, and is the ILO's most formal procedure of supervision. Such a complaint may be lodged by any ILO member state or by the Governing Body of the ILO. The Governing Body may do so either on its own initiative or on receipt of a complaint from a delegate to the International Labour Conference. The Governing Body may, on the basis of written complaints, appoint on an *ad hoc* basis a Commission of Inquiry (Article 26) to make a thorough examination of the matter. This Commission presents a report containing its findings on all questions of fact relevant to determining the issue between the parties, and its recommendations concerning steps that should be taken to meet the complaint. The governments concerned are required to state, within three months, whether or not they accept the recommendations, and if not, whether they wish to refer the complaint on a voluntary basis to the International Court of Justice to provide a final judgement in the dispute between the government concerned and the Commission. Because the procedure is cumbersome, it is not in use.

b) The representations procedure is provided for by Articles 24 and 25 of the ILO Constitution. Representations may be made by employers' and workers' organisations against a state that, in their opinion, has failed to secure in any respect the effective observance within its jurisdiction of a convention to which it is a party. The representation has to be examined first by a Committee of three members of the Governing Body. This Committee decides on the admissibility of the representation, after which it may decide to invite the government concerned to make a statement. In the event of an unsatisfactory reply, the Governing Body has the right to publish the representation and the government statement, if any, in reply to it. Compared to other procedures the representations procedure has most often been invoked.

c) In view of the importance of freedom of association, a special procedure was established by the ILO in 1950 following an agreement with the ECOSOC.

By its Resolution 277(X) (1950) on trade union rights, the ECOSOC formally accepted the ILO's services in this matter on behalf of the UN. The procedure is founded on the submission of complaints that may be made by governments or by employers' or workers' organisations. It may be applied even against states that have not ratified the Conventions on Freedom of Association (ILO 87 and ILO 98). The machinery comprises two bodies:

The Committee on Freedom of Association is appointed by the Governing Body of the ILO from among its members. The complaints - submitted by governments, employers' and workers' organisations - are examined by the Committee that is chaired by an independent chairman. Use can also be made of the so-called 'direct contacts' procedure regarding these complaints. This procedure has been developed to enhance the effectiveness of the working methods of the ILO, since no procedure in the ILO allowed for direct contact with the government concerned. In practice, it can lead to a visit *in loco* upon initiative of the Committee. Over 2,000 complaints have been dealt with so far by means of this procedure (July 2004). The findings (conclusions and recommendations) of the Committee are submitted to the Governing Body.

The Fact-Finding and Conciliation Commission on Freedom of Association is made up of independent persons appointed by the Governing Body. The Commission essentially has a fact-finding role, entrusted with the task of examining any complaint concerning alleged infringements of trade union rights that may be referred to it by the Governing Body. It may, however, also examine, in conjunction with the government concerned, the questions referred to it in order to settle difficulties by way of agreement. The Commission decides on a case by case basis in its procedure, which generally includes the hearing of witnesses and a visit to the country concerned.

All these complaints mechanisms include provisions to ensure implementation of the final decision. The most important of these provisions, publication of the decision, is common to all of them. It has turned out to be an effective tool, even if legally and formally it does not appear very severe.

Studies, inquiries and the Article 19 procedure

The ILO also employs the method of special inquiries and studies. For example, in the 1950s, two ILO commissions of independent experts conducted inquiries into new systems of forced labour which had developed in some parts of the world. However, such procedures are not used frequently.

Mention should also be made of the Article 19 procedure. Article 19(5) of the ILO Constitution stipulates that in case an ILO member state does not ratify a convention, it is obliged, nevertheless, to report, at appropriate intervals as requested by the Governing Body, on its implementation of the convention.

IMPLEMENTATION

Since the beginning of the 1960s, the membership of the ILO has grown enormously. After 1960, most of the new members were newly independent countries, almost all of them developing countries. Generally, their labour administrations were not well prepared to deal with all the questions arising out of membership of the ILO and they looked to the organisation to provide advice and assistance. The International Labour Office accordingly found it necessary to intensify its activities in this field, in addition to fostering technical co-operation aimed at improving labour administration and social legislation. The range of measures available today includes:

a) Direct contacts and less formal advisory missions.

b) The appointment of regional advisers and other forms of advice on questions relating to international labour standards, seminars, training and manuals, measures aimed at securing more active involvement of employers' and workers' organisations, and the promotion of tripartite consultations at the national level on questions concerning ILO standards.

c) Regional discussions, especially during regional conferences, concerning the ratification and implementation of ILO standards, and measures aimed at closer integration of standards in operational activities. ILO regional meetings have repeatedly emphasised the value of these measures and called for their intensification.

Since the 1970s, the ILO has been able to establish a large programme of technical co-operation in the social and employment field. Much effort has been undertaken to integrate the promotion of its labour standards into its technical co-operation programme. The ILO approach is generally considered one of the most encouraging examples of what is called a 'positive approach' to the implementation of human rights standards. In addition, programmes have been developed that aim at directly limiting and finally eliminating practices, which are contrary to human rights standards. A typical example is the Programme against Child Labour.

2. UNITED NATIONS EDUCATIONAL, SCIENTIFIC AND CULTURAL ORGANISATION (UNESCO)

The United Nations Educational, Scientific and Cultural Organisation (UNESCO) was created in 1945:

> [T]o contribute to peace and security by promoting collaboration among the nations through education, science and culture in order to further universal respect for justice, for the rule of law, human rights and fundamental freedoms which are affirmed for the peoples of the world without distinction of race, sex, language or religion by the Charter of the United Nations. (Article 1 of the Statute).

UNESCO's mandate to promote education, science and culture includes human rights. The institution's main task in relation to human rights is to promote teaching and research through the adoption of conventions and recommendations on human rights related to its subject areas.

Standards

Over the years, UNESCO has developed a series of standards, mainly related to Articles 19, 26 and 27 of the Universal Declaration of Human Rights (freedom of speech, the right to education and the right to cultural experience and protection). UNESCO's best-known instruments are:

- The 1960 Convention against Discrimination in Education and its 1962 additional Protocol (revised 1978);
- The 1954 Convention for the Protection of Cultural Property in the Event of Armed Conflict;
- The 1997 Universal Declaration on the Human Genome and Human Rights (see textbox); and
- The 1997 Declaration on the Responsibilities of the Present Generations towards Future Generations.

Supervision

UNESCO has established a number of supervisory mechanisms over the years, both under conventions and as a procedure under UNESCO:

a) Reporting procedure. Article 7 of the Convention against Discrimination in Education provides that each state party to the Convention must submit periodic reports to the Committee on Conventions and Recommendations (CCR) on the implementation of the different articles in the Convention. After examining the reports, the Committee submits the reports to the General Conference of UNESCO.

b) Individual complaint procedure. Since 1978, UNESCO has established a non-judicial communication procedure that allows victims or any person with

reliable knowledge about a human rights violation concerned with education, science or culture to submit a petition to UNESCO. The communication is brought to the attention of both the CCR and the government in question, which may submit a reply. Moreover, all parties involved may appear before the CCR. Several actions may be taken on communications. First, the Director-General of UNESCO may initiate consultations, if the circumstances call for humanitarian action. This action may be taken even before the communication has been declared admissible. Second, the Committee on Conventions and Recommendations (CCR), after having considered a complaint, may propose that specific measures be taken by the state concerned. It is important to note, however, that this UNESCO procedure emphasises friendly settlement and the procedure is confidential and non-judicial in character. Nevertheless, it appears to have been relatively successful.

3. UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES (UNHCR)

In 1950, the UN General Assembly decided to establish the position of the High Commissioner for Refugees (UNHCR), with responsibility for the legal protection of refugees and efforts to find durable solutions for their plight. The mandate of the UNHCR gives the High Commissioner executive responsibility for the legal protection of refugees (see IV.§.3).

International protection is the cornerstone of UNHCR's work. In practice this means ensuring respect for a refugee's basic human rights and ensuring that no person will be returned involuntarily to a country where he or she has reason to fear persecution (*refoulement*). The organisation seeks long-term or 'durable' solutions by helping refugees repatriate to their homeland (if conditions warrant it), by helping them to integrate in their countries of asylum or to resettle in third countries.

UNHCR provides legal protection to refugees by using the 1951 Convention relating to the Status of Refugees as its major tool. This Convention is the key legal document in defining who is a refugee, their rights and the legal obligations of states. The 1967 Protocol to the Convention removed geographical and temporal restrictions from the Convention. UNHCR also promotes international refugee agreements and monitors government compliance with international refugee law. The UNHCR' mandate is, however, limited in its supervisory role for numerous reasons. Unlike the international system of human rights protection, there is no formal mechanism in international refugee law to receive individual or inter-state complaints; and provisions of the 1951 Refugee Convention setting out obligations for states to provide UNHCR with information and data on, *inter alia,* the implementation of the Convention have not been given full effect. As a consequence, there is no review of country practices that can be used to aid in ensuring states' compliance with international standards of refugee protection.

To make up for the lack of supervisory mechanisms, the General Assembly created the Executive Committee of the Programme of the UN High Commissioner for Refugees (ExCom) in 1956. The ExCom has become the main international forum developing standards of refugee protection. The Committee is made up of 64 countries and meets every autumn in Geneva to review and approve the agency's programmes and budgets and to advise on protection matters. ExCom sets international standards with respect to the treatment of refugees and provides a forum for wide-ranging exchanges among governments, the UNHCR and its numerous partner agencies.

The conclusions of this annual intergovernmental meeting represent an important international consensus regarding refugee-related issues, and carry persuasive authority as standards of refugee protection. Throughout the year, ExCom's Standing Committee meets to review protection and refugee assistance activities, as well as financial and management matters.

CHAPTER 2

COUNCIL OF EUROPE

The European system for the protection of human rights was established by the Council of Europe (CoE), which is a regional intergovernmental organisation. The CoE was founded in London on 5 May 1949 by 10 countries - Belgium, Denmark, France, Ireland, Italy, Luxembourg, the Netherlands, Norway, Sweden and the United Kingdom. Greece, Turkey, West Germany and Iceland joined in 1950. It has its seat in Strasbourg, France.

The CoE was established to defend human rights, parliamentary democracy and the rule of law; develop continent-wide agreements to standardise member countries' social and legal practices and to promote awareness of a European identity based on shared values. According to Article 3 of the Statute of the CoE, any European state wishing to become a member of the organisation, must 'accept the principles of the rule of law and of the enjoyment by all persons within its jurisdiction of human rights and fundamental freedoms, and collaborate sincerely and effectively in the realisation of the aim of the Council [...].'

For this reason, the CoE consisted for many years solely of Western parliamentarian democracies. After the political changes in Central and Eastern Europe, however, most countries in that part of the world expressed their interest in joining the CoE. Of these, for instance, Hungary became a member in 1990 and Bulgaria in 1992. As of July 2004, 45 European countries are members of the CoE, with a total population of 800 million. Canada, the Holy See, Japan, Mexico, and the USA have observer status. The CoE is distinct from the European Union, which is composed of 25 countries (see Part VI), but no country has ever joined the EU without first belonging to the Council of Europe. When Romania joined in 1993, a debate started as to whether the CoE is strict enough in applying its membership criteria. In later years, this debate has continued in relation to, among other countries, the Ukraine (member of the CoE since 1995) and the Russian Federation (1996).

The founding members of the CoE were convinced that new divisions and conflicts in Europe could only be avoided by guaranteeing respect for the dignity of all human beings, and by sustained efforts towards mutual understanding and reconciliation of the European peoples. Therefore, in 1949, the Parliamentary

Assembly gave its political blessing to the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), which was signed on 4 November 1950 and entered into force on 3 September 1953. As of July 2004, the Convention had been ratified by all 45 states.

The acceptance of the ECHR and its mechanisms is a central part of the *acquis* of the Council. In the European context, notably in the European Union and in the Council of Europe, the term *acquis* implies that any country that accedes to such international organisation must accept the body of law that has been accepted or acquired by that organisation. This applies to those conventions to which all member states are parties and all the case-law.

Reflecting the Council's human rights foundations, other significant treaties are the European Social Charter, the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment and the Framework Convention for the Protection of National Minorities.

A. Principal organs and human rights bodies

The Statute of the CoE established the Committee of Ministers, the Parliamentary Assembly and the Secretariat under the authority of a Secretary General. A number of human rights bodies have been established by various CoE Conventions, the most prominent of which is the European Court of Human Rights. Other human rights bodies include: a) the Committee of Independent Experts and the Governmental Committee under the European Social Charter; b) the European Committee for the Prevention of Torture; c) the Advisory Committee on Minorities and d) the European Commission against Racism and Intolerance.

1. THE COMMITTEE OF MINISTERS

The Committee of Ministers (CM) is composed by the Foreign Minister of each Council of Europe member state. The Committee is the CoE's executive body, which meets twice a year in Strasbourg. The Foreign Ministers' Deputies (Permanent Representatives) meet once or twice a month, or more often, depending on the agenda. The CM is the Council's policy-making body; it decides on the intergovernmental co-operation and working programme as well as on the organisation's budget.

Until 1 November 1998, the Committee, under specific circumstances, was entitled to decide whether a violation of human rights under the ECHR had taken place. After Protocol No. 11 of the ECHR (see below) came into force, it no longer plays this role; but in accordance with Article 46, the Committee retains the important function of supervising the execution of judgements of the Court. The Committee receives all cases from the Court. It is common to bring to the special attention of the CM cases where member states do not comply with a

judgement. Although the CM cannot enforce judgements 'peer pressure' plays an important role in the mobilisation of shame in relation to violating members.

In addition to policy making, the CM has since 1993 convened the Council of Europe Summits, which bring together Heads of State or Government of the member states of the Council to discuss major issues relating to the work and future of the CoE. To date (July 2004) two Summits have been held: the first in October 1993, and the second in October 1997.

2. THE PARLIAMENTARY ASSEMBLY

The Parliamentary Assembly brings together some 300 members who are elected from national parliaments (of the CoE member states) and meet four times a year. All OSCE participating states that are not members of the CoE may attend the Assembly's meetings as special guest delegations, and are invited to any special meeting, provided they adhere to the OSCE human rights standards. In addition to English and French, which are the official languages of the Council of Europe, the Parliamentary Assembly also uses German, Italian and Russian as working languages.

The Assembly debates international affairs and prepares reports, focusing on European issues. Although it has no legislative power, the Assembly may make recommendations to the 45 governments via the Committee of Ministers on any aspect of the Council's work. The Assembly played an important role in the drafting of the ECHR.

3. THE SECRETARY GENERAL AND THE SECRETARIAT

The highest official of the CoE is the Secretary General (SG), who is elected for five years by the Parliamentary Assembly. The list of candidates is drawn up by the Committee of Ministers. The Secretary General acts as the depository for ratifications of and accessions to the ECHR as well as all other instruments (more than 190) concluded by the CoE.

Article 52 of the European Convention entrusts the Secretary General with the task of monitoring the effective implementation of the provisions of the Convention in national law. The Convention also allows the Secretary General to request states to report to him/her on a specific subject (Article 52). The SG has asked for such reports twice but it may be assumed that, for the time being, Article 52 will not be put into practice very often.

The Secretary General also plays a role in various other supervisory mechanisms under the CoE. She/he is the head of the CoE Secretariat with a staff of 1,300, which serves the Council of Ministers, the Parliamentary Assembly and the Court.

4. THE COMMISSIONER FOR HUMAN RIGHTS

In 1999, the Council of Europe established the position of the Commissioner for Human Rights of the Council of Europe. The Commissioner's role is to promote the effective observance and full enjoyment of human rights, to identify possible shortcomings in the law and practice of member states and to assist them, with their agreement, in their efforts to remedy such shortcomings. Since taking office in October 1999, the Commissioner has paid special attention to the protection of human rights in times of crisis, notably to the situation in Chechnya and Georgia. Furthermore, the Commissioner undertakes regular visits to member states and focuses, *inter alia*, on the situation of vulnerable persons; such as, women in prisons, mentally ill children, refugees, and members of the Roma community. The Commissioner also organises seminars on thematic issues such as the rights of the elderly and the rights of aliens arriving at the border of member states. Moreover, the Commissioner maintains close contact with NGOs and professional groups involved in monitoring situations that lead or may lead to human rights violations, such as ombudsmen, judges, and journalists. The Commissioner also publishes an annual report.

5. THE EUROPEAN COURT OF HUMAN RIGHTS

The permanent European Court of Human Rights was established by Protocol No. 11 to the European Convention. The aim of this Protocol was to simplify the structure, shorten the length of proceedings and strengthen the judicial character of the system by making it fully compulsory. Protocol No. 11, which came into force on 1 November 1998, replaced the existing, part-time Court and Commission by a single, full-time Court. For a transitional period of one year (until 31 October 1999), the Commission continued to deal with the cases that it had previously declared admissible. Moreover, the Committee of Ministers' adjudicative role was abolished.

The Court is composed of a number of judges equal to that of the contracting states (45 in July 2004). There is no restriction on the number of judges of the same nationality. Judges are elected by the Parliamentary Assembly of the Council of Europe for a term of six years. The terms of office of one half of the judges elected at the first election expired after three years, so as to ensure that the terms of office of one half of the judges are renewed every three years. The members of the Court are to be of high moral character and sit in their individual capacity (Article 21). The Court forms committees of three judges to declare whether cases are admissible or not, or remove them from the list if the decision can be taken without further examination (Articles 27(1) and 28). When deciding on the admissibility or merits of a case, the Court sits in Chambers of seven judges (Articles 27(1) and 29). In cases related to 'serious questions affecting the interpretation or application of the Convention and the Protocols thereto' or

to 'a serious issue of general importance' the Court can form a Grand Chamber of seventeen judges.

Advisory Jurisdiction

Under its advisory jurisdiction, the Court may give advisory opinions at the request of the Committee of Ministers, on legal questions concerning the interpretation of the European Convention and its protocols (Articles 47, 48 and 49). As of July 2004, no advisory opinion had been given.

Contentious Jurisdiction

Under its contentious jurisdiction, the European Court deals with both individual and inter-state complaints. The individual complaint procedure enables the Court to 'receive applications from any person, non-governmental organisation or group of individuals claiming to be the victim by one of the High Contracting Parties of the rights set forth in the Convention or the protocols thereto' (Article 34 ECHR). The European Court can also accept cases brought by states parties against other states parties who are alleged to be violating provisions in the European Convention (Article 33). (For a detailed description of both procedures, see below).

The number of cases brought before the European system is rising rapidly. In 1988, for instance, 4,200 petitions were received; 18,000 were received in 1998; 35,000 were received in 2002; and in 2003, more than 39,000 applications were received. While many complaints have been received from individuals in countries newly parties to the Convention (such as Poland, the Ukraine and Russia), older members are also subject to a continuing stream of complaints.

In the first decade after 1961, the former, non-permanent Court decided upon only 10 individual cases. In the period between 1960 and 1998, however, approximately 900 cases were decided upon but in 2002 844 cases were decided and 703 in 2003. The system has become, to some extent, a victim of its own success. Because of the great number of cases, proceedings can take up to six years before being decided by the Court. This delay was one of the main reasons behind the reform of the supervisory system. With the advent of the 14th Protocol, in May 2004, further efficiency in the handling of the caseload is hoped for. With regard to inter-state complaints, 18 state complaints have been submitted since 1945. The last complaint was decided upon by the European Court on 10 May 2001 (*Cyprus* v. *Turkey*).

INDIVIDUAL COMPLAINTS

Whoever feels that a state party to the ECHR has violated one or more of his/her rights under the Convention can write a letter of complaint to the European Court of Human Rights. The petition may be sent to the following address:

The European Court of Human Rights

Council of Europe

F-67075 Strasbourg-Cedex

France tel. no. 33 (0)3 88 41 20 18

Email: webmaster@echr.coe.int fax no. 33 (0)3 88 41 27 30

Although only English and French are official languages of the CoE, the letter may also be written in any of the 28 languages of other countries. The letter must include a summary of the alleged human rights violation(s) with a specification of the relevant articles under the Convention or one of the Protocols thereto. Furthermore, details on the legal steps taken at the national level and their outcome (preferably through copies of the court rulings) must be provided. The form can be downloaded from the website of the CoE: www.CoE.int

6. THE COMMITTEE OF INDEPENDENT EXPERTS AND THE GOVERNMENTAL COMMITTEE

The Committee of Independent Experts and the Governmental Committee are the two human rights bodies set up under the European Social Charter to supervise state compliance with the Charter (see below).

The Committee of Independent Experts is composed of nine experts who are appointed for six years. The role of this committee was intended to be very similar to that of the ILO Committee of Experts. Its main function is to review the national reports of states parties to assess whether their national laws and practices are in accordance with the European Social Charter. After assessing the reports, the Committee adopts conclusions which it submits to the Governmental Committee.

The Governmental Committee is composed of representatives of the states parties and the international employers' and employees' organisations. Its main role is to advise the Committee of Ministers about situations of non-compliance with the European Social Charter, which should form the subject of recommendations to individual states parties.

7. THE EUROPEAN COMMITTEE FOR THE PREVENTION OF TORTURE

The European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (ECPT) is established by the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment. The Committee's task is to examine the treatment of persons deprived of their liberty and for this purpose it is entitled to visit any place where people are being detained by a public authority. The Committee may then formulate recommendations to strengthen protection against torture and inhuman or degrading treatment or punishment. In principle, these visits take place periodically, but if the Committee deems it necessary, *ad hoc* visits on very short notice may be organised (Article 7(1)). NGOs are important sources of information for the Committee. The information gathered during visits, the ensuing report and the consultations with the state concerned are confidential. However, if the state expressly requests it, the report is made public. The Committee can also decide, by a two-thirds majority, to make a public statement on the situation, in case the state is not willing to co-operate (Article 10(2)).

Each state party has an expert on the Committee, acting in a personal capacity and elected for a four-year term by the CM. The Committee is composed of persons from a variety of backgrounds, including lawyers, doctors, prison experts and persons with parliamentary experience, who enjoy privileges and immunities during the exercise of their functions (Article 16 and Annex). The Committee meets three times a year. While the European Court aims at a solution in legal terms, the Committee aims at prevention of violations in practical terms. The Committee is non-judicial, also in the sense that it cannot adjudge individual complaints or award compensation. This is the task of the Court, which deals with cases in the field of torture and inhuman or degrading treatment or punishment under Article 3 ECHR. At the heart of the work of the Committee is the principle of co-operation; the Committee's aim is to co-operate with the competent authorities, focusing on assistance to states and not condemnation (see II§2.C below).

B. Other relevant human rights organs

The Advisory Committee on Minorities advises the Committee of Ministers on compliance with the Framework Convention for the Protection of National Minorities (see II.§2.C).

Another human rights body is the European Commission against Racism and Intolerance (ECRI). This Commission was set up following a decision by the 1st Summit of Heads of State and Government of the member states of the Council of Europe in October 1993. The decision was taken in reaction to the ethnically and racially motivated human rights violations in the Balkans. In

addition, various serious incidents of racially motivated violence in several Western European cities called for decisive action at the international level. The Commission's task is to combat racism, xenophobia, anti-Semitism and intolerance in the greater European area with the protection of human rights at the forefront. The Commission is a typical non-treaty based supervisory mechanism. It monitors the situation in each CoE country and drafts reports, in approximately four-year cycles, with recommendations for each of the CoE member states. The reports are meant to contribute to a dialogue with the state concerned and to long term improvement with regard to combating racism and intolerance. In addition, the ECRI has produced numerous General Policy Recommendations, whereby general comments and conclusions are drawn up on specific subjects related to combating racism.

Mention should also be made of the Steering Committee for Equality between Women and Men (CDEG), the intergovernmental body which is responsible for defending, stimulating and conducting the Council of Europe's action to promote equality between women and men. It is directly answerable to the Committee of Ministers, from which it receives its instructions and to which it addresses its reports and proposals.

C. Standards and supervisory mechanisms

1. THE EUROPEAN CONVENTION FOR THE PROTECTION OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS, ITS PROTOCOLS AND THE EUROPEAN COURT OF HUMAN RIGHTS

On 4 November 1950, ministers of fifteen European countries gathered in Rome and signed the ECHR (ETS No. 5). By July 2004, the Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) had been ratified by all 45 states. Over the years, a total of fourteen Protocols to the ECHR have been adopted, some have amended the original text of the Convention or Convention procedures; others have extended the human rights catalogue of the Convention itself.

Article 1 of the ECHR stipulates that all states parties must 'secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention'. The ECHR applies to all persons under the jurisdiction of the contracting states; thus the Convention protects not only the nationals and citizens of the state, but all persons under its jurisdiction affected by a measure taken by its authorities.

THE EUROPEAN CONVENTION OF HUMAN RIGHTS AND PROTOCOLS

Articles 2 to 14 of Section I of the Convention set out the following rights and freedoms: right to life (Article 2); prohibition of torture (Article 3); prohibition of slavery and forced labour (Article 4); right to liberty and security (Article 5); right to a fair trial (Article 6); no punishment without law (Article 7); right to respect for private and family life (Article 8); freedom of thought, conscience and religion (Article 9); freedom of expression (Article 10); freedom of assembly and association (Article 11); right to marry (Article 12); right to an effective remedy (Article 13); prohibition of discrimination (Article 14).

Articles 15 to 18 deal, respectively, with derogation in time of emergency, restrictions on political activity of aliens, prohibition of abuse of rights and limitations on use of restrictions on rights.

Section II of the ECHR (Articles 19 to 51) regulates the supervision by the European Court.

Some of the fourteen Protocols, added to date (July 2004) to the ECHR added specific rights to the Convention, others amended the supervisory mechanisms. They are summarised below.

The First Protocol (1952) deals with protection of property (Article 1); right to education (Article 2); and right to free elections (Article 3) (ETS No. 9)

The Second Protocol (1963): gives the Committee of Ministers of the CoE the right to ask the European Court of Human Rights for advisory opinions concerning the interpretation of the ECHR and its Protocols (ETS No.044).

The Third Protocol (1963): amends a few articles of the Convention (incorporated in the ECHR itself) (ETS No.045).

The Fourth Protocol (1963) deals with: prohibition of imprisonment for debt (Article 1); freedom of movement (Article 2); prohibition of expulsion of nationals (Article 3); and prohibition of collective expulsion of aliens (Article 4) (ETS No.046).

The Fifth Protocol (1966): stipulates procedural amendments to a few articles of the Convention (incorporated in the ECHR itself) (ETS No.055).

The Sixth Protocol (1983): abolishes the death penalty in peacetime (ETS No.114).

The Seventh Protocol (1984): deals with Procedural safeguards relating to expulsion of aliens (Article 1); right of appeal in criminal matters (Article 2); compensation for wrongful conviction (Article 3); right not to be tried or punished twice (Article 4); and equality between spouses (Article 5) (ETS No. 117).

The Eighth Protocol (1985): was designed to improve and speed up the petition procedure (incorporated in the ECHR itself) (ETS No. 118).

The Ninth Protocol (1992): deals with the petition procedure; it extends to individuals the right to refer a case to the European Court (repealed after the coming into force of the Eleventh Protocol) (ETS No. 140).

The Tenth Protocol (1992): amended the decision taking process of the Committee of Ministers (the Protocol is obsolete as a result of the Eleventh Protocol) (ETS No. 146).

The Eleventh Protocol (1994): changes the supervisory mechanism of the ECHR (ETS No. 155) (see the following section).

The Twelfth Protocol (2000): introduces a general prohibition of discrimination. The Convention contains an article prohibiting discrimination but only with regard to rights and freedoms set forth in the Convention (ETS No.177).

The Thirteenth Protocol (2002): abolishes the death penalty under all circumstances (ETS No. 187).

The Fourteenth Protocol (2004) amends the control system of the Convention (ETS No.194).

In addition to the establishment of a catalogue of civil and political rights and freedoms, the ECHR established the procedural mechanisms to be followed by the European Court and the Committee of Ministers to ensure the enforcement of the European Convention by states parties.

In the case of an individual complaint, after the receipt of a complaint, the Court needs to decide whether the complaint is admissible. If a committee of three judges declares a petition inadmissible or decides to strike the case without further consideration, the procedure stops and appeal is not allowed. Otherwise, the question of admissibility is dealt with by a chamber of seven judges. An individual may submit a complaint to the European Court in his or her own language.

The admissibility criteria include: a) all domestic remedies must have been exhausted, according to 'the generally recognised rules of international law' (Article 35(1)); b) the case must have been taken to the Court within a period of six months from the date on which the final decision was taken (Article 35(1)); c) the alleged human rights violations must be covered by the ECHR or one of the Protocols ratified by the state concerned (Articles 34 and 35(3)); d) the complaint must not be anonymous (Article 35(2.a)), nor 'substantially the same as a matter that has already been examined by the Court or has already been submitted to another procedure of international investigation or settlement and contains no relevant new information' (Article 35(2.b)); and e) the complaint

must not be incompatible with the provisions of the Convention or the Protocols thereto, manifestly ill-founded, or an abuse of the right of application (Article 35(3)).

Many petitions are deemed inadmissible on the basis of the written information provided by the plaintiff; for instance, complaints which are not directed against a state but against an individual are in principle not admissible. A majority of cases submitted to the European Court are declared inadmissible.

If the complaint is deemed admissible, a Chamber of seven judges pursues the examination of the case, together with the representatives of the parties, and, if need be, undertakes an investigation (Article 38(1.a)). The state concerned is requested to submit comments. The Chamber then attempts to reach a 'friendly settlement' between the plaintiff and the state on the basis of compliance with the human rights as set out in the ECHR (Article 38(1.b)). This part of the procedure is confidential (Article 38(2)). If a friendly settlement is reached, the Court 'shall strike the case out of its list by means of a decision which shall be confined to a brief statement of the facts and of the solution reached' (Article 39).

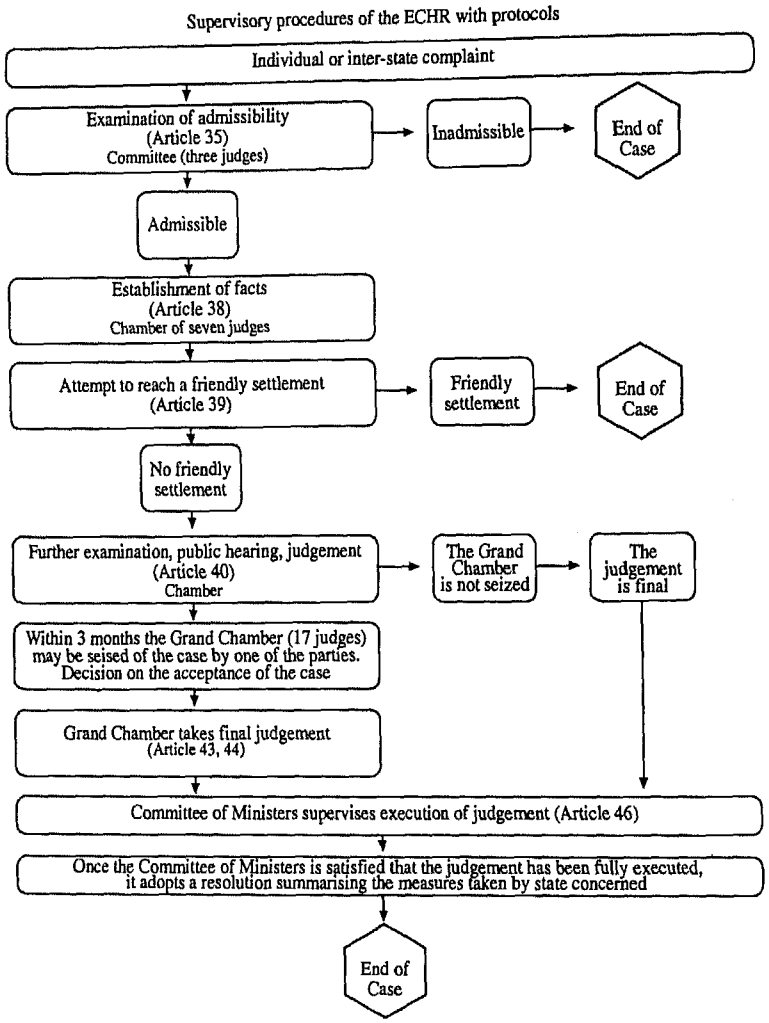
If a friendly settlement is not reached, the Chamber proceeds by organising a public hearing (Article 40(1)), leading to a decision on the merits of the case. The Court may also afford just satisfaction to the injured party (Article 41).

In the event that a party to the case is not satisfied by the judgement of the Chamber, it may request that the case be referred to the Grand Chamber (Article 43(1)). A panel of five judges of the Grand Chamber will accept such a request 'if the case raises a serious question affecting the interpretation or application of the Convention or the Protocols thereto or a serious issue of general importance' (Article 43(2)). The Grand Chamber will then decide the case by means of a (final) judgement (Articles 43(3) and 44), where separate opinions are allowed (Article 45(2)).

A judgement shall be transmitted to the Committee of Ministers 'which shall supervise its execution' (Article 46(2)). The Committee of Ministers examines the violation(s) found in each case and decides on measures to be taken by the state in order to comply with the judgement. In addition to compensation, where appropriate, the state may be obliged to take measures to remedy the consequences of the violation(s) for the applicant (*e.g.*, re-opening of domestic proceedings). General measures may also be required, if necessary, to avoid continued violations (*e.g.* amendment of legislation).

On 13 May 2004, the Council of Europe's Committee of Ministers adopted Protocol No. 14, which will amend the European Convention on Human Rights. The purpose of the Protocol is to ensure the medium- to long-term effectiveness of the European Court of Human Rights. The measure has been made necessary by the massive increase in the number of individual applications submitted to the Court. The Protocol provides for a set of measures to enable the Court to deal with individual applications within a reasonable period of time. Decisions concerning clearly inadmissible cases, which are now taken by a committee of

three judges, will be taken by a single judge, assisted by rapporteurs. In addition, repetitive cases deriving from the same structural defect at national level will be declared admissible and decided upon by a committee of three judges (instead of a seven-judge Chamber at present). A new admissibility criterion will permit the Court to declare individual applications inadmissible if the applicant has not suffered significant damages, except in cases where respect for human rights as defined in the ECHR and its Protocols requires further examination of the application. Finally, the Protocol provides that the Committee of Ministers can bring proceedings before the Court against a state that has failed to comply with a judgement.



Inter-state complaints are governed by Article 33 of the ECHR, which enables any state party to refer to the Court any alleged breach of the provisions of the Convention and the protocols thereto by another state party. It is not imperative that there be any relationship between the rights and interests of the referring state and the alleged breaches of the Convention. Furthermore, the ECHR allows a state to submit a complaint regarding violations committed against persons who are not nationals of a CoE member state, stateless persons or even persons who possess the nationality of the violating state. The subject of the complaint can also be the national legislation or government practices. As of July 2004 only two inter-state complaints have led to a final Court judgement. The other ten inter-state complains, which were initiated, were settled.

Evolving principles in the interpretation of the European Court

The dynamic nature of the interpretation of the human rights instruments has led to the emergence of certain principles that have been applied in the work of the regional human rights courts. Some find their roots in age-old principles used in national courts, while others emerged only in recent decades. Emphasis here is placed on the principles of proportionality, the margin of appreciation and subsidiarity which hold an important place in the interpretation of the European Convention.

Proportionality

When a state interferes with an individual right, the principle of proportionality requires the consideration of a fair balance between the general interests of the community and the requirements for the protection of the individual's fundamental rights. In *James* v. *The United Kingdom*, the European Court held that 'there must also be a reasonable relationship of proportionality between the means employed and the aim sought to be realised'; this notion of a fair balance is not respected if the person concerned has had to bear an individual and excessive or disproportionate burden as a result of the state's interference. The 'test of proportionality' has been applied in numerous cases before the European Court and it can be argued that the principle has acquired the status of a general principle under the European Convention. The Court's examination is generally of a marginal nature, reviewing only whether a measure is disproportionate or not. Where the Court considers the individual's burden excessive or disproportionate, it finds that the state has violated the Convention. The Court applies the proportionality test first and foremost when interpreting the restriction clauses under Articles 8 to 11, Article 14 and Article 1 of Protocol I. The test is not uniformly applied; the Court is stricter, for instance, in the interpretation of Articles 8 to 11 than in the interpretation of Article 1 of Protocol I (property). Proportionality is also a central principle in the case-law of the Court of Justice of the European Union.

Subsidiarity

The subsidiarity principle, a keystone in the interpretation of the European Convention, was formulated by the European Court of Human Rights more than 25 years ago in *Handyside* v. *The United Kingdom.* The principle reflects the division of responsibility for human rights protection between the national and international levels. The Court points out that there are areas where national authorities must be given genuine discretionary powers – powers which, up to a certain point, the Court is obliged to respect. In light of the complexity and sensitivity of the issues involved in policies balancing the interests of the general population the Court can only take on a strictly supervisory role. As the Court has reaffirmed, it is the state which is primarily responsible for guaranteeing enjoyment of the rights and freedoms enshrined in the Convention. The Strasbourg supervisory system will never provide an adequate substitute for effective human rights protection at the national level; it is to be complementary to such protection. The Court is not a European court of appeal. It intervenes where national protection breaks down but it cannot replace it. The Convention is concerned with individuals, but it can only rule on the complaints of those few individuals who bring their cases to Strasbourg; therefore, national human rights protection is of prime importance.

Margin of appreciation

Closely related to the principle of subsidiarity is the doctrine of the margin of appreciation, which entails that a state's legislative or judicial authority is allowed a certain margin in the interpretation of human rights law in the discharge of its responsibilities. In a democratic society, state authorities are generally considered to be in a better position than the international judge when appreciating complex factors and balancing conflicting considerations of public and private interests. Again, as in the case of proportionality, the application of the margin of appreciation by the Court varies. The scope of the margin of appreciation will differ according to the circumstances, the subject-matter and background. This may appear complex, but a clear logic can be discerned when one studies the European case-law. In cases regarding issues such as freedom of expression where a common European view on acceptable restrictions can be identified, a narrower margin of appreciation is applicable. In the case of the protection of morals, a concept that may differ more from one country to another, the Court allows a much wider margin of appreciation. Similarly, there will be a difference in the margin of appreciation between the strict interpretation of the freedom of religion on the one hand and of the right to property on the other. Property rights may be subject to a wide margin, in view of substantial differences in interpretation between countries, given political priorities and, for instance, tax policies. One sees the interplay between various factors determining the margin of appreciation. In itself this creates a degree of variety. At the same time, the margin of appreciation assists in defining the respective roles of the national

courts and authorities on the one hand and the supervisory mechanism on the other.

2. EUROPEAN SOCIAL CHARTER AND THE COMMITTEE OF EXPERTS

On 18 October 1961, the European Social Charter (ESC) (ETS No. 163) was opened for signature in Turin. It entered into force in February 1965. In July 2004, it had been ratified by 26 states. The European Social Charter was revised in 1996. The European Social Charter (revised) (ETS No.163) had, by July 2004, been ratified by 17 states. Over the years, several Protocols have been annexed to the Charter.

THE ESC AND PROTOCOLS

Articles 1-4: labour rights.

Articles 5-6: trade union rights.

Articles 7-8: rights to protect employees and other groups of persons (children, young people and women).

Articles 9-10: rights in connection with vocational and professional training.

Articles 11-17: rights to social security, social and medical assistance.

Articles 18-19: rights connected with labour mobility (migrant workers).

The First Protocol (1988): contains, *inter alia*, an article on the right to equal opportunities and equal treatment in matters of employment and occupation regardless of sex (ETS No. 128).

The Second Protocol (1991): contains changes in the supervisory procedure (see below) (ETS No. 142).

The Third Protocol (1995): provides for a system of collective complaints. This implies that contracting states recognise the right of national and international organisations of employers and trade unions and of certain non-governmental organisations to submit complaints to the Committee of Experts alleging unsatisfactory application of the ESC (ETS No. 158).

The Preamble of the ESC provides a general description of the objectives of the Charter. Parts I and II list, in 19 articles, the substantive rights protected by the Charter (see above). Part III (Article 20) indicates minimum requirements that state parties have to fulfil. Part IV contains articles pertaining to supervision and implementation of the Charter, while Part V, besides several final articles, indicates the conditions under which states parties may depart from their obligations under the Charter. An appendix to the ESC includes, *inter alia*, explanations of interpretations of various articles.

The ESC is a so-called *'à la carte'* convention; states parties do not have to accept all articles, but can choose the articles by which they consent to be bound. Article 20 does, however, oblige every state party to consider Part I of the ESC as a declaration of the aims that it will pursue by all appropriate means, both national and international. Moreover, states parties have to consider themselves bound by at least five of the seven listed articles of Part II (Articles 1, 5, 6, 12, 13, 16 and 19) and they have to make a choice among the other articles in Part II so that a 'package' is formed of at least 10 articles (or 45 numbered paragraphs of Part II, into which the articles are subdivided). States parties have to accept this package before ratifying the Charter. At a later stage, states parties may declare themselves bound by any of the other articles or paragraphs as well.

The Charter contains a supervisory mechanism, which is comparable to the mechanisms of the ILO (see II.§1.D). Every state party must report on a regular basis (every second year for hard core articles and every four years for non-hard core articles) to the Secretary General of the CoE on the implementation of the obligations accepted. The Committee of Independent Experts examines this report and submits its findings, together with the country reports, to the Governmental Committee. This Committee is composed of representatives of the states parties and the international employers' and employees' organisations. The Governmental Committee selects, on the basis of social, economic and other policy considerations, the situations that call for recommendations to the states parties. The Committee of Ministers issues recommendations to states that fail to comply with the Charter's requirements in concert with the Parliamentary Assembly. The conclusions of the Committee of Experts are used as a basis for the periodical organisation of social policy debates.

3. EUROPEAN CONVENTION FOR THE PREVENTION OF TORTURE AND THE EUROPEAN COMMITTEE FOR THE PREVENTION OF TORTURE AND INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT

To strengthen the European system of human rights supervision, the CoE adopted the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (ECPT) on 26 November 1987 (ETS No. 126). In July 2004, the Convention had been ratified by 45 states.

The ECPT established a European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment. The Committee's task is to examine the treatment of persons deprived of their liberty and for this purpose it is entitled to visit any place where people are being detained by a public authority. The Committee may then formulate recommendations to strengthen protection against torture and inhuman or degrading treatment or punishment. In principle, these visits take place periodically but, if the Committee deems it necessary, *ad hoc* visits on very short notice may be organised (Article 7(1)). NGOs are important sources of information for the Committee. The information

gathered during visits, the ensuing report and the consultations with the state concerned are confidential. However, if the state expressly requests it, the report is made public. The Committee can also decide, by a two-thirds majority, to make a public statement on the situation, in case the state is not willing to co-operate (Article 10(2)).

Each state party has an expert on the Committee, acting in a personal capacity and elected for a four-year term by the CM. The Committee is composed of persons from a variety of backgrounds, including lawyers, doctors, prison experts and persons with parliamentary experience, who enjoy privileges and immunities during the exercise of their functions (Article 16 and Annex). The Committee meets three times a year. While the European Court aims at a solution in legal terms, the Committee aims at prevention of violations in practical terms. The Committee is non-judicial, also in the sense that it cannot adjudge individual complaints or award compensation. This is the task of the Court, which deals with cases in the field of torture and inhuman or degrading treatment or punishment under Article 3 ECHR. At the heart of the work of the Committee is the principle of co-operation; the Committee's aim is to co-operate with the competent authorities, focusing on assistance to states and not condemnation.

PROCEDURE UNDER THE ECPT

Committee: members elected; one member from each state party; elected for a four-year term; members can only stand for re-election once (Articles 4, 5)
Visits: periodic country visits- *ad hoc* country visits, in principle unannounced follow-up visits (periodically or *ad hoc*); as a rule visits involve at least two Committee members (in practice usually three to five members); under - special circumstances, the entire Committee or just one member; as a rule visits to larger institutions are announced a few days in advance; visits to police stations are unannounced.
Report (Article 10): contains facts and recommendations; must be submitted to state concerned within six months of the visit; confidential (may be published only at the request of the state concerned).
Official reaction of state concerned: Committee expects plan of action regarding improvements; interim report must be published within six months of plan of action; follow-up report must be published within twelve months
Follow-up: consultations with state concerned aimed at improving the situation; public statement made by Committee after follow-up report if state concerned fails to co-operate or refuses to improve the situation along the lines set out in the recommendations.

The ECPT is unique because it does not contain any articles defining the material scope of the Convention. Unlike the CAT, it does not contain any substantive provisions concerning torture and inhuman or degrading treatment or punishment, nor does it include a definition of torture. The Convention leaves these aspects as well as the consideration of individual complaints to the ECHR and the European Court. The aim of the Convention is to strengthen the protection of persons deprived of their liberty by establishing non-judicial machinery for the prevention of torture. The convention therefore only creates a supervisory mechanism.

According to Article 8(2) ECPT, a party shall provide the Committee with a number of facilities to carry out its task, including a) access to its territory and the right to travel without restriction; b) full information on the places where persons deprived of their liberty are being held; c) unlimited access to any place where persons are deprived of their liberty, including the right to move without restriction in prisons, police cells, mental hospitals, military barracks, and interview detainees in private and d) other information available to the party which is necessary for the Committee to carry out its task. In seeking such information, the Committee shall have regard to applicable rules of national law and professional ethics.

4. THE FRAMEWORK CONVENTION FOR THE PROTECTION OF NATIONAL MINORITIES AND ITS MONITORING MECHANISMS

With the fall of the Berlin Wall and the re-emergence of ethnic conflict in Europe, the issue of national minorities has become increasingly important. In the course of the 1990s, several initiatives and co-operation programmes were undertaken to protect minorities through the CoE and two conventions have been concluded.

The Framework Convention for the Protection of National Minorities entered into force on 1 February 1998 (ETS No. 157). It is the first legally binding multilateral instrument on the general protection of national minorities. The aim of the Convention is to set out the principles that states undertake to respect to ensure the protection of national minorities and the title indicates the mostly programmatic and discretionary nature of the Convention. The obligations are state obligations, not individual or collective rights, leaving the states a measure of discretion in the implementation of the principles. As of July 2004, there were 35 states parties to the Convention.

The monitoring of the Convention is based on the examination of state reports. The main monitoring body of the Convention is the Committee of Ministers, which is assisted in this work by an Advisory Committee of Independent Experts. The Advisory Committee adopts opinions on the implementation of the Convention and, on the basis of the reports; the Committee of Ministers adopts its conclusions, normally in the form of a resolution. The Committee of Ministers may also make specific recommendations to the states.

Another convention addressing minorities is the European Charter for Regional or Minority Languages adopted in 1992 (ETS No. 148). As of July 2004, the Charter had been ratified by 17 states. The Charter sets out various measures that states may undertake to promote regional or minority languages. The Charter is supervised by the Secretary General of the CoE, with assistance from the Committee of Experts.

IMPLEMENTATION

Besides being the forum under whose aegis many effectual human rights supervisory mechanisms have been established, the CoE is actively engaged in the implementation of human rights. The human rights dimension is part of many other areas of activities - in the social field, the media field (media and freedom of information), and the legal field (legal co-operation). A programme worth mentioning is the Demosthenes Programme that provides assistance to countries in Central and Eastern Europe, with the objective of strengthening institutions that promote democratic principles based on the rule of law and respect for human rights. In addition, two other programmes have been established - the Themis plan, aiming especially at training in the legal profession, and the Lode plan for the development of local democracy. Furthermore, since 1993 the Council of Europe and the European Commission have established Joint Programmes for the benefit of several countries in Central and Eastern Europe.

The co-operation with Central and Eastern Europe has resulted in emphasis on more resources being channelled to the most recent CoE member states from these regions. This initiative aims at strengthening the democratic process in the Commonwealth of Independent States (CIS), particularly in the Russian Federation and Ukraine. The programme allows for expansion to cover other European CIS countries, such as Moldova, Belarus (candidate member state) and the Transcaucasian Republics (Armenia, Azerbaijan and Georgia). Consequently, the assistance programmes are attaining a fully pan-European dimension. To handle the ever-increasing need for information to and from the organisation, the CoE has established Information and Documentation Centres (CID) in fourteen capitals of Central and Eastern European countries.

The CoE undertakes numerous other activities in the field of democratisation and human rights. The Council is involved in the introduction of human rights protection mechanisms and legal system reforms aimed at adapting the legislation of the new member states to the standards of the ECHR. Other areas in which the Council is actively involved are, *inter alia*, the field of minority issues, and the battle against racism and intolerance where the Framework Convention for the Protection of National Minorities and the European Commission against Racism and Intolerance (see above) deserve mention.

CHAPTER 3

ORGANISATION OF AMERICAN STATES

The Organisation of American States is a regional inter-governmental organisation as defined by Article 52 of the UN Charter. The OAS Charter was adopted at the Ninth International Conference of American States in 1948 and entered into force in 1951. It has been amended several times. The 1967 Protocol of Buenos Aires changed the structure of the organisation in several aspects and elevated the status of the Inter-American Commission on Human Rights to that of a 'principal organ' of the OAS.

Various provisions of the OAS Charter refer to human rights but only in vague terms. Article 3 (j) of the 1948 Charter referred to the 'fundamental rights of the individual' among the principles, which the Charter promotes. While the Charter does not list or define the human rights it refers to, the Inter-American Court has ruled that '[t]hese rights are none other than those enunciated and defined in the American Declaration' (Advisory Opinion No. 10, OC-10/89, 14 July 1989 para. 41).

A. Principle organs and human rights bodies

Various organs of the OAS have a degree of responsibility regarding human rights:

1. THE GENERAL ASSEMBLY

The General Assembly is the supreme organ of the OAS (Article 54 OAS Charter). It meets once a year in a regular session in a place selected in accordance with the principle of rotation. Among other functions, the General Assembly shall 'decide the general action and policy of the Organisation'. The 35 member states of the OAS have the right to be represented in the General Assembly.

The General Assembly elects the members of the Inter-American Commission on Human Rights and approves the budget and the annual reports of both institutions. It should be noted, that the judges of the Inter-American

Court of Human Rights are elected by the states parties to the American Convention on Human Rights, and not by the General Assembly.

2. THE PERMANENT COUNCIL

The Permanent Council is composed of one representative of each member state of the OAS, especially appointed by the respective Government, with the rank of Ambassador (Article 80 OAS Charter). Since 1985, the Permanent Council has assumed the role of reviewing the annual reports of the Commission and the Court before their submission to the General Assembly. When discussing the Court's Annual Report, the General Assembly may consider only the resolutions approved by the Permanent Council. Therefore if this organ decides against considering or commenting on the recommendations made by the Court, the General Assembly is unable to act on the recommendations.

3. THE MEETINGS OF CONSULTATION OF MINISTERS OF FOREIGN AFFAIRS

These are *ad hoc* meetings held at the request of any government whenever problems of an urgent nature and of common interest to the member states arises (Article 61 OAS Charter).

4. THE GENERAL SECRETARIAT

The General Secretariat is the central and permanent organ of the OAS, with its seat in Washington, D.C. (Articles 107 and 121 OAS Charter). It performs the functions assigned to it in the Charter (Articles 112 and 113), in other inter-American treaties and agreements and those entrusted by the General Assembly, the Meeting of Consultation of Ministers of Foreign Affairs or the Councils. The Secretariat is headed by the Secretary General, elected by the General Assembly for a five-year term (Article 108). The Secretary General may participate in all meetings of the OAS, with voice but without vote (Article 110).

5. THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS

Since its creation in 1959 by the Fifth Meeting of Consultation of Ministers of Foreign Affairs, the Inter-American Commission on Human Rights has evolved into a unique organ within the Inter-American system. The Protocol of Buenos Aires transformed the Commission into a formal organ of the OAS and prescribed that the Commission's principal function should be 'to promote the observance and protection of human rights' (Articles 52 and 106 OAS Charter).

The Commission is characterised by a unique 'dual role', which reflects its origin as a Charter-based body and later transformation into a treaty body when the American Convention came into force. As an OAS Charter organ the Commission performs functions in relation to all member states of the OAS (Article 41 ACHR) and as a Convention organ its functions are applicable only to states parties to the American Convention on Human Rights (ACHR).

The Commission is composed of seven members 'elected in a personal capacity' (Article 36 ACHR) and meets for eight weeks a year (Article 15 Commission Regulations) in Washington D.C. It also carries out *in loco* visits.

The Commission's function is to promote the observance and the defence of human rights. The Commission's activities include the following:

- Since 1965, it has been authorised to receive, examine and investigate individual complaints or petitions, which allege violations of the rights guaranteed under the American Declaration or the American Convention.
- It refers cases to the Inter-American Court of Human Rights under the American Convention and appears before the Court. Before the Court, the Commission, acting as guardian of the Convention and of the Inter-American system for the protection of human rights, presents its own case while the alleged victim has independent legal counsel presenting his or her case.
- It requests advisory opinions from the Court regarding questions of interpretation of the American Convention.
- It monitors the general human rights situation in the member states. It carries out on-site visits to observe the general human rights situation in a country or to investigate specific situations.
- It publishes special reports on the general human rights situation of member countries when it considers it appropriate.
- It undertakes research and publishes documents, such as the study of both domestic and international authorities and precedents in the context of the Proposed Declaration on the Rights of Indigenous Peoples.

The supervisory procedures of the Commission are described below:

Individual petition procedure

Admissibility of communications

Article 44 of the Convention establishes that the individual petition procedure is automatic for all states parties (Article 20(b) of the Commission's Statute provides the same with regard to the Declaration for other OAS member states). The petitions procedure is not limited to victims but is open to 'any person or group of persons, or any non-governmental entity legally recognized in one or more

member states of the Organization'. This is a major advantage given that the victims may not know or have access to the protection machinery. In practice, however, to ensure effective follow-up, there needs to be some link between the victim and the persons or organisation presenting the case.

Petitions may refer to a specific event, practice or even to widespread human rights abuses, encompassing numerous violations and victims. The petition must, however, refer to specific victims and detailed description of the act or situation that gives rise to the complaint.

Like other international human rights bodies the Commission and Court require that domestic remedies be exhausted in order for an individual petition to be admitted for consideration. Article 46(2) of the ACHR stipulates that domestic remedies need not be exhausted when they are ineffective, when the victim has been denied access or prevented from exhausting them or there has been unwarranted delay in rendering a final judgement.

Although a petition must be filed within six months of the exhaustion of domestic remedies, an exception can be made where the state has interfered with the petitioner's ability to file or where the complaint is lodged by a third party on the victim's behalf. In these cases, the Commission may admit complaints filed a 'reasonable' time after exhaustion of domestic remedies.

Precautionary measures

Although the Convention does not explicitly grant the Commission the faculty to request interim measures, the wide powers conferred upon it by Article 41 have been interpreted in the Rules of Procedure, which establish that 'in serious and urgent cases, and whenever necessary according to the information available, the Commission may, on its own initiative or at the request of a party, adopt precautionary measures to prevent irreparable harm to persons.' (Article 25(1) Rules of Procedure Inter-American Commission). Measures may be taken when three conditions are satisfied: the situation is urgent, the circumstances could lead to irreparable harm, and the facts appear to be true.

The possibility of a rapid response is assured by the power granted to the Chairman of the Commission who may act when the Commission is not in session. The Commission may act *ex officio* or at the request of a petitioner. It should be noted that as with other cases presented to the Commission, the petitioner need not necessarily be the victim or his representative but can also be, for example, an NGO with knowledge of the case. This is especially important in refugee cases as many potential victims of *refoulement* may live in remote rural areas.

Unlike the judicially enforceable, convention-based measures that may be exercised by the Court, the precautionary measures of the Commission are not binding but they do put the government in question 'on notice' and communicate the seriousness with which the Commission views the case.

When the state concerned is a party to the Convention, the Commission may also exercise the power bestowed on it by Article 63(2) which permits it to

request that the Court adopt *binding* provisional measures in 'cases of extreme gravity and urgency'.

Decision on the merits

Where a friendly settlement is not reached, Article 50 of the Convention establishes that the Commission is to draw up a report of its 'conclusions' and any 'recommendations as it sees fit'. If, after three months, the matter has not been settled or referred to the Court by the Commission or the state concerned, Article 51 stipulates that the Commission must issue a second report stating its 'opinion and conclusions', making 'pertinent recommendations' where this is 'appropriate'. In place of adopting and publishing a final report, the Commission may present a case to the Court.

On-site visits and country reports

In the face of gross, systematic violations of human rights carried out by undemocratic governments in the Americas during its formative years, the Commission developed the practice of doing fact-finding through country visits and reporting on the human rights situation in selected OAS member states by means of country reports. This has proven to be one of the most effective mechanisms in the system. Country reports are often produced after a Commission *in loco* visit to the country or hearings on the situation in the state. The country reports are generally published separately from the Commission's annual report but sometimes 'mini-country reports' are published in the annual report. Although the Convention does not specifically provide for the practice of country reports (Article 41 (c) merely refers to the preparation of those reports the Commission 'considers advisable'), the Rules of Procedure do establish a legal basis for the practice and set out the procedural aspects for them, including the possibility for states to comment on draft reports.

The Commission carries out country visits and country reporting at its own discretion, generally when it believes violations to be widespread. The reports typically focus on the general human rights situation in a country but raise issues of specific concern.

The effectiveness of country visits is hard to measure as the impact appears to lie mainly in dissuading future violations. The visits also provide the Commission with information, and therefore credibility, for its country reports. Since country reports usually deal with large scale violations of human rights and are frequently cited by NGOs as authoritative descriptions of the human rights situation in a given country, governments may find them particularly embarrassing.

Since 2000, the Commission has issued special thematic reports on relevant topics such as indigenous peoples and terrorism. In addition, it is worth

mentioning that the Commission has published the reports of special rapporteurs such as the Special Rapporteur for Freedom of Expression.

The Annual Report

The Annual Report of the Commission includes a broad range of information, *inter alia*, information on individual cases, requests for precautionary measures and 'mini-country reports' as well as a chapter on 'Areas in which steps need to be taken towards full observance of the human rights set forth in the ADHR and the ACHR'.

6. THE INTER-AMERICAN COURT OF HUMAN RIGHTS

The Court came into being in 1979 following the entry into force of the American Convention. The Court is the supreme judicial organ established by the American Convention and exercises both contentious and advisory jurisdiction. The Court is composed of seven judges elected for a term of six years and may be re-elected once. The Court is a part-time body, with its seat in San José, Costa Rica.

Advisory Jurisdiction

The Court's advisory jurisdiction is unique in several ways. In addition to the Inter-American Commission and other authorised bodies of the OAS, all OAS member states have the right to request advisory opinions regardless of whether they are parties to the American Convention or whether they have recognised the Court's jurisdiction over contentious matters. Furthermore, OAS member states may consult the Court regarding the interpretation not only of the Convention, but also of any other treaty pertaining to the protection of human rights in the Americas. They may also consult the Court on the compatibility of their domestic laws, bills and proposed legislative amendments with the American Convention or any other treaty concerning human rights (Article 64 ACHR).

Contentious jurisdiction

The Court began functioning in 1979, but the first decision on merits was in 1987 in a case against Honduras, which originated in a petition received by the Commission on 7 October 1981.

States parties do not accept the contentious jurisdiction of the Court merely by becoming parties to the Convention. The acceptance of its jurisdiction is optional and requires a separate declaration or special agreement. A declaration of acceptance of the Court's jurisdiction may be made at the time of ratification or adherence to the Convention or at any subsequent time (Article 62(1) ACHR).

Declarations may be unconditional, recognising the Court's jurisdiction as binding *ipso facto*, without requiring special agreement. States can also accept the Court's jurisdiction on the condition of reciprocity (inter-state cases), for a specified period or for specific cases. In addition, all states parties to the Convention may at any time, on an *ad hoc* basis, permit the Court by special agreement to adjudicate a specific dispute relating to the application of the Convention (Article 62(3) ACHR).

The jurisdiction of the Court comprises all cases concerning the interpretation and application of the provisions of the Convention that are submitted to it provided the parties to the dispute have accepted its jurisdiction.

Only states parties to the Convention and the Commission have the right to submit a case to the Court (Article 61(1) ACHR). Individuals cannot bring a case directly to the Court; they have to file a complaint with the Commission; the Court can only deal with individual complaints when they have been considered, and referred to it by the Commission. States parties can bring cases directly to the Court. It should be noted also that, unlike the European Convention, the American Convention does not require that those filing complaints with the Commission be the victims of the alleged violations themselves; any 'person or group of persons, or any non-governmental entity legally recognised in one or more member states' may lodge petitions with the Commission.

The proceedings before the Court in contentious cases terminate with a judgement, which is final and not subject to appeal. The Court may be requested to interpret the meaning or scope of any judgement at the request of any party to the case (Article 67 ACHR and Article 46 Rules of Procedure).

While the decisions of the Court are only binding on the parties to the case, the Court's interpretation of the rights contained in the Convention are authoritative and have a greater practical significance than their formal status would suggest.

If the Court finds that there has been a violation of the Convention, it shall rule that the injured party be ensured the enjoyment of the right or freedom that was violated and, if appropriate, rule that the consequences of the measures or situation that constitute the violation be remedied and award compensation. When reparations are awarded, the Court has generally reserved for itself the faculty of supervising compliance with the judgement (see, *e.g.*, *Aloeboetoe* v. *Suriname* and *Maqueda* v. *Argentina*).

States parties to the Convention undertake to comply with the Court's judgement in any case to which they are parties. The part of the judgement that stipulates compensatory damages may be executed in the country concerned in accordance with domestic procedure governing the execution of judgements against the state (Article 68 ACHR).

B. Standards and supervisory mechanisms

1. AMERICAN DECLARATION OF THE RIGHTS AND DUTIES OF MAN

The same Diplomatic Conference that adopted the OAS Charter proclaimed the American Declaration of the Rights and Duties of Man (ADHR) (2 May 1948). Although it was adopted as a non-binding instrument, its character has gradually changed. Nowadays it is deemed to be the authoritative interpretation of 'the fundamental rights of the individual', which Article 3 (j) of the OAS Charter proclaims as one of the principles of the Organisation. The Inter-American Court confirmed the legal force of the American Declaration in Advisory Opinion No. 10 on the Interpretation of the American Declaration of the Rights and Duties of Man within the Framework of Article 64 of the American Convention on Human Rights (see paras 43 and 45).

The Commission receives individual complaints alleging violations of the Declaration with respect to OAS member states that are not parties to the ACHR.

2. AMERICAN CONVENTION ON HUMAN RIGHTS AND ITS PROTOCOLS

The American Convention on Human Rights (1969)

The American Convention on Human Rights (ACHR) was adopted on 20 November 1969 and entered into force on 18 July 1978. As of July 2004, 25 states have adopted the Convention. The Convention confers competence with respect to matters relating to the fulfilment of its obligations to two organs: the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights. The supervisory system provided by the Convention is legally binding only on the states parties to it.

Although the ACHR contains primarily civil and political rights, Article 26 expresses the general commitment of states parties to adopt measures with a view to the full realisation of economic, social and cultural rights (see textbox on 'progressive realisation of economic, social and cultural rights').

AMERICAN CONVENTION ON HUMAN RIGHTS

Chapter I: **General Obligations**: obligation to respect rights (Article 1) and domestic legal effects (Article 2).

Chapter II: **Civil and political rights**: right to juridical personality (Article 3); right to life (Article 4); right to humane treatment (Article 5); freedom

from slavery (Article 6); right to personal liberty (Article 7); right to fair trial (Article 8); freedom from *ex post facto* law (Article 9); right to compensation (Article 10); right to privacy (Article 11); freedom of conscience and religion (Article 12); freedom of though and expression (Article 13); right to replay (Article 14); right to assembly (Article 15), freedom of association (Article 16); rights of the family (Article 17); right to a name (Article 18); rights of the child (Article 19); right to nationality (Article 20); right to property (Article 21); freedom of movement and residence (Article 22); right to participate in government (Article 23); right to equal protection (Article 24); and right to judicial protection (Article 25).

Chapter III: **Economic, social and cultural rights** (Article 26).

Chapter IV: suspension of guarantees, interpretation and application (Articles 27 to 31).

Chapter V: personal responsibilities (Article 32).

Chapter VI: competent organs (Article 33).

Chapter VII: Inter-American Commission on Human Rights (Articles 34 to 51).

Chapter VIII: Inter-American Court of Human Rights (Articles 52 to 69).

Chapter IX: common provisions (Articles 70 to 73).

Chapter X and XI: general and transitory provisions (Articles 74 to 82).

The ACHR differs from the ICCPR, because it contains guarantees of the right to reply (Article 14) and to property (Article 21). In addition, it has a more elaborated and advanced text than the ECHR in regard to, for example, to right to participate in government (Article 23) and a guarantee of the right to equal protection (Article 24).

The Protocol of San Salvador in the Area of Economic, Social and Cultural Rights (1988)

The Protocol of San Salvador was adopted in 1998 to give effect to the provisions of Article 26 ACHR. It entered into force on 16 November 1999. As of July 2004, the Protocol had 13 member states.

The states parties to the Protocol undertake to adopt the necessary measures, both domestically and through international co-operation, especially economic and technical, for the purpose of achieving progressively and pursuant to their internal legislation, the full observance of the rights recognised in the Protocol. Although the Protocol takes into account the states' degrees of development and restrictions of available resources, progressive implementation is, nonetheless, an obligation.

The Protocol of San Salvador contains mostly the same rights as the ICESCR: the right to work (Article 6); the right to just, equitable and satisfactory conditions of work (Article 7); trade union rights (Article 8); the right to social security (Article 9); the right to health (Article 10); the right to education (Article 13) and the right to the benefits of culture (Article 14). Nonetheless, the protocol improves the text of the ICESCR by giving recognition to a number of rights which are not included in the Covenant, such as the right to a healthy environment (Article 11); the right to the formation and the protection of the family (Article 15), the rights of children (Article 16), the protection of the elderly (Article 17) and the protection of the handicapped (Article 18).

The Protocol establishes the possibility to submit to the Inter-American Commission through the individual petition mechanism, complaints alleging violations of the right to organise and to join unions and national federations of unions or international trade union organisations, protected under Article 8(1)(a), as well as violations of the right to education, protected under Article 13. The Court may examine these cases under its contentious jurisdiction (Article 19(6) of the Protocol).

The Protocol to Abolish the Death Penalty (1990)

This Protocol was adopted on 8 June 1990. As of July 2004, the Protocol had 8 member states. It expands upon Article 4 ACHR (right to life). No reservations may be made to the Protocol but, at the time of ratification or accession, the states parties may declare that they reserve the right to apply the death penalty in wartime in accordance with international law, for extremely serious crimes of a military nature. However, this exception must be provided for in domestic law and its application is subject to strict reporting conditions set out in the Protocol.

3. THE INTER-AMERICAN CONVENTION TO PREVENT AND PUNISH TORTURE (1985)

The Convention on Torture was adopted on 9 December 1985, entered into force on 28 February 1987, and is open to ratification by all member states of the OAS. As of July 2004, the Convention had 16 member states. The Convention expands upon the provisions of Article 5 ACHR, which prohibits torture and cruel, inhuman or degrading punishment or treatment and can be invoked before the Inter-American Court to interpret the provisions of Article 5 ACHR. Furthermore, the Court has given itself jurisdiction to apply the Convention directly (see, for example, *Villagrán Morales et al.* v. *Guatemala*). The Convention excludes the defence of superior orders, as well as any state of emergency, any other kind of public emergency, the suspension of constitutional guarantees, or political instability as justification for torture. States undertake to submit reports on 'any legislative, judicial, administrative, or other measures'

they adopt in application of the Convention to the Inter-American Commission (Article 17).

4. THE INTER-AMERICAN CONVENTION ON THE FORCED DISAPPEARANCE OF PERSONS (1994)

Adopted on 9 June 1994, the Convention on the Forced Disappearance of Persons came into force on 28 March 1996. As of July 2004, 10 states had ratified the Convention. It addresses an issue that has plagued Latin America for decades. Violations of the Convention can be brought to the attention of the Inter-American Commission and follow the same process as petitions under the American Convention. Ratification is not limited to states parties to the American Convention, but is open to all member states of the OAS. The Convention includes a definition of 'forced disappearances' in its Article 2 (see III.§3.A).

5. THE INTER-AMERICAN CONVENTION ON THE PREVENTION, PUNISHMENT AND ERADICATION OF VIOLENCE AGAINST WOMEN (CONVENTION OF BELÉM DO PARÁ) (1994)

This Convention was adopted at the same time as the Convention on the Forced Disappearance of Persons and came into force on 2 March 1995. As of July 2004, 31 states had ratified the Convention. It condemns any act or conduct 'based on gender which causes death or psychological harm or suffering to women, whether in the public or the private sphere'.

The definition of violence under the Convention includes domestic violence in the widest sense; that is, within any inter-personal relationship and whether or not the perpetrator resides with the victim. It also includes violence occurring in the community, or perpetrated or condoned by the state or its agents, wherever it occurs. States parties have specific duties under the Convention to adopt the required legislative measures to prevent and punish all forms of violence against women. States report on measures they have adopted to prevent and prohibit violence against women in their national reports to the Inter-American Commission of Women, a specialised organisation of the OAS, which aims to promote and protect the rights of women in the Americas. If provisions of the Convention have allegedly been violated, any person, group of persons or legally recognised NGO can lodge petitions with the Inter-American Commission.

This Convention provides a good example of the trend towards the accountability of private actors in international law. It clearly spells out that 'violence against women is an offence against human dignity and a manifestation of the historically unequal power relations between women and men' and 'shall be understood as any act or conduct, based on gender, which causes death or physical, sexual or psychological harm or suffering to women, *whether in the public or the private sphere*' (Article 1 emphasis added). It is still, however, the

state concerned that remains responsible, as the violations have to be 'condoned by the state or its agents'.

6. THE INTER-AMERICAN CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST PERSONS WITH DISABILITIES (1999)

Adopted on 7 June 1999, this Convention entered into force on 14 September 2001. As of July 2004, 15 states had ratified the Convention. Its Preamble refers to a number of international conventions, declarations, and resolutions aimed at the protection of persons with physical, mental, or sensory impairment, 'whether permanent or temporary, that limits the capacity to perform one or more essential activities of daily life, and which can be caused or aggravated by the economic and social environment'.

The Convention is in four parts: a) the objectives concerning the prevention and elimination of discrimination and the integration of persons with disabilities into society; b) the obligations of states parties; c) definitions of discrimination and disability; and d) implementation mechanisms.

States parties undertake to take all the necessary measures, including legislation, to promote the integration of persons with disabilities into society, 'under conditions of equality'. Their obligations range from ensuring that buildings and vehicles be designed so as to allow access by persons with disabilities, to giving priority to the prevention, early detection and treatment. States parties also undertake to increase public awareness so as to eliminate stereotypes, prejudices, and discrimination in employment.

The Convention establishes a supervisory mechanism, the Committee for the Elimination of All Forms of Discrimination against Persons with Disabilities, composed of one representative from each state party. The Committee is charged with reviewing state reports to be submitted every four years on 'follow-up on the commitments' undertaken in the Convention (see IV.§9, disabled persons).

C. The case-law of the Inter-American Court of Human Rights compared to that of the European Court of Human Rights

The case-law of the Inter-American Court of Human Rights is not as extensive as that of the European Court of Human Rights and although the American Convention contains all the traditional civil and political rights, the case-law in contentious cases has dwelt primarily upon a few of the most basic rights. These include the right to life (Article 4); the right to personal liberty (Article 7); the right to humane treatment (Article 5); the right to fair trial (Article 8); the right to judicial protection (Article 25); and the right to equal protection before the law (Article 24).

Although cases regarding these rights still find their way onto the Court's docket, the Court has slowly been widening its scope to deal with a broader range of issues, including the wrongful dismissal of judges and civil servants, film censorship, the withdrawal of citizenship and removal from positions of authority of government critics, and the land rights of indigenous peoples. In addition, the Inter-American Commission invoked Article 26 of the American Convention before the Court, and the Court addressed the problem by implicitly admitting jurisdiction to apply Article 26 in its contentious cases (see *Torres Benvenuto et al. (Five Pensioners case)* v. *Peru*).

The reasons for the limited case-law of the Inter-American system are manifold. One is that the Inter-American Court is a young institution meeting for the first time in 1979. The first cases in which the Court decided that a state party had violated the Convention were in 1988 in the so-called *Honduran Disappearance Cases* (*Velásquez Rodríguez* v. *Honduras* and *Godínez Cruz* v. *Honduras*). The European Court began its work twenty years earlier.

Secondly, for various reasons few contentious cases have been submitted to the Court. In the early years of the Court, only a few states had made optional declarations accepting its contentious jurisdiction. Furthermore, individuals do not have standing before the Court (*locus standi*), and while it may seem obvious that states are reluctant to present cases to the Court, what has had a greater impact is the reluctance of the Inter-American Commission to take the initiative and submit cases. However, with the adoption of new Rules of Procedure of the Commission, it is expected that all cases against states parties that have recognised the Court's contentious jurisdiction will be referred to the Court.

Although most of the cases the Inter-American organs of human rights have dealt with have involved gross violations of human rights, the political reality of the continent has changed from what it was at the system's inception, and it can be anticipated that the jurisprudence will evolve to include other issues.

In relation to the above, it should be noted that while the case-law of the Inter-American Court is limited in terms of the number of judgements and scope, the Court has nonetheless contributed significantly to the progress of international human rights with cases such as its landmark decision in the *Velásquez Rodriguez* v. *Honduras case.*

CHAPTER 4

THE AFRICAN UNION

The African Union (AU) is a regional inter-governmental organisation that replaced the Organisation of African Unity (OAU). The Assembly of the Heads of State and Governments of the OAU adopted the Constitutive Act that established the African Union (AU) in Lomé, Togo, on 11 July 2000. The Constitutive Act had to be ratified by two-thirds of the member states of the OAU in order for it to come into force. It became a legal and political reality in May 2001 and was officially launched in Durban, South Africa, on 10 July 2002. The new inter-governmental organisation is loosely modelled on the European Union (EU) and is headquartered in Addis Ababa.

The OAU was originally established in 1963 to promote unity, solidarity and international co-operation among the newly independent African states. During the past four decades, however, the organisation's struggle to achieve its stated goal of 'a better life for the people of Africa' was hindered by internal conflict and self-serving heads of state. According to some critics, the OAU protected the interests of African heads of state without addressing the real problems that plagued the continent.

The AU was first proposed in 1999 by Libyan leader Moammar Gadhafi as a more effective institution for increasing prosperity throughout the region. It is hoped that the new AU will have the authority and the ability to achieve true economic and political integration among its member states by promoting democratic values, defending human rights and providing a forum for internal and regional conflict.

With regard to human rights, the AU has a human rights focus that is more explicit than the OAU. The importance of human rights was not strongly recognised under the OAU Charter, which only made reference to the UN Charter and to the Universal Declaration of Human Rights. In contrast, the AU Act confirms the importance of human rights by the adoption of guiding principles such as gender equality, participation of the African peoples in the activities of the Union, social justice, peaceful co-existence of the member states, and respect for democratic principles, human rights, the rule of law, and good governance. Thus, apart from the individual obligation of member states to ensure the

guarantee of human rights within their jurisdiction, the AU has undertaken an institutional obligation to ensure the effective guarantee of human rights in Africa in general.

In order to achieve this, the AU needs to define which of the nine organs under the AU will be empowered to further the human rights mandate of the AU Act, as none of these organs have defined tasks specifically relating to human rights. In order to meet its human rights objectives, the AU has incorporated the 1993 Mechanism on Conflict Prevention, Management and Resolution, which used to be an OAU human rights organ. Moreover, the Union incorporated the African Commission on Human Rights and the African Committee of Experts on the Rights of the Child in July 2002. Moreover, the proposed Pan-African Parliament and the Economic, Social and Cultural Council are hoped to enable the Union to meet its objective to promote popular participation of African peoples in the activities of the Union.

A. Principal organs and human rights bodies

The African Union is based on the Constitutive Act, which enumerates the nine principal organs of the AU. They include the Assembly of the Union, the Executive Council, the Pan-African Parliament, the Court of Justice, the Commission, the Permanent Representatives Committee, the Economic, Social and Cultural Council, the Specialised Technical Committees and the Financial Institutions. The Assembly of the Union, the Executive Council, the Commission and the Specialised Technical Committees are equivalent to the Assembly of the Heads of State and Government, the Council of Ministers, General Secretariat and Specialised Commissions under the OAU structure. The Pan-African Parliament, the Court of Justice and the Economic Social and Cultural Council have equivalent structures in the African Economic Community (AEC). The AU's Permanent Representatives Committee and the Financial Institutions are new institutions. In addition, the AU has adopted a protocol aiming at the establishment of the Peace and Security Council, which is meant to replace the Mechanism on Conflict Prevention, Management and Resolution.

The three bodies most relevant to human rights protection under the African human rights system are the African Commission on Human and Peoples' Rights, the African Court on Human and Peoples' Rights and the African Committee on the Rights and the Welfare of the Child.

1. THE ASSEMBLY OF THE UNION

The Assembly is composed of the Heads of State and Governments and meets at least once a year. It is considered the supreme organ of the African Union and as such determines, monitors and implements common policies of the African Union;

it receives, considers and takes decisions on reports and recommendations from other organs of the African Union and it establishes new organs of the African Union. The Assembly elects the members of the African Commission on Human Rights and the judges of the African Court on Human and Peoples' Rights. The Assembly also approves the annual reports produced by the African Commission.

2. THE EXECUTIVE COUNCIL

The Executive Council is composed of Ministers of Foreign Affairs and meets at least twice in ordinary session. The Executive Council has two main functions: a) to co-ordinate and take decisions on policies in areas of common interest to member states, including, *inter alia*, foreign trade; environmental protection, humanitarian action and disaster response and relief; education, culture, health, human resources development and social security; and b) to consider issues referred to it and to monitor the implementation of policies formulated by the Assembly.

3. THE COMMISSION

The Commission functions as the secretariat of the AU. It is composed of the Chairperson, his or her deputy or deputies and the Commissioners.

4. THE PAN-AFRICAN PARLIAMENT

Unlike the above-mentioned organs, which were established as organs of the AU only, the Pan-African Parliament is a single parliament serving two organisations, the AU and the African Economic Community (AEC). The AEC was established by the OAU, *inter alia*, to promote economic development and the integration of African economies. According to Article 17 of the Constitutive Act of the AU, 'in order to ensure the full participation of African peoples in the development and integration of the continent, a Pan-African Parliament shall be established. The composition, powers, functions and organisation of the Pan-African Parliament shall be defined in a protocol thereto.' The Protocol establishing the Parliament was adopted in March 2001, and entered into force 14 December 2003, following ratification by 24 states parties. As of July 2004, 46 AU member states had ratified the Protocol and a significant amount of them have submitted the list of their five members elected to the Parliament.

The protocol establishing the Pan-African Parliament provides that the members of this organ are elected or designated by national parliaments. Each state party is entitled to elect five members to the Pan-African Parliament, at least one of which must be a woman (Article 4(2)). The Pan-African Parliament will initially have a consultative and advisory function that will enable it to,

inter alia, discuss and make recommendations on issues relating to human rights, democracy and good governance. In addition, Article 11 envisages that the Pan-African Parliament 'shall be vested with legislative powers to be defined by the Assembly'. The protocol does not define any precise time scope, however, but provides that the Pan-African Parliament shall have consultative and advisory powers 'until such time as the member states [of the AEC] decide otherwise by an amendment to this protocol'.

5. THE PEACE AND SECURITY COUNCIL

The Protocol Relating to the Establishment of the Peace and Security Council was adopted by the Union on 9 July 2002 and entered into force on 26 December 2003. As of July 2004 the Protocol has been ratified by 36 AU member states.

The Protocol seeks to establish an African Peace and Security Council to replace the OAU Mechanism for Conflict Prevention, Management and Resolution (Article 22(1)), which was incorporated into the institutional structure of the AU in July 2001.

The Protocol provides that the Council should be composed of 15 member states of the Union that manifest, *inter alia*, commitment to uphold the principles of the Union, including humanitarian intervention (Article 5(2)(a)), respect for constitutional governance, the rule of law and human rights (Article 5(2)(g)). In order for the Council to function continuously, the Protocol requires the Council to be represented at the headquarters of the AU at all times (Article 8(1)). This will allow the Council to take decisions to intervene in humanitarian situations in order to prevent mass loss of life or massive violations of human rights on short notice.

The Protocol enumerates some of the objectives of the Peace and Security Council, which include anticipating and preventing armed conflict (Article 3(b)) and massive violations of human rights. Its aim is to promote and encourage democratic practices, good governance, the rule of law, human rights, the respect for the sanctity of human life and international humanitarian law (Article 3(f)).

The Protocol provides for the establishment of the African Standby Force to assist the Council in situations requiring humanitarian intervention. The standby force is to be composed of standby contingents 'for rapid deployment at appropriate notice' (Article 13(1)). The functions of the African Standby Force include 'intervention in member state in respect of grave circumstances in order to restore peace and security, in accordance with article 4(h) [of the AU Act]' (Article 13(3)(c)).

6. THE COURT OF JUSTICE

The Constitutive Act of the AU provides for the establishment of the Court of Justice and for a Protocol on its statute, composition and functions. The Protocol

of the Court was adopted on 11 July 2003, but as of July 2004 it had not come into force yet. When established, the Court will be seized primarily with matters of interpretation arising from the application or implementation of the Constitutive Act.

7. THE ECONOMIC, SOCIAL AND CULTURAL COUNCIL

The Constitutive Act of the AU provides for an Economic, Social and Cultural Council (ECOSOCC) as 'an advisory organ composed of different social and professional groups of the Member States of the Union'. This institution is meant to give the African peoples the possibility to participate in the activities of the AU.

Along with the Pan-African Parliament and the Court of Justice, the Council is one of the new structures intended to open the intergovernmental system of the AU to greater transparency and accountability. As of July 2004, it had not yet been established.

8. THE AFRICAN COMMISSION ON HUMAN AND PEOPLES' RIGHTS

The African Commission on Human and Peoples' Rights was established in 1987 under the African Charter on Human and Peoples' Rights to protect and promote human and peoples' rights in Africa. The African Commission was incorporated into the AU framework at the Durban Summit held in July 2002. The Commission is composed of eleven members, who are elected for a term of six years by secret ballot by the Assembly of the African Union from a list of persons nominated by the states parties to the Charter. The Commission meets twice a year in ordinary sessions.

The African Charter provides the African Commission with three principle functions: examining state reports (Article 62 ACHPR), considering communications alleging violations of human rights from both individuals and states (Articles 47 and 55 ACHPR) and interpreting provisions in the African Charter (Article 45(3) ACHPR).

Under Article 62 ACHPR, member states are obliged to submit reports every two years on legislative and other measures they adopted in order to give effect to the provisions of the African Charter. The African Charter failed in Article 62 to identify the organ competent to review these reports. In order to remedy this situation, the African Commission adopted a resolution at its third session requesting the OAU Assembly to allow it to review state reports. The request was approved by the OAU Assembly, and the state reports are now presented to the African Commission for examination. Like UN treaty bodies, the African Commission has drawn up guidelines to help states submit reports that are clear

and detailed enough. Since 1999, the African Commission has had the opportunity to examine 21 reports. Many states, however, have not yet submitted any reports, and some of the reports that have been submitted show a lack of seriousness in carrying out introspective self-evaluation. The African Commission does not issue 'concluding comments' on state reports, and no uniform position has yet been taken by the Commission on the various issues raised.

The African Commission is allowed to receive and consider inter-state complaints under Article 47 ACHPR. As of July 2004, the procedure governing inter-state communications had only been used once before the African Commission.

The Commission is entitled to consider other communications from individuals and organisations alleging violations of human and peoples' rights under Article 55 of the African Charter. It was initially interpreted that the African Commission could only accept communications revealing a series of serious and massive violations of human rights. The Commission, however, clarified this in *Jawara* v. *The Gambia*, *Communications 147/95 and 146/96,* where it stated that it is empowered to consider any communication from anyone, including NGOs, as long as rights contained in the African Charter come into play. After examining such communications, the Commission makes recommendations to the Assembly of the African Union and to the state party concerned. All the recommendations are included in the annual reports of the African Commission, which are made public once the AU Assembly has approved them.

In addition to examining state reports and receiving, examining and investigating communications, the African Commission can interpret any provision in the African Charter if requested to do so by AU member states, organs of the AU or African organisations. The Commission is also entitled to appoint members of the Commission as special rapporteurs to gather information about human rights violations. So far, the Commission has appointed three Special Rapporteurs on thematic issues: on extrajudicial executions; on prison conditions; and on women's rights.

9. THE AFRICAN COURT ON HUMAN AND PEOPLES' RIGHTS

The original African Charter did not provide for the institution of a court of human rights. In June 1998, the OAU adopted the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, which came into force 25 January 2004. As of July 2004, 17 AU member states had ratified the Protocol.

The Court will be composed of eleven judges elected in their individual capacity by the Assembly of the African Union. Judges will serve for a six-year term and be eligible for re-election only once. All judges, except the President of the Court, will serve on a part-time basis.

Under its advisory jurisdiction, the Court is entitled to give advisory opinions on 'any legal matter relating to the Charter or any other relevant human rights instruments'. Advisory opinions may be requested not only by a member state of the AU, but also by any organ of the AU, or an African NGO recognised by the African Union.

The African Court's jurisdiction is not limited to cases or disputes that arise out of the African Charter, but also any relevant instruments, including international human rights treaties, which are ratified by the state party in question. Furthermore, in addition to the African Charter, the Court can apply as sources of law any relevant human rights instrument ratified by the state in question.

The African Commission, states parties and African intergovernmental organisations can bring a case to the African Court once a state ratifies the Protocol. Individuals and NGOs however, do not have 'automatic' access to the Court. The Court cannot receive an individual petition unless the state party involved has made a declaration accepting the competence of the Court to receive such cases.

The Court is formally independent of the African Commission although it may request the Commission's opinion with respect to the admissibility of a case brought by an individual or an NGO. The Court may also consider cases or transfer them to the African Commission, where it feels that the matter requires an amicable settlement, not adversarial adjudication.

The Court's judgements are final and without appeal. They are binding on states. In its annual report to the AU, the Court shall specifically list states which have not complied with its judgements. The AU Executive Council is required to monitor the execution of the judgements on behalf of the AU Assembly.

The Assembly of the Union is expected to make decisions on matters relating to the African Court on Human and Peoples' Rights in its Third Ordinary Session in Addis Ababa, Ethiopia, in July 2004. Issues, such as the location of the Court and its budget shall be decided and election of eleven judges to the Court is anticipated.

10. THE AFRICAN COMMITTEE ON THE RIGHTS AND THE WELFARE OF THE CHILD

The African Committee on the Rights and the Welfare of the Child was established in 1999 under the African Charter on the Rights and Welfare of the Child. The eleven members of the Committee are elected by secret ballot by the Assembly of Heads of State and Government from a list of persons nominated by the states parties to the Charter.

The mandate of the Committee includes the promotion and protection of the rights and welfare of the child; the collection and documentation of relevant information; the assessment of problems relating to children; the organisation of meetings, the formulation and drafting of rules aimed at protecting children; and the monitoring of implementation of the rights enshrined in the Charter. As

part of the monitoring activities, there is a reporting procedure that requires states to submit a report to the Committee every three years.

Similar to the African Commission, the Committee can receive communications from persons, groups or NGOs regarding violations of the Charter. In addition, the Committee has been granted broad powers of investigation. It may resort to any appropriate method of investigating any matter falling within the jurisdiction of the Charter, including measures a state party has taken to implement the Charter. It may also request from the states parties any information relevant to the implementation of the Charter. However, in formal terms of enforcement, the Committee's principle means is publicity, the AU bearing the ultimate responsibility for enforcement.

B. Standards and supervisory mechanisms

The African human rights system is founded on five treaties of the African Union, namely a) the African Charter on Human and Peoples' Rights; b) the Protocol on the Rights of Women in Africa; c) the Convention on Specific Aspects of the Refugee Problem in Africa; d), the African Charter on the Rights and Welfare of the Child; and e) the Protocol on the Establishment of an African Court on Human and Peoples' Rights. In addition, mention should be made of the New Partnership for Africa's Development (NEPAD), which seeks to address underdevelopment in Africa through the promotion of democracy, human rights, accountability, transparency and participatory governance (see textbox in V.§1.).

1. THE AFRICAN CHARTER ON HUMAN AND PEOPLES' RIGHTS

On 26 June 1981, the African Charter was unanimously adopted by the Assembly of Heads of State and Government. It became effective on 21 October 1986. As of July 2004, it had been ratified by 53 AU member states. The two principal organs charged with the supervision of states parties' compliance with the African Charter are the African Commission on Human and Peoples' Rights and the African Court on Human and Peoples' Rights.

The African Charter is a binding treaty that covers four main categories of rights and duties: individual rights; rights of peoples; duties of states; and duties of individuals.

The combination of the specific needs and values of African cultures and the international human rights standards has resulted in some distinctive features, compared to other regional conventions. The Charter covers economic, social and cultural rights, as well as civil and political rights and it confers rights upon peoples and not only individuals. Furthermore, the African Charter covers 'third generation rights', and gives due importance to the assumption that a person has duties as well as rights in a given community. Article 29 of the African Charter

offers a list of duties, each implicitly embodying the 'values of African civilization'.

Unlike other international human right conventions, the African Charter does not contain a general derogation clause allowing the states parties to suspend the enjoyment of certain rights during national emergencies. Instead, the African Commission has found that legitimate reasons for limiting rights and freedoms are found in Article 27(2) ACHPR, namely 'the rights of others, collective security, morality and common interest' (see *Media Rights Agenda et al* v. *Nigeria, Communications 105/93, 128/94, 130/94 and 152/96*).

While not providing for derogation clauses, the African Charter contains a number of articles with provisions that limit the reach of these rights, and which have been referred to as 'clawback clauses'. Article 9(2) ACHPR provides an example of a so-called 'clawback clause': 'every individual shall have the right to express and disseminate his opinions within the law'. The term 'within the law' was by many experts interpreted to mean that no domestic legal provision limiting the right in question could be challenged under the African Charter. The Commission rectified this interpretation in one of its communications, when it found that the term 'within the law' was to be understood to refer to international law, not domestic law (*Civil Liberties Organisation in respect of the Nigerian Bar Association* v. *Nigeria, Communication 101/93*).

2. THE PROTOCOL TO THE AFRICAN CHARTER ON HUMAN AND PEOPLES' RIGHTS ON THE RIGHTS OF WOMEN IN AFRICA

The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa was adopted by the AU on 11 July 2003. This protocol has not yet entered into force (July 2004).

The Protocol consists of 32 articles, addressing a variety of civil, political, economic, cultural, and social rights. Of particular note are Article 4, 5, and 14. Article 4 prohibits all forms of violence against women. Article 5 forbids all forms of female genital mutilation. Article 14 assures women a wide variety of health and reproductive rights, including the right to decide whether to have children, the number of children and the spacing of children; the right to choose any method of contraception; the right to self protection and to be protected against sexually transmitted infections, including HIV/AIDS; the right to be informed of one's health status and of the health status of one's partner; the right to have family planning education' and perhaps most significantly, the right to 'medical abortion in cases of sexual assault, rape, incest, and where the continued pregnancy endangers the mental and physical health of the mother or the life of the mother or the foetus.' This represents the first time that an international standard explicitly provides for the right of a woman to abortion. It is also unique in that it unequivocally denounces and declares female genital mutilation and related practices illegal.

The Protocol particularly addresses the special needs of women in times of armed conflict (Article 11). States are required to protect asylum-seeking women,

refugees, returnees and internally displaced persons from acts of sexual violence that take place within the context of armed conflict and to ensure that such acts are considered as war crimes, genocide and/or crimes against humanity and to prosecute them accordingly.

The Protocol elaborates far more extensive human rights for women than any other international treaty, including the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW). States parties to the Protocol are required to submit periodic reports indicating what legislative and other measures they have undertaken to fully realise the rights in the Protocol (Article 26). Moreover, the African Court on Human and Peoples' Rights can be seized in matters of interpretation arising from the implementation of the Protocol.

3. THE CONVENTION GOVERNING THE SPECIFIC ASPECTS OF REFUGEE PROBLEMS IN AFRICA

The African Refugee Convention was the first African regional convention to be adopted. It entered into force in 1969 and had, as of July 2004, been ratified by 45 states. Its most celebrated feature is its expanded definition of who is a 'refugee'. In comparison to the 1951 Convention, the OAU definition focuses more on the objective circumstances that compelled flight. The fear of danger is not linked to the individual's personal subjective reaction to a perceived adversity. In addition, the definition includes accidental situations not based on deliberate state action. Likewise, the source of danger need not be actions of the state or of its agents. In doing so, the AU definition highlights the causal element of refugee situations and the jeopardy of human rights of those fleeing, as opposed to emphasising the motive for flight, as is done in the 1951 Convention. Moreover, it contains an absolute prohibition of *refoulement* that allows for no exception to be made in times of national emergency or when national security is at stake.

4. THE AFRICAN CHARTER ON THE RIGHTS AND WELFARE OF THE CHILD

The African Charter on the Rights and Welfare of the Child was adopted in July 1990 by the OAU Assembly. It entered into force on 29 November 1999 and had been ratified by 33 AU member states as of July 2004. The AU is the first regional organisation to adopt a binding regional instrument safeguarding the rights of children. The African Charter on the Rights and Welfare of the Child is in many respects more protective than its universal counterpart, the UN Convention on the Rights of the Child, especially with regard to refugee children, child marriages and child soldiers.

Compliance with the Charter is supervised by the African Committee of Experts on the Rights and Welfare of the Child which examines state reports and can make recommendations on individual and inter-state communications (see II.§4. A.10 above).

ASIAN REGIONAL SYSTEM

Much of the development of the human rights regime has occurred at regional level under the guise of bodies such as the European Court of Human Rights and the Inter-American Commission and Court of Human Rights. Building on these examples, the African Charter on Human and Peoples Rights was adopted in 1981, with a view to creating a similar system for Africa.

The merits of a regional system for human rights protection are very clear: it enables regions to create mechanisms whereby rights can be guaranteed in that region with particular respect given to regional custom. It has the advantage that issues that are relevant to the region can be determined by the people of that region – in keeping with the best democratic traditions.

Today the three regional systems sit alongside a growing international regime, often proving more effective in the guarantee of rights. However the lack of a regional system for Asia remains a fundamental lacuna in this umbrella of protection. This is exacerbated when put into the perspective that close to 60 percent of the world's population live in Asia, often in circumstances of terrible poverty not unlike Africa. Unlike in Africa however, there have never been continent-wide unifying factors. Instead, Asian states have developed in isolation and competition with one another, with strong regional rivalries.

The root of the problem, however, goes deeper with some leaders expressing scepticism of human rights as no more than western neo-colonialism. This charge is relatively easy to refute, based on the universality of the norm of inherent human dignity; however, in practice it has reduced the scope for co-operation on this issue between Asian states. There is no doubt that the human rights agenda, as currently expressed, is based on western values. Typical examples of this lie in the emphasis of civil and political rights over economic, social and cultural; and the greater importance of individual rights over collective rights. Yet, in more recent years, as the human rights regimes themselves have become more inclusive, increasing attention has been paid to these two aspects within the international system.

The vehement criticism of the international system underlines the need for a regional system of rights protection in Asia. It is precisely through a regional mechanism cognisant of the cultural ethos of the region, that these difficulties can be overcome. Thus rather than a rejection of human rights *per se*, a venture of co-operation between the states for its interpretation in an Asian context would be more progressive.

While this might be desirable, it is hindered by fundamental differences that exist between the regions in Asia. It can be argued that there are at least five distinct sub-regions within the continent, in terms of geography, cultural ethos and regional identity. Thus East Asia would consist of states such as China,

Japan and the Koreas; South-East Asia, the most developed in terms of regional co-operation, would include states that currently form the regional association of ASEAN, such as Indonesia, Malaysia, Vietnam and others; South Asia would include the weak customs union SAARC consisting of India, Pakistan and Bangladesh among others; the Middle East region would include the Arab states in Asia that are part of the Arab League; with the fifth sub-region consisting of the former Soviet states, such as Azerbaijan, Turkmenistan and Kazakhstan, among others.

While this geographic classification might theoretically be a starting point for a discussion on sub-regional systems of human rights protection, there are fundamental difficulties with forging such a discussion. In two of the biggest sub-regions identified, the leading states *i.e.* China and Japan in East Asia, and India and Pakistan in South Asia have had extremely antagonistic relationships that make it impossible to foster cross-border discussions. Most crucially, however, the building of regional or sub-regional systems of human rights will need to overcome the opinion that the biggest issue facing many Asian states is poverty reduction, and that the human rights concept, with its emphasis on civil and political rights, is ineffective as a vehicle for this agenda. Instead, it is often perceived as being a privilege that can be embarked upon once states are at a suitable level of development.

Joshua Castellino

CHAPTER 5

ORGANISATION FOR SECURITY AND CO-OPERATION IN EUROPE

The Conference on Security and Co-operation in Europe (CSCE), renamed in 1994 the Organisation for Security and Co-operation in Europe (OSCE) is not strictly a European organisation. Although its members now include all European countries, some other states, such as the United States, Canada, and Tajikistan, are also members. Although the Organisation's main focus is regional security it provides a comprehensive system in the field of human rights protection, differing considerably from that of other international bodies. For one, the OSCE standards do not generally impose enforceable international legal obligations, nor do they contain a list of rights to be protected. The instruments are of a more political nature, and have provided states and international bodies with valuable guidance in formulating standards as to what is 'politically acceptable' to states.

The CSCE came into being in the wake of the Cold War, when tensions between East and West had eased to such an extent that both blocs agreed to sit at one table to discuss the future. The preparatory talks that marked the start of the actual negotiating process for the CSCE took place between November 1972 and June 1973 in Helsinki. The Conference on Security and Co-operation in Europe was officially opened on 3 July 1973 in Helsinki. The subjects for discussion in Helsinki were divided headings, which have become known as the three 'Baskets' of Helsinki:

a) Matters of European security (First Basket);
b) Co-operation in the field of economics, science, technology and environment (Second Basket);
c) Co-operation on humanitarian matters, including information, education and culture (Third Basket).

The CSCE was formally created by the Helsinki Final Act (HFA) in August 1975, which was signed by 35 states, 33 European countries except Albania, plus the United States and Canada. Today the OSCE has 55 participating states from Europe, Central Asia, and North America.

East-West relations were still strained, however, in 1975, so it was not until 1989 - the year in which a wave of liberalisation swept across Eastern Europe - that a breakthrough within the CSCE framework in the field of human rights proved possible, resulting in the adoption of the Charter of Paris for a New Europe (1990), an event that marked the end of the Cold War.

The links between the Baskets form one of the most important elements of the HFA and, to maintain the CSCE/OSCE as an integral process, it is essential to strive for balanced progress in all three. The HFA is not a treaty and its provisions are not legally binding on the signatories. They conceived it as a non-binding instrument proclaiming political commitments. According to the Preamble 'determination to respect and put into practice [...] the following principles, which are all of primary significance, guiding their mutual relations', setting out political commitments. The great achievement of the CSCE in the field of human rights and related issues was embodied mainly in Principle VII ('respect for the human rights and fundamental freedoms, including freedoms of thought, conscience, religion or belief'); Principle VIII ('equal rights and self-determination of peoples'); and in the First and Third 'Baskets'. The Vienna Concluding Document (1989) consolidated the subject of human rights previously dealt with in Baskets I and III, and it subsumed both topics under the heading 'Human Dimension of CSCE' (see below).

A. Principal organs and institutional aspects

The CSCE/OSCE was established as a process; until 1990 there were no formal institutions. Even now (July 2004), a strong emphasis is placed on the process-aspects. The OSCE process consists of the convening by the participating states of periodic inter-governmental conferences, meetings, and consultations to discuss the relations between the participating states, based on the principles of sovereignty and equality. In principle, proposals could only be accepted if they commanded a consensus, but at the Prague meeting in February 1992 the 'consensus minus one' principle was introduced for decision-making in 'cases of clear, gross and uncorrected violations of relevant CSCE commitments' related to the Human Dimension principles of the CSCE/OSCE. This principle was used to suspend Yugoslavia in 1992. The pertinent provision in the Prague document has the heading 'safeguarding human rights, democracy and the rule of law'.

The fact that the CSCE/OSCE is still an ongoing process is reflected in the periodic Meetings of Heads of States and/or Ministers and the various interim expert meetings and forums. The Meetings of Heads of States are preceded by Review Conferences. These Review Conferences aim to examine the degree to which the HFA has been implemented (the so-called implementation debate), to reach new agreements on improvements in the implementation of the Final Act, and, where necessary, to define and clarify its provisions.

Until the adoption of the Charter of Paris for a New Europe (1990), the institutional structure was very limited; no secretariat existed, the country hosting a meeting made the agenda, consulted all participants and provided services. Since the Paris Charter, the countries agreed to hold high-level meetings on a more regular basis; generally, there is a meeting of Heads of State or Government every two years while the Foreign Ministers meet annually in the Ministerial Council, the main decision-making body. The OSCE's regular body for political consultation and decision-making is the Permanent Council, which meets every week in Vienna and is composed of the permanent representatives of the OSCE participating states. The Permanent Council can be convened for emergency purposes. In the years following the Paris Charter the Committee of Senior Officials, since 1994 the Senior Council, was very active but in recent years it has become less important. Since 1993, an Economic Forum has been held every year, in May, in Prague. Since 1992, there is also a CSCE/OSCE Parliamentary Assembly meeting annually in Copenhagen.

To support the new CSCE/OSCE structure, the following bodies were created at the beginning of the 1990s:

- A Secretariat (Prague);
- A Centre for Conflict Prevention, as well as the office of the Secretary-General (Vienna).
- An Office for Democratic Institutions and Human Rights (ODIHR) (Warsaw);
- High Commissioner on National Minorities (see below).

The 1992 Helsinki Summit led to the establishment of new institutions of relevance for the Human Dimension and a framework for monitoring compliance, conflict prevention ('early warning' and 'early action'), and implementation. In addition, the function of Chairman-in-Office was formalised. This function has become increasingly important as the Chairman has overall responsibility for executive action. Preceding and succeeding chairmen assist the Chairman-in-Office; together constituting the 'Troika'. The chairmanship rotates annually.

HELSINKI DECALOGUE

The participating states at the 1975 CSCE meeting in Helsinki declared their intention to conduct their relations in the spirit of the following ten principles:

1. Sovereign equality, respect for the rights inherent in sovereignty;
2. Refraining from the threat or use of force;
3. Inviolability of frontiers;
4. Territorial integrity of states;
5. Peaceful settlement of disputes;
6. Non-intervention in internal affairs;
7. Respect for human rights and fundamental freedoms, including the freedom of thought, conscience, religion or belief;
8. Equal rights and self-determination of peoples;
9. Co-operation among states;
10. Fulfilment in good faith of obligations under international law.

B. Standards and supervisory mechanisms

1. HUMAN DIMENSION OF THE CSCE/OSCE

The Human Dimension may be defined as the *corpus* of undertakings laid down in the Helsinki Final Act and in other CSCE/OSCE documents concerning respect for human rights and fundamental freedoms, human contacts and other related issues, including the rule of law and democracy. The expression 'Human Dimension' refers to the Seventh Principle of the 1975 Helsinki Final Act and a large part of the Third Basket introduced in the 1989 Vienna Final Act.

During the Cold War era, the differences between East and West were particularly apparent in the human rights field. While Western delegations emphasised civil and political rights and their close links with other CSCE issues, the communist countries emphasised economic, social and cultural rights and the principle of non-intervention. At the CSCE-meetings in the 1970s and early 1980s, results were only achieved in fields such as:

- Human contacts; related to matters like family reunion, marriage between nationals of two participating states, travel (visa and passport applications), international exchanges of young people, and sports.

- The free exchange of information; agreements were reached to improve the availability of newspapers and ease restrictions on journalists even in the difficult times of the Cold War.
- Cultural co-operation and exchange; since the adoption of the Madrid Concluding Document (1983) (see below), attempts were made to clear obstacles in this field. The establishment of a direct dialogue was also the ulterior objective of the Budapest Cultural Forum in the autumn of 1985.
- Initiatives to co-operate in the field of education; the exchange of students, tutors and academics; scientific co-operation, the dissemination of scientific information and co-operation in research; the study of foreign languages; and the exchange of experience in education.

As a result of the processes of Glasnost and Perestroika, initiated in the Soviet Union by President Michael Gorbachev in 1985, the political upheaval in Eastern Europe led to a narrowing of the gap between East and West on human rights issues. The CSCE strongly supported the radical changes taking place in Central and Eastern Europe and made use of the changes to agree on concrete commitments regarding human rights. Not only were the norms extended and deepened but also the supervisory mechanism was significantly improved.

The meetings held since Helsinki 1975, relevant to the Human Dimension, including standard-setting achievements, are summarised below.

The First Follow-up Meeting (Belgrade, October 1977 - March 1978) ended after a year of discussions with a largely pointless final document in which the participating states agreed to reconvene at a later date.

The Second Follow-up Meeting in Madrid lasted - with breaks - from 11 November 1980 until 9 September 1983 and did result in a substantial concluding document. The participants codified a number of new commitments, including in the Human Dimension field the the right to establish and join trade unions, the right of trade unions freely to exercise their activities, religious freedom, and the equality of the sexes. In addition, the CSCE countries agreed on better arrangements for reuniting families.

The Third Follow-up Meeting took place in Vienna between 4 November 1986 and 19 January 1989. Here the participants were able to make significant progress on all Baskets, particularly the Third. Additional commitments were reached which signified a qualitative step forward: the right of every person to leave and return to his or her country; religious freedom; the rights of detainees; the right to effective remedy and to fair trial; and some rights of persons belonging to minorities.

In Vienna, the CSCE participating states also agreed on a Conference on the Human Dimension (CHD) consisting of three meetings to be held before the Fourth Follow-up Meeting in Helsinki in 1992. Especially the second CHD meeting in Copenhagen (June 1990) is regarded as a long-awaited breakthrough in the Human Dimension of the CSCE. Thanks to the political change in Central and Eastern Europe, all the communist regimes had changed or collapsed. With

the adoption of the Copenhagen document, the CSCE participating states committed themselves to pluralist democracy and the rule of law as the essential preconditions for the protection of fundamental human rights and freedoms. Special mention should be made of some of the additional provisions: freedom of expression; freedom of peaceful assembly and association; affirmation of the will of the people as the basis of the authority of government and of the rule of law; limitations on provisions regarding the restriction of human rights. The agreed text with rights of persons belonging to minorities has served since as one of the most important guidelines on minority rights. This is an especially important addition, because it was the first time since the Second World War that a multilateral human rights forum adopted a catalogue of minority rights.

The third and last CHD meeting (Moscow, September - October 1991) added some CSCE commitments in the field of the Human Dimension. It included the protection of human rights during a state of emergency; the right to peaceful enjoyment of one's possessions; the question of humanitarian access; the rights of women; and the rights of disabled people.

In 1992, the Fourth Follow-up Meeting was held in Helsinki, followed by the above-mentioned Summit of Heads of State or Government. Given the shift of emphasis from standard setting to supervision and implementation, the final document of Helsinki included only limited additional commitments to standards. Included were, *inter alia*, the protection of minorities (including the prohibition of ethnic cleansing) and indigenous populations, the protection of refugees and displaced persons, and the right to citizenship.

The Fifth Follow-up Meeting, now called Review Conference, took place in Budapest in 1994, again followed by a Summit of Heads of State or Government. Determined to give the CSCE new political impetus at the 1994 Budapest Summit, 52 heads of state or government from CSCE participating states renamed CSCE the Organisation for Security and Co-operation in Europe (OSCE). A Code of Conduct on Politico-Military Aspects of Security was adopted, setting forth principles guiding the role of armed forces in democratic societies. The most important improvement concerned the attention being paid to the issues of the Roma and Sinti.

A summit meeting of the Heads of State or Government took place in Lisbon in 1996 and concluded with the Lisbon Document 1996. The main results of the Lisbon meeting were related to the area of security problems. The Istanbul Summit (1999), resulted in the signing of the Charter for European Security and the adoption of the Istanbul Summit Declaration. It did not lead to major new standards in the human dimension field.

Multilateral mechanism for supervising the Human Dimension of the OSCE

During the era of East-West confrontation, no agreement could be reached as to the control over the supervision of agreed standards. It was therefore considered a great breakthrough that, in the final document of the Third Follow-up Meeting in Vienna (1989), the participating states created a relatively far-reaching supervisory mechanism for the Human Dimension of the CSCE. It confirmed formally that Human Dimension issues were no longer considered internal affairs, through the acceptance of a so-called *droit de regard.* This multilateral mechanism comprises four phases:

Phase I Request for information on a situation considered to affect the CSCE Human Dimension	**Phase II** Discuss Human Dimension situation in a bilateral meeting	**Phase III** Bring Human Dimension situation to the attention of other CSCE states	**Phase IV** Provide information at Follow-up Meetings
Re I: Exchange of information on a human rights situation (written response is obligatory within 10 days of the request).	**Re II:** Discuss HD situation in a bilateral meeting (the meetings must take place as a rule within one week of the date of the request: situations which are not connected to the case may not be raised at the meeting, unless agreed otherwise).	**Re III:** Bring HD situation to the attention of other CSCE states.	**Re IV:** Provide information at Follow-up Meetings. **Re I-IV:** Phases I to III are confidential, phase IV is public.

The mechanism was frequently used by countries bilaterally, as well as by the EU. It was used both in reaction to the violations of human rights of individuals, and to raise general human rights issues or draw attention to specific situations. It should be noted that the Vienna Mechanism was chiefly used by Western countries to raise issues in Central and Eastern Europe and - very few times - *vice versa.* While its value has been reduced by the substantial changes in Central and Eastern Europe, it still has some importance. The conditions attached to the four phases have been amended in the documents of Copenhagen, Moscow and, lastly, in the 1992 Helsinki document.

2. EXPERT MISSIONS AND RAPPORTEURS

In the Moscow document (1991), the supervision system was substantially strengthened through the addition of a system of expert missions or CSCE rapporteurs to facilitate the solution of issues related to the Human Dimension. The mission of experts can either be invited by the participating state concerned, or initiated by a group of six or more participating states. The mission may gather information that is necessary for carrying out its tasks and, if appropriate, use its good offices and mediation services to promote dialogue and co-operation among interested parties.

The mandate of the missions can vary according to the procedure from which the missions arise. In general, the powers of missions of experts go beyond those of missions of rapporteurs. The powers of the latter are mainly related to fact-finding and the rendering of advice or proposals for the solution of the questions raised. Missions of experts have a broader mandate aiming at facilitating the resolution of a particular question or problem relating to the Human Dimension of the OSCE. For that purpose these missions may gather information and, as appropriate, use their good offices and mediation services to promote dialogue and co-operation among states. The Moscow mechanism has been used only a few times.

In addition to the Moscow document, the CSCE/OSCE has expanded supervisory procedures by introducing fact-finding missions. Furthermore, the Chairman-in-Office can appoint personal representatives to deal with specific situations.

3. HIGH COMMISSIONER ON NATIONAL MINORITIES

The position of a High Commissioner on National Minorities (HCNM) was established in the final document of the Helsinki Follow-up Meeting (1992). The Office of the High Commissioner is located in The Hague, the Netherlands. The High Commissioner's role is to identify, and seek an early resolution of ethnic tensions that might endanger peace, stability or friendly relations between the participating states of the OSCE. The High Commissioner's mandate includes acting as 'an instrument of conflict prevention at the earliest possible stage'. The High Commissioner does not function as an international minorities' ombudsman or as an investigator of individual human rights violations. The mandate does not contain a description or definition of what constitutes a national minority. The High Commissioner has been involved in minority issues in many OSCE participating states, including Albania, Croatia, Estonia, Hungary, Kazakhstan, Kyrgyzstan, Latvia, Romania, Slovakia, Macedonia and the Ukraine. Although not established under the heading of the Human Dimension, its early warning and early action mandate have contributed significantly to improving the supervisory system of the OSCE.

The Former Foreign Minister of the Netherlands, Max van der Stoel, acted as HCNM from January 1993 until July 2000. Since then, the Swedish diplomat Ralf Ekeus has taken over the function.

4. OFFICE FOR DEMOCRATIC INSTITUTIONS AND HUMAN RIGHTS

Since the end of the Cold War, the OSCE has strongly emphasised implementation; with this aim, it has established, *inter alia,* the Office of Free Elections (1990), later renamed 'Office for Democratic Institutions and Human Rights' (ODIHR) and the position of the Representative on Freedom of the Media (see below).

The ODIHR's tasks, in addition to monitoring elections, are the following.

- Organising implementation meetings when a Follow-up or Review Meeting does not take place;
- Supporting assistance programmes for new democracies by acting as a clearinghouse;
- Organising meetings and seminars; liaising with NGOs;
- Assisting the High Commissioner on National Minorities and missions to OSCE participating states in the sphere of the Human Dimension;
- Acting as the OSCE contact point for Roma and Sinti issues.

The ODIHR presently fulfils an important role in the field of democracy-building in the former Central and Eastern European states. The ODIHR consists of around 40 staff members, in addition to a number of external experts on Special Service Agreements contracted to implement projects.

5. REPRESENTATIVE ON FREEDOM OF THE MEDIA

Another mechanism for implementation and supervision has been developed in the field of freedom of expression. The OSCE created the post of Representative on Freedom of the Media in 1997 to observe all relevant media developments and provide rapid response to serious non-compliance with OSCE principles and commitments by participating states in respect of freedom of expression and the media. The office of the Representative is located in Vienna.

In addition, the OSCE has established various missions and field operations in a number of countries and carried out extensive field activities.

PART III

SUBSTANTIVE HUMAN RIGHTS

After introducing general aspects concerning human rights, the following part will deal with a number of substantive human rights in more detail. The question arises, which rights should be dealt with and in what order? A simple and transparent model was chosen, illustrating the interdependency and the interaction between human rights; stressing the indivisibility of substantive rights.

The traditional way of dealing with human rights would have meant discussing the civil and political rights, followed by a discussion on the economic, social and cultural rights. This kind of categorisation is problematic, however, as it suggests a hierarchy of human rights, placing civil and political rights over other human rights. Several attempts have been made in the past to come up with a simple and logical framework for human rights; the two best known are the *liberté, egalité, fraternité* slogan of the French revolution, and the four freedoms of President Roosevelt: freedom of speech and expression, freedom of belief, freedom from want and freedom from fear.

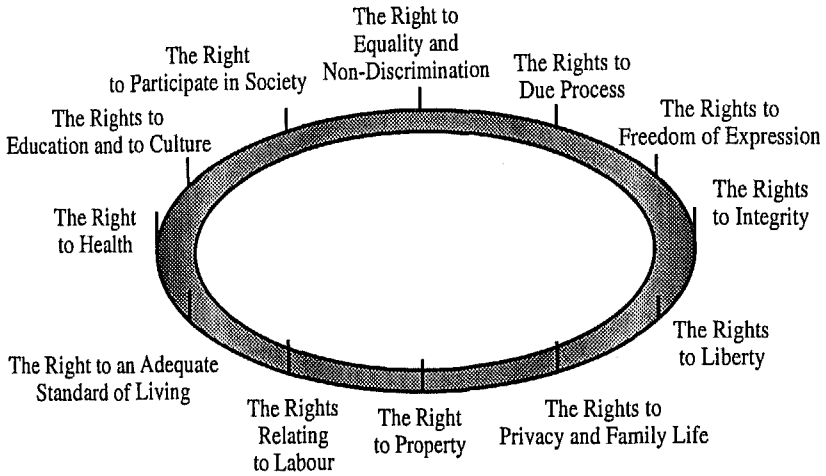
The human rights framework presented here is comprised of twelve groups of rights. The twelve rights are presented in a circular model (see below).

The circular model aims at illustrating the interdependency and non-hierarchical nature of the substantive rights. The right to cultural life, for example, cannot be enjoyed without the right to equality or the right to participation. Moreover, the right to property cannot be adequately protected if the rights to due process are not guaranteed. This interdependency of human rights is clearly demonstrated in the many individual complaints brought before international supervisory mechanisms referring not only to violation of one human right but to several, such as the right to fair trial and the right to non-discrimination.

The twelve rights included in the circular model are based on the rights enumerated in the Universal Declaration of Human Rights. The circle is made up of substantive rights essential for the protection of the individual. In defining these rights, care was taken to create a good balance between the various types of rights and the more closely related rights were grouped together.

Clearly, simplifying a complex interrelationship between rights is problematic. Instead of twelve rights, thirteen, fourteen or even forty rights could

have been included. Nevertheless, the circular visualisation of the rights has the advantage of providing a better overview of how human rights interact. It underlines that human rights are interdependent and indivisible. The division is used here as an illustration and guidance in examining the rights discussed in the following chapter.



1. The Rights to Due Process
The right to a fair trial
The right to an effective remedy

2. The Rights to Freedom of Expression and Religion
The right to freedom of opinion and expression
The right to freedom of conscience and religion

3. The Rights to Integrity
The right to life
The right to freedom from torture or cruel, inhuman or degrading treatment or punishment

4. The Rights to Liberty
The right to liberty and security
The right to freedom from slavery servitude and forced or compulsory labour
The rights to freedom of movement

5. The Rights to Privacy and Family Life
The right to respect for private and family life
The right to marry and found a family

6. The Right to Property

7. The Rights Relating to Labour
The rights relating to work
The rights relating to social security

8. The Right to an Adequate Standard of Living
The right to adequate food
The right to adequate housing
The right to adequate clothing
The right to water

9. The Right to Health

10. The Rights to Education and to Culture

11. The Right to Participate in Society
The right to vote and stand for elections
The right to freedom of association

12. The Right to Equality and Non-Discrimination

Each right is examined under two major topics: 'standards' and 'supervision'. Under standards, the content of each right, as it has been recognised in the major human rights instruments at the universal and regional levels, is identified. Under supervision, we provide examples of the protection afforded to each of the rights in the case-law of the international supervisory bodies. In the case of some economic, social and cultural rights, such as the right to adequate standard of living and the right to highest attainable standard of health, domestic case-law is also discussed. This is because only limited international case-law exists on certain aspects of these topics and discussion of landmark decisions at the domestic level may contribute to further promoting the justiciability of these rights.

CHAPTER 1

THE RIGHTS TO DUE PROCESS

In a broad sense, due process is interpreted here as the right to be treated fairly, efficiently and effectively by the administration of justice. The rights to due process place limitations on laws and legal proceedings, in order to guarantee fundamental fairness and justice. Due process is interpreted here as the rules administered through courts of justice in accordance with established and sanctioned legal principles and procedures, and with safeguards for the protection of individual rights. The rules applicable to the administration of justice are extensive and refer to, *inter alia*, fair trial, presumption of innocence, and independence and impartiality of the tribunal. In most conventions, the various rules are included in several articles. As this handbook focuses on a variety of conventions, four elements of due process are discussed: a) quality in terms of administration of justice; b) quality in terms of protection of the rights of the parties involved; c) efficiency; and d) effectiveness. As due process rights are traditionally known among human right experts to centre on the right to fair trial and the right to an effective remedy, the first three elements are discussed under the heading of fair trial, while effectiveness is discussed under the right to an effective remedy.

A. The Right to a Fair Trial

The right to a fair trial does not focus on a single issue, but rather consists of a complex set of rules and practices. The right to a fair trial is interpreted here as the rules administered through courts of justice in accordance with established and sanctioned legal principles and procedures, and with safeguards for the protection of individual rights. The rules applicable to the administration of justice are wide and refer to, *inter alia*, a fair and public hearing, the presumption of innocence and the independence and impartiality of the tribunal.

The importance of these rights in the protection of human rights is underscored by the fact that the implementation of all human rights depends

upon the proper administration of justice. Whenever a person's rights are interfered with, she/he can only defend herself/himself adequately if she/he enjoys an effective recourse to due process.

1. QUALITY OF THE ADMINISTRATION OF JUSTICE

The right to a fair trial is guaranteed if individuals can have recourse to 'a competent, independent and impartial tribunal', as recognised by international conventions, such as the ICCPR and the American Convention. These components are discussed below.

Independence

The most important component is the independence of the judiciary, referring to, *inter alia,* independence from the executive and the legislature. If such independence does not exist, the recourse to a court is of little use. The UN Basic Principles on the Independence of the Judiciary set out certain requirements that have to be met for a court to be considered 'independent': a) conditions of service and tenure; b) manner of appointment and discharge; and c) degree of stability and logistical protection against outside pressure and harassment. The problems linked with the independence of judges are diverse, both in quality and quantity, in different parts of the world, ranging from salary bargaining schemes to physical disappearances. The major conventions expressly require that tribunals be 'established by law'. The existence of a tribunal should not depend on the discretion of the executive branch but be based on an enactment by the legislature. Special courts are only tolerated under exceptional circumstances.

Impartiality

The judge must not have any personal interest in the case. The appearance of impartiality is of great importance; there must be impartiality in the objective sense (which examines whether the judge offered procedural guarantees sufficient to exclude any legitimate doubt of partiality), as well as the subjective sense (there should not be any appearance of impartiality).

Competence

The idea of competence has not been elaborated upon explicitly in international conventions or case-law. Indirectly, however, some important elements have been included in the case-law of international supervisory bodies. Supervisory bodies have pointed out, for example, that the statute law must fulfil basic conditions such as foreseeability and accessibility. Moreover, it has been recognised that case-law must be consistently applied in order for court decisions

not to be unforeseeable or resulting in the arbitrary deprivation of effective protection of applicants' rights.

2. QUALITY WITH REGARD TO PROTECTION OF THE RIGHTS OF THE PARTIES TO THE TRIAL

The quality of a court cannot be assured if the rights of the applicants are not assured. A number of individual rights and principles related to the right to a fair trial have been developed, including: the right to a fair hearing; the right to a public hearing and pronouncement of judgement; equality of arms; presumption of innocence; freedom from compulsory self-incrimination; the right to know the accusation; adequate time and facilities to prepare a defence; the right to legal assistance; the right to examine witnesses; the right to an interpreter; the right to appeal in criminal matters; the rights of juvenile offenders; no punishment without law; *ne bis in idem*; and the right to compensation for miscarriage of justice. A few of these rights are elucidated below.

Fair hearing

There must be an equal and reasonable opportunity for all parties to present a case. The right to a fair hearing depends on many issues, such as the presentation of evidence or the behaviour of the members of the court, public and press. Such fair hearing is often dependent on several other rights. The availability of competent legal assistance may, for instance, also be crucial in carrying out successful litigation in court.

Equality of arms

Equality of arms, which must be observed throughout the trial process, means that both parties are treated in a manner ensuring that they have a procedurally equal position during the course of the trial, and are in an equal position to make their case. It means that each party must be afforded a reasonable opportunity to present its case, under conditions that do not place it at a substantial disadvantage *vis-à-vis* the opposing party.

In criminal trials, where the prosecution has all the machinery of the state behind it, the principle of equality of arms is an essential guarantee of the right to defend oneself. This principle would be violated, for example, if the accused was not given access to the information necessary for the preparation of the defence, if the accused was denied access to expert witnesses, or if the accused was excluded from an appeal hearing where the prosecutor was present.

The difference in position between an accused and a 'civil' litigant must be emphasised. The former is more vulnerable to abuse by the state machinery, especially if he is deprived of his liberty.

Public hearing

A public hearing implies that oral hearings on the merits of the case are held in public, whereby members of the public, including press, can attend. Courts must make information about the time and venue of the oral hearings available to the public and provide adequate facilities (within reasonable limits) for the attendance of interested members of the public. Judgements are to be made public, with a few exceptions. The public's access to hearings may be restricted in certain narrowly defined circumstances. The ICCPR and the European Convention set out the limited number of grounds on which the press and the public may be excluded from all or parts of hearings. They include a) public morals; b) public order; b) juveniles; d) protection of the private life of the parties; and e) where publicity is found to prejudice the interests of justice. Under Article 8(5) American Convention, the right to a public trial in criminal proceedings may be suspended only 'in so far as necessary to protect the interests of justice'.

Presumption of innocence

The right to the presumption of innocence requires that judges and juries refrain from prejudging any case. It also applies to all other public officials. This means that public authorities, particularly prosecutors and police, should not make statements about the guilt or innocence of an accused before the outcome of the trial (see Human Rights Committee, General Comment 13, para.7). It also means that the authorities have a duty to prevent the news media or other powerful social groups from influencing the outcome of a case by pronouncing on its merits. In accordance with the presumption of innocence, the rules of evidence and conduct of a trial must ensure that the prosecution bears the burden of proof throughout a trial.

3. EFFICIENCY OF THE ADMINISTRATION OF JUSTICE

Reasonable time

The European Convention and the American Convention expressly require that hearings take place 'within reasonable time'. The ICCPR speaks of expeditious hearings, thereby also implying that justice be delivered expeditiously and within a reasonable time. A delay of justice is often equal to no justice at all; as the old saying goes: 'Justice delayed is justice denied.' It is especially important for a person charged with a criminal offence not to remain longer than necessary in a state of uncertainty about his/her fate. No other subject of human rights is so often the subject of case-law before the European Court as 'the reasonable time requirement'. The European Court and the other major supervisory mechanisms have assessed what is reasonable time on a case-by-case basis. Elements to be

considered include a) national legislation; b) what is at stake for the parties concerned; c) the complexity of the case; d) the conduct of the accused or the parties to the dispute; and e) the conduct of the authorities. Trials lasting as long as 10 years have been deemed reasonable, while others lasting less than one year have been found to be unreasonably delayed. Nevertheless, the wealth of case-law has resulted in an excellent set of tools to assess the efficiency of courts and signal the importance of an adequate administration of justice, including legislation allowing for efficiently functioning courts.

The above has shown clearly that for a good system of due process a large number of important rules have to be complied with. Such compliance has to be done in a consistent way. In turn, such consistency has lead to detailed analysis of the wording of the various standards. In the course of the past decades the various supervisory mechanisms have provided for an adequate interpretation of various concepts such as what are civil rights and obligations; what is suit at law; what is criminal and what a court is. Such interpretation is important as can be explained by the following example. As mentioned above, accused persons deserve, for understandable reasons, more protection than other parties participating in court cases. That can, however, induce a national legal order to erode such protection by introducing non-criminal legal norms and procedures. A government can then litigate someone for punitive damages instead of prosecuting the person concerned. Supervisory mechanisms have corrected such an approach by defining the concept of 'criminal charge' and giving it an autonomous meaning.

4. STANDARDS

The UDHR states in Article 10 that 'everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him'. The right to be presumed innocent is dealt with in Article 11 UDHR.

The right to a fair trial (including the right to be presumed innocent) has been translated into obligations in:

- The ICCPR: Article 14 (fair trial) and Article 15 (no retroactive penal laws).
- The ECHR: Article 6 (fair trial), Article 7 (no punishment without law), and Protocol No. 7 (rights of accused persons).
- ACHR: Article 8 (fair trial) and Article 9 (freedom from *ex-post facto* laws). According to Article 27 ACHR, judicial guarantees have been given non-derogable status, which means that certain aspects of the right to a fair trial are non-derogable.
- ACHPR: Article 7 (fair trial). Article 26 imposes a duty on states parties to guarantee the independence of the Courts and allow the establishment and improvement of appropriate national institutions entrusted with the promotion and protection of the rights and freedoms guaranteed by the African Charter.

One may further note various articles in the Rome Statute on the International Criminal Court (ICC), which define in detail principles of criminal justice (Articles 22-33) and principles of fair trial (Articles 62-67). The Rome Statute, which was adopted in 1998, provides the highest standard of rules on due process and reflects the case-law and doctrine developed since the adoption in the 1950s and 1960s of the major conventions.

In addition to the main human rights conventions, there are declarations, resolutions and other non-treaty texts that address the independence of the judiciary and fair trial. These include, for example, the Basic Principles on the Independence of the Judiciary (UNGA Resolution 40/146), the United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, which contains broad guarantees for those who suffer pecuniary losses, physical or mental harm (UNGA Resolution 40/34), Basic Principles on the Role of Lawyers and the Draft United Nations Body of Principle on the Right to a Fair Trial and to a Remedy.

In 1990, the Human Rights Commission appointed two rapporteurs to prepare a report on existing international norms and standards pertaining to the right to a fair trial. The rapporteurs' work included the examination of national practices related to the right to a fair trial. In 1994, the rapporteurs submitted a draft third optional protocol to the ICCPR, aiming at including the right to fair trial in the non-derogable rights provided for in Article 4(2) ICCPR. The right to fair trial is currently a derogable right and may be suspended in certain circumstances, such as times of public emergency under Article 15 ECHR (see I.§4.C).

5. SUPERVISION

The international supervisory mechanisms – notably the European Court and the Human Rights Committee – have dealt with a substantial amount of cases where the right to fair a trial has come into play.

At the UN treaty level, the Human Rights Committee has decided more cases regarding Article 14 than any other ICCPR right. Many of the cases concern complaints from persons on death row about the fairness of their trials (see, *e.g.*, *Levy* v. *Jamaica*, *Johnson (Errol)* v. *Jamaica* and *Thomas (Damien)* v. *Jamaica*). Moreover, the Human Rights Committee has issued two General Comments that are very important with regard to the right to a fair trial, General Comments 13 and 29. In General Comment 29, the Committee stated that, *inter alia*, some elements of the right to a fair trial that are considered fundamental principles, such as the presumption of innocence, should not be deviated from in emergency situations (General Comment 29, para. 11 and 16) and that 'it is inherent in the protection of rights explicitly recognized as non-derogable' in the Convention, that they 'must be secured by procedural guarantees, including often, judicial guarantees.' Therefore, provisions relating to procedural safeguards 'must never be subject to measures that would circumvent the protection of derogable rights.'

Like the Human Rights Committee, the European Court has adjudicated more cases concerning the right to a fair trial than any other right. Article 6 on the right to a fair trial is the article dealt with in most cases before the European Court. Elements developed through the case-law of the European Court include, for instance, a) access to court (a civil claim must be capable of being submitted to a judge, prohibition of denial of justice); b) fair hearing (equality of arms, right to be present at the trial); and c) the concept of 'criminal'. Moreover, in the recent years, more than 40% of the approximately 800 judgements the European Court issues every year contain aspects relating to reasonable time.

At the African level, the African Commission has adopted three resolutions with regards to fair trial. These resolutions elaborate upon Article 7(1) ACHPR and guarantee several additional rights, as well as elaborating upon the role of lawyers and judges in the implementation of the Charter and the strengthening of the independence of the judiciary. Moreover, two special rapporteurs have been appointed with mandates that touch upon the right to a fair trial: the Special Rapporteur on Extrajudicial, Summary, and Arbitrary Executions and the Special Rapporteur on Prisons and Conditions of Detention. In its communications, the African Commission has mainly dealt with issues concerning the presumption of innocence and the impartiality of the court.

The Inter-American Commission has dealt with a few issues under the right to a fair trial. When it has dealt with Article 8 ACHR, however, it has made it clear that it is not concerned with the correctness of a national court's decision, but whether that decision has been reached in accordance with the principles of due process of law. The elements of fair trial that the Commission has mainly dealt with are a) access to a court in the context of amnesty or impunity laws; b) right to hearing within a reasonable time; and c) competent, independent and impartial tribunals. In analysing the meaning of 'independent' and 'impartial', the Commission has emphasised the importance of the constitutional doctrine of the separation of powers *(e.g.* the 1983 report on the situation of human rights in Cuba).

NGOs like Amnesty International (www.amnesty.org) and Human Rights Watch (www.hrw.org) play an important role in developing and safeguarding the right to a fair trial. This is done both through research and documentation, such as the documentation of violations, which are brought to the attention of the various mechanisms. The International Commission of Jurists (www.icj.org) has identified itself above all with the independence of the judiciary.

B. The right to an effective remedy

1. THE EFFECTIVENESS OF THE ADMINSTRATION OF JUSTICE

The need for effective administration of justice may appear obvious but the absence of an effective administration of justice continues to plague numerous legal systems in the world. The lack of effective administration of justice is a continuous source of complaints before the international supervisory mechanisms. There are at least one hundred human rights treaties adopted internationally and regionally. Nearly all states are parties to some of them and several human rights norms are considered part of customary international law. However, like all laws, human rights law is violated. The increasing case-load before supervisory mechanisms is a clear indicator that individuals and victims are increasingly capable of bringing complaints against their governments for not complying with their international obligations.

The right to an effective remedy when rights are violated is itself a right expressly guaranteed by most international human rights instruments. The international guarantee of a remedy implies that a state that has violated a human right has the primary duty to afford an effective remedy to the victim. International tribunals and supervisory bodies play a subsidiary role; they only come into play when the state fails to afford required redress. The role of these international bodies, however, is important in protecting the integrity and consistency of the human rights system. Absence of effective remedy can create a climate of impunity, particularly when states intentionally and constantly deny remedies.

2. STANDARDS

The Universal Declaration states in Article 8 that 'everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted by the constitution or by law.'

The right to an effective remedy is found under many articles in the ICCPR. Article 2(3) provides the most highly elaborated general provision in human rights law. Moreover, one finds specific remedies in the ICCPR such as Article 6(4) on the right to apply for pardon, amnesty and commutation of the death sentence. Article 9(3) and (4) defines the right to *habeas corpus* and judicial review, Article 13 provides a remedy against expulsion, Article 14 guarantees fair trial and Article 14(5) defines the right to review of conviction and sentence. Both general and specific provisions on effective remedy can be found under other UN Conventions, such as Articles 2, 2(c) and 3 CEDAW; Article 6 CERD; Article 2 and 3 ICESCR; Article 12 and 13 CAT; Articles 2(2), 3, 4, 19, 20, 32; 37(d) CRC; and Articles 18, 19, 22 and 23 CMW.

The ACHPR has several provisions on remedies. Article 7 guarantees every individual the right to have his cause heard. Article 21 refers to the right to 'adequate compensation' in regard to 'the spoliation of resources of a dispossessed

people'. Article 26 imposes a duty on states parties to guarantee the independence of the courts, and allow the establishment and improvement of appropriate national institutions entrusted with the promotion and protection of the rights and freedoms guaranteed by the African Charter. The Protocol to the African Charter on the establishment of an African Court on Human and Peoples' Rights also affords effective remedies. Article 27 of the Protocol states that 'If the Court finds that there has been violation of a human or peoples' right, it shall make appropriate orders to remedy the violation, including the payment of fair compensation or reparation.' This provision is broader than all the current mandates to afford remedies to victims of human rights abuse. The ECHR defines the right to an effective remedy in Article 13, *habeas corpus* in Article 5 (4) and the right to appeal in Article 2 Protocol No. 7. The ACHR recognises the right to judicial protection in Article 25.

Except for Article 25 ACHR, which guarantees a right to recourse to 'courts and tribunals', other human rights conventions do not require that the remedy be 'judicial'. Article 2(3)(b) ICCPR, for instance, leaves a considerable margin of appreciation to each state by accepting 'judicial, administrative or legislative authorities' or 'any other authority provided for by the legal system' of the state. The same applies to the ECHR and the ACHPR.

In addition to the main human rights conventions, there are declarations, resolutions and other non-treaty texts that address the right to an effective remedy, such as the United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, which contains broad guarantees for those who suffer pecuniary losses, physical or mental harm (UNGA Resolution 40/34). Victims are entitled redress and to be informed of their right to seek redress.

3. SUPERVISION

The main purpose of remedial justice is to correct the harm done to a victim. Corrective justice generally aims at restitution or compensation for loss in order to help make things better for the victims and deter violators from engaging in future misconduct. The practice of supervisory bodies in awarding compensatory damages varies considerably. UN supervisory bodies, such as the Human Rights Committee recommend sometimes that states pay compensation or afford other remedies, but they never specify amounts that may be due or other forms of redress. Regional human rights bodies, such as the European and Inter-American Courts have the power to designate remedies and compensation that the state must comply with.

At the United Nations level, the Human Rights Committee has indicated in individual cases that a state that has engaged in human rights violations must undertake to investigate the facts, take appropriate action, and bring to justice those found responsible for the violations. Guarantees of non-repetition are an important aspect of the Committee's approach to remedies; it frequently calls upon states to take measures in order for similar violations not to occur in the

future (see, *e.g.*, *J.D. Herrera Rubio* v. *Colombia*). Moreover, in a series of prisoner cases involving Jamaica and Trinidad and Tobago, the Committee insisted that the applicants receive an effective remedy and suggested suitable remedies such as a) release; b) further measures of clemency; c) payment of compensation; d) improved conditions of confinement; e) release from prison; f) medical treatment, and g) commutation of the sentence (*e.g.*, *Thomas* v. *Jamaica*, *LaVenda* v. *Trinidad and Tobago*, *Leslie* v. *Jamaica*, and *Matthews* v. *Trinidad*). In addition, the Human Rights Committee states in General Comment 29 that even though the right to an effective remedy is not mentioned in the list of non-derogable provisions in Article 4, paragraph 2, 'the State party must comply with the fundamental obligation, under article 2, paragraph 3, of the Covenant to provide a remedy that is effective' during a state of emergency (General Comment 29, para. 14).

At the regional level, the European Court has read its mandate narrowly with regard to remedies and has applied its powers in a restrictive fashion. The Court, for instance, has regularly stated that it is limited to financial compensation and is not empowered to order other remedial measures. It rejected requests, for instance, that the state should be required to refrain from corporal punishment of children or to take steps to prevent similar breaches in the future (see, *e.g.*, *Campbell and Cosans* v. *The United Kingdom*). It also refused to insist that a state judged to have wrongfully expelled an alien allow the victim to rejoin his family (see, *e.g.*, *Mehemi* v. *France*). Recently, however, the Court seems to be indicating that a state may be required implicitly to take such steps (see, *e.g.*, *Papamichalopoulos et al.* v. *Greece*).

Both the Inter-American Commission and Court have recommended remedies. The Inter-American Commission has in recent years started to negotiate friendly settlements involving wide-ranging remedies and large compensatory damages. In addition or as an alternative to monetary compensation, the Commission has recommended reform of court systems, investigation, prosecution and punishment of violators, adoption or modification of legislation and guarantees for the safety of witnesses. Of all the supervisory mechanisms, the Inter-American Court has made the broadest use of its jurisdiction concerning remedies. It has awarded pecuniary and non-pecuniary damages, granting monetary and non-monetary remedies. Moreover, the Court has been innovative in controlling all aspects of the awards; including setting up trust funds, and maintaining cases open until the awards on remedies have been fully implemented.

The African Commission has made specific recommendations on remedies in several cases, including demanding the release of persons wrongfully imprisoned, and repeal of laws found to be in violation of the Charter. The Commission has not discussed the scope of its remedial powers, but in a case against Nigeria, it indicated it would follow up to ensure state compliance with its recommendations (*Constitutional Rights Project (in respect of Zamani Lakwot and 6 Others)* v. *Nigeria, Communication 87/93*).

CHAPTER 2

THE RIGHTS TO FREEDOM OF EXPRESSION AND RELIGION

This chapter includes two rights: a) the freedom of opinion and expression and b) the freedom of conscience and religion. Although these are two distinctive rights, they are in the same group as they both entail essential conditions for individual personal development. It is important to note, however, that the freedom of expression is subject to more restrictions than the freedom of religion.

A. The right to freedom of opinion and expression

The freedom of expression is a right without which other rights are difficult to acquire and defend. The right to freedom of expression is rooted in the 17th century struggle of European legislators for freedom of speech. Since then, the world has seen a continuing struggle for the freedom of expression, including the freedom of speech and freedom of the press, often going hand in hand with the endeavour to limit the power of governments. The freedom of expression can be considered an essential aspect of the individual's defence against government, just as the suppression of the freedom of expression is essential to tyranny. As freedom of expression is a foundation for religious and political activities, it is often exercised in concert with the right to freedom of thought and assembly.

Under present international conventions, state obligations in relation to freedom of expression are absolute and immediate. At the same time, as with other forms of liberty, completely unrestricted freedom of expression may lead to the infringement on the rights of others. The freedom of expression has been hedged in by a number of limitations and restrictions, often more extensively than other rights. Historically, most limitations have dealt with the expression of sentiments contrary to prevailing institutions or religious, political or other beliefs. In addition, in times of war, governments often restrict the freedom of expression in the interest of national security. As a cornerstone of democracy, the complexity and importance of freedom of expression has lead to extensive case-law before national courts and international supervisory mechanisms.

1. STANDARDS

Article 19 of both the UDHR and the ICCPR establish the freedom of opinion and expression. Article 19 UDHR stipulates: 'everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.' The CRC and CMW set out freedom of expression in Article 13. In addition, CRC stipulates that states have to assure that a child who is capable of forming his or her own views can express those views freely and that these views be taken into account in accordance with the age and maturity of the child (Article 12).

The regional conventions also contain provisions regarding the freedom of expression: Article 10 ECHR, Article 13 ACHR, and Article 9 ACHPR.

The freedom of expression and opinion is a complex right that includes the freedom to seek, receive and impart information and ideas of all kinds through any media. The exercise of this right 'carries with it special duties and responsibilities' (see Article 19 ICCPR and Article 10 ECHR). Therefore, in general, certain restrictions or limitations on the freedom of expression are permitted under human rights law. Article 19 ICCPR stipulates that these limitations 'shall only be such as are provided by law and are necessary: a) for respect of the rights or reputations of others; b) for the protection of national security of public order (*ordre public*), or of public health or morals'. Other conventions add to these limitations: 'for the moral protection of childhood and adolescence' (Article 13(4) ACHR) and for the restriction of any propaganda for war and any advocacy of national, racial, or religious hatred that constitute incitements to lawless violence or to any other similar illegal action against any person or group of persons on any grounds including those of race, colour, religion, language, or national origin (Article 13(5) ACHR); for the prevention of disclosure of information received in confidence; and for maintaining authority and impartiality of the judiciary (Article 10 ECHR). In addition, Article 10 ECHR explicitly gives the state broad discretion in licensing of the media.

In the Inter-American system, the Inter-American Court has dealt with freedom of expression in Advisory Opinion No. 5 on Membership in an Association Prescribed by Law for the Practice of Journalism.

Under the African system, the Declaration of Principles on Freedom of Expression in Africa was adopted by the African Commission in 2002. It stresses the 'fundamental importance of freedom of expression as an individual human right, as a cornerstone of democracy and as a means of ensuring respect for all human rights and freedoms'. The Declaration seeks to guarantee the freedom of expression and addresses, *inter alia*, limitations to the right, the obligation of states to promote diversity of information and private broadcasting, freedom of information, independence of regulatory bodies for broadcast and telecommunications, defamation laws, complaints about media content and attacks on media practitioners.

The OSCE also addresses freedom of expression. In the Helsinki Final Act (1975), principles guiding relations between participating states include provisions on conditions for journalists and dissemination of information. Both the Madrid document (1983) and the Vienna document (1989) include provisions encouraging exchanges in the media field. Likewise, states committed themselves to facilitating the work of journalists and respecting their copyrights. Paragraph 9 of the 1990 Copenhagen document stipulates that '[e]veryone has the right to freedom of expression including the right to communication. This right will include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers.' In order to ensure a high level of commitment with the norms and standards accepted by the OSCE participating states, the position of the OSCE Representative on Freedom of the Media was established in December 1997. The task of the Representative on Freedom of the Media is to observe relevant media developments in OSCE participating states with a view to providing early warning on violations of freedom of expression. In addition, he/she has to assist participating states by advocating and promoting full compliance with OSCE principles and commitments regarding freedom of expression and free media.

Recently, both the CoE and the OSCE have issued declarations on the right to freedom of expression on the Internet. In the CoE Declaration on Freedom of Communication on the Internet from 30 May 2003, states declare that they must abide by principles that establish, *inter alia,* that internet content should not be subject to restrictions that go further than restrictions on classical media and that authorities should not deny access to information and other communication on the internet. The OSCE Recommendation on Freedom of the Media and the Internet (14 June 2003) expresses alarm regarding on-line censorship.

In several international fora, particular attention has been paid to the protection of professionals, particularly journalists, whose physical integrity is at stake when freedom of expression is insufficiently guaranteed. The First Protocol (1977) to the 1949 Geneva Conventions provides additional protection to civilian journalists working in areas of armed conflict (war correspondents employed by the military are regarded as 'soldiers').

Some UN specialised agencies are also committed to the promotion of freedom of expression. For example, UNESCO has promoted freedom of expression, press freedom, independence and pluralism of the media as part of its activities. UNESCO has adopted several resolutions in this regard (see, *e.g.* resolutions 'Promotion of independent and pluralist media' (1995) and 'Condemnation of violence against journalists' (1997)).

2. SUPERVISION

The freedom of expression is reduced by possible limitations under several international standards mentioned above. Moreover, freedom of expression and its internationally accepted limitations can be distorted by government initiatives

through propaganda, control of the media and through various other measures aimed at restricting the press, *e.g.* licensing requirements, economic measures or restrictions on access to information. The right to freedom of expression has engendered a substantial body of case-law, in which both the right itself as well its limitations have been further defined.

The Human Rights Committee has dealt with many cases dealing with the right to freedom of expression. It has, for instance, found that imprisoning a trade leader for supporting a strike and condemning a government threat to send in troops violated his right to freedom of expression (*Sohn* v. *Republic of Korea*), but convicting a person under a law that criminalised contesting the existence of the Holocaust served a legitimate aim (*Faurisson* v. *France*). In another case, the Committee found inadmissible a complaint alleging a violation where the dissemination of anti-Semitic messages via recorded telephone messages was prohibited. The complaint was found inadmissible as hate speech was clearly incompatible with the rights protected in the Covenant (*J.R.T. and the W.G. Party* v. *Canada*). The Committee has stated that commercial expression, such as outdoor advertising, is protected by freedom of expression (see, *i.e. Ballantyne et al.* v. *Canada*) and that the right to receive information was violated when a journalist was denied full access for no disclosed reason to parliamentary press facilities in his country (*Gauthier* v. *Canada*).

Under the auspices of the European system, the European Court has stated that freedom of expression:

> [C]onstitutes one of the essential foundations of such a (democratic) society, one of the basic working conditions for its progress and for the development of every man. [...] It is applicable not only to 'information' or 'ideas' that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no 'democratic society' (*Handyside* v. *The United Kingdom*).

Many cases have been brought before the former European Commission and the Court regarding the freedom of expression; several dealing with the rights of journalists to freedom of expression. In a case of Austrian journalists found guilty in domestic courts for defamation, the Court found that politicians may be subject to stronger public criticisms than private citizens (see, *i.e. Lingens and Oberschlick* v. *Austria).* In another case, the Court found that convicting a defence counsel of defamation for strongly criticising a public prosecutor's decision not to charge a potential defendant, who was then able to testify against her client, violated her right to freedom of expression (*Nikula* v. *Finland*). The Court has found that state monopoly on broadcasting constitutes an interference with the right to freedom of expression (*Informationsverein Lentia et. al.* v. *Austria*); it has found restrictions on the rights to freedom of expression of public employees justified (see, *i.e. Ahmed et al.* v. *The United Kingdom*). Regarding the right to receive information it has found that this right does not necessarily

impose a positive duty on the state to collect and disseminate information (*Guerra* v. *Italy)*. In a case in 2003, the Court found that Austrian courts had overstepped their margin of appreciation by issuing an injunction on a company banning it from comparing its price to that of a competitor without also mentioning differences in their reporting styles (*Krone Verlag GmbH & Co KG* v. *Austria (no. 3)*).

Cases brought before the Inter-American Commission have among other issues dealt with violence against or murder of journalists; intimidation, threats, and harassment (see, *i.e. Bishop Gerardi* v. *Guatemala (Case 7778)*). The Interamerican Court has dealt with preventive censorship in a case where the exhibition of a 'blasphemous' film was prevented. In this case, the Court stated that although some prior censorship is allowed, prior censorship on grounds of blasphemy falls outside the permitted category of 'moral protection of the young'. The Court therefore found a violation of the right to freedom of expression (*Olmedo Bustos et al.* v. *Chile ('The Last Temptation of Christ' Case)*).

The Court has issued an advisory opinion finding that mandatory membership in a professional association for the practice of journalism could not be justified as it deprived non-licensed journalists of their rights under the American Convention. The Court has also dealt with indirect restrictions on freedom of expression; the right to the truth; and the right to reply. As regards the Inter-American Court, the freedom of expression

> has both an individual and a social dimension: it requires that, on the one hand, no one may be arbitrarily harmed or impeded from expressing his own thought and therefore represents a right of each individual; but it also implies, on the other hand, a collective right to receive any information and to know the expression of the thought of others. These two dimensions must be guaranteed simultaneously (*Ivcher Bronstein* v. *Peru*).

In the African system, the African Commission on Human and Peoples' Rights has addressed the right to freedom of expression in diverse realms. It has, *inter alia,* found the detention of members of opposition parties and trade unions under legislation outlawing all political opposition during a state of emergency a violation of the freedom of expression; it has found that the failure of a state to investigate attacks against journalists violates their right to express and disseminate information and opinions and also violates the public's right to receive such information and opinions (*Sir Dawda K. Jawara* v. *The Gambia Communications 147/95 and 149/96*). The Commission has held that state harassment with the aim of disrupting legitimate activities of an organisation that informs and educates people about their rights constitutes a clear violation of the right to freedom of expression. Finally, in a case regarding the trial and execution of community organisation leaders in the wake of a rally, the Commission stressed the close relationship between the right to freedom of expression and the rights to association and assembly. Because of that relationship the Commission found that the severe punishments inflicted as a result of the

rally were inconsistent with the right to freedom of expression (*International Pen, Constitutional Rights Project, Interrights on behalf of Ken Saro-Wiwa Jr and Civil Liberties Organisation* v. *Nigeria, Communications 137/94, 139/94, 154/96 and 161/97*). In discussing the importance of freedom of expression, the Commission has stated: 'Freedom of expression is vital to an individual's personal development, his political consciousness and participation in the conduct of public affairs in his country.' (*Mediarights Agenda et. al.* v. *Nigeria, Communications 105/93, 128/94, 130/94 and 152/96*).

Recognising the importance of freedom of expression, international fora and national governments have sought to promote additional standards to protect particular elements of the right. Several governments have enacted legislation to improve access to information; to provide adequate access to media; to protect employees from reprisals for disclosing illegal activities of their employers; to provide data protection so that individuals have access to their personal files held by public authorities and to ensure that such information is withheld from all persons not expressly entitled to it.

International organisations have addressed the implementation and supervision of the right to freedom of expression by, for instance, appointing experts on the issue. In 1993, the Human Rights Commission appointed a Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression (Resolution 1993/45 of 5 March 1993). The mandate was extended by the Commission on Human Rights in 2002, at its 58th session (Resolution 2002/48). The rapporteur has stated that 'the exercise of the right to freedom of opinion and expression is a clear indicator of the level of protection and respect of all other human rights in a given society' and has touched upon such issues as how the right to freedom of opinion and expression helps promote and strengthen democratic systems, and its benefits in other areas, such as in the effectiveness of education and information campaigns on HIV/AIDS prevention.

In 1997, the Inter-American Commission on Human Rights created the Office of the Special Rapporteur for Freedom of Expression. The mandate of the Special Rapporteur is to stimulate awareness of the importance of observance of the right of freedom of expression, to make recommendations to states for adoption of progressive measures to strengthen the right, to prepare reports and carry out studies, and to respond to petitions or other violations of the right in OAS member states. The Special Rapporteur may also solicit that the Inter- American Commission requests precautionary measures from the member states, to protect the personal integrity of journalists and media correspondents who are facing threats or the risk of irreparable harm.

Within the OSCE framework, standards have been drawn up to protect journalists and much effort has been devoted to promoting the exchange of ideas and expertise on actual implementation of the freedom of the press. The OSCE established the position of Representative on Freedom of the Media in 1997. The function of the Representative is to observe relevant media developments in OSCE participating states with a view to provide early warning on violations

of freedom of expression. The Representative also assists states by advocating and promoting full compliance with OSCE principles and commitments regarding freedom of expression and free media (see II.§5).

The UN Special Rapporteur on the Promotion and Protection of the Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media, and the OAS Special Rapporteur on Freedom of Expression issued a joint declaration on 18 December 2003, condemning the continued attacks on journalists, and the possible challenge to editorial independence posed by concentration of media ownership. They also recognised the interdependence of a free media and an independent judiciary, and that concentration in ownership of the media and the means of communication might challenge editorial independence. In addition, they condemned criminal defamation as an unjustifiable restriction to freedom of expression.

B. The right to freedom of conscience and religion

The guarantees of freedom of conscience and religion are closely related to other substantive rights. For instance, the rights to freedom of expression, assembly and association are fundamental to holding religious beliefs and practising one's religion. Thoughts and views are intangible as long as they have not been expressed, and convictions are valuable for a person only if he or she can express them. The private freedom of thought and religion is an absolute right that does not permit any limitation. The guarantee of the value of freedom of thought and religion implies that one cannot be subjected to a treatment intended to change one's process of thinking, be forced to express thoughts, to change opinion, or to divulge a religious conviction; thus, the right to freedom of thought, conscience, religion, belief and opinion is closely associated with the right to privacy. No sanction may be imposed holding any view, or on the change of a religion or conviction; and the freedom of thought and religion protects against indoctrination by the state.

The public aspect of the freedom, the right to manifest one's belief in worship, observance, practice or teaching, is subject to limitations and defining the meaning of the freedom is complex; for instance, may refusal to serve in the military or pay taxes be justified on grounds of religion? Many states include guarantees for the right to freedom of thought, conscience, religion and belief in their constitutional traditions; in laws and regulations provisions are incorporated to prevent and punish interference with legitimate manifestations of religion or belief. Nevertheless, violations of the principles of non-discrimination and tolerance in the area of religion or belief are extensive; millions of people enjoy the freedom of thought, conscience, religion and belief only to a limited extent. Most human rights conventions do allow fewer limitations to freedom of religion than to comparable rights such as freedom of assembly and freedom of expression.

In the last decades increasing political attention has been given to the freedom of religion, notably in Europe, in the light of religious intolerance.

1. STANDARDS

One of the first standards for protection against religious intolerance was the founding document of the Republic of the United Netherlands, the Union of Utrecht from 1579, which stipulated that no one will be persecuted because of his religion. In 1648, in the Treaty of Westphalia, a minimum of freedom of religion was guaranteed: the right to freedom of religion in private and equal rights in all other fields of public life, regardless of religion. In the 18th and 19th centuries, several other treaties protecting religious rights followed.

With the founding of the United Nations, protection against religious intolerance found its way into modern international standard setting. The freedom of religion or belief is expressly recognised in Article 18 UDHR and, *inter alia*, further defined in Article 18 ICCPR.

Article 27 ICCPR refers, *inter alia,* to religious minorities and stipulates that persons belonging to such minorities shall not be denied the right to profess and practice their religion. Article 14 CRC recognises the right of the child to freedom of thought, conscience and religion and the right of the parents/legal guardians to provide guidance to the child in the exercise of this right. Article 12 CMW recognises the right of migrant workers and their family members to freedom of thought, conscience and religion. In addition, religious groups are protected under the Convention on the Protection and Punishment of the Crime of Genocide (1948) (Article 2).

In 1981, the UNGA adopted the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief after a long process of drafting. Progress had been very slow as the issue of freedom of conversion or change of religion was a major obstacle to consensus. At length, explicit reference to the freedom to change one's religion or belief was excluded though Article 8 confirms, by implication, the continuing validity of the freedom to change one's religion. The Declaration confirms that the right of freedom of thought, conscience and religion includes the freedom of everyone 'to have a religion or whatever belief of his choice' and that 'no one shall be subjected to discrimination on grounds of religion or belief, by any State, institution, group of persons or a person'.

Another relevant document is the Declaration on the Right to Persons Belonging to National or Ethnic, Religious and Linguistic Minorities (1992) emphasising, among other things, obligations of states to protect and promote the religious identities of persons belonging to minorities within their territories.

All regional conventions contain provisions regarding the freedom of thought and religion: Article 9 ECHR defines the right to freedom of thought, conscience and religion in the same words as Article 18 ICCPR. The First Protocol to the ECHR includes a provision ensuring education and teaching in conformity with the parents' religious and philosophical convictions. Article 12 ACHR and Article

8 ACHPR define the right similarly. These conventions also set out restrictions; for instance, Article 12 ACHR stipulates that these freedoms 'may be subject only to the limitations prescribed by law that are necessary to protect public safety, order, health, or morals, or the rights or freedoms of others'.

The OSCE framework also addresses freedom of thought and religion. For instance, Principle VII of the OSCE Helsinki Final Act (1975) stipulates that the participating states 'will recognise and respect the freedom of the individual to profess and practise, alone or in community with others, religion or belief, acting in accordance with the dictates of his own conscience'. States also pledge to respect the freedom of religion and belief of persons belonging to national minorities living in their territory. Another example is Article 16 of the Vienna Document (1989), which stipulates that states will take effective measures to prevent and eliminate discrimination against individuals and communities on the grounds of religion or belief, and that they have to foster a climate of mutual tolerance and respect between believers of different communities, as well as between believers and non-believers. Furthermore, the CSCE Charter of Paris for a New Europe (1990) affirms that every individual, without discrimination, has the right to freedom of religion and thought.

2. SUPERVISION

The international supervisory bodies have dealt with a number of communications regarding violations of the freedom of thought and religion. The Human Rights Committee has dealt with several individual communications regarding freedom of thought and religion. For instance, the Committee has found forbidding prisoners wearing a beard, worshipping at religious services and taking away their prayer books a violation of this right. The Committee affirms that: '[T]he freedom to manifest religion or belief in worship, observance, practice and teaching encompasses a broad range of acts and that the concept of worship extends to ritual and ceremonial acts giving expression to belief, as well as various practices integral to such acts' (*Boodoo* v. *Trinidad and Tobago*). The Committee has, however, found that requiring a Sikh who wears a turban in daily life to wear a safety-helmet at work does not violate his right to religious freedom (*Singh Bhinder* v. *Canada*).

In recent times the Committee has departed from its previous jurisprudence stating that conscientious objection to military service can be derived from Article 18 ICCPR (General Comment 22). In this General Comment, the Committee, *inter alia,* 'views with concern any tendency to discriminate against any religion or belief for any reasons, including the fact that they are newly established, or represent religious minorities that may be the subject of hostility by a predominant religious community'. The Committee states, *inter alia,* that Article 18(2) bars coercion that would impair the right to retain one's religion or belief, including threats of violence and that designated state religions may not serve as justifications of violations of the right to freedom of religion.

The Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief stipulates that all states have to take effective measures to prevent and eliminate discrimination on the grounds of religion or belief. As a UNGA resolution, the Declaration has no machinery for supervision or implementation of the principles and measures it stipulates but, in 1986, the Human Rights Commission appointed a Special Rapporteur on Religious Intolerance whose mandate is based on the Declaration. The Special Rapporteur, *inter alia,* writes reports, carries out country visits, receives communications and makes recommendations to states.

Within the regional systems several cases regarding freedom of thought and religion have been brought before the supervisory mechanisms. The European Court of Human Rights has received numerous cases regarding the right to freedom of conscience and religion, many of which have dealt with the freedom of religion in Greece. The Court has found that states may not impose overly stringent requirements for operating a place of worship (*Manoussakis* v. *Greece*). Article 9 protects non-religious beliefs; the Court has said that the values of the article are the foundation of a democratic society: 'It is in its religious dimension, one of the most vital elements that go to make up the identity of believers and their conception of life, but is also a precious asset for atheists, agnostics, sceptics and the unconcerned' (*Kokkinakis* v. *Greece*).

Another aspect of religious freedom is the right of parents to ensure that the religious or moral education of their children conforms to their own belief. Here the Court has stated that the state is forbidden to pursue an aim of indoctrination that might be considered as not respecting the parents' religious and philosophical convictions (*Kjeldsen, Busk Madsen and Pedersen* v. *Denmark*). Further to indoctrination, the Court has made a distinction between 'improper proseltysm' and 'bearing witness to Christianity', the former possibly entailing brainwashing or violence (*Kokkinakis* v. *Greece*).

Finally, in a controversial communication regarding assisted suicide, it was stated that freedom of thought under Article 8, that had hitherto included beliefs such as veganism and pacifism, could be applied to the applicant's belief in and support for the notion of assisted suicide for herself. This was rejected by the Court as her claims did not involve a form of manifestation of a religion or belief, through worship, teaching, practice or observance as described in the ICCPR *(Pretty* v. *The Union Kingdom),* citing, *inter alia,* a case where the European Commission had found that not all acts which are motivated by religion or belief constitute 'religious practice' (*Arrowsmith* v. *The United Kingdom*).

In regard to the right to freedom of conscience and religion under the Inter-American system, the Commission has ruled on a number of cases concerning Jehovah's witnesses and legitimate limitations of the right. The Commission has found that prosecuting members of that religion for refusing to swear oaths of allegiance, recognise the state and its symbols and to serve in the military is a violation of the right (*Jehovah's Witnesses* v. *Argentina (Case 2137)*).

The African Commission has also dealt with the freedom of religion; it has, for instance, found harassment of Jehovah's witnesses and religious leaders, assassinations and death threats aimed at them and destruction of religious structures in violation of the right (*Free Legal Assistance Group, Lawyers' Committee for Human Rights, Union Interafricaine des Droits de l'Homme, Les Témoins de Jehovah* v. *Zaire, Communications 25/89, 47/90, 56/91, 100/93*). It has also stipulated that the expulsion of political activists was denying them, *inter alia*, the right to freedom of conscience in violation of Article 8 of the African Charter (*Amnesty International* v. *Zambia, Communication 212/98*).

CHAPTER 3

THE RIGHTS TO INTEGRITY

Respect for the integrity of the person requires states to protect the right to life and respect the prohibition of torture and ill-treatment. Both rights are dealt with in this section. The rights to integrity are of utmost importance. This is reflected by the fact that a) unlike some other rights which contain clauses acknowledging the permissibility of restricting them on grounds such as the need to maintain public order, under no circumstances is it possible to justify restrictions to these rights and also because b) these rights cannot be derogated from in time of public emergency. These two rights are considered to be norms of *jus cogens,* that is, fundamental norms binding on all states and which cannot be abrogated even by domestic law or treaty.

A. The right to life

The right to life is considered a fundamental human right, because without it, enjoyment of all of the other rights and freedoms established in international human rights conventions would be rendered nugatory; there can be no rights if there is no life.

Given the fundamental importance of the right to life to the protection of human rights, under most human rights instruments the right to life is a supreme right from which no derogation is permitted, even in time of a public emergency threatening the life of the nation (see Article 4(2) ICCPR, Article 15(2) ECHR and Article 27(2) ACHR).

One aspect that is generally overlooked with respect to the right to life pertains to the interpretation of the right to life itself. The Human Rights Committee issued a statement to the effect that under the ICCPR the expression 'inherent right to life' should not be understood in a restrictive manner, and that the protection of the right to life entails both a negative obligation not to take someone's life and a positive obligation to protect the right to life, except in certain exceptional cases. In relation to positive obligations, the Committee considered that states parties should take all possible measures to reduce infant

mortality and to increase life expectancy, especially measures to eliminate malnutrition and epidemics (see General Comment 6).

Another aspect that is very important with regard to the right to life is remedy for violations. With regard to the right to life, the Human Rights Committee has asserted that purely disciplinary and administrative remedies cannot be deemed to constitute adequate and effective remedies within the meaning of Article 2(3) ICCPR. The Inter-American Court of Human Rights has stated that 'individuals lack true freedom if they cannot design life according to their own goals and strive to achieve their desires'; compensation seeks to restore the victim to his/her original position enjoyed before the violation or to ensure that the victim gets other redress that corresponds to the wrong suffered.

1. STANDARDS

Article 3 Universal Declaration provides that 'everyone has the right to life, liberty and security of person.' In all human rights conventions, the right to life is dealt with separately from the right to liberty and security. The right to life is further developed in several human rights instruments, such as Article 6 ICCPR, Article 6 CRC, Article 9 CMW, Article 2 ECHR, Article 4 ACHR and Article 4 ACHPR.

The protection of the right to life will be examined under the following sub-sections: a) the right not to be arbitrarily killed by the state; b) disappearances; c) death penalty or capital punishment; and d) positive obligations arising from the right to life. In addition, this section will examine some problems of interpretation that arise with regard to the right to life: when the protection of life starts and when it ends. Therefore attention will be paid to a) the unborn child/abortion; and b) euthanasia/the right to die.

The right not to be arbitrarily killed by the state

Article 6(1) ICCPR states that no one shall be 'arbitrarily' deprived of his life. Article 4 declares that no derogation from Article 6 is allowed, not even in an emergency situation. Article 2 European Convention prohibits the 'intentional deprivation' of life and states that everyone shall have the right to life protected by law, and limits the situation in which deprivation of life is acceptable. Article 15 ECHR provides that this right is non-derogable in a war or state of emergency, except in respect of deaths resulting from lawful acts of war.

Article 4(1) ACHR provides that every person has the right to have his life respected. Article 27 provides that Article 4 is non-derogable in times of war, public danger or other emergency. Article 4 ACHPR states that human beings are inviolable. Everyone is entitled to respect for his/her life and the integrity of his/her person, and no one may be arbitrarily deprived of this right.

Special attention needs to be paid to extra-judicial executions, the paradigm violation of the right to life. These involve 'killings committed, condoned or

acquiesced by governments', in the UN system, the expression 'extra-judicial, summary and arbitrary executions', is used. Originally, these terms did not fully overlap, but over the years the distinction between the three elements has become blurred. Even one of the most important international instruments in this area, the Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions, fails to define these types of executions. The character of extra-judicial executions has undoubtedly changed; these crimes have become more and more related to situations of armed conflict or civil war.

In 1982, the UN Commission on Human Rights appointed a Special Rapporteur on Extra-legal, Summary and Arbitrary Executions. The Special Rapporteur carries out his mandate mainly on the basis of information brought to his attention by non-governmental organisations, Governments, individuals and intergovernmental organisations. Communications received by the Special Rapporteur contain specific cases of alleged extra-judicial, summary or arbitrary executions, death threats, and/or general information about issues related to the right to life. All information received is examined and analysed by the Special Rapporteur before being transmitted to the Government concerned. The Special Rapporteur's work includes the examination of individual cases and the implementation of on-the-spot visits. The Special Rapporteur also regularly sends 'urgent messages' in cases of imminent executions.

At the UN level, two instruments deserve to be noted in this context: the Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions (1989) and the Basic Principles on the Use of Force and Firearms by Law Enforcement Officials (1990). Although these instruments are not legally binding, they assist in determining what constitutes unlawful deprivation of life.

Among the various categories of killings by state officials, international human rights law especially condemns those carried out on racial grounds. Article 5 CERD obliges states to take measures to prohibit racial discrimination and provide protection against violence or bodily harm 'whether inflicted by government officials or by any individual, group or institution'. The Convention on the Suppression and Punishment of the Crime of Apartheid defines 'apartheid' as a 'crime against humanity' and prohibits the killing of members of a racial group (Article II). Similarly, the Convention on the Prevention and Punishment of the Crime of Genocide defines the offence of genocide to entail a number of acts 'committed with the intent to destroy, in whole or in part, a national, ethnical, racial or religious group as such', including 'killing members of the group' (Article I).

It is important to note that not all killings by states belong to the category of extra-legal executions. In certain circumstances, human rights law does not condemn killings committed by state agents. It is recognised that in certain circumstances, for example, law enforcement officials may have recourse to the use of force. In this regard, it is worth noting that unlike the other human rights instruments, the European Convention defines which type of killing would not

be arbitrary and allows the use of force, only when it is absolutely necessary, in three specific situations: a) in defence of any person from unlawful violence; b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained; and c) in action lawfully taken for the purpose of quelling a riot or insurrection.

'Disappearances'

'Disappearances' (or 'unacknowledged detention') have been defined as follows:

> [T]he act of depriving a person or persons of his or their freedom, in whatever way, perpetrated by agents of the state or by persons or groups of persons acting with the authorisation, support, or acquiescence of the state, followed by an absence of information or a refusal to acknowledge that deprivation of freedom or to give information on the whereabouts of that person, thereby impeding his or her recourse to the applicable legal remedies and procedural guarantees.' (Article 2 Inter-American Convention on the Forced Disappearance of Persons).

'Disappearances' are not new in the history of human rights violations. A number of circumstances may be identified under which disappearance occurs most frequently. The most prominent of these are situations of internal armed conflict, declarations of a state of emergency and high levels of militarization. The investigation of disappearances is often hampered by the accompanying violence and chaos. It may be further complicated by the fact that many disappearances are committed by non-governmental entities. On the other hand, official authorities (not necessarily the central government) are often responsible for disappearances and extra-judicial executions. Ineffectiveness of the judiciary, including the lack of judicial independence, ineffective protection of the right of *habeas corpus*, non-compliance with immediate and accessible registration of detainees, and impunity for violations, are factors that facilitate the actions of perpetrators.

It has proved very difficult to find a definition of disappearances that encompasses all the elements of this crime. 'Disappearances' involve violations of the right to liberty and security of person, will often involve torture and other ill-treatment of the 'disappeared person' (including as a result of the very fact of being 'disappeared' and isolated from one's family for a prolonged period), and often end in death. Indeed, 'disappeared' persons often never reappear. Because the fate and whereabouts of 'disappeared' persons remain unknown, it is considered a continuing crime (Article 3 Inter-American Convention on Forced Disappearance of Persons). 'Disappearances' also impact on society as a whole by creating a culture of fear and insecurity. Finally, the impact on family members of disappearance may lead to such anguish as to amount to torture or other ill-treatment.

In the early 1990s, the international community took steps to develop further standards that would explicitly prohibit the practice of disappearances, and deal

with both the victims and the perpetrators. In 1992, the UN Commission on Human Rights adopted a Declaration on the Protection of All Persons from Enforced Disappearances. At the Inter-American level, the Convention on the Forced Disappearance of Persons was adopted in 1994; it established the definition of enforced disappearances included at the beginning of this section.

The Rome Statute of the International Criminal Court defines 'enforced disappearance of persons' as 'the arrest, detention or abduction of persons by, or with the authorisation, support or acquiescence of, a State or a political organisation, followed by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of those persons, with the intention of removing them from the protection of the law for a prolonged period of time' (Article 7(2)(i)).

The Human Rights Committee also elaborates on the obligation of states parties with regard to disappearances in its General Comment 6 on the right to life. It requires states to take specific and effective measures to prevent the disappearances of individuals. They should establish effective facilities and procedures to thoroughly investigate cases of missing and disappeared persons in circumstances that may involve the violation of the right to life.

Although 'disappearances' sometimes lead to extra-judicial executions, this is not always the case: in some instances, 'disappeared' persons who have been presumed killed or officially declared dead have later returned alive. However, extra-judicial executions and disappearances share two major characteristics: the (virtual) elimination of political opponents (real or assumed), and the denial of accountability.

Within the UN system there is a charter-based body that deals specifically with disappearances: the Working Group on Enforced and Involuntary Disappearances. The basic mandate of this Working Group is to assist the relatives of disappeared persons to ascertain the fate and whereabouts of their missing family members. For this purpose, the Working Group receives and examines reports of disappearances submitted by relatives of missing persons or human rights organisations acting on their behalf. After determining whether those reports comply with a number of criteria, the Working Group transmits individual cases to the governments concerned, requesting them to carry out investigations and to inform the Working Group of the results. The Working Group deals with the numerous individual cases of human rights violations on a purely humanitarian basis, irrespective of whether the government concerned has ratified any of the existing legal instruments that provide for an individual complaints procedure. It essentially acts as a channel of communication between the families of missing persons and governments, and has successfully developed a dialogue with the majority of governments concerned with the aim of solving cases of disappearance. With a view to preventing irreparable damage, the Working Group has also established an urgent action procedure under which the Working Group's Chairman is authorised to act on reported cases of disappearance occurring in between the Group's sessions, thus helping to avoid any delays in its attempts to save lives (see II.§1.C.2).

Finally, it is important to note that in the context of disappearances and extra-judicial executions, the question of impunity has recently attracted much attention, not only in Latin America but also in other regions. Impunity refers to a situation where the perpetrators of disappearances and extra-judicial executions or other human rights violations are not prosecuted and brought to justice. Systematic impunity is likely to contribute to a quasi-justification, condoned by the authorities in the light of 'special circumstances', of the illegal acts committed by state officials. Many governments and the UN Human Rights Commission have therefore regularly called for measures against impunity, stating that 'impunity is simultaneously one of the underlying causes of enforced disappearances and one of the major obstacles to the elucidation of cases thereof' (UN Human Rights Commission Resolution 1998/40).

Death penalty or capital punishment

The death penalty has been the subject of controversy since the end of the 19th century. The first countries to abolish the death penalty were Venezuela (1863), Portugal (1867) and Costa Rica (1877). Gradually, all European countries followed and in the last few years, the death penalty has not been carried out in any of the countries that are members of the Council of Europe.

The UDHR does not contain any provision on capital punishment. Article 3 UDHR states: 'Everyone has the right to life, liberty and security of person.' This provision, however, cannot be interpreted as constituting a ban on the death penalty. The same applies to the provisions of the ICCPR. The ICCPR stipulates, however, that the sentence of death may be imposed only for the most serious crimes and it may not be imposed on pregnant women or juvenile offenders (see below).

In 1989, the UN General Assembly adopted the Second Optional Protocol to the ICCPR, aiming at the abolition of the death penalty. Under the terms of the Protocol no one may be executed within the jurisdiction of a state party to the Protocol. Moreover, parties bind themselves to take measures to abolish the statutory provisions, which allow the imposition of the death penalty. No reservation is admissible to the Protocol, except for the application of the death penalty in time of war.

The ECHR also contains provisions on the death penalty. A Sixth Protocol on the abolition of the death penalty has been added to the Convention. Article 1 of the Protocol states that the death penalty shall be abolished, but provision is made for the application of a statutory death penalty as a sanction for certain acts in time of war or in case of a threat of war. More recently, the Council adopted Protocol No. 13 abolishing the death penalty in all circumstances. This is the first legally binding international treaty to abolish the death penalty in all circumstances with no exceptions. When it was opened for signature in May 2002, 36 countries signed it, as of July 2004 it has been ratified by 24 states.

Article 15 ECHR provides that the provisions of the Protocol are non-

derogable; that is, no derogation can be made from them in the event of an emergency, nor are any reservations permitted.

According to Article 4(3) ACHR capital punishment cannot be re-established in states that have abolished it. In addition, the Second Protocol to the ACHR adopted in 1990 provides for the abolition of the death penalty. As in the case of the ECHR, Article 27 ACHR prohibits taking derogating measures from the right to life in case of emergency.

The ACHPR does not contain any provision concerning the death penalty. The African Commission has adopted a resolution entitled 'Urging States to Envisage a Moratorium on the Death Penalty', in which it 'urges all state parties to the African Charter on Human and Peoples' Rights that still maintain the death penalty to comply fully with their obligations under the treaty and to ensure that persons accused of crimes for which the death penalty is a competent sentence are afforded all the guarantees in the African Charter'. In the same resolution, the African Commission called upon states that still apply the death penalty to impose it only for the most serious crimes and to consider its possible abolishment.

It should also be noted that in several conventions on extradition, a state can refuse to extradite a person who risks the death penalty in the state requesting the extradition (see, *e.g.*, Article 11 of the European Convention on Extradition). This is also the current position of the Human Rights Committee (see *Judge* v. *Canada*).

Therefore, although under general international law, the abolition of the death penalty is not expressly required, there is a movement towards abolition as noted above. The goal of abolition is to be found in several international instruments drafted for this specific purpose, such as the Second Optional Protocol to the ICCPR aiming at the Abolition of the Death Penalty; Second Protocol to the American Convention on Human rights to Abolish the Death Penalty; and Protocols No. 6 and 13 ECHR. This movement is also supported by several resolutions of political bodies, which have expressed their commitment to progressively restrict the application of the death penalty (see, *e.g.*, UNGA Resolution 1997/12 of April 1997). It is also relevant to note that according to the statutes of the international criminal tribunals, the International Criminal Tribunal for the Former Yugoslavia (ICTY), the International Tribunal for Rwanda (ICTR), and the International Criminal Court (ICC), the death penalty cannot be imposed. The intention of the international community to abolish capital punishment is also made clear by Article 6(6) of the ICCPR that points out that nothing therein shall be invoked to delay or to prevent the abolition of capital punishment by any state party to the Covenant.

The Human Rights Committee has interpreted Article 6 (paras 2 and 6) ICCPR as suggesting that abolition of the death penalty is desirable, and that measures to that end should be considered as progress in the enjoyment of the right to life within the meaning of Article 40.

Nonetheless, there is a debate as to the compatibility of the death penalty and the right to life. The ICCPR, for example, maintains the death sentence only

for the most serious crimes. On this issue, a member of the Human Rights Committee remarked that the permission of the death penalty 'merely provides a possibility for states parties to be released from their obligations under Articles 2 and 6 of the ICCPR, namely to respect and ensure to all individuals within their territory and under their jurisdiction the inherent right to life without any distinction, and enables them to make a distinction with regard to persons having committed the most serious crimes' (see dissenting opinion of Mr. Bertil Wennergren in *Kindler* v. *Canada*).

Among the arguments put forward by those who support the abolition of the death penalty is that the risk of executing the innocent precludes the use of the death penalty. This argument is supported by evidence that many mistakes have been made in sentencing people to death. Another argument in support of abolition centres on its arbitrariness and discrimination. According to this line of reasoning, the death penalty does not single out the worst offenders, but rather selects an arbitrary group based, for instance, on the quality of the defence counsel. In addition, it is difficult to reconcile the fact that corporal punishment is prohibited under international law (prohibition of torture or cruel, inhuman and degrading treatment), while capital punishment apparently is not.

Given that capital punishment is not completely prohibited under international law, it is important to ensure that in countries where the death sentence is permitted international standards and safeguards should be applied and adhered to. Several international treaties as well as commentaries from the various human rights monitoring bodies and resolutions by the United Nations have highlighted these standards and safeguards. Some of these limitations are discussed below.

Lawful sanction

Human rights instruments have established that the death penalty must be prescribed by national law. This requirement is established by Article 6 ICCPR, Article 4 ACHR and Article 4 ACHPR. This requirement is also implicit in Article 2 ECHR. If capital punishment is not provided for by national law, carrying out a death sentence constitutes an extra-legal execution prohibited by all the above-mentioned provisions.

Most serious crimes requirement

Article 6(2) of the ICCPR states that 'In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime and not contrary to the provisions of the present Covenant and to the Convention on the Prevention and Punishment of the Crime of Genocide'. This penalty can only be carried out pursuant to a final judgement rendered by a competent court.' The Economic and Social Council (ECOSOC) has interpreted most serious crimes

as those whose scope 'does not go beyond intentional crimes with lethal or extremely grave consequences.'

Furthermore, the jurisprudence of the Human Rights Committee shows that sentencing someone to death for aggravated robbery in situations where the use of firearms does not produce any death, would not meet the most serious crime requirement and death penalty in such a situation would violate Article 6 (2) of the Covenant (see, *e.g., Lubuto* v. *Zambia*).

The Inter-American Court also addressed this issue in an individual case, in which it found that the application of the death penalty for crimes that do not exhibit characteristics of 'utmost seriousness' violates the right to life (see, *e.g., Hilaire, Constantine and Benjamin et al.* v. *Trinidad and Tobago*).

The requirement that the death penalty may only be applied for the most serious crimes has also been emphasised by the Special Rapporteur on Extrajudicial, Arbitrary or Summary Executions (see, *e.g.*, Doc. E/CN.4/1998/68 para.94).

Non-retroactivity

A death sentence must be imposed only 'in accordance with the law in force at the time of the commission of the crime' (Article 6(2) ICCPR). In other words, the penalty for the offence must have been laid down at the time it was committed. Similar restrictions are set forth in Article 4(2) ACHR and Article 2(1) ECHR. In addition, if the law has changed to provide a less severe penalty than that which existed at the time the offence was committed, the convicted person must benefit from the lighter penalty (see Article 15 ICCPR, Article 7 ECHR, and Article 9 ACHR).

Fair trial safeguards

Apart from substantive restrictions on the use of the death penalty, human rights instruments also establish certain procedural requirements that must be met in capital punishment cases. These include, for example, international standards for a fair trail set forth in Article 14 of the ICCPR. Furthermore, for proceedings that may lead to the imposition of the death sentence, it is required that the highest standards of due process are followed. These include independence, competence, objectivity and impartiality of judges and juries; that all defendants facing capital punishment benefit from the services of a lawyer; and that defendants must be presumed innocent until their guilt has been proved beyond a reasonable doubt. Failure to safeguard these requirements in cases involving the death sentence would amount to a violation of the right to life.

It is clear from the various UN resolutions and recommendations by treaty bodies, that more protection of due process is required for capital punishment offences than for trials of other offences.

Furthermore, international law requires that those sentenced to death should have the right to seek pardon or commutation of the sentence (Article 6(4) ICCPR). The American Convention is explicit in this regard, stating that 'capital punishment shall not be imposed while such a petition [amnesty, pardon or commutation of death sentence] is pending decision by the competent authority' (Article 4(6) ACHR). The Geneva Conventions also establish this requirement for prisoners of war and protected civilians (see, Article 106 Third Geneva Convention and Article 73 Fourth Geneva Convention).

Other procedural requirements with which states must comply are, *inter alia*, that adequate time between sentence and execution is allowed, that officials responsible for execution be informed of the status of cases, that executions should not be carried out in public and that the treatment of prisoners under sentence of death be guided by the UN Standard Minimum Rules for the Treatment of Prisoners, so as to avoid any exacerbation of their suffering.

Methods of execution

Related to the death penalty is the method by which it is carried out. A relationship exists between the right to life and freedom from torture. A person sentenced to death has the right not to be tortured, but conditions prior to execution or the manner in which an execution is carried out may constitute torture or other ill-treatment. Relevant cases on the topic have been dealt by the European Court of Human Rights and the Human Rights Committee (see, *e.g.*, *Soering* v. *The United Kingdom* and *Ng* v. *Canada*).

Juvenile offenders and pregnant women

The death penalty is also restricted in that certain categories of individuals may not be executed under any circumstances. According to Article 6(5) ICCPR the death sentence should not be carried out on those below eighteen years of age or on pregnant women. Article 37 CRC also stresses the rule that capital punishment shall not be imposed for offences committed by persons below eighteen years of age. This requirement has also been established by Article 4(5) ACHR and by the two Additional Protocols to the Geneva Conventions that rule out the death penalty for offenders who were under eighteen years of age when the crime was committed.

The Additional Protocols to the Geneva Conventions expand on the prohibition of Article 6(5) ICCPR, forbidding executions of any 'mother having dependent infants' (Article 76 Additional Protocol I) and 'mothers of young children' (Article 6 Additional Protocol II).

The American Convention on Human Rights adds to this list of categories of individuals who may not be executed, those individuals who are over 70 years of age (Article 4(5) ACHR). The ECOSOC has also called for setting an upper age limit on death sentences (see ECOSOC Resolution 1989/64 of 24

May 1989). Although not provided for in legally binding instruments, other categories of people that are exempt from the death penalty include persons who have become insane and those suffering from mental retardation or limited mental competence (see, *e.g.*, ECOSOC Resolution 1989/64 of 24 May 1989).

Positive obligations arising from the right to life

States not only have to refrain from intentional and unlawful deprivation of life, but must also take appropriate steps to safeguard the lives of those within their jurisdiction. Human rights supervisory bodies have identified a variety of positive obligations with which states are required to comply.

Among these positive duties, it is worth mentioning a) the duty to investigate killings and b) the duty to punish offenders.

By reading the right to life in conjunction with the general duties to 'guarantee' (Article 1(1) ACHR), 'ensure' (Article 2(1) ICCPR) or 'to secure' (Article 1 ECHR), we find an obligation of states to establish effective facilities and procedures to investigate killings and cases of missing or 'disappeared' persons in circumstances that may involve a violation of the right to life.

The European Court tends to call these obligations the 'state's procedural obligations to protect the right to life' (see, *e.g., Timurtas* v. *Turkey*), because they refer to the way in which the state must 'proceed' after a deprivation of life has occurred under its jurisdiction or after someone has disappeared.

The Inter-American and the European Court have stressed that the responsibility of the state to proceed with an 'effective' investigation is engaged even when there is no evidence that agents of the state have been implicated in the killing or disappearance and even if members of the victim's family or others have not lodged a formal complaint about the killing with the authorities (see, *e.g., Velásquez Rodríguez* v. *Honduras* and *Yasa* v. *Turkey*). This duty is more stringent when the disappeared person was last held in state custody. In such circumstances it is incumbent upon the state to provide a plausible explanation as to the detainee's fate, as well as to ensure some form of independent monitoring (see, *e.g., Velásquez Rodríguez* v. *Honduras* and *Satik et al.* v. *Turkey*).

If the state fails to undertake an official investigation it would be in breach of the right to life. However, it would also entail a breach of the obligation if, after having investigated, the investigation is considered by the supervisory organs to be 'ineffective'. The human rights monitoring organs have referred to various reasons for considering an investigation 'ineffective', including, for example, because it was not initiated promptly and immediately after someone's death; because it was short in length and limited in scope; because it contained unexplained failures to take obvious steps; or due to the lack of independence of the organs entrusted to investigate (see, *e.g. Velokova* v. *Bulgaria* and *Kaya* v. *Turkey*).

States must also protect the right to life by punishing the perpetrators of arbitrary killings. After an arbitrary killing has been committed within the

jurisdiction of a state, the state has the duty to prosecute perpetrators and bring those responsible to justice. According to the Human Rights Committee, some form of criminal proceeding is necessary. As it notes, in the event of a violation of the right to life, disciplinary and administrative measures against those responsible might not fully discharge the state's international responsibility; it may be obligated to resort to criminal proceedings.

The unborn child

The protection of the right to life raises the question of whether the unborn child is protected. Article 1 ICCPR, for example, declares that 'every human being' has the inherent right to life, while in respect to other rights the expressions used are 'everyone' and 'every person'. This use of different terminology raises the question whether 'every human being' has a broader meaning than 'everyone' and could therefore be interpreted to include the unborn child. The Human Rights Committee has not commented on this issue directly. However, in both its case-law and its concluding observations, it has found that, for example, the criminalisation of abortion can have implications regarding the right to life. The Committee in this instance was of the view that suicides, which young females commit as a result of failure to perform an abortion due to its criminalisation by the state, may count as violation of the right to life. The Committee called on the state to take 'all necessary legislative and other measures to assist women and particularly adolescent girls, faced with the problem of unwanted pregnancies to obtain access to adequate health and educational facilities.' (Concluding Observations on Ecuador (1998)). The implication of such views is that countries are obliged to carefully analyse the consequences of criminalising abortions. Failure to prevent unnecessary deaths due to anti-abortion laws would raise issues pertaining to the obligation to ensure that everyone enjoys the right to life.

The issue of the unborn child is clearer at the Inter-American level. Article 4 American Convention requires the right to life to be protected 'in general, from the moment of conception.' The Inter-American Commission, however, seems to question whether Article 4 American Convention accords absolute protection (see *Baby boy case* v. *The United States of America (Case 2141)*).

Euthanasia

The protection of the right to life raises the question whether it includes the right to die. A closely related issue concerns the question of euthanasia and assisted suicide. Euthanasia is the performance of an act by a third party that intentionally causes a person's death for humanitarian reasons. An example would be giving a patient, upon his/her request, a lethal injection that would end his/her life. On the other hand, assisted suicide is where the last action that causes death is performed by the person who dies, but with the assistance of another person. An example of this would be a person swallowing an overdose of drugs provided by

a doctor. Very few cases have been brought to international supervisory bodies regarding euthanasia, therefore it remains unclear how it relates to the right to life. So far, it seems, for instance, that Article 2 ECHR does not permit unrestricted euthanasia (see *Pretty* v. *The United Kingdom*).

2. SUPERVISION

The right to life has been dealt with by all supervisory bodies within the UN and the regional systems. The issue that has been developed the most through case-law is the arbitrary deprivation of life.

The Human Rights Committee has confirmed that states have a strict duty not to kill people arbitrarily. It has pointed out that this duty entails a positive obligation for the state to investigate all state killings and punish any improper killings. For example, in the case of *Bautista de Arellana* v. *Colombia* the Committee held that, 'purely disciplinary and administrative remedies cannot be deemed to constitute adequate and effective remedies within the meaning of Article 2(3) of the Covenant, in the event of particularly serious violations of human rights, notably in the event of an alleged violation of the right to life'. Therefore, according to the Committee, in the event of serious violations of human rights, such as the right to life, purely disciplinary and administrative remedies cannot be deemed to constitute adequate and effective remedies within the meaning of Article 2(3) ICCPR.

The Committee has also dealt with cases in which the death could not be directly attributed to the action of the police. In *Dermit Barbato* v. *Uruguay*, the Committee considered that a state would be in violation of the right to life if either by act or by omission it does not take adequate measures to protect the life of an individual while in custody. In this case, the state was asked to bring any person found to be responsible for the death to justice and to pay appropriate compensation to the family. An interesting feature in this case is that the Committee found it unnecessary to make a finding that state authorities killed the victim. It found a breach of Article 6(1) ICCPR (right to life) on the basis of the state's failure to take adequate measures to prevent the victim's death while he was in their custody.

The Human Rights Committee has recognised the role of law enforcement agents, as far as violating the right to life is concerned, especially in the area of arbitrary killings, which it notes is a matter of utmost gravity. It has recommended that the law must strictly control and limit the circumstances in which a person may be deprived of his life by such authorities.

As to the issue of disappearances, the Human Rights Committee has dealt with this topic in several cases. In *Bautista de Arellana* v. *Colombia*, for example, the Committee found that the right to life under Article 6 ICCPR is violated when the state fails to prosecute criminally and punish a person who is known to be responsible for the disappearance and subsequent death of a person. In this

particular case, the Colombian government was found to have violated Article 6 ICCPR for only applying disciplinary sanctions to the military officers who caused the death of Nydia Erika Bautista de Arellana, a political activist. Moreover, the Committee found a violation of the right to effective remedy on the basis that awarding Nydia's family compensation by an administrative tribunal does not constitute adequate and effective remedies within the meaning of Article 2(3) ICCPR in the event of particularly serious violations of human rights (see also *Mojica* v. *Dominican Republic*). In *Quinteros* v. *Uruguay*, which was brought to trial by the victim's mother, the Committee found that the mother herself was also 'a victim of the violations of the Covenant, in particular of Article 7, suffered by her daughter'. Thus, the stress and anguish of the mother caused by the disappearance of her daughter and by the continuing uncertainty concerning her fate amounted to a violation of Article 7 ICCPR. The European Court has also found a violation of Article 3 (ill-treatment) for the 'anguish and distress' suffered by relatives of a 'disappeared person' (see *e.g. Kurt* v. *Turkey*).

The Human Rights Committee has mainly dealt with death penalty cases when considering the fairness of trials that result in a death sentence. The Committee has found that any failings in the trial constitute a breach of the right to life as well as provisions in the right to a fair trial (see, *e.g., Johnson (Errol)* v. *Jamaica*).

The Human Rights Committee has followed to a large extent the principle developed by the ECHR in the *Soering* case. In its General Comment 20 the Committee noted that the death penalty 'must be carried out in such a way as to cause the least possible physical and mental suffering'. As to the methods of execution, in *Ng* v. *Canada* the Committee found that by extraditing Ng to California, Canada had violated Article 7 (prohibition of torture and ill-treatment) because 'execution by gas asphyxiation may cause prolonged suffering and agony and does not result in death as swiftly as possible, as asphyxiation by cyanide gas may take over ten minutes'. Recently, the Committee has stated that for countries that have abolished the death penalty, there is an obligation not to expose a person to the real risk of its application. Thus, in the case of *Judge* v. *Canada*, the Committee noted that by deporting the author to the United States where he was under sentence of death, Canada established the crucial link in the causal chain that would make possible the execution of the author and therefore violated Article 6 of the Covenant.

With regard to abortion issues, the Human Rights Committee has confirmed that abortion is compatible with Article 6 ICCPR and that anti-abortion laws may breach the right to life of the woman. The Committee has examined the issue of euthanasia in very few cases. In this regard, it is worth noting that the Human Rights Committee expressed its concerns regarding the Act Concerning Review Procedures on Euthanasia and Assisted Suicide in the Netherlands. In its observations, the Committee expressed its belief that the ICCPR obliges the state to apply the most rigorous scrutiny to determine whether the state party's obligations to ensure the right to life are being complied with as required by

Articles 2 and 6 of the Covenant. It therefore seems that euthanasia and assisted suicide would only be permissible under the ICCPR in extreme circumstances of 'voluntary and well considered request, unbearable circumstances and where no other reasonable alternative is available' (see ICCPR Concluding Observations on The Netherlands 2001).

At the European level, the ECHR seems to require a similar approach as the ICCPR. In *McCann et al.* v. *The United Kingdom*, the European Court found that the killing of three terrorists suspected of involvement in a bombing mission represented an unjustifiable taking of life, because the authorities did not appropriately plan and control the use of force. In the case of *Kaya* v. *Turkey*, the Court found a violation of Article 2 ECHR, read together with Article 1 (duty to secure Convention rights), resulting from the absence of an effective investigation into a death carried out by military forces under contested circumstances.

The European Court has dealt with the death penalty in very few cases. In *Soering* v. *The United Kingdom*, which concerned an imminent extradition of the applicant from the United Kingdom to the United States where he feared being sentenced to death and being subjected to the 'death row' phenomenon, the European Court found that the extradition of a person to a country where he faces the death penalty does not constitute, in itself, a violation the right to life or the right to freedom from torture under the European Convention. The Court found that in this specific case, however, the very long period of time he would spend on death row and the personal circumstances of the applicant, taking into account his age and mental state at the time of the offence, his extradition to the United States would expose him to a real risk of treatment that would amount to a violation of Article 3.

In a case concerning abortion, the former European Commission did not exclude the possibility that in certain circumstances, the right to life could offer protection to the unborn child, without however specifying what those 'circumstances' were (see, *e.g.*, *H* v. *Norway*). As matters stand, however, the grounds for an abortion that were approved in individual cases appear to be very wide and capable of covering most cases (see *Paton* v. *The United Kingdom and H* v. *Norway*).

The Inter-American Court of Human Rights has developed a similar pattern with regard to the right to life, including one of the most important bodies of jurisprudence on disappearances. Although neither the American Declaration nor the American Convention contains an explicit prohibition of this practice, the Court has found in cases against Honduras that the state committed a violation of the right to life because it failed to fulfil its positive obligation to act preventively and showed 'lack' of respect for the right to life by virtue of 'arbitrary' taking of life by the state, carried out or tolerated by officials. In the landmark *Velásquez Rodriguez* v. *Honduras case*, the Court found, *inter alia*, that there was a systematic practice of disappearances in Honduras between 1981 and 1984 that was 'carried out or tolerated by Honduran officials' and that Mr. Velásquez had disappeared within the framework of that practice. The context

in which the disappearance occurred and the lack of any information seven years later in regard to his fate created a reasonable presumption that he had been killed. Even if there was a minimal margin of doubt in this respect, it must be presumed that his fate was decided by authorities who systematically executed detainees without trial and concealed their bodies in order to avoid punishment. This, together with the failure to investigate, was a violation by Honduras of the legal duty to ensure to every person subject to its jurisdiction the inviolability of the right to life and the right not to have one's life taken arbitrarily under Article 4 of the American Convention. Another important decision regarding disappearances is *Bámaca Velásquez* v. *Guatemala*. The Inter-American Court has further developed the positive obligations regarding the right to life to impose a duty on the state to provide assistance for preserving human life (*Villagrán Morales et al.* v. *Guatemala*).

The Inter-American Commission has dealt with the question of the death penalty on many occasions, and has adopted an abolitionist approach in a number of cases. When Peru amended its constitution to add terrorism to the list of crimes where the death penalty would apply, the Inter-American Commission considered that it was an obvious violation of Peru's obligations under the American Convention. The Commission has also ruled that the application of the death penalty may constitute cruel, inhuman and degrading treatment (see Report on the Situation of Human Rights in Peru (1993)).

The African Commission has made a number of findings of serious or massive violations of the right to life. Examples of violations include extra-judicial killings, denial of medication to a patient with a serious condition, arbitrary and brutal executions, and a series of detentions and arrests that were found to violate Article 4 ACHPR, even though no loss of life resulted.

With regard to disappearances, the African Commission found in a case against Chad that the state had violated Article 4 ACHPR because it had not attempted to prevent the disappearance or investigate afterwards. It was thus established that the state's failure to 'protect' individuals under its jurisdiction constituted a violation of Article 4 (see *Commission Nationale des Droits de l'Homme et des Libertes* v. *Chad, Communication 74/92*). The African Commission has also found violations relating to extra-judicial executions in a number of cases, all of them under Article 4. As an example, in three cases against Malawi, the violation occurred when the police shot and killed peacefully striking workers (see *Krishna Achuthan, Amnesty International on behalf of Orton and Vera Chirwa and Amnesty International on behalf of Orton and Vera Chirwa* v. *Malawi, Communications 64/92, 68/92 and 78/92*). In other cases against Sudan, the African Commission has also emphasised that a state has the responsibility to protect all persons residing under its jurisdiction, irrespective of whether the executions were committed by government forces (see *Amnesty International, Comité Loosli Bachelard, Lawyers Committee for Human Rights and Association of Members of the Episcopal Conference of East Africa* v. *Sudan, Communications 48/90, 50/91 and 52/9).*

As to the death penalty, the African Commission found in a case against Nigeria that even though Article 4 does not favour any side in the death penalty debate, the trial itself in the case violated Article 7 ACHPR, making the subsequent imposition of the death penalty arbitrary and in violation of Article 4 ACHPR (see *e.g., International Pen, Constitutional Rights Project, Interights on behalf of Ken Saro-Wiwa Jr. and Civil Liberties Organisation* v. *Nigeria, Communications 137/94, 154/96 and 161/97*).

B. The right to freedom from torture or cruel, inhuman or degrading treatment or punishment

In all societies there is agreement that torture is a human rights violation that is not to be tolerated. Under human rights law and humanitarian law, freedom from torture is a right protected under all circumstances - in times of internal or international disturbances, under a formal state of emergency and in war situations. Although torture, in all its different forms, still occurs frequently world-wide, it can be argued that the prohibition of torture has attained the status of international customary law.

The basic formula, 'torture or cruel, inhuman or degrading treatment or punishment' was coined by Article 5 UDHR. All subsequent human rights treaties contain a similar prohibition. Although it was not the intention of the drafters of the Universal Declaration to differentiate between the different components of this right, the practice of some of the supervisory bodies, in particular the European Court, has made it necessary to distinguish between them. Before discussing the main components included in this right, a few points need to be emphasised. Firstly, with regard to each component, the prohibition is absolute and non-derogable even in a situation of public emergency. Secondly, any recourse to torture or cruel, inhuman or degrading treatment or punishment is prohibited, even if it is demonstrated that law and order cannot be maintained without such recourse (see, *e.g., Tyrer* v. *The United Kingdom*). Finally, the victim's conduct is irrelevant, and there is no justification for using torture or cruel, inhuman or degrading treatment or punishment because of a suspicion, however well-founded, that a person may be involved in criminal activities (see, *e.g., Aydin* v. *Turkey*).

Defining torture

A definition of torture is found in Article 1 CAT:

> For the purposes of this Convention, the term 'torture' means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes a obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidation or coercing him or a third person, or for any reason based

> on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.

Moreover, case-law and general comments by international and regional courts and human rights organisations are invaluable sources in defining what kind of acts are considered torture. One definition often used by international human rights organs and courts is 'an aggravated and deliberate form of cruel, inhuman or degrading treatment or punishment', with the purpose to obtain information or confessions (see, *e.g.*, *Denmark, Norway, Sweden and The Netherlands* v. *Greece).* Thus, for torture to occur, certain criteria must be met, such as: a) the method used must be degrading treatment; b) it must be inhuman treatment; c) it must be an aggravated form of inhuman treatment, inflicted for specific purposes; and d) it must reach a certain level of severity.

Defining cruel, inhuman, or degrading treatment or punishment

No definition exists concerning cruel, inhuman, or degrading treatment or punishment, as it is very difficult to draw sharp distinctions between the different forms of treatment or punishment. According to the Human Rights Committee, these distinctions depend on the nature, purpose and severity of the particular treatment. The European Court, moreover, has observed that ill-treatment must attain a minimum level of severity if it is to fall within the scope of the prohibition. The assessment of this minimum is relative as it depends on the circumstances of the case. Different factors are relevant here such as a) the duration of the treatment; b) its physical or mental effects; and c) the age, sex, and state of health of the person. It seems then that in order to decide whether torture or cruel, inhuman, or degrading treatment or punishment has occurred, it is important to apply both an objective and a subjective test. Treating a young and healthy adult in a certain way might amount to degrading treatment; the same treatment, however, might amount to torture if inflicted on a child or an elderly person.

1. STANDARDS

Article 5 UDHR states that no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. The CAT is considered today the most authoritative international legal standard on the subject of torture. Articles 1 to 16, which are the substantive articles, relate not only to torture but also refer to other forms of cruel, inhuman or degrading treatment or punishment. State obligations under this convention include, *inter alia*, the following provisions: a) no statement made under pressure of torture may be invoked as evidence in any proceedings (Article 15); and b) every state party is obliged to institute legal proceedings against anyone who is alleged to have committed acts of torture, not only against persons who have committed such acts on its

territory, but also against foreigners who have committed such acts elsewhere (Articles 6 and 7).

Article 7 ICCPR provides protection against torture, or cruel, inhuman or degrading treatment or punishment. In its General Comment 20, the Human Rights Committee notes that it is the duty of states parties to afford everyone protection through legislative and other measures against the acts prohibited by Article 7, 'whether inflicted by people acting in their official capacity, outside their official capacity or in a private capacity'. This prohibition extends to corporal punishment, including excessive chastisement ordered as punishment for a crime or as an educative or disciplinary measure. States parties must not expose individuals to the danger of torture or cruel, inhuman or degrading treatment or punishment upon return to another country by way of their extradition, expulsion or *refoulement*.

The CRC provides protection in all areas of importance in order for a child to have a meaningful and dignified existence. Article 37(a) provides protection against torture, or other cruel, inhuman or degrading treatment or punishment, and emphasises that capital punishment and life imprisonment without possibility of release may not be imposed on persons below eighteen years of age. Article 10 CMW prohibits torture or cruel, inhuman or degrading treatment or punishment.

At the regional level, Article 3 ECHR and Article 5(2) ACHR contain a prohibition against torture and other forms of ill-treatment though the wording is quite different. Both conventions set out that no one shall be subjected to torture or to inhuman or degrading treatment or punishment, a general negative obligation, but the ACHR then adds that 'Everyone has the right to have his physical, mental and moral integrity respected', stressing that the obligation of the state is not only to refrain from torture and ill-treatment, but also to respect the dignity of the person. It is worth noting that at the Inter-American level a specific convention on torture was adopted in 1985. The Inter-American Convention to Prevent and Punish Torture expands upon the provisions of Article 5 ACHR, which prohibits torture and cruel, inhuman or degrading punishment or treatment and can be invoked before the Inter-American Court to interpret the provisions of Article 5 ACHR. It is worth noting that the Convention contains a definition of torture (Article 2) that is broader than the one contained in Article 1 CAT, potentially encompassing more acts of coercion than may be covered by the CAT definition.

Article 5 ACHPR essentially protects dignity. A non-exhaustive list of practices that could lead to the violation of dignity is provided and torture and cruel, inhuman and degrading punishment are explicitly listed as examples.

The European Committee for the Prevention of Torture (ECPT) has, since its establishment in 1989, developed a number of standards aimed at protecting detainees from torture and inhuman or degrading treatment or punishment. These cover a range of matters such as solitary confinement, discipline, contact with the outside world, and complaints and inspection procedures (see II.§2.C).

In addition to the main international human rights conventions, other instruments have been adopted which are relevant to the protection against torture, such as the four Geneva Conventions (1949) which contain a common Article 3, under which torture and humiliating and degrading treatment is prohibited in international as well as internal armed conflicts; the Standard Minimum Rules for the Treatment of Prisoners (1955); and the Principles of Medical Ethics Relevant to the Role of Health Personnel (1982), which protect prisoners and detainees against torture and other cruel, inhuman or degrading treatment or punishment. In addition, Article 5 of the Statute of the International Criminal Tribunal for the Former Yugoslavia (1993), which also applies for the International Criminal Tribunal for Rwanda (1993), sets out how acts of torture can be prosecuted as crimes against humanity. Article 7 of the Rome Statute for the International Criminal Court (1998) also establishes that torture can constitute a crime against humanity.

With regard to standards prohibiting torture, emphasis should be place on a) the principle of *non-refoulement* and b) the conditions of imprisonment or detention.

Non-refoulement

A special aspect of the right to freedom from torture is the concept of *non-refoulement* (*i.e.* 'non-return'), an established principle of customary international law that prohibits states to expel, deport or extradite persons to countries where they face torture or ill-treatment. *Non-refoulement* is a fundamental rule of international refugee law and several human rights instruments forbid the return of a person who has reason to fear for his/her life or physical integrity in his/her country of origin. Article 3 CAT stipulates that states may not expel, return (*refouler)* or extradite persons to countries where they are in danger of being subject to torture and stipulates that states have a duty to take into account all relevant considerations when determining whether there are grounds to believe that the person is in danger. Article 33 of the Convention relating to the Status of Refugees also contains the principle of *non-refoulement*. Although not explicitly set out in Article 7 ICCPR, the Human Rights Committee has deduced from that article that states are obliged not to expose persons to 'the danger of torture or cruel, inhuman or degrading treatment or punishment upon return to another country by way of their extradition, expulsion or refoulement' (General Comment 20, para. 6).

A number of regional instruments also forbid states to expel persons in danger of being subjected to torture. Article 22(8) ACHR states that 'in no case may an alien be deported or returned to a country, regardless of whether or not it is his country of origin, if in that country his right to life or personal freedom is in danger of being violated because of his race, nationality, religion, social status, or political opinions'. Article 2(3) of the Convention Governing the Specific Aspects of Refugee Problems in Africa stipulates that states may not subject persons to measures such as rejection at the frontier, return or expulsion, which

would compel them to return to or remain in a territory where their life, physical integrity or liberty would be threatened for reasons of race, religion, nationality, membership of a particular social group or political opinion. Article 12(3) ACHPR further establishes the rights of persons to asylum 'when persecuted'. Under the auspices of the CoE, there is no explicit prohibition of return, but Article 3 (prohibition of torture) ECHR implies this prohibition.

Conditions of imprisonment or detention

A group that is especially vulnerable to violations of the right to freedom from torture and ill-treatment are persons detained by the state. Detainees find themselves in a particularly vulnerable position. They do not enjoy the right to freedom of movement and they are not given a choice regarding their place of detention. Their contact with the outside world is limited and highly regulated. Prisoners, for instance, must submit to the discipline of prison life and to rules regulating their behaviour and treatment. To protect those in custody several basic rules have been formulated. The Standard Minimum Rules for the Treatment of Prisoners, first adopted in 1955, set out in great detail the minimum conditions acceptable in the treatment of prisoners, including those under arrest or awaiting trial, or arrested and imprisoned without charge. Among the requirements are: a) minimum floor space and cubic content of air for each prisoner; b) adequate sanitary facilities; c) clothing which in no manner should be degrading or humiliating; d) a separate bed; and e) food of adequate nutritional value. These minimum requirements should always be complied with, regardless of the financial situation of the state concerned.

The rights of detained persons are not limited to those in prison, but apply to anyone deprived of liberty under the laws and authority of the state, whether such person is held in a hospital, in particular a psychiatric hospital, a detention camp, a correctional institution, or elsewhere.

Detention conditions, such as overcrowding; denial of food or inadequate quality and quantity of food; inadequate heating or toilets; denial of contact with the outside world; lack of clean drinking water; no ventilation or electric lighting; denial of exercise; and denial of medical treatment or inadequate medical attention may amount to a violation of the prohibition of torture and other cruel, inhuman and degrading treatment or punishment. While the cumulative effects of harsh conditions rarely amount to 'torture', the threshold for inhuman or degrading treatment is lower; *i.e.* the treatment need not have been intended to cause suffering for it to constitute inhuman or degrading treatment.

It is important to note that in order to assess the conditions of detention; the supervisory bodies take account of the cumulative effect and the duration of the conditions as well as the specific allegations. It is also important to stress that even when the administration of prisons or psychiatric hospitals is in the hands of private companies or corporations it is the state that is ultimately responsible for the protection of human rights and accountable for any mistreatment suffered by individuals in the institutions.

THE RIGHTS OF PRISONERS AND DETAINED PERSONS

The ICCPR (Article 10) and the American Convention (Article 5) are the main international human rights conventions containing specific provisions concerning the rights of prisoners. They include the following minimum requirements: a) all individuals deprived of their liberty are to be treated with respect for the inherent dignity of the human person; b) accused persons should be kept separated from convicted persons; c) juveniles (or minors in the case of Article 5 American Convention) must be separated from adults and brought to trial as speedily as possible (before 'specialised tribunals' in Article 5 American Convention); and d) the penitentiary system should aim at the reformation and social rehabilitation of convicted prisoners.

At the European level, the European Convention for the Prevention of Torture is significant with respect to the protection of prisoners. Under the Convention, the European Committee for the Prevention of Torture (ECPT) was created 'to examine the treatment of persons deprived of their liberty with the view to strengthening, if necessary, the protection of such persons from torture and from inhuman or degrading treatment or punishment.' The ECPT has the power to visit places of detention of any kind including prisons, police cells, military barracks and mental hospitals, with the aim of examining the treatment of detainees and, when appropriate, to make recommendations to the states concerned. A similar mechanism is found under CAT in the form of an additional protocol, which has not yet entered into force (see II.§1.C).

Other documents have been drafted, mainly at the UN level, elaborating standards for the improvement of the situation of prisoners. The Standard Minimum Rules for the Treatment of Prisoners are very important in setting out the minimum conditions for the treatment of prisoners. While the rules set are not referred to in Article 10 ICCPR or Article 5 American Convention, they are intended to be taken into account whenever applicable. Apart from the Standard Minimum Rules, relevant UN standards include the following: the Code of Conduct for Law Enforcement Officials (1978); the Principles of Medical Ethics Relevant to the Role of Health Personnel, particularly Physicians, in the Protection of Prisoners and Detainees against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (1982); and the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment (1988).

At the UN treaty-body level, the Human Rights Committee has held that Article 10 ICCPR is violated, *inter alia*, when a prisoner: a) is held incommunicado for any length of time; b) is beaten by prison wardens; c) is shackled and blind-folded; d) is displayed to the press in a cage; e) is refused medical attention; f) is subjected to ridicule; g) is denied reading facilities and is not allowed to listen to the radio; h) is required to sleep on a wet concrete floor, or to share a mattress; or i) is kept in a cell with electric light

continuously on (see, *e.g.*, *Drescher Caldas* v. *Uruguay*; *Solorzano* v. *Venezuela*; *Espinoza de Polay* v. *Peru*; *Kalenga* v. *Zambia*; *Francis* v. *Jamaica*; *Almirati Nieto* v. *Uruguay*; *Manera Lluberas* v. *Uruguay*).

At the regional level, both the Inter-American Commission and Court have tended to deal with all the provisions of Article 5 without separating its different components. Thus, the jurisprudence of the Inter-American Commission and Court in relation to prisoners is not as comprehensive as it could potentially become. Nevertheless, in a few cases involving prisoners in El Salvador, the Commission found that El Salvador had violated the 'respect for the inherent dignity of the human person' guaranteed in Article 5(2) because of a) overcrowding; and b) lack of minimum services in prisons (see IACHR Annual Report 1994). Similar concerns were expressed with regard to Cuban prisons, although Article 5(2) was not specifically mentioned (see 'Report on Cuba' in IACHR Annual Report 1994).

At the European level, the European Committee on the Prevention of Torture (ECPT) has produced a substantial number of reports, out of which annually a general report is produced. This report has gradually led to a number of general standards being developed, notably as regards prison health care, juvenile detention, the treatment of foreign nationals and the situation of women in prisons.

At the African level, the African Commission has very limited case-law on the treatment of prisoners. It has dealt with aspects of imprisonment when it found that, *inter alia*, overcrowding, beatings, torture, excessive solitary confinement, shackling within a cell, extremely poor quality food and denial of access to adequate medical care amounted to a violation of Article 5 African Charter (see *Krischna Achutan (on behalf of Aleke Banda), Amnesty International on behalf of Orton and Vera Chirwa* v. *Malawi, Communications 64/92, 68/92 and 78/92*).

2. SUPERVISION

Within both the UN and the regional systems, there are several supervisory mechanisms that can be used to consider issues related to torture, such as CAT, the UN Human Rights Commission Special Rapporteur on Torture and the Human Rights Committee. At the regional level the European Court and Committee for the Prevention of Torture, the African Commission and the Inter-American Court and Commission are charged with supervising compliance. Nevertheless, the frequency with which torture still occurs is discouraging and further measures to supervise and enhance implementation are called for.

At the UN treaty-based level, CAT established the Committee Against Torture, which supervises the compliance of states parties through four means: review of periodic reports, inter-state complaints, individual complaints and a

confidential inquiry into systematic practices of torture (see II.§1.C). The latter one is the most innovative supervisory procedure allowing the Committee to initiate an inquiry when it receives 'reliable information' that suggest 'well-founded indications that torture is being systematically practised in the territory of a state party'. After consulting the state party, the Committee may decide to include a summary account of the results of the proceedings in its annual report to the General Assembly.

The United Nations Commission on Human Rights decided in 1985 to appoint a Special Rapporteur to examine questions relevant to torture, to seek and receive credible and reliable information on such questions and to respond effectively to the information. The mandate comprises three main activities: a) transmitting communications consisting of urgent appeals and allegation letters to governments; b) undertaking fact-finding missions to countries where information suggests that torture may involve more than isolated or sporadic incidents; and c) submitting annual reports on the Special Rapporteur's activities, mandate and methods of work to the UN Commission on Human Rights and the General Assembly. Unlike the treaty monitoring bodies established under international treaties, the Special Rapporteur does not require the exhaustion of domestic remedies before acting on individual cases involving a risk of torture or on alleged acts of torture. Moreover, when the facts in question come within the scope of more than one mandate, the Special Rapporteur may decide to approach one or more thematic mechanisms and country rapporteurs with a view to sending joint communications or seeking joint missions.

At the regional level, many cases have come before the European Court and the former European Commission concerning Article 3 ECHR. In one of its inter-state cases, *Ireland* v. *The United Kingdom*, the Court condemned the ill-treatment of suspected terrorists during interrogation, with the result that the United Kingdom Government had to introduce new rules concerning the interrogation of detainees. In individual cases, the Court has found a violation of Article 3 in cases concerning, for example, a) the practice of beating children as a punishment in schools (see, *e.g.*, *Campbell and Cosans* v. *The United Kingdom*); b) risk of being tortured in the event of being expelled to another country (see, *e.g.*, *Cruz Varas et. al.* v. *Sweden*); c) conditions of detention in a psychiatric hospital (see, *e.g.*, *Herczegfalvy* v. *Austria*); and d) physical violence during police custody (see, *e.g.*, *Tomasi* v. *France*).

The ECPT's work concentrates on examining day-to-day conditions in which detainees are held, including such matters as accommodation, personal hygiene and medical services. During its visits, the ECPT has observed that treatment in places of detention varies greatly ranging from mild forms of ill-treatment to torture. The Committee makes so-called Public Statements setting out its findings.

At the Inter-American level, both the Inter-American Commission and Court have dealt with many torture cases. Neither institution has attempted to define torture, but instead they have identified that certain practices, such as rape, mock burials, mock executions, isolation and incommunicado detention, deprivation

of food and water and exposure to the torture of others, fall within the concept of torture and ill-treatment (see, *i.e., Lissardi and Rossi* v. *Guatemala (Case 10.508), Loayza Tamayo* v. *Peru* and *Velásquez Rodriguez* v. *Honduras*). In certain cases, moreover, the Court has stated that the very act of causing the disappearance of the victim amounts to torture, inhuman and degrading treatment, not only with respect to the victims, but also with respect to their close relatives (see, *i.e., Villagrán Morales et al.* v. *Guatemala*). For a comprehensive analysis regarding torture see *Cantoral Benavides* v. *Peru.*

The case-law of the Inter-American and African systems is limited in regards to *non-refoulement.* Several cases have been brought before the Human Rights Committee and the European Court. The Human Rights Committee has dealt with this issue in, *e.g., A.* v. *Australia* and *C.* v. *Australia.* The European Court has interpreted that Article 3 entails the principle of *non-refoulement* and has dealt with several cases. It is worth noting that the ECHR has established that the prohibition of return is unconditional. In cases where the state is purporting to extradite or deport persons guilty of serious crimes or persons that are considered a danger to national security, it must be assured that those persons are not facing torture in the receiving countries. If not, it may be found in breach of Article 3 (see, *e.g., Chahal* v. *The United Kingdom; D.* v. *The United Kingdom;* and *Ahmed* v. *Austria*). Supervising the CAT, the Committee against Torture has developed an extensive jurisprudence on the principle of *non-refoulement* (*e.g. Mutombo* v. *Switzerland; Alan* v. *Switzerland; Kisoki* v. *Sweden; Khan* v. *Canada* and *Aemei* v. *Switzerland*).

In regard to conditions of imprisonment, at the UN level there is an important body of case-law. The Human Rights Committee found violations of Article 7 in respect to prison conditions in many of its early cases against Uruguay (see *e.g., Buffo Carballal* v. *Uruguay* and *Vasilskis* v. *Uruguay)* and in more recent cases against Jamaica (see *e.g., Francis (Clement)* v. *Jamaica, Francis (Victor)* v. *Jamaica* and *Young* v. *Jamaica).* In *Mukong* v. *Cameroon,* the Committee clearly noted that 'certain minimum standards regarding the conditions of detention must be observed regardless of the State party's level of development'. The Committee has also noted that 'prolonged solitary confinement [...] may amount to acts prohibited by article 7' (General Comment 20). Another case worth mentioning in regard to conditions of imprisonment is *Lantsova* v. *Russia,* although in this case the Committee did not consider it necessary to pronounce itself on Article 7.

At the Inter-American level, the Inter-American Court has especially examined conditions of imprisonment in, *inter alia,* the decision on provisional measures in the case of the *Urso Branco Prisons* v. *Brazil* and its report on the *Challaplaca Prison* in Peru (Special Report on the Human Rights Situation at the Challapalca Prison, 2003). In Europe, the European Court has dealt with this issue in, for example, *Aktas* v. *Turkey*).

The African Commission has dealt with violations of the prohibition of torture under Article 5, which deals not only with torture and other forms of ill-treatment,

but with the dignity of the person. As a consequence of this, the African Commission has often found violations of Article 5 on the basis of torture, without however providing information of what acts amounted to the torture. The Commission has found that the cumulative effects of certain aspects of imprisonment can amount to violations of Article 5, such as a) overcrowding; b) beatings; c) excessive solitary confinement; and d) shackling within a cell (see, *e.g., Krischna Achutan (on behalf of Aleke Banda), Amnesty International on behalf of Orton and Vera Chirwa* v. *Malawi, Communications 64/92, 68/92 and 78/92* and *International Pen, Constitutional Rights Project, Interights on behalf of Ken Saro-Wiwa Jr. and Civil Liberties Organisation* v. *Nigeria, Communications No. 137/94, 139/94, 154/96 and 161/97*).

UNITED NATIONS VOLUNTARY FUND FOR VICTIMS OF TORTURE

The physical and psychological effects of torture can be devastating and last for years, affecting not only the victims but also members of their families. Assistance in recovering from the trauma suffered can be obtained from organisations that specialise in assisting victims of torture. In 1981, the General Assembly established the United Nations Voluntary Fund for Victims of Torture to receive voluntary contributions for distribution to NGOs that provide humanitarian assistance to victims of torture and members of their families. The Fund is administered by the Secretary-General on the advice of a Board of Trustees.

The Fund partially subsidises projects providing medical, psychological, social, economic, legal or other forms of humanitarian assistance to torture victims and members of their families. Each year, the Fund finances projects to assist more than 60,000 victims and their family members from all over the world. Subject to the availability of funds, it also subsidises a limited number of projects to train health professionals and others on how to provide specialised assistance to victims of torture. In 2003, grants were approved totalling US$7.2 million to some 200 organisations assisting victims of torture and members of their families in 77 countries.

CHAPTER 4

THE RIGHTS TO LIBERTY

The right to personal liberty is one of the most fundamental human rights as it affects the vital elements of an individual's physical freedom. This chapter examines a) the right to liberty and security; b) the right to freedom from slavery, servitude and forced or compulsory labour, and c) the right to freedom of movement.

A. The right to liberty and security

The right to liberty can be traced back to the English *Magna Charta* (1215) and the United States Declaration of the Rights of Man and Citizen (1789). Even though the *Magna Charta* guaranteed rights only to a limited group of people, namely feudal noblemen, it nevertheless required that arrest or detention be lawful, and protected the individual against the excesses of his ruler. Protection against arbitrary arrest and detention as one of the main dimensions of the right to the liberty of the person was further established in the 17th century Bill of Rights (1689) and *Habeas Corpus Acts* (1640, 1679). The right was further developed and its scope of application widened after the French Revolution, in the French Declaration of Rights (1789) where the right to liberty was guaranteed to all nationals in the constitutions of national states. The right to liberty played a major role in the Mexican revolution (1915) where 'land and liberty' (*Tierra y Libertad)* was the slogan of the revolution.

At the international level, the right to liberty and security of the person found its first legal formulation in Article 9 of the Universal Declaration. The right to liberty and security in this declaration appears in a short and vague version, but has since been further elaborated upon by a number of international human rights instruments at the international and the regional level.

The right to liberty and security of the person, as the title suggests, entails two distinct rights: the right to liberty of the person and the right to personal security. In order to clarify how these two rights are understood under human rights law, a short description of each right follows.

The right to liberty of the person, as found in international human rights instruments, does not grant complete freedom from arrest or detention. Deprivation of liberty is a legitimate form of state control over persons within its jurisdiction. Instead, the right to liberty acts as a substantive guarantee that arrest or detention will not be arbitrary or unlawful. In general, any deprivation of liberty is only allowed if it is carried out in accordance with a procedure established by domestic law and if the following minimum guarantees are respected: a) every detained person shall be informed promptly of the reasons for her/his arrest; b) every detained person shall be entitled to take *habeas corpus* proceedings before a court (which has to decide without delay and order release if the detention is unlawful); c) every detained person has an enforceable right to compensation if detention was unlawful; and d) persons held in custody shall be brought promptly, that is within a few days, before a judge who must either release them or authorise pre-trial detention. They are entitled to trial within a reasonable time and to release in exchange for bail or some other guarantee to appear for trial. In other words, pre-trial detention shall not be the general rule and shall be as short as possible, depending on the complexity of the case.

The right to personal security has not been defined as clearly as the right to liberty and the meaning of this right differs in the different human rights conventions. Under the ICCPR, which gives it the broadest meaning, the right to personal security is understood as the right to the protection of the law in the exercise of the right to liberty. This means that the right to security extends to situations other than the formal deprivation of liberty. For instance a state may not ignore a known threat to the life of a person under its jurisdiction; it has an obligation to take reasonable and appropriate measures to protect that person.

1. STANDARDS

The right to liberty and security, expressed in Article 9 UDHR, has been embedded in most of the existing human rights instruments, both at the international and regional level.

Article 9 UDHR states very briefly that 'no one shall be subjected to arbitrary arrest, detention or exile'. The basic principles set out in Article 9 of the Universal Declaration are elaborated upon by the ICCPR in Article 9 (right to liberty and security of the person); and Article 12(4) (prohibition of arbitrary exile). At the regional level, these rights are guaranteed in Article 7 ACHR, Article 5 ECHR and Article 6 ACHPR.

Article 9 ICCPR, Article 7 ACHR, Article 5 ECHR, and Article 6 ACHPR all establish certain procedural guarantees and minimum standards for protection against arbitrary arrest and detention. Article 5(1) European Convention differs from the other conventions in that it defines exhaustively the cases in which a person may be deprived of her/his liberty. The other human rights conventions leave the regulation of the grounds for detention to the domain of domestic

legislation. An important exception is the detention merely on the grounds of inability to fulfil a contractual obligation (detention for debt), which is clearly prohibited in Article 11 ICCPR, Article 7(7) American Convention and Article 1 Protocol No. 4 European Convention.

Article 10 ICCPR and Article 5(3) to (6) ACHR guarantee to all persons deprived of their liberty a special right to humane treatment and to certain minimum conditions of pre-trial detention and imprisonment, such as the segregation of the accused from the convicted persons or segregation of juveniles from adults. Mention should also be made of Article 16 CMW that grants migrant workers and their families the right to liberty and security of person.

2. SUPERVISION

The Human Rights Committee, the Inter-American Commission and Court and the European Court of Human Rights have developed fairly detailed case-law on the varied and highly complex issues related to the right to personal liberty and security. The exact meaning of many terms, such as 'arbitrarily', 'promptly', 'speedily' and 'without delay' is unclear and can only be established on a case-by-case basis, taking into account all relevant circumstances. The increasing body of case-law is gradually contributing to a clearer definition of the concept of liberty and security.

At the universal level, the Human Rights Committee has developed extensive case-law with regard to the right to the liberty and security of the person. The Human Rights Committee has issued a large number of decisions concerning most aspects of the provisions in Article 9. The large majority has concerned detention for the purposes of criminal justice, though other types of detention (such as detention of aliens and detention for the reason of enforced psychiatric treatment) have been dealt with as well (see, *e.g.*, *Torres* v. *Finland* and *A.* v. *New Zealand*). Nevertheless, there remain a number of uncertainties concerning the interpretation of certain provisions of Article 9, such as the exact definition of 'promptness' and what is considered a permissible length of time that a court can take to render a decision under a *habeas corpus* application. With regard to the right to personal security, the Committee has given this right its widest scope, as it has established in a number of views that, in the case of serious threats to the life of persons under their jurisdiction, states are under the obligation to take reasonable and appropriate measures to protect them (see, *e.g.*, *Delgado Paez* v. *Colombia*, *Bwalya* v. *Zaire and Oló Bahamonde* v. *Equatorial Guinea*). Apart from individual decisions, General Comment 8 elaborates on the meaning of the right to liberty and helps define some of the elements found in Article 9. In addition, in its General Comment 29, the Human Rights Committee has established that the requirement of a court review to determine whether detention is lawful, is a non-derogable element of Article 9.

Another important mechanism under the UN that deals specifically with arbitrary detention is the UN Working Group on Arbitrary Detention. The UN

Commission on Human Rights has entrusted the Working Group with the following mandate: a) to investigate cases of detention imposed arbitrarily or otherwise inconsistently with relevant international standards set forth in international human rights instruments; b) to seek and receive information from governmental and intergovernmental and non-governmental organisations, and receive information from the individuals concerned, their families or their representatives; and c) to present a comprehensive report to the Commission at its annual session. The Working Group on Arbitrary Detention is the only non-treaty-based mechanism whose mandate expressly provides for consideration of individual complaints.

At the regional level, both the Inter-American Commission and the Inter-American Court have issued a considerable number of decisions regarding most provisions in Article 7 ACHR. However, the jurisprudence of the Court and the Commission has not substantially clarified these provisions; although many of the decisions present new viewpoints, they lack strong legal reasoning and analysis. This may be related to the difficult circumstances in which decisions concerning this right have to be made; states are often reluctant to co-operate and evidence (especially in disappearance cases) is hard to obtain. Nevertheless, both the Commission and the Court have rendered some very interesting judgements concerning the right to personal liberty and security. In the *Velásquez Rodriguez* and *Godinez Cruz* v. *Honduras cases*, for instance, the Court held that the kidnapping of an individual and the denial of access to judicial authorities by which the legality of the detention could be reviewed (*habeas corpus*), constituted a manifest violation of Article 7. In *Garcia* v. *Peru* (*Case 11.006*), the Commission ruled that threatening persons with arbitrary and unjust detention can infringe the right to personal security and therefore violated Article 7. More generally, the Commission has stated that any arrest must be made by the agency properly authorised by the national constitution and in accordance with the procedures required by international law. If these conditions are not met, 'arrests cease to be arrest *per se* and become kidnappings'. In regard to liberty and security, the Inter-American Court cases of *Gangarand* v. *Surinam* and *Bulacio* v. *Argentina* are also worth mentioning.

At the European level, the European Court of Human Rights has dealt with more than 250 cases under Article 5 ECHR, providing extensive jurisprudence that aids in clarifying difficult issues, such as 'reasonable time', 'promptly', and 'judge or other officer'. One of the problems that the Court deals with is the exhaustive list of circumstances in which states may detain an individual. As explained above, the European Convention is the only one that provides the states with such a list, and both states parties and the Court have found that it is not easy to accommodate all recognised cases of arrest in one article. The European Court has established that short detention for the purpose of searching a person in the street is not a violation of Article 5(1) (see, *e.g., McVeigh, O'Neill and Evans* v. *The United Kingdom*). Another problem has been that some of the provisions found in Article 5 are difficult to apply uniformly to the different

civil and common law systems represented among the states parties. In general, however, the European Court has provided the most comprehensive jurisprudence with regard to the right to the liberty and security of the person and its well-formulated decisions have been a great help for other international human rights supervisory bodies. It has, for instance, ruled that the provision that a person must be brought 'promptly' before a judge implies that this has to be done within exactly four days (see, *e.g.*, *O'Hara* v. *The United Kingdom*). For the concept of 'reasonable time' a series of parameters have been developed which provide a useful framework for deciding whether a period is reasonable. Some states have introduced such parameters to reduce the time before a sentence is given to less than for instance one-and-a-half-year, even in the more difficult cases.

Under the African system, the African Commission has attempted in a number of cases to clarify and elaborate on the content of Article 6 ACHPR. On the issue of the length of detention the Commission has found in a number of communications that, for example, imprisonment of over twelve years without a trial constituted a violation of Article 6 and that three years' detention without a trial or even three months may be sufficient to violate Article 6 (see, *e.g.*, *Krishna Achuthan (on behalf of Aleke Banda), Amnesty International on behalf of Orton and Vera Chirwa and Amnesty International on behalf of Orton and Vera Chirwa* v. *Malawi, Communication 64/92, 137/94 and 154/96*). In other cases, a violation of Article 6 was found in regard to the basis and manner of the detention. In *Alhassan Abubakar* v. *Ghana, Communication 103/93* the Commission found that the detention of the victim without a trial constituted a violation of Article 6. In a case against Rwanda the Commission found that arbitrary arrests and detention, presumably by the government, of thousands of people solely because of their ethnic origin, was contrary to Article 6 (*Organisation Mondiale Contre la Torture and Association Internationale des Juristes Democrates, Commission Internationale des Juristes (CIJ), Union Interafricaine des Droits de l'Homme* v. *Rwanda, Communications 27/89, 46/9, 49/93,* see also *Commission Nationale des Droits de l'Homme et des Libertés* v. *Chad, Communication 74/92*).

B. The right to freedom from slavery, servitude and forced or compulsory labour

Slavery has existed since time immemorial; rules regarding slaves were, for instance, part of written Roman law. For centuries, slave trade was practiced globally and large scale slave trade in the past and the slavery or slavery-like practices that accompanied colonialism had a devastating impact on societies around the world, notably in West- and East Africa as well as Latin America and Asia.

The freedom from slavery was the first human right to be protected under international law. In 1926 the Slavery Convention, the first multilateral human rights treaty, was adopted. Its aim was to prevent slave trade and abolish slavery

in all forms. Prohibition of slavery is today considered a customary international law rule and a *jus cogens* norm. Moreover, in one of its judgements, the International Court of Justice identified the protection from slavery as an *erga omnes* obligation (*Barcelona Traction Case*). The problematic abolition of traditional slavery in the course of the 19th and the first half of the 20th century demonstrates how complex and controversial it can be to change current practices in order to protect human rights.

The word 'slavery' has come to include a variety of human rights violations. In addition to traditional slavery and slave trade, abuses include the sale of children, child prostitution, child pornography, the exploitation of child labour, the sexual mutilation of female children, the use of children in armed conflicts, debt bondage, the traffic in persons and sale of human organs, the exploitation of prostitution, and certain practices under *apartheid* and colonial regimes.

Contemporary slavery is a distressing fact. Today, even in the 21st century, it is estimated that 27 million people are slaves or endure slavery-like situations. Of these, some 20 million suffer various forms of bonded labour. All over the world persons are sold and bought, kept in private detention, maltreated and exploited for economic benefit.

Slavery

The 1926 Slavery Convention defines slavery as 'the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised' (Article 1(1)). The circumstances of the 'enslaved person' are crucial to identify what slavery is. It depends, for instance on a) the degree of restriction of the individual's inherent right to freedom of movement; b) the degree of control of the individual's belongings; and c) the existence of informed consent and a full understanding of the nature of the relationship between the parties (see, for example, the 1956 Supplementary Convention on the Abolition of Slavery). In general, however, slavery occurs when one human being effectively 'owns' another, so that the former person can exploit the latter with impunity.

Servitude

Servitude is a broader concept than slavery. The term 'servitude' refers to other forms of atrocious economic exploitation exercised by one person over another. In *Van Droogenbroeck* v. *Belgium*, the European Commission held that the concept of 'servitude' involves the obligation of the 'serf' to live on the property of another person without the possibility of changing her/his condition. However, in the same case, the European Commission found that a situation could only be regarded as 'servitude' if it involves 'particularly serious form of denial of freedom'.

Forced or compulsory labour

Forced or compulsory labour is defined in Article 2 ILO 29 concerning Forced Labour as 'all work or service, which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily.' Supervisory bodies such as the European Court have used the definition of ILO 29 to interpret freedom from forced labour in their respective conventions. In addition, the European Court has, through its jurisprudence, contributed to a more comprehensive understanding of forced and compulsory labour. In *Van Der Mussele* v. *Belgium*, the Court found that forced labour includes manual work, as well as professional work and that the term 'forced' includes both physical and mental constraints. The Court also further defined the term 'compulsory', which it found to refer to work 'exacted under the menace of any penalty', and performed against the will of the person concerned. Thus, 'compulsory' labour does not only refer to any form of legal compulsion or obligation.

1. STANDARDS

Article 4 UDHR states that 'no one shall be held in slavery or servitude; slavery and the slave trade shall be prohibited in all their forms.'

In Article 8 ICCPR, Article 4 ECHR, Article 6 ACHR and Article 5 ACHPR, slavery is prohibited together with slave trade, servitude and forced or compulsory labour. In addition, Article 6 ACHR expressly prohibits traffic in women.

Article 8(3)(c) ICCPR, Article 4(3) ECHR and Article 6(3) ACHR enumerate four categories of work or service, which are not deemed to be included in the concept of forced or compulsory labour. These include a) military and substitute service; b) duties in cases of emergency; c) normal civic duties; and d) normal work in detention.

The CRC is potentially one of the most effective means of combating slavery-like practices. Properly implemented by states, the Convention offers protection to children at risk from sexual, economic, and other forms of exploitation, including their sale, trafficking and involvement in armed conflict.

Article 11 CMW provides for protection of migrant workers from slavery, servitude and forced or compulsory labour.

In addition to the main international human rights conventions, there are other instruments dealing with the prohibition of slavery and slavery-like activities. The most comprehensive ones include a) the Slavery Convention (1926); b) the Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery (1956); and c) the Convention for the Suppression of Traffic in Person and of the Exploitation of the Prostitution of Others (1950). Moreover, a number of ILO instruments are relevant to the matter of forced and compulsory labour.

2. SUPERVISION

Although slavery and slavery-like practices are a wide-spread problem in our societies today, human rights supervisory bodies such as the Human Rights Committee, the European Court of Human Rights and the Inter-American Commission and Court have not developed a comprehensive 'jurisprudence' with regard to the subject. The following section will outline briefly the trends in the different universal and regional systems.

At the UN treaty body level, the Human Rights Committee has dealt very little with Article 8 in its jurisprudence. At the UN charter-based level, many special rapporteurs have been appointed over the years to conduct studies on slavery, especially related to the exploitation of children. In 1990, the UN Commission on Human Rights created the mandate of the Special Rapporteur on the sale of children, child prostitution and child pornography. The Rapporteur is required to investigate the exploitation of children around the world and to submit reports on the findings to the General Assembly and the UN Commission on Human Rights, making recommendations for the protection of the rights of the children concerned. These recommendations are targeted primarily at governments, other United Nations bodies and non-governmental organisations. The Sub-Commission on the Promotion and Protection of Human Rights has also appointed a Special Rapporteur on contemporary forms of slavery.

At the regional level, the European Court has not found violations of Article 4 European Convention as the terms 'slavery' and 'servitude' have not been considered applicable in the situations presented. In a number of cases concerning forced or compulsory labour, for example, both the European Commission and Court found that the imposition of obligations to provide services of a certain type (free legal aid) or in a given location (in an isolated part of the country) does not constitute a violation of Article 4 of the European Convention (see, *e.g., Van Der Mussele* v. *Belgium*). With regard to slavery, the article has mainly been invoked in connection with complaints of detainees over the obligation to perform work in prison, which is not considered a violation by the European Court.

Under the American Convention, the concepts of slavery, servitude and related practices are not defined and the Inter-American Commission and Court have not yet had the possibility to elaborate upon these concepts in any detail.

The African Commission dealt with the issue of slavery in the five consolidated communications against Mauritania. With regard to some of the allegations of systematic enslavement of the black community of Mauritania, the Commission stated that '[...] there was a violation of Article 5 of the Charter due to practices analogous to slavery, [...] the conditions to which descendants of slaves are subjected clearly constitute exploitation and degradation of man, both practices condemned by the African Charter.' (*Malawi African Association, Amnesty International, Ms. Sarr Diop, Union Interafricaine des Droits de l'Homme and RADDHO, Collectif des Veuves et Ayants-droit and Association*

Mauritanienne des Droits de l'Homme v. *Mauritania, Communications 54/91, 61/91, 98/93, 164/97 -196/97 and 210/98*).

C. The right to freedom of movement

The right to freedom of movement is a fundamental human right, which has found expression and won endorsement in a range of human rights and humanitarian instruments. Its first legal recognition can be traced back as early as the English *Magna Charta* (1215). During the Cold War years, the right to leave one's country – part of the freedom of movement – constituted a source of sharp conflicts between Western and Eastern European Countries. After 1989, changing conditions have affected the issues covered by the right to freedom of movement. Increasing international mobility, tourism and migration on the one hand and alarming tendencies of xenophobia and restrictive attitudes of many states towards asylum seekers, migrant workers and aliens on the other, have made the right to freedom of movement increasingly important and at the same time controversial.

Freedom of movement, commonly understood, entails the right of everybody lawfully within a given territory to move about freely within it, without hindrance, and without having to ask specific permission of the authorities. The right to freedom of movement, as found in international human rights instruments includes four distinct rights: a) the right to move freely within a given territory; b) the right to choose a residence within a territory; c) the right to leave any country, including one's own; and d) the right to enter one's own country.

The right to move freely within a given territory

Everyone lawfully within the territory of a state has the right to move freely within that territory. The citizens of a state are always lawfully within the territory of that state. As regards aliens, however, a state may determine by law whether persons may move freely in accordance with the law. The Human Rights Committee has held on this matter that an alien who enters a state lawfully, and whose status is regularised, must be considered lawfully within the territory (General Comment 27). Once a person is lawfully within a state, any restrictions on her/his right to freedom of movement and any treatment different from that accorded to nationals, have to be justified on one or more of the grounds prescribed in Article 12 ICCPR.

Permissible restrictions on the freedom of internal movement often relate to efforts to protect 'public order', where detention is in order, where traffic must be regulated, or where special measures (such as blockades) are called for to maintain public safety. Limitations for 'public health reasons', such as those who confine freedom of movement for quarantine reasons in order to prevent the spread of infectious diseases, are also permissible. Protection of the natural

environment is a further justifiable basis for controlling movement. The Human Rights Committee has indicated that under Article 12 ICCPR it is permissible to restrict the categories of persons entitled to live on tribal reserves, for the purpose of protecting the resources and preserving the identity of the tribe (see, *e.g.*, *Lovelace* v. *Canada*).

The state's obligation under the right to freedom of movement is to ensure that the right to freedom of movement is protected from both public and private interference. In the case of a woman, the obligation to protect includes the right to move freely and to choose her residence without any interference, by law or by practice, by any other person, including a relative.

The right to choose a residence within a territory

Any person lawfully within the territory of a state has the right to choose her/his place of residence. The right to choose where to live includes protection against all forms of forced internal displacement. It also means that the state is not permitted to prevent the entry or stay of persons in a defined part of the country. This right was successfully invoked before the Human Rights Committee in *inter alia, Ackla* v. *Togo,* where the applicant was under a prohibition from entering a certain area and his native village. The Committee found that in the absence of an explanation from the states justifying the restriction, there had been a violation of Article 12(1) ICCPR (see also *Mpaka-Nsusu* v. *Zaire*).

An important point to mention is that the right to choose a residence within the territory of one's state of nationality is not affected by temporary absence from home.

The right to leave any country

The right to leave any country, including one's own, is another component of the right to freedom of movement. It involves the right to depart permanently (emigration), or for a shorter or longer period. It stems from the general principle that no state owns an individual, and that the right is a personal one. The right to leave any country is not restricted to persons lawfully within the territory of a state, which means that an alien being legally expelled from the country is allowed to choose the state of destination, with the agreement of that state. The right to leave any country, including one's own, does not however guarantee an unrestricted right to travel from one country to another. However, Article 12 UDHR, Article 22(7) American Convention, and Article 12(3) African Charter recognise the right of a person to leave her/his country in order to seek and enjoy asylum from persecution in another country. In order to enable a person to exercise her/his right to leave any country, including her/his own, obligations are imposed both on the state of residence and on the state of nationality. Since international travel usually requires appropriate documents, in particular a passport, the right to leave a country includes the right to obtain the necessary

travel documents. Normally, the issue of a passport falls under the obligation of the state of nationality of the individual. If the citizen is resident abroad, or being resident abroad has obtained travel documents from another country, this does not relieve the state of nationality of the obligation to issue a passport. In such a case, obligations are imposed both on the state of residence and on the state of nationality. The Human Rights Committee has been called upon, in the context of analysing the right to freedom of movement, to consider the denial of provision or revocation of passports to citizens living abroad. These cases, known as the 'Passport cases', articulate positive and negative duties on both the state of residence and the state of nationality:

> The State of residence is primarily obligated to avoid interfering with the freedom to leave; the State of nationality is under a positive duty to ensure effective possibilities to leave by issuing the necessary documents; States that deny their citizens a passport thus violate Article 12(2) [of ICCPR] insofar as this denial is not justified pursuant to Article 12(3) (see, *e.g., Varela Nuñez* v. *Uruguay*).

The right to enter one's own country

The right of a person to enter her/his country or to return to one's own country recognises the special relationship of a person to that country. The right entails different guarantees, such as a) the right to remain in one's own country; b) the right to return after having left one's own country; and c) the right to come to the country for the first time if she/he were born outside of it (for example, if the country is the person's state of nationality). The right to return is of particular importance for refugees seeking voluntary repatriation.

The right to enter one's own country is a right enjoyed by a person who is abroad. Accordingly, the state has the positive obligation to take all necessary measures to ensure that a citizen abroad has the right to return to her/his own country, since constitutionally recognised rights are guaranteed not only within the territory of the state but within its jurisdiction as well. If the citizen is detained abroad, positive obligations require the state of nationality to deal with the state where the citizen is detained in order to secure the enjoyment of the right to return, since no citizen on her/his own can act with equal legal status with the governmental authorities of the foreign country. The right to return, however, does not imply that a person who has committed a crime shall be freely entitled to return to her/his home country.

Absolute freedom of movement would include the right to enter another country. However, given the complexities of residence, the rights of the nationals already residing in a country, and the preservation of certain cultural rights, it has never been possible to achieve absolute freedom of movement in any human rights fora. In the so-called Schengen-area (fifteen countries, of which 13 are members of the European Union), consensus on a rather 'complete' freedom of movement was reached. This has, however, had the side effect of a rather strict entry policy for persons from countries not belonging to the Schengen agreement.

1. STANDARDS

The right to the freedom of movement is found in a substantive number of international and regional conventions.

The UDHR contains the first universal statement on the right to freedom of movement. Article 13 UDHR states that: '[e]veryone has the right to freedom of movement and residence within the borders of each state' and '[e]veryone has the right to leave any country, including his own, and to return to his country.' Article 13 UDHR does not directly restrict the right to freedom of movement to those lawfully within the territory. Under many subsequent international and regional instruments, however, the right to freedom of movement applies only to persons lawfully within a given territory.

Article 12 ICCPR, Article 2 Protocol 4 ECHR, Article 22 ACHR, and Article 12 ACHPR state that everyone lawfully within the territory of a state has the right to liberty of movement and the freedom to choose her/his residence. Moreover, the state may not arbitrarily deprive someone of the right to enter her/his own country.

Article 4 Protocol 4 ECHR, Article 22 ACHR, and Article 12 ACHPR also prohibit the collective expulsion of aliens (mass expulsion of non-nationals under Article 12 ACHPR).

The right to freedom of movement, as found in Article 12 ICCPR, Article 2 Protocol 4 ECHR and Article 22 ACHR, allows the state to restrict the right in certain specific circumstances such as national security, public safety, maintenance of '*ordre public*', for the prevention of crime, protection of health and morals, and protection of the rights and freedoms of others. The power of the state to restrict freedom of movement is, however, circumscribed by the requirement that the limitations must be 'provided by law' (ICCPR and American Convention), or be 'necessary in a democratic society', in order to safeguard certain essential interests of the state (European Convention).

Article 12(3) ACHPR is unusual in that it provides that a person has the right not only to seek but also to obtain asylum. Similarly, Article 22(7) ACHR provides for the right to 'seek and be granted asylum'.

The right to freedom of movement can also be found in other related texts such as the Convention Relating to the Status of Refugees, the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; the Convention on the Elimination of all Forms of Racial Discrimination; the International Convention Governing Specific Aspects of Refugee Problems in Africa; and the Convention on the Protection of the Rights of All Migrant Workers and Members of their Families.

2. SUPERVISION

The right to the freedom of movement has not generated as detailed case-law as other civil rights. Having said that, the Human Rights Committee, the Inter-American Commission and Court and the European Court of Human Rights do have some interesting case-law regarding the right to the freedom of movement, which has helped interpret and clarify this right.

At the UN level, the Human Rights Committee has decided relatively few cases under Article 12. General Comment 27, adopted in 1999, was a welcome addition to the jurisprudence. States parties have been able to justify restrictions to the right to freedom of movement by invoking the limitations despite the fact that limits to freedom of movement and the right to leave the country are to be interpreted narrowly (see, *e.g., Celepli* v. *Sweden* and *Peltonen* v. *Finland*). The Human Rights Committee's most controversial views under Article 12 concern the right to enter one's 'own country' under Article 12(4). In *Stewart* v. *Canada*, the Human Rights Committee found that Canada would not violate Article 12(4) by deporting a British citizen who had committed petty crimes, even though he had lived in Canada since the age of seven and both his mother and brother still resided in Canada. This is a narrow interpretation of the term 'own country', as it does not include a person who has lived most of his life in a country but never applied for the nationality (see, *e.g.*, the dissenting opinions in *Stewart* v. *Canada*).

At the regional level, all three supervisory bodies have dealt with the right to freedom of movement, but like the Human Rights Committee, not in detail.

At the European level, the European Court appears to allow states a considerable margin of appreciation when applying the right to freedom of movement. In general, whenever considering a case under the right to freedom of movement, the European Court examines whether the interference with a person's freedom of movement was provided by law, necessary and proportionate. In the *Raimondo* v. *Italy* case, for example, the Court ruled that the house arrest of a person suspected of being a member of the mafia was not disproportionate. However, the Court found that allowing 18 days to pass before informing the person that the house arrest had been revoked was not in accordance with law, not necessary and therefore violated Article 2 Protocol 4 (ECHR). In addition, the European Court has applied the principle of proportionality in several cases against Italy, where it found that forbidding persons declared bankrupt to move from their place of residence until liquidation proceedings have been concluded is a necessary measure to ensure payment to creditors, that is, such measures are not considered disproportionate. However, where the liquidation proceedings, and therefore the interference, had lasted for 18 years, the Court found a violation as the fair balance between general interest and the individual's interest had been upset (see *Bassani* v. *Italy* and *Neroni* v. *Italy*).

At the Inter-American level, few petitions concerning the right to freedom of movement have been brought to the Inter-American Commission. The jurisprudence concerning this right is therefore limited. In summary, the Inter-

American Commission has interpreted some of the issues included in the right to freedom of movement in the following way: a) the right to freedom of movement and residence is violated if a person is unlawfully detained and kidnapped (see, *e.g.*, *Rivera* v. *El Salvador (Case 10.227)*); b) forced exile without proper due process procedure is a violation of Article 22(5); c) regarding the expulsion of legal aliens, the Commission has held that due process must be followed and that the procedural guarantees in Article 8 ACHR must apply in such proceedings; and d) the mass expulsion of illegal immigrant agricultural workers from Honduras due to violence that followed a World Cup football match was considered a violation of Article 22(9).

At the African level, examples where the African Commission has found a violation of Article 12 include the following situations: b) where travel restrictions were imposed on former politicians (*Sir Dawda K. Jawara* v. *The Gambia, Communications 147/95 and 149/96*), b) where people were evicted from their homes and deprived of their nationality (*Malawi African Association, Amnesty International, Ms. Sarr Diop, Union Interafricaine des Droits de l'Homme and RADDHO, Collectif des Veuves et Ayants-droit and Association Mauritanienne des Droits de l'Homme* v. *Mauritania, Communications 54/91, 61/91, 98/93, 164/97-196/97 and 210/98*) and c) where a person was forced to flee his country because of abductions and threats (*Rights International* v. *Nigeria, Communications 215/98, 147/95 and 54/91*).

CHAPTER 5

THE RIGHTS TO PRIVACY AND FAMILY LIFE

The first pronouncement on the right to respect for privacy and family is set out in the Universal Declaration stipulating that 'no-one shall be subjected to arbitrary interference with his privacy, family, home or correspondence' and that 'the family is the fundamental group unit of society entitled to protection by society and the state'. Today the right to respect for private and family life has come to encompass a wide range of areas. Privacy applies to a wide spectrum ranging from phone tapping to sexual orientation, while prominent issues regarding the right to respect for family include the rights of parents to contact with their children, remarriage and adoptions. This chapter examines a) the right to respect for private and family life, and b) the right to marry and found a family.

A. The right to respect for private and family life

The right to respect for privacy mirrors the liberal concept of the individual's freedom as a self-governing being as long as his/her actions do not interfere with the rights and freedoms of others. The right to privacy is the right to individual autonomy that is violated when states interfere with, penalise, or prohibit actions that essentially only concern the individual, such as not wearing safety equipment at work or committing suicide. States justify such interferences with the social costs of the actions prohibited, for instance to the health care system. The right to privacy encompasses the right to protect a person's intimacy, identity, name, gender, honour, dignity, appearance, feelings and sexual orientation. The right to privacy may be limited in the interests of others, under specific conditions, provided that the interference is not arbitrary or unlawful. People cannot be forced to change their appearance or name, for instance, nor can they be prohibited from changing their name or sex; however, in the interests of the rights of others they may, for example, be compelled to give biological samples for the determination of paternity. The right to privacy extends to the home, the family and correspondence. The term family relates, for example, to blood ties, economic ties, marriage, and adoption. The right to the respect for

privacy of the home has been interpreted to include place of business. A common interference with the privacy of correspondence has to do with secret surveillance and censorship of the correspondence of prisoners.

Finally, with the propagation of computer technology and automated data processing, states are obliged to ensure effective data protection as public authorities and commercial organisations are in a position to exploit personal data threatening the privacy of individuals.

1. STANDARDS

Article 12 UDHR and Article 17 ICCPR stipulate that 'no one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation' and that 'everyone has the right to protection of the law against such interference or attacks.' Very similar wording is used in Article 14 CMW protecting migrant workers and their families from arbitrary interference with their family life and privacy and Article 16 CRC protects the right to privacy.

Article 8 ECHR sets out the right to respect for private and family life, home and correspondence, as well as a number of possible limitations. Authorities may not interfere with this right except as is 'in accordance with law and is necessary in the interests of a democratic society, in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health and morals, or for the protection of the rights and freedoms of others.'

Article 11 ACHR sets out the right to privacy, honour and dignity, and prohibits arbitrary interference with the right to privacy and stipulates that everyone has the right to protection of the law against attacks or interferences with the right.

The ACHPR does not explicitly set out the right to privacy, but Article 18 attaches particular importance to the state's duty to protect the family.

2. SUPERVISION

The Human Rights Committee has dealt with many complaints regarding violations of the right to respect for private and family life. The Committee has found, for instance, that the right to privacy was violated when people were not allowed to change their names for religious purposes (*Coeriel and Aurik* v. *The Netherlands*), that a general prohibition of homosexuality is a violation of the right to privacy (*Toonen* v. *Australia)* and that dispossession by the state of the ancestral burial territory of members of an indigenous population was arbitrary interference with their right to privacy and family (*Hopu and Bessert* v. *France).* The right to privacy may be restricted, but the Committee has also stated that measures of control or censorship of correspondence shall be subject to

satisfactory legal safeguards against arbitrary application and found that excessive restriction or censorship of the correspondence of prisoners is a violation of the right to privacy (see, *e.g., Estrella* v. *Uruguay).* The Committee has also stipulated in General Comment 16 that states are under the obligation to ensure effective protection of personal data and that the right to respect for the home extends to commercial or business space.

The European Court has made it clear that a state has a duty not to interfere with its subjects' privacy, except under the strictly limited circumstances proscribed in Article 8; *i.e.*: only if prescribed by law, in the public interest and necessary in a democratic society. The Court has ruled that a person's private life extends to moral and physical integrity, including sex life, and it has found that in certain circumstances a state has a duty to act to ensure that the right to privacy can be enjoyed. The Court has, *inter alia*, found violations of the right to respect for private and family life where the individuals were being subjected to secret surveillance by telephone-tapping (*Huvig* v. *France*); where the state controlled correspondence of prisoners (*Campbell and Fell* v. *The United Kingdom*); the prohibition of homosexual acts of consenting adults (*Norris* v. *Ireland*); placing or keeping children in public care, in circumstances where parents have not fully participated in the proceedings relating to these decisions, or in proceedings where parents have been refused the right of access to their children (see *e.g., Olsson* v. *Sweden* and *O., H., W., B.* and *R.* v. *The United Kingdom*); and the expulsion of foreigners in circumstances where their right to family life has been violated (*Moustaquim* v. *Belgium*). Furthermore, the Court has interpreted the right to the respect for the privacy of the home to include certain professional or business activities or premises (*Niemitz* v. *Germany*). Finally, emerging in the doctrine of the Court is the expansion of the currently limited rights of transsexuals. The Court has, for instance, ruled that in barring transsexuals from obtaining legal recognition of their gender re-assignment the state demonstrates a failure to respect the right to private life (*Goodwin (Christine)* v. *The United Kingdom*).

The Inter-American system has not dealt with many cases regarding the right to privacy. The Commission has found that forcible recruitment of a soldier violated his right to dignity (*Piché* v. *Guatemala (Case 10.975)*), and that rape implies, among other things, a deliberate outrage to a person's dignity and becomes in this respect a question that is included in the concept of 'private life' (*Rivas Quintanilla* v. *El Salvador (Case 11.625)*). In regard to interferences for investigative purposes, the Commission has set out that any search must be justified by a 'well-substantiated search warrant issued by a competent judicial authority, spelling out the reasons for the measure being adopted and specifying the place to be searched and the objects that will be seized' (*Robles Espinoza e Hijos* v. *Peru (Case 11.006)*).

The African Commission has not explicitly dealt with the right to privacy.

B. The right to marry and found a family

Marriage and family are ancient institutions, recognised for centuries as the foundation of society. Like other aspects of society, family life and even the concept of 'family' has undergone rapid changes and evolution in recent times, resulting in varied regulations aiming at, for instance, guaranteeing equal rights of both spouses or partners in a relationship, when it comes to children and regulating adoptions. The state has an obligation to establish marriage and family as institutions under law, but at the same time to respect a person's freedom to enter into marriage and the equal rights of both partners. For instance, an absolute ban on divorce based on religion violates the right to marry and prisoners cannot be prohibited to marry.

1. STANDARDS

The family is entitled to special protection under a number of international standards. Article 16 UDHR establishes that 'the family is the natural and fundamental group unit of society and is entitled to protection by society and the State.' Article 23 ICCPR sets out protection for the family, for example, the right of men and women to found a family, as well as protection for children in the case of dissolution of marriage. Article 10 ICESCR, Article 17 ACHR, Article 15 Protocol of San Salvador, Article 12 ECHR, as well as Articles 16, 17 and 19 European Social Charter deal with rights of the family. Article 18 ACHPR attaches particular importance to the state's duty to protect the family as the 'natural unit and basis of society [...] a custodian of morals and traditional values'.

The right to marry is also protected under international standards. The UDHR sets out in Article 16 that men and women of full age have the right to marry without limitations; that they are entitled to equal rights regarding marriage; and that the marriage shall be consensual. Article 23 ICCPR, Article 16 CEDAW and Article 12 ECHR set out the right to marry in similar terms. Specific international conventions also deal with the right to marriage, for instance, the Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages (1962) and the Convention on the Nationality of Married Women (1957).

Rights of children are naturally paramount in the context of the family; Article 24 ICCPR, Article 19 ACHR, the European Social Charter and the CRC set out the special protection for children. Other important standards include, *inter alia*, the Declaration on Social and Legal Principles relating to the Protection and Welfare of Children, with Special Reference to Foster Placement and Adoption Nationally and Internationally (1986), the Inter-American Convention on Conflict of Laws Concerning the Adoption of Minors (1984) and the European Convention on the Adoption of Children (1967).

In this context, obligations of states include registering children after birth, ensuring that they enjoy the right to a name and nationality, and that they are not

subject to discrimination (for instance, those born out of wedlock). Children are to be protected against physical and moral dangers, social and family benefits shall be provided and mothers and children shall be guaranteed special protection. Migrant workers and their families also merit special protection.

2. SUPERVISION

The Human Rights Committee has dealt with the right to family in a number of cases. The Committee has observed that that the term 'family' should be given a broad interpretation, so as to include all those comprising the family as understood in the society in question (*Hopu and Bessert* v. *France*). The Committee has taken the view that the common residence of husband and wife has to be considered as the normal behaviour of a family and therefore the exclusion of a person from a country where close members of his family are living can amount to interference with family life. The Committee has stated that the legal protection, or other measures, a society can afford to the family may vary from country to country and depend on different social, economic, political and cultural conditions and traditions, but that restrictions solely based on sex are not allowed (*Aumeeruddy Cziffra and 19 other Mauritanian women* v. *Mauritius).*

In regard to the state's duty to protect the family, the African Commission has found that the forcible exile of political activists and expulsion of foreigners was in violation of the duties to protect and assist the family, as it forcibly broke up the family unit (*Amnesty International* v. *Zambia plus Angola, Communication 212/98*). Harassment, detention and torture of parents and families of detainees violates the right to protection of family: 'the family is central to African society and the rights of the family are a necessary corollary to the protection of the individual, being an integral part of this unit' (*Comité Culturel pour la Democratie au Benin, Badjogoume Hilaire, El Hadj Bobacar Diawara* v. *Benin, Communications 16/88, 17/88 and 18/88*). The Commission has also found that it is a violation to prevent detainees from communicating with their families.

The Inter-American Court has hardly dealt with the right to family life, except in the context of reparations where it has expanded the traditional notion of the family to include the extended family according to the culture and traditions of the society in question. Furthermore, the Court has granted provisional measures to protect migrant workers from expulsion in violation of their right to family and that of special protection of children within a family. Similarly, the Inter-American Commission has dealt with the right to respect for the family only to a limited extent; dealing, for instance, with discriminatory practices in respect of the role of each partner within marriage and gender discrimination violating the right to protection of the family. The Commission found discriminatory legislation stating, *inter alia*, that engaging in a profession or having a job, in the case of women, should be conditioned to situations in which it would not impair their role as mothers and housewives (*Morales de Sierra* v. *Guatemala (Case 11.625)*).

It is within the European system that the right to the protection of family is the most developed. The European Court has dealt with many cases dealing with the right to privacy. The Court has found, *inter alia*, that the 'family' is not confined to blood or marriage and can include de facto relationships (*X. Y. Z.* v. *The United Kingdom*); it has established that certain factors come into play when determining whether the relationship of individuals constitutes a family, *e.g.*, the length of the relationship, if the couple lives together and whether they have demonstrated a commitment to each other in one form or another, but it stated that protecting the family does not necessarily oblige the state to ensure that non-married couples are to enjoy the same rights as married couples. The right to marry does not guarantee the right to divorce, but the Court has found that the temporary prohibition on remarriage of a man who had already divorced three times constituted a violation of the right to marry (*F.* v. *Switzerland*).

CHAPTER 6

THE RIGHT TO PROPERTY

One of the more controversial and complex human rights is the right to property. The right is controversial, because the very right which is seen by some as central to the human rights concept, is considered by others to be an instrument for abuse; a right that protects the 'haves' against the 'have-nots'. It is complex, because no other human right is subject to more qualifications and limitations and, consequently, no other right has resulted in more complex case-law of, for instance, the supervisory bodies of the ECHR. It is complex also because it is generally regarded as a civil right, and by some even as an integrity right. At the same time, it clearly has characteristics of social rights with significant implications for the distribution of social goods and wealth. Moreover, the right to property has major implications for several important social and economic rights such as the right to work, the right to enjoy the benefits of scientific progress, the right to education and the right to adequate housing.

In many revolutions, including the French, the Russian, the American and the South African, property questions played a central role. Moreover, several of the worst violations of human rights in the 20th century were related to property rights. The collectivisation of agricultural land in the Ukraine during the Stalin era led to large-scale famine, which claimed 5 to 7 million lives in 1932-1933 alone. During the 'Great Leap Forward' of Chairman Mao, land in China was collectivised, and household iron utensils were gathered to be used for collective purposes. This, too, led to famine, whereby an estimated 20 million people died of starvation between 1958 and 1962. One of the worst was also the removal of some 3 million people, on discriminatory grounds, from their ancestral lands during the *Apartheid* regime in South Africa.

It is, therefore, not surprising that this right was already the subject of debate quite early in history. To John Locke, the right to property belonged to the so-called natural rights such as life and liberty, which human beings could not be deprived of. To the socialist Proudhon, on the other hand, property was equal to theft. The question was likewise fundamental in the treatises of Friedrich Engels, but also in the papal encyclical letter *Rerum Novarum* (1891). Land reform, incentives to provide people with access to land, housing, and wealth can have

significant benefits. Successful pension schemes in Europe in the 1960s to 1980s have had a significant impact on the distribution of wealth and increased long-term security of its population.

Property has been defined in the case-law of both the European and the Inter-American Courts of Human Rights. As such, the concept of property has an autonomous meaning, often substantially different from national legislation. It may also include rights which result from rent or lease agreements and – under certain conditions – benefits from public relationships, such as public pension schemes.

In today's modern states – the EU member states, for instance – property is considered one of the key concepts of the legal order. Property is vital to society, since property and contracts jointly form the basis of exchange and trade, on which the market economy is built. In parallel, extensive case-law has been established to protect individuals against abuse of property, while some limited legislation has been developed to counterbalance possible imbalances caused by the accumulation of property, and to provide additional protection for those dependent on the property of others.

In the developed world, protection of property is, despite its complexity and controversial nature, considered an important element in the market economy, and a prerequisite for security of the individual. In the developing world, property and, more specifically, land issues are frequently sources of controversy. On the one hand, there is sometimes a lack of protection of the owner against abuse, because of the absence of proper registration and of judicial recourse in the case of infringement of property rights. On the other hand, powerful property owners can sometimes abuse their power, which can go hand in hand with large-scale holdings.

In many less developed countries – where the industry and services sectors are underdeveloped – there are few alternatives to land to provide citizens with the means for a decent standard of living, as well as security. It is therefore not surprising that land is one of the most difficult issues in many developing countries, as often more than two-thirds of all wealth is vested in land. Moreover, utilisation patterns of, for example, indigenous peoples do not fit into existing property protection systems and are therefore more susceptible to abuse.

Examples of infringements of property rights are the forcible eviction or relocation of urban squatters who have settled in an area for a long period; excessive administrative difficulties in the registration of land; denial of grazing or water rights, which have existed for many generations, but have never been formally registered; eviction of forest dwellers for environmental reasons; and the relocation of villages for the development of hydroelectric projects without adequate compensation.

1. STANDARDS

The protection of property is included in Article 17 UDHR: 'Everyone has the right to own property alone as well as in association with others. No one shall be arbitrarily deprived of his property.' But the ideological debate between East and West in the 1950s and 1960s, as well as large-scale nationalisation of banks, railways and industries in Western Europe led to no provision on property being incorporated into the two main UN Covenants (ICCPR and ICESCR). The right to property is touched on in two UN Conventions. Article 16 CEDAW sets out equal rights of spouses to enjoyment and disposition of property and Article 15 CMW recognises the right to property and the right to adequate compensation in case of expropriation with regard to migrant workers and their families.

The regional human rights conventions in Europe, America and Africa contain property clauses. The ECHR includes the right to property in its First Protocol (1952): 'Every natural or legal person is entitled to the peaceful enjoyment of his possessions' (Article 1). This standard qualifies the right, not only by speaking of 'enjoyment' rather than of 'ownership', but also by giving the state more powers to limit property rights than is the case for other rights. The state may deprive an individual of his/her possessions 'in the public interest and subject to conditions provided for by law' and may limit this right 'in accordance with the general interest or to secure the payment of taxes or other contributions or penalties'. In fact, a balance has to be struck between the interests of the community, on the one hand, and the fundamental rights of the individual, on the other. The article expressly does not stipulate compensation in case of deprivation or expropriation. In practice, the extensive case-law as well as standards such as the Charter of Nice (2000), lead one to conclude that justifications for non-payment of compensation are very unlikely to be accepted.

At the Inter-American level, the right to property is set out in Article 21 ACHR. At the African level is protected under Article 14.

In 1991, an independent expert, Luis Valencia Rodriguez, was appointed by the UN Commission on Human Rights to study 'the means whereby the right of everyone to own property alone as well as in association with others, fosters, strengthens and enhances the exercise of other human rights and fundamental freedoms.' Valencia Rodriguez had a research and standard-setting mandate, rather than the usual supervision mandate. In the CSCE/OSCE framework, the right to the peaceful enjoyment of property is stipulated in the 1990 Copenhagen document (Paragraph 9.6).

2. SUPERVISION

In the absence of a defined right in the ICCPR, the Human Rights Committee has not found any complaint about property rights admissible, unless it was related to, for instance, non-discrimination. This is the case despite the fact that

several communications, such as: *Oló Bahamonde* v. *Equatorial Guinea*; *Ackla* v. *Togo* and *Diergaardt of Rehoboth Baster Community et al.* v. *Namibia* showed, *prima facie*, evident unjustifiable interference with property rights.

On the basis of the European Convention, the European Commission and the European Court have generated substantive case-law regarding the right to property. Important findings in the more than four hundred cases include that licences and 'goodwill' may, under specific circumstances, constitute 'possessions'; that fairness requires affording affected individuals rights of appeal against governmental decisions and compensation and that the right to property does not encompass the right to acquire property.

Many cases focus on deprivation and on compensation for such deprivation or expropriation. The right of a state to control or limit property rights is, however, also clearly subject to limits. The European Court has also awarded compensation for unjustified limitation of property rights (see, *e.g.*, *Chassagnou* v. *France*).

In the notable case of the *Mayagna (Sumo) Awas Tingni Community* v. *Nicaragua*, the Inter-American Court clarified what the right to property entails 'those material things which can be possessed, as well as any right which may be part of a person's patrimony; that concept includes all movables and immovables, corporeal and incorporeal elements and any other intangible object capable of having value' and that the protection of right to property extends to the rights of members of the indigenous communities within the framework of communal property. The Court also found that the right to property may lead to positive obligations, including the obligation of the state to delimit, demarcate and provide formal titles to lands. In this case, the land belonged to indigenous communities, which had never registered their ancestral land. Such failure to register cannot justify absence of government property protection.

In international co-operation the issue of property protection is increasingly receiving attention. The fact that property protection contributes to economic security and can stimulate growth is a significant element in this context. Projects that may contribute to improved protection, *e.g.* through titling, as well as projects that lead to better access to effective remedies, are increasingly receiving support. Compliance of states with positive obligations in connection with property rights should of course be focused on the position of those who cannot live in dignity, as a result of deprivation or the absence of possessions.

CHAPTER 7

THE RIGHTS RELATING TO LABOUR

The right to work affects the degree of enjoyment of many other rights such as the right to education, health and culture. Its realisation is not only important for the provision of income to the individual, but also for the individual's personal development and dignity, as well as for peaceful progress of society. On the other hand, the right to work intrinsically creates a degree of dependency of the employed on his employer. As such, it could create a relationship of inequality. To protect the employed and to make a more level playing field, the right to strike and the right to associate are guaranteed, as well as the right to organise and to bargain collectively. Closely linked to the rights relating to work, are the rights related to social security.

This chapter examines a) the rights relating to work, and b) the rights relating to social security.

A. The rights relating to work

The right to work, in a broad sense, implies the right to enter employment, and the right not to be deprived of employment unfairly. The first component encompasses the factors that come into play regarding access to work; such as education, vocational training, and unemployment levels. The latter component deals with issues regarding employment security, for instance, security from being fired unjustly.

The main elements of the right to work are access to employment, freedom from forced labour and labour security. Other important components are:

- The freedom to work; freedom concerning the choice of occupation as well as the place of performance;
- The right to earn a living from work of one's own choice, encompassing the freedom to establish one's own independent form of employment or business;
- The right to free employment services; the right to work has been interpreted as the commitment of the state to undertake continuous efforts to ensure full

employment. Such efforts include the formulation and implementation of employment promotion policies and the promotion of technical and vocational education programmes aimed at increasing employment, as well as free access to information and assistance for job seekers;

- The right to safe and healthy working conditions, as well as rest, leisure and reasonable working hours;
- The right to employment; the right not to be arbitrarily dismissed and the right to protection against unemployment.

As in all socio-economic rights, the non-discrimination principle is an important dimension of the right to work. It entails non-discrimination in recruitment, in remuneration and in promotion opportunities, and in the treatment of aliens.

1. STANDARDS

Several international standards deal with the right to work and many conventions have been drafted on labour rights. Article 23 UDHR sets out the right to work, the right to equal pay for equal work, and just and favourable remuneration and Article 24 provides that everyone has the right to rest and leisure, reasonable limitations of working hours as well as periodic holidays with pay. Articles 6 and 7 ICESCR develop these rights further with regard to the right to work and its essential corollary, just and favourable conditions of work. Article 11 CEDAW provides that states shall take all appropriate measures to eliminate discrimination against women in the field of employment and Article 32 CRC sets out work conditions for children in order to protect them from economic exploitation and from work that would interfere with their education, health and development.

Within the American system, Articles 6 and 7 Protocol of San Salvador set out the right to work and that conditions of work shall be just, equitable and satisfactory. Article 15 ACHPR stipulates that 'every individual shall have the right to work under equitable and satisfactory conditions, and shall receive equal pay for equal work'. Equally, Part I European Social Charter (ESC) protects various aspects of the right to work.

When discussing labour rights it is important to stress the work of the International Labour Organisation (ILO). As stipulated in the ILO Constitution, labour should not be regarded as a commodity or article of commerce. The ILO has adopted several conventions related to the right to work: ILO 100 concerning Equal Remuneration, ILO 122 concerning Employment Policy, ILO 111 concerning Discrimination, and ILO 142 concerning Human Resources Development. Closely related to the right to work are trade union rights and the prohibition of forced labour. Several ILO conventions protect these rights, especially ILO 87 and ILO 98 concerning Freedom of Association, ILO 29 and ILO 105 concerning Prohibition of Forced Labour, ILO 138 concerning Minimum Age, and ILO 182 aiming at elimination of the worst forms of child labour.

2. SUPERVISION

A fundamental obligation laid on states is to ensure freedom from slavery and forced labour. Whereas a state is not obliged to guarantee work for all, it does have an obligation to take measures to achieve progressively a high, stable rate of employment. Establishing a system of government that clearly sets out a high, permanent rate of unemployment could be regarded a violation of the right to work.

The right to work does not imply the right to be provided with employment, but although the state is not obliged to provide work it has to ensure that, for instance, it does not discriminate in access to public jobs; distinctions based on gender, race, colour, nationality, or ethnicity may not be made. Neither Article 6 ICESCR nor international or national case-law have been interpreted to establish a right to receive a function in a public or private institution. An absolute right not to be dismissed is not established, but several human rights standards protect against arbitrary deprivation of one's right to work.

The right to work contains aspects that reflect strict and legally enforceable rights, such as the freedom to work and the principle of non-discrimination, while other elements have traditionally been more difficult to enforce; they are in essence policy objectives, framed in terms of legal obligations for states.

The Committee on Economic, Social and Cultural Rights has, for instance, dealt with the prohibition of discrimination in relation to the right to work. The Committee has found laws requiring women to obtain permission from their husbands to work a violation and it has stipulated that women may not be subjected to inferior working conditions in relation to those of men, nor be paid less for the same work.

The European Committee of Independent Experts supervising the ESC has stated, *inter alia*, that the prohibition of discrimination regarding the right to work is absolute and may require special legislation, and that special measures may be necessary to help disadvantaged groups. It has stated that laws requiring women to resign from public posts when they marry, as well as forcing employees to carry out work they do not want to carry out are in violation of the right to work.

The African Commission has not dealt with many cases relating to the right to work. Cases concerning slavery have been brought before it and the Commission has found a violation of the right to work in the case of a political prisoner not being reinstated in his former governmental position following an amnesty (*Annette Pagnoulle on Behalf of Abdoulaye Mazou* v. *Cameroon, Communication 39/90*).

The Inter-American system has dealt with the rights relating to work to a very limited extent. For instance, in the *Baena Ricardo Case* brought before the Inter-American Court, 270 former state employees alleged they were illegally dismissed for exercising their right to assembly and association in violation of the American Convention: The Court found in favour of the applicants. Reference

was made to the rights related to work as set out in the Protocol of San Salvador but as Panama had not ratified the Protocol, it could not be accused of violating it (*Baena Ricardo et al. (270 Workers* v. *Panama)*).

B. The rights relating to social security

Social security can be provided on many levels and the standards do not prescribe a particular system. The Committee on Economic, Social and Cultural Rights has interpreted the term social security to encompass all the risks involved in the loss of means of subsistence for reasons beyond a person's control. The ILO 102 concerning Social Security (1952) defines social security as the protection society provides for its members through a series of public measures against economic and social distress, that would be caused by the stoppage or substantial reduction of earnings resulting from sickness, maternity, employment injury, unemployment, invalidity, old age, or death. These measures include the provision of medical care, and the provision of subsidies for families with children.

The right to social security exists on three different levels; the first, minimal approach, is that of social assistance provided to the needy; the second is social insurance based on contributions, grounded in working relations stipulated in national law; and the third, the welfare state, combines the two, drawing means from workers' contributions and state funding, extending to everyone in a comprehensive approach.

The so-called 'rights based approach' identifies five core elements of the right to social security: *Comprehensiveness:* Comprehensive coverage against all circumstances that threaten the income earning ability of persons and therefore their ability to enjoy an adequate standard of living should be provided. *Universality:* entails that everyone in need of social security should have access to it. *Adequacy and appropriateness:* entails that various social security schemes should provide adequate and appropriate benefits, sufficient to ensure that the beneficiary does not fall below the poverty line. *Non-discrimination:* Programs should not discriminate on grounds of race, sex, gender, sexual orientation, religion, political opinion, national or social origin, birth or socio-economic status. Finally, *respect for procedural rights* entails that reasonable and fair rules must be established to govern eligibility for social security programmes and effective legal remedies should be provided.

In general, the rights relating to social security presume the existence of a social security system. A state has the obligation to guarantee benefits and therefore may not reduce expenditure on social security. The right to social security obliges the state to guarantee minimum conditions for survival; *e.g.*, to provide shelter when a person's life is in danger because of homelessness. The state must make certain insurance available; for instance, establish a regime of old-age insurance to be prescribed by national law.

1. STANDARDS

Article 22 Universal Declaration stipulates that:

> Everyone, as a member of society, has the right to social security and is entitled to realisation, through national effort and international co-operation and in accordance with the organisation and resources of each state, of the economic, social and cultural rights indispensable for his dignity and the free development of his personality.

And according to Article 25:

> Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.

Article 9 ICESCR stipulates that the parties recognise the right of everyone to social security without, however, defining or indicating the degree of protection to be guaranteed. Article 10 ICESCR, dealing with the protection of the family, mentions the right to social security benefits. Equally, Article 11 CEDAW recognises the right to social security for women, especially in cases of retirement, unemployment, sickness, invalidity, old age and other incapacity to work. In addition, Article 11 recognises the right to paid leave; Article 26 CRC recognises the right of the child to social security and social insurance and Article 27 CMW sets out the right of all migrant workers to social security on equal footing with nationals, as well as to special complementary benefits.

The American Convention does not specifically mention social security, but the Protocol of San Salvador sets out the right in Article 9 and specifies situations in which the right applies, such as in old age, disability and as regards those employed, social security shall cover medical care and allowance or retirement benefits in case of occupational accidents, as well as paid maternity leave before and after birth. The African Charter stipulates that 'the aged and the disabled shall also have right to special measures of protection in keeping with their physical or moral needs'. There is no mention of social security as an autonomous human right, but aspects of it are covered in other articles in relation to health, the right of the aged and the disabled to special measures of protection and the individual's duty to society.

The European Social Charter sets ILO 102 as a minimum standard and states undertake to 'progressively' raise standards of social security (Article 12). The ESC furthermore sets out that all workers and their dependants have a right to social security and that anyone without adequate resources has a right to social and medical assistance (Article 13), as well as the right to benefit from social welfare services (Article 14).

A number of ILO conventions set out in more detail what the right entails;

what the protection is, who is entitled to the social security and under what circumstances as well as the level of minimum benefits. The relevant ILO conventions include: ILO 24 and ILO 25 concerning Sickness Insurance (1927 and 1933); ILO 37 and ILO 38 concerning Invalidity Insurance (1933); ILO 39 and ILO 40 concerning Compulsory Widow's and Orphan's Benefits (1933); ILO 42 concerning Workmen's Compensation for Occupational Diseases (revised, 1934); ILO 102 concerning Minimum Standards of Social Security (1952); ILO 118 concerning Equality of Treatment of Nationals and Non-Nationals in Social Security (1962); ILO 121 concerning Benefits in the Case of Employment Injury (1964); ILO 128 concerning Invalidity, Old-Age and Survivors' Benefits (1967); ILO 130 concerning Medical Care and Sickness Benefits (1969); and ILO 157 concerning Maintenance of Social Security Rights (1982).

2. SUPERVISION

In broad terms, the right to social security can be regarded as guaranteeing the material conditions for an adequate standard of living. Social security serves to protect individuals from degrading living conditions, poverty, sickness, and material insecurity. As such, it is possible to derive a right to social security from several civil and political rights, such as the prohibition of torture and ill-treatment, the right to life, and the right to security of the person. To date, these rights have not been interpreted to encompass the right to social security; the supervisory bodies have mainly dealt with cases on discriminatory regulations regarding the beneficiaries of, or contributors to, the social security systems. Other issues include undue delay in payment, arbitrary change of amounts of benefits, and authorities' undue delay in dealing with complaints regarding social security benefits.

The Human Rights Committee has decided a number of cases regarding discrimination in allocation of social security benefits. It has held many times that although a state is not required by the ICCPR to adopt social security legislation, if it does, such legislation and its application may not be discriminatory. The Committee has held that an unemployment benefits law making benefits available to married men and not married women (as they were not considered 'breadwinners') is discriminatory, setting out that Article 26 of the ICCPR prohibits discriminatory legislation in the field of economic, social and cultural rights (*Zwaan-de Vries* v. *The Netherlands*). It has found that the denial of severance pay to a long-standing civil servant who is dismissed by the government is discriminatory, as the applicant did not benefit 'without any discrimination (from) equal protection of the law' (*Orihuela* v. *Peru*). On the other hand, differentiation based on marital status as regards benefits does not necessarily constitute discrimination under the Covenant. The Committee has found the requirement of being unemployed at the time of application for unemployment benefits is reasonable and objective, in view of the purposes of the legislation to provide assistance to the unemployed (*Cavalcanti* v. *The Netherlands*).

As regards unemployment, the ICESCR Committee has stated in its General Comment 6 that limiting benefits for people temporarily unfit to work in such a way that it amounts to less than the time the individual is unable to work, is contrary to constitutional guarantees concerning social security. Furthermore, the 'Revised general guidelines regarding the form and contents of reports to be submitted by states parties under articles 16 and 17 of the International Covenant on Economic, Social and Cultural Rights' (1991), provide a useful quantifying and qualifying tool for supervising programme service delivery on the right to social security. The Committee established, *inter alia,* what branches fall under Article 9: medical care, cash sickness benefits, maternity benefits, old-age benefits, invalidity benefits, survivors' benefits, employment injury benefits, unemployment benefits and family benefits.

In relation to the right to social security, the Inter-American bodies have received a handful of cases regarding pensions. Where a government reduced pensions of workers to a fraction of what they had previously been paid, the Court found that it had violated the right to judicial protection and the right to property, but passed over the claim of a right to social security under Article 26 ACHR (progressive development) (*Torres Benvenuto et al.* v. *Peru (Case 12.034, (Five Pensioners Case)).*

The African Commission has not decided any cases regarding rights to social security.

Within the European system, the European Court has decided numerous cases regarding discrimination in the provision of social security benefits. The Court has found that only very strong considerations can justify differentiation based on sex in relation to social security (see, *i.e., Schuler-Zgraggen* v. *Switzerland*) and that differentiation solely based on nationality with regard to beneficiaries of benefits constitutes prohibited discrimination under the ECHR (see, *i.e., Gaygusuz* v. *Austria*).

The Committee of Independent Experts that supervises the European Social Charter has stated, like the ICESCR Committee, that states have to establish or maintain a system of social security which should be on a level at least equivalent to that provided by ILO 102 and that they should endeavour to raise this level gradually. The Committee has also stated that the close relationship between the economy and social rights means the pursuit of economic goals is not necessarily incompatible with the requirement of raising the level of social security; consolidating public finances in order to prevent deficits and debt interest, is one way of safeguarding the social security system, but the Committee reserves the right to assess whether the methods chosen are appropriate.

The European Court of Justice has also adjudicated a case against the United Kingdom, concerning discriminatory laws regarding social benefits, finding that paying men winter fuel benefits up to a higher age than women was discriminatory (*The Queen* v. *Secretary of State for Social Security,* ex parte *John Henry Taylor*).

CHAPTER 8

THE RIGHT TO AN ADEQUATE STANDARD OF LIVING

The right to an adequate standard of living requires, at a minimum, that everyone shall enjoy the necessary subsistence rights: adequate food and nutrition, clothing, housing and the necessary conditions of care when required. The essential point is that everyone shall be able, without shame and without unreasonable obstacles, to be a full participant in ordinary, everyday interaction with other people. Thus, people should be able to enjoy their basic needs in conditions of dignity. No one should have to live in conditions whereby the only way to satisfy their needs is by degrading themselves or depriving themselves of their basic freedoms, such as through begging, prostitution, or forced labour.

In purely material terms, an adequate standard of living implies living above the poverty line of the society concerned, which according to the World Bank includes two elements: 'The expenditure necessary to buy a minimum standard of nutrition and other basic necessities and a further amount that varies from country to country, reflecting the cost of participating in the everyday life of society'.

Even though economic, social and cultural rights instruments establish the principle of progressive realisation, this principle does not exclude immediate obligations (see textbox on 'progressive realisation'); steps towards this goal must be taken immediately. In addition, the prohibition of discrimination of any kind with regard to access to adequate food, clothing and housing, on grounds of race, colour, sex, language, age, religion, political or other opinion, national or social origin, property, birth or other status, with the purpose or effect of nullifying or impairing the equal enjoyment or exercise of this right, is an immediate obligation for states parties to major human rights treaties.

A. Standards

According to Article 25(1) UDHR, 'everyone has the right to a standard of living adequate for the health and well-being of himself and his family'. This provision

sets out some of the elements of this right: a) food; b) clothing; c) housing; d) medical care; and e) necessary social services.

Under Article 11 ICESCR, everyone has the right to 'an adequate standard of living for himself and his family'. The Committee on Economic, Social and Cultural Rights has issued several General Comments explaining the components of this right including the right to adequate housing (General Comments 4 and 7), the right to food (General Comment 12) and the right to water (General Comment 15). Through these General Comments, the Committee elaborates on which criteria are to be met to fulfil the rights to housing, food and water and provides the single most comprehensive interpretation of these rights under international law (a more detailed discussion of each of these rights follows below).

The right to an adequate standard of living is included in several other human rights treaties. Under Article 27 CRC, 'States Parties recognise the right of every child to a standard of living adequate for the child's physical, mental, spiritual, moral and social development'. Under Article 14 CEDAW, 'States Parties shall take all appropriate measures to eliminate discrimination against women in rural areas [...] to ensure [...] the right [...] to enjoy adequate living conditions, particularly in relation to housing, sanitation, electricity and water supply, transport and communications [....]'. The CERD recognises the right of everyone, without distinction as to race, colour, or national or ethnic origin, to enjoy, *inter alia,* the right to housing, and the right to social security and social services.

In addition, some instruments aimed at the protection of people under specific circumstances also contain provisions relating to an adequate standard of living. This is the case, for example, of the Convention Relating to the Status of Refugees and the Geneva Conventions. The Convention Relating to the Status of Refugees provides for the right to housing (Article 21), public relief and assistance (Article 23) and social security for refugees (Article 23). The right to an adequate standard of living is also envisaged in Additional Protocol I to the Geneva Conventions Relating to the Protection of Victims of International Armed Conflicts, which declares in Article 54(1) that starvation of civilians as a method of warfare is prohibited. Article 54(2) prohibits attack, destruction, removal, or rendering useless objects indispensable to the survival of the civilian population, such as foodstuffs, water installations and supplies and irrigation works, for the specific purpose of denying them for their sustenance value to the civilian population or to the adverse party, whether in order to starve out civilians, to cause them to move away, or any other motive. Protocol II on Non-International Armed Conflicts has a similar provision in Article 14. Although these provisions are not formulated as human rights *per se,* they are aimed at ensuring that persons or groups that do not or no longer take part in hostilities are not denied the enjoyments of these rights.

At the Inter-American level, although the ACHR deals primarily with civil and political rights, it includes in Article 26 a general provision on economic, social and cultural rights. The ACHR alludes indirectly to the right to an adequate

standard of living when it refers in Article 26 to the commitment of states parties to take measures to guarantee 'the full realisation of the rights implicit in the economic, social, educational, scientific, and cultural standards set forth in the Charter.' According to Article 26 'states parties undertake to adopt measures, both internally and through international co-operation, especially those of an economic and technical nature, with a view to achieving progressively, by legislation or other appropriate means, the full realisation' of these rights. The principle of progressive realisation is not unique to this Convention; it is also contemplated, for example, in Article 1 Protocol of San Salvador and Article 2(1) ICESCR. While compliance with the principle of 'progressive realisation' depends on the availability of resources, this provision also prescribes particular conduct that is compulsory for all states parties, regardless of their level of development. In this regard, Article 26 ACHR imposes the obligation to continuously improve conditions and the prohibition of taking deliberately retrogressive measures. This later interpretation finds support in the recent jurisprudence of the Inter-American Commission on Human Rights (*e.g. Miranda Cortez et al.* v. *El Salvador (Case 11.670)*). Additionally, the Protocol of San Salvador deals in Article 12(1) with the right to an adequate standard of living. Article 12(1) provides that 'everyone has the right to adequate nutrition which guarantees the possibility of enjoying the highest level of physical, emotional and intellectual development'.

At the European level, in Article 4(1) European Social Charter, the contracting parties undertake 'to recognise the right of workers to remuneration such as will give them and their families a decent standard of living'. Moreover, the European Social Charter (Revised) includes Article 31 on the right to housing. Protection of the right to housing is also to be found in Articles 16 and 19(4) of the European Social Charter, and in Article 4 of the Additional Protocol to the Charter.

At the African level, the ACHPR does not expressly guarantee the right to an adequate standard of living, housing or food. However, these rights are not outside the scope of interpretative possibilities open to the African supervisory bodies and would be well-covered by a combined reading of Articles 5 and 14-18 ACHPR. The African Commission confirmed this recently in *The Social and Economic Rights Action Centre et al.* v. *Nigeria, Communication 155/96* where it found violations of the rights to housing and food, neither of which are expressly recognised by the Charter. In an innovative interpretation, the Commission held that the right to housing or shelter is implicitly entrenched in the totality of the right to enjoy the best attainable standard of mental and physical health, the right to property, and the protection of the family. Likewise, the right to food was implied in the rights to life, health and to economic, social and cultural development.

States have also committed to the realisation of the right to an adequate standard of living in several international instruments, such as the Declaration on the Right to Development (Article 8), the Universal Declaration on the Eradication of Hunger and Malnutrition (Article 1); the Rome Declaration of

the World Food Summit; Agenda 21 (*e.g.* Chapters 3 and 7); the Habitat Agenda (*e.g.* paragraphs 36 and 116); the Declaration of Alma-Ata on Primary Health Care; the Platform of Action of the Fourth World Conference on Women; the Declaration on the Protection of Women and Children in Emergency and Armed Conflict; the Standard Minimum Rules for the Treatment of Prisoners; the Declaration on the Rights of Mentally Retarded Persons; and the Declaration on the Rights of Disabled Persons.

Within the framework of the UN specialised agencies, the rights related to the right to an adequate standard of living have been dealt by the International Labour Organisation (ILO), the Food and Agricultural Organisation of the United Nations (FAO) and the World Health Organisation (WHO). Under the framework of these organisations, several instruments aimed at the protection of an adequate standard of living have been adopted, such as ILO 117 on Social Policy and ILO 169 concerning Indigenous and Tribal Peoples.

The UN Committee on Economic, Social and Cultural Rights is the body which has provided the most comprehensive examination of the right to adequate standard of living. The following analysis will therefore follow the Committee's General Comments 4, 12 and 15.

1. ELEMENTS OF THE RIGHT TO ADEQUATE FOOD

The right of everyone to an adequate standard of living includes the right to adequate food. The right to food is accomplished when every man, woman and child, alone or in a community with others, has physical and economic access at all times to adequate food or the means for its procurement. The right to food has to be realised progressively. However, the state has a core obligation to take the necessary action to mitigate and alleviate hunger as provided for in Article 11(2) ICESCR, even in times of natural or other disasters. The right to food and the inherent dignity of the human person are inseparable and without food it is not possible to fulfil other rights.

According to General Comment 12, the core content of the right to adequate food includes the following elements:

a) Availability of food: In a quantity and quality sufficient to satisfy the dietary needs of individuals. Dietary needs implies that the diet as a whole contains a mix of nutrients for physical and mental growth, development and maintenance, and physical activity that are in compliance with human physiological needs at all stages throughout the life cycle and according to gender and occupation. Measures may therefore need to be taken to maintain, adapt or strengthen dietary diversity and appropriate consumption and feeding patterns, including breast-feeding, while ensuring that changes in availability and access to food supply at the very least do not negatively affect dietary composition and intake.

b) Food safety: Food should be free from adverse substances. States should establish a range of protective measures by both public and private means to

prevent contamination of foodstuffs through adulteration and/or through bad environmental hygiene or inappropriate handling at different stages throughout the food chain; care must also be taken to identify and avoid or destroy naturally occurring toxins.

c) Acceptability: Food should be acceptable within a given culture. Cultural or consumer acceptability implies the need also to take into account, as far as possible, perceived non nutrient-based values attached to food and food consumption and informed consumer concerns regarding the nature of accessible food supplies.

d) Availability: This refers to the possibilities either for feeding oneself directly from productive land or other natural resources, or for well functioning distribution, processing and market systems that can move food from the site of production to where it is needed.

e) Accessibility: This encompasses both economic and physical accessibility. *Economic accessibility*: implies that personal or household financial costs associated with the acquisition of food for an adequate diet should be at a level such that the attainment and satisfaction of other basic needs are not threatened or compromised. Economic accessibility applies to any acquisition pattern or entitlement through which people procure their food and is a measure of the extent to which it is satisfactory for the enjoyment of the right to adequate food. Socially vulnerable groups, such as landless persons and other particularly impoverished segments of the population may need attention through special programmes. *Physical accessibility*: implies that adequate food must be accessible to everyone, including physically vulnerable individuals, such as infants and young children, elderly people, the physically disabled, the terminally ill and persons with persistent medical problems, including the mentally ill. Victims of natural disasters, people living in disaster-prone areas and other specially disadvantaged groups may need special attention and sometimes priority consideration with respect to accessibility of food. A particular vulnerability is that of many indigenous population groups whose access to their ancestral lands may be threatened.

FOOD AND AGRICULTURAL ORGANISATION OF THE UNITED NATIONS (FAO)

The aim of the FAO is to achieve food security for all. In this regard, it is important to recall the World Food Summit, convened by FAO in 1996. As a result of this meeting, 112 heads or deputy heads of state and government, and over 70 high-level representatives from other countries, adopted the Rome Declaration on World Food Security and the World Food Summit Plan of Action. The Rome Declaration sets forth seven commitments, which lay the basis for achieving sustainable food security for all, while the Plan of Action spells out the objectives and actions relevant for practical implementation of

these seven commitments. The Declaration and Plan of Action establish a particular follow-up mechanism through co-operation between the High Commissioner for Human Rights, FAO and its Committee on World Food Security as well as other food organisations, the United Nations Children' Fund (UNICEF), the Sub-Committee on Nutrition of the United Nations Administrative Coordinating Committee (ACC-SCN) and other bodies.

2. ELEMENTS OF THE RIGHT TO ADEQUATE HOUSING

The right to adequate housing derives from the right to an adequate standard of living and is of central importance for the enjoyment of all economic, social and cultural rights.

The right to adequate housing is included in most major human rights instruments adopted under the United Nations: Article 25 UDHR; Article 11 ICESCR; Article 14 CEDAW; Article 5 CERD; Article 27 CRC and Article 43 CMW. In addition, it is included in Article 31 of the European Social Charter (revised) and Article 21 of the Convention Relating to the Status of Refugees.

The United Nations estimates that around 100 million people world-wide have no place to live and more than one billion people are inadequately housed. Individuals, as well as families, are entitled to adequate housing regardless of factors such as age, economic status, groups or other affiliation or status. Thus, the enjoyment of this right may not be subject to any form of discrimination.

The UN Commission on Human Rights has repeatedly stressed that the right to adequate housing is a component of the right to an adequate standard of living (see, *e.g.* Resolutions 2002/21 and 2003/27).

The right to housing means more than just a roof over one's head. It should be seen as the right to live somewhere in security, peace, and dignity. The requirements for adequate housing have been defined in General Comments 4 and 7 of the Committee on Economic, Social and Cultural Rights. According to the Committee the core content of the right to adequate housing includes the following elements:

a) Security of tenure: Security of tenure is the cornerstone of the right to adequate housing. Secure tenure protects people against arbitrary eviction, harassment and other threats. Most informal settlements and communities lack legal security of tenure, and millions of people currently live in homes without adequate secure tenure protection. Security of tenure is a key issue for all dwellers, particularly women. Women who are particularly vulnerable include those experiencing domestic violence; that have to flee their homes to save their lives and women who do not have title to their homes or lands and can therefore be easily removed, especially upon marriage dissolution or death of a spouse.

b) Affordability: The principle of affordability stipulates simply that the

amount a person or family pays for their housing must not be so high that it threatens or compromises the attainment and satisfaction of other basic needs. Affordability is an acute problem throughout the world and a major reason why so many people do not have formal housing, and are forced as a result to live in informal settlements. In affluent countries, individuals and families living in poverty find it increasingly difficult to find affordable adequate housing. In many developed countries, when rental housing is unaffordable, tenants' security of tenure is threatened as they can often be legally evicted for non-payment of rent.

c) Habitability: For housing to be considered adequate, it must be habitable. Inhabitants must be ensured adequate space and protection against the cold, damp, heat, rain, wind or other threats to health, or structural hazards.

d) Accessibility: Housing must be accessible to everyone. Disadvantaged groups such as the elderly, the physically and mentally disabled, HIV-positive individuals, victims of natural disasters, children and other groups should be ensured some degree of priority in housing.

e) Location: For housing to be adequate it must be situated so as to allow access to employment, health care services, schools, childcare centres and other social facilities. It must not be located in polluted areas. When communities are evicted from their homes they are often relocated to remote areas lacking facilities, or to polluted areas, near garbage dumps or other sources of pollution.

f) Cultural Adequacy: The right to adequate housing includes the right to reside in housing that is considered culturally adequate. This means that housing programmes and policies must take fully into account the cultural attributes of housing, which allow for the expression of cultural identity and recognise the cultural diversity of the world's population.

3. ELEMENTS OF THE RIGHT TO ADEQUATE CLOTHING

Due to the enormous variations in cultural clothing needs and wants, the right to adequate clothing is probably the least specified of all the components of an adequate standard of living. As of July 2004, this right had not been subject to any comment by the ESCR Committee and very limited examination has been undertaken by commentators.

4. ELEMENTS OF THE RIGHT TO WATER

The right to water and the right to an adequate standard of living are intrinsically linked. Enjoyment of the right to water is an essential component of the fulfilment of the right to an adequate standard of living (food and housing) and the right to health. Without equitable access to clean water, these other rights are not attainable.

The right to water is implicit in Article 11(1) ICESCR because its realisation is linked to the realisation of rights such as the right to food, the right to adequate housing, the right to health, the right to earn a living and the right to take part in

cultural life. The Committee on Economic, Social and Cultural Rights stressed the importance of the right to water in its General Comment 15:

> The right to water contains both freedoms and entitlements. The freedoms include the right to maintain access to existing water supplies necessary for the right to water, and the right to be free from interference, such as the right to be free from arbitrary disconnections or contamination of water supplies. By contrast, the entitlements include the right to a system of water supply and management that provides equality of opportunity for people to enjoy the right to water.

General Comment 15 acknowledges that while the adequacy of water may vary according to different conditions, three factors apply in all circumstances:

a) Availability: Each person has the right to a water supply that is sufficient and continuous for personal and domestic uses, such as drinking, personal sanitation, washing of clothes, food preparation, personal and household hygiene.

b) Quality: The right to water means that not only are people entitled to a sufficient and continuous supply of water, but they are also entitled to water of adequate quality. Water for personal or domestic use must be safe and free from micro-organisms, chemical substances and radiological hazards that constitute a threat to a person's health. Furthermore, water should be of an acceptable colour, odour and taste for personal or domestic use.

c) Accessibility: The Comment provides that water and water facilities and services must be accessible to everyone, without discrimination, within the jurisdiction of the state party. It identifies four overlapping dimensions of accessibility: *Physical accessibility:* water and adequate water facilities and services must be within safe physical reach of all sectors of the population, which is defined as 'within the immediate vicinity, of each household, educational institution and workplace'. Water should be of sufficient quality, culturally appropriate and sensitive to gender, life-cycle and privacy requirements; *economic accessibility:* water, water facilities and services and the direct and indirect costs and charges associated with securing water must be affordable for all; and *non-discrimination*: access to water and water facilities and services should be realised, in law and in fact, without discrimination on any of the prohibited grounds – race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. *Information accessibility* is defined as including the right to seek, receive and impart information concerning water issues.

Finally, it is important to note that the right to water has also been recognised as a human right in several instruments, such as Article 14 CEDAW and Article 24 CRC. Article 24 CRC, which refers to the right to 'the highest attainable standard of health' of children, expressly states that the state 'shall take appropriate measures' to provide clean drinking water.

RIGHT TO WATER AND SANITATION

In the southern Serbian town of Laskovac, skin diseases have plagued a Romani settlement. The immediate cause is unclean water for bathing; 50 homes in the settlement lack access to running water and electricity. Since the nearby river cannot be utilised in colder weather, the community has resorted to installing wells. But the lack of sanitation resulted in the groundwater being polluted by faeces. Poverty then prevented the community from purchasing clean water or seeking medicines.

This scenario is sadly typical: a situation faced by communities all over the world from burgeoning urban settlements to neglected rural areas in the South and, perhaps surprisingly, amongst a range of marginalised groups in the North. The estimates are that 1.1 billion people are without a minimum supply of water for the most basic needs.

In November 2002, the UN Committee on Economic, Social and Cultural Rights ('Committee') took the bold step of affirming that the right to water was an integral part of international human rights law. Noting that the 'right to water clearly falls within the category of guarantees essential for securing an adequate standard of living, particularly since it is one of the most fundamental conditions for survival' (Committee on Economic, Social and Cultural Rights, *General Comment 15 on Right to Water*), the Committee derived the right to water from two provisions of the International Covenant on Economic, Social and Cultural Rights (ICESCR). Article 11 recognises the 'right of everyone to an adequate standard of living, *including* adequate food, clothing and housing' (emphasis added) and Article 12 provides for the right to health. The right to water has also been recognised in a number of other international instruments most notably the Convention on the Elimination of All Forms of Discrimination Against Women, the Convention on the Rights of the Child and the Mar Del Plata Action Plan of the United Nations Water Conference.

The Committee declined to recognise the right to adequate sanitation despite the common grouping of the two issues. A Special Rapporteur of the Sub-Commission on the Promotion and Protection of Human Rights has been tasked though with reporting on the right to adequate sanitation and so further legal developments may emerge in the future (see E/CN.4/Sub.2/2002/10). The Committee, in any case, stated that 'ensuring that everyone has access to adequate sanitation is not only fundamental for human dignity and privacy, but is one of the principal mechanisms for protecting the quality of drinking water supplies and resources' (General Comment 15, para. 29).

The content of the right and the obligations of states were extensively defined by the Committee. This included the right of everyone to sufficient, safe, accessible and affordable water for personal and domestic uses and the

corresponding duties of states, within their maximum available resources, to respect, protect and progressively fulfil that right without discrimination for residents in their own jurisdiction, and through international assistance and co-operation, for people everywhere. As far as possible, according to the Committee, remedies are to be provided for violations and an examination of case-law shows that Courts and other bodies can make the right justiciable (See Malcolm Langford, Ashfaq Khalfan, Carolina Fairstein and Hayley Jones *Legal Resources for the Right to Water: International and National Standards,* Centre on Housing Rights & Eviction, 2004).

In the case of the settlement in Laskovac mentioned above, it is clear that the situation is not consistent with the right to water. Despite the presence of a nearby water supply system and offers of foreign assistance, no plans were made by local and national government to supply water and sanitation to the community. The local council in Laskovac claims that the housing was built illegally, but the Committee clearly states in its General Comment that housing status should not be used as a reason to deny people access to water. The challenge for this community, and those advocating for them and the right to water, is to take the steps to ensure that this international human right is put into practice.

Malcolm Langford

B. Supervision

Like other social and economic rights, the right to an adequate standard of living is difficult to supervise. Traditionally, economic, social and cultural rights have been considered non-justiciable, *i.e.* not susceptible to invocation before a court of law and unsuitable as a basis on which a judicial review can be conducted. However, litigation of economic, social and cultural rights is gaining momentum and a growing body of case-law at the domestic, regional and international levels clearly illustrates that a wide variety of economic, social and cultural rights are indeed justiciable.

At the international level, the main obstacle to the realisation of economic, social and cultural rights has been the lack of individual complaints procedures for violations of these rights. At the universal level, the main supervisory mechanisms available to the Committee on Economic, Social and Cultural Rights and the Committee of the Rights of the Child are their respective reporting systems. An individual complaint procedure for the violations of economic, social and cultural rights was made available only in the year 2000, when the Optional Protocol to CEDAW entered into force, but its impact is limited. In general, the CEDAW establishes the equality between men and women in the exercise of rights. Therefore only if some economic, social and cultural rights protected by the Convention are granted only to men and not to women in the same position,

is it possible to submit a claim. However, where men are denied economic, social and cultural rights, it can be presumed that women have no recourse under CEDAW, except in the case of rights envisaged just for women (*e.g.*, related to pregnancy and rural women).

It should be noted, that because of the 'integrated approach' in relation to civil and political rights and economic, social and cultural rights, supervisory bodies such as the Human Rights Committee and the European Court of Human Rights have dealt with some components of the right to adequate standard of living when addressing other rights, such as the right to non-discrimination and the right to fair trial.

At the UN level, the Human Rights Committee has applied an integrated approach when dealing with the right to an adequate standard of living under Article 26 (the right to non-discrimination) and Article 27 (the right to minorities) (see III.§12).

Under the regional systems, again, the main supervisory mechanism is the reporting system established in the European Social Charter. The Social Charter does not allow for individual complaints, but a Protocol to the Charter provides for a system of collective complaints. Furthermore, the protection of at least the right to housing may be achieved through the European Convention on Human Rights, as the European Court has adopted an integrated approach when dealing with different components of this right. For example, in *Oneryildiz* v. *Turkey*, the Court recognised that governments have duties to protect persons occupying land without planning permission. Although the Court did not consider the applicant in possession of a formal legal title to the land where he was living, it found, nonetheless, that he was entitled to compensation for the destruction of his house and personal items. The European Court has ruled on the right to housing in more than 100 cases.

Under the Inter-American system, the Protocol of San Salvador only contains the right to food (Article 12) but does not include any provision on the right to adequate housing, clothes, or water. Moreover, the Protocol limits the individual complaint procedure to the right to form and join trade unions (Article 8a) and the right to education (Article 13). Nonetheless, protection of economic, social and cultural rights also falls under the American Declaration of the Rights and Duties of Man and Article 26 ACHR. In several cases, the Inter-American Commission has recognised its competence to hear violations of economic, social and cultural rights provided for by the Declaration and that are denounced through individual claims (see, *e.g. Amilcar Menéndez et al.* v. *Argentina (Case 11.670)*). The Inter-American Court has examined economic, social and cultural rights in the *Torres Benvento et al.* v. *Peru*, in which it implicitly admitted its competence to apply Article 26 American Convention in its contentious jurisdiction. This opens the possibility for future claims of violations of the right to an adequate standard of living.

Under the African system, the African Commission recently took a landmark decision with regard to the right to housing and the right to food. In a case where

it was alleged that the Nigerian government had contributed to gross violations of human rights through the actions of its military forces and unsound environmental management related to exploitation of the Niger Delta, the African Commission found with regard to the content of the right to shelter that it obliges the state not to destroy the housing of its citizens or obstruct efforts by individuals or communities to rebuild lost homes. The duty to respect this right also requires that the state and its agents refrain from carrying out, sponsoring or tolerating any practice, policy or legal measure violating the integrity of the individual or infringing upon the freedom of an individual to use available resources to satisfy individual, family, household or community housing needs. The duty to protect, the Commission stated, includes the prevention of violations of this right by any individual or non-state actor such as landlords, property developers and landowners. The right to food was held to bind states to protect and improve existing food sources and to ensure access to adequate food for all citizens. The minimum core of this right obliges the government to desist from destroying or contaminating food sources or from allowing private actors to contaminate food sources or to prevent people's efforts to feed themselves (see *The Social and Economic Rights Action Centre et al. v. Nigeria, Communication 155/96*).

Although the protection of the right to an adequate standard of living through individual complaints is limited, several resolutions on components of the right to an adequate standard of living have been adopted by UN bodies. Both the UNGA and the ECOSOC have adopted resolutions concerning the realisation of the right to adequate housing and the right to food. Moreover, the UN Sub-Commission on the Promotion and Protection of Human Rights has adopted numerous resolutions concerning issues relating to housing rights. It has dealt with topics such as a) housing and property restitution in the context of the return of refugees and internally displaced persons; b) women and the right to land, property and adequate housing; and c) the realisation of the human right to adequate housing and children and the right to adequate housing. The Sub-Commission has also adopted a number of resolutions concerning the right to food.

In addition, in 2000 the UN Commission on Human Rights appointed two special rapporteurs dealing with the right to an adequate standard of living: the Special Rapporteur on the Right to Food and the Special Rapporteur on the Right to Adequate Housing.

The mandate of the Special Rapporteur on the Right to Food includes: a) seeking, receiving and responding to information on all aspects of the realisation of the right to food; b) establishing co-operation with governments, intergovernmental organisations and non-governmental organisations on the promotion and effective implementation of the right to food; and c) identifying emerging issues related to the right to food world wide (see Commission on Human Rights Resolution 2000/10). It is important to note that the mandate of the Special Rapporteur on the Right to Food has been expanded by the Commission on Human Rights to include monitoring of the right to water, in

order to 'pay attention to the issue of drinking water, taking into account the interdependence of this issue and the right to food'. The express linkages between the rights to water and food have been dealt with in the reports of the Special Rapporteur on the Right to Food.

The mandate of the Special Rapporteur on the Right to Adequate Housing includes: a) reporting on the status of the realisation of rights relevant to his mandate; b) promoting co-operation among and assistance to governments in their efforts to secure this right; c) applying a gender perspective; d) developing a regular dialogue and discussing possible areas of co-operation with governments, relevant United Nations bodies, specialised agencies, international organisations in the field of housing rights, *inter alia,* the United Nations Centre for Human Settlements (UNCHS-Habitat), non-governmental organisations and international financial institutions; e) identifying possible types and sources of financing for relevant advisory services and technical co-operation; f) facilitating the inclusion of issues relating to the mandate in relevant United Nations missions, field offices and national offices; and g) reporting annually to the UN Commission on Human Rights (see Commission on Human Rights Resolution 2000/9).

Finally, it is important to mention that at the national level, several countries have constitutions that refer to the right to an adequate standard of living. These constitutional provisions are key texts in the protection of this right at the national level and they have allowed for an increasing number of cases to be brought before the courts. An exceptional example in this regard is the South African Constitution and Bill of Rights, in which all economic and social rights have been declared justiciable. A notable domestic case regarding the protection of the right to an adequate standard of living is, for example, *Government of the Republic of South Africa* v. *Grootboom*, decided by the Supreme Court of South Africa.

PROGRESSIVE REALISATION OF ECONOMIC, SOCIAL AND CULTURAL RIGHTS

The notion of 'progressive' realisation using 'available resources', contained in some economic, social and cultural rights treaties such as Article 2 ICESCR and Article 1 Protocol of San Salvador, has given rise to much uncertainty with regard to the nature and extent of state' obligations. Some people have interpreted this provision as a meaning that economic, social and cultural rights are mere 'aspiration', without creating real obligation for states.

This text below refers mainly to the ICESCR, but the discussion is also relevant for other economic, social and cultural rights instruments, such as the Protocol of San Salvador. Certainly, economic, social and cultural rights involve progressive realisation to a greater extent than civil and political rights. Nevertheless, it would be difficult to dispute that the full realisation of all human rights is a progressive undertaking. The *full* realisation of all human rights requires states to progressively develop policies and targets. While

compliance with the principle of 'progressive realisation' depends on the availability of resources in each state, this notion also imposes legally binding obligations on states. These obligations considerably limit the discretion of states with regard to the implementation of the economic, social and cultural rights' obligations and require immediate implementation. Some of these obligations are:

1. The obligation to take steps to continuously improve the conditions. According to its ordinary meaning, the term 'progressive' means 'making continuous forward movement.' Thus, states parties are required to continuously take steps forward in order to achieve the full realisation of the rights recognised in the instruments. This obligation is immediately applicable and is not subject to limitation. Hence, it is not merely an obligation to take action at sometime in the future. States, regardless of their level of development, must take steps immediately to achieve the full realisation of the rights enshrined in the Covenant.

2. The obligation to abstain from taking deliberately retrogressive measures except under specific circumstances. The Maastricht Guidelines on Violations of Economic, Social and Cultural Rights establish that 'violations of economic, social and cultural rights can occur through the direct action of states [...]. Examples of such violation include: [...] (e) the adoption of any deliberately retrogressive measure that reduces the extent to which any such rights are guaranteed. (g) the reduction or diversion of specific public expenditure, when such restriction or diversion results in the non-enjoyment of such rights and is not accompanied by adequate measures to ensure minimum subsistence rights for everyone.' (Guideline No. 14)

In 1990, the Committee on Economic, Social and Cultural Rights noted, '[A]ny deliberately retrogressive measures [...] would require the most careful consideration and would need to be fully justified by reference to the totality of the rights provided for in the Covenant and in the context of the full use of the maximum available resources.' (General Comment 3)

A 'deliberate retrogressive measure' means any measure that implies a step back in the level of protection accorded to the rights contained in the Covenant, which is the consequence of an intentional decision by the state. This may occur, for example, if a state:

a) Adopts any legislation or policy with a direct or collateral negative effect on the enjoyment of the rights by individuals or if it introduces legislation which discriminates in the enjoyment of rights.

b) Abrogates any legislation or policy consistent with these rights, unless obviously outdated or replaced with equally or more consistent laws or compensatory measures.

c) Makes an unjustified reduction in public expenditures devoted to implementing economic, social and cultural rights, in the absence of adequate compensatory measures aimed to protect the injured individuals.

The Committee on Economic, Social and Cultural Rights has noted that if 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 and in the context of the full use of the state party's maximum available resources. From the analysis of the Committee's work, it is possible to conclude that a state party to the ICESCR seeking to justify a retrogressive measure or a failure to comply with the obligation to continuously improve conditions due to resource constraints must:

a) Demonstrate that every effort has been made to use all resources at its disposal. This implies that the state not only has the burden of proving the lack of resources, but it must also prove that it has unsuccessfully sought to obtain international assistance.

b) Demonstrate that every effort has been made to use the resources at its disposal to satisfy, as a matter of priority, certain minimum obligations with respect to the implementation of the Covenant. This obligation is over and above that of justifying lack of resources.

c) Demonstrate that particular attention has been paid to vulnerable groups within society and, in particular, that it has taken measures to prevent or ameliorate the adverse consequences that vulnerable groups may suffer.

d) Rescind any restrictive measures taken to reduce Covenant-related expenses due to real constraints on resources and repair adverse effects on the population, in particular among vulnerable groups, once the resource constraints disappear and the economy recovers.

e) Take adequate measures to ensure that the reduction in resources does not result in the violation of the state party's obligations under the Covenant and in particular those of Article 4 ICESCR. To the extent that a retrogressive measure places a limitation on the rights, states must comply with the conditions set out in article 4 ICESCR, which stipulates:

> The states parties to the present Covenant recognise that, in the enjoyment of those rights provided by the state in conformity with the present Covenant, the state may subject such rights only to such limitations as are determined by law only in so far as this may be compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society.

CHAPTER 9

THE RIGHT TO HEALTH

Although the foundations for modern public health were laid in earlier centuries, it really came into existence during the Industrial Revolution in 19th century Europe. Industrialised society, with its unhealthy working and living conditions, created serious health problems necessitating public health measures. Through pressure from an important public health movement in England, a Public Health Act was adopted, which foresaw a system with boards of health.

At the international level, the formulation of health as a human right was initiated at the United Nations Conference in 1945. A special memorandum which declared that 'Medicine is one of the pillars of peace' led to the insertion of a reference to health in Article 55 UN Charter and to the adoption of a declaration on the establishment of an international health organisation. The World Health Organisation (WHO) came into existence in 1946. It was the first organisation to formulate an explicit 'right to health' in the Preamble to its constitution. The WHO text is very important as it inspired the definition of a right to health in the various human rights treaty provisions discussed below.

It is difficult to pinpoint exactly what the right to health entails, but specific elements that constitute the core content of the right to health have been identified by scholars, activists and relevant UN bodies. States must guarantee these elements under all circumstances, regardless of their available resources.

Inspiration for the core content of the right to health derives from the Health for All and Primary Health Care strategies of the WHO, which stipulate that 'there is a health baseline below which no individuals in any country should find themselves'. Thus, irrespective of their available resources, states should provide the following basic services: a) access to maternal and child health care, including family planning; b) immunisation against the major infectious diseases; c) appropriate treatment of common diseases and injuries; d) essential drugs; e) adequate supply of safe water and basic sanitation; and f) freedom from serious environmental health threats. In addition to the scope of core content, a number of guidelines constitute the framework of the right to health: a) availability of health services; b) financial, geographic and cultural accessibility of health

services; c) quality of health services; and d) equality in access to available health services.

In order to clarify what the normative content of the right to health entails, it is useful to identify the obligations of states in relation to the right to health. The tripartite typology of obligations demonstrates that the right to health gives rise to both the negative obligation to 'respect', as well as the positive obligations to 'protect' and to 'fulfil' (see I.§1.F). The obligation to respect the right to health includes a) the obligation to respect equal access to health services, and b) the obligation to refrain from activities that are detrimental to health such as environmental pollution. The obligation to protect the right to health includes the obligation to take legislative and other measures to: a) assure that people have equal access to health services provided by third parties, and b) to protect people from health infringements by third parties. Finally, the obligation to fulfil includes a) the adoption by the state of a national health policy, and b) the devotion of a sufficient percentage of the available budget to health.

A. Standards

The right to health has been included in a considerable number of human rights treaties at the international as well as the regional levels.

At the UN level, the provisions of a number of instruments deal with the right to health. The main ones are Article 25 Universal Declaration; Article 12 ICECSR; Article 12 CEDAW; Article 24 CRC; Article 5 CERD and Article 28 CMW. It is interesting to examine the protection afforded by each of these instruments:

Article 12 ICESCR begins by stating that everyone has the right to 'the highest attainable standard of physical and mental health'. Article 12(b) identifies four steps the state has to take in order to promote conditions in which people can lead a healthy life. These include, *inter alia,* the improvement of environmental hygiene, preventive health care and the prevention of occupational diseases. Thus, Article 12 ICESCR acknowledges that the right to health includes a wide range of socio-economic factors which are underlying determinants of health, such as food, housing, potable water, safe and healthy working conditions, as well as a healthy environment.

Article 12 CEDAW stipulates the right to health care of women. The text focuses on equal access to health care facilities for women. Pre- and post natal care are specially emphasised in the second paragraph, services which states parties are to provide for free. Article 11(1)(c) CEDAW refers to 'the right to protection of health and safety in working conditions [...]'. Article 14 CEDAW deals with the situation of rural women. According to paragraph 2(d), states shall ensure that rural women have 'access to adequate health care facilities, including information, counselling and services in family planning'. The text in this Convention is narrower than Article 12 ICESCR in that it only refers to health care services and not health-related issues.

Article 24 CRC contains a very elaborate provision on the right to health of children. Similar to Article 12 ICESCR, it recognises the right to 'the highest attainable standard of health' of children. The article is broader than Article 12 CEDAW in that it does not only refer to a right to health care facilities, but also to adequate food, drinking water, environmental health, access to information, and prohibition of traditional harmful practices. Article 5(e)(iv) of CERD establishes the right of everyone to enjoy, without distinction as to race, colour, or national or ethnic origin, *inter alia,* the right to public health and medical care. Article 27 CMW requires state parties to provide emergency medical care to migrant workers and members of their families.

In addition, the Convention Relating to the Status of Refugees provides, in Article 23, the obligation for states to accord to refugees in their territories 'the same treatment with respect to public relief and assistance as is accorded to their nationals'.

Some protection of the right to health is also envisaged in the Geneva Conventions and Additional Protocols, such as the obligation to provide medical care for the wounded (Common Article 3(2) and Article 7 of Protocol II) and Article 12 of the First and Second Geneva Conventions.

Several other instruments adopted under the framework of the United Nations provide for the right to health, such as the Declaration on the Protection of Women and Children in Emergency and Armed Conflict; the Standard Minimum Rules for the Treatment of Prisoners; the Body of Principles for the Protection of All Persons Under Any Form of Detention or Imprisonment; the Declaration on the Rights of Mentally Retarded Persons; and the Declaration on the Rights of Disabled Persons.

At the regional level, the right to health has been included in human rights instruments of all three regional organisations. At the Inter-American level, the American Declaration of the Rights and Duties of Man contains the right to health (Article XI). As has been mentioned, the Inter-American Commission uses the Declaration to supervise all members of the OAS including those that are not parties to the American Convention. In addition, when preparing state reports, the Commission sometimes includes a chapter on the enjoyment of economic, social and cultural rights, issuing recommendations in this regard (see, *e.g.* Mexico, Country Report 1998). In addition, Article 10 of the Protocol of San Salvador specifically deals with the right to health. This article is notable for many reasons. Firstly, the wording of the first paragraph states that 'Everyone shall have the right to health [...].' This is the first article that uses the term 'right to health'. Secondly, Article 10(1) not only recognises that everyone shall enjoy physical and mental well-being but also social well-being. Thirdly, Article 10(2) mentions six concrete steps that the states parties must undertake in order to guarantee the right to health. In addition, it is worth noting that the right to a healthy environment is to be found in a separate provision (Article 11 Protocol of San Salvador).

At the African level, the right to health is found in Article 16 ACHPR. The first paragraph of Article 16 is very similar to Article 12 ICESCR in that it recognises that everyone 'shall have the right to enjoy the best attainable state of physical and mental health'. However, unlike Article 12(1) ICESCR, this article does not enumerate clear undertakings for the state. In addition, the African Charter on the Rights and Welfare of the Child also includes the right to health (Article 14).

In the European system, Article 11 European Social Charter deals with the right to health. This article has different wording compared to the above-mentioned articles:

> With a view to ensuring the effective exercise of the right to protection of health, the Parties undertake, either directly or in co-operation with public or private organisations, to take appropriate measures designed inter alia:
> A. To remove as far as possible the cause of ill-health;
> B. To provide advisory and educational facilities for the promotion of health and the encouragement of individual responsibility in matters of health;
> C. To prevent as far as possible epidemic, endemic and other diseases as well as accidents.

A few comments on this article are necessary. First, the references to individual responsibility in health matters and to the co-operation with public or private organisations are very unusual. Secondly, the three state obligations mentioned are very vague. The term 'as far as possible' used in paragraphs 1 and 3 weakens the mandatory character of the obligation. Thirdly, no references are made to child health, occupational health and to environmental health. A positive feature of the text, however, is the provision of advisory and educational facilities mentioned in paragraph 2. The right to health at the European level is also provided by Article 3 of the Convention on Human Rights and Biomedicine, which enshrines equal access to health care.

B. Supervision

The main supervisory body concerning economic, social and cultural rights at the universal level, the Committee on Economic, Social and Cultural Rights, does not have the legal prerogative to receive individual complaints but after examining the states' reports it provides recommendations to states parties ('concluding observations') on the implementation of the right to health. In addition, the Committee has contributed greatly to the understanding of this right, in particular through its General Comment 14 on the right to the highest attainable standard of health.

Through the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), it is possible to submit

complaints by or on behalf of individuals and groups for alleged violations of the right to health contained in the CEDAW. However, no complaints on this right have yet been submitted to the CEDAW Committee. On the other hand, under the integrated approach, the Human Rights Committee has dealt with the right to health in its case-law, even though the ICCPR does not explicitly include the right to health (see, *e.g. Kelly* v. *Jamaica* and *Lewis* v. *Jamaica).*

Some attempts have been made to deal with health issues under other international procedures. Within the context of the 1235 procedure of the UN Human Rights Commission, issues related to environmental health have been brought up, but no decision has been made. The WHO has put the right to health before the International Court of Justice (ICJ), but to no avail (see, the ICJ Advisory Opinion on the Legality of the Use by a State of Nuclear Weapons in Armed Conflict (1996)). The World Bank has introduced a special panel, where, *inter alia*, health issues may be addressed. Thus, health issues are progressively being given more attention at the international level.

At the regional level, the Inter-American Commission had until recently only dealt with the right to health under the American Declaration of the Rights and Duties of Man. This is because the Commission was reluctant to invoke Article 26 American Convention as it is a general clause, which does not enumerate any individual economic, social and cultural rights, and which refers to the 'progressive nature' of these rights. However, in a recent case, the Commission decided that the right to health is protected by the Convention under Article 26 and, consequently, that the Commission is empowered to hear individual cases of violations (see *e.g., Miranda Cortez et al* v. *El Salvador (Case 12.249)*). The Commission stated that 'although establishing violations to Article 10 of the Protocol of San Salvador is beyond our competence, [...] the standards referring to the right to health will be considered in our analysis of the merits of the case, pursuant to Articles 26 and 29 of the Convention.' The significance of this case of direct enforceability of the right to health derives from the fact that the Commission is taking firm steps towards achieving the effectiveness of economic, social and cultural rights. Thus, the same criterion could be applied to other social rights implicit in Article 26 American Convention.

Although Article 10 of the Protocol of San Salvador explicitly sets forth the 'right to health' for all individuals, the Protocol only provides the possibility of submitting individual petitions before the supervisory organs of the Inter-American system with respect to the right to education and the right to form and join trade unions.

In the African system, communications alleging violations of economic, social and cultural rights have often been presented to the Commission in association with other violations. A majority of the Commission's findings in this regard have arisen in the consideration of deportation and nationality-related cases. Examples include the *Mauritania cases,* which deal with racial discrimination against the black Mauritanian community by the ruling Beydane community. The Commission found, *inter alia,* that the starvation of black

prisoners, and depriving them of blankets, clothing and health care violated Article 16 of the African Charter (see, *e.g., Malawi African Association, Amnesty International, Ms. Sarr Diop, Union Interafricaine des Droits de l'Homme and RADDHO, Collectif des Veuves et Ayants-droit and Association Mauritanienne des Droits de l'Homme* v. *Mauritania, Communications 54/91 and 61/91*). The Commission has also found a violation of Article 6, where a state party by reason of corruption and mismanagement had failed to provide basic services necessary for basic health, including safe drinking water, electricity and basic medicine for its health facilities (see, *e.g., Free Legal Assistance Group, Lawyers' Committee for Human Rights, Union Interafricaine des Droits de l'Homme, Les Témoins de Jehovah* v. *Zaire, Communications 25/89 and 47/90* and *The Social and Economic Rights Action Centre et al* v. *Nigeria, Communication 155/96*). It is important to note that once the African Court on Human and Peoples' Rights is established it may receive complaints regarding violations of all rights protected under the African Charter, including the right to health.

Under the auspices of the CoE, the European Court has dealt with the right to health under political and civil rights, such as, for example, the right to non-discrimination or the right to privacy. This was done, for instance, in the *Guerra* v. *Italy case*. The European Court found that the failure of Italy to prevent a chemical plant from releasing dangerous toxic fumes amounted to a violation of the right to privacy (Article 8 ECHR) of those injured by the gases.

In 2002, the Commission on Human Rights appointed a Special Rapporteur on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health. The mandate of the Special Rapporteur includes a) to gather, request, receive and exchange information from all relevant sources, including governments, intergovernmental organisations and non-governmental organisations, on the realisation of the right of everyone to the enjoyment of the highest attainable standard of physical and mental health; b) to develop a regular dialogue and discuss possible areas of co-operation with all relevant actors, including governments, relevant United Nations bodies, specialised agencies and programmes, in particular the World Health Organisation and the Joint United Nations Programme on HIV/AIDS, as well as non-governmental organisations and international financial institutions; c) to report on the status, throughout the world, of the realisation of the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, in accordance with the provisions of the human rights, and on developments relating to this right, including on laws, policies and good practices most beneficial to its enjoyment and obstacles encountered domestically and internationally to its implementation; and d) to make recommendations on appropriate measures to promote and protect the realisation of the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, with a view to supporting states' efforts to enhance public health (see UN Commission on Human Rights Resolution 2002/31).

There have also been notable cases on the protection of the right to the highest attainable standard of health at the domestic level, such as the landmark decision of the South African Constitutional Court in *Minister of Health and Others* v. *Treatment Action Campaign (TAC)* and the Supreme Court of India case of *Paschim Banga Khet Mazdoor Sanity and Others* v. *State of West Bengal and Anor.*

BIOETHICS AND HUMAN RIGHTS: THE CHALLENGE OF UNIVERSAL STANDARD SETTING IN THE CONTEXT OF THE HUMAN GENOME PROJECT

The advance in the fields of molecular biology and genetics are of such great significance, that they affect not only all the spheres of ordinary life, but also threaten to compromise the destiny of the human species. The ethical reflections raised around these questions have been called 'bioethics'.

The confrontation between the individual's intrinsic value as a person, and the implicit risk associated with the advance of science in challenging this value is especially visible in reference to the International Human Genome Project (IHGP) – launched in the 1990s - whose objective was to identify the map of the structure of the human genome and to sequence human DNA. The map has been completed and it has been agreed that it will be freely accessible to any scientist of the world. Progress in the field of genetics is claimed as being necessary for a healthier population as well as in the cure of fatal diseases. However, it is clear that research in this field may put at stake the very survival of human beings as species.

The impact of the new technologies raises questions of potential new sources of discrimination, especially differences between poor and rich. In this context the obligation of the State to ensure that medical practitioners and other health professionals meet appropriate standards of education, skill and ethical codes of conduct is particularly relevant. Particular emphasis has been given to the right to enjoy the benefits of scientific progress and liberalisation of trade in confrontation with intellectual property rights and the question of patenting.

Prohibiting research and application in this sphere is probably not a realistic/ desirable solution; instead, regulating how its fruits are to be utilised seems to be increasingly necessary to prevent permanent damages to individuals, groups of individual, and/or humanity as a whole.

Since the abstract concept of 'human dignity' seems to be the only consensual one, bioethics researchers have sought this as a natural link into the field of human rights. Thus, the normative instruments that have been developed so far in response to this scientific revolution have focussed on the protection of human rights.

The *UNESCO Declaration on Human Genome and Human Rights 1997* endorsed by the General Assembly of the UN in 1998, tries to provide a

starting point for this discussion at international level. The first legally binding international instrument in this field is the *Convention for the Protection of Human Rights and Dignity of the Human Being with Regard to the Application of Biology and Medicine*. This regional instrument was adopted by the Council of Europe in 1997. Standards have also been adopted by the European Union, though these are limited to regulation of specific existing practice and do not tackle the issue of general scientific advances.

In the case of a potential conflict between the preservation of human being from harm and other intervening interests, preference should be given to the preservation and protection of the human person. One drawback inherent in the human rights approach that should also be considered is the lack of global participation in the formation of the required standards. This could potentially be the sources of new conflict, affecting the implementation of such principles if they are seen as 'alien' and/or 'imposed'.

Elvira Dominguez

CHAPTER 10

THE RIGHTS TO EDUCATION AND CULTURE

This Chapter will examine a) the right to education and b) the right to culture.

A. The right to education

Education is imperative to the promotion of human rights; it is both a human right in itself and an indispensable means of realising other human rights. It is the precondition for the enjoyment of many economic, social and cultural rights; for instance, the right to receive a higher education on basis of capacity, the right to enjoy the benefits of scientific progress and the right to choose work can only be exercised in a meaningful way after a minimum level of education is reached. Similarly, in the ambit of civil and political rights, the freedom of information, the right to vote and the right to equal access to public service depends on a minimum level of education, *i.e.* literacy. As a vehicle for empowerment, education can give marginalised adults and children the means to escape from poverty and participate meaningfully in their societies. Education is vital to empowering women, safeguarding children from exploitation and hazardous labour, to the promotion of human rights and democracy and to the protection of the environment.

1. STANDARDS

Two major dimensions may be distinguished in the right to education: the social dimension and the freedom dimension. The social dimension requires states to make various forms of education available and easily accessible to all and to introduce progressively several forms of free education. The freedom dimension applies to the right to academic freedom and institutional autonomy and it implies the personal freedom of individuals or their parents or guardians to choose the educational institutions meeting their educational standards, or their religious or moral convictions. This freedom implies, in addition, the freedom of individuals and bodies to establish and direct their own educational institutions.

The right to education has been included in several international instruments.

The UDHR proclaims that '[e]ducation shall be directed to the full development of the human personality and to the strengthening of respect for human rights and fundamental freedoms'. Articles 13 and 14 ICESCR, Articles 28 and 29 CRC, Articles 10 and 14 CEDAW, Article 5 CERD and Article 30 CMW contain detailed provisions regarding education. In addition, the Convention Relating to the Status of Refugees provides for the right to education in Article 22. Moreover, the UNESCO Convention against Discrimination in Education seeks not only to ban discrimination, but also to promote equal opportunities and equal treatment in education for the individual.

At the regional level, Article 13 and 16 Protocol of San Salvador contain detailed provisions on education. Article 13 lays down the normative content of the right: respect for human rights and fundamental freedoms, friendship amongst all, pluralism, tolerance and the maintenance of peace. The aim of education is human dignity and the full development of the human personality.

In Europe, Article 2 First Protocol to the ECHR is phrased in negative terms: 'No person shall be denied the right to education' and focuses on the liberty of parents to ensure education in conformity with their own religious and philosophical convictions. Article 17 ESC contains provisions regarding education, while Article 19 contains provisions regarding language education of migrant workers and their children.

Under the auspices of the African Union, Article 17 ACHPR only contains provisions regarding the duty of the state to promote and protect 'morals and traditional values recognised by the community'. Provisions of the Cairo Declaration on Human Rights in Islam from 1990 stress the right of every human being to 'receive both religious and worldly education'(Article 9).

An analysis of the state obligations regarding the right to education is given below.

RIGHT TO EDUCATION MATRIX

(Source: A.P.M. Coomans, The international protection of the right to education, Maastricht, April 1992)

Elements of the right to education Level of state obligations	SOCIAL DIMENSION		FREEDOM DIMENSION	
	ACCESSIBILITY	AVAILABILITY	FREEDOM TO CHOOSE	FREEDOM TO ESTABLISH
RESPECT	Prevent denial of access to public education both in legislation, policy and practice	Respect education in minority languages	Prevent state indoctrination or coercion; Respect freedom of school choice; Respect human dignity	Respect free establishment of schools within the legal minimum standards; Respect (cultural) diversity in education
PROTECT	Apply and uphold the principle of non-discrimination in policy and practice. Combat active discrimination; Eliminate the causes of child labour; Establish legislation against child labour	Regulate recognition of diplomas and education systems; Maintain educational standards and quality	Eliminate indoctrination or coercion; Protect legally freedom to choose; Combat discrimination in the admissions to private institutions; Guarantee pluralism in the curriculum	Apply and uphold the principle of equality; Protect legally private institutions, parental initiatives and teachers

	ACCESSIBILITY	AVAILABILITY	FREEDOM TO CHOOSE	FREEDOM TO ESTABLISH
FULFIL	Create positive measures for groups with an educational backlog (*e.g.*, minorities, migrants, refugees, socially vulnerable, and detainees). Eliminate passive discrimination; Introduce progressively free education; Promote fellowship systems	Establish educational facilities; Train teachers; Make transportation facilities and teaching materials available if needed; Combat illiteracy; Promote adult education	Encourage different forms of education; Promote tolerance and understanding between all groups of the population in the education programme	Provide financial and other material support to institutions of private education on a non-discriminatory basis

2. SUPERVISION

The Committee on Economic, Social and Cultural Rights has provided useful guidelines in its General Comment13 on the implementation of the right to education. It has set out, *inter alia,* examples of possible violations of the right to education occurring through the direct action of states parties - acts of commission or through their failure to take the steps required for the realisation of the right - acts of omission. By way of illustration violations could include: the introduction or failure to repeal discriminatory legislation in the field of education; the failure to maintain a transparent and effective system to monitor implementation of the right to education; the failure to introduce compulsory, free primary education; the failure to take 'deliberate, concrete and targeted' measures towards the progressive realisation of secondary, higher and fundamental education; the prohibition of private educational institutions; the denial of academic freedom of staff and students; and the closure of educational institutions in times of political tension.

There is much case-law as regards the individual right to education in relation to other rights but limited when it comes to the right to education on its own.

The UN treaty bodies have dealt with the right to education, primarily through the prohibition of non-discrimination. An example is the case of *Waldman* v.

Canada, where the Human Rights Committee decided that by providing funding for the schools of one religious group (Roman Catholic) and not for another, without basing such different treatment on reasonable and objective criteria, Canada violated Article 26 ICCPR.

In the European context, the European Court has ruled on cases regarding the right to education; for instance, it has found a violation where no secondary schools were available for Greek Cypriots living in northern Cyprus (*Cyprus* v. *Turkey*); it has found a violation of parents' rights where children were suspended from school for refusing – in accordance with their parents' philosophical convictions – to be subject to corporal punishment (*Campbell and Cosans* v. *The United Kingdom*); it has also ruled that a measure that conforms to Article 2 of Protocol 1 violates this Article combined with Article 14 (non-discrimination) if it is discriminatory and that the phrase 'religious or philosophical convictions' does not cover parental preference for schools using a particular language (*Belgian Linguistics case*); and it has ruled that integrated, compulsory sex education in primary schools is not in violation of morals/convictions (*Kjeldsen, Busk Madsen and Pedersen* v. *Denmark*).

Although the Protocol of San Salvador explicitly provides for the possibility to submit individual petitions with respect to the right to education, the Inter-American Court has yet to decide on this issue. Nonetheless, the Inter-American Commission has dealt with the right to education and has adopted precautionary measures to protect it (see, *Yean and Bosica* v. *Dominican Republic (Case 12.189)*).

In the African system, the Commission has dealt with the exclusion of Jehovah's Witnesses from access to education, ruling that the closure of universities and secondary schools, non-payment of teachers' salaries, thus preventing them from providing education and students from attending school, was a violation of the right to education (*Free Legal Assistance Group, Lawyers' Committee for Human Rights, Union Interafricaine des Droits de l'Homme, Les Témoins de Jehovah* v. *Zaire, Communications 25/89, 47/90, 56/91, 100/93*).

In 1998, the UN Commission on Human Rights established a Special Rapporteur on the Right to Education. The first Rapporteur, Katarina Tomaaevski, set out the obligations the right to education places on states; the obligations to ensure that education is made available, accessible, acceptable and adaptable. *Availability* requires the government to permit the establishment of educational institutions by non-state actors, as well as requiring the government itself to establish institutions and fund them. The obligation to make education *accessible* entails that governments secure access to free education for all children of compulsory education age, but not for secondary or higher education where tuition or other charges may be applied to some extent. *Acceptability* implies that states have to ensure the education is of a certain quality, by setting and enforcing standards on, *e.g.*, textbooks, health, safety, and qualification of educators. The concept of *adaptability* can best be demonstrated with the right to education of disabled children. The concept of children adapting to schools has been replaced

by the notion that schools should adapt to children and in the instances where children cannot go to school – children that need to work or prisoners - education must be brought to them.

B. The Right to Culture

Cultural rights were already subject to international litigation before World War II, as minorities sought protection against forced assimilation before the Permanent Court of International Justice and minorities were a major concern of the League of Nations. Cultural rights have since remained controversial and during the negotiations on the contents of the Universal Declaration of Human Rights it proved impossible to achieve consensus on the protection of cultural rights. Agreement was only reached on the right to participate in cultural life and protection of scientific, literary and artistic production (Article 27 UDHR), and as such the Universal Declaration contains a rather narrow definition of cultural rights. Furthermore, the East-West controversies and other developments, including decolonisation, made protection of minorities and of cultural rights very contentious.

There are several bones of contention regarding cultural rights. One reflects the policy of many nations to assimilate minorities. National sovereignty and national identity tend to be considered of prime importance and the recognition of cultural rights is seen as a hindrance to assimilation. Another problematic aspect is the collective element of cultural rights. Should cultural practices discriminating against women be recognised, allowing collective cultural rights to prevail over an individual woman's right? Furthermore, the concept of culture is considered vague. Is it to be limited to artistic expression or should the anthropological concept of culture be used? Or is a broad concept preferable?

While the field of human rights favours a broad concept of culture, with all expressions of culture considered as elements in cultural rights, there is still no consensus and the rights relating to culture remain as controversial as they were in 1948. An illustration of this is Article 15 ICESCR which deals with cultural rights; the ICESCR Committee held general discussions concerning Article 15 ten years ago, but has still not been able to draft a General Comment on it.

UNESCO has held several colloquiums on cultural rights and has even attempted to draft a declaration on cultural rights. So far, however, the best result has been a declaration on cultural diversity drafted in 2001.

At the regional level, the Committee of Ministers of the Council of Europe initiated in 1993 the drafting of a protocol on cultural rights, to be added to the European Convention. The process, however, was suspended in January 1996, as the content could not be agreed on. Though the content of cultural rights is controversial, increased attention has been given to these rights in the past twenty years, especially in connection with minorities, an issue that became explosive as a result of the changes that took place in Central and Eastern Europe. Since minority rights are closely related to cultural rights, several standards have been

established both at the global and the regional level. Moreover, supervisory mechanisms have produced a wealth of material, which has gradually contributed to a better understanding of cultural rights. Cultural rights, as set out in international human rights instruments, include the following distinct rights:

a) The right to participate in cultural life;
b) The right to enjoy culture;
c) The right to choose to belong to a group;
d) Linguistic rights; and
e) Protection of cultural and scientific heritage.

1. STANDARDS

The Universal Declaration on Human Rights sets out in Article 27 that:

> [E]veryone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits' and that 'everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.

Other early, important standards concerning cultural rights are Article 27 ICCPR, setting out the rights of minorities to enjoy, *inter alia*, their culture, which is interpreted here in a much broader sense and includes practising religion and using the own language. Article 15 ESC sets out, *inter alia,* intellectual property rights and the right to take part in cultural life. Article 31 CRC stipulates that children have the right to participate freely in cultural life and the arts. Article 31 CMW recognises the right of migrant workers and their families to a cultural identity. Apart from these, only limited standard setting has been adopted at the universal level.

At the regional level, Article 22 ACHPR stipulates that 'all peoples have the right to economic, social and cultural development with due regard to their freedom and identity and in the equal enjoyment of the common heritage of mankind'.

Article 14 Protocol of San Salvador stipulates rights to the benefits of culture such as, a) the right to take part in the cultural and artistic life of the community; b) the right to enjoy the benefits of scientific and technological progress; and c) the right to benefit from the protection of moral and material interests deriving from any scientific, literary or artistic production of which the person is the author.

Under the auspices of the European system, cultural rights are mostly related to minority rights and include for instance language rights, protection against discrimination and protection of cultural heritage. Other human rights, closely related to cultural rights, are, *inter alia*, freedom of association, freedom of expression, and freedom of religion.

The strained East–West relations in the seventies and eighties had a negative effect on the standard setting of cultural rights. The fear that collective rights would interfere with individual rights obstructed a constructive consensus on cultural rights. After the fall of the Berlin Wall, however, efforts at standard setting for the protection of minorities were revived, both at the global and the regional level (see IV.§6). Major standards in the field of minority protection are:

- The UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities;
- The European Framework Convention on National Minorities; and
- The European Charter for Regional and Minority Languages.

2. SUPERVISION

Individual complaint mechanisms have contributed substantially to the definition of cultural rights, particularly Article 27 ICCPR and various culture-related articles in the European Convention, such as Articles 9, 10 and 11, as well as Article 14 on non-discrimination. These rights have generated important case-law, helping to clarify further the various aspects of cultural rights.

The search for a balance between individual or community interests on the one hand and public or general interests on the other seems to dominate the case-law of the supervisory organ of the ICCPR, the Human Rights Committee. In the cases *Mahuika et al.* v. *New Zealand* and *Diergaardt of Rehoboth Baster Community et al.* v. *Namibia*, the Committee emphasised the importance of the right of communities and cultural rights, but at the same time recognised the legitimacy of states to act in the general interest of the community.

Various treaty bodies have touched on culture in their General Comments. For instance, in General Comment 1, the Committee on the Right of the Child has discussed issues such as a) the aims of education; b) possibly conflicting values; and c) cultural identities and languages. The Committee has thereby emphasised that:

> [P]art of the importance of this provision lies precisely in its recognition of the need for a balanced approach to education and one which succeeds in reconciling diverse values through dialogue and respect for difference. Moreover, children are capable of playing a unique role in bridging many of the differences that have historically separated groups of people from one another.

At the European level, the reporting mechanism of the Framework Convention on National Minorities is gradually generating information on cultural issues, even though that information has not yet lead to substantially changed insights into cultural rights. No general comments have emerged yet from the Advisory Committee of Independent Experts, which functions as the supervisory mechanism under the Framework Convention.

CHAPTER 11

THE RIGHT TO PARTICIPATE IN SOCIETY

The foundations of the right to participation are shaped by the possibility of any individual to be involved in decision-making, which affects her/his interests. Everyone should be able to participate in society, to defend her/his interests, to help create a society, which also fulfils her/his interests and desires. The freedom to vote and stand for elections and the freedoms of association and assembly are the major political expressions of such participation. These rights form the bases for any representative, democratic process, active civil society, and ensure that public affairs are truly public. The right to participation in government is also intricately linked with other rights; such as the right to education and the right to freedom of conscience and religion.

The concept of participation is broader than the right to vote or the freedom of association. It entails the notion that all citizens should be involved in decision-making processes that affect them. Moreover, participation is at the core of a human rights-based approach to development and to poverty reduction where the poor must be considered as the principal actors and strategic partners for development.

This chapter examines a) the right to vote and stand for election, and b) the right to freedom of association.

A. The right to vote and stand for elections

The right to elections is a composite of the right and opportunity to vote, the right and opportunity to be elected and the freedom of association, including the right to form and join organisations and associations concerned with political and public affairs, which is an essential adjunct to the right. The state holds the guarantee to the enjoyment of the right to elections and it can restrict the right on certain grounds. The Human Rights Committee has stated:

> The right to vote at elections and referenda must be established by law and may be subject only to reasonable restrictions, such as setting a minimum age limit for the

right to vote. It is unreasonable to restrict the right to vote on the ground of physical disability or to impose literacy, educational or property requirements. Party membership should not be a condition of eligibility to vote, or a ground of disqualification. If a conviction for an offence is a basis for suspending the right to vote, the period of such suspension must be proportionate to the offence and the sentence.

1. STANDARDS

The right to vote and stand for elections is protected in numerous instruments. Article 21 UDHR and Article 25 ICCPR both stipulate the right to vote and to be elected 'at periodic and genuine elections, which shall be by universal and equal suffrage' and shall be held by secret ballot or by equivalent free voting procedures, guaranteeing the free expression of the will of the electors, and that everyone has the right to equal access to public service in his or her country. Furthermore, in General Comment 25, the Human Rights Committee has emphasised the duty of the state to ensure that people entitled to vote are able to exercise that right. Interference with voting should be prohibited by penal law and the states should take measures to overcome specific difficulties impeding the free enjoyment of the right, such as language, illiteracy, or poverty. Article 7 CEDAW stipulates the right of women to vote and to participate in political and public life.

Article 3 of the First Protocol ECHR and Article 23 ACHR contain similar standards regarding the right to elect and be elected. Article 13 ACHPR stipulates that 'Every citizen shall have the right to participate freely in the government of his country, either directly or through freely chosen representatives in accordance with the provisions of the law', and Article 20 states that 'they shall freely determine their political status and shall pursue [...] development according to the policy they have freely chosen.'

Other standards include the Inter-American Democratic Charter (2001) that spells out the possibility of electoral missions and that '[e]ssential elements of representative democracy include, *inter alia,* respect for human rights and fundamental freedoms, access to and the exercise of power in accordance with the rule of law, the holding of periodic, free, and fair elections based on secret balloting and universal suffrage'. The Charter is a politically laden document representing the commitment of the nations of the Americas to collectively promote and defend democracy in the region.

2. SUPERVISION

The right to vote can be constrained in a myriad of ways and the international standards leave room for a wide variety of electoral systems. It is generally recognised that no single electoral method equally suited to all nations and peoples exists; election systems are complex and require close examination to ensure freedom and fairness.

Cases decided by the European Court related to violations of the right to free elections have, for instance, dealt with the dissolution of political parties and the termination of parliamentary mandates of members of opposition parties and their subsequent imprisonment for alleged separatist activities. The Court held that 'the measure was incompatible with the very essence of the right to stand for election and to hold parliamentary office and that it had infringed the unfettered discretion of the electorate which had elected the applicants' (*Sadak et al.* v. *Turkey*).

Other instances where the Court has found a violation include the prerequisite that candidates for parliamentary elections have adequate command of the official language (*Podkolzina* v. *Latvia*) and the continued suspension of the right to vote of a suspected criminal after he was acquitted (*Labita* v. *Italy*). In cases regarding the legitimacy of legislation barring people in public office from standing for elections, the Court has given states considerable leeway; states are permitted to establish in their constitutional order rules governing the status of parliamentarians, including criteria for disqualification. The Court has found certain restrictions reasonable and that legislation restricting the right 'served a dual purpose that was essential for the proper functioning and upholding of democratic regimes, namely ensuring that candidates of different political persuasions enjoyed equal means of influence and protecting voters from pressure from holders of public office (see, *e.g., Gitonas et al.* v. *Greece*, *Ahmed et al.* v. *The United Kingdom*).

In the Inter-American system, the Inter-American Commission has held that prohibiting a member of a former regime that was unconstitutional from standing for elections was not a violation of his electoral rights (*Whitbeck* v. *Guatemala (Case 10.804)*), but that denying an applicant the recovery of his nationality so that he could stand for elections led to a violation of his political rights. In the context of election criteria, the Commission has stated that 'any mention of the right to vote and to be elected would be mere rhetoric if unaccompanied by a precisely prescribed set of characteristics that the elections are required to meet' (*Bravo Mena* v. *Mexico (Case 10.596)*). The Inter-American Court has examined Article 23 American Convention in *Constitutional Tribunal* v. *Peru.*

The African Commission has dealt with communications regarding the right to political participation. The Commission has found the annulment of elections in violation of the right. It stated: 'to participate freely in government entails, among other things, the right to vote for the representative of one's choice. An inevitable corollary of this right is that the results of free expression of the will of the voters are respected; otherwise, the right to vote freely is meaningless' (*Constitutional Rights Project (in respect of Zamani Lakwot and 6 Others* v. *Nigeria, Communication 87/93*). In another case, the Commission found banning political participation of former government members after a military coup in violation of their rights and the military coup itself a violation of the people's right to freely choose their government (*Sir Dawda K. Jawara* v. *The Gambia, Communications 147/95 and 149/96*).

The right to elect depends to a large extent on compliance with positive obligations of states. If funds, capacity, and political will are not in place, it is almost impossible to assure proper elections. The quality of elections has in the last ten years been enhanced, not only by financial support of various states, but also by the refinement of standards and approaches. In this connection, mention may be made of the special role played by the International Institute for Democracy and Elections (IDEA), an intergovernmental institute established in Stockholm that has contributed much to insight into the complexities of elections.

ELECTORAL MISSIONS

In the past decade there has been a general move towards democracy on all continents, and international organisations such as the UN, OSCE, AU, OAS and EU have increasingly been concerned with the support and international observation of elections. These organisations carry out co-ordinating tasks; drafting the 'terms of reference' of the missions, and training and supporting the observers. The international organisations also implement pre-election measures, such as the establishment of electoral registers, the training of polling officials and the financing of public awareness campaigns. Furthermore, these organisations often provide funds; for printing election forms, voting slips, polling station facilities and transport, as well as technical assistance and specialist advice, *i.e.* monitoring.

The UN is increasingly involved in electoral assistance through its Electoral Assistance Unit at the Department for Political Affairs of the UN Secretariat. In concert with existing peace forces, large-scale observation missions have been carried out.

The EU has carried out several observation operations, some independently, others in co-operation with other organisations. Finally, following common EU deliberations, observers may be put at the disposal of other organisations; principally the OSCE but also the OAS (*e.g.* Haiti, Guatemala and Venezuela).

B. The right to freedom of association

The Inter-American Court has described the freedom of association as 'the right of the individual to join with others in a voluntary and lasting way for the common achievement of a legal goal.' (Compulsory Membership in an Association Prescribed by Law for the Practica of Journalism, Advisory Opinion OC-5/85). The freedom of association allows individuals to join together to pursue and further collective interests in groups, such as sports clubs, political parties, NGOs and corporations. The freedom of association is multifaceted; it encompasses the right to form and join association freely, but in order for the right to be enjoyed, associations themselves must be free from excessive interference from

governments. This entails that the right has aspects of both an individual and collective right.

The freedom of association implies a mutual relationship; an individual does not have the right to associate with others when they do not care to associate with him/her. The freedom of association also implies a negative aspect - the freedom not to associate. Generally, a person may not be forced to belong to an association, though associations that are necessary for the functioning of democratic society are exempted. For instance, a person may not choose to be un-associated with the society he/she lives in, although its activities may be contrary to that person's convictions. A person may also, in specific cases, be compelled to join professional associations established to ensure a certain standard of performance, such as, medical associations and lawyers associations. The freedom to associate may not be hemmed in by laws that require associations to be officially recognised nor may government requirements for granting registration be overly stringent.

The right to form and join trade unions and its negative component, the right not to join and form unions, is a particular aspect of the right to freedom of association joined with the right to work. This right includes, for instance, the right of unions to administer their own affairs, join federations and international organisations, and draw up their own rules. It encompasses the rights of persons to be elected to and act within unions without intimidation and the right not to join without fear of retribution.

The armed forces and the police fall into a special category, as their rights to freedom of association can be limited to a greater extent than that of others, particularly with regard to trade union activities. The limitations placed on the rights of these groups are not meant to deny them the enjoyment of the rights, but solely to limit their choices of associations.

Closely related to the freedom of association is the right to strike. The right to strike is one of the most important tools trade unions can apply to protect their interests, but it has to be exercised in conformity with relevant national law. A general prohibition of strikes for public employees may be considered an excessive restriction on the possibilities open to trade unions to further their interests.

1. STANDARDS

The UDHR sets out that 'everyone has the right to freedom of peaceful assembly and association', that 'no one may be compelled to belong to an association' and that 'everyone has the right to form and join trade unions' (Article 20).

Article 22 ICCPR draws from the Universal Declaration, but allows for possible restrictions to the right. Restrictions must be 'prescribed by law, necessary in a democratic society, in the interest of national security or public safety, public order, the protection of public health or morals or the protection of the rights and freedom of others.' The article also allows for the imposition of

lawful restrictions on members of the armed forces and of the police in their exercise of the right to association. Article 8 ICESCR sets out the right to form trade unions, the rights of trade unions to form federations, the rights of trade unions to function freely though subject to certain limitations, and the right to strike. Article 15 CRC stipulates the right of children to freedom of association with similar limitations. Article 26 CMW recognises the right of migrant workers to join and seek the aid and assistance of trade unions.

In a similar vein, Article 11 ECHR sets out the right to freedom of assembly and association, as well as the right to form and join trade unions. Article 5 ESC sets out the right to organise, but the negative freedom not to join is not mentioned. The ECHR also reserves the right for states parties to restrict the political activities of aliens. Article 16 ACHR sets out the right and its limitations and Article 8 Protocol of San Salvador sets out the right to form and join trade unions.

Article 10 ACHPR stipulates simply that 'every individual shall have the right to free association provided that he abides by the law' and that no-one may be compelled to join an association; but paragraph 2 of the Article setting out the right is unique as it subjects the right not to join to specific obligations of solidarity set out in Article 29 of the Charter.

Many ILO conventions deal with the right to association; for instance, ILO 87 concerning the Freedom of Association and Protection of the Right to Organise (1948); and ILO 98 concerning the Application of the Principles of the Right to Organise and to Bargain Collectively (1949).

2. SUPERVISION

States parties are allowed some measure of discretion concerning the freedom of association, *i.e.* in the interests of national security, public order and the rights and freedoms of others. These grounds for exemption must be interpreted narrowly by states seeking to invoke them and have often generated case-law before the various supervisory mechanisms.

The Human Rights Committee has not dealt with many cases regarding freedom of association. The Committee has found that restriction to the freedom by banning a fascist political party, presumably for public order and national security was compatible with the ICCPR (*M.A.* v. *Italy*), The Committee has found violations of the freedom when trade-union activists have been subject to harassment by authorities because of their trade-union activities (*Lopez Burgos* v. *Uruguay*) and it has expressed concern over onerous registration regulations for NGOs and trade unions, stating that such requirements may not be as burdensome as to result in restrictions on the right to freedom of association. The Committee has interpreted (with strong dissent) the Convention so that the right to strike is not included in the scope of Article 22, while it enjoys protection under the procedures and mechanisms of the ICCPR subject to the specific restrictions set out in the Convention (*J. B. et al.* v. *Canada*).

The European system has mainly dealt with cases either relating to restrictions

on certain associations or the negative aspect of the freedom of association, the right not to join. It has found violations in cases regarding, *e.g.*, a state's refusal to register a suspected subversive association and dissolution of an opposition political party. The Court has similarly dealt with the negative aspect of the freedom of association, ruling that compulsory membership of a professional organisation, contrary to a person's conviction, is an infringement of that individual's right to freedom of association (*Sidiropoulos et al.* v. *Greece*); on the other hand, the Court has found that banning police from participation in political activity was not in violation of the right (*Rekvényi* v. *Hungary*).

Within the Inter-American framework, the Inter-American Court has dealt with this issue in an advisory opinion on the compulsory membership of an association for the practice of journalism. It observed that: 'it would be against all reason to interpret the word freedom as a 'right' only and not as the 'inherent power that man has to work in one way or another, or not to work' according to his free will' and that preventing specific individuals from joining an association violated their right to freedom of expression in that it denied them the use of the media as means of expression and to impart information. The Court has also passed a ruling on the violation of human rights of nearly 300 workers/union leaders, fired from state owned companies because of their union activities (*Baena Ricardo et al. (270 workers)* v. *Panama)*.

The African Commission has decided cases where the right to association has come into play. The Commission has, for instance, found illegal deportation of prominent political figures a violation of the right to freedom of association (*Amnesty International* v. *Zambia, Communication 212/98*), it has found the right to freedom of association violated when the state unjustly tried and convicted members of a community organisation (*International Pen, Constitutional Rights Project, Interights on behalf of Ken Saro-Wiwa Jr. and Civil Liberties Organisation* v. *Nigeria, Communications 137/94, 139/94, 154/96 and 161/97*), and that a governmental decree establishing a governing body for a bar association appointing the majority of nominees itself violated the freedom of association (*Civil Liberties Organisation in Respect of the Nigerian Bar Association* v. *Nigeria, Communication 101/93*).

As the right to freedom of association is intricately linked with labour rights, the ILO has put in place special mechanisms to supervise freedom of association. A special procedure was established by the ILO in 1950 following an agreement with the ECOSOC. The procedure is founded on the submission of complaints that may be made by governments or by employers' or workers' organisations. It may be applied even against states that have not ratified the Conventions on Freedom of Association (ILO 87 and ILO 98). The machinery is comprised of two bodies. One is the Committee on Freedom of Association, which receives complaints submitted by governments and employers' and workers' organisations and a so-called 'direct contacts' procedure may be employed where the Committee can initiate *in loco* visits. The findings (conclusions and recommendations) of the Committee are submitted to the Governing Body of the ILO (see II.§1.D).

The other body is the Fact-Finding and Conciliation Commission on Freedom of Association that examines complaints of infringement of trade union rights referred to it by the ILO's Governing Body in respect of both countries that have ratified the Freedom of Association Conventions and those which have not, though in the latter case, referral may not be made without the consent of the country concerned. The Commission may also examine complaints of violations of freedom of association against non-member states of the ILO when such complaints are forwarded to it by the United Nations and the country consents. Not many complaints have been examined under this procedure (see II.§1.D).

The ILO complaints mechanisms include provisions to ensure implementation of the final decision. The most important of these provisions is the publication of the decision. It has turned out to be an effective weapon, even if legally and formally it does not appear very severe.

CHAPTER 12

THE RIGHT TO EQUALITY AND NON-DISCRIMINATION

The general principle of equality and non-discrimination is a fundamental element of international human rights law.

A useful definition of non-discrimination is contained in Article 1(1) of ILO 111, which provides that discrimination includes: 'Any distinction, exclusion or preference made on the basis of race, colour, sex, religion, political opinion, national extraction or social origin, which has the effect of nullifying or impairing equality of opportunity or treatment in the employment or occupation [...].'

Thus, the right to equal treatment requires that all persons be treated equally before the law, without discrimination. The principle of equality and non-discrimination guarantees that those in equal circumstances are dealt with equally in law and practice. However, it is important to stress that not every distinction or difference in treatment will amount to discrimination. In general international law, a violation of the principle of non-discrimination arises if: a) equal cases are treated in a different manner; b) a difference in treatment does not have an objective and reasonable justification; or c) if there is no proportionality between the aim sought and the means employed. These requirements have been expressly set out by international human rights supervisory bodies, including the European Court of Human Rights (see, *e.g.*, *Marckx* v. *Belgium*), the Inter-American Court of Human Rights (see, *e.g. Advisory Opinion No. 4*, para. 57) and the Human Rights Committee (see, *e.g.*, General Comment 18, para. 13).

The principle of equality can in certain circumstances require a state to take affirmative action in order to diminish or eliminate conditions that cause or help to perpetuate discrimination. The Human Rights Committee has clearly stated this obligation in General Comment 18, and the Committee on Economic, Social and Cultural Rights frequently refers to the duty to take affirmative action in its Concluding Observations.

For further analysis of this principle, see I.§3.B.

A. Standards

The right to equality and non-discrimination is recognised in Article 2 UDHR and is a cross-cutting issue of concern in different UN human rights instruments, such as Articles 2 and 26 ICCPR, Article 2(2) ICESCR and Article 2 CRC. In addition, two of the major UN human rights treaties are established explicitly to prohibit discrimination on the ground of race (CERD) and gender (CEDAW). The prohibition of discrimination has also been addressed by the Sub-Commission on the Promotion and Protection of Human Rights in its standard setting instruments.

The principle of non-discrimination and equal treatment is also contained in regional instruments, such as Article 2 American Declaration, Article 24 ACHR and Articles 2 and 3 ACHPR. Despite the fact that the principle of non-discrimination is contained in all human rights instruments, only a few instruments expressly provide a definition of non-discrimination; Article 1(1) CERD, Article 1 CEDAW, Article 1(1) ILO 111, and Article 1(1) Convention against Discrimination in Education.

Human rights instruments prohibit discrimination on several grounds. Article 2 UDHR prohibits discrimination on the following 10 grounds: 1) race, 2) colour, 3) sex, 4) language, 5) religion, 6) political or other opinion, 7) national or social origin, 8) property, 9) birth, or 10) other status. The same prohibited grounds are included in Article 2 ICESCR and Article 2 ICCPR. It is important to note that the grounds enumerated in these provisions are merely illustrative and not exhaustive. The term 'or other status' has an open-ended meaning; some grounds not explicitly mentioned, such as age, gender, disability, nationality and sexual orientation could also be considered prohibited grounds.

Some human rights instruments such as CERD and CEDAW are aimed specifically at eliminating discrimination on specific grounds. In both cases, it is possible to submit individual complaints in case of violations of the rights enshrined therein. In the case of CEDAW, such a procedure was established by the Optional Protocol adopted in 1999. It is important to stress that these two instruments expressly require states to take actions to prevent and combat discrimination committed by third persons. For example, Article 2(d) CERD reads: 'Each State party shall prohibit and bring to an end, by all appropriate means, including legislation as required by circumstances, racial discrimination by any persons, groups or organisation.' In the same vein, Article 2(e) CEDAW requires states 'to take all appropriate measures to eliminate discrimination against women by any person, organisation or enterprise.'

Article 2 ICESCR/ICCPR contains a general non-discrimination clause that prohibits discrimination in the enjoyment of the rights in both Covenants. In addition, Article 3 of each instrument stresses the principle of equality between men and women. These provisions should be seen as an integral part of all substantive provisions contained in ICESCR/ICCPR; a measure that, in itself, is in conformity with the substantive provisions may nevertheless constitute a

violation of those provisions when they are read in conjunction with Articles 2 and 3.

The general non-discrimination clauses of each Covenant are complemented by provisions prohibiting discrimination on specific grounds. For example, Article 7(a)(i) ICESCR guarantees equal conditions of work between men and women and requires equal remuneration for work of equal value; Article 7(c) ICESCR guarantees equal opportunity for everyone to be promoted in his/her employment; Article 10(3) prohibits any discrimination in the protection and assistance for all children and young persons; and Article 13(2)(C) guarantees equal accessibility in higher education. In the same vein, Article 23(4) ICCPR requires states to take adequate steps to ensure equality of rights and responsibilities of spouses as to marriage, during marriage and at its dissolution; and Article 24 ICCPR prohibits any discrimination against children based on race, colour, sex, language, religion, national or social origin, property, or birth.

Sometimes the prohibition of discrimination included in human rights instruments provides for the protection that is not limited to the rights set forth in the instruments. For example, Article 26 ICCPR, Article 3 ACHPR, Article 24 ACHR, and Protocol No. 12 ECHR establish free-standing rights to equality; their application is not confined to the rights contained in the Conventions.

The importance of the distinction may be illustrated by reference to Article 14 and to Protocol No. 12 ECHR. The protection provided by Article 14 of the Convention with regard to equality and non-discrimination is limited as it prohibits discrimination only with regard to the 'enjoyment of the rights and freedoms' set forth in the Convention. In order to fill this gap, Protocol No. 12 ECHR sets out a free standing right to equality on a number of grounds, including sex, race, colour, language, religion, national or social origin and birth. Protocol No. 12 provides a general non-discrimination clause and thereby affords a scope of protection that extends beyond the 'enjoyment of the rights and freedoms set forth in [the] Convention' found in Article 14 ECHR.

The meaning of the term 'discrimination' under Article 1 Protocol No. 12 ECHR is the same as that found in Article 14 ECHR; the list of prohibited grounds in both instruments is identical and non-exhaustive.

Article 1 Protocol 12 ECHR is important to mention as its additional scope of protection concerns cases where a person is discriminated against:

a) In the enjoyment of any right specifically granted to an individual under national law;
b) In the enjoyment of a right which may be inferred from a clear obligation of a public authority under national law, that is, where a public authority is under an obligation under national law to behave in a particular manner;
c) By a public authority in the exercise of discretionary power (for example, granting certain subsidies); and
d) By any other act or omission by a public authority (for example, the behaviour of law enforcement officers when controlling a riot).

Although Protocol 12 ECHR was opened for signature by member states of the Council of Europe on 4 November 2000, it has not entered into force yet. As of July 2004, only 6 states had ratified it (it requires 10 ratifications to enter into force).

At the African level, it is notable that the non-discrimination provision contained in Article 2 ACHPR is the first substantive right listed, appearing before life. The ACHPR lists the same prohibited grounds as the ICCPR, although instead of 'property' the ACHPR prohibits discrimination on the ground of 'fortune'. Like in the ICCPR and ICESCR, the list of prohibited grounds is not exhaustive. Article 2 ACHPR is complemented by Article 3 that provides a general requirement stating that '1) Every individual shall be equal before the Law. 2) Every individual shall be entitled to equal protection of the law.' Furthermore, Article 12(5) prohibits discrimination in the expulsion of non-nationals; Article 18(3) prohibits discrimination against women and children; Article 18(4) proscribes special measures of protection for the elderly and the disabled; and Article 13 requires equal access of all persons to public property and services.

At the Inter-American level, Article 2 ADHR and Article 1(1) ACHR prohibit discrimination on numerous grounds, including 'economic status'. Similar to the UN Covenants, the open-ended nature of the list is reinforced by the words 'any other social conditions'. In addition, Article 24 ACHR provides a general prohibition of discrimination in the application of the law and in legal proceedings. Although this provision does not include a list of prohibited grounds of discrimination, the Inter-American Court has declared that the meaning of discrimination in Article 24 must be interpreted with reference to the list of prohibited grounds contained in Article 1(1) ACHR.

B. Supervision

As the prohibition of discrimination is contained in most human rights instruments and their supervisory mechanisms are analysed elsewhere in the Handbook, this section will deal primarily with Article 26 ICCPR and Protocol 12 ECHR.

Due to the fact that Article 26 ICCPR is of a free-standing nature, its application is not confined to the rights contained in the ICCPR. According to the Human Rights Committee's General Comment 18: 'Article 26 provides that all persons are equal before the law and are entitled to equal protection of the law without discrimination, and that the law shall guarantee to all persons equal and effective protections against discrimination on any of the enumerated grounds'.

The importance of Article 26 ICCPR arises when there is a legislative provision or a state action or omission with a discriminatory impact on the enjoyment of the rights not set forth in the ICCPR. As the Human Rights Committee has noted:

> When legislation is adopted by a State party, it must comply with the requirement of article 26 that its content should not be discriminatory. In other words, the application of the principle of non-discrimination contained in article 26 is not limited to those rights which are provided for in the Covenant. (General Comment 18 para. 12)

The Human Rights Committee has found violations of Article 26 on several grounds, such as sex (see *e.g. Zwaan-de Vries* v. *The Netherlands*); nationality (see *e.g. Gueye et al. v France*); sexual orientation (see *e.g. Young* v. *Australia*); and age (see *e.g. Love et al.* v. *Australia*). The jurisprudence of the Human Rights Committee under Article 26 is rich and dynamic, covering a wide variety of discriminatory acts. For example, it has noted that: the exemption of only one group of conscientious objectors (Jehovah's Witnesses) and the inapplicability of exemption for all others cannot be considered reasonable and was therefore discriminatory (see, *e.g. Brinkhof* v. *The Netherlands*); to impose much more onerous conditions for choosing the wife's surname as family name, than was the case for choosing the husband's surname is unreasonable and entails a violation of Article 26 of the Covenant (see *Müller and Engelhard* v. *Namibia*); if the state provides funds for religious education for one minority and not for other minorities in a comparable situation, it constitutes discrimination (*Waldman* v. *Canada).*

It is notable that the Human Rights Committee has applied Article 26 in relation to the enjoyment of economic, social and cultural rights in many cases. This is of great significance due to the lack of an individual complaints procedure, for instance, under the ICESCR. In this regard, it is important to highlight the landmark case of *Zwaan-de Vries* v. *The Netherlands*. In this case, the state concerned argued that Article 26 overlaps with the provision of Article 2(2) of the ICESCR. It argued that if Article 2(2) (non-discrimination clause) and Article 9 (right to social security) of the ICESCR were not justiciable within that Covenant (in the sense that they were not subject to the same kind of petition procedure as available under the ICCPR), then they should not be rendered justiciable by means of an interpretation which imports them into Article 26 of the ICCPR. By refusing to accept this argument, the Committee implicitly rejected the notion that what is protected within the ICESCR cannot be protected by the ICCPR. On the contrary, the Committee held that 'the provisions of Article 2 of the ICESCR do not detract from the full application of Article 26 of the ICCPR.'

Therefore, legislative measures setting out unreasonable distinctions between individuals regarding the economic, social and cultural rights set forth in the Covenant constitute a violation of Article 26 ICCPR and if a state has ratified the First Optional Protocol to the ICCPR, a victim of discrimination has a right to submit a complaint to the Human Rights Committee. Several important aspects of the application of Article 26 ICCPR should be noted here.

First, according to Article 26 ICCPR, states parties are obliged to establish judicial remedies in the case of discrimination occurring in the public and even in the private sphere. As the Human Rights Committee has noted:

> The Committee observes that under Articles 2 and 26 of the Covenant the State party is under an obligation to ensure that all individuals within its territory and subject to its jurisdiction are free from discrimination, and consequently the courts of States Parties are under an obligation to protect individuals against discrimination, whether this occurs within the public sphere or among private parties in the quasi-public sector of, for example, employment [...] (*Nahlik et al. v. Austria*).

The application of Article 26 has served to protect individuals from discrimination in the enjoyment of a variety of economic, social and cultural rights. Of the numerous examples, mention should be made of *Waldman* v. *Canada,* where the Committee stated that 'the Covenant does not oblige States Parties to fund schools which are established on a religious basis. However, if a State party chooses to provide public funding to religious schools, it should make this funding available without discrimination'. In *Garcia Pons* v. *Spain*, it was stated that 'although the right to social security is not protected as such, in the International Covenant on Civil and Political Rights, issues under the Covenant may nonetheless arise if the principle of equality contained in Articles 14 and 26 of the Covenant is violated.'

At the regional level, the notion of discrimination has been interpreted consistently by the European Court of Human Rights in its case-law with regard to Article 14 of the Convention. In particular, the Court has made it clear in its case-law that not every distinction or difference of treatment amounts to discrimination. As the Court has stated, for example, in the case of *Abdulaziz, Cabales and Balkandali* v. *The United Kingdom*: a difference of treatment is discriminatory if it 'has no objective and reasonable justification', that is, if it does not pursue a 'legitimate aim' or if there is not a 'reasonable relationship of proportionality between the means employed and the aim sought to be realised' (paragraph 72). The European Court has also found that a certain margin of appreciation is allowed when national authorities are assessing whether and to what extent differences in otherwise similar situations justify a different treatment in law. The scope of the margin of appreciation will vary according to the circumstances, the subject-matter and the background of the case (see, *e.g. Rasmussen* v. *Denmark*).

In addition, it is important to mention that the Council of Europe has established the European Commission against Racism and Intolerance (ECRI) and the Steering Committee for Equality between Women and Men (CDEG)(see II.§2.B).

The African Commission has also dealt with the prohibition of discrimination. For example, in a case against Mauritania, it held that racial discrimination against black Mauritanians violated 'the very spirit of the African Charter and of the letter of its Article 2' (*Malawi African Association, Amnesty International, Ms. Sarr Diop, Union Interafricaine des Droits de l'Homme and RADDHO, Collectif des Veuves et Ayants-droit and Association Mauritanienne des Droits de l'Homme* v. *Mauritania, Communications 54/91, 61/91, 164/97-196/97 and 210/98*).

The Inter-American Court has dealt with the principle of equality and non-discrimination primarily in its advisory opinions. Particularly relevant are Advisory Opinion No. 4 on 'Proposed Amendments to the Naturalization Provisions of the Political Constitution of Costa Rica' and Advisory Opinion No. 18 on 'Juridical Conditions and Rights of the Undocumented Migrants'.

The Inter-American Court has held that 'Equality springs directly from the oneness of the human family and is linked to the essential dignity of the individual'. Nonetheless, it has recognised that 'not all differences in treatment are in themselves offensive to human dignity'. The Court has followed the general principles of international law by which 'no discrimination exists if the difference in treatment has a legitimate purpose and it does not lead to situations which are contrary to justice, to reason or to the nature of things'. The Inter-American Commission has also dealt with the principle of equality and non-discrimination, in particular on the ground of sex. For example, in *Morales de Sierra* v. *Guatemala (Case 11.625)*, the Commission found the inability of married women to represent their own property in courts was a gender-based discrimination in violation of Article 24 ACHR.

PART IV

THE HUMAN RIGHTS PROTECTION OF VULNERABLE GROUPS

The aim of human rights instruments is the protection of those vulnerable to violations of their fundamental human rights. There are particular groups who, for various reasons, are weak and vulnerable or have traditionally been victims of violations and consequently require special protection for the equal and effective enjoyment of their human rights. Often human rights instruments set out additional guarantees for persons belonging to these groups; *i.e.*, the Committee on Economic, Social and Cultural Rights has repeatedly stressed that the ICESCR is a vehicle for the protection of vulnerable groups within society, requiring states to extend special protective measures to them and ensure some degree of priority consideration, even where in the face of severe resource constraints.

This part focuses on groups that are especially vulnerable to abuse of human rights; groups that are structurally discriminated against like women and groups that have difficulties defending themselves and are therefore in need of special protection. Twelve groups are discussed: 1) women and girls; 2) children; 3) refugees; 4) internally displaced persons; 5) stateless persons; 6) national minorities; 7) indigenous peoples; 8) migrant workers; 9) disabled persons; 10) elderly persons; 11) HIV positive persons and AIDS victims; and 12) Roma/ Gypsies/Sinti. Clearly this is not an exhaustive list of persons in need of particular protection, as many other groups not discussed in this part suffer from discrimination and oppression. In the case of women and children special issues of concern are further examined.

CHAPTER 1

WOMEN AND GIRLS

The inferior status of women is entrenched in history, culture and tradition. Through the ages, national and religious institutions have been called upon to justify violations of women's rights to equality and enjoyment of fundamental human rights. Even now, women are subject to discrimination in all stages of life; in income, education, health and participation in society and they are particularly vulnerable to specific violations such as gender-based violence, trafficking and sex discrimination. Various international bodies have been established with the aim of eradicating policies, actions and norms that perpetuate discrimination against women and violate women's human rights.

A. Standards

After the Second World War, a number of treaties on the protection of women were drafted and both the UN Charter and the International Bill of Human Rights (see *e.g.* Article 3 ICESCR and Article 3 ICCPR) proclaim equal rights for men and women and ban discrimination on the grounds of sex. In addition to instruments relating to discrimination in general, a whole series of instruments have been developed specifically for the protection of women, the elimination of discrimination against women and the promotion of equal rights. These serve to create a broad, international framework for future developments and the establishment of general norms for national policy.

One of the most important instruments for the protection of women is the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), which was adopted by the UNGA on 18 December 1979, following consultations over a five-year period by various working groups, the CSW and the UNGA. It entered into force in 1981. The 30-article Convention sets out internationally accepted principles and measures to achieve equal rights for women everywhere (see II.§1.C). As of July 2004, 177 states were parties to CEDAW.

The CEDAW reflects the scope of exclusion and restriction suffered by women solely on the basis of their sex. It sets out equal rights for women, regardless of their marital status, in all fields - political, economic, social, cultural and civil - and calls for national legislation banning discrimination. It allows for temporary special measures ('affirmative action') to accelerate the achievement of equality in practice between men and women (Article 4), and actions to modify social and cultural patterns that perpetuate discrimination (Article 5). Other measures aim at equal rights for women in political and public life (Article 7); equal access to education and equal choice of curricula (Article 10); non-discrimination in employment and pay (Article 11); and guarantees of job security in the event of marriage and maternity (Article 11). The Convention underlines the equal responsibilities of men with women in the context of family life (Article 16). It also stresses the social services needed - especially childcare facilities - for combining family obligations with work responsibilities and participation in public life (Article 11).

Furthermore, articles of the Convention call for non-discriminatory health services for women, including services related to family planning, and equal legal capacity to that of men. States parties agree that all contracts and other private instruments that restrict the legal capacity of women 'shall be deemed null and void' (Article 15). Special attention is given to the problems of rural women (Article 14).

It should be noted that the effectiveness of the Convention in promoting the rights it contains is significantly undermined by the numerous reservations made by states parties. Most reservations aim to preserve religious and national institutions that are contrary to the rights guaranteed and many are obviously incompatible with the object and purpose of the Convention.

On 6 October 1999, the General Assembly adopted an Optional Protocol to the Convention, which entered into force in 2000. The Protocol establishes a procedure that allows individual women, or groups of women, to submit claims of violations of rights protected under the Convention to the CEDAW Committee. In July 2004, 60 states had ratified the Optional Protocol (see II.§1.C).

Other universal instruments relating to the rights of women include the UN Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others (1949), the UN Convention on the Political Rights of Women (1952) and the UN Convention on the Nationality of Married Women (1957). Furthermore, the Rome Statute of the International Criminal Court (1998) Article 7 establishes that rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilisation and other forms of sexual violence are each to be considered a crime against humanity.

Various conventions of relevance to women have been concluded within the framework of the ILO, namely:

- ILO 3 (1919) and ILO 103 (revision of ILO 3, 1952) concerning Maternity Protection, providing twelve weeks maternity leave during which women

shall be entitled to financial benefits and medical care and may not be dismissed;

- ILO 45 (1935) concerning Underground Work by Women in Mines;
- ILO 89 (1948) (to which a Protocol was added in 1990) concerning Night Work by Women in Industrial Employment;
- ILO 100 (1951) concerning Equal Remuneration for Men and Women Workers for Work of Equal Value; seeks to eliminate forms of discrimination based solely on gender;
- ILO 102 (1952) concerning Minimum Standards of Social Security; contains regulations for all areas of social security, including maternity benefits;
- ILO103 (1952) concerning Maternity Protection; regulates maternity leave and the payments to which women are entitled while on maternity leave;
- ILO 111 (1958) concerning Discrimination in Respect of Employment and Occupation; gives a definition of discrimination; and
- ILO 156 (1981), known as the Workers with Family Responsibilities Convention, on equal opportunities and equal treatment for men and women workers.

The main conventions of the Council of Europe in the field of women's rights are the European Convention on Human Rights and the European Social Charter and respective protocols. While the ECHR does not explicitly discuss women's rights, *per se*, it does, under Article 14, prohibit any 'distinction' based, *inter alia,* on grounds of sex, in relation to the rights protected under the Convention. Furthermore, the principle of equality between spouses with regard to their rights and responsibilities in marriage has been added to the Convention in Protocol No. 7. The ESC sets out a number of specific rights for women, such as equal remuneration; protection of mothers; protection of working women; and the social and economic protection of women and children. The Additional Protocol from 1988 includes the right to equal opportunities and treatment with regard to employment without discrimination based on sex. Furthermore, the revised Charter contains a clause prohibiting discrimination on a variety of grounds, one of which is sex.

Notable in the African context is the Optional Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (2003), which aims, *inter alia*, to eradicate harmful practices relating to women, such as genital mutilation (Article 5), the right to equality of men and women in marriage (Article 6) and the right of women to decide whether to have children (Article 14), the right to peace (Article 10), and various economic and social rights.

Within the Inter-American system various standards are relevant to women's human rights: the Inter-American Convention on the Nationality of Women (1933); the Inter-American Convention on the Granting of Political Rights to Women (1948); and the Inter-American Convention on the Granting of Civil Rights to Women (1948). Furthermore, the Organisation of American States has adopted the unique Inter-American Convention on the Prevention, Punishment

and Eradication of Violence against Women (Convention of *Belem do Para*) that entered into force in 1995 (see II.§3.B).

B. Supervision

The CEDAW establishes the Committee on the Elimination of Discrimination against Women to oversee the implementation of the rights it guarantees (for further analysis of the Convention and Committee II.§1.C). The Committee acts as a monitoring system to oversee the implementation of the Convention. This is done principally by examining reports submitted by states parties, but in 1999, an optional protocol expanded the powers of the Committee to include competence to receive individual complaints. This procedure allows individuals and groups of individuals, alleged victims of violations, to file a complaint against states parties to the protocol. As has been examined, the Optional Protocol also establishes a distinctive feature: an inquiry procedure that allows the Committee to initiate investigations into suspected grave or systematic violations by a state party of the rights contained in the Convention. In this regard the Committee can carry out visits to the country in question (see II.§1.C).

The Committee has contributed significantly to the interpretation of the obligations imposed by the Convention through its General Recommendations which have dealt with several issues of utmost importance for women such as violence against women (General Recommendation 12); equal remuneration for work of equal value (General Recommendation 13); female circumcision (General Recommendation 14); AIDS (General Recommendation 15); violence against women (General Recommendation 19); equality in marriage and family relations (General Recommendation 21); women's political rights (General Recommendation 23) and women and health (General recommendation 24).

Although the CEDAW Committee has the competence to receive individual complaints, to date no individual cases have been decided. Individual communications regarding sex-discrimination have, however, been brought to the Human Rights Committee. In the Mauritian Women Case (*Aumeeruddy Cziffra and 19 other Mauritian Women* v. *Mauritius*), the Committee found that an immigration law giving certain status to wives and not husbands made an adverse distinction on the grounds of sex on the right to be free from arbitrary and unlawful interference with the family and was in violation of the ICCPR.

Another case brought before the Human Rights Committee dealt with a law that stipulated that married women could not claim continued unemployment benefits unless they proved they were either 'breadwinners' or that they were permanently separated from their husbands. This condition did not apply to married men. The Committee found a violation of Article 26 ICCPR (non-discrimination) on the grounds of sex (*Broeks* v. *The Netherlands*). Article 26 is 'free-standing', meaning that it can be applied to discriminatory laws, whether

or not the subject matter is covered by provisions of the ICCPR (for further analysis see the right to equality and non-discrimination III.§12).

Furthermore, the Convention on the Elimination of All forms of Racial Discrimination (CERD) sets out a communications procedure, that has been used to challenge discrimination based on a combination of race and gender, for example, in the case of a foreign worker who was fired because she was pregnant. She sought remedy in domestic courts, which found in favour of the employer who claimed that foreign workers with children tended to take more sick-leave than nationals, as they tended to stop working when they had children. The CERD Committee decided that the state had not protected the right to work under the CERD (*Yilmaz-Dogan* v. *The Netherlands*). The CERD Committee has specifically dealt with the issue of gender-related dimensions of racial discrimination in its General Recommendation 25.

Within the Inter-American system, two important decisions of the Inter-American Commission are worth mentioning: *Maria da Penha v. Brazil (Case 12.051)* and *Ana, Beatriz and Celia Gonzalez Perez (Case 11.565)* v. *Mexico*. In the case against Brazil, the Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women (Convention of *Belem do Para)* was applied for the first time and the Commission established that the responsibility of a state for its negligence and lack of effectiveness in prosecuting and condemning the aggressor of the victim (her ex-husband), as well as for the failure to fulfil the state duty to prevent harm. In the second case, the Commission established Mexico's responsibility for the illegal detention, rape, and torture of the Perez sisters and the subsequent failure to investigate and provide compensation for these acts. It is worth noting that in this case, the Commission clearly states that rape may amount to torture and is a violation of the private life of women. In this particular case, the seriousness of the conduct was aggravated by the significance that being a victim of such a crime carries in the indigenous community of which the victims were members.

In addition, mention should be made of the UN Commission on the Status of Women (see II.§1.B), which has a mandate to consider confidential and public communications on the status of women. During each session, a Working Group of five members, selected with due regard for geographical distribution, gathers in closed meetings to consider communications addressed to the Commission and those pertaining to women received by the Office of the High Commissioner for Human Rights, including the replies of governments thereto, with a view to bringing to the attention of the Commission those communications which reveal a consistent pattern of reliably attested injustice and discriminatory practices against women. The Commission may make recommendations to ECOSOC regarding the complaints submitted; what steps are to be taken is decided by ECOSOC.

Every year, the UN Human Rights Commission deals with issues related to the protection of women under several agenda items, for instance, the traffic in women and girls, the elimination of violence against women, and the integration

of the rights of women in the UN system. In addition, the Commission has appointed a Special Repporteur on Violence against Women, its Causes and Consequences and a Special Rapporteur on Traditional Practices affecting the Health of Women and the Girl Child.

Furthermore, complaints regarding infringements of the rights of women can clearly be brought to the general supervisory mechanisms of the ILO and under the mechanisms of the ECHR and the ESC.

The UN Decade for Women (1976-1985) has had an impact on the development of the equal opportunities policy of the UN. During the World Conference on Women in Nairobi in 1985, a set of Forward-Looking Strategies was drawn up, to be seen as a kind of international action programme for the advancement of the position of women until the year 2000, setting out guidelines for world-wide long-term action. The Forward-Looking Strategies reflect the obstacles that women face in achieving equality, development and peace. The programme is not binding, but rather a general recommendation. The unanimous approval it met, however, has given it considerable moral force.

At the Fourth World Conference on Women (Beijing, 1995), a Platform for Action and the Beijing Declaration were adopted. This document contains objectives in a range of areas, and proposes institutional and financial arrangements. During a special session of the General Assembly in 2000, the Platform for Action was evaluated and appraisal of progress made in its implementation was undertaken by the twenty-third special session of the General Assembly (Beijing +5) entitled 'Women 2000: gender equality, development and peace for the twenty-first century'. The Assembly adopted a Political Declaration and Further Actions and Initiatives to Implement the Beijing Declaration and Platform for Action (the Outcome Document). The CSW's current and future work, as determined by its multi-year programme for 2002-2006, is closely related to the Platform for Action and the Outcome Document.

The ILO actively fights discrimination against women. The organisation aims to mainstream gender concerns in all its policies and programmes. Specific ILO activities related to the Beijing Conference aim at, for instance: creating productive employment for women and eradication of poverty; improving the working conditions and social protection of women; strengthening organisations and institutions that represent and support women; and promoting the more widespread application and ratification of international labour standards that are of particular relevance to women. Activities of the ILO include various studies and seminars, and the Bureau for Gender Equality. At its 265th session in 1996, the Governing Body of the ILO approved the establishment of an International Programme on More and Better Jobs for Women. This programme promotes more jobs for women through employment creation, training, entrepreneurship development, improvement in access to the labour market, and equality of opportunity. It promotes better jobs through equal pay, occupational desegregation, health and safety, improved working conditions for non-standard employment, social security, family-friendly workplaces, and protection for

vulnerable workers. The ILO has also established the Capacity-building Programme on Gender, Poverty and Employment focusing on enhancing women's access to quality jobs, strengthening their bargaining and negotiating power, and providing innovative ways of increasing social protection, especially in the informal sector.

On the occasion of the 90th Session of the International Labour Conference, held in June 2002 in Geneva, the ILO issued a report on Women and Men in the Informal Economy. The report includes an up-to-date statistical summary and analyses of the situations and characteristics of employment of women and men in the informal economy in selected countries.

Finally, it should be noted that both within the UN system and in regional organisations, NGOs play a crucial role in the promotion of women's rights and the undertaking of research and the documentation of violations. An NGO that deserves special mention in connection with the CEDAW Committee is the International Women's Rights ActionWatch (IWRAW-Asia Pacific), set up in 1986 as a watchdog to support the work of the CEDAW. The IWRAW-Asia Pacific is active in education and conscientisation as well as in country-analysis. Other examples of NGO activities are the Women's Environment and Development Organisation's (WEDO) report, which deals with the national implementation of the Beijing Platform and the Coalition against Trafficking in Women (CATW).

A NOTE ON THE BENEFITS OF WORKING FOR THE PROMOTION OF WOMEN'S HUMAN RIGHTS THROUGH THE LENS OF THE CEDAW CONVENTION

International Women's Rights ActionWatch Asia-Pacific (IWRAW Asia Pacific) envisions a world where there is full realisation of human rights by all. In our view, women's equality is integral to this achievement. As means to attain this vision, we adopt a human rights approach and see ourselves as catalysts in building capacity for change and enhancing the realisation of the human rights of women.

Over a decade, IWRAW Asia Pacific and our main partners have been using the CEDAW Convention's framework to inform our activism. Experiences gathered have helped us gain a better understanding on the ways the CEDAW Convention, as well as other treaties, can be used as tools for change.

Why does IWRAW Asia Pacific work with the CEDAW Convention?

One of the most interesting features of the CEDAW Convention is that it extends protection to all groups of women. In addition the CEDAW Convention sets forth a framework for the elimination of all forms of gender based discrimination. In this connection, it promotes three overarching principles that should be used by anyone undertaking efforts to promote the

realisation of all the human rights of women. These principles are:

(i) **The principle of non-discrimination**: the CEDAW Convention recognises all the manifestations of discrimination against women and that this continues to occur. In addition, it addresses the systematic nature of women's oppression;

(ii) **The principle of substantive equality**: the CEDAW Convention mandates the adoption of gender-responsive policies and programmes informed by the substantive model of equality;

(iii) **The principle of state obligation**: the CEDAW Convention mandates States parties to condemn discrimination against women in all its forms and to ensure its elimination.

In addition, human rights advocates should be aware that the meaning and content of the CEDAW Convention can evolve and, that it can be influenced by civil society groups. In this regard, one of the challenges for women's groups is to continue to ensure that women's experiences and women's participation are given due importance as the treaty continues to be progressively interpreted.

Finally, it should be noted that since the ratification of CEDAW creates obligations for the states parties concerned, it is legally binding and as such, provides the basis for the promotion of other important documents such as the Beijing Platform for Action and the ICPD PoA.

How has the CEDAW Convention strengthened our activism?

By understanding the strengths of the CEDAW Convention and identifying gaps in its domestic implementation, IWRAW Asia Pacific has been able to undertake three major areas of work that stem out of: (i) the need to develop methodologies and materials to provide knowledge and skills on the significance of the CEDAW Convention and other treaties that women at the national level can utilise to claim their rights; (ii) the necessity to strengthen advocacy efforts that aim to further the linkages between local and international activism while ensuring processes by which women can actively participate in standard-setting processes; and (iii) the importance of using information dissemination strategies to strengthen advocacy as a means to collect, exchange and disseminate information on the most efficient use of international human rights standards to enhance national level efforts.

Examples of efforts that draw on the CEDAW Convention

Through a strategy that aims to ensure *the Domestic Implementation of International Human Rights Standards,* IWRAW Asia Pacific seeks to continue building capacity for change. On-going efforts will continue to focus on: 1) the incorporation and application of human rights treaties in the national legal framework; 2) the domestic implementation of the CEDAW Convention

through the use of its Optional Protocol; 3) the further implementation of the Concluding Comments of treaty bodies; and 4) litigation initiatives as a means of building effective domestic remedies. In order to make this possible, IWRAW Asia Pacific will expand its pool of resource persons with the ability to provide technical assistance on the more intricate aspects of CEDAW implementation.

María Herminia Graterol Garrido

C. Issues of special concern

There are several issues that call for special concern when dealing with women's rights, for instance: a) trafficking in women and girls; b) violence against women; c) reproductive rights; and d) traditional practices.

1. TRAFFICKING IN WOMEN AND GIRLS

Every year, thousands of women and girls from poor countries are lured, abducted, or sold into forced prostitution and other forms of servitude, mostly in the West. Trafficking is a complex trans-national issue that needs to be addressed on many levels. It has its roots in gender inequality and socio-economic factors where migration, criminal activity and law enforcement come into play.

The UN Commission on Human Rights has called upon governments:

> [T]o criminalise trafficking in women and girls in all its forms, to condemn and penalise all the offenders involved, including intermediaries, whether their offence was committed in their own or in a foreign country, while ensuring that the victims of those practices are not penalised, and to penalise persons in authority found guilty of sexually assaulting victims of trafficking in their custody (Resolution 1998/30).

In 2003, the Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, supplementing the Convention against Transnational Organised Crime (2000) (UNGA Resolution 55/25) entered into force. In ratifying the Protocol, states commit to criminalise trafficking, to provide assistance to and protection of victims and to provide reparations to them. In addition, Article 9 sets out measures for prevention of trafficking.

The Council of Europe also pays attention to trafficking in women. In 2003 it established an Ad-hoc Committee on Action against Trafficking in Human Beings (CAHTEH), with the aim of drawing up a European Convention on action against trafficking in human beings. This instrument is expected to be a practical tool of international co-operation, which will be geared towards the protection

of victims' rights and the respect for human rights. It will aim at a proper balance between matters concerning human rights and prosecution. Furthermore, within the European context, mention should be made of the Declaration of the Committee of Ministers from 16 November 1988, affirming that the principle of equality of the sexes is an integral part of human rights, and that sex-related discrimination is an impediment to the exercise of fundamental freedoms. Its eradication is a *sine qua non* of democracy and an imperative of social justice.

Though many states have identified trafficking in human beings as a horrendous form of maltreatment, more concrete steps need to be taken to end the practice and ensure that women and girls are protected, that traffickers are prosecuted and that victims are provided with effective redress.

2. VIOLENCE AGAINST WOMEN

Everyday, millions of women around the world face abuse violating the right to life, safety, dignity and physical and psychological wellbeing. Physical and mental violence is endured in the home and outside and even inflicted by the public authorities or by coercive institutions. The least visible form of abuse, domestic violence, remains the most widespread and results in the deaths of thousands of women every year. Those belonging to minority groups, indigenous women, refugee women, migrant women, women living in rural or remote communities, destitute women, women in institutions or in detention, female children, women with disabilities, elderly women and women in situations of armed conflict are especially vulnerable.

In the Preamble to Declaration on the Elimination of Violence against Women (1993), the General Assembly states that:

> [...]Violence against women is a manifestation of historically unequal power relations between men and women, which have led to domination over and discrimination against women by men and to the prevention of the full advancement of women, [...] violence against women is one of the crucial social mechanisms by which women are forced into a subordinate position compared with men. (UNGA Resolution 48/104).

And in this regard the UN Commission on Human Rights has called upon governments

> to enact and, where necessary, reinforce or amend penal, civil, labour and administrative sanctions in domestic legislation to punish and redress the wrongs done to women and girls subjected to any form of violence, whether in the home, the workplace, the community or society, in custody or in situations of armed conflict, and to ensure that they conform with relevant international human rights instruments and humanitarian law (Resolution 1998/52).

In 1994, the UN Commission established the mandate of the Special Rapporteur on Violence against Women. The Rapporteur is to seek and receive information

on violence against women, its causes and its consequences from relevant actors such as international organisations, states and women's organisations, and to respond effectively to such information, recommending measures ways and means, at the national, regional and international levels, to eliminate violence against women and its causes, and to remedy its consequences (E/CN.4/RES/1994/45). In her 2004 report, current Rapporteur Ms. Yakin Ertürk, draws attention to the '*universality* of violence against women, the *multiplicity* of its forms and the *intersectionality* of diverse kinds of discrimination against women and its linkage to a system of domination that is based on subordination and inequality.' The Rapporteur also discusses, *inter alia*, the human rights problems associated with HIV/AIDS and their interplay with violence against women (ECN.4/2004/66). The Rapporteur has also been concerned with issues regarding trafficking in women and girls and female genital mutilation.

At the universal level, violence against women is a cross-cutting theme that all treaty bodies have dealt with from different perspectives. In this regard, is worth noting CEDAW General Recommendation 19 on violence against women, which clearly states that 'Gender based violence is a form of discrimination that seriously inhibits women's ability to enjoy rights and freedoms on a basis of equality with men'.

According to the CEDAW Committee

> The definition of discrimination includes gender based violence, that is, violence that is directed against a woman because she is a woman or that affects women disproportionately. It includes acts that inflict physical, mental or sexual harm or suffering, threats of such acts, coercion and other deprivations of liberty. Gender based violence may breach specific provisions of the Convention, regardless of whether those provisions expressly mention violence.

In the regional systems, the Organisation of American States has uniquely adopted a specific instrument dealing with violence against women, the Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women (Convention of *Belem do Para*). The Convention sets out a number of obligations for states, ranging from negative obligations, such as to refrain from engaging in acts of violence, to positive actions, such as undertaking to modify social and cultural patterns of conduct of men and women (Articles 7 and 8)(see II.§3.B).

In Africa, Article 3(4) Optional Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (2003) stipulates that 'States Parties shall adopt and implement appropriate measures to ensure the protection of every woman's right to respect for her dignity and protection of women and all forms of violence, particularly sexual and verbal violence.' The Protocol also sets out the right to life (Article 4) and the elimination of harmful practices (Article 5) (see II.§4.B).

The Council of Europe has adopted a series of recommendations on women and violence. The Committee of Ministers adopted the Recommendation on the protection of women against violence on 30 April 2002 and the Parliamentary Assembly of the Council of Europe has adopted Recommendation 1450 (2000) on violence against women in Europe and Recommendation 1582 (2002) on domestic violence against women.

3. REPRODUCTIVE RIGHTS

Woman's biological role as bearer of children has traditionally led to inequality between men and women. Women are in many cultures considered the property of their husbands or male relatives and their role in society is principally as childbearing instruments. Traditional inequalities entail that these women have limited control over their reproductive functions; they often have limited access to health services and in numerous countries women are not allowed access to family planning services.

Under international human rights law, women's reproductive rights are a composite of a number of separate human rights, *i.e.*:

- The right to equal treatment;
- The right to privacy;
- The right to reproductive health and family planning;
- The right to decide the number and spacing of children;
- The right to marry and to found a family;
- The right to life, liberty, and security;
- The right to freedom from sexual exploitation and assault;
- The right to freedom from torture and ill-treatment.

CEDAW stipulates that states have a duty to ensure the right to family planning, information, counselling, and services, and the Programme of Action adopted by states at the International Conference on Population and Development (ICPD) (1994) establishes that:

> [Reproductive] rights rest on the recognition of the basic right of all couples and individuals to decide freely and responsibly the number, spacing and timing of their children and to have the information and means to do so, and the right to attain the highest standard of sexual and reproductive health. It also includes their right to make decisions concerning reproduction free of discrimination, coercion and violence, as expressed in human rights documents.

In a regional context, the extensive Protocol on the Rights of Women in Africa (2003) (discussed above), which has, as of July 2004, not yet entered into force, requires states to 'ensure that the right to health of women, including sexual and reproductive health, is respected and promoted' (Article 14). The

rights specified include the right to: control one's fertility; determine the number and spacing of one's children; choose any method of contraception; protect oneself and be protected against sexually transmissible infections, including HIV/AIDS; be informed about one's health status and the health status of one's partner; and have access to family planning education. As to obligations of the states parties, the Protocol stipulates that they are to take all measures to: provide adequate, affordable and accessible health services; establish and strengthen prenatal, delivery and postnatal health, and nutritional services for women during pregnancy and while breast-feeding; and protect women's reproductive rights by authorising abortion in cases of sexual assault, rape, incest, and foetal impairment and where the continued pregnancy endangers the mental and physical health or life of a woman.

At the centre of reproductive rights is the principle that a woman has the right to decide whether and when she wants to have children. While recent years have seen developments towards increased legalisation of abortion, the right to choose remains non-existent or under threat in many parts of the world. According to a prominent NGO, the Centre for Reproductive Rights, currently 38% of the world's population live in countries where abortion is prohibited or permitted only in cases where the pregnancy endangers the woman's life. Several countries stress the right to life of the foetus; in this context, Article 4 of the American Convention on Human Rights is notable as it protects the right to life 'in general, from the moment of conception'. To protect women's right to choose when to have children, states have a duty to ensure access to contraceptives and reproductive health services to prevent unwanted or untimely pregnancies. This right also implies that governments have to ensure that women are informed and give their consent before contraceptive measures are taken. Furthermore, in drafting instruments relating to reproductive rights, governments have a duty to remove barriers to safe abortion and make women's reproductive autonomy, health and right to equality a primary concern.

SEXUAL AND REPRODUCTIVE RIGHTS

Sexual and reproductive rights are not a new group of rights. They have been recognised for years in different international human rights treaties. However, their defence and promotion has greatly evolved as a result of two United Nations international conferences that took place in the 90's: The International Conference on Population and Development (ICPD) and the Fourth World Conference on Women (in which sexual and reproductive rights were addressed in an explicit and direct way).

The ICPD was held in Cairo, Egypt, during 5-13 September 1994; its main contribution was the adoption of an Action Plan (Cairo Programme), which among other things establishes that *'reproductive rights embrace certain*

human rights that are already recognised in national laws, international human rights documents and other consensus documents[...]' (paragraph 7.3). The Cairo Programme not only manifests the existing relationship between human rights and reproductive rights, but also establishes a clear definition of what reproductive health is, and recognised two fundamental rights: the right to reproductive choice and the right to have access to sexual and reproductive health.

The Forth World Conference on Women took place in Beijing, China on 4-15 September 1995. A Declaration and an Action Plan (Beijing Platform) were adopted and the international commitment to protect women's rights was strengthened. The Beijing Declaration clearly points out that 'women's rights are human rights', while the Beijing Platform of Action explains that 'The human rights of women include their right to have control over and decide freely and responsibly on matters related to their sexuality, including sexual and reproductive health, free of coercion, discrimination and violence' (paragraph 96). The contents of the documents adopted in both of these conferences, have been strengthened through the five-year review sessions, known today as Cairo +5 and Beijing +5 respectively. As of today, efforts are being made for the undertakings of the 10-year review sessions.

Many international human rights treaties already recognise human rights that include those applicable to sexuality and reproduction, including the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, and the Convention on the Elimination of all Forms of Discrimination against Women (CEDAW). The International Planned Parenthood Federation (IPPF), one of the most prominent and progressive non-governmental organisations working in the field, elaborated a Charter on Reproductive Rights that enlist all these rights.

The CEDAW, when referring to the right to health, establishes that states parties should take the measures to 'eliminate discrimination against women in the field of health care in order to ensure, on a basis of equality of men and women, access to health care services, including those related to family planning' (Article 12). This right is developed in a more detailed way in General Comment 24 (Women and health) of the Committee on the Elimination of Discrimination Against Women.

This Convention also addresses the need to eliminate discrimination against women in all matters relating to marriage and family relations, and ensure equality of men and women in the right 'to decide freely and responsibly on the number and spacing of the children and to have access to the information, education and means to enable them to exercise these rights' (Article 16 (e)).

In its recent 2004 Report, the Special Rapporteur on the Right to Health, Paul Hunt, establishes that he has 'no doubt that the correct understanding of fundamental human rights principles, as well as existing human rights norms,

leads ineluctably to the recognition of sexual rights as human rights' (paragraph 54).

A very recent resolution approved at the 60th Session of the Commission on Human Rights, that took place from 15 March to 23 April 2004 (Resolution 200/46), emphasises that violence against women has an impact on their physical and mental health, including their reproductive and sexual health (paragraph 7).

Regina Tamés Noriega

4. TRADITIONAL PRACTICES

Many societies adhere to traditional cultural practices that violate women's rights, perpetuating gender discrimination and the subordination of women. These practices include female genital mutilation (FGM); early marriage; various taboos or practices, which prevent women from controlling their own fertility; forced feeding of women; traditional birth practices; son preference and female infanticide; early pregnancy; dowry price; and honour killings. These practices persist 'because they are not questioned and take on an aura of morality in the eyes of those practising them' (OHCHR, Fact Sheet No.23, Harmful Traditional Practices Affecting the Health of Women and Children).

A particularly dreadful traditional practice that will be discussed here is female genital mutilation (FGM). FGM is a harmful traditional practice that involves cutting off or otherwise damaging the female genitals. It may entail excision of the prepuce, clitoris, and/or labia minora; stitching or narrowing of the vaginal opening; and/or other procedures. The procedure has its roots in custom in some African countries, as well as some Middle-Eastern states and many diasporas from these regions practice FGM.

An estimated 130 million women and girls have suffered some form of mutilation and another two million run the risk of being subjected to it. There is extensive documentation of the health hazards caused by FGM, including severe pain, anaemia, shock, haemorrhage, infections, urine retention, stones in the bladder or urethra, scarring, cysts, development of fistulae or holes between the vagina and the bladder, urinary incontinence, infertility, difficulty in childbirth, and even death. Sexual and psychological difficulties are also common consequences of the procedure. Although countless women and girls have been maimed or even died as result of the practice and several countries in Africa, as well as in the West, have criminalised the practice, FMG is firmly rooted in tradition in many societies and efforts to curtail it have had limited effect.

Reasons for the persistence of FGM are complex. In many communities, it is seen as a rite of passage from girlhood to adulthood, it is a means to reduce women's sexual desire and increase male sexual pleasure, is supposed to guard virginity until marriage and maintain fidelity on the part of the woman during

marriage; in some communities women that have not undergone the procedure are not eligible for marriage. In certain regions, FMG is associated with Islam, though it is also practised by Jews, Christians, and other religious groups. Although many traditional justifications have been put forth, FMG's underpinnings seem to be the long-established subordination of women and the taboo of their sexuality.

In recent years, increased awareness of FGM as a violation of women's right to physical integrity has lead several international bodies to take up the issue. In 1998, the UN Commission on Human Rights established the post of Special Rapporteur on Traditional Practices Affecting the Health of Women and the Girl Child. In addition, the Special Rapporteur on Violence Against Women its Causes and Consequences has discussed FGM in reports to the Commission.

In 1997, three UN agencies, the World Health Organisation (WHO), United Nations Children's Fund and United Nations Population Fund (UNICEF), put forth a Joint Plan to bring about a decline in FGM within ten years and eradicate the practice within three generations. The plan involves educating the public and law-makers on the need to eliminate FGM; 'de-medicalising' FGM and encouraging African countries to develop a national, culturally specific plan to eradicate FGM.

A special international initiative to eradicate FGM took place in 2003, when more than a hundred experts representing governments of 28 African and Arab countries, national-level NGOs and international organisations gathered in Cairo for the Expert Consultation on Legal Tools to Prevent Female Genital Mutilation. The meeting concluded with the Cairo Declaration for the Elimination of FGM; affirming, *inter alia*, that 'the prevention and the abandonment of FGM can be achieved only through a comprehensive approach promoting behaviour change, and using legislative measures as a pivotal tool.'

The Committee on the Elimination of Discrimination Against Women has examined the issue of FGM in numerous state reports and has specifically dealt with the issue in its General Recommendation 19 on violence against women and General Recommendation 24 on women and health. Similarly, the Committee on Economic, Social and Cultural Rights often discusses harmful traditional practices when examining state reports and has addressed the issue of FGM in General Comment 14, stating that it is a violation of the right to health.

In the continent most affected by FGM, the African Union has adopted the Optional Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (see II.§4.B). The Protocol provides in Article 5 that states parties to the Charter must undertake 'prohibition, through legislative measures backed by sanctions, of all forms of female genital mutilation, scarification, medicalisation and para-medicalisation of female genital mutilation and all other practices in order to eradicate them'.

To eliminate female genital mutilation, education, outreach and quality reproductive health care for women is imperative and women's rights to physical integrity, equality and to health need to be respected and promoted.

CHAPTER 2

CHILDREN

Every child has the right to grow to adulthood in health, peace and dignity. Young children are vulnerable and dependent on adults for their basic needs, such as food, health care and education. In many countries they are forced to fend for themselves, often at the cost of their full development and education. The United Nations Children's Fund (UNICEF) has estimated that twelve million children under the age of five die every year, mostly of preventable causes; 130 million children in developing countries, a majority of whom are girls, are not in primary school; 160 million children are malnourished; approximately 1.4 billion children lack access to safe water; and 2.7 billion children lack access to adequate sanitation. Furthermore, Human Rights Watch estimates that annually 250 million children between the ages of five and fourteen years engage in some form of labour often related to debt bondage, forced or compulsory labour, child prostitution, pornography, or drug trafficking. UNICEF reports that approximately 300,000 children in more than 30 countries are currently participating in armed conflicts.

Ensuring the rights of children to health, nutrition, education, and social, emotional and cognitive development is imperative for every country and entails obligations for every government. Ensuring that children enjoy fundamental rights and freedoms not only advances a more equitable society, but fosters a healthier, more literate and, in due course, a more productive population. Clearly, children's rights are closely tied to women's rights; even before being born a child's survival and development is dependent on the mother's health and opportunities. Women are still primary care-givers for children, so ensuring women's rights is positively linked to children's enjoyment of human rights.

A. Standards

In 1924, the League of Nations adopted a Declaration on the Rights of the Child (Declaration of Geneva), containing five basic principles reflecting the clear consensus that children were in need of special protection. In 1959, the UNGA

unanimously adopted another more elaborate Declaration on the Rights of the Child, stating in the preamble that 'the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth'.

Serious work on drafting a convention on the rights of the child began in the final years of the 1970s, resulting in the UNGA adoption of the Convention on the Rights of the Child (CRC) on 20 November 1989. The Convention entered into force on 2 September 1990 and a few years later the majority of the world's states had ratified it. As of July 2004, 192 states had ratified the Convention, making the CRC the most universally accepted human rights treaty ever drafted. The United States and Somalia are the only UN members, which have not ratified the Convention.

The Convention is meant to be all encompassing and sets out civil, political, social, economic and cultural rights for 'every human being below the age of eighteen years, unless under the law applicable to the child, majority is attained earlier' (Article 1). Four general principles have guided the authors of the Convention:

- The principle of non-discrimination (Article 2);
- The best interests of the child (Article 3);
- The right to life, survival and development (Article 6); and
- Respect for the views of the child (Article 12).

Underpinning the CRC are three core concepts; protection, provision and participation: a) protection, against, *e.g.*, violence, abuse, neglect, maltreatment or exploitation (Article 19); b) provision of, *e.g.*, name and nationality (Article 7), social security, adequate standard of living and education (Articles 26 to 28); c) participation through the right of a child to express its views, to freedom of thought and to freedom of association (Articles 12 to 15).

The CRC contains several rights which are also included in other international instruments, but Article 41 provides an explicit 'most favourable conditions clause', stating that nothing in the CRC shall affect any provisions which are more conducive to the realisation of the rights of the child and which may be contained in the law of a state party or international law in force in that state (Article 41). While the Convention sets out many rights already proclaimed in other instruments such as the ICCPR (Articles 23(4) and 24) and ICESCR (Article 10(3)), it is the first instrument to specifically grant children rights and protection as autonomous human beings. The value added by the CRC lies mainly in that:

- The general rights formulated in earlier conventions and the UDHR have been reformulated with a special focus on the rights and needs of the child. Other rights only applicable to children are elaborated, such as the right to adoption, education and contact with parents.

- New elements have been included, such as the provisions regarding parental guidance and regarding international co-operation in the field of handicapped children.
- The CRC covers children in difficult circumstances, such as the separation from parents; abuse and neglect; disabled and refugee children; indigenous children and children belonging to minorities; sale, trafficking and abduction of children; deprivation of liberty; and children in armed conflict.

Some international instruments contain more protective clauses than the CRC. For instance, Article 32 CRC regarding child labour does not explicitly define a minimum age for admission to employment. ILO 138 stipulates that the minimum age for admission to employment or work shall not be less than 15 years and that developing countries may initially specify a minimum age of 14 years. For employment under specified circumstances (*e.g.*, in the case of health hazards), the minimum age is 18 years in the aforementioned ILO Convention. The CRC generally sets out the minimum age of 18 years (Article 1) so does ILO 182 concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour (1999), which defines persons younger than 18 as children (Article 2).

Similarly, while the CRC forbids recruitment of children below 15 years for the armed forces, Article 77 of Protocol I to the Geneva Conventions of 1949, affords superior protection as regards recruitment of children between 15 and 17 years of age. Here, Article 41 ('most favourable treatment') applies for those states, which have ratified more favourable international instruments. Moreover, states may make declarations when ratifying the CRC, expressing their commitment to apply more protective standards; *e.g.*, by not recruiting children under 18 years of age into the armed forces.

Two optional protocols to the CRC were adopted by the UNGA in 2000. The first optional protocol on Children in Armed Conflict aims at, *inter alia,* raising the minimum age of individuals taking part in armed conflict to 18 and includes a unique provision regulating the acts of non-state actors, stipulating that non-state forces should not recruit persons under 18. The second protocol to the CRC on the Sale of Children, Child Prostitution and Child Pornography stipulates, *inter alia*, that states have to ensure that certain acts against children are criminalised, and that states are obliged to prosecute or extradite offenders under their jurisdiction.

Relevant standards in the regional systems for the protection of children's rights include the African Charter on the Rights and Welfare of the Child (1990), setting out in Article 18(3) that 'the State shall [...] ensure protection of the rights of the woman and the child as stipulated in international declarations and conventions'. The American Convention on Human Rights sets out the equal rights of children born in and out of wedlock (Article 17(5)) and that 'every minor child has the right to measures of protection [...] on the part of his family, society, and the state' (Article 19). Other relevant documents within the American

context are, for instance, the Inter-American Convention on the International Return of Children (1989); the Inter-American Convention on Conflict of Laws Concerning the Adoption of Minors (1984); and the Inter-American Convention on International Traffic in Minors (1994). Within the European system the European Social Charter sets out special protection for children with regard to employment (Article 7) and the right of children and young persons to social, legal and economic protection (Article 17). Other important European conventions are the European Convention on the Adoption of Children (1967); the European Convention on the Legal Status of Children born out of Wedlock (1975); and the European Convention on the Exercise of Children's Rights (1996).

B. Supervision

The CRC establishes the Committee on the Rights of the Child to supervise the progress made by the states parties in achieving the realisation of their obligations contained in the Convention. The Committee is composed of eighteen multidisciplinary experts from fields such as international law, medicine, education and sociology, whose main task is to review reports submitted by states on actions they have taken to implement the Convention, as it has no competence to receive individual complaints. The Committee may convene informal regional meetings with the collaboration of UNICEF, to get familiar with the different issues facing children in different regions, as well as establishing dialogues with NGOs and governments. Like other supervisory mechanisms, the Committee adopts General Comments for the interpretation of the rights contained in the CRC. The Committee has recently (2003) adopted General Comment 5 on general measures of implementation of the CRC, outlining the obligations of states in regard to the Convention.

The supervisory body of the ICCPR, the Human Rights Committee, has also been active in the protection of children. It has ruled on a number of issues regarding children. The Committee has, for instance, found that by not investigating the disappearance of a minor, the state failed to provide the special measures of protection set out in the ICCPR (*Laureano* v. *Peru*). It has also ruled that the failure to recognise the legal standing of a grandmother in guardianship and visitation proceedings, as well as delay in legally establishing a child's real name and issuing identity papers, entailed a violation of the special measures of protection of the Covenant (*Monaco de Gallicchio and Vicario* v. *Argentina*). The Committee has set out that the exceptional circumstances that limit the right to regular contact between children and both of their parents upon dissolution of a marriage generally does not include unilateral opposition of one parent (*Hendriks* v. *The Netherlands*). The Committee has found the failure of the state to ensure the right to permanent contact between a divorced parent and her children entailed an interference with the right to privacy (*Fei* v. *Colombia*).

The Committee has found the deportation of parents from a country where a child has nationality and has grown up, an arbitrary interference with the right to family, as well as a violation of the child's right to special protection as a minor (*Winata and Li* v. *Australia*). The Committee has found that not segregating minors from adults in prison is a violation of the right to special protection under Article 24 (*Thomas (Damien)* v. *Jamaica*).

Within the Inter-American system, the Commission and the Court have dealt with several cases referring to children. In this regard, several cases deserve mention including *Villagrán Morales et al.* v. *Guatemala* (see *Street Children case* below); *Bulacio* v. *Argentina,* which refers to a 17 year old who was detained arbitrarily and beaten so severely and died the day after he left detention as a consequence of the blows; and *Centro de Reeducacion del Menor* v. *Paraguay* which refers to the situation of extreme physical and psychological violence endured by children and adolescents imprisoned in the Panchito López Reformatory in Paraguay. The latter case was being examined by the Court at the time of writing (July 2004).

In addition, it is worth mentioning that the Inter-American Court has adopted an Advisory Opinion specifically dealing with the protection of children in which it establishes that the American Convention, which only refers to the rights of children in general terms, forms an organic whole (*corpus jure*) with the UN Convention on the Rights of the Child (see Juridical Status and Human Rights of the Child, Advisory Opinion OC-17/02, 28 August, 2002).

In addition, mention should be made of the United Nations Children's Fund (UNICEF), one of the key organisations concerned with children's rights. UNICEF was created in 1946 in the aftermath of the Second World War to provide European children facing famine and disease with food, clothing and health care. Today, UNICEF aims to overcome the obstacles that poverty, violence, disease and discrimination place in a child's path. UNICEF's role is specifically mentioned in Article 45 of the CRC. The organisation focuses on improving the child's environment, the improvement of primary health care, water supply, nutrition, education and community development. In recent years, it has invested heavily in programmes for, among other things, immunisation, water supply systems and literacy. UNICEF is a global leader in vaccine supply, reaching 40 per cent of the world's children and is paramount in the implementation of the targets set at the 1990 World Summit for Children and the Millennium Development Goals. UNICEF has also published a very useful 'Implementation Handbook for the Convention on the Rights of the Child'.

Through activities, such as participation in the Global Movement for Children and the Special Session on Children of the UNGA, UNICEF stresses the need for global commitment to children's rights and encourages children and young people to participate in decisions that affect their lives. More than 7,000 people, in 158 countries are working for UNICEF to improve the lives of children worldwide.

C. Issues of special concern

There are several issues that call for special concern when dealing with children's rights, for instance: a) sexual exploitation; b) child soldiers; c) child labour; and d) street children.

1. SEXUAL EXPLOITATION

In March 1990, the UN Human Rights Commission decided to appoint a Special Rapporteur on the Sale of Children, Child Prostitution and Child Pornography. In a 2003 report, the Rapporteur expressed concern that many children who are sold, trafficked or exploited through prostitution or pornography are criminalised and still not being treated as victims. Furthermore, to combat sexual exploitation of children the Stockholm World Congress against Commercial Sexual Exploitation of Children was held in 1996. A second Congress, held in Yokohama in 2001, aimed at drawing attention to the plight of children in the world sex trade, review progress made and devise further methods to protect children from sexual exploitation. The Congress adopted the 'The Yokohama Global Commitment', where parties pledged, *inter alia*, to reinforce efforts against commercial sexual exploitation of children by addressing root causes that put children at risk of exploitation, such as poverty, inequality, discrimination, persecution, violence, armed conflicts, HIV/AIDS, dysfunctional families, the demand factor, criminality, and violations of the rights of the child, through improved access to education and other social measures. The Congress also set out action to criminalise the sexual exploitation of children.

The Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography entered into force on 18 January 2002. This Protocol supplements the Convention on the Rights of the Child with detailed requirements for criminalising violations of children's rights in relation to the sale of children, child prostitution and child pornography (see II.§1.C).

2. CHILD SOLDIERS

It is estimated that children are being recruited to the armed forces in more than thirty countries worldwide. Many are recruited by force and threatened with death; others join out of desperation when conflict breaks out leaving them without education, family or any coherent social structure. Child soldiers are commonly abused and when hostilities end many are left mentally and physically scarred, often stigmatised and unable to rejoin society. In 1996, the UN appointed a Special Representative to the UN Secretary-General on the Impact of Armed Conflict on Children. In this regard, the UN Human Rights Commission has said that states have an obligation:

> [T]o end the use of children as soldiers and to ensure their demobilisation, and to implement effective measures for the rehabilitation and the reintegration into society of child soldiers, child victims in cases of armed conflict or foreign occupation, including victims of landmines and all other weapons, and victims of gender-based violence, inter alia, through adequate education and training, and invites the international community to assist in this endeavour (Resolution 1998/76).

The emotional and physical strain the child soldiers suffer leaves them particularly vulnerable after the conflicts end. Many are left physically disabled and suffer post-traumatic stress syndrome in the form of anxiety, bedwetting, nightmares and hyperactive and aggressive behaviour, to name a few examples.

The dehumanising reality of child soldiers receives limited attention in some societies, as it is a taboo subject. This prevents the victims from seeking help and being able to rejoin society and reunite with their families. More generally, however, lack of awareness regarding what child soldiers are exposed to, such as, sexual exploitation, leads to problems in regard to successful disarmament, demobilisation and reintegration of child soldiers.

In addition to the Optional Protocol to the CRC on the involvement of children in armed conflict, three other instruments relating to child soldiers have been adopted and entered into force. All three support, and in one case strengthen, the standards set by the Optional Protocol.

The African Charter on the Rights and Welfare of the Child (1990) was the first regional treaty to establish 18 as the minimum age for all recruitment and participation in hostilities.

ILO 182 concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour (1999) declares that 'forced or compulsory recruitment of children for use in armed conflict' comprises one of 'the worst forms of child labour' prohibited in the Convention, and calls for programmes of action to eliminate child soldiering with 'all necessary measures to ensure the effective implementation and enforcement [...] including the provision and application of penal sanctions or, as appropriate, other sanctions'.

Finally, the Rome Statute of the International Criminal Court is an important development in the campaign against the use of children in armed conflict. It defines the following acts as war crimes: 'conscripting or enlisting children under the age of fifteen years into the national armed forces or using them to participate actively in hostilities' in an international armed conflict and 'conscripting or enlisting children under the age of fifteen years into armed forces or groups or using them to participate actively in hostilities' in a non-international armed conflict.

It is worth mentioning that the Special Court for Sierra Leone [jointly created by the Government of Sierra Leone and the United Nations in January 2002 with the mandate to try those who bear the greatest responsibility for serious violations of international humanitarian law and Sierra Leonean law committed in the country since 30 November 1996] ruled that the recruitment or use of

children under age 15 in hostilities is a war crime under customary international law (see *Decision on Preliminary Motion Based on Lack of Jurisdiction (Child Recruitment), Prosecutor* v. *Sam Hinga Norman*).

3. STREET CHILDREN

An issue of major concern within the realm of children's rights is the plight of street children. The ICESCR Committee has raised this issue a number of times in its concluding observations. The EU and its members have regularly taken position on the situation of street children and called on governments concerned to take adequate measures, as well as taking positive steps to try to alleviate their plight, through the financing of different programmes. The Inter-American Court has elaborated on the issue in the 'Street Children case' (*Villagrán Morales et al.* v. *Guatemala*), which refers to the murder by agents of the state of five street children 'who lived on the streets in a risk situation'. The Court held that in relation to the street children, the 'right to life includes, not only the right of every human being not to be deprived of his life arbitrarily, but also the right that he will not be prevented from having access to the conditions that guarantee a dignified existence [...].'

4. CHILD LABOUR

Child labour is another issue of concern. The International Labour Organisation (ILO) has estimated that 250 million children between the ages of five and fourteen work in developing countries, often supplying an essential income for the survival of their family. The CRC addresses, *inter alia*, child labour that is harmful to a child's development. Aware that the abolition of child labour is a long term, structural issue, organisations such as the ILO and several international NGOs have initiated programmes aimed at the abolition of child labour while simultaneously improving the lives of those children that are forced to work.

Mention should also be made of ILO 182 concerning the prohibition and immediate action for the elimination of the worst forms of child labour. The Convention was adopted in June 1999 and has in five years received 149 ratifications.

Ensuring the rights of children lies largely in the hands of states and the international community. The World Summit for Children that took place in 1990 adopted concrete goals to implement children's rights: The World Declaration on the Survival, Protection and Development of Children and Plan of Action. The Plan of Action called upon nations to be guided by the principle that the essential needs of all children should be given high priority in the allocation of resources and included targets for the end of the decade such as:

- Reduction of under-five child mortality by at least one third;

- Reduction of maternal mortality rates by half of the 1990 levels;
- Universal access to safe drinking water;
- Universal access to basic education;
- Protection of children in especially difficult circumstances, particularly in situations of armed conflict.

The 1993 Vienna World Conference on Human Rights also placed great emphasis on the rights of children in its Vienna Declaration and Programme of Action. The Conference called for universal ratification of the CRC. It recognised the need to strengthen mechanisms for the protection of children and agreed that children's rights should be at the forefront within the UN system actions for the protection and promotion of human rights.

Under the System of Collective Complaints of the European Social Charter (ESC) there has been an important complaint made against Portugal regarding child labour. The complaint (*International Commission of Jurists* v. *Portugal, Complaint No. 1/1998)* lodged on 12 October 1998, relates to Article 7(1) (prohibition of employment under the age of 15) of the European Social Charter. The European Committee of Social Rights concluded that there was a violation of Article 7(1) and transmitted its decision on the merits of the complaint to the parties and to the Committee of Ministers, which adopted Resolution CHS (99)4 on 15 December 1999 (for more information on the ESC see II.§2.C.2)

CHAPTER 3

REFUGEES

The problem of the world's refugees and internally displaced persons is one of the most complex issues facing the world community today. Much discussion is taking place, both at the United Nations and in other fora, to improve protection for these particularly vulnerable groups.

Throughout history, people have fled their homes to escape persecution. In the aftermath of the Second World War, the international community included the right to seek and enjoy asylum in the 1948 Universal Declaration of Human Rights (Article 14). In 1950, the Office of the United Nations High Commissioner for Refugees (UNHCR) was created to protect and assist refugees, and, in 1951, the United Nations adopted the Convention Relating to the Status of Refugees (1951 Convention), which is the cornerstone document of refugee protection. In addition, the Protocol relating to the Status of Refugees (the 1967 Protocol) helped widen the definition of a refugee, as it lifted the time and geographic limits found in the 1951 Convention.

While the international community has generally responded swiftly and generously to refugee crises in the past 50 years, some worrying trends are emerging. Countries that once generously opened their doors to refugees have largely regressed in their commitment to protect refugees by adopting adversarial and restrictive policies. Real and perceived abuses of asylum systems, as well as irregular movements, have led to the refusal of entry to refugees and expulsion from asylum countries. Those who reach a potential country of asylum are often turned away or sent back without having been able to apply for asylum.

The majority of today's refugees are from Africa and Asia. Current refugee movements frequently take the form of mass exoduses rather than individual flights. Eighty per cent of today's refugees are women and children and the causes of flight now include natural or ecological disasters and extreme poverty. As a result, many of today's refugees do not fit the definition contained in the 1951 Convention. In 2001, there were an estimated 14.9 million refugees in the world - people who had crossed an international border to seek safety - and at least 22 million internally displaced persons (IDPs) who had been uprooted within their own countries (see IV.§4).

WHO IS A REFUGEE?

According to the 1951 Convention relating to the Status of Refugees, a refugee is someone who:

- ❑ Has a well-founded fear of persecution because of his/her
  - Race
  - Religion
  - Nationality
  - Membership in a particular group, or
  - Political opinion;
- ❑ Is outside his/her country of origins; and
- ❑ Is unable or unwilling to avail him/herself of the protection of that country, or to return there, for fear of persecution.

The African Union Convention Governing the Specific Aspects of Refugee Problems in Africa, a regional treaty adopted in 1969, added to the definition found in the 1951 Convention to include a more objectively based consideration, namely:

- ❑ Any person compelled to leave his/her country owing to external aggression, occupation, foreign domination or event seriously disturbing public order in either part or whole of his/her country of origin or nationality. (Article 1(2)).

In 1984, a colloquium of Latin American Government representatives and jurists adopted the Cartagena Declaration on Refugees. Like the AU Convention, the declaration adds a more objectively based consideration to the 1951 Convention refugee definition to include:

- ❑ Persons who flee their countries 'because their lives, safety or freedom have been threatened by generalised violence, foreign aggression, internal conflicts, massive violation of human rights or other circumstances which have seriously disturbed public order'. (Conclusion 3).

A. Standards

The 1951 Refugee Convention, as amended by the 1967 Protocol, is the most important international instrument protecting the rights of refugees. According to Article 1(a) of the Convention, a refugee is:

> [A]ny person who owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence, is unable or, owing to such fear, is unwilling to return to it.

The 1951 Convention specifies who is a refugee (see textbox), and what rights a refugee has. In Article 33, the principle of *non-refoulement* is established. This principle forbids states to expel or return a refugee, in any manner whatsoever, to the frontiers of territories where his/her life or freedom would be threatened on account of race, religion, nationality, membership of a particular social group or political opinion. The *non-refoulement* principle also encompasses non-rejection at the border and can oblige a state to accept a person on its territory). It does not oblige a state to grant the person asylum. The refugee may be expelled to another state where his life and freedom will not be in danger, provided that state is prepared to admit him. Granting of asylum may, however, be the result of *non-refoulement*, if no other state is prepared to admit the refugee.

The 1951 Convention also includes 'exclusion clauses', which stem from the understanding that the commission of some types of crimes justifies the exclusion of the perpetrators from the benefits of refugee status. Under Article 1(f), refugee status under the 1951 Convention does not apply to persons with regard to whom there are 'serious reasons' for considering they have committed the following crimes: a) Crimes against peace, war crimes and crimes against humanity; b) Serious non-political acts; and c) Acts contrary to the purposes and principles of the United Nations. Thus, if one of the exclusion clauses applies, the claimant cannot be a Convention refugee, whatever the other merits of his or her claim.

Often the recognition as refugee on the basis of Article 1(A) of the 1951 Convention will coincide with the granting of asylum, according to national law. In general, asylum will not be granted if the person concerned can enjoy protection elsewhere, or if there are compelling reasons of public order not to admit her/him. Although the definition of refugee in Article 1(A) of the 1951 Convention is formulated in a general way and can therefore be applied broadly, it is limited by the fact that the well-founded fear of persecution must be based on the five grounds mentioned in Article 1(A). However, there can be situations in which it would be inhumane to return someone who does not fulfil the criteria for refugee status under the Refugee Convention. This can be the result of general circumstances in the country of origin such as, for example, war and hunger. It can also be related to individual circumstances such as the risk of torture or cruel, inhuman or degrading treatment or punishment upon return. Granting of asylum may therefore imply both admission as refugee on the basis of the 1951 Convention and permission to stay on humanitarian grounds.

In addition to the 1951 Convention and the 1967 Protocol, two regional instruments have been adopted expanding the definition found in the 1951 Convention, the OAU Convention Governing the Specific Aspects of Refugee Problems in Africa (1969) and the Cartagena Declaration on Refugees (1984).

In addition to international and regional refugee conventions, international human rights law and international humanitarian law play a significant role in guaranteeing international protection of refugees.

Article 7 ICCPR has been interpreted to prohibit return to situations where the person might suffer torture or other cruel, inhuman and degrading treatment or punishment. Moreover, nearly all of ICCPR's provisions apply to non-citizens.

Article 3 CAT provides for protection from *refoulement* in situations where there is a substantial risk of torture. The *non-refoulement* provision under CAT is absolute. Unlike the *non-refoulement* provision of the 1951 Convention it is not linked to cases where a person fears harm on account of race, religion, nationality, membership of a particular social group, or political opinion and it does not provide for exceptions based on national security. This means that the prohibition of return applies to all persons regardless of their past criminal conduct.

CRC applies to all children without discrimination, including child refugees and asylum seekers. CRC specifically stipulates that every child seeking refugee status has a right to protection and humanitarian assistance in the enjoyment of the rights set forth in the Convention, as well as other conventions to which the state is party.

Regional human rights conventions also establish important safeguards for refugees. For example, Article 3 European Convention has been interpreted by the European Court as prohibiting return of persons where there is a risk of torture while Article 22(7) American Convention recognises 'the right to seek and be granted asylum' and Article 22(8) prohibits *refoulement* and it is formulated in absolute terms.

In humanitarian law, Article 44 of the Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War deals specifically with refugees and displaced persons. Moreover, the 1977 Additional Protocol provides that refugees and stateless persons are to be protected under the provisions of Parts I and III of the Fourth Geneva Convention.

B. Supervision

UNHCR was created to provide international protection to refugees and to find durable solutions to refugee problems. These functions include securing legal and practical protection to refugees with and through governments, overseeing the mobilisation and co-ordination of resources for the well-being and survival of refugees and encouraging conditions in conflict zones that will allow refugees to return voluntarily to their countries of origin. Both the 1951 Convention (Article 35) and its 1967 Protocol (Article II) bestow upon UNHCR responsibility for supervising implementation by states. The Convention and Protocol specifically establish the obligation of states to provide UNHCR with information on the condition of refugees, implementation of the Convention and Protocol and

relevant national law. They do not, however, provide for individual complaints or a state reporting procedure. In addition to providing protection to refugees, UNHCR's mandate has been expanded to include persons in refugee-like situations, internally displaced persons, stateless persons, and returnees (refugees who have returned to their own countries).

At the international level, UNHCR promotes accession by states to international agreements relating to refugees and monitors government compliance with international refugee law. To this end, the Global Consultations on International Protection were launched in 2001. The Consultations were aimed at promoting improved understanding of the 1951 Convention, its strengths, limitations and potential. The process was designed along three tracks: a) Ministerial Meetings of states parties to the Convention; b) Roundtable meetings with experts; and c) Policy formulation in the framework of the Executive Committee (ExCom). These consultations resulted in the establishment of the Agenda for Protection, a series of guidelines for UNHCR, governments and humanitarian organisations to strengthen worldwide refugee protection.

In the field, UNHCR staff work to protect refugees through a wide range of activities, including emergency response; relocating refugee camps away from border areas to improve safety; ensuring that refugee women have access to food distribution and social services; reuniting separated families; providing information to refugees on conditions in their home country so that they can make decisions about return; documenting a refugee's need for resettlement to a third country of asylum; visiting detention centres; and giving advice to governments on draft refugee laws, policies and practices.

UNHCR seeks long-term and durable solutions to refugee problems by helping refugees return voluntarily to their home countries if the situation allows it; monitoring the treatment and promoting the reintegration of returnees after repatriation has taken place; helping refugees integrate in their countries of asylum and resettling refugees to third countries when needed.

Given the general nature of UNHCR's supervisory role, international human rights supervisory mechanisms have also played a key role in protecting the rights of refugees and asylum seekers. Both the Committee Against Torture and the Human Rights Committee constitute crucial safeguards for refugees and asylum seekers in danger of being returned to face torture or cruel, inhuman or degrading treatment or punishment. Under its individual complaint procedure, the Committee Against Torture has developed a broad jurisprudence concerning the principle of *non-refoulement* under Article 3 CAT and has provided important protection to refugees and asylum seekers who risked being deported to countries where they would be exposed to torture.

The Committee on Economic, Social and Cultural Rights and the CEDAW, CRC and CERD Committees have all played an important role in refugee protection by raising issues relating to refugees when examining state reports.

The European Court has found obligations of parties to the European Convention relating to refugees and other non-nationals in a series of judgements

on private and family life, the right to an effective remedy and, perhaps most importantly, the prohibition of return when there is a risk of torture.

Similarly, at the Inter-American level, the Court, and in particular, the Commission have played an important role in the protection of the human rights of refugees and other non-nationals through examination of individual cases, provisional and precautionary measures, and examination of refugee problems in the annual and country reports of the Commission.

CHAPTER 4

INTERNALLY DISPLACED PERSONS

Globally, an estimated 25 million persons are displaced within the borders of their own countries. These are people who have often left their homes to flee armed conflict, but have not sought asylum in other countries. In general, internally displaced persons have many of the same needs as refugees in terms of protection, but since they have not crossed international borders, they are not protected by the 1951 Convention or by the UNHCR's statute.

International concern for the plight of internally displaced persons (IDP's) has acquired a degree of urgency in recent years as greater numbers of people, uprooted by internal conflict and violence, are exposed to further violations of their rights. Unfortunately, there is as yet no single international agency or international treaty that focuses on internal displacement. As a result, the international response to internal displacement has been selective, uneven and, in many cases, inadequate. Large numbers of IDPs receive no humanitarian assistance or protection whatsoever. The international community is now exploring ways to provide more sustained and comprehensive protection and assistance to this extremely vulnerable group of people.

A. Standards

In response to the growing international concern at the large number of IDPs worldwide, the UN Commission on Human Rights requested the UN Secretary-General in 1992 to appoint a Representative of the Secretary-General on Internally Displaced Persons. The mandate has since been renewed on numerous occasions. Mr. Francis M. Deng was appointed in this capacity and developed the 'Guiding Principles on Internal Displacement', which address all phases of internal displacement. They address prevention; protection during displacement; humanitarian assistance; return, resettlement and reintegration; and are intended to provide guidance to states, non-state actors, and inter-governmental and non-governmental organisations on issues of internal displacement. The Guiding Principles are not in themselves legally binding, but most of the principles reflect treaty obligations of states and the obligations of parties to non-international

armed conflict. The Guiding Principles are finding increasing acceptance and are being frequently used by states, international organisations and NGOs.

The UNGA has adopted several resolutions concerning IDPs. A recent one, adopted in February 2002, drew attention to the situation of the 'alarming high numbers of internally displaced persons throughout the world' (UNGA Resolution 56/164). The General Assembly, *inter alia*, reiterated the relevance of the Guiding Principles and asked states to 'provide protection and assistance, including reintegration and development assistance, to internally displaced persons, and to facilitate the efforts of relevant United Nations agencies and humanitarian organisations in these respects, including by further improving access to internally displaced persons'. At the regional level, the Organisation of American States (OAS) has also adopted several resolutions concerning IDPs reiterating its concern for internally displaced persons in the Americas, urging states, *inter alia*, to promote public activities and information campaigns to fight racism, discrimination, xenophobia, and intolerance towards internally displaced persons; to update procedures to identify those persons in need of international protection; and to urge those member states that have not yet done so to consider becoming parties to relevant international instruments (see, *i.e.*, AG/RES. 1971 XXXIII-O/03).

B. Supervision

In order to address the needs of IDPs, the United Nations and its humanitarian partners established in January 2002 the Office for Co-ordination of Humanitarian Affairs (OCHA), which consists of international staff seconded by, *inter alia*, the UNDP, UNHCR, WFP, UNICEF, and the NGO community. The main role of OCHA is to assist the UN Emergency Relief Co-ordinator in responding effectively to the needs of the internally displaced persons world-wide and to provide support to field response in IDP crises.

UNHCR has also called for greater attention to the problems of the internally displaced. In response to requests from the UN Secretary-General, UNHCR's humanitarian expertise can be extended to IDPs on a case-by-case basis as when UNHCR assisted internally displaced persons in the former Yugoslavia. Certain experiences, *i.e.*, that of 'ethnic cleansing' in the former Yugoslavia, have led to a call for standards explicitly forbidding the forcible movement of IDPs on racial, religious, ethnic, or political grounds. Furthermore, increased protection for relief workers and others engaged in assisting and protecting those internally displaced is called for.

Another organisation, which is increasingly important to the protection of IDPs, is the International Committee of the Red Cross (ICRC). As the ICRC's mission is to protect and assist victims of armed conflict, its primary target group is often IDPs. The ICRC estimates that of the nearly five million persons assisted in 1999, the great majority were IDPs. Since 2000, the ICRC has been developing programmes specifically aimed at protecting and assisting internally displaced persons world-wide.

CHAPTER 5

STATELESS PERSONS

Nationality and citizenship are fundamental elements of human security because they provide people with a sense of belonging and identity. They provide a legal basis for the exercise of many human rights. Persons without a nationality are in many countries denied numerous human rights that citizens take for granted, like access to schools and medical care, ownership of property, marriage and foundation of a family and enjoyment of legal protection. Globally, an estimated 9 million persons are considered stateless.

Nationality is not granted indiscriminately, but is normally based on factors such as the place of birth of a person, parentage or the relationship a person has established with a state through, for example, marriage to a national or long-term residence there.

A stateless person is the person who is not considered a national of any state under operation of its law. Statelessness occurs for many different reasons. A person may loose her/his nationality and is not able to acquire a new one because of extended stay abroad or because of marriage or dissolution of marriage to a person of a different nationality (women are particularly vulnerable). In the case of children, if they are born to stateless persons or refugees, or in some cases out of wedlock, they may be denied citizenship. Some individuals may find themselves stateless because of faulty administrative practices, such as excessive fees or the failure to be notified of registration or other obligations. Children who are not properly registered at birth can easily become stateless, as they are not able to show where or to whom they were born.

Situations of statelessness involving a large number of persons in a particular society may arise in a number of different circumstances. Governments may change their nationality laws and deny certain groups nationality under the new laws in order to marginalise them or to facilitate their expulsion from the state's territory. The transfer of territory or sovereignty or the disintegration and formation of new states may leave thousands of people stateless or with disputed claims of citizenship.

Historically, refugees and stateless persons have been linked and both have received protection and assistance from international refugee organisations. After

the Second World War, however, the needs of refugees became dominant and when the 1951 Refugee Convention was drafted, a protocol relating the status of stateless persons, attached to the draft convention, was postponed for consideration at a later date. International conventions on statelessness were adopted in 1954 and 1961, but because the international community did not pay much attention to statelessness at that time, few countries acceded to these treaties. UNHCR was entrusted with certain responsibilities with regard to stateless persons, but for many years the organisation devoted little time, resources, and efforts to statelessness.

With increasing numbers of stateless people around the world and the implications this may have for national and regional security, the international community is revisiting international instruments that deal with issues relating to nationality and citizenship. The end of the Cold War led to a profound change in international relations and forced the issue of statelessness onto the agenda of the international community. These changes included the disintegration of several states, the rise of ethnic consciousness in many parts of the world and the fear of large-scale population movements involving stateless persons. This prompted UNHCR and other humanitarian organisations to address the issue of statelessness in a more urgent and systematic manner, by trying to avert situations that can lead to statelessness, protecting stateless persons and trying to find adequate solutions to their problems. Ultimately, however, the problems of statelessness and disputed nationality can only be effectively addressed by states themselves.

A. Standards

The two primary international conventions on statelessness are the Convention relating to the Status of Stateless Persons (1954) and the Convention on the Reduction of Statelessness (1961). Article 1 Convention relating to the Status of Stateless Persons defines a stateless person as a person not considered a national (or citizen) under the law of any state. In addition to providing a definition to statelessness, the Convention seeks to improve the status of stateless persons and helps ensure that stateless persons enjoy fundamental rights and freedoms without discrimination. It regulates, *inter alia*, the legal rights of stateless persons, their access to work and welfare and urges states to facilitate their assimilation and naturalisation.

The Convention on the Reduction of Statelessness defines ways in which persons who would otherwise be stateless can acquire or retain nationality through an established link with a state through birth or descent. It deals with cases of statelessness resulting from, *inter alia*, a change of civil status, residence abroad, or the voluntary renunciation of nationality. It also stipulates that children should be granted the nationality of the state party in which a parent had citizenship. The Convention prohibits states parties from depriving people of their

nationalities on racial, ethnic, religious, or political grounds. The Convention does not, however, oblige states to grant nationality to stateless persons who enter their territory, unless those persons already have strong connections with the state and do not have any chance of acquiring a nationality elsewhere.

Other international instruments dealing with the right to nationality include, *inter alia*, Article 15 Universal Declaration on Human Rights, which stipulates the right to a nationality and the right not to be arbitrarily deprived of nationality and Article 5 CERD, which seeks, with respect to the right to nationality: 'To prohibit and to eliminate racial discrimination in all its forms and to guarantee the right to everyone, without distinction as to race, colour, or nationality or ethnic origin, to equality before the law.'

Other international instruments deal specifically with the right to a nationality with regard to women and children. These include the Convention on the Nationality of Married Women (1957), CEDAW (Article 9) and CRC (Articles 7 and 8). The instruments concerning women seek to ensure that they enjoy equal rights to acquire, change or retain nationality, while those covering children deal mainly with the right of children to be registered and to acquire a nationality from birth.

At the regional level, Article 20 of the American Convention on Human Rights and the European Convention on Nationality (1997) underline the need of every person to have a nationality, and seek to clarify the rights and responsibilities of states in ensuring individual access to a nationality.

B. Supervision

Similar to the situation of IDPs, there is today no specific body that deals with the problem of statelessness, or that supervises the 1954 and 1961 statelessness conventions. In order to fill this vacuum, upon the entry into force of the Convention on the Reduction of Statelessness in 1975, UNHCR was provisionally asked to assume the responsibilities foreseen in Article 11 Convention on the Reduction of Statelessness 'of a body to which a person claiming benefit of this convention may apply for the examination of his claim and for assistance in presenting it to the appropriate authority'. However, no mention was made of UNHCR's competence with regard to the Convention relating to the Status of Stateless Persons and UNHCR was not asked to assume any wider responsibilities regarding statelessness issues.

In recent years, the international community has faced an increased number of stateless persons and the security issues arising with them. This led the High Commissioner's Executive Committee and the UN General Assembly to adopt and endorse the Conclusion on the Prevention and Reduction of Statelessness and the Protection of Stateless Persons (Resolution 50/152). In addition, UNHCR was requested to 'actively promote accession' to the 1954 and 1961 Conventions

on statelessness, 'as well as to provide relevant technical and advisory services pertaining to the preparation and implementation of national legislation'.

To this end, UNHCR has taken a number of practical steps to strengthen its efforts with regard to stateless persons. It has appointed a legal expert on the problem of statelessness, and has actively assisted governments in the preparation and implementation of nationality legislation while encouraging them to accede to the 1954 and 1961 statelessness conventions. In addition, UNHCR has strengthened its working relationship with a number of organisations involved in this issue such as the OHCHR, the Council of Europe and the OSCE. UNHCR has also been able to play an important role in a number of situations where problems related to statelessness and nationality have arisen. For example, it has been involved in intensive dialogues with governments of, *i.e.*, Azerbaijan, Cambodia and the Czech and Slovak Republics with regard their nationality legislation.

CHAPTER 6

NATIONAL MINORITIES

Human rights are established to protect the rights of the individual *vis-à-vis* the state. Frequently the most vulnerable persons in need of protection belong to groups/minorities that in one way or another distinguish themselves from the rest of society, *i.e.*, by means of language, religion, ethnicity and culture. Throughout history minorities have suffered at the hands of oppressive majorities, enduring discrimination, land seizures, expulsion, forced assimilation and even genocide, and active repression by governments aiming at cultural unity has often resulted in loss of identity and culture. One of the difficult challenges governments face in an increasingly homogenised world is to strike a balance between legitimate concerns of marginalised minorities and those of the ruling majority.

Before the 19th century, protection set out for minorities was primarily concerned with religious minorities. In the Treaty of Berlin of 1878, for instance, the Balkan states joining the Concert of Europe were required to respect the freedom of religion inside their borders; those states would only be recognised under international law if religious freedom was respected for the Muslims in Bulgaria and Montenegro and for the Jews in Romania and Serbia.

In the wake of the First World War it became clear that existing arrangements provided insufficient protection for national minorities, but the Covenant establishing the League of Nations (1919) did not contain any general provision ensuring the rights of minorities. Protection was to be achieved through the adoption of treaties dealing with specific situations and endorsed by the major powers, but efforts to this end were not fruitful for various reasons.

After the Second World War, a different approach prevailed whereby the protection of individual rights and the prevention of discrimination were seen as effective methods of protection. Increasing emphasis on democracy and human rights has led to greater attention to the protection of the rights of minorities. Furthermore, national minority rights have become less of a taboo. Before, governments worried that granting rights to minorities would affect their territorial integrity, but after the end of the Cold War, the issue of the rights of minorities has became a priority area in many international fora, most notably the UN, the

CoE, and the OSCE. Increasingly, efforts are undertaken and ways are sought to protect the culture, traditions and identities of minorities, while at the same time ensuring equal treatment of all nationals and the territorial integrity of states.

In the international instruments on minorities there is no uniform definition of the term 'minority'. The former UN Sub-Commission on Prevention of Discrimination and Protection of Minorities did not succeed in formulating an acceptable definition. Mr Francesco Capotorti, Special Rapporteur of the Sub-Commission, has defined a minority as follows:

> A group numerically inferior to the rest of the population of a state, in a non-dominant position, whose members - being nationals of the State - possess ethnic, religious or linguistic characteristics differing from those of the rest of the population and show, if only implicitly, a sense of solidarity, directed towards preserving their culture, traditions, religion or language.

In 1985, Mr Jules Deschênes, member of the Sub-Commission, submitted an amended definition to it:

> A group of citizens of a State, constituting a numerical minority and in a non-dominant position in that State, endowed with ethnic, religious or linguistic characteristics which differ from those of the majority of the population, having a sense of solidarity with one another, motivated, if only implicitly, by a collective will to survive and whose aim is to achieve equality with the majority in fact and in law.

Furthermore, the Working Group on Minorities, established in 1995 under the auspices of the UN Sub-Commission, discussed whether its work should be based on a precise definition of the term 'national minority', but now seems to follow the pragmatic approach of the former OSCE High Commissioner on National Minorities, Mr Max van der Stoel, who stated the he is able 'to recognise a minority when he sees one'. In his opinion, a minority is a group who's linguistic, ethnic, or cultural traits set it apart from the majority. It is also a group, which wishes to preserve its identity. It should be noted that the lack of definition of the term remains subject to debate; for instance, while ratifying the CoE Framework Convention for the Protection of National Minorities, several states have made declarations wherein they set forth their own definitions of national minorities; other states have denounced such declarations. It is clear that in many instances a sharp distinction cannot be made between national and other minorities. These other minorities may include foreigners living in a country whose nationality they do not have, and 'modern minorities', such as migrants. This section concentrates on national minorities.

A. Standards

Under the auspices of the UN, neither the Charter nor the UDHR make any specific reference to the issue of ethnic, religious, or linguistic minorities; but in

1946, the Sub-Commission for the Prevention of Discrimination and Protection of Minorities (now Sub-Commission on the Promotion and Protection of Human Rights) provided limited scope of attention to issues relating to national minorities.

In 1948, the Convention on the Prevention and Punishment of the Crime of Genocide was adopted, extending protection to minorities or groups; furthermore the UNESCO Convention against Discrimination in Education (1960), as well as the UN International Convention on the Elimination of All Forms of Racial Discrimination (CERD)(1965), provided protective clauses extending to minorities. It was with the adoption of the ICCPR (1966) that the issue of national minorities received explicit attention. Article 27 of this Covenant states:

> In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language.

The Human Rights Committee has explained the scope of Article 27 in its General Comment 23 on the rights of minorities. A number of other rights in the ICCPR may be particularly relevant to minorities, along with the general protections that apply to all individuals, such as Articles 12 and 26. While there is not a single article of the ICESCR dealing specifically with the subject of national minorities, there are several articles of the ICESCR of particular interest to minorities, such as Articles 6 and 7, Article 12, Article 13, Article 14 and Article 15. Additionally, Article 30 of the Convention on the Rights of the Child (CRC) extends to children the provision of Article 27 ICCPR regarding the right to enjoy one's culture, practice one's religion, and use one's own language.

Among the United Nations human rights treaties, it is worth stressing the importance of CERD: The application of CERD is not limited to what is traditionally thought as 'racial discrimination'; it is much broader. In fact, 'racial discrimination' is defined as 'any distinction exclusion, restriction or preference based on race, colour, descent, or *national or ethnic origin* which has the purpose or effect of nullifying or impairing the recognition, enjoyment, or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life' (emphasis added). The CERD Committee has consistently considered discrimination against minorities in its examination of the periodic reports.

In 1960, the UNGA adopted the Declaration on the Granting of Independence to Colonial Countries and Peoples, which stipulated that 'all peoples enjoy the right of self-determination'. However, the UN has never defined the term 'peoples'. One may still ponder whether a minority should be considered a 'people' as this is a central question; an affirmative answer would imply that minorities are entitled to the rights of peoples, particularly the right of self-

determination. The Declaration also stipulated that 'disruption of national unity and territorial integrity of a country is incompatible with the purposes and principles of the Charter of the UN'. Article 2(4) of the Charter contains the relevant provision in this respect.

Until recently, little progress had been made in international fora regarding a specific, comprehensive instrument for the protection of minorities. In the UN context, a plan was already conceived in 1978 to draft a declaration on the protection of minorities. An open-ended Working Group was established that year under the aegis of the UN Commission on Human Rights but it was not until 1992 that the Working Group produced the draft Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities adopted by the UNGA in December 1992 (Resolution 47/135). In comparison to some other documents dealing with national minorities, for instance, CSCE documents (see below), the Declaration appears to provide a limited standard of protection.

It is in the context of the Organisation on Security and Co-operation in Europe (OSCE) that most progress has been made in standard setting on the protection of persons belonging to national minorities. The Final Act of Helsinki (1975) contains an explicit reference to national minorities under Principle VII:

> The Participating States on whose territory national minorities exist will respect the right of persons belonging to such minorities to equality before the law, will afford them the full opportunity for the actual enjoyment of human rights and fundamental freedoms and will, in this manner, protect their legitimate interests in this sphere.

The Document of the Copenhagen Meeting of the Conference on the Human Dimension (1990) contains a catalogue of rights of persons belonging to national minorities, setting out that: 'The Participating States recognise that the questions relating to national minorities can only be satisfactorily resolved in a democratic political framework based on the Rule of Law, with a functioning independent judiciary.' The Document sets out non-discrimination for persons belonging to national minorities and provides that states shall adopt necessary measures to ensure the rights of minorities. It stipulates that no disadvantage may arise from a person's choice to belong to a national minority and that persons have a right to 'preserve and develop their ethnic, cultural, linguistic or religious identity and to maintain and develop their culture in all its aspects, free of any attempts at assimilation against their will.' Furthermore, the Document sets out that states 'will protect the ethnic, cultural, linguistic and religious identity of national minorities on their territory and create conditions for the promotion of that identity.' The Copenhagen document stimulated discussions in other fora such as the UN and the CoE.

In the European context, the Framework Convention for the Protection of National Minorities of the Council of Europe is the most comprehensive international instrument dealing specifically with minority protection. The

Convention was adopted on 10 November 1994 by the Committee of Ministers and had, by July 2004, been ratified by 35 states. The Framework Convention is based upon the commitments concerning the protection of national minorities contained in the Copenhagen Document and other OSCE (then CSCE) documents with a view 'to transforming, to the greatest possible extent, these political commitments into legal obligations'. The word 'Framework' indicates that the principles contained in the instrument are not directly applicable in the domestic legal orders of the states parties to the Convention, but will have to be implemented through national legislation and appropriate governmental policies. The Framework Convention sets out some general principles, covering a wide range of issues: non-discrimination; promotion of effective equality; promotion of the conditions regarding the preservation and development of culture, religion, language and traditions; freedoms of assembly, association, expression, thought, conscience and religion; access to and use of media; linguistic freedoms; education; trans-frontier contacts and co-operation; participation in public, economic, cultural and social life; and prohibition of forced assimilation.

The Convention categorically states that it 'does not imply the recognition of collective rights' and that the emphasis is placed on the protection of 'persons belonging to' national minorities. However, in the Preamble to the Convention and Section 1 Article 1 reference is made both to 'persons belonging to national minorities' and to minorities as such. Like the OSCE, the Convention links the protection of national minorities to the issue of peace and security. The Preamble states clearly: 'Considering that the upheavals of European history have shown that the protection of national minorities is essential to stability, democratic security and peace in this continent.' However, this does not mean that minority issues unrelated to peace and security fall outside its scope, as is the case of the OSCE High Commissioner on National Minorities. Another instrument in the CoE framework worth mentioning in regard to minorities' protection is the European Charter for Regional or Minority Languages (1992), whose purpose is to protect languages 'that are traditionally used within a given territory of a State by nationals of that State who form a group numerically smaller than the rest of the State's population; and different from the official languages of that State' (Article 1). The main aim of the Charter is to afford protection to existing regional and minority languages, such as Breton, Catalan, Lower Saxon and Frisian. The Charter itself excludes from its scope 'dialects of the official language(s) of the State or languages of migrants' (Article 1.) The Charter does not provide for individual or community protection, and states themselves indicate what languages they consider minority languages. The Charter entered into force in March 1998, and by July 2004, it had been ratified by 17 states.

Furthermore, although the European Convention does not contain a specific provision for the protection of minority rights many articles of the ECHR can be resorted to in connection with minority issues, *i.e.*: Article 5 (the right to liberty and security of person), Article 8 (privacy and family life), Article 11 (freedom

of peaceful assembly and association), and Article 2 of the First Protocol to the ECHR (the right to education).

B. Supervision

Under the auspices of the United Nations many different bodies can be charged with supervising compliance with human rights obligations relating to the rights of national minorities. For instance:

- The procedures before the Human Rights Committee on the basis of Articles 26 and 27 of the ICCPR (see, *e.g., Ballantyne et al.* v. *Canada* and *Waldman* v. *Canada)* (see II.§1.C.1).
- The procedure before the CERD Committee (see II.§1.C.1).
- The 1503 procedure (see II.§1.C.2).
- The procedure before the UN Working Group on Minorities (see above).

Over the years, several minority cases have been brought before the supervisory mechanisms of the European Court of Human Rights, especially as regards language rights. Plans to draw up a protocol to the ECHR protecting minority rights have so far not led to concrete results.

In the OSCE framework, the question of minority rights has been the subject of the Vienna mechanism. Hungary has used the mechanism, for instance, with respect to the Hungarian minority in Romania, and by Austria with respect to the Kurdish minority in Turkey. In addition, the Moscow mechanism has been used by Russia with regard to the Russian minority in Estonia, and by The United Kingdom, acting on behalf of the EU, with regard to the former Yugoslavia.

Most important in relation to the protection of national minorities within the OSCE framework is the establishment, during the CSCE Follow-up Conference in Helsinki (1992), of the function of High Commissioner on National Minorities (see I.§6.D).

In relation to the European Charter for Regional or Minority Languages, states are obliged to report on their policy on regional and minority languages. The Committee of Ministers, assisted by a Committee of Experts (Articles 15-17), then determines whether a violation has taken place. Assistance is thus provided indirectly to minorities who wish, for instance, to support the preservation and public use of their language in schools. The support is indirect, because the Charter imposes a number of obligations on the contracting parties, which are not clearly formulated in terms of rights of (persons belonging to) national minorities.

The CoE Committee of Ministers supervises the implementation of the Framework Convention for the Protection of National Minorities, assisted by an Advisory Committee. States are required to report regularly, providing information on legislative and other measures taken to give effect to the principles

of the Convention. The conclusions and recommendations of the Committee of Ministers are to be made public upon their adoption, together with any comments the state party may have submitted in respect of the opinion delivered by the Advisory Committee. As of July 2004, 42 reports had been received and the Advisory Committee has published 28 country specific opinions. Hopefully, in time, these opinions will lead to further improvement of standards and insights into issues relating to national minorities.

Although the treatment of national minorities has improved in many countries, practices of governments vary greatly. The different approaches depend very much on the actual situation, the identity of the minority, and its position in society. Some governments maintain an approach whereby assimilation of the various population groups is emphasised; a policy that might enhance state identity and can coincide with a government policy underlining individual rights and equal treatment. Such an approach, however, entails the risk that minority identity is neglected or even suppressed. Other governments maintain an approach whereby the gradual establishment of a multicultural society is the point of departure. Such an approach may entail the risk of disintegration or of undermining societal cohesion. Nevertheless, many states have been able to find successful and durable solutions for minority questions.

CHAPTER 7

INDIGENOUS PEOPLES

Indigenous peoples have only after the Second World War become the subject of international human rights debate. There have been numerous attempts to formulate a definition of the term 'indigenous peoples', but a generally accepted definition has not emerged. Similar to the case of minorities, the diversity of indigenous peoples impedes a definition. The indigenous differ enormously in cultures, religions, and patterns of social and economic organisation, such as the Mayas in Guatemala, the Inuit in Canada, the Masai in Tanzania, and the Naga in India. Some estimated 5,000 indigenous peoples comprising around 300 million persons live in more than 70 countries from the Arctic to the Amazon.

In his Study of the Problem of Discrimination against Indigenous Populations, the rapporteur of the Sub-Commission, Mr Martinez Cobo, has formulated a definition, which features the most important characteristics:

> Indigenous communities, peoples and nations are those which, having a historical continuity with pre-invasion and pre-colonial societies that developed on their territories, consider themselves distinct from other sectors of the societies now prevailing in those territories, or parts of them. They form at present non-dominant sectors of society and are determined to preserve, develop and transmit to future generations their ancestral territories, and their ethnic identity, as basis of their continued existence as peoples, in accordance with their own cultural patterns, social institutions and legal system. (E/CN.4/Sub.2/1986/7/Add.3 (Geneva, 1987).

Looking at Mr Martinez Cobo's definition and the ILO Conventions mentioned below, a number of characteristics can be distinguished:

- Indigenous peoples have a strong affinity with the land they live on. Their environment is essential for their survival as a cultural entity; it is decisive for their social and cultural conditions;
- They are not dominant in their present national society, usually they have little if any influence on state policy;
- They generally speak their own language and have common cultural qualities;
- Their political/organisational structure is generally of a decentralised nature.

A. Standards

The first international standard on indigenous populations was ILO 107 (1957), revised and reformulated in 1989 and amended in ILO 169. In this Convention, a definition of indigenous peoples is given in Article 1(1):

a) Tribal peoples in independent countries whose social, cultural and economic conditions distinguish them from other sections of the national community, and whose status is regulated wholly or partially by their own customs or traditions or by special laws or regulations.

b) Peoples in independent countries who are regarded as indigenous on account of their descent from the populations which inhabited the country, or a geographical region to which the country belongs, at the time of conquest or colonisation or the establishment of present state boundaries and who, irrespective of their legal status, retain some or all their own social, economic, cultural and political institutions.

Article 1(2) complements Article 1(1) with the following text: 'self-identification as indigenous or tribal shall be regarded as a fundamental criterion for determining the groups to which the provisions of this Convention apply.'

Since the 1970s, the United Nations have been involved in initiatives, frequently in co-operation with the ILO and the OAS, concerning the development of specific standards for the protection of indigenous peoples. In 1982, the UN Working Group on Indigenous Populations was created as a body of the Sub-Commission for the Prevention of Discrimination and Protection of Minorities (now Sub-Commission on the Promotion and Protection of Human Rights). One of its commitments was the drafting of a Declaration on the Rights of Indigenous Populations, which was adopted by the Sub-Commission in August 1994. The draft Declaration consists of 45 articles, related to issues such as:

- The right of indigenous populations to self-determination (Article 3);
- The right not to be 'forcibly removed from their lands or territories' (Article 10);
- The right 'to practice and revitalise their cultural traditions and customs' (Article 12);
- The right 'to establish their own media in their own languages' (Article 18); and;
- The right 'to determine and develop priorities and strategies for the development or use of their lands, territories and other resources [...]' (Article 30).

The Working Group on the Draft Declaration on the Rights of Indigenous Peoples, which was established by the UN Commission on Human Rights, has been debating the draft Declaration on an article-by-article basis, with the participation of a number of organisations of indigenous peoples. The Declaration was to be

adopted by the UN General Assembly in December 2004 at the end of the decade of the rights of indigenous peoples. However, as of July 2004, there was still no consensus on a draft text; indigenous peoples and governments differ on issues related to the right to self-determination, collective rights and the exclusive right to use natural resources.

Although some instruments, such as the Draft Declaration on Indigenous Rights, ILO 169 and the Convention on the Rights of the Child (Article 30) address indigenous peoples as a separate group from minorities in general, in General Comment 23, the Human Rights Committee states that indigenous peoples are minorities for the purposes of Article 27 (see IV.§6 above). Other treaty bodies also deal with minorities; for example, the Committee on the Elimination of Racial Discrimination (CERD) has issued a General Recommendation on Indigenous Rights under the CERD (General Recommendation 23).

B. Supervision

At the UN treaty-based level, the Human Rights Committee has been called upon several times by indigenous persons to decide on possible infringements of their human rights. A number of cases have involved complaints relating to the preservation of culture of indigenous groups, language rights and access to effective remedies. Issues include dispossession by the state of the ancestral land of indigenous groups; legality of rules stipulating loss of membership in an indigenous minority following marriage to a non-indigenous person; forced use of language other than the indigenous language during official court proceedings; indigenous rights to natural resources; and state interference with traditionally indigenous lands (see, *e.g.*, *Hopu* v. *France, Lovelace* v. *Canada, Diergaardt et al.* v. *Namibia, Mahuika et al.* v. *New Zealand* and *Äärelä and Näkkäläjärui* v. *Finland*).

Three charter-based bodies have been established to deal with issues relating to indigenous peoples at the UN: a) the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous Peoples, b) the Working Group on Indigenous Populations, and c) the Permanent Forum on Indigenous Issues.

In 2001, the UN Commission on Human Rights appointed a Special Rapporteur on the Situation of the Human Rights and Fundamental Freedoms of Indigenous Peoples, Rodolfo Stavenhagen, from Mexico, in response to the growing international concern regarding the marginalization and discrimination against indigenous people worldwide (Resolution 2001/57). The Special Rapporteur has under his mandate addressed a wide range of human rights issues. He has, for instance, formulated a proposal for a definition of indigenous peoples, and addressed the role of intergovernmental and non-governmental organisations, the elimination of discrimination, and basic human rights principles, as well as

special areas of action in fields such as health, housing, education, language, culture, social and legal institutions, employment, land, political rights, religious rights and practices, and equality in the administration of justice. His conclusions, proposals and recommendations mark important progress in United Nations consideration of the human rights problems facing indigenous peoples; many are still under consideration and others have been incorporated into resolutions of the Sub-Commission.

Apart from facilitating and encouraging dialogue between governments and indigenous peoples, the Working Group on Indigenous Populations has a two-fold mandate: a) to review developments pertaining to the promotion and protection of human rights and fundamental freedoms of indigenous peoples; and b) to give attention to the evolution of international standards concerning indigenous rights.

The Permanent Forum on Indigenous Issues serves as an advisory body to the Economic and Social Council, with a mandate to discuss indigenous issues relating to economic and social development, culture, the environment, education, health and human rights. The Forum focuses on the following issues: a) to provide advice and recommendations on indigenous issues to the Council, as well as to programmes, funds and agencies of the UN through the Council; b) to raise awareness and promote the integration and co-ordination of activities relating to the indigenous issues within the UN system; and c) to prepare and disseminate information on indigenous issues.

In 1998, the EU Council for Development Co-operation issued a Resolution concerning Indigenous Peoples. In particular, the Council underlines the positive contribution of indigenous peoples in the development process, their vulnerability and the risk that development programmes may disadvantage them, their key role in conservation of natural resources and the rights of indigenous peoples to secure a livelihood. In 2002, the Council adopted conclusions on indigenous peoples, where it, *inter alia,* stressed mainstreaming of indigenous issues into EU policy and recommended the integration of concerns of indigenous peoples into political dialogue with partner countries.

At the Inter-American level, the Inter-American Commission and Court have dealt with several cases referring to indigenous rights. For example, in the *Mayagna (Sumo) Awas Tingni Community* v. *Nicaragua*, the Court decided that the state had to adopt the necessary measures to create an effective mechanism for delimitation, demarcation and titling of the property of indigenous communities, in accordance with their customary law, values, customs, and mores. The Court also decided that, until such a mechanism was created, the state had to refrain from any acts affecting the existence, value, use, or enjoyment of the property located in the geographic area where the members of the indigenous community lived and carried out their activities.

CHAPTER 8

MIGRANT WORKERS

Throughout the ages, people have been leaving their homelands in search of work elsewhere. Mobility of labour has been the foundation for economic development in many societies and has contributed to growth and prosperity in both host and source countries. Migrant workers play a vital role in the global economy, and today, one human being out of 35 is an international migrant. Unfortunately, the growing number of migrants due to the increased mobility of people from poorer areas to those better off is a cause of rising tension, particularly in the receiving countries. One problem is the perception of migrant workers as temporary guests, who will eventually go back 'home', when in reality they settle and become permanent members of society, entitled to rights as other citizens.

Traditionally, poverty and the inability to earn a decent living are major reasons behind migration from one country to another, as well as war, civil strife, insecurity and persecution arising from discrimination. But migrant workers and their families frequently find themselves in situations of vulnerability in their host countries, in part due to their living and working outside of their state of origin. They are aliens and may, because of that status alone, be targets of suspicion and hostility and, as they are frequently poor, they share the economic, social and cultural handicaps of marginalised groups in the host country. Migrant workers often face discrimination in terms of employment: exclusion from certain jobs, difficulty in access to vocational training and contracts that are inferior to those of nationals. Migrant workers are also known to have been subject to inferior working conditions, they have been denied the right to participate in trade unions and they are often assigned jobs that nationals do not want. Migrant workers are exceptionally vulnerable when they are recruited and employed illegally, often with criminal elements involved. Illegal migrants are more often than not targets of exploitation. They are at the mercy of their employers, forced to accept abhorrent conditions, in the worst cases amounting to modern day slavery or forced labour, incapable of seeking justice for fear of expulsion from the host country. Furthermore, children of migrants often need special measures to help

them adapt to a foreign language and customs, especially when it comes to education in a new language.

Many receiving countries are conflicted as regards migration; on the one hand considerations for the protection of human rights and humanitarian issues come into play, while, on the other, influences of increasing nationalism, racism and xenophobia weigh heavily. Unfortunately, the trend in policy of many receiving countries is gradually veering away from human rights protection towards the protection of borders.

A. Standards

Historically, the rights of migrant workers have fallen under general diplomatic protection, based on the international law governing the treatment of non-nationals. This system has gradually given way to specific standards and norms, articulated in international and national instruments, and today there is a large body of instruments that deal directly or indirectly with the rights of migrant workers.

In 1990, the UNGA adopted the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (CMW) (see II.§1.C.1). The main thrust of the Convention is that persons who qualify as migrant workers under its provisions are entitled to enjoy their human rights regardless of their legal status. The Convention does not create new rights for migrants, but aims at guaranteeing equality of treatment and the same working conditions for migrants and nationals, as well as guaranteeing the rights of migrants to maintain ties to their countries of origin. The Convention aims at:

- Preventing inhumane living and working conditions, physical and sexual abuse and degrading treatment (Articles 10, 11, 25, 54).
- Guaranteeing migrants' rights to freedom of thought, expression and religion (Articles 12, 13).
- Guaranteeing migrants' access to information on their rights (Articles 33, 37).
- Ensuring their right to legal equality. This implies that migrant workers are subject to correct procedures, have access to interpreting services and are not sentenced to disproportionate penalties such as expulsion (Articles 16-20, 22).
- Guaranteeing migrants' equal access to educational and social services (Articles 27-28, 30, 43-45, 54).
- Ensuring that migrants have the right to participate in trade unions (Articles 26, 40).
- Ensuring that migrants can return to their country of origin if they wish to, that they are allowed to pay occasional visits, and that they are encouraged to maintain cultural links (Articles 8, 31, 38).

- Guaranteeing migrants' political participation in the country of origin (Articles 41, 42).
- Ensuring migrants' right to transfer their earnings to their home country (Articles 32, 46-48).

Furthermore, the Convention establishes rules for recruitment of migrant workers, and for their return to their states of origin, it details the steps to be taken to combat illegal or clandestine migration and it imposes a series of obligations on parties in the interest of promoting 'sound, equitable, humane and lawful conditions' for the international migration of workers and members of their families. Although the Convention has entered into force, only a few countries (26 as of July 2004) have become party to it, most of them countries that primarily send migrants abroad. For the time being, it looks as though several migrant-receiving countries are not willing to be bound by the Convention as many find the formulation of the rights unacceptable.

The ILO has been at the forefront in seeking solutions to problems facing migrant workers and their families. The two major ILO conventions concerning migrant workers are ILO 97 Migration for Employment Convention (revised) and ILO 143 Migrant Workers Convention. These conventions contain provisions dealing with all aspects of the working life of aliens, including access to information, recruitment, medical attention, family reunification, maintenance of their own culture and expulsion. Both these conventions aim at non-discrimination and equal treatment of migrant workers and nationals.

The European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) does not contain special provisions addressing the rights of migrant workers, but applications have been based on Article 3 (prohibition of inhuman and degrading treatment) and Articles 5 and 6 (liberty and right to a fair and public hearing). Article 8 ECHR is important for migrants in cases where the right to family life is violated, it stipulates that 'everyone has the right to respect for his private and family life, his home and his correspondence' and it has led the former European Commission on Human Rights to observe that 'in certain circumstances, refusals to give certain persons access to, or allow them to take up residence in, a particular country, might result in the separation of such persons from the close members of their family which could raise serious problems under Article 8 of the Convention'. Applications alleging violations of the rights of migrant workers have also been brought under Article 12 (right to marry) and Article 14 (non-discrimination).

Article 19 European Social Charter (ESC) guarantees the rights of migrant workers and their families to protection and assistance. Another important instrument is the European Convention on the Legal Status of Migrant Workers (1977) setting out, for instance, the right to family reunion (Article 12).

Within the EU, emphasis has also been placed on the rights of migrant workers. Relevant resolutions are, for instance, the Council Resolution of 21 January 1974 concerning a Social Action Programme, and the Council Resolution

of 9 February 1976 on an Action Programme for Migrant Workers and Members of their Families. Also important is EEC Regulation 1408/71 (as amended) of the Council of 14 June 1971 on the Application of Social Security Schemes to Employed Persons and their Families Moving within the Community.

Furthermore, the importance the EU places on migration issues is reflected in the Treaty of Maastricht and the Treaty of Amsterdam. The Treaty of Maastricht offers possibilities for the development of policies relating to immigration and asylum. Title VI (Justice and Home Affairs) of the treaty incorporates, in a binding provision, the member states' obligation to co-operate in a number of areas of identified 'common interest', particularly asylum and immigration.

The Inter-American system has no legal instrument specific to migrant workers, nor do the current instruments include provisions on migrants. Migrant workers and their families are, however, entitled to the general protection guaranteed by the American Convention on Human Rights; particularly relevant is Article 22(9) which prohibits the collective expulsion of aliens. A major step in determining the content and scope of the rights of migrants workers was the Inter-American Court's Advisory Opinion 18 on the Juridical Condition and Rights of the Undocumented Migrants.

B. Supervision

At the World Summit for Social Development in 1995, states committed themselves to ensure that migrant workers benefit from the protection provided by relevant national and international instruments. They pledged to take concrete and effective measures against the exploitation of migrant workers, and to encourage all states to consider ratifying and fully implementing international instruments relating to migrant workers.

The International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (CMW) provides for the establishment of a Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families. A state party can make a declaration that it recognises the competence of the Committee to receive and consider individual communications on behalf of persons who claim that their rights under the Convention have been violated. The effectiveness of this mechanism remains to be seen as its power depends on whether states will accept the Committee's optional complaints procedure (see II.§1.C). Of the existing mechanisms that deal with violations of the rights of migrant workers, the ILO procedures are currently considered to be the most effective.

In 1997, the UN Commission on Human Rights established the Working Group of Intergovernmental Experts on the Human Rights of Migrants with a mandate to gather all relevant information on the obstacles existing to the effective and full protection of the human rights of migrants, and to elaborate recommendations to strengthen the promotion, protection and implementation

of the human rights of migrants. Furthermore, in 1999 the Commission appointed a Special Rapporteur on the Human Rights of Migrants, to examine ways and means to overcome the obstacles existing to the full and effective protection of the human rights of migrants, including obstacles and difficulties for the return of migrants who are non-documented or in an irregular situation. The Rapporteur's mandate is to receive information on violations and make recommendations and promote effective application of human rights standards and norms. The Rapporteur has expressed concern that measures aimed at stopping irregular migration frequently undermine migrants' basic rights, including the right to seek asylum and minimum guarantees against arbitrary deprivation of liberty.

Like the UN Commission on Human Rights, the OAS has created the post of a Special Rapporteur on Migrant Workers and Members of their Families. The Rapporteur meets with international and domestic organisations involved in the area of migrant workers and conducts on-site visits, in addition to participating in various international migration and migrant rights events. Furthermore, though no specific provisions relating to migrant workers are included in the Inter-American instruments, migrant workers are protected under the general provisions of the American Convention, generating the development of certain principles in the 'jurisprudence' of the Inter-American Commission and Court, for instance: a) children born of undocumented migrants have the right to the nationality of the state where they are born; b) states must ensure the protection of families and children - they have to avoid expelling children without their parents and *vice versa*; c) the collective expulsion of aliens is prohibited; and d) all aliens, legal or illegal, have a right to a fair trial and judicial protection, including access to translation, to consular representatives, and to effective judicial recourse for the determination of their rights to remain in the country (see, *e.g.* Inter-American Commission discussion on Haitian migrant workers in The Dominican Republic, Country Report 1999 and *Yean and Bosica* v. *The Dominican Republic)*. In addition, it is worth stressing that the Inter-American Court has issued Advisory Opinion No. 18 on the Juridical Condition and Rights of the Undocumented Migrants.

The Committee of Independent Experts of the ESC has dealt with issues relating to migrant workers. The Committee has noted that national reports examined did not show that contracting parties complied with the ESC in practice. The Committee has said that the equal treatment set out in the ESC was not always ensured between migrants and the rest of the population and that most countries covered by the Charter had an age limit of eighteen for family reunions, whilst the Appendix to the Charter set it at twenty-one. Finally, the Committee stressed that in some countries covered by the Charter, migrant workers do not have a right of appeal before an independent body against a deportation order.

Other European institutions relevant to the rights of migrant workers are the European Commission Against Racism and Intolerance (ECRI) and the European Committee on Migration. The European Committee on Migration aims at

developing European co-operation on migration, on the situation and social integration of populations of migrant origin and refugees. Unfortunately, to date, the supervision of this Committee has been rather weak.

Finally a leading international organisation in the field of migration is the International Organisation for Migration (IOM). The IOM is an intergovernmental agency outside the UN system with some 100 members. It seeks to advance the understanding of migration issues and to promote the orderly management of migration to the benefit of both migrants and societies. Leading NGOs promoting the rights of migrants are, for instance, Migrant Rights International, an independent monitoring body aiming to promote recognition and respect for the rights of all migrants and to advocate for ratification of the 1990 International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families.

CHAPTER 9

DISABLED PERSONS

Discrimination against persons with disabilities has a long history and persons with disabilities are regularly excluded from participation in society and denied their human rights. Discrimination against the disabled can take many forms, ranging from limited educational opportunities to more subtle forms, such as segregation and isolation because of physical and social barriers. The effects of discrimination are most clearly felt in the sphere of economic, social and cultural rights, in the fields of, for instance, housing, employment, transport, cultural life and access to public services. The obstacles the disabled face in enjoying their human rights are often the result of exclusion, restriction, or preference, and, for instance, when the disabled do not have access to reasonable accommodation on the basis of their limitations, their enjoyment or exercise of human rights may be severely restricted. In order for disabled persons to freely enjoy their fundamental human rights, numerous cultural and social barriers have to be overcome; changes in values and increased understanding at all levels of society has to be promoted, and those social and cultural norms that perpetuate myths about disability have to be put to rest.

At the national level, disability legislation and policies are often based on the assumption that the disabled are not able to exercise the same rights as non-disabled persons, thus often focusing on rehabilitation and social security. It is increasingly recognised that domestic legislation must address all aspects of the human rights of the disabled, ensuring their participation in society on an equal footing with people without disabilities, creating opportunities for people with disabilities and eliminating discrimination. Although domestic legislation has the prime role in generating social change and promoting the rights of disabled persons, international standards concerning disability can be very useful for setting common norms for disability legislation. Violations of the human rights of persons with disabilities have not been systematically addressed in the sphere of international legal bodies, but in recent years the rights of the disabled have come to be discussed in various international fora.

A. Standards

In general, international human rights instruments protect the rights of persons with disabilities through the principles of equality and non-discrimination. The UDHR refers expressly to disabled persons, stipulating in Article 25 that 'everyone has the right to security in the event of [...] disability', but its derivatives, the ICCPR and ICESCR, do not contain any explicit reference to persons with disabilities. Many provisions of the Covenants are, however, of direct relevance for ensuring equal opportunities and the full participation of persons with disabilities in society; for example, Article 6 (respecting the right to life) and Article 7 (respecting the right to freedom from torture and other cruel, inhuman or degrading treatment and punishment) under the ICCPR and Article 2 (the general non-discrimination norm) under the ICESCR. Article 23 of the Convention on the Rights of the Child (CRC) specifically discusses the rights of handicapped and disabled children.

The Committee on Economic, Social and Cultural Rights has adopted a General Comment on persons with disabilities. General Comment 5 is particularly important as it establishes that disability falls under the heading, 'other status' in Article 2 ICESCR and is therefore regarded by the Committee as a prohibited ground for discrimination. Similarly, the Committee on the Elimination of All Forms of Discrimination Against Women has adopted General Recommendation 18 on disabled women.

Several international and regional human rights instruments contain specific provisions concerning persons with disabilities.

Under the auspices of the AU, the African Charter of Human and Peoples' Rights stipulates in Article 18(4) that the disabled shall be entitled to special measures of protection and the African Charter on the Rights and Welfare of the Child discusses the rights of handicapped children in Article 13.

The European Social Charter (revised) stipulates that disabled persons have the right to independence, social integration and participation in the life of the community' (Part I No. 15) and sets out steps that states shall undertake to this end, such as promoting access to employment and education (Article 15).

Article 6 of the Protocol of San Salvador stipulates: 'States Parties undertake to adopt measures to make the right to work fully effective [...] in particular, those directed to the disabled' and Article 9 sets out the right to social security in case of disability. Moreover, provisions in human rights instruments protecting members of vulnerable groups are applicable to disabled persons.

Two international conventions dealing directly with the rights of disabled persons have been adopted. One is the Inter-American Convention on the Elimination of All Forms of Discrimination Against Persons with Disabilities (1999) (see II.§3.B), the only regional convention of its kind in the world. States parties undertake, *inter alia*, to adopt necessary measures to eliminate discrimination against persons with disabilities; to ensure access to facilities and services; to provide services to ensure optimal level of independence and

quality of life for persons with disabilities; and to implement educational campaigns to increase public awareness so that discrimination can be eliminated, promoting respect for and co-existence with persons with disabilities (Article 3). Furthermore, states parties undertake to collaborate and co-operate to eliminate discrimination (Article 4) and to promote participation of organisations of persons with disabilities in the measures and policies adopted to implement the Convention (Article 5). The other Convention is ILO 159 concerning Vocational Rehabilitation and Employment (Disabled Persons) (1983). It sets out, *inter alia,* principles of vocational rehabilitation and employment policies aimed at equal opportunity and measures for action at the national level to be taken for the development of rehabilitation and employment services for disabled persons.

Specific non-binding instruments have also been adopted at the international level addressing the rights of disabled persons. These instruments include the Declaration of the Rights of Mentally Retarded Persons (UNGA Resolution 26/2856 (XXVI), 1971); the Declaration on the Rights of Disabled Persons (UNGA Resolution 30/3447 (XXX), 1975); the World Programme of Action concerning Disabled Persons (UNGA Resolution 37/52, 1982); the Tallinn Guidelines for Action on Human Resources Development in the Field of Disability (UNGA Resolution 44/70, 1990); the Principles for the Protection of Persons with Mental Illness and the Improvement of Mental Health Care (UNGA Resolution 46/119, 1991); ILO Recommendations concerning Vocational Rehabilitation of the Disabled (1955) and concerning Vocational Rehabilitation and Employment (Disabled Persons) (1983); the Sundberg Declaration on Actions and Strategies for Education, Prevention and Integration (1981); the Salamanca Statement on Principles, Policy and Practice in Special Needs Education (1994); and the Standard Rules on the Equalisation of Opportunities for Persons with Disabilities (UNGA Resolution 48/96, 1993).

A World NGO Summit on Disability was held in Beijing in March 2000, resulting in the Beijing Declaration on the Rights of People with Disabilities in the New Century. Through this Declaration, the NGOs in the field of disability lent their moral authority to the idea of a disability-specific human rights treaty.

In 2001, in the wake of the Beijing Summit, the General Assembly established an Ad Hoc Committee to consider proposals for a convention on disability. The aim is a comprehensive and integral international convention to promote and protect the rights and dignity of persons with disabilities, based on the work done in the fields of social development, human rights and non-discrimination (UNGA Resolution 56/168, 2001). The Committee is at the first stages of work and held its second session in June 2003, assisted by the participation of several prominent global NGOs in the field of disability such as: Disabled Persons International (DPI); Inclusion International; Rehabilitation International (RI); World Blind Union (WBU); World Federation of the Deaf (WFD); World Network of Users and Survivors of Psychiatry (WNUSP); and World Federation of the Deaf-Blind (WFDB).

TOWARDS A HUMAN RIGHTS CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES

In December 2001, the Mexican government put forward Resolution 56/168 in the United Nations General Assembly. The resolution called for consideration of a Convention on the human rights of persons with disabilities and further sought the immediate formation of an Ad-Hoc Committee. This Committee would 'consider proposals for a comprehensive and integral international convention to protect and promote the rights and dignity of persons with disabilities'. Resolution 56/168 passed without any vote. The Committee held its first session at UN Headquarters in New York from 29 July to 9 August 2002. In its initial report to the General Assembly, the Committee recommended the adoption of a resolution that would invite 'regional commissions and inter-governmental organisations, as well as non governmental organisations to make available to the Ad Hoc Committee suggestions and possible elements, to be considered in proposals for a Convention'. The General Assembly subsequently passed Resolution 56/510, respecting the accreditation and participation of NGOs in the Committee, and Decision 56/474, which 'requests the Secretary-General to make, as needed and within existing resources, reasonable efforts to facilitate the participation by persons with disabilities in the meetings and deliberations of the Ad Hoc Committee [...]'

The second session of the Committee took place again in New York from 16 to 27 June 2003 and was marked by a significant increase in the participation of disability-related NGOs. Participating NGOs formed a caucus, called the International Disability Convention Caucus. The Caucus elected a 15-member steering committee, consisting of seven members from International Disability Alliance groups, five regional representatives, and one representative from each of the Centre for International Rehabilitation, the Landmine Survivors Network, and other non-disability related NGOs. The session ended with a decision to form a 40 member Working Group, comprised of 27 representatives from member states, 12 NGO representatives and one representative from a National Human Rights Institution. The Working Group met from 5-16 January 2004 for a single session to prepare a first draft of a Convention for consideration at the third session of the Committee in May 2004.

The General Assembly's decision to pursue a Disability Rights Convention has been enthusiastically welcomed by the disability-related NGO community. Indeed, while the development of contemporary international human rights law since the 1948 Universal Declaration of Human Rights has advanced the interests of a number of marginalised, equality-seeking groups, it has simultaneously neglected the rights of persons with disabilities. The draft text produced by the Working Group (which can be found at www.un.org/esa/socdev/enable/rights/ahcwgreportax1.htm) has many progressive features.

For example, despite particular objections, it adopts a comprehensive approach, rather than simply being premised on non-discrimination. Thus, it avoids the trap of concentrating on non-discrimination without giving proper attention to the substance of the rights to which the principle of non-discrimination would apply. Unfortunately, however, the Working Group did not have time to address the important issue of an international monitoring mechanism for the potential Convention. This, along with other contentious issues (for example, whether forced psychiatric confinement is a violation of the right to liberty and security of the person without discrimination based on disability) will be left for the Committee to reconcile during its two summer 2004 sessions, which will conclude in August. Given that the Committee is primarily a political body, and that NGOs will not have direct input in its meetings, it is hoped that the resulting text will be an effective way to limit abuses of the rights of persons with disabilities and not simply a hollow mechanism that serves only to perpetuate the problems it seeks to ameliorate. *Aaron A. Dhir*

B. Supervision

In 1994, the position of Special Rapporteur on Disability of the United Nations Commission for Social Development was established. The task of the Special Rapporteur is to monitor implementation of the Standard Rules on the Equalisation of Opportunities for Persons with Disabilities and to advance the status of people with disabilities throughout the world. Furthermore, under the auspices of the UN, the Division for Social Policy and Development of the United Nations Secretariat is the focal point on matters relating to disability. The Division deals, *inter alia,* with the promotion, monitoring and evaluation of the implementation of the World Programme of Action and the Standard Rules; it prepares publications, promotes national and international programmes and works closely with and supports governments and NGOs in the field of disability. The Division also publishes the UN Enable, the United Nations Persons with Disabilities website.

One of the major development goals of the United Nations is promoting the quality of life of the disadvantaged, including people with disabilities. The year 1982 was the UN International Year of Disabled Persons and towards its end the World Programme of Action concerning Disabled Persons (WPA) was adopted by the General Assembly. The WPA is a global strategy to enhance disability prevention, rehabilitation and equalisation of opportunities with the aim of full participation of persons with disabilities in social life and national development. The WPA emphasises the need to approach disability from a human rights perspective and that persons with disabilities should not be treated in isolation,

but within the context of normal community services. The WPA provided analysis of principles, concepts and definitions relating to disabilities and an overview of the world situation regarding persons with disabilities, setting out recommendations for action at the national, regional and international levels.

In order to provide a time frame for the implementation of the World Programme of Action, the General Assembly proclaimed 1983-1992 the United Nations Decade of Disabled Persons. One of the major results of the Decade was the adoption of the Standard Rules on the Equalisation of Opportunities for Persons with Disabilities. Although not legally binding, the rules summarise the message of the WPA, cover all aspects of the life of disabled persons and set out the moral and political commitment of states to take action to attain equal opportunities for the disabled; the rules serve as policy instrument and as a foundation for economic and technical co-operation.

The Inter-American Convention on the Elimination of All Forms of Discrimination Against Persons with Disabilities establishes a supervisory body, the Committee for the Elimination of All Forms of Discrimination against Persons (Article 6). The Committee is charged with reviewing reports submitted by states parties on 'measures adopted by the member states pursuant to this Convention and on any progress made by the states parties in eliminating all forms of discrimination against persons with disabilities. The reports shall indicate any circumstances or difficulties affecting the degree of fulfilment of the obligations arising from this Convention'. Unfortunately, although the Convention entered into force in 2001, to date (July 2004), the Committee has not convened.

The International Day of Disabled Persons is 3 December each year. The aim is to promote an understanding of disability issues and mobilise support for the dignity, rights and well-being of persons with disabilities. Similarly, the United Nations Economic and Social Commission for Western Asia (ESCWA) has launched the Arab Decade for People with Disabilities from 2003-2012.

CHAPTER 10

ELDERLY PERSONS

Many regions have in recent years witnessed a drastic improvement in life expectancy, resulting in an increasing number of persons surviving into the advanced stages of life. One out of every ten persons is now 60 years or older. By 2050, it is estimated that one out of five will be 60 years or older and by 2150 one out of three persons. The majority of older persons are women and striking differences exist between regions; for instance, one out of five Europeans is 60 years or older, but only one in twenty Africans.

It is only recently that the attention of the world community has been drawn to the social, economic and political issues related to this phenomenon of ageing on a massive scale. As the world's population ages and the traditional role of the family as the main support of older people weakens, the elderly are increasingly vulnerable to abuse and various forms of negative stereotyping and discrimination. They often have limited access to health care and face specific age related restrictions in many fields, such as job discrimination in hiring, promotion and dismissal. Furthermore, as many industrialised countries struggle with the task of adapting their social and economic policies to the ageing of their populations, even in affluent societies many older persons live in conditions of poverty. In developing countries with limited social security systems, the emigration of the younger members has left the elderly, traditionally cared for by members of their families, to fend for themselves. This is especially true in the case of older women who live longer than men do and more commonly face poverty and isolation.

A. Standards

In general, the rights stipulated for the elderly in international instruments stem from the principles of dignity and non-discrimination. Neither the UDHR nor its derivatives, the ICCPR and ICESCR, contain any explicit reference to older persons, but many provisions of these instruments are of direct relevance to ensuring equal opportunities and the full participation of the elderly. Although

the rights of older persons are not referred to in the Bill of Rights, the ICESCR Committee expressly addresses the economic, social and cultural rights of older persons in General Comment 6. In the General Comment, the Committee calls on states parties, *inter alia*: to pay particular attention to older women as they have often not engaged in a remunerated activity entitling them to an old-age pension; to institute measures to prevent discrimination on grounds of age in employment and occupation; to take appropriate measures to establish general regimes of compulsory old-age insurance; and to establish social services to support the whole family when there are elderly people at home and assist elderly persons living alone or elderly couples wishing to remain at home. The General Comment also sets out that, even though not specified as a prohibited ground for discrimination in the Convention, 'other status' could be interpreted as applying to age. It is beyond doubt that the principle of non-discrimination enshrined in the ICESCR, ICCPR, CERD and CEDAW prohibits discrimination on the grounds of age.

Three regional human rights instruments expressly mention older persons as a group in need of special protection. In Article 18(4), the African Charter stipulates that the aged shall have the right to measures of special protection in keeping with their physical or moral needs. The Protocol to the African Charter on the Rights of Women in Africa sets out special protection for elderly women. Under the Inter-American System, Article 17 Protocol San Salvador stipulates that everyone has the right to special protection in old age and calls upon states to progressively provide suitable facilities, food and medical care for elderly persons that lack them; to undertake work programmes to enable the elderly to take part in productive activity; and to foster establishment of social organisations aimed at improving the quality of life of the elderly. The Revised European Social Charter sets out the right to social protection for the elderly in Article 23. According to this provision states parties undertake to adopt measures: a) to enable the elderly to remain full members of society for as long as possible by providing adequate resources and information about available services; b) to enable the elderly to choose their life-style freely and live independently for as long as possible by providing adequate housing and services; and c) to guarantee support for older persons living in institutions. In addition, the Charter on Fundamental Rights of the European Union (2000) sets out the rights of the elderly 'to lead a life of dignity and independence and to participate in social and cultural life' (Article 25).

Although no convention expressly dealing with the rights of the elderly has been adopted - as in the case of women and children - a number of steps towards the improvement of the lives of older persons have been taken under the auspices of the United Nations.

In 1982, the World Assembly on Ageing, held in Austria, adopted the Vienna International Plan of Action on Ageing, the first international instrument on ageing. It was endorsed by UNGA Resolution 37/51. The Plan promotes international co-operation to strengthen the capacities of states to contend with

the ageing of populations and to address the developmental potential and dependency needs of older persons. It addresses research, training and education and makes recommendations in the following areas: a) education; b) health and nutrition; c) family; d) protection of elderly consumers; e) income security and employment; f) housing and environment; and g) social welfare. The Plan is to be implemented within the framework of other international standards and human rights instruments.

In 1991 in pursuance of the Plan of Action, the General Assembly adopted the United Nations Principles for Older Persons (UNGA Resolution 46/91) encouraging states to adopt certain principles relating to the status of the elderly, promoting independence, participation, care, self-fulfilment and dignity of elderly persons. *Independence*: includes access to adequate food, water, shelter, clothing and health care, as well as the opportunity for remunerated work and access to education and training. *Participation*: aims for older persons to actively participate in the formulation and implementation of policies that affect their well-being, to share their knowledge with younger generations. Furthermore, the elderly should have the right to form movements and associations. *Care*: entails that the elderly should benefit from family and health care and that when residing in care or treatment facilities their human rights and fundamental freedoms shall be respected. *Self-fulfilment:* entails that educational, cultural, spiritual and recreational resources should be available for older persons to be able to pursue opportunities for the full development of their potential. *Dignity:* aims for the elderly to live in dignity and security and be free of exploitation and physical or mental abuse; to be treated fairly, regardless of age, gender, racial or ethnic background, disability, financial situation or any other status; and be valued independently of their economic contribution.

In 1992, the General Assembly adopted the Proclamation on Ageing. The Proclamation, *inter alia,* urges support for older women and that they be recognised for their contributions to society; older men are encouraged to develop capacities, which they may have been prevented from developing during breadwinning years; families should be supported in providing care and all family members encouraged to co-operate in care-giving.

In 2002, the Second World Assembly on Ageing adopted a Second International Plan of Action on Ageing. This plan includes a number of central themes setting out goals, objectives and commitments. These include: a) the full realisation of all human rights and fundamental freedoms of all older persons; b) the achievement of secure ageing; c) empowerment of older persons; d) provision of opportunities for individual development; e) ensuring the full enjoyment of all human rights, and the elimination of all forms of violence and discrimination against older persons; f) gender equality among older persons; g) recognition of the importance of families; h) provision of health care, support and social protection for older persons; and k) recognition of the situation of ageing indigenous persons.

B. Supervision

The protection of elderly persons is a topic that is increasingly being addressed by different treaty bodies. Several supervisory bodies are progressively developing the application of their respective instruments to afford protection to this group and now concluding observations frequently offer recommendations on the protection of elderly persons (see, for example, the Concluding Observations of the CESCR Committee on Jamaica E/2002/22 (2001); CEDAW Committee on Iceland A/57/38 (2002) and CERD Committee on Iraq CERD/C/304/Add. 28 (1997)).

The UN Commission for Social Development is responsible for follow-up and appraisal of the implementation of the 2002 International Plan of Action on Ageing. The Commission is to integrate the different dimensions of population ageing as contained in the International Plan of Action in its work. The United Nations conferences and special sessions of the General Assembly provide the context in which the specific contributions and concerns of older persons shall be expressed.

To follow up on the International Plan of Action and the Principles for Older Persons the UNGA proclaimed 1999 the International Year of Older Persons. The theme was 'A society for all ages', containing four dimensions: individual lifelong development, multigenerational relationships, the inter-relationship between population ageing and development, and the situation of older persons. The International Year raised awareness, and fostered research and policy action worldwide, including efforts to integrate the issue of ageing into all sectors of public life.

At the regional level, there have been interesting decisions, particularly relating to the protection of the social security rights of elderly persons. At the Inter-American level, it is worth mentioning the case of *Menéndez et al.* v. *Argentina (Case No. 11.670).* In this case, a group of retired persons alleged that in order to seek an adjustment in their retirement benefits, they had to deal with a cumbersome administrative and judicial system that failed to realise their rights. The fundamental violations alleged derived from delayed judgements and inadequate enforcement of the judgements. The retirees also claimed that their rights to property had been adversely affected, and that the social security system was discriminatory as certain retired persons (members of the legislative and judicial branches, the military and former executive branch officials) were privileged. The petitioners also maintained that their right to health, well-being and life had been adversely affected as the situation had prevented them from buying food, essential services or medicine. The Commission declared admissible the petitions in reference to, *inter alia,* the right to judicial guarantees (Article 8(1)); property (Article 21); equal protection of the law (Article 24); and effective remedy (Article 25(2)(c)) of the American Convention; and of the rights to the preservation of health and well-being (Article XI); and to social security, in relation to the obligation to work and contribute to social security (Articles XVI,

XXXV and XXXVII), as enshrined in the American Declaration on the Rights and Duties of Man.

At the European level, the European Court of Justice decided in *Taylor* v. *The United Kingdom* that regulations for receipt of a winter fuel payment benefits, setting out the age of women entitled to the payment at 60 or over and for men at 65, did not comply with the European Union Council Directive on the progressive implementation of the principle of equal treatment for men and women in matters of social security.

CHAPTER 11

HIV POSITIVE PERSONS AND AIDS VICTIMS

Increasingly, human rights supervisory bodies have begun to focus on the vulnerability of people infected or affected by HIV/AIDS. HIV positive persons and AIDS victims are often subject to violations of many rights; some economic and social such as work-related rights and access to health care facilities, but also in relation to the enjoyment of civil rights, such as the right to privacy and freedom of movement. It is often difficult to separate violations of economic, social and cultural rights from violations of civil and political rights and states therefore need to adopt an integrated approach. HIV/AIDS demonstrates the indivisibility of human rights since the realisation of economic, social and cultural rights, as well as civil and political rights, is essential to an effective response to the epidemic.

The incidence of HIV/AIDS is disproportionately high in groups who already suffer from lack of protection and discrimination; such as women, children, those living in poverty, minorities, refugees and internally displaced people. In this regard, for example, the CEDAW Committee has stressed the link between women's reproductive role, their subordinate social position and their increased vulnerability to HIV infection.

A. Standards

The key human rights principles essential for effective protection of people with HIV/AIDS are to be found in existing international instruments, such as the ICESCR; ICCPR; CEDAW; CAT; CERD; and the CRC. At the regional level, the American Convention on Human Rights, the European Convention for the Protection of Human Rights and Fundamental Freedoms and the African Charter on Human and Peoples' Rights also enshrine general state obligations, which are applicable to persons affected by HIV/AIDS. There are, however, to date (July 2004), no binding international human rights standards dealing specifically with HIV/AIDS.

The UN General Assembly has emphasised the need to counter discrimination and to respect human rights of people with HIV/AIDS in several resolutions (*e.g.* Resolutions 45/1990 and 46/20 1991) and has held a Special Session on the topics (*e.g.* in 2001). The UN Commission on Human Rights has also adopted numerous resolutions on human rights and HIV/AIDS (see, *e.g.*, Resolution 1989/1). Another international instrument worth mentioning is the Paris Declaration on Women, Children and AIDS (1989).

The pandemic has been consistently addressed by UN specialised agencies, such as the Joint United Nations Programme on HIV/AIDS (UNAIDS); the United Nations Population Fund (UNFPA); the World Health Organisation (WHO); the United Nations Children Funds (UNICEF); and the International Labour Organisation (ILO). The work of these agencies has increased awareness and concern for the protection of HIV/AIDS infected people through the contribution of noteworthy reports and codes of practices such as: Action for Children affected by AIDS: programme profiles and lessons learnt (WHO/UNICEF); HIV/AIDS and Human Rights: Young People in Action (UNAIDS/UNESCO); and Code of Practice on HIV/AIDS and the world of work (ILO). In addition, a number of conventions and recommendations of the International Labour Organisation (ILO) are relevant to the problem of HIV/AIDS, such as instruments concerning discrimination in employment and occupation, termination of employment, protection of workers' privacy, and safety and health at work.

The Office of the United Nations High Commissioner for Human Rights (OHCHR) and the joint United Nations Programme on HIV/AIDS (UNAIDS) have developed guidelines to assist states in translating international human rights norms into practical observance in the context of HIV/AIDS: The International Guidelines on HIV/AIDS and Human Rights (1998) and its Revised Guideline 6: Access to prevention, treatment, care and support (2002).

B. Supervision

Since the epidemic began in the early 1980s, the international community has become increasingly concerned with the human rights protection of HIV/AIDS infected people. This is a crosscutting theme that UN treaty bodies have dealt with from their different perspectives, progressively developing the application of their respective instruments to respond to the pandemic and its consequences, setting out that states parties should include in their reports information on the effects of AIDS on the enjoyment of human rights of those infected and the measures taken to prevent discrimination against them.

The treaty bodies have dealt with HIV/AIDS in several General Comments and Recommendations. In this regard, CEDAW General Recommendations 15 on Avoidance of Discrimination against Women in National Strategies for the

Prevention and Control of Acquired Immunodeficiency Syndrome (AIDS) adopted in 1990 and 24 on Women and Health adopted in 1994 are important. In the same vein, General Comment 3 on HIV/AIDS and the rights of the child was adopted by the Committee on the Rights of the Child in 2003.

When examining state party reports, the treaty bodies commonly issue recommendations and suggestions as to how to deal with the pandemic from the human rights perspective (see, *e.g.* CESCR Concluding Observations on Egypt E/2001/22; and Republic of Congo E/2001/22; CEDAW Committee on Fiji A/57/38 and CRC Committee on Kenya CRC/C/111).

The work of the treaty bodies establishes that the principle of non-discrimination prohibits any discrimination on the ground of health status, including HIV/AIDS (see, *e.g.* HRC General Comment 18). States must not discriminate against this group and they are required to adopt special measures of protection. For instance, the Committee on Economic, Social and Cultural Rights has stated that HIV positive individuals should have some degree of priority consideration in the allocation of housing and access to health facilities (General Comment 4 and 14). In general, treaty bodies require the implementation of laws and policies to eliminate all systemic discrimination, including where the victims are persons with HIV/AIDS. States are to enact or strengthen laws that protect vulnerable groups, people living with HIV/AIDS and people with disabilities, from discrimination in both public and private sectors. States shall ensure respect of all rights of these groups, *inter alia*: the right to the highest attainable standard of health; the right to liberty and security of person; freedom of movement; the right to privacy; the right to marry and found a family; the right to work; and the right to be free from torture and cruel, inhuman and degrading treatment or punishment.

The special rapporteurs of the UN Commission on Human Rights have also supervised the enjoyment of human rights by the victims of HIV/AIDS. For instance, the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health and the Special Rapporteur on the promotion of the right to freedom of opinion and expression have dealt with this issue (see, *e.g.* E/CN.4/2003/58 and E/CN.4/2003/67).

At the regional level, there have been some interesting cases regarding this vulnerable group. At the European level, the case *D.* v. *The United Kingdom* is noteworthy. Here the European Court established that withdrawing medical treatment that the applicant, who was in an advanced stage of AIDS, was receiving in the United Kingdom, would hasten his death. The Court ruled that expelling the applicant to his home country (Saint Kitts and Nevis), where there were no facilities to treat his illness, 'would amount to inhuman treatment by the respondent State in violation of article 3'.

At the Inter-American level, the Commission of Human Rights has admitted a petition against El Salvador alleging violations of the right to life, health and full development of personality of a group of persons who are carriers of HIV

(*Miranda Cortéz et al.* v. *El Salvador (Case 12.249)*). The allegation was grounded in the state's failure to provide the applicants with the medication needed to prevent them from dying and to improve their quality of life. The petitioners also claimed that the situation constituted cruel, inhumane and degrading treatment. The Commission declared the case admissible in respect of alleged violations to the rights enshrined in Articles 24 (equal protection), 25 (judicial protection) and 26 (social rights) of the American Convention on Human Rights.

Furthermore, several interesting cases regarding the protection of HIV/AIDS victims have been decided at the domestic level, such as *Treatment Action Campaign* v. *Minister of Health* (2002) decided by the South African Constitutional Court and a decision by the Supreme Court of Chile in the case *People Living with HIV* v. *the Ministry of Health* (2001).

AIDS AND THE RIGHT TO HEALTH, THE SOUTH AFRICAN PERSPECTIVE

The South African Constitution is one of the most progressive in the world, but the HIV pandemic has changed the course of the country's history, presenting problems and dilemmas of the greatest magnitude. South Africa is in third place in Africa, following Botswana and Swaziland with the highest number of people living with AIDS. The South African Medical Association has now developed a national plan. The government has constantly refused to endorse this national plan for treatment and care, which includes access to anti-retroviral drugs, despite widespread national support for treating people living with HIV and widespread acknowledgement of the massive social, public health, and economic damage to the country as the result of untreated HIV/AIDS.

Non-governmental organisations and organisations fighting for the rights of people living with Aids are mobilising to fight for access to antiviral therapies, such as nevarpine, that can prolong life and drastically reduce the rates of transmission of HIV from mother to child. The South African government's response to the epidemic is based on 'the thesis that HIV causes AIDS'. An effective response to the epidemic demanded that all the factors contributing to the spread of the disease should be taken into account and until the questions around the disease had been answered scientifically, the government had to assume HIV was the cause of AIDS.

Speaking in Parliament in September 2001, the South African president said that while the Human Immunodeficiency Virus (HIV) could be one of the contributory factors in causing AIDS, it could not actually cause the syndrome itself. 'A virus cannot cause a syndrome. A virus can cause a disease and AIDS is not a disease it is a syndrome,' he told parliamentarians. He said that

while he could accept that HIV contributed to the collapse of the immune system, other factors like poverty and poor nutrition were also involved.

The Constitution of the Republic of South Africa guarantees the right 'to health' and the right to have access to health care services, including reproductive health care. Everyone has the right to basic health-care. The continual increase in the number of people affected by the epidemic has brought about the need for the interpretation of the right of access to health care and reproductive health, as enshrined in the South African Constitution.

As a way of putting pressure on the government, Treatment Action Campaign (TAC) activists launched a non-violent campaign of civil disobedience against the government. The Treatment Action Campaign's main objective is to campaign for greater access to treatment for all South Africans by raising public awareness and understanding about issues surrounding the availability, affordability and use of HIV treatments. TAC campaigns against the view that AIDS is a 'death sentence'. According to TAC, these civil disobedience actions were aimed at drawing attention to the fact that the government does not respect the right to life, dignity, equality and health care access of children, men and women who live with HIV/AIDS'. The Treatment Action Campaign has challenged the refusal of the South African government to provide these treatments to pregnant women living with HIV/AIDS.

This has seen the government and Treatment Action Campaign in and out of the Constitutional Court over this right. As much as the South African government realises the meaning of the right of 'access to health care', it has all but ignored the right to 'emergency treatment' and the right to life. The government's defence has been financial constraints and that it has been progressively doing something to ameliorate the situation. Courts have found this a reasonable justification limiting the right of the applicant to ongoing emergency treatment at state expense.

M.C. Vimba

CHAPTER 12

ROMA / GYPSIES / SINTI

In recent years, the human rights treaty-monitoring bodies have begun to pay attention to the rights of the Roma population. It is estimated that there are more than twelve million Roma around the world, but an exact number is difficult to assess, as the Roma are often not included in official census counts. The Roma are a distinct ethnic minority dispersed worldwide and generally form a separate social group distinguished from mainstream society where they live. This group of people suffers a wide range of human rights violations, in particular racial violence and discrimination in the enjoyment of rights, such as the right to adequate housing and right to education. This situation is particularly severe in Central and Eastern European countries where the Roma are, in general, in an extremely vulnerable position in social, economic and political terms. This vulnerability is manifested in widespread and acute poverty, unemployment, illiteracy, lack of formal education and segregation in the educational system, substandard housing, and other problems. Prejudice against the Roma is persistent and, as reported by several human rights organisations, Roma populations are frequently targeted as scapegoats for the ills of society at large, resulting in violent attacks against the Roma and their property.

A. Standards

The key human rights principles essential for effective protection of Roma/Sinti/Gypsy populations are to be found in existing international instruments, such as the International Convention on the Elimination of All Forms of Racial Discrimination (CERD), the International Covenant on Civil and Political Rights, the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the Convention on the Rights of the Child (CRC). All these instruments establish rights, which shall be enjoyed by this group without discrimination.

Of particular importance are the provisions against racial discrimination, which should be applied specifically for the protection of Roma communities. Among the different United Nations bodies involved in combating racism, there was no reference to the Roma until 1991 when the Sub-Commission on the Promotion and Protection of Human Rights expressed that 'in many countries, various obstacles exist to the full realisation by persons belonging to the Roma community of their civil, political, economic, social and cultural rights and that such obstacles constitute discrimination directed specifically against that community, rendering it particularly vulnerable' (Resolution 1991/21). A year later, the UN Human Rights Commission in Resolution 1992/65, 'Protection of Roma (gypsies)', urged the Sub-Commission's Special Rapporteur on minorities 'to afford special attention to and to provide information on the specific conditions in which the Roma communities live'.

In 2000, the vulnerability of this group was highlighted in a working paper written by Yeung Kam Yèung Sik Yuen, Sub-Commission Expert on the situation of Roma.

The Committee for the Elimination of Racial Discrimination has been particularly important regarding Roma issues, as it has taken a comprehensive approach to the protection of this group. In 2000, it adopted its General Recommendation XXVII, which focuses specifically on 'Discrimination against Roma'. This General Recommendation urges states parties to adopt measures to protect Roma communities against racial violence and to improve their living conditions. The general recommendation, which is addressed to all states parties to the International Convention on the Elimination of All Forms of Racial Discrimination (CERD), calls upon them to adopt and implement national strategies and programmes and to express determined political will and moral leadership, with a view to improving the situation of Roma and protecting them against discrimination by state bodies or persons and organisations.

At the European level, in addition to the protection afforded by the European Convention on Human Rights, this group is also protected through the Framework Convention for the Protection of National Minorities and the European Charter for Regional or Minority Languages. It is important to recall that the European Commission against Racism and Intolerance (ECRI) has adopted a General Policy Recommendation (No. 3) on 'Combating Racism and Intolerance against Roma/ Gypsies', which provides for a broad approach to the protection of this vulnerable group (see I.§6.D).

The Organisation for Security and Co-operation in Europe (OSCE) is also committed to the protection of Roma. It was the first international organisation to recognise in 1990, the 'particular problems of Roma (gypsies)' in the context of the proliferation of racial and ethnic hatred, xenophobia, and discrimination (Copenhagen Document). As a result, a Contact Point for Roma and Sinti Issues was established in 1994 within the OSCE Office for Democratic Institutions and Human Rights (ODIHR) in Warsaw. In November 2003, the Permanent Council of the OSCE adopted Decision No. 566 on 'Action Plan on Improving

the Situation of Roma and Sinti within the OSCE Area'. The aim of the action plan is to ensure that Roma and Sinti people are able to play a full and equal part in society, and to eradicate discrimination against them.

B. Supervision

It is a common practice of the UN treaty monitoring bodies to issue recommendations and suggestions as to how to protect Roma/Gypsy/Sinti in their concluding observations on states' reports. For example, the Committee on Economic, Social and Cultural Rights has required states to take positive measures to protect the Roma population. Examining the report on Italy, the Committee noted with concern that:

> [A] large number of the Roma population live in camps lacking basic sanitary facilities on the outskirts of major Italian cities. The Roma on the whole live below the poverty line and are discriminated against, especially in the workplace, if and when they find work, and in the housing sector. Life in the camps has had a major negative impact on the Roma children, many of whom abandon primary and secondary schooling in order to look after their younger siblings or to go out begging in the streets in order to help increase their family income' (Concluding Observations Italy E/2001/22 para 116).

In light of these findings, the Committee recommended that the state:

> [S]tep up its efforts to improve the situation of the Roma population, inter alia by replacing camps with low cost houses; by legalising the status of Roma immigrants; by setting up employment and educational programmes for parents; by giving support to Roma families with children at school; by providing better education for Roma children; and by strengthening and implementing anti discrimination legislation, especially in the employment and housing sectors. (para 126).

The Committee has also indicated that 'the continued discrimination against the Gypsies calls for immediate remedial policies and measures' (Concluding Observations Germany E/1999/22 para 317).

The Committee against Torture has also dealt with issues relating to Roma. For example, in *Dzemajl et al.* v. *Yugoslavia,* the Committee found that the lack of protection afforded by the police in an anti-Roma rampage, during which the whole settlement was levelled and all properties belonging to its Roma residents burnt or destroyed, amounted to a violation by the state of the prohibition of cruel, inhuman or degrading treatment or punishment.

In September 1999, pursuant to UN Commission on Human Rights Resolutions 1993/20 of 2 March 1993 and 1999/78 of 28 April 1999, the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance carried out a mission to Hungary, the Czech Republic

and Romania. His mission was prompted by reports he had received of systematic discrimination (particularly in education, employment and housing), against the Roma citizens of these countries and frequent acts of violence against them by members of extreme-right organisations and the police. The report of his mission (E/CN.4/2000/16/Add.1) highlighted the violations suffered by the Roma communities and the actions needed to be taken by the states concerned.

At the European level, the Court has dealt with the violence against Roma, for example, in *Assenov et al.* v. *Bulgaria*, where the applicant was a Bulgarian national of Roma origin who claimed that when he was 14 years of age, he was beaten by the police while in detention. The Court found that a lack of an effective investigation into the applicant's claim that he had been beaten by the police entailed a violation by the state of Article 3 of the Convention. Nonetheless, the Court still needs to provide better protection to the Roma traditional ways of life. For example, in *Chapman* v. *The United Kingdom*, a slim majority of the European Court found there had been no violation of Article 8 (respect for home, private and family life), nor of Article 1 Protocol No. 1 (the right to peaceful enjoyment of possessions) when the applicant, a gypsy by birth, was not allowed to live in a caravan on his own piece of land.

PART V

HUMAN RIGHTS IN RELATION TO OTHER TOPICS

The interrelationship between human rights and 'related fields' such as development, democracy and good governance was emphasised four years ago at the United Nations Millennium Summit, which resulted in a declaration that affirmed global commitments to the protection of the vulnerable, the alleviation of poverty, and the rectification of corrupt structures and processes – particularly in those countries in which there is a lack of 'rule of law' and good governance. The world's leaders resolved to 'spare no effort to promote democracy and strengthen the rule of law, as well as respect for all internationally recognised human rights and fundamental freedoms, including the right to development.'

This part will first analyse human rights and development with a focus on the interrelationship between human rights and concepts such as the right to development, democracy and good governance.

Secondly, the role of economic co-operation with regard to human rights is examined in the context of how states can apply economic co-operation to further human rights both domestically and internationally. The chapter also includes a short description of international institutions such as the International Monetary Fund (IMF), the World Bank (WB) and the World Trade Organisation (WTO), and their respective roles in stimulating economic co-operation and international stability.

Thirdly, the relationship between human rights and the right to a clean and healthy environment is discussed. The right to environment has been included in many human right instruments and international jurisprudence has made clear links between, *inter alia*, the rights to health and privacy and environmental protection.

The last two chapters discuss the importance of international human rights in situations of armed conflict and in the fight against terrorism where human rights law and humanitarian law complement each other and overlap. Some human rights norms are applicable in states of emergency and are non-derogable whatever the situation. This means that states have to continue to respect and apply international human rights law in armed conflict or when applying counter-terrorism measures.

CHAPTER 1

HUMAN RIGHTS AND DEVELOPMENT

When the interrelationship between human rights and development co-operation was established in the 1970's, the linkage between the two concepts was often connected with debates about the discontinuation of assistance to a country whose government grossly violated human rights and the punitive aspect of the linkage appeared to prevail in public opinion. Most donors have had experiences with the withdrawal of aid, often a much debated and not necessarily effective measure; and active promotion of human rights through, *e.g.*, assistance to the judiciary or human rights institutions can be interpreted as interference in internal affairs.

In the course of the 1980's, the relationship between human rights and development co-operation began to take on a different form. The use of development co-operation to promote human rights through, *e.g.*, additional support to democratising governments, support to human rights NGOs or decentralised co-operation, received increasing attention. Gradually, human rights became part of the dialogue between donors and recipients. One of the first instruments formally establishing the linkage and confirming the emerging human rights policy was the Lomé III Convention between the EC and its partner states in Africa, the Caribbean and the Pacific (signed in 1984). Human rights were mentioned in the Preamble of the Convention and further elaborated upon in the joint declarations attached to it. The dramatic changes in Central and Eastern Europe in 1989 influenced governments' views on the relationship between human rights and sustainable development, generating an approach where the individual was placed at the centre, becoming the main protagonist and beneficiary of development. The conviction emerged that, in the long term, respect for human rights, the rule of law, political pluralism and effective, accountable political institutions form the basis of all development and equitable distribution.

An important achievement in establishing the relationship between human rights and development were the so-called 'Millennium Development Goals' (MDGs). At the United Nations Millennium Summit in 2000, world leaders agreed upon a set of time-bound and measurable goals and targets for combating poverty, hunger, disease, illiteracy, environmental degradation and discrimination against women. These goals aim at achieving measurable progress in a number

of specific fields, which are considered essential for human development and several lead to increased enjoyment of human rights, such as primary education. The goals provide a framework for development co-operation institutions to work coherently together towards a common end. Close co-operation is imperative as a large majority of nations can only reach the MDGs with substantial support from outside. Progress toward the MDGs is being measured on a regular basis.

MILLENNIUM DEVELOPMENT GOALS T0 BE ACHIEVED BY 2015

1. Halve extreme poverty and hunger.
2. Achieve universal primary education.
3. Empower women and promote equality between women and men.
4. Reduce under-five mortality by two-thirds.
5. Reduce maternal mortality by three-quarters.
6. Reverse the spread of killer diseases, especially HIV/AIDS and malaria.
7. Ensure environmental sustainability.
8. Create a global partnership for development, with targets for aid, trade and debt relief.

The MDGs have led to increased emphasis on human rights-based approaches to development and poverty reduction. A human rights-based approach deals with the substance of the development support initiatives, but focuses on the way in which development is being approached. The human rights-based approach, in essence, requires that policies and institutions working on development and reduction of poverty base themselves on the obligations that emanate from the international human rights conventions (ICCPR, ICESCR, CERD, CEDAW, CAT and CRC). Human rights refer to rights that are inherent to the person and belong equally to all human beings and their realisation has to be carried out as a participatory, egalitarian and transparent process. Human rights instruments, such as the Universal Declaration of Human Rights, provide a coherent framework for practical action at the international and domestic levels to reduce poverty. The human rights-based approach to poverty reduction upholds the principles of universality and indivisibility, empowerment and transparency, accountability and participation.

A HUMAN RIGHTS BASED APPROACH TO DEVELOPMENT CO-OPERATION

The terms 'human centred development' and 'human rights' are prominent features in present policy documents and the strategy papers of most donor agencies. This placing of the individual at the centre of development and including human rights as one of the principal objectives of development co-operation is, however, the outcome of a crucial paradigm-shift in development thinking throughout the last decades.

The development model after Second Word War focused on growth and development at the macro-economic level. Today we observe a broadening of the term development to include a distinct micro-level perspective which also takes into account individual well-being. This individual component is closely linked to the recognition of the instrumental role of individual participation and choice for development and underlines that particular attention has to be put to disadvantaged and most marginalized groups. Furthermore, the emergence of 'good governance' in the late 80s reflects a growing awareness that development in economic terms cannot be detached from capacity building and institutional considerations in the political field.

These changing perceptions eventually paved the way for increased attention to the relationship between economic development and democratic governance as well as for an enhanced role for human rights as means and objective of development.

With regard to the inclusion of human rights in development co-operation two approaches can be noted. From a more traditional perspective, development and human rights are in principle still viewed as two distinct concepts and fields of activity. Within such an approach, human rights projects and programmes are simply 'added' to the traditional activities of development co-operation, which itself is understood as aiming primarily at economic (and social) development.

In contrast, the so-called human rights based approach to development (HRBA) takes the view that the ultimate aim of development can be defined as the fulfilment of all human rights. Such an approach is based on the conviction that human rights and development are closely interrelated and mutually reinforcing and that neither human rights nor development are prerequisites of, or just ingredients to the other.

In essence, a HRBA can be defined as a conceptual and analytical approach to development co-operation, which is based on the standards and principles of human rights and which aims to incorporate these standards and principles in all planning and implementation of development co-operation.

While 'standards' refer to the norms enshrined in the international human rights treaties (in particular the six core conventions) the term 'principles' regularly encompasses 'non-discrimination', 'participation', accountability' and 'the rule of law'. UNDP in its 2003 practice note on '*Poverty Reduction and Human Rights*' names 'universality and indivisibility', 'equality and non-discrimination', 'participation and inclusion' as well as 'accountability and the rule of law' as the principles of a HRBA to development and to poverty reduction.

A HRBA however, does not refer to a closed model which can be mechanically applied to any given situation, but it requires, as a starting point, a thorough and in depth analysis of the status of the implementation of the international

human rights obligations of a given country. With regard to the variety of civil, political, economic, social and cultural rights as well as to differing country situations this is a complex task and the expertise needed has to be drawn from both, best development as well as human rights practice. Accordingly many development agencies are still struggling with the practical implementation of a HRBA in a comprehensive way, which, in addition, also respects the local ownership of the development process.

However, it is also increasingly recognised that a HRBA can contribute in a very relevant way to development analysis and programming. Firstly, it offers a common and universally accepted framework of analysis for both donors and recipients. Secondly, (based on the notion of 'rights' instead of 'needs') a HRBA looks at the root causes of uneven development by analysing the underlying power mechanism and by focusing on discriminated and marginalised strata and groups of society. Furthermore, it introduces a corresponding relationship between 'rights bearers' and 'duty-holders' which makes it possible to identify concrete accountability for lacking development. Finally a HRBA has the potential to deepen the best development practices of empowerment and participation as it is based on the recognition of the (human) rights of the poor to be heard and to take part in the formulation and implementation of development affecting their lives.

Christian Hainzl

The United Nations Development Programme (UNDP) plays a central role within the UN in realising the human rights based approach to development. It focuses its policy, programming and capacity development support to this approach. In particular, it:

- Encourages all actors to adopt a human rights-based approach in tailoring and customising the MDG targets to the local context.
- Focuses on the capacities of duty-bearers to meet their obligations to respect, protect and fulfil rights; as well as the capacities of rights-holders to claim their rights.
- Enhances the synergy between poverty reduction and democratic governance. Programmes for local governance, access to justice, capacity of human rights institutions, grassroots initiatives for community development, and human rights education will be included among pro-poor poverty programming.
- Engages in the work of UN Treaty Bodies; particularly strives to incorporate selected and relevant recommendations that result from periodic reviews into its programme development.
- Promotes and supports participatory assessment methodologies that link rights, obstacles and strengths around which poor people can secure their livelihood.
- Build in-house capacity to undertake multi-disciplinary review and analysis that maximise meaningful participation of the poor.

The human rights-based approach is a perspective and process that can lead more directly to increased enjoyment of human rights. Development processes - traditionally technical and economically orientated - are becoming increasingly focused on enjoyment of rights and promotion of values. One of the most important aspects of this approach is the increased recognition of poverty as one of the greatest barriers to the universal enjoyment of human rights.

A. DEMOCRACY

Democracy and human rights have historically been regarded as very different phenomena occupying separate areas of the political sphere. Democracy is generally connected with terms such as competitive elections, multi-party democracy and the separation of power. Moreover, democracy aims to empower the people in order to ensure that they rule society. Human rights, on the other hand, aim to empower the individual and to guarantee the minimum necessary conditions for pursuing a distinctively human life. Human rights, moreover, apply to all 'humans' and are universal in their scope and subject to international definition and regulation. The constitutional arrangements of governments, including democracy, have until now been regarded as an internal matter of the state, comprising the essence of 'sovereignty'.

Since the fall of the Berlin Wall and the collapse of most communist regimes, the issue of democratisation has been prioritised and democracy and human rights are now seen as firmly standing together. As a consequence, in the 1990s, democracy became the theme of a number of international conferences. UN organs such as the Secretariat, the General Assembly and the UN Commission on Human Rights have commented on ways to strengthen democracy. In 2001, the General Assembly, in its Resolution 56/98 of 14 December, requested the Secretary-General 'to examine options for strengthening the support provided by the United Nations system for the efforts of the Member States to consolidate democracy, including the designation of a focal point'. In addition, five conferences on new or restored democracies have been convened in close co-operation with the UN, the latest in Ulaanbaatar, Mongolia in 2003 where the theme was 'Democracy, Good Governance and Civil Society'. The participants adopted a plan of action, affirming, *inter alia*, the need to further work towards consolidation of democracy by building societies that are just and responsible, inclusive and participatory, open and transparent, that respect all human rights and fundamental freedoms of all and ensure accountability and the rule of law.

In resolution 2001/41 on Continuing dialogue on measures to promote and consolidate democracy, the UN Commission on Human Rights called on the OHCHR to organise an expert seminar to examine the interdependence between democracy and human rights. The seminar was held in 2002 with two objectives: a) to make a conceptual contribution to the ongoing debate on democracy and its relationship with all human rights and b) to engage in a more practical dialogue on concrete ways and means of promoting and consolidating democracy. The

seminar adopted a concluding document (E/CN.4/2003/59) where, *inter alia,* the interdependence between democracy and human rights is discussed and the centrality of the rule of law, parliaments, the media and civil society to democracy and human rights is emphasised.

According to the Secretary-General 'democracy is not a model to be copied from certain states, but a goal to be attained by all peoples and assimilated by all cultures' (A/50/332). There is no single formula for how to obtain democracy or peace. Although, the specific circumstances of each society or culture determine the choice and outcome of democratic processes, it is now widely accepted that democracy is a precondition for the full realisation of all human rights, and *vice versa.* It is however, only relatively recently, that the UN Commission on Human Rights, at its fifty-fifth session in 1999, recognised the existence of a right to democracy for the first time, stating that 'democracy, development and respect for all human rights and fundamental freedoms are interdependent and mutually reinforcing, and that democracy is based on the freely expressed will of the people to determine their own political, economic, social and cultural systems and their full participation in all aspects of their lives.'

The UN Human Rights Commission has attempted to identify essential elements of the right to democracy by listing the following components of the rights of democratic governance: a) the rights to freedom of opinion and expression, of thought, conscience and religion, and of peaceful association and assembly; b) the right to freedom to seek, receive and impart information and ideas through any media; c) the rule of law, including legal protection of citizens' rights, interests and personal security, and fairness in the administration of justice and independence of the judiciary; d) the right to universal and equal suffrage, as well as free voting procedures and periodic and free elections; e) the right to political participation, including equal opportunity for all citizens to become candidates; f) transparent and accountable government institutions; g) the right of citizens to choose their governmental system through constitutional, or other democratic means; and h) the right to equal access to public service in one's own country.

The Inter-American Democratic Charter, adopted by the General Assembly of the Organisation of American States in Lima, Peru, on 11 September 2001 defines respect for human rights as an essential element of democracy as well as *inter alia*

> access to and the exercise of power in accordance with the rule of law, the holding of periodic, free, and fair elections based on secret balloting and universal suffrage as an expression of the sovereignty of the people, the pluralistic system of political parties and organisations, and the separation of powers and independence of the branches of government. (Article 3).

And:

> Transparency in government activities, probity, responsible public administration on the part of governments, respect for social rights, and freedom of expression and of the press are essential components of the exercise of democracy. The constitutional

> subordination of all state institutions to the legally constituted civilian authority and respect for the rule of law on the part of all institutions and sectors of society are equally essential to democracy. (Article 4).

From a human rights perspective, democracy appears to play two different roles. On the one hand, democracy is considered the basic guarantor of human rights, on the other we are witnessing the merging of human rights with democracy.

A democratic system of governance is not a panacea for all human rights abuses. Many serious human rights violations occur in democratic countries. Reports and jurisprudence of international human rights supervisory mechanisms prove that rights to freedom of opinion, expression, information, dissent, association and participation on an equal basis, and fair trial have been violated in virtually every country in the world. However, respect for democratic principles is an indispensable condition for protection and promotion of all categories of rights and freedoms. Democratic principles have become a cornerstone of the human rights regime indispensable for the promotion of civil and political as well as economic, cultural and social rights.

B. GOOD GOVERNANCE

Good governance is the transparent and responsible assertion of authority and use of resources by governments. Many states seek to promote good governance in their foreign policies and in relations with developing countries as well as with countries that are in a process of transition towards a market economy and democracy.

Good governance concerns the fulfilment of three elementary tasks of government: a) to guarantee the security of all persons and of society itself; b) to manage an effective framework for the public sector, the private sector and civil society; and c) to promote economic, social and other aims in accordance with the wishes of the population.

Good governance and human rights are closely related. They can mutually reinforce each other in important ways; both are concerned with the rule of law and with equity in the outcomes of government policies and they overlap in specific areas. However, they remain distinct as good governance is about providing society with a framework for the effective and equitable generation and division of wealth while human rights seek to protect the inherent dignity of each and every individual.

In recent years, good governance has evolved from a topic of growing international debate to an explicit policy aim of many international organisations. In the Enhanced Structural Adjustment Facilities of the International Monetary Fund and the International Development Assistance (IDA) lending activities of the World Bank, criteria of good governance play a major role in asserting the effectiveness of economic and social policies of governments for sustainable

development. These include, for example: a) financial transparency; b) the quality of the public sector; c) the effectiveness of public service delivery; d) the equity of taxation by the government; and e) the quality of the legal and institutional framework that protects independent activities within the private sector and civil society.

The United Nations Development Programme (UNDP) policy document Governance for Sustainable Human Development (1997) defines (good) governance as:

> The exercise of economic, political and administrative authority to manage a country's affairs at all levels. [...] Good Governance is, among other things, participatory, transparent and accountable. It is also effective and equitable. And it promotes the rule of law. Good governance ensures that political, social and economic priorities are based on broad consensus in society and that the voices of the poorest and the most vulnerable are heard in decision-making over the allocation of development resources.

This definition draws on various UN human rights instruments, notably the UDHR, which states that 'the will of the people shall be the basis of the authority of government', and reiterates that 'everyone has the right to take part in the government of his country, directly or through freely chosen representatives' and that 'everyone has the right of equal access to public service'.

The UNDP's concern for governance touches directly on legal instruments, governmental and non-governmental institutions and processes affecting human rights. Concern for human rights and good governance is reflected, for example, in public management programmes, which address such issues as accountability, transparency, participation, decentralisation, legislative capacity and judicial independence. The UNDP's governance programme, for instance, identifies three domains playing a unique role in promoting sustainable development and good governance: the state, the private sector, and civil society.

The concept of good governance has been clarified further by the work of the UN Commission on Human Rights. In its Resolution 2000/64, the Commission identified the key attributes of good governance as: a) transparency, b) responsibility; c) accountability; d) participation; and e) responsiveness (to the needs of the people).

Resolution 2000/64 expressly linked good governance to an environment conducive to the enjoyment of human rights and 'prompting growth and sustainable human development.' By linking good governance to sustainable human development, emphasising principles such as accountability, participation and the enjoyment of human rights, and rejecting prescriptive approaches to development assistance, the resolution stands as an implicit endorsement of the rights-based approach to development.

In addition to the above-mentioned resolution, there exists a considerable body of human rights standards of direct relevance and applicability to questions of good governance. The ICCPR requires its states parties 'to respect and to

ensure [...] the rights recognised' in the Covenant and 'to take the necessary steps [...] to give effect to the rights.' States parties are required, *inter alia*, to ensure that an effective remedy for violations is available; to provide for determination of claims by competent judicial, administrative or legislative authorities; and to enforce remedies when granted (Article 2).

Similarly, in ratifying the ICESCR, states have undertaken 'to take steps [...] with a view to achieving progressively the full realisation of the rights recognised [...] by all appropriate means' (Article 2).

The Declaration on the Right to Development (1986) (see V.§.1.C) further clarifies the nature of these obligations, setting forth important objectives for governance. It mandates states 'to formulate appropriate national development policies that aim at the constant improvement of the well-being of the entire population and of all individuals, on the basis of their active, free and meaningful participation in development and in the fair distribution of the benefits resulting there from.'

Moreover, states are expected to 'undertake, at the national level, all necessary measures for the realisation of the right to development' and to 'ensure, *inter alia*, equality of opportunity for all in their access to basic resources, education, health services, food, housing, employment and the fair distribution of income.' 'Effective measures' are to be undertaken to ensure that women have an active role in the development process, and 'appropriate economic and social reforms' are to be carried out with a view to eradicating all social injustices. In sum, the Declaration requires states to take steps 'to ensure the full exercise and progressive enhancement of the right to development, including the formulation, adoption and implementation of policy, legislative and other measures at the national and international levels.'

Finally, an important aspect of good governance is the civilian control over military activities and expenditures; part of good governance might be the restriction of military spending. Excessive military expenditure not only reduces funds available for other purposes, but can also contribute to increased regional tensions and violations of international law. Furthermore, the military is often used for purposes of internal repression and denial of human rights.

HUMAN RIGHTS AT THE HEART OF THE NEW PARTNERSHIP FOR AFRICA'S DEVELOPMENT

Background

The New Partnership for Africa's Development (NEPAD) was drafted by the governments of Algeria, Egypt, Nigeria, Senegal and South Africa and is based on a 'firm and shared conviction, that African leaders have a pressing duty to eradicate poverty and to place their countries, both individually and collectively, on a path of sustainable growth and development.' The NEPAD highlights peace, security and political and economic good governance as

'conditions for sustainable development' and is expected to become the cornerstone of developed nations' support for development in Africa.
Human rights are central to NEPAD. Political governance and human rights are addressed primarily through the Declaration on Democracy, Political, Economic, and Corporate Governance and the African Peer Review Mechanism (APRM), which were officially adopted by the African Union (AU) at the Durban Summit (8-10 July 2002). The Declaration seeks to codify a set of standards and practices that AU members will uphold. The reforms outlined in the Declaration on Democracy include the rule of law, freedom of opinion and expression, the right to association and peaceful assembly, and the right to vote and be elected.

Nepad is a response to the historical impoverishment of the african continent
Colonialism contributed to the subversion of traditional structures, institutions and values. It also contributed to African countries becoming subservient to the economic and political needs of the colonisers and imperial powers. It has led to a situation of sustained patronage and corruption in the post-colonial period. Africa's participation in the workings of the international economic system has mainly been as supplier of cheap, raw materials, *i.e.* Africa exported minerals and raw materials rather than exported value-added products. Internationally supported structural adjustment programmes promoted reforms that removed serious price distortions but paid inadequate attention to provision of social services.

The post-independence era has left many countries on the continent with a shortage of skilled professionals, weak states and economies that are aggravated by poor leadership; corruption; bad governance and the disempowerment of its people to embark on development initiatives.

About nepad
NEPAD is essentially a pledge by African leaders to deal with the historical impoverishment of the continent by eradicating poverty and working towards sustainable growth and development of all its countries. It is also a pledge to ensure that the African continent actively participates in the world economy. It is based on a common vision and shared conviction in this respect.

Africa continues to be marginalised in the globalisation process. The limits of credit and bilateral aid have been reached. Private aid and upper limit of public aid are below the 1970's target. This not only affects Africa's social and economic development but also constitutes a threat to global stability. NEPAD is about breaking the African continent's dependency on aid or marginal concessions. It is about consolidating and accelerating Africa's gains and calling for a new partnership between Africa and the international community to overcome the development chasm of unequal relations.

C. THE RIGHT TO DEVELOPMENT

Development and human rights are intricately linked. As such, numerous documents have explicitly acknowledged their indivisibility, including the Declaration on the Right to Development (1986), the UNDP Human Rights and Sustainable Development policy document, and the 2000 Human Development Report.

Ultimately, both development and human rights movements share the same enthusiasm and motivation to promote the freedom, well-being and dignity of individuals. On the one hand human development improves the capabilities and freedoms of individuals while on the other hand human rights provide the framework for a social arrangement that facilitates and secures capabilities and freedoms expressed by human development.

Article 1 of the Declaration on the Right to Development states that:

> The right to development is an inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realised.

Moreover, the preamble of the Declaration states that:

> Development is a comprehensive economic, social, cultural and political process, which aims at the constant improvement of the well being of the entire population and of all individuals on the basis of their active, free and meaningful participation in development and in the fair distribution of benefits resulting there from.

Article 1 of the Declaration identifies the human person as the beneficiary of the right to development. It imposes obligations on individual states to ensure equal and adequate access to essential resources and on the international community to promote fair development policies and effective international co-operation.

The right to development has been reaffirmed at the World Conference on Human Rights in Vienna in 1993 'as a universal and inalienable right and an integral part of fundamental human rights'. The UN Commission on Human Rights speaks of an important right 'for every human person and all peoples in all countries' (Resolution 1998/72) and places emphasis on the individual as bearer of the right to development. The Commission also underlines the importance of structural measures to tackle the problems developing countries have to overcome. In a resolution on the right to development, the Commission, *inter alia*, stated that

> [I]nternational co-operation is acknowledged more than ever as a necessity deriving from recognised mutual interest, and therefore that such co-operation should be strengthened in order to support efforts of developing countries to solve their social

> and economic problems and to fulfil their obligations to promote and protect all human rights (Resolution 1998/72).

To illustrate the need for such an approach, the Commission speaks of 'the unacceptable situation of absolute poverty, hunger and disease, lack of adequate shelter, illiteracy and hopelessness, being the lot of over one billion people; the gap between developed and developing countries remaining unacceptably wide; the difficulties developing countries have to face when participating in the globalisation process, risking to be marginalised and effectively excluded from its benefits.'

In a resolution on the right to development in 2003 the Commission confirmed the right to development as 'an inalienable human right and that equality of opportunity for development is a prerogative both of nations and of individuals who make up nations, and the individual as the central subject and beneficiary of development' (Resolution 2003/83). It should, however, be noted that the states themselves are primarily responsible for development. The international community can contribute to development but cannot take over that responsibility.

An open-ended Working Group on the Right to Development was established in 1998 following a recommendation by the UN Commission on Human Rights to the ECOSOC (E/CN.4/RES/1998/72). The Commission has recognised the role of the Working Group as 'the only global forum on the right to development mandated to monitor and review progress made in the promotion and implementation of the right to development [...]' (Resolution 2003/98). The Working Group is mandated to a) monitor and review progress made in the promotion and implementation of the right to development; b) review reports and other information submitted by states and international or non-governmental organisations; and c) submit reports to the UN Commission on Human Rights.

The Working Group holds annual sessions where it considers operational aspects of the right to development and discusses the reports of the independent expert on progress made in implementing the right to development.

In its consideration of the 6th report of the Independent Expert on the right to development, the Working Group discussed what the right to development entails, *inter alia*:

> The realization of the right to development is seen as the fulfilment of a set of claims by people, principally on their State but also on the society at large, including the international community, to a process that enables them to realize the rights and freedoms set forth in the International Bill of Human Rights in their totality as an integrated whole. The right to development encompasses the right of the people to the outcomes of the process, i.e. improved realization of different human rights, as well as the right to the process of realizing these outcomes itself. It is to be facilitated and ensured by the corresponding duty-bearers on whom the claims are made, and who must adopt and implement policies and interventions that conform to the human rights norms, standards and principles. In other words, both the ends and the means of such a process of development are to be treated as a right.

> Further, it has to be viewed as a composite right wherein all the rights, i.e. economic, social and cultural, as well as civil and political rights, because of their interdependence and indivisibility, are realized together. The integrity of these rights implies that if any one of them is violated, the composite right to development is also violated. The independent expert has described the realization of the right to development in terms of an improvement of a "vector" of human rights, such that there is improvement of some or at least one of those rights, without any other right being violated. Also, this right is not a finite event but a process in time, wherein some, if not all, of the desired outcomes are realized progressively, with resource constraints on their realization being gradually relaxed through, inter alia, economic growth consistent with human rights norms and principles. (E/CN.4/2004/WG.18/2).

The UN Commission on Human Rights appointed an Independent Expert on the right to development in 1998. His tasks include studying the current state of progress in the implementation of the right to development and preparing country -specific studies. The Expert views the right to development as 'a right to a particular development process, which enables all fundamental freedom and rights to be realised, and expands the basic capacities and abilities of individuals to enjoy their rights' and has suggested a step-by-step approach for the realisation of the right to development through the achievement of three fundamental rights: a) the right to food; b) the right to primary education; and c) the right to health. Furthermore, the Independent Expert has recommended that to realise the right to development, co-ordinated action between the developing countries concerned, the donor countries and international financial institutions is called for. Under a 'development compact', developing countries should agree to fulfil their human rights obligations while the international community provides the necessary resources. The 'compacts' should be strengthened with increased access to trade and markets for developing countries, debt adjustment, transfer of technology and resources, protection of migrants and respect for labour standards as well as increased influence of developing countries in the international financial system. In his 2003 Preliminary study on the impact of international economic and financial issues on the enjoyment of human rights, the Expert examines, *inter alia*, the main characteristics of the increasingly globalized world and the way they relate to the process of the right to development. He summarises some of the barriers that have to be overcome in the process of trade liberalisation in order to make the international economic environment more supportive of needs of the developing countries. In this context he studied the functioning of the World Trade Organisation (WTO) and other trade arrangements with a view to enabling trade and liberalisation policies to realise a rights-based process of development (E/CN.4/2003/WG.18/2).

The indivisibility and interdependency of development and human rights has forced many organisations to merge the two concepts in their work. The United Nations Development Programme (UNDP), for example, has stated that eliminating poverty, sustaining livelihood, promoting gender equality, protecting the environment, and capacity building will assist in mainstreaming human rights

in the development sector. The UNDP has concluded that a human rights approach to development will result in a mutually beneficial arrangement that enhances the achievement of universal human rights and development goals.

It should be noted that due to the complexity and contentious issues regarding the right to development, despite several attempts, only limited progress has been made between 1998 and 2004 in reaching consensus on a specific 'binding' instrument related to the right.

CHAPTER 2

HUMAN RIGHTS AND ECONOMIC CO-OPERATION

Economic circumstances may influence the level of enjoyment of many human rights, such as those relating to education, due process, social security and an adequate standard of living. There is, however, no simple formula to indicate this relationship, and prosperity is neither a precondition nor a guarantee for respect for human rights. The premise that poor countries cannot be expected to respect the classic freedoms until they have reached a certain level of economic development, enabling them to realise social and economic rights, must be rejected, as this implies that people in poorer countries have fewer rights than people in richer countries. Moreover, history has shown that in the long term, successful economic and social development is not sustainable in a repressive society. At the same time, poverty affects dignity and extreme poverty can be seen as an abuse of human rights.

International relations cannot be based solely on consideration of national economic interests; all human rights play a role. In the past, there was a clear reluctance from the side of governments to interfere in economic relations between private individuals and bodies in market-economies. As states are responsible for the framework in which international relations are developed they are required to intervene in situations were human rights are at stake. Some caution is called for, however, as this may entail interference in relations in which the government is not traditionally the sole actor. At the same time, the responsibility for implementing human rights is universal and concerns all state and non-state actors whose activities may affect people's lives. The primary responsibility in the field of domestic human rights enjoyment remains with the state. But institutions within the state as well as international institutions have to share some responsibility.

In the field of economic co-operation, a distinction should be made between positive and reactive measures. Positive measures are defined here as all those that contribute to the improvement of economic relations. Promotion of economic relations based on private initiatives can be especially conducive in stimulating economic diversity.

Reactive measures, which may include economic sanctions, can be defined in the context of this section as any restrictions imposed on economic relations with a particular country. Such measures may be used as an instrument of human rights policy, to exert political pressure to stop human rights violations, as a means of punishment or as a way to avoid involvement in such violations.

One important element of economic co-operation is the maintenance, at the national and sub-national level, of internationally accepted human rights standards such as labour standards. As an institution establishing a framework for international economic relations, the ILO has set guidelines which, from a human rights point of view, are important positive measures in the international social and economic field. The ILO has also, at an early stage, directly addressed companies involved in international relations, for instance, through its Declaration on Fundamental Principles and Rights at Work (1998) that addresses the basic principles and rights at work that concern all. Labour standards must be respected in all international co-operation but should, however, not be used for protectionist trade purposes. The standards to be maintained by multinational companies in their international investments will be discussed in VI.§3.

Human rights elements are increasingly being incorporated into international trade agreements. The EU agreements with third countries, including trade and co-operation agreements, contain a clause stipulating that respect for human rights is an 'essential element' of the accord. The Cotonou Agreement with 77 African, Caribbean and Pacific countries entered into force on 1 April 2003; containing the most recent version of the clause. An innovation introduced in 2003 was the establishment of a Subgroup on Governance and Human Rights under the co-operation agreement with Bangladesh, which is the first time that such a mechanism has been introduced in this context. The group provides an opportunity for in-depth exchanges on human rights issues between the EU and Bangladeshi officials (see V.§2.C).

In the context of economic co-operation, the EU Generalised System Preferences (GSP) should also be mentioned. This system has existed since 1971 and offers developing countries the possibility of concessions as regards export tariffs. With respect to trade, the granting of additional preferences or withdrawal of preferences in relation to human rights issues is factored into the System. The basis for temporary withdrawal of general preferences was extended to cover the serious infringement of all ILO core conventions in 2001. Within the system additional preferences can be granted to countries that have adequately observed ILO 87 concerning Freedom of Association and Protection of the Right to Organise, ILO 98 concerning the Right to Organise and Collective Bargaining, and ILO 138 concerning Minimum Age. Furthermore, within this system it is possible to investigate violations of the relevant ILO conventions and, eventually, to impose sanctions on the basis of the investigation.

International Institutions such as the International Monetary Fund (IMF), the World Bank (WB) and the World Trade Organisation (WTO) play a crucial role in stimulating economic co-operation and international stability and

increasingly, their functions can have a positive impact with regard to human rights. Through their complementary roles in maintaining international financial stability and efforts to improve living standards in the world's poorest countries, the IMF and World Bank can contribute directly and indirectly towards people's realisation of many of their human rights. The WTO supervises world trade. It aims to lower trade barriers and encourage multilateral trade. It monitors members' adherence to international trade agreements and negotiates and implements new agreements.

Macro-economic stability is an essential pre-condition to economic success for every country, rich or poor. It is, however, increasingly recognised, also by the IMF, that macro-economic and financial aspects cannot be considered separate from the structural, social and human aspects of development. Therefore, human rights experts have requested the IMF that human rights considerations are integrated in all aspects of its operations.

The World Bank has since the 1990's made considerable efforts to integrate strategies for poverty alleviation in its policies. In recent years, it has strengthened its emphasis on working with governments and other partners to aid developing countries by providing a range of services that include analysis, advice and resources to fund development activities promoting poverty alleviation. In this context mention should be made of the 2004 poverty report and booklet entitled 'Partnerships in Development: Progress in the Fight Against Poverty'. The report provides a comprehensive and externally focused assessment of how the World Bank works to help countries move towards the vision of poverty reduction embodied in the Millennium Development Goals (see V.§.1) and the Monterrey Consensus (which was an outcome of the International Conference on Financing for Development, Doc. A/CONF. 198 MI). The report highlights the broad range of the Bank's activities to promote growth and reduce poverty in its multiple dimensions.

At the First Ministerial Conference of the WTO in Singapore, it was decided that the ILO would be responsible for the observance of internationally recognised labour standards accepted by the members of the WTO (the issue of the 'social clause'). The connection between respect for these labour standards and the free market, however, is not without problems, as can be deduced from the following quotation from the Singapore Ministerial Declaration adopted on 13 December 1996:

> We renew our commitment to the observance of internationally recognised labour standards. The International Labour Organisation (ILO) is the competent body to set and deal with these standards, and we affirm our support for its work in promoting them. We believe that economic growth and development fostered by increased trade and further trade liberalisation contribute to the promotion of these standards. We reject the use of labour standards for protectionism purposes, and agree that the comparative advantage of countries, particularly low-wage developing countries, must in no way be put into question.

CHAPTER 3

HUMAN RIGHTS AND THE ENVIRONMENT

In recent years the relation between human rights and environmental issues has become an issue of vigorous debate. The link between the two emphasises the need for a decent physical environment for all, as a condition for living a life of dignity and worth. More concretely, a decent physical environment has to do with protection against, for instance, noise nuisance, air pollution, pollution of surface waters, and the dumping of toxic substances. Environmental degradation and human rights was first placed on the international agenda in 1972, at the UN Conference on the Human Environment. Principle 1 of the Stockholm Declaration on the Human Environment establishes a foundation for linking human rights and environmental protection, declaring that man has a 'fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being, and he bears a solemn responsibility to protect and improve the environment for present and future generations.' As a result of the 1972 Conference, the United Nations Environment Programme (UNEP) was set up.

In 1992, twenty years after the first global environment conference, the United Nations Conference on Environment and Development (UNCED), also known as the Earth Summit, took place from 3-14 June in Rio de Janeiro, Brazil. The Conference aimed to help governments 'rethink economic development and find ways to halt the destruction of irreplaceable natural resources and pollution of the planet' as, despite international efforts since the Stockholm Conference, environmental degradation had accelerated at an alarming rate.

Delegations from 178 countries, heads of state of 108 countries and representatives of more than 1,000 non-governmental organisations attended the meetings and four preparatory committees or 'prepcoms' met in the two years prior to the Conference to produce the texts of the major UNCED agreements. In Rio, three major agreements were concluded of which the Rio Declaration on Environment and Development is the most pertinent in the context of human rights and the environment. Principle 1 sets out that 'Human beings are at the centre of concerns for sustainable development. They are entitled to a

healthy and productive life in harmony with nature' and Principle 4 establishes 'In order to achieve sustainable development, environmental protection shall constitute an integral part of the development process and cannot be considered in isolation from it.'

Ten years later, the World Summit on Sustainable Development (WSSD) was held in Johannesburg (in September 2002). The WSSD plan of implementation shows clearly that respect for human rights and fundamental freedoms are essential for achieving sustainable development. The plan stresses the importance of action at the national level for successful development. Key components of the plan include good governance, the rule of law, gender equality and an overall commitment to a just and democratic society. Transparency, accountability and fair administrative and judicial institutions are considered essential for sound national policies to be carried out. The plan also emphasises how important it is to promote public participation in environmental decision-making, including measures that provide access to information regarding legislations, regulations, activities, policies and programmes. The plan states that women must be involved fully and equally at all levels of the environmental and developmental process, including those of policy formulation and decision-making.

The human right to a clean environment is controversial, *inter alia,* because it has individual as well as collective aspects. If, for instance, after a period of foreign domination it emerges that the physical environment of the dominated people has been severely damaged, it is generally considered logical to allow for a claim to protection (*i.e.* , restoration) of the environment not only by individuals, but in equal measure by the affected population as a whole. In this context, reference can be made to Article 55 of Protocol I to the 1949 Geneva Conventions. This article, which relates to the protection of the environment in time of war stipulates:

> Care shall be taken in warfare to protect the natural environment against widespread, long-term and severe damage. This protection includes a prohibition of the use of methods or means of warfare which are intended or may be expected to cause such damage to the natural environment and thereby to prejudice the health or survival of the population.

The UN Special Rapporteur on the Adverse Effects of the Illicit Movement and Dumping of Toxic Waste and the International Committee of the Red Cross have observed that the article in question is one whose significance is becoming increasingly salient with the passage of time, and that efforts should be made to establish how it can be used in a strictly legal sense.

Provisions concerning the environment are limited in international human rights instruments. The only two instruments explicitly mentioning the environment are the African Charter on Human and Peoples' Rights (Article 24) and the Protocol of San Salvador (Article 11).

The African Charter on Human and Peoples' Rights sets out in Article 24 that '[a]ll peoples shall have the right to a general satisfactory environment favourable to their development'. The Charter also sets out that 'all peoples shall freely dispose of their [...] natural resources (Article 21). Similarly ILO 169 (Indigenous and Tribal Peoples Convention) sets out in Article 7:

> [Indigenous peoples] shall have the right to decide their own priorities for the process of development as it affects their lives, beliefs, institutions and spiritual well-being and the lands they occupy or otherwise use, and to exercise control [...] over their own economic, social and cultural development [...]. Governments shall take measures [...] to protect and preserve the environment of the territories they inhabit.

The Protocol of San Salvador to the American Convention on Human Rights includes the 'right to healthy environment' in Article 11. According to this provision:

> 1. Everyone shall have the right to live in a healthy environment and to have access to basic public services.
> 2. The states parties shall promote the protection, preservation and improvement of the environment.

Although provisions regarding the environment are scant, human rights cases related to the environment are being brought to the international and regional supervisory bodies. The Human Rights Committee has dealt with some cases where the environment has played a role, for instance, a case was brought to the Committee alleging that foreseen nuclear testing would violate the applicants right to life and family (*Bordes and Temeharo* v. *France*) and in a similar vein, a case alleging violations of the right to life because the environmental impact of nuclear stockpiles situated close to housing (inadmissible because of non-exhaustion of domestic remedies, *E. H. P. et al.* v. *Canada*).

Like the ICCPR, the European Convention does not contain provisions on the environment but the European Court of Human Rights has decided some cases where the environment has come into play. For instance, in the case of *López Ostra* v. *Spain,* the Court held that Article 8 of the ECHR had been violated, because the applicant had not been indemnified by the state for damage resulting from environmental pollution. A comparable issue - damage resulting from mismanagement of an urban waste dump - was raised in *Oneryildiz* v. *Turkey.* In *Hatton et al.* v. *The United Kingdom,* the issue raised concerned a violation of the right to privacy and family resulting from noise pollution from night air-traffic. In *Guerra et al.* v. *Italy*, the state was found to have violated the right to privacy and family by not providing information on environmental pollution that would have allowed the applicants to assess health risks they were facing by living in a certain area.

In the Inter-American system, the Inter-American Commission has, when reviewing the implications of environmental degradation for human rights, noted that:

> [T]he American Convention on Human Rights is premised on the principle that rights inhere in the individual simply by virtue of being human. Respect for the inherent dignity of the person is the principle which underlies the fundamental protections of the right to life and to the preservation of physical well being. Conditions of severe environmental pollution, which may cause serious physical illness, impairment and suffering on the part of the local populace, are inconsistent with the right to be respected as a human being. (Report on the Situation of Human Rights in Ecuador, OEA/Ser.L/V.II.96, 1997).

Under the African system, the African Commission recently took a landmark decision with regard to the right to a clean environment. In a case where it was alleged that the Nigerian government had contributed to gross violations of human rights through the actions of its military forces and unsound environmental management related to exploitation of the Niger Delta, the Commission found that the Nigerian government had violated, *inter alia*, the right to a clean environment by directly contaminating water, soil and air, which harmed the health of the Ogoni people living in the area, and by failing to protect the community from the harm caused by the oil companies. The Commission emphasised that the right to a clean and safe environment is critical to the enjoyment of economic, social and cultural rights. This right, it was held, requires a state to take reasonable measures to prevent pollution and ecological degradation, to promote conservation and to secure an ecologically sustainable development and use of natural resources. The duty to respect the right to a clean environment largely entails non-interventionist conduct from the state, such as refraining from carrying out, sponsoring or tolerating any practice, policy or legal measures violating the integrity of the individual. The Commission stated that compliance with the right to a clean environment must include undertaking or at least permitting independent scientific monitoring of threatened environments, and requiring and publicising environmental and social impact studies prior to any major industrial development. This right also requires that appropriate monitoring is undertaken, information is disseminated to the communities exposed to hazardous materials, and that meaningful opportunities are guaranteed for individuals to be heard and to participate in development decisions affecting their communities. The Nigerian government, it was held, had discharged none of these obligations (see *The Social and Economic Rights Action Centre et al. v. Nigeria, Communication 155/96*).

CHAPTER 4

HUMAN RIGHTS AND ARMED CONFLICT

It is often during armed conflicts that human rights are infringed upon the most. Therefore, over the years, experts have focused much attention on formulation of instruments aimed at alleviating human suffering during war and conflict. Today, three areas of modern international law attempt to provide protection to victims of war: human rights law, refugee law and humanitarian law. While these fields are closely linked, they need to be distinguished systematically. Refugee law has been discussed in Part IV. This chapter focuses on international humanitarian law that is different from human rights law in that it concentrates on specified conflict-related acts and does not give rise to individual claims.

Humanitarian law applies in armed conflict, restricting the actions of warring parties, providing for protection and humane treatment of persons who are not or can no longer take part in the hostilities. Like international human rights law, humanitarian law protects the lives and dignity of individuals; prohibiting torture or cruel treatment, prescribing rights for persons subject to a criminal justice procedure, prohibiting discrimination and setting out provisions for the protection of women and children. In addition, humanitarian law deals with the conduct of hostilities, combatant and prisoner of war status and the protection of the Red Cross and Red Crescent emblems.

A distinction is generally made between the law designed to protect military and civilian victims of armed conflicts on the one hand, and the laws governing the way war is waged, on the other.

The international law of armed conflicts, of which international humanitarian law is a part, was formulated much earlier than international human rights law. Important phases in the development of the humanitarian law of armed conflicts were the (diplomatic) Conferences of Paris (1856), Geneva (1864), St. Petersburg (1868), Brussels (1874), The Hague (1899, 1907) and Geneva (1949 and 1977). The international law instruments adopted at these conferences form the basis of modern humanitarian law, the most relevant being the four Geneva Conventions (1949) and their additional two Protocols (1977).

The principal purpose of the four Geneva Conventions was to set out humanitarian rules to be followed in international armed conflict. The Convention

relative to the Protection of Civilian Persons in Time of War (the Fourth Geneva Convention) lists a number of actions, which the parties must refrain from in all circumstances. These include actions that are also recognised as violating the most basic human rights in international human rights instruments, such as refraining from violence endangering life, torture and physical or moral coercion, and also compliance with many due process rights. The Convention states that civilians may not be used to prevent certain areas or regions from being used for military operations nor be compelled to work for an occupying power unless certain strict conditions are met (Article 51). The Protocols to the Geneva Conventions, which were adopted by the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law applicable in Armed Conflicts (1977), are major developments in this context.

In recent years humanitarian intervention, the maintenance of peace and the protection of collective security, as well as the protection of cultural property, have received increased attention in relation to humanitarian and human rights law. The last mentioned issue has a place in the Protocol I to the Geneva Conventions in Chapter III dealing with civilian objects. Discussion of all these elements is beyond the scope of this book.

Other recent international efforts to lessen human suffering resulting from conflict is the fight against the widespread use of anti-personnel mines and small arms and the efforts to curb easy funding such as the trade in 'conflict diamonds' and the use of drug' revenues to finance conflicts.

A. Relationship between human rights and humanitarian law

The relationship between human rights law and the law of armed conflicts is easily explained in a schematic way (see the diagram below). Four different situations may apply to a country at a specific point in time. A distinct set of international standards is applicable to each of the four situations identified. The diagram shows clearly the different fields of application between the two areas of international law.

I **Normal Situation**	II **Emergency Situation**	III **International Conflict**	IV **Internal Conflict**
All human rights applicable	Terrorism Human rights in emergency applicable	Protocol I Geneva Conventions applicable Human rights in emergency applicable	Civil war Geneva Conventions (common Article 3) applicable Protocol II Human rights in emergency applicable

The level of protection by human rights law is the highest in 'normal' situations, *i.e.*, in times of peace, and may diminish during times of non-international armed conflict or international conflict.

International humanitarian law is only applicable when there is a non-international armed conflict (common Article 3 to the Geneva Conventions and Protocol II apply) and an international armed conflict (the four Geneva Conventions and Protocol I apply).

International humanitarian law is specifically designed to regulate the contact of parties to an armed conflict. Its provisions already take into account the principles of humanity, military necessity and proportionality and therefore do not allow for derogation. These norms that apply in all circumstances are spelled out in the common Article 3, included in each of the Geneva Conventions, which reads:

> In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions:
>
> 1. Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.
> To this end the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:
> a. Violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
> b. Taking of hostages;
> c. Outrages upon personal dignity, in particular humiliating and degrading treatment;
> d. The passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court, affording all the judicial guarantees which are recognised as indispensable by civilised peoples.
> 2. The wounded and sick shall be collected and cared for.
> An impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict. [...]

While human rights law provides for derogation of some rights in times of emergency, it is important to note that several human rights may not be derogated from under any circumstance (see I.§2.B).

1. INTERNATIONAL ARMED CONFLICT

Broadly speaking, international armed conflicts involve different states whereas non-international armed conflicts involve government and rebel forces within the territory of one state. This distinction is not always applicable. In the wake of the emergence of numerous new states - as a result of sometimes violent

decolonisation - the international community recognised that certain 'internal' conflicts should be treated as if they were international armed conflicts. As a result, 'wars of national liberation' were included under Protocol I of the Geneva Conventions. This means that participants in such wars are granted the status of prisoners of war if captured (see below).

Protocol I to the 1949 Geneva Conventions (1977) relates to international armed conflicts. The international law regarding these types of conflicts is less related to the human rights discussed in this handbook. Nevertheless, Article 75 of Protocol I stipulates certain rights for individuals while Article 1 refers explicitly to the Martens clause (introduced at the 1899 Hague Peace Conference). The Martens clause states that in cases which are not covered by the above-mentioned Conventions and their Protocols, civilians and combatants 'remain under the protection and authority of the principles of international law derived from established custom, from the principles of humanity and from the dictates of public conscience'. It should be noted that expressions such as 'principles of humanity' and 'public conscience' have not yet been defined in terms of human rights.

Article 75 of Protocol I regulates the rights of individuals who find themselves in the power of a party to a conflict of which they are not subjects. Article 75 could be regarded as a mini-convention on the protection of basic human rights during international armed conflicts. In fact, the article's authors carefully studied all the material provisions of the ICCPR and distilled from it the regulations they considered most important and which can be expected to be observed, even in times of war. Paragraph 1 of Article 75 contains the same prohibition of discrimination as Article 2 of the ICCPR. Paragraph 2 of Article75 reads:

> The following acts are and shall remain prohibited at any time and in any place whatsoever, whether committed by civilian or military agents:
> A. Violence to the life, health or physical or mental well-being of persons, in particular:
> - murder,
> - torture of all kinds, whether physical or mental,
> - corporal punishment,
> - mutilation;
> B. Outrages upon personal dignity, in particular humiliating and degrading treatment, enforced prostitution and any form of indecent assault;
> C. The taking of hostages;
> D. Collective punishments;
> Threats to commit any of the foregoing acts.

Paragraphs 3 and 4 of Article 75 contain due process rights, while paragraph 5 deals with the treatment of female prisoners. Paragraph 6 emphasises that the various regulations of the Article remain in force on the cessation of hostilities for people who are still being detained. Paragraph 7 contains provisions on the prosecution and trial of persons who have been accused of war crimes or of crimes against humanity.

The protection of prisoners of war and civilians

A Prisoner of War (POW) is a combatant who is imprisoned by an enemy power during an armed conflict. The first international convention to define the requirements for combatants to be eligible for treatment as prisoners of war was the Second Hague Convention (1899). The 1949 Geneva Conventions are the main conventions today that provide a framework for protective rights of POWs. The basic principle is that being a soldier is not a punishable act in itself. The laws apply from the moment a prisoner is captured until he is released or repatriated. One of the main provisions of the Convention makes it illegal to torture prisoners, and states that a prisoner can only be required to give his name, date of birth, rank and service number (if applicable).

According to Article 4 of the Third Geneva Convention Relative to the Treatment of Prisoners of War protected combatants include military, personnel, guerrilla fighters and certain civilians. To be entitled to prisoner of war status, the combatant must conduct operations according to the laws and customs of war, *e.g.* be part of a chain of command, wear a uniform and bear arms openly. Thus, *franc-tireurs*, terrorists and spies are excluded. It also does not include unarmed non-combatants who are captured in time of war; they are protected by the Fourth Geneva Convention. Non-combatant is a military term describing persons not engaged in combat, such as civilians and medical personnel.

Persons who do not have the status of wounded or sick member of armed forces (protected by the First and Second Geneva Convention) or prisoner of war (protected under the Third Geneva Convention) are considered protected persons under the Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War. Article 4 defines protected persons as the following:

> Persons protected by the Convention are those who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals.
> Nationals of a State which is not bound by the Convention are not protected by it. Nationals of a neutral State who find themselves in the territory of a belligerent State, and nationals of a co-belligerent State, shall not be regarded as protected persons while the State of which they are nationals has normal diplomatic representation in the State in whose hands they are. [...]

Article 5 of the same Convention circumscribes the rights of protected persons when they commit hostile acts:

> Where in the territory of a Party to the conflict, the latter is satisfied that an individual protected person is definitely suspected of or engaged in activities hostile to the security of the State, such individual person shall not be entitled to claim such rights and privileges under the present Convention as would, if exercised in the favour of such individual person, be prejudicial to the security of such State.

> Where in occupied territory an individual protected person is detained as a spy or saboteur, or as a person under definite suspicion of activity hostile to the security of the Occupying Power, such person shall, in those cases where absolute military security so requires, be regarded as having forfeited rights of communication under the present Convention.
> In each case, such persons shall nevertheless be treated with humanity, and in case of trial, shall not be deprived of the rights of fair and regular trial prescribed by the present Convention. They shall also be granted the full rights and privileges of a protected person under the present convention at the earliest date consistent with the security of the State of Occupying Power, as the case may be.

In addition to terms such as prisoners of war and protected persons, some countries have introduced the term 'illegal combatants' (also referred to as unlawful combatants). This term refers to persons who carry arms or engage in warlike acts in alleged violation of the law of war. Such persons are not necessarily considered lawful combatants and therefore are not necessarily accorded the rights of prisoners of war. The term 'illegal combatant' was first introduced in 1942 by the United States Supreme Court decision in the case *ex parte Quirin* (317 U.S. 1 (1942)). In this case, the Supreme Court upheld the judgement of a United States military tribunal regarding several German saboteurs in the United States. This decision states (emphasis added and footnotes omitted):

> [T]he law of war draws a distinction between the armed forces and the peaceful populations of belligerent nations and also between those who are lawful and unlawful combatants. Lawful combatants are subject to capture and detention as prisoners of war by opposing military forces. Unlawful combatants are likewise subject to capture and detention, but in addition they are subject to trial and punishment by military tribunals for acts which render their belligerency unlawful. The spy who secretly and without uniform passes the military lines of a belligerent in time of war, seeking to gather military information and communicate it to the enemy, or an enemy combatant who without uniform comes secretly through the lines for the purpose of waging war by destruction of life or property, are familiar examples of belligerents who are generally deemed not to be entitled to the status of prisoners of war, but to be offenders against the law of war subject to trial and punishment by military tribunals.

Some countries also make theoretical distinctions between lawful and unlawful combatants and the legal status thereof.

The legal status of 'illegal combatant' or 'enemy combatant' as defined by some countries since 2001, has been criticised by many states parties to the Geneva Conventions and international institutions such as the International Committee of the Red Cross (ICRC) and NGOs like Human Rights Watch. These criticisms have pointed out that terms such as 'illegal combatant' or 'enemy combatant' have been used to deny detainees basic civil rights, such as the right to a counsel, a speedy trial and the right to appeal. It has been argued that this gives governments a right to arbitrarily suspend the rule of law in an unacceptable way. Many governments and human rights organisations worry that the

introduction of the 'illegal or enemy combatant' status sets a dangerous precedent for other regimes to follow, in addition to undermining the Geneva Conventions. These concerns have recently found response and support by the United States Supreme Court. In *Hamdi et al.* v. *Rumsfeld et al.* (2004) the Supreme Court concluded that although Congress authorised the detention of combatants in the narrow circumstances alleged in this case, due process demands that citizens held in the United States as enemy combatants be given a meaningful opportunity to contest the factual basis for their detention before a neutral decision maker. The United States Supreme Court further held on the same day that detention may be challenged by detainees with this status. The petitioners, two Australians and twelve Kuwaitis, were captured abroad during hostilities, and were being held, since early 2002 - along with, according to the government's estimate, approximately 640 other non-Americans - in military custody at the Guantanamo Bay Naval Base, Cuba, which the United States occupies under a lease and treaty. The Supreme Court held that United States courts have jurisdiction to consider challenges to the legality of the detention of foreign nationals captured abroad in connection with hostilities and who, in this case, are incarcerated at the Guantanamo Bay Naval Base.

2. INTERNAL ARMED CONFLICTS

For decades the common Article 3 of the Geneva Conventions was the only written rule containing generally applicable humanitarian norms related to internal armed conflicts. Article 3 requires parties to the Conventions to respect the integrity of persons who are not directly involved in the hostilities. . As the scale and intensity of internal or civil wars increased significantly in the sixties and seventies, the 1977 Diplomatic Conference decided to extend and elaborate this article in Protocol II to the 1949 Geneva Conventions.

The Preamble of Protocol II establishes the principle that every human being must be protected in times of war. The extent to which this applies, and the people whom it protects, is described in the Protocol.

Article 1(1) Protocol II specifies the criteria for its application. Insurgents must have military forces or other organised armed troops who control part of the territory and who are capable of sustaining coherent military operations. Clearly, with these kinds of criteria, in practice, the Protocol will apply almost exclusively to civil wars in which battles and military operations take place on a large scale. Situations involving internal disturbances and tensions - such as riots and isolated actions - are expressly excluded from the Protocol.

The provisions concerning humanitarian treatment most clearly show a relationship with human rights law. They require behaviour that respects the human rights and dignity of civilians in a conflict situation. Article 4 of Protocol II requires the parties to respect the person, honour, convictions and religious practices of all persons not directly involved or no longer taking part in the

hostilities, and states that 'they shall in all circumstances be treated humanely without any adverse distinction'. The provisions protecting children are an important addition. It is notable that the minimum age for military service has been set at fifteen years of age.

Article 5 of Protocol II prescribes special protection to persons whose freedom is limited in connection with the armed conflict. Two categories of people are defined: people whose freedom of movement is restricted in some other way (for example because they live in a cut-off area) enjoying only limited protection and internees or prisoners who enjoy full protection. With respect to these detained or interned persons, Article 5 distinguishes two types of obligations: a) absolute minimum obligations in relation to the protection of the sick or wounded and the right to individual or collective help and to practice religion. As far as the provision of food and drink, hygienic facilities and working conditions are concerned, the same criteria apply as for the local population; and b) obligations that must be taken into account within the limitations of what is feasible. These relate to the personal circumstances of female detainees and prisoners, the distance to the battlefield, the right to medical treatment and protection against certain forms of medical practices or negligence. The latter obligation is an absolute minimum requirement according to the Explanatory Memorandum to the approving act.

Article 6 of Protocol II contains a number of fair trial rules that are also found in Articles 14 and 15 ICCPR. If, for example, a party that is in rebellion decides to hold trials, it must create a judicial organisation for that purpose. As long as the law cannot be carried out by a court in accordance with a reasonable procedure, no judgements may be passed or sentences carried out. Article 6 seems to allow for the creation of courts for the duration of the conflict, provided their independence is guaranteed. In other words, they must not be subject to external controls and must be impartial. Similar cases must be dealt with in the same manner. Moreover, Article 6 recommends that amnesty be granted on the largest scale possible on cessation of the hostilities.

Protocol II applies to anyone who is wounded, sick or shipwrecked and stipulates that such people must be cared for and protected. It also lays down the duty to protect medical personnel, without any distinction between military personnel and civilians. It likewise applies to medical units and means of transport and to the discharge of medical duties in a general sense. If medical units are abused, their protection ceases. This applies to both military and civilian medical units.

Finally, Article 6 of Protocol II to the 1949 Geneva Conventions stipulates that civilian populations may not be the object of attacks. Article 13 sets out the principle of distinction, specifying that attacks on groups of the population and individual citizens are prohibited in all circumstances, as are threats of violence. The enforced movement of civilian populations is also forbidden, unless their safety is at risk or urgent military interests require them to be moved.

Organisations such as the International Red Cross (ICRC) can offer their services, but they can only take action with the consent of the state on whose territory the conflict is taking place.

CHAPTER 5

HUMAN RIGHTS AND TERRORISM

'Terrorism strikes at the very heart of everything the United Nations stands for. It is a global threat to democracy, the rule of law, human rights and stability, and therefore requires a global response' (Secretary-General Kofi Annan, 17 June 2004, SG/SM/9372).

The terrorist attacks on 11 September 2001 in New York made the fight against terrorism a top political priority for the international community. On 28 September 2001, the UN Security Council adopted Resolution 1373 under Chapter VII of the UN Charter, calling upon states to implement more effective counter-terrorism measures at the national level and to increase international co-operation in the struggle against terrorism. The Resolution created the Counter-Terrorism Committee (CTC) to monitor actions on this issue and to receive reports from states on measures taken. Following Security Council Resolution 1373, a substantial number of states have since adopted or announced plans for further measures to combat terrorism. The attacks on 11 March 2004 on trains in Madrid reminded world leaders that terrorism poses a serious threat to the security and the lives and freedom of citizens world-wide. In Resolution 1530 (2004), the Security Council condemned the attacks and expressed its reinforced determination to combat all forms of terrorism, in accordance with its responsibilities under the Charter of the United Nations.

What is terrorism? It has been difficult to define terrorism precisely while avoiding the inclusion of normal criminal acts or even non-criminal acts in the definition. A clear definition of terrorism is imperative as without it situations of abuse could arise; opponents of government policies may be categorised as terrorists in the same way as, for example, some states in the 1970's labelled perceived 'dissidents' as communists. The Parliamentary Assembly of the Council of Europe considered on 23 September 1999 an act of terrorism to be 'any offence committed by individuals or groups resorting to violence or threatening to use violence against a country, its institutions, its population in general or specific individuals which, being motivated by separatist aspirations, extremist ideological conceptions, fanaticism or irrational and subjective factors, is intended to create a climate of terror among official authorities, certain individuals or groups in

society, or the general public'. The Council of the European Union adopted on 13 June 2002 in its Framework Decision on Terrorism a detailed definition of terrorism specifying a terrorist act as:

> [A]n act which may seriously damage a country or an international organisation where committed with the aim of: seriously intimidating a population, or unduly compelling a Government or international organisation to perform or abstain from performing any act, or seriously destabilising or destroying the fundamental political, constitutional, economic or social structures of a country or an international organisation.

The definition enumerates nine types of acts which are as such punishable as terrorist acts, including: a) certain attacks on life and integrity of persons, b) seizure of aircraft and ships, c) kidnapping or hostage taking, d) causing destruction of government property or infrastructure, e) manufacture of what amounts to weapons of mass destruction and c) interfering with a country's resources with the effect of endangering human life.

Several conventions have also been drafted at the UN level such as the Convention for the suppression of terrorist bombings (1997) and the Convention for the suppression of financing terrorism (1999). Two draft conventions regarding terrorism are currently being discussed within the United Nations; one, a comprehensive treaty on terrorism, and the other on the suppression of nuclear terrorism.

These conventions and others establish that states are under the obligation to take the measures needed to protect the fundamental rights of everyone within their jurisdiction against terrorist acts, especially the right to life. In itself such protection is difficult to achieve. Security of humans is difficult to define and relatively limited terrorist acts can create a widespread feeling of insecurity among a population. Preventive measures amount often to complex operations interfering with the privacy of many citizens. At the same time political leaders must be seen to take effective measures. It is therefore understandable that large scale operations were mounted in reaction to major attacks. An example of such measure was the creation of the department of Homeland Security in the United States. In the EU, as a reaction to the 11 March 2004 bombings, an EU security co-ordinator was nominated and the so-called solidarity clause whereby states promise to assist each other in fighting terrorism - including with military means - was invoked (Article 42 of the new Constitution for Europe).

Terrorists often set out to create an atmosphere of extreme uncertainty in which normal decision-making processes become difficult if not impossible and as such interfere with democracy and the rule of law. While terrorist attacks threaten democracy and human rights, measures against terrorism must comply with human rights. The Security Council has held that under Chapter VII of the UN Charter, states have the duty to protect persons under their jurisdiction from terrorism and to employ to the maximum their legal weapons to repress and

prevent terrorist activities. Terrorism, however, must be fought within the framework of the law and with respect for the principle of proportionality and non-discrimination. In the words of Secretary-General Kofi Annan: 'there is no trade-off between effective action against terrorism and the protection of human rights'. The fight against terrorism implies long-term measures with the aim to preventing the causes of terrorism, by promoting, in particular, cohesion in our societies and a multicultural and inter-religious dialogue. Counter-terrorism must be lawful, respect human rights – *i.e.,* never make use of torture - and be subject to appropriate supervision.

In 1997, the Sub-Commission on the Promotion and Protection of Human Rights recommended the appointment of a Special Rapporteur to conduct a comprehensive study on human rights and terrorism. The Special Rapporteur (Ms. Kalliopi Koufa, Greece) has submitted a series of reports to the Sub-Commission. In her final 2004 report entitled 'Specific human rights issues: New priorities, in particular terrorism and counter-terrorism', the Special Rapporteur notes that accountability for acts of terrorism, and the need to distinguish between what is terrorism and what is something else, *e.g.* military operation, other armed conflict, or fighting against colonial domination, alien occupation and racist regimes in the exercise of the right to self-determination is an issue that needs to be addressed. The report addresses, *inter alia,* state terrorism, state-sponsored terrorism, and the continuing debate over the applicability of human rights norms to non-state actors, extradition, impunity and the question of periodic review of national counter-terrorism measures and their compliance with human rights. Recently, (June 2004), the UN Commission on Human Rights appointed Mr. Robert Goldman as an Independent Expert on the protection of human rights and fundamental freedoms while countering terrorism.

Several other special procedures of the UN Commission on Human Rights have also drawn attention to the negative impact of numerous measures taken in the context of counter-terrorism efforts. The Special Rapporteur on the question of torture, Theo van Boven, for instance, devoted his entire 2002 report to the General Assembly to the issue of the prohibition of torture and cruel, inhuman or degrading treatment and punishment in the context of counter-terrorism measures (UN Doc A/57/173). This led the UN Commission on Human Rights and the General Assembly to call upon the Office of the High Commissioner for Human Rights (OHCHR) to take action on the issue of human rights and terrorism. It has been asked, *inter alia*: a) to examine the question of protection of human rights and fundamental freedoms while countering terrorism; b) to make general recommendations concerning the obligation of states to promote and protect human rights while taking actions to counter terrorism; and c) to provide assistance and advice to states, upon their request, on the protection of human rights while countering terrorism as well as to relevant UN bodies. In response to these requests, the OHCHR published in 2003 the Digest of Jurisprudence of

the UN and Regional Organisations on the Protection of Human Rights while Countering Terrorism. The digest clarifies the concept of non-derogable rights under the UN and regional human rights systems and addresses the core principles of necessity and proportionality, which are fundamental to lawful counter-terrorism measures.

Other UN bodies, special rapporteurs and working groups, as well as reputable NGOs have been gathering extensive evidence of abuses of human rights in different parts of the world that have taken place under the pretext of combating terrorism. Human rights violations include the use of torture and the incarceration of suspects without taking into account the required due process measures, including refusing access to effective remedies. In 2003, the special rapporteurs/representatives, experts and chairpersons of working groups of the special procedures of the UN Commission on Human Rights, issued a second joint statement statement where they expressed alarm at, *inter alia,* 'the growing threats against human rights and voice profound concern at the multiplication of policies, legislations and practices increasingly being adopted by many countries in the name of the fight against terrorism, which affect negatively the enjoyment of virtually all human rights - civil, cultural, economic, political and social.' They draw attention to the dangers inherent in the indiscriminate use of the term 'terrorism', reiterate the non-derogability of certain rights and deplore the fact that, under the pretext of combating terrorism, human rights defenders are threatened and vulnerable groups are targeted and discriminated against. Finally, they affirm that any counter-terrorist measures must be in accordance with international human rights law (E/CN.4/2004/4, annex 1). Similarly, the UN Security Council declared in Resolution 1456 (2003), that 'States must ensure that any measures taken to combat terrorism comply with all their obligations under international law, and should adopt such measures in accordance with international law, in particular international human rights, refugee, and humanitarian law.'

In a similar vein, under the UN human rights treaty-based system, the Human Rights Committee has expressed concerns regarding counter-terrorism measures taken by the states, and has reaffirmed in its concluding observations that states parties must ensure that the measures undertaken in order to implement Security Council Resolution 1373 (2001) conform fully with the ICCPR. Moreover, the Human Rights Committee has exchanged briefings with the Counter Terrorism Committee on their work methods and areas of concern. In addition, the CERD Committee monitors, *inter alia,* the potentially discriminatory effects of counter-terrorism legislation and the CAT Committee consistently reminds states of the non-derogable nature of torture, reiterating that no exceptional circumstances whatsoever may be invoked as a justification of torture.

All regional bodies have also exposed both the threat of terrorism as well as the potentially negative impact of anti-terrorist measures on human rights, including the Secretary General of the Council of Europe, the Chairperson of

the European Committee for the Prevention of Torture and the Inter-American Commission on Human Rights.

The Council of Europe adopted an early instrument on terrorism, the Convention on the Suppression of Terrorism (1977). The Council was the first regional organisation to adopt a specific international text on human rights and terrorism in July 2002. The 'Guidelines on human rights and the fight against terrorism' reaffirm the obligation of states to protect everyone against terrorism, lawfully and without arbitrariness and reiterate the absolute prohibition of torture. They also set out a framework concerning the collection and processing of personal data and measures that interfere with privacy, arrest, police custody and pre-trial detention, legal proceedings, extradition and compensation of victims. The document strikes a balance between the obligation of states to protect their citizens on the one hand and the obligation to comply with human rights in counter-terrorism activities on the other. The text also makes direct reference to the extensive case-law of the European Court on issues such as due process and compensation. Other instruments also intended to combat terrorism, include the Convention on Cybercrime (2001), the Convention on Money-laundering (1990), the European Convention on Extradition (1957) and the European Convention on Mutual Assistance in Criminal Matters (1959).

Under the auspices of the OAS, the Inter-American Commission has adopted recommendations on terrorism and human rights. On 12 December 2001, the Inter-American Commission on Human Rights adopted a resolution in which it discussed the use of military tribunals. The Commission acknowledged, *inter alia,* that

> According to the doctrine of the IACHR, military courts may not try civilians, except when no civilian courts exist or where trial by such courts is materially impossible. Even under such circumstances, the IACHR has pointed out that the trial must respect the minimum guarantees established under international law, which include non-discrimination between citizens and others who find themselves under the jurisdiction of a State, an impartial judge, the right to be assisted by freely-chosen counsel, and access by defendants to evidence brought against them together with the opportunity to contest it.

The OAS Inter-American Committee Against Terrorism (CICTE) held its third regular session in January 2003 where it adopted the Declaration of San Salvador on Strengthening Co-operation in the Fight Against Terrorism (OEA/ Ser.L/X.2.3, CICTE/DEC.1/03 rev.2), in which it expressed concern about the links between terrorist groups and groups involved in transnational organised crime. The Declaration states that counter-terrorism measures must be carried out with full respect for the personality, sovereignty and independence of member states, the rule of law, human rights and fundamental freedoms, in compliance with international human rights law, the international law of refugees, and international humanitarian law.

In addition, on 3 June 2002 an Inter-American Convention Against Terrorism was adopted. According to Article 15 (paragraph 2)

> Nothing in this Convention shall be interpreted as affecting other rights and obligations of states and individuals under international law, in particular the Charter of the United Nations, the Charter of the Organization of American States, international humanitarian law, international human rights law, and international refugee law.

On this point, the OSCE has appointed an Anti-Terrorism Co-ordinator with the main goal to ensure that anti-terrorism measures taken by participating states fully comply with OSCE commitments and international human rights law. In September 2003, the OSCE held a seminar on human rights and terrorism where attempts were made to tackle dilemmas with regard to, *inter alia,* the definition of terrorism and criminal- and immigration laws conflicting with the human rights of suspected terrorists.

In March 2004, the EU appointed Mr. Gijs De Vries as Anti-Terrorism Coordinator. Foreign policy and security chief Javier Solana has outlined three main fields of action for the Co-ordinator: to present proposals aimed at better organising and streamlining the work of the EU secretariat in the fight against terrorism, to prepare proposals for better co-ordination among specialist EU councils, and to maintain regular contacts with member states to ensure the best co-ordination between the EU and national action on terrorism.

In the African context, the Convention on the Prevention and Combating of Terrorism entered into force in 2002. An Additional Protocol to this Convention establishing a mechanism for combating terrorism has been drafted.

PART VI

HUMAN RIGHTS ACTORS

Traditional international law did not confer rights on individuals. Individual human beings did not have international legal rights as such; they were objects rather than subjects of international law and could not generally claim to be the direct beneficiaries of rights, nor take legal action to enforce such claims. Some exceptions to this rule were found in 'early human rights treaties' regarding, *inter alia,* religious rights, minority rights, the prohibition of slavery and the protection of property rights, but the domain of international law was, to a large extent, that of states. After the Second World War, the adoption of the Universal Declaration of Human Rights began a different era, where rights and duties under international law were gradually conferred upon the individual.

Today it is clear that individuals have legal rights and are subject to international law. In 1950, the European Convention for the Protection on Human Rights and Fundamental Freedoms (ECHR) introduced, for the first time, the possibility for an individual to bring complaints of violations to an international body and gradually the role of individuals and NGOs increased. Although states remain of major importance in the human rights field, they are no longer the sole actors. The annual sessions of the UN Commission on Human Rights, for instance, demonstrate the multiplicity of relevant actors where among others 53 member states of the Commission, more than one hundred non-member states, the ICRC and numerous NGOs, experts, human rights defenders, and members of indigenous peoples take part in the human rights debate.

This part will examine the role that certain actors play in the promotion and protection of human rights in order to draw attention to the ways in which the protection of human rights can be enhanced.

Non-state actors can also violate human rights. It remains the responsibility of the state to address such violations, but it is at the same time important to analyse and address these violations in international fora. In the following chapters the focus will be on the protection and promotion of human rights, although abuse of power leading to violations of human rights will also be touched upon.

The first chapter examines the role of states as protectors and enforcers of human rights. States are the primary institutions called upon to promote human

rights; it is also generally states that are responsible for violations of human rights. States have an obligation to promote respect for human rights; this section will examine the various ways in which states can act internationally to this end.

The second chapter analyses the work of the European Union and its member states as an example of how states can act jointly to protect and promote human rights. Special focus on the European Union is justified by the fact that it is to date the only partly intergovernmental, partly supranational organisation, for which compliance with human rights is one of the most important foundations; based on the principles of democracy, freedom, the rule of law and respect for human rights.

The third chapter analyses the role of non-state actors. First, Non-Governmental Organisations (NGOs) are discussed; during the last few decades, many NGOs have contributed significantly to the strengthening of the protection of human rights under the existing supervisory mechanisms. NGOs can play and have played an active role in increasing the efficacy of international human rights standards. Secondly, the role of individual human rights defenders is examined. Together with the NGOs, human rights defenders can contribute to the promotion and protection of rights despite all the adverse circumstances they endure. By exposing human rights violations and seeking redress for them, human rights defenders have contributed significantly to the strengthening of human rights standards. Finally, the role of multinational companies is examined.

CHAPTER 1

THE ROLE OF STATES

The promotion and protection of human rights by individual states has an internal as well as an external dimension. This chapter discusses the domestic and the international actions states can carry out to enhance human rights protection. Internationally, states can, having subscribed to the Universal Declaration, raise their voices whenever human rights are violated anywhere in the world. States are actively involved in the development of human rights standards, institutions and supervisory mechanisms. They are the first to bring violations to the attention of international fora and, furthermore, have the capacity to stimulate positive developments with regard to compliance with human rights standards.

At the national level, it is imperative that states comply with international standards. These standards, however, often provide only the minimum safeguards and it is thus preferable that states provide a higher level of protection, *i.e.* by making available resources for a higher enjoyment of certain socio-economic rights. It is emphasised that effective domestic protection and the success of international standards ultimately lie in the power of states. The human rights supervisory mechanisms, particularly the European Court, have consistently emphasised this point in establishing that their supervision should be subsidiary to that of the national courts and domestic systems for the protection of human rights.

A. Domestic human rights protection

Effective protection of human rights depends on the compliance of each state with its human rights obligations. Establishing a constitutional model in which all human rights are effectively protected is not an easy task. It requires elaborate legislation, effective control over state institutions such as the law enforcement agencies and continuous efforts on the part of numerous other state organs. The struggle of many countries in Eastern Europe and Africa, which changed from absolutist rule to democracy, to comply with the requirements of democracy and human rights – especially regarding questions of multiparty democracy and

effective remedies before national courts – demonstrates the enormous efforts and time that may be needed to ensure effective domestic compliance.

The 1990 Copenhagen document of the CSCE (not to be confused with the so-called EU Copenhagen criteria of 1993) spells out in detail what internal compliance may require, *inter alia*:

- Free elections that will be held at reasonable intervals by secret ballot or by equivalent free voting procedure, under conditions which ensure in practice the free expression of the opinion of the electors in the choice of their representatives;
- A form of government that is representative in character, in which the executive is accountable to the elected legislature or the electorate;
- The duty of the government and public authorities to comply with the constitution and to act in a manner consistent with law;
- A clear separation between the state and political parties; in particular, political parties will not be merged with the state;
- The activity of the government and the administration as well as that of the judiciary will be exercised in accordance with the system established by law. Respect for that system must be ensured;
- Military forces and the police will be under the control of, and accountable to, the civil authorities;
- Human rights and fundamental freedoms will be guaranteed by law and in accordance with their obligations under international law;
- Legislation, adopted at the end of a public procedure, and regulations will be published, that being the condition for their applicability. These texts shall be accessible to everyone;
- All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law will prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground;
- Everyone will have an effective means of redress against administrative decisions, so as to guarantee respect for fundamental rights and ensure legal integrity;
- Administrative decisions against a person must be fully justifiable and must as a rule indicate the usual remedies available; and
- The independence of judges and the impartial operation of the public judicial service will be ensured. Principles of fair trial are guaranteed and access to justice, to effective remedies, is secured.

Furthermore, to comply with human rights obligations, a state must establish foundations for the rule of law in which the following institutions must be guaranteed:

- A legislative institution, which represents the will of the people, and is chosen by free elections held at reasonable intervals under conditions which ensure

in practice the free expression of the opinion of the electors in the choice of their representatives. The legislative body should legislate in compliance with international human rights commitments.

- A judiciary that protects the human rights of individuals and groups against arbitrary legislative power and guarantees effective remedies and fair trial.
- An executive branch that does not abuse discretionary power and seeks to promote the enjoyment of human rights by all under its jurisdiction.

CODES OF CONDUCT

One important factor in compliance with human rights is to ensure that those in positions of authority do not abuse their power. Several international documents on human rights directly address actors other than governments (corporate bodies or individuals), stipulating correct behaviour in relation to those within their sphere of influence. These instruments, so-called 'codes of conduct' or 'codes of ethics', are written for specific groups of officials or certain professions, directly addressing those individuals who are subject to demands, for example, that they torture people or commit other forms of human rights violations. Codes of ethics are designed to promote compliance with international standards and create an ethos where individuals will refuse to yield to demands to commit human rights violations. Most codes of conduct relevant to human rights concern the police and law enforcement personnel as well as the military, but the medical and legal professions are also addressed. Some examples of codes of conduct are the following:

- The 1979 UN Code of Conduct for Law Enforcement Officials, which sets rules of conduct for police and penitentiary staff, *inter alia*, in order to prevent torture of prisoners.
- The 1982 UN Principles of Medical Ethics (Principles of Medical Ethics, relevant to the Role of Health Personnel, particularly Physicians, in the Protection of Prisoners and Detainees against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment), which seek to prevent medical personnel from engaging in any form of torture or other form of inhuman or degrading treatment.
- The 1979 Council of Europe Declaration on the police, which aims at preventing abuse of (police) power and clearly defining police authority.
- The 1985 UN Basic Principles on the Independence of the Judiciary that establish the conditions under which justice is secured.
- The 1996 UN International Code of Conduct for Public Officials.

Other codes address, for instance, lawyers, judges or prosecutors. These are groups that, although not necessarily in the service of the state, act in the public sphere where their actions may affect the human rights of others.

1. NATIONAL HUMAN RIGHTS INSTITUTIONS

National institutions provide the checks and balances that ensure the optimal functioning of the rule of law in modern society. In this regard, special attention should be paid to the establishment of national institutions for the protection of human rights.

National institutions in the field of human rights are bodies, authorities or organisations performing general and specific functions in the protection and promotion of human rights. They are different from NGOs in that constitutions or governments have often given them legal competence to protect and promote human rights. Given the plurality of democratic society, no standard structure or mandate typifies such a national institution, but usually a collegiate structure (*e.g.*, national commissions on human rights) or a personalised structure is adopted (mediators or ombudsmen). Apart from advisory capacity in the area of human rights policies, some of these institutions have quasi-judicial powers regarding violations of personal freedoms. Many modern democracies have established the positions of ombudsmen.

The mandates of national human rights institutions are wide-ranging and varied. They may include: the preparation of advisory reports; drawing the government's attention to situations of human rights violations; the promotion of awareness and national legislation in conformity with international human rights standards; the formulation of education programmes in the field of human rights; control of standards in the fields of *e.g.* health or education; and examination of individual petitions. The definition of spheres of competence as regards, *e.g.*, access to documents, possibilities of examination and possibilities of initiative is closely linked to their mandates. Ombudsman-type institutions are a good example: their powers of investigation are sometimes far-reaching, including access to confidential data; their reports are public; and their role is especially important as regards cases which normally do not reach the courts. National institutions can also play an *ad hoc* or permanent role promoting reconciliation or affirmative action to remedy domestic situations in which groups of persons have been denied enjoyment of their human rights.

Most important, and often neglected, is the absolute need for guarantees for the independence and pluralism of national human rights institutions. The International Meeting on National Institutions, held in Paris in October 1991 under the auspices of the UN, made recommendations aimed at strengthening the independence and pluralism of national human rights institutions. These may take several forms:

- Independence through legal status: by giving the institution an effective mandate clearly spelled out in a constitutional or legislative text specifying composition and sphere of competence.
- Independence through composition: by ensuring that composition and

appointment of members is established in a procedure, which guarantees pluralist representation from civilian society.

- Independence through operation: *e.g.*, by ensuring that the institution can freely consider any question within its competence, by guaranteeing the institution direct access to the public, by enabling consultations with other bodies.

Unless their independence is sufficiently guaranteed, the contribution of national institutions to a pluralistic democratic society can only be of limited value. Without independence an institution might even be counterproductive to the extent that it may serve as window dressing for governments not sufficiently committed to human rights. In reviewing possible financial or other kinds of support to institutions, independence is of crucial importance.

SOUTH AFRICA - TRUTH AND RECONCILIATION COMMISSION

Examples of a national institutions in the field of human rights are the so-called 'truth commissions' that generally deal with large scale human rights violations that have been committed nationally. The South African experience may serve as an example:

In 1995, the South African Truth and Reconciliation Commission (TRC) was set up by the new democratic government to address human rights violations committed 'in the course of the conflicts of the past'. The Commission's purposes were to file a report detailing human rights violations under apartheid, to make recommendations for material and symbolic reparations to the victims, and to restore 'the human and civil dignity of victims by granting them an opportunity to relate their own accounts of the violations.' The Commission also had the power to grant amnesty to individual perpetrators under certain conditions. Its mandate did not, however, include general apartheid policies that had been violating the human rights of the great majority of South Africans for decades, such as the denial of voting rights, or the forced removal of people from their homes.

In its final report, published in 1998 and amended in 2002, the TRC concluded that gross human rights abuses had been committed by both sides in the conflict: the state and the liberation movements in their armed struggle against apartheid. However, the report stated that it had ultimately been the state that had generated violent political conflict, and that its apartheid policies amounted to a crime against humanity. The report recommended that some 21,500 victims be paid reparations. However, despite repeated government assurances to that effect, as of 2004 many victims have still not received any monetary reparation, a fact which has been sharply criticised by victims' organisations and human rights groups.

2. INTERNATIONAL ENFORCEMENT OF HUMAN RIGHTS

Many states do not comply with international human rights norms; one may argue that all states violate human rights every so often. As a result, there is justified international concern regarding states committing human rights violations. But how can individual states react? International law is founded on the will of states, which does not generally allow for intervention in delinquent states in order to assure compliance with human rights law. Nevertheless, international society is no longer an order of power in which might makes right; it is now recognised that states can and must challenge notions of sovereignty in cases of violations of human rights.

For states that value compliance with human rights, the promotion and protection of human rights is an important element in their international relations. It is, however, not a policy field that can be easily separated from other policies or handled by a single governmental department. While the promotion of human rights is an independent policy objective in foreign policy, its pursuance is often integrated into the various policies pursued in international relations by foreign ministries, including trade and development assistance.

In enforcing human rights compliance against violating states international fora are of prime importance. Individual states are important and relevant actors in those fora as they can raise human rights issues resulting in violating states being shamed and confronted by their peers. The promotion and protection of human rights in other states is *a priori* within the competence of all states, in conformity with their constitutional traditions and their obligations under international human rights conventions. Notably, in several of the UN Charter bodies, criticism is dependent on the initiative of individual states acting, preferably, in concert with others.

Outside the international fora there is room for bilateral action. Bilateral measures can be more informal and historical or personal relations or other relationships (*e.g.*, economic, trade, aid) can play a significant role. Where international interventions cannot take place for some reason, bilateral intervention can be of importance, *inter alia,* when an outspoken approach is called for or action to strengthen and support a position taken by an international body is needed. A clear bilateral role is also played in the field of development co-operation where small projects in the field of human rights are often more efficiently undertaken bilaterally. Furthermore, support for judiciary or good governance projects is another example of how bilateral actions can contribute to the improvement of compliance with human rights obligations. At the same time, one must realise that human rights promotion through bilateral relations runs the risk of conflicts of interest: a difficult balance must be kept between national interest and human rights interests, between principles and direct benefits. Several states have initiated human rights programmes and integrated human rights into their bilateral co-operation.

Mention should also be made of the responsibilities of foreign missions. When governments want to make their views in the field of human rights known abroad, they usually rely on their missions in the first instance. The instrument of *démarches* is one option, but informal measures are also frequently used. Foreign missions are especially important in relation to human rights dialogue with the host government: a dialogue can be more effective and conducive to improvement as it is often regarded as a constructive approach by the countries concerned. The dialogue may also extend to other layers of society as bilateral missions can maintain contacts with local human rights NGOs and other human rights defenders. Moreover, missions are a source of first-hand information on the human rights situation in a given country as monitoring and reporting on human rights issues is one of the regular tasks of missions.

Finally, mention should be made of the special role played by the permanent missions with the international fora dealing with human rights. Many states have missions in Geneva, New York, Vienna and Strasbourg and are actively involved in the human rights discussions taking place in the fora headquartered there. Active and regular co-ordination between the EU member states is part of the day-to-day work, especially of the missions in Geneva (UNCHR, ILO, UNCHR) and New York (Security Council, UNGA).

CHAPTER 2

THE ROLE OF THE EUROPEAN UNION

This chapter examines the role of the European Union (EU) and provides a contextual examination of the role of states as protectors and enforcers of human rights. The EU is a unique organisation, in that its member states have set up common institutions to which they delegate some of their sovereignty so that decisions on specific matters of joint interest can be made democratically at the European level. This pooling of sovereignty is also called 'European integration'.

On 18 June 2004 the Constitution for Europe was accepted by the European Council, demonstrating the strong commitment of the European Union to comply with human rights in all its actions. Although the original EEC Treaty did not contain any human rights clauses, as these were considered within the realm of the Council of Europe, the EU has long been committed to human rights. One of the original aims of European integration was to prevent the atrocities of the Second World War from being repeated and the first EC convention of 1957 contained human rights provisions such as the prohibition of discrimination, the freedom of movement and the right to equal remuneration.

European integration has come a long way since it was first proposed by the French Foreign Minister Robert Schuman on 9 May 1950. Initially, the EU consisted of only six countries: Germany, France, Italy, Luxembourg and The Netherlands. Denmark, Ireland and The United Kingdom joined in 1973, Greece in 1981, Spain and Portugal in 1986, and Austria, Finland and Sweden in 1995. In May 2004 the biggest ever enlargement took place with 10 new countries joining the EU. Eight Central and Eastern European countries (the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Slovakia and Slovenia) together with Cyprus and Malta are the new EU member states. Today, the EU consists of 25 countries with a joint population of 452 million. Another 100 million individuals live in the four countries that have now applied for membership (June 2004).

The European Union is discussed separately from Part II (Fora) because:

- It is not a human rights forum that sets standards and supervises compliance with human rights treaties. It is a supranational (governing) structure, set up with the original aim of creating a common market.

- Member states have transferred parts of their national sovereignty to the EU. It has to exert such sovereign power in accordance with human rights law. The fora mentioned do not, themselves, exert sovereign power but supervise compliance.
- The European Union can act in mentioned international fora to stimulate and contribute to compliance with human rights.

This chapter begins with an examination of the EU organs relevant for human rights, thereafter discusses compliance with human rights in the internal order of the Union and concludes with the role of the EU in international affairs.

The European Union is a community of democratic European states, committed to the promotion of peace and prosperity. Article I-2 of the new Constitution sets out the fundamental values of the EU: 'respect for human dignity, liberty, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities [...] in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.' Article I-3 specifies the Union's objectives as:

1. The promotion of peace, of its values and of the well-being of its peoples.
2. The promotion of an area of freedom, security and justice without internal frontiers, and an internal market where competition is free and undistorted.
3. The promotion of sustainable development of Europe based on balanced economic growth and price stability, a highly competitive social market economy, aiming at full employment and social progress, and with a high level of protection and improvement of the quality of the environment. It shall promote scientific and technological advance.
   It shall promote economic, social and territorial cohesion, and solidarity among Member States. The Union shall respect its rich cultural and linguistic diversity, and shall ensure that Europe's cultural heritage is safeguarded and enhanced.
4. In the wider world, the promotion of its values and interests. It shall contribute to peace, security, the sustainable development of the Earth, solidarity and mutual respect among peoples, free and fair trade, eradication of poverty and protection of human rights and in particular the rights of the child, as well as to strict observance and to development of international law, including respect for the principles of the United Nations Charter.

A. Main actors in the human rights context

The administration of the European Union if often explained with reference to the 'European Architecture': the various organisations, institutions, treaties and traditional relations which make up the so-called three pillar structure. The three pillars are:

1) The community dimension, comprising the arrangements set out in the treaties on which the European Community was built and which include Union

citizenship, community policies and the Economic and Monetary Union, where essentially supranational procedures apply.

2) The Common Foreign and Security Policy (CFSP) regulated by Title V of the EU treaty (second pillar).
3) The Justice and Home Affairs (JHA) regulated by Title VI of the EU treaty (third pillar). Intergovernmental procedures apply to the last two pillars.

Within the European Union, several of the most important institutions have roles that may affect human rights. These include: the European Council, the Council of the European Union, the European Commission, the European Parliament and the Court of Justice.

The protection of human rights is in first instance the concern of the individual member states; as states parties to the different treaties, they have primary obligations under international law to protect and promote human rights. They are directly accountable for such obligations directly to international supervisory mechanisms. However, the EU agreed to act jointly on certain specific human rights issues *e.g.* in combating racism and discrimination. It should be noted that besides the governments and parliaments of the member states of the EU, NGOs and individuals play a vital role in the actual implementation process of decisions taken at the European level. Not only are NGOs and individuals often effective in collecting data and flexible in raising issues in connection with human rights violations, they also provide the crucial external and evident legitimacy to, and research support for, the actions of the EU and its member states.

1. THE EUROPEAN COUNCIL

The European Council, instituted in 1975 and formally enshrined in the Single European Act (1986, Article 2), brings together the Heads of State or Government of the member states and the President of the European Commission, assisted by the Ministers of Foreign Affairs and a member of the Commission. The Council normally meets twice a year but may meet more often under exceptional circumstances. The European Council deals with both Union affairs and political co-operation. The importance of the European Council in the workings of the Union has steadily increased. In recent years, the Council has provided political impetus or laid down guidelines in areas of prime importance.

2. THE COUNCIL OF THE EUROPEAN UNION

Formely known as the Council of Ministers, this institution consist of goverment ministers from all the EU countries. The Council meets regulary to take detailed decisions and to pass European law.

The Council is the major policy decision-making body. The Council is a single body, but for reasons relating to the organisation of its work, it meets –

according to the subject being discussed – in different 'configurations', which are attended by the Ministers from the member states and the European Commissioners responsible for the areas concerned. Since June 2002 the Council meets in 9 configurations, including the General Affairs and External Relations Council (GAERC) and the Justice and Home Affairs Council. However, regardless of the Council configuration, it is the Council as a whole that adopts a decision. Council decisions are prepared by a structure of some 250 working parties and committees comprising delegates from the member states. They resolve technical issues and forward the dossier to the Permanent Representatives Committee (COREPER), made up of the member states' ambassadors to the European Union. This Committee ensures consistency in the work and resolves technical-political questions before submitting the dossier to the Council.

Common Foreign and Security Policy issues are first presented to the Political and Security Committee (PSC), which, under the GAERC, helps to define policies and monitors their implementation. Under the authority of the GAERC, it is responsible for the political control and the strategic guidance of crisis management operations. It is in turn assisted by various working groups and committees. The main working party responsible for dealing with human rights issues in the EU's external relations is the thematic Working Party on Human Rights (COHOM). In a great majority of cases, the Council takes decisions on a proposal from the European Commission and in association with the European Parliament, either through the consultation procedure (*e.g.* in the areas of agriculture, judicial and police co-operation, and taxation) or through co-decision (*e.g.* the internal market). Human rights in international affairs are normally dealt with by the so-called GAERC, which brings together the foreign ministers of the twenty-five member states and is responsible for the development of the Common Foreign and Security Policy (CFSP). The Secretary General of the Council, also called High Representative for the CFSP, participates in the Council and plays a key role in formulation, preparation and implementation of the CFSP.

In October 1999, Mr. Javier Solana took up the High Representative post. Outsiders often refer to him as the EU foreign minister. Other Council meetings, that may discuss and decide on human rights issues at the EU level are, for instance, the meeting of the Council of Ministers on Employment, Social Policy, Health and Consumer Affairs.

3. THE EUROPEAN PARLIAMENT

Since 1979 the citizens of the member states directly choose the European Parliament (EP) through universal suffrage. After the entry of the ten new member states on 1 May 2004, the Parliament numbers 732 members and convenes alternately in Luxembourg and Strasbourg. The Parliament may debate and reach conclusions independently of both the Council of Ministers and the Commission. The powers of the European Parliament have gradually been increased, notably

through the entry into force of the Maastricht Treaty and the Amsterdam Treaty. The European Parliament contributes actively to the development of a coherent EU policy in the field of human rights. The European Parliament has moreover an important role to play in treaty-making processes with third countries because of the need for its assent to most international agreements. It undertakes human rights missions to countries outside the EU, draws up reports on specific human rights situations as well as thematic issues, and regularly sends a delegation to sessions of the UN Commission on Human Rights. In addition, the Parliament adopts resolutions, issues declarations and submits questions to the Council and the Commission on human rights issues. The Parliament publishes an Annual Report on human rights in the world and the European Union's human rights policy. Each year the Parliament awards an individual or organisation the Sakharov prize for freedom of thought. The European Parliament has a number of Committees dealing with human rights issues. For human rights issues within the Union several Committees are responsible, notably the Committee on Public Freedoms and Internal Affairs; the Committee on Juridical Affairs and Citizens' Rights; and the Committee on Women's Rights.

FILING PETITIONS WITH THE EUROPEAN PARLIAMENT

Every citizen of an EU country has the right to petition: to file individually or collectively, a request or complaint with the European Parliament. The EP's Petitions Committee may hear the plaintiff, launch an enquiry and question the EU institutions. There is no special format for a petition. However, it must contain the name, address, occupation, and nationality of the petitioner. The petition must further be signed and legible. The EP is not a judicial organ, but may follow various procedures to bring the petition to the attention of the authorities concerned. The plaintiff is kept informed about the status of the enquiry. The petition may be filed in one of the official languages of the EU. It should be addressed to:
The President of the European Parliament,
L-2929 Luxembourg, Luxembourg

4. THE EUROPEAN COMMISSION

The Commission is often regarded as the Union's executive body. The Commission is the guardian of the EC/EU Treaties and the negotiator, upon mandate of the Council, of external agreements. Its members, although appointed by the member states, carry out their tasks independently from the member states, as it is their duty to represent and promote the Union's interests. The Commission participates actively in international conferences and in the work of international organisations; thus contributing, for instance, to the promotion of the universal principles of human rights. It does so, for instance, also through the integration of human rights in economic and trade relationships, and through the integration

of human rights in development co-operation relationships. The Commission is part of the troika which represents the EU externally, for example in conducting dialogue and participating in *démarches* on human rights issues to third countries, and it manages the support for the many human rights projects specifically aimed at the promotion of human rights or at relief for victims of human rights violations in third countries. A major part of such initiatives form part of the European Initiative for Human Rights, which is discussed below.

5. THE COURT OF JUSTICE

The Court of Justice supervises the compliance by the member states with the EC/EU Treaties. It is seated in Luxembourg, and consists of up to twenty-five independent judges and eight advocates-general, all appointed by the member states for a term of six years. EU member states and institutions as well as individuals can bring a matter pertaining to European law before the Court. Moreover, national courts may refer questions on the interpretation of European law to the European Court of Justice. The so-called preliminary rulings given by the Court in these cases are binding on the parties to the dispute. Community law is directly applicable in all member states. The Court ensures that Community law is interpreted and applied equally throughout the EU. The rulings given by the Court are binding and have confirmed that the obligation to respect fundamental rights applies both to EU institutions and to member states in the area of Community law, thereby ensuring that human rights are fully taken into account in the administration of justice.

The Court of Justice has consistently held that fundamental rights form an integral part of the Community legal order, thereby ensuring that human rights are fully taken into account in the administration of justice. Article 7 of the new Constitution, adopted in June 2004, states that 'The Union shall recognise the rights, freedoms and principles set out in the Charter of Fundamental Rights (the Charter of Nice) which constitutes Part II of the Constitution.' It further stipulates that the fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms, and as they result from the constitutional traditions common to the member states, shall constitute general principles of the Union's law. In its case-law, the Court has elaborated upon the role of human rights in the judicial order of the community. It ruled already in 1969 - in the case *Erich Stauder* v. *Stad Ulm/Sozialambt* - that measures that are incompatible with fundamental rights cannot be taken. This judgement has subsequently been elaborated on, mainly in the cases *J. Nold, Kohlen- und Baustoffgrosshandlung* v. *the European Commission*, *Hoechst AG* v. *the European Commission* and *Orkem* v. *the European Commission and ERT.* In addition, the role of human rights has been recognised in political decisions and can be derived from the Maastricht Treaty as well as the Amsterdam Treaty.

6. THE EUROPEAN OMBUDSMAN

The main task of the European Ombudsman is the supervision of the administration of the European Union and its various organs and institutions. The Ombudsman investigates maladministration in the activities of the institutions and bodies of the European Community. Examples include administrative irregularities, unfairness, discrimination, abuse of power, or unnecessary delay. The Ombudsman acts mainly on the basis of complaints from citizens, but may undertake investigations also on, his or her, own initiative. The complaints which the Ombudsman receives often focus on questions concerning the right to freedom of expression and non-discrimination.

FILING A COMPLAINT WITH THE EUROPEAN OMBUDSMAN

Every citizen of or individual living in an EU country has the right to complain to the European Ombudsman regarding alleged maladministration. It must be clear which institution or body the claim is brought against and the claim must be brought within two years of the date when the facts of the complaint were known. The claimant need not be individually affected by the maladministration, but must already have contacted the institution or body concerned, *e.g.* by letter. No special format is needed for a petition but it must contain the name, address, occupation, and nationality of the petitioner. The petition must further be signed and legible. The petition may be filed in one of the 21 official languages of the EU. The Ombudsman does not deal with matters that are currently before a court or that have already been settled by a court. Complaints should be addressed to:

The European Ombudsman
1 Avenue du President Robert Schuman
B.P. 403
F-67001 Strasbourg Cedex
http://www.euro-ombudsman.eu.int

B. Human rights within the European Union

1. THE LEGAL CONTEXT

Although the original EEC Treaty did not contain any human rights clauses, gradually, however, human rights standards have been elaborated upon in later treaties and over the years human rights have become the cornerstone of the European Union. An important step in integrating human rights and democratic principles into the policies of the European Union was taken with the entry into force of the Treaty on European Union (TEU, 1992).

With regard to internal policies, Article 2 of the Treaty on European Union (TEU) stipulates that the objective of the Union is to 'strengthen the protection of the rights and interests of the nationals of its Member States' and to 'maintain and develop the Union as an area of freedom, security and justice'. Additionally, Article 6(2) states that the Union is bound to respect 'fundamental rights, as guaranteed by the [...] Convention [of the Council of Europe] for the Protection of Human Rights and Fundamental Freedoms [...], and as they result from the constitutional conditions common to the Member States, as general principles of Community law'. In addition, Article 7 of the TEU introduces a mechanism where member states of the European Union punish serious and persistent violations of human rights by way of suspension of certain rights enshrined in the TEU.

On 1 May 1999, with the entry into force of the Treaty of Amsterdam another significant step forward in integrating human rights into the legal order of the European Union was taken. While the Treaty of Amsterdam consolidates each of the three 'pillars' mentioned above, it enhances human rights concerns. This Treaty inserts a new Article 6 in the Treaty on European Union, which reaffirms that the European Union '*is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States*'. Member states violating these principles in a 'serious and persistent' way risk suspension of certain rights deriving from the Union Treaty. This mechanism was further reinforced by the Treaty of Nice concluded in December 2000, which extends the objective of promoting the respect of human rights and fundamental freedoms from development co-operation to all forms of co-operation with third countries (Article 181bis TEC).

To promote coherence between the EU's internal and external approaches, EU actions in the field of external relations are guided by compliance with the rights and principles contained in the EU Charter of Fundamental Rights (officially proclaimed at the Nice Summit in December 2000). The Charter sets out a range of rights for European citizens. The rights are in six sections: dignity, freedoms, equality, solidarity, citizens' rights and justice, and are based on material from various sources, such as the fundamental rights and freedoms recognised by the European Convention for the Protection of Human Rights and Fundamental Freedoms, common constitutional traditions, and international instruments. Recently, with the adoption of the Constitution for Europe on 18 June 2004, the EU has demonstrated an even stronger commitment to compliance with human rights in all its actions.

The Constitution for Europe of 2004 places human rights among the core values to be pursued by the EU. It includes the Charter of Nice, adopted in 2000, which details the rights and freedoms of the individuals who are under the jurisdiction of the EU. It furthermore includes rights and freedoms already contained in the European Convention for the Protection of Human Rights and Fundamental Freedoms, as well as several 'modern rights' such as the right to

protection of personal data and the right to good administration, which are not part of most human rights catalogues.

2. ADHERENCE TO INTERNATIONAL TREATIES

One of the starting points for compliance with human rights is adherence to international treaties. Until now only states could become parties to major global or regional treaties but it has long been subject of discussion whether the European Union should accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR). In 1979, the European Commission recommended that the European Community accede to the ECHR, in order for the European institutions to be subjected to control under the Convention. In 1994, the Council of Ministers decided to request the Court of Justice to report on whether accession of the EC to the ECHR was compatible with the Maastricht Treaty. The Court decided as follows:

> Respect for Human Rights is therefore a condition of the lawfulness of Community acts. Accession to the Convention would, however, entail a substantial change in the present Community system for the protection of human rights in that it would entail the entry of the Community into a distinct international institutional system as well as integration of all the provisions of the Convention into the Community legal order. (Report 2/94, 28 March 1996).

However, in recent years the situation has changed dramatically and on 13 May 2004, the Committee of Ministers of the Council of Europe adopted Protocol No. 14 to the European Convention which in Article 17 amends Article 59 of the Convention to insert a new paragraph 2: 'The European Union may accede to this Convention.' In turn, Article 7 of the 2004 Constitution for Europe stipulates that the Union shall seek accession to the European Convention for the Protection of Human Rights and Fundamental Freedoms. This development is very welcome from a human rights perspective as it sets an important precedent in showing how international organisations may be bound by human rights norms. In addition, it makes the actions of the European Union institutions subject to the scrutiny of the European Court.

As regards other international human rights treaties, the member states have confirmed their support for the UDHR upon many occasions, all 25 member states and the four accession states (Turkey, Romania, Bulgaria and Croatia) have ratified the six major UN conventions (ICCPR, ICESC, CEDAW, CAT, CERD and CRC) as well as the European Convention for the Protection of Human Rights and Fundamental Freedoms, the European Social Charter and the European Convention for the Prevention of Torture.

3. ISSUES OF CONCERN WITHIN THE EUROPEAN UNION

Perfect compliance with international human rights norms is beyond the reach of most countries, the member states of the Union included. All are confronted regularly with judgments of the European Court of Human Rights where it is found that the Convention has been violated. For instance, a common problem has to do with the reasonable time requirement, as part of fair trial, stipulated in Article 6 of the European Convention; many countries have difficulty in complying with this provision.

The 2003 EU Annual Report on Human Rights dedicates a special chapter to compliance with human rights within the Union. Examples of issues that are of continuing concern in the European Union are racism and xenophobia, terrorism, issues regarding asylum and migration policies, minority protection, trafficking in human beings, children's and women's rights and human rights in relation to business. In this context, the Community has taken joint action in implementation activities, including funding for specific information and assistance programmes, and the relevant legislation plays a significant role in the internal order of the Union. Three issues and examples of institutional measures are discussed below.

Non-discrimination, racism and xenophobia

The issue of racism and xenophobia is of major concern in the European Union. Globalisation, the increased movement of people, the influx of foreigners and perceived problems regarding minorities has led many member states to adopt increasingly discriminatory policies as regards immigration. To counter inequitable trends the Union has adopted several measures. Article 21 of the Charter of Nice includes a broad anti-discrimination clause. Following the adoption of the Amsterdam Treaty which provided the European Community with new powers to tackle discrimination, a set of measures have been put into place to combat discrimination, comprising, *inter alia,* two Directives and a Community Action Programme (2001-2006).

The Racial Equality Directive (2000/43/EC) contains definitions of direct and indirect discrimination; it prohibits racial and ethnic discrimination in the fields of employment, education, social security and healthcare and access to goods and services and housing; it prohibits harassment and victimisation; it provides for a judicial or administrative procedure where victims of discrimination may complain; sets out appropriate penalties for those who discriminate; places the burden of proof on the respondent in civil and administrative cases. The Directive also provides for the establishment in each member state of an organisation to promote equal treatment (*inter alia* through the elaboration of independent reports and recommendations) and provides independent assistance to victims of racial discrimination. It further recognises that implementation measures should promote equality between women and men, as women are often victims of discrimination on many levels.

Notable in the fight against racism and xenophobia is the European Union's Monitoring Centre on Racism and Xenophobia (EUMC), which was founded in 1997 in Vienna. The Centre undertakes research in order to present member states with objective and comparable data with regards to patterns of racism, xenophobia and anti-Semitism. Its work is essential to a proper understanding of the problems of racism and to the formulation of policies and practices to promote equality and fight discrimination.

The Employment Equality Directive (2000/78/EC) implements the principle of equal treatment in the areas of employment and training irrespective of religion or belief, disability, age and sexual orientation. The EU's legislation is backed up by the Community Action Programme to combat discrimination (2001-2006, with a budget of 100 million), which aims at improving the understanding of issues related to discrimination, developing the capacity to tackle discrimination effectively and promoting the values underlying the fight against discrimination.

Terrorism

In the aftermath of the terrorist attacks of 11 September, 2001, the European Council, at an extraordinary meeting on 21 September 2001, put terrorism at the top of its agenda and approved the 'Action Plan to combat terrorism'. For the first time, the EU developed a co-ordinated, coherent and cross-cutting approach in all its policies and measures to fight terrorism. The EU has since approved a Framework Decision on combating terrorism (2002/475/JHA), a European Union Common List of Terrorists, as well as a Framework Decision on the European arrest warrant and the surrender procedures between member states (2002/584/JHA). Respect for human rights and fundamental freedoms in the adoption and implementation of anti-terrorist policies and measures is a basic principle, where no decision of the European Union may have the effect of modifying the obligation to respect fundamental rights and legal principles.

Asylum and migration

The increasing number of asylum seekers and migrants has called for harmonisation of national legislation on asylum and migration issues. The large difference in asylum procedures between the member states has led to the search for harmonisation of asylum and migration policies. While the states must still come to an agreement on a number of key issues in this highly sensitive area, some progress has been made in *e.g.* the agreement on the Council Directive laying down minimum standards for the reception of asylum seekers (2003/9/EC) and Council Regulation (EC 343/2003) establishing the criteria and mechanisms for determining the member state responsible for examining an asylum application lodged in one of the member states by a third-country national. These two documents demonstrate the growing trend towards harmonised asylum policies in the EU.

Institutions

The establishment of domestic human rights institutions is an important step towards improved compliance with human rights law. At the European Union level several institutions have been established to ensure compliance in fields which are of common interest. One is the European Union's Monitoring Centre on Racism and Xenophobia (EUMC) discussed above.

Another example is the network of experts established by the European Commission in September 2002 on fundamental rights aimed at improving information and analysis as regards the situation in each of the member states of the EU. The European Parliament had recommended the creation of this network both in its report on the situation of fundamental rights in the EU in 2000 (2000/2231 (INI)) and in its Resolution of 5th July 2001. The network has agreed to rely on the use of three instruments in the discharge of its mandate: an Annual Report on the situation of fundamental rights within the European Union presented in March; thematic observations on specific questions; and a report on the implementation of certain rights, freedoms or principles of the Charter of Fundamental Rights. The network's first Annual report to the Commission of March 2003 analyses the implementation of the provisions of each article in the Charter of Fundamental Rights with an overview of recent developments in EU member states.

C. The European Union and international human rights

1. COMMON FOREIGN AND SECURITY POLICY

Human rights issues are usually dealt with in the framework of the European Common Foreign and Security Policy (CFSP), the so-called second pillar of the 1992 Maastricht Treaty. Article 11 of the Maastricht Treaty states that efforts to 'develop and consolidate democracy and the rule of law, and respect for human rights and fundamental freedoms' are among the objectives of external policies of the EU and Article 177 of the TEU requires that Community development co-operation policy contribute to the achievement of these objectives. In the framework of the Common Foreign and Security Policy, the EU policy has gradually developed a number of principles, which include the following:

- The protection of human rights is the legitimate and continuous duty of the world community and of all nations individually, wherever in the world these rights are violated;
- Coherence and consistency between Community action and the Common Foreign and Security Policy (CFSP) as well as development policy through

close co-operation and co-ordination between its competent bodies and with the Commission;

- Mainstreaming of human rights and democratisation into EU policies and actions;
- Openness of the EU's human rights and democratisation policy through a strengthened dialogue with the European Parliament and civil society;
- Regular identification and review of priority actions in the implementation of its human rights and democratisation policy;
- Expressions of concern at violations of such rights cannot be considered interference in the domestic affairs of a state;
- The CFSP is non selective and without bias with respect to political views or ideology;
- Civil and political rights and economic, social and cultural rights are indivisible in character and essential for the full realisation of human dignity; and
- The promotion of lasting security and peace between nations cannot be separated from the promotion of the enjoyment of human rights within nations.

The EU human rights policy aims at an international order in which international human rights standards are implemented and respected. To achieve this, the EU and its member states stimulate the development of international standards, the strengthening of supervisory mechanisms and the actual observance of those standards.

To mark the 50th anniversary of the Universal Declaration of Human Rights, the General Affairs Council adopted a declaration made public in Vienna on 10 December 1998, recommending the drafting of an EU annual report on human rights. Since 1999 the EU Annual Report on Human Rights has been published every year, providing an overview of joint positions and joint actions undertaken in respect of human rights (http://europa.int/comm/external_relations/human_rights).

2. INTERNATIONAL PROTECTION AND PROMOTION OF HUMAN RIGHTS

Based on the principles discussed above, the EU and its member states engage in various activities, both negative and positive depending on the situation at hand. The former consist of reactions to human rights violations, including joint and individual initiatives to stop and redress them - common strategies and positions and joint actions are the main instruments of the EU's Common Foreign and Security Policy. The latter, positive measures aim at the strengthening of (national) institutions and procedures for the protection of human rights, as well as the development of international norms and supervisory mechanisms.

There are also several kinds of activities that the EU and its member states undertake by way of reaction, *e.g.*, drawing up country reports, executing

démarches, publishing declarations and delivering speeches. If the situation calls for it, the member states of the EU can ask the heads of their embassies and the representative of the European Commission to draw up a report on the human rights situation in a country or on specific violations of human rights. These reports are an important source of information for the member states enabling them to deal appropriately and effectively with human rights situations.

When the EU and its member states want to remedy a situation where human rights are being violated, several courses of action can be considered, for instance:

- A *démarche* by the EU Presidency (usually confidential), the Troika, or all ambassadors of the EU member states in the country concerned;
- A public declaration;
- Common diplomatic measures; and
- Multilateral initiatives, jointly and individually, at human rights fora.

An example of reactive measures is the method of *démarches*. A *démarche* entails the representative of the Union contacting the representatives of the government in question. Concern can be expressed about violations of human rights and the government can be called upon to take action, ranging from the release of prisoners to the criminal prosecution of responsible officials. *Démarches* are undertaken by the ambassador of the country holding the EU Presidency or by the Troika. The effectiveness of *démarches* is difficult to measure, but experience has shown that governments are often sensitive to such activities. To enhance their effectiveness *démarches* are usually confidential, but the EU and its member states can also decide to issue statements on the situation in a particular country. Such declarations are public and are released to the press. The statements usually call upon the government or other parties to respect human rights, but are also used regularly to welcome positive developments. In the year 2002-2003 *démarches* to the governments of more than 80 states were made.

Another example of a reactive measure is the European Initiative for Democracy and Human Rights (EIDHR). This initiative is one of the funding mechanisms for human rights along with other EU instruments such as PHARE, TACIS, MEDA and other instruments of financial and technical co-operation under which human rights and good governance initiatives can be supported in third countries. The initiative has an annual budget of more than 100 million and focuses on: 1) strengthening democracy, good governance and the rule of law (co-operating with civil society to promote political pluralism; a free media and sound justice system); 2) abolishing the death penalty; 3) combating torture through preventive measures (like police training and education) and repressive measures (like creating international tribunals and criminal courts); and 4) fighting racism and discrimination by ensuring respect for political and civil rights. In addition, projects for gender equality and the protection of children are funded and joint action with other organisations involved in the defence of human rights - such as the UN, ICRC, CoE and OSCE is supported.

A large number of pro-active measures are undertaken, of which the most prominent is the European Initiative for Democracy and Human Rights (EIDHR). The EIDHR provides added value in relation to other Community instruments in that it complements the Community programmes carried out with governments such as the EDF, TACIS, ALA (Asian and Latin American countries), MEDA, CARDS, PHARE, and because it can be implemented with different partners such as NGOs and international organisations. It may also be used without host government consent or where leading Community programmes are not available for other reasons, such as their suspension. In addition, it is complement to the objectives of the Common Foreign and Security Policy.

For the years 2002-2004, the amount available annually for the activities of the EIDHR is approximately 100 million, covering the following two budget headings: Development and consolidation of democracy and the rule of law – Respect for human rights and fundamental freedoms. Priorities are to be identified by sector or issue and pursue specific medium and long-term objectives. Thematic priorities for 2002-2004 (valid until 2006) include: support for increased democratisation, good governance and the rule of law; actions to support the abolition of the death penalty; support for the fight against torture and impunity and for the establishment of international criminal tribunals; and combating racism, xenophobia and discrimination against minorities and indigenous peoples.

Regular consultations and dialogues, as well as human rights clauses in trade and co-operation agreements with third countries, are other well-known mechanisms that contribute to the promotion of human rights. Such clauses stipulate that respect for fundamental human rights and democratic principles underpin the internal and external policies of the parties and constitute an 'essential element' of the agreement. If these third countries fail to respect human rights, trade concessions can be suspended and aid programmes reduced or curtailed. The Cotonou Agreement – a trade and aid pact – concluded with 77 African, Caribbean and Pacific countries (entered into force 1 April 2003) includes a 'state of the art' version of the essential elements clause, with a new procedure for dealing with violations of the essential elements, *inter alia,* a consultation process. Similar provisions exist in the EU's other aid programmes, *inter alia,* those involving the candidate countries in eastern Europe and the Balkans, Russia and the republics of the Caucasus and Central Asia, and countries in the southern and eastern Mediterranean.

The European Union has also imposed sanctions on countries that have violated human rights such as Serbia, Burma (Myanmar) and Zimbabwe.

3. EUROPEAN UNION ACTIONS IN INTERNATIONAL FORA

In the 1970s, European diplomats serving at sessions of the UN Commission on Human Rights dreaded the voting on controversial resolutions whereby some European Community countries would vote for a given resolution, some against and the rest would abstain. This phenomenon, sometimes known as 'the three-

way split', did little to enhance a strong image of the European Community in the field of human rights. While such a split may still occur today as EU member states are independent members of the UN Human Rights Commission, much has changed in terms of strengthening the common position of the European Union, whether in drawing up joint policies, delivering joint speeches in international fora or undertaking joint initiatives. Today the Union speaks with one voice on issues such as the death penalty and torture and on the majority of country situations. Both in the UN General Assembly and the UN Commission on Human Rights, the Union has become an important player in defending human rights and in contributing to the debate.

In recent years the EU has been the participant with the greatest number of initiatives before the UN Commission on Human Rights; in 2003 it submitted eleven resolutions/decisions on country situations. In addition, the member states introduced a number of national initiatives, most of which were actively supported by the EU as a whole and the EU's visibility was increased; *inter alia*, by its statements under the various agenda items and explanations of vote. Furthermore, the EU engaged in numerous formal as well as informal consultations with other delegations and groups prior to and during the session. The EU carried out *démarches*, both in Geneva and in capitals all over the world, to lobby in support of EU initiatives. Under Agenda Item 9, the EU delivered, as in previous years, a speech in which the worst offenders of human rights were singled out for criticism.

The EU and its member states do not only act jointly in the United Nations fora, but also in the Council of Europe, the OSCE and other conferences and multilateral initiatives, where appropriate. One example is the Stability Pact for South Eastern Europe. The Stability Pact was adopted in Cologne on 10 June 1999. The founders, more than forty partner countries and organisations, seek to strengthen the countries of South Eastern Europe in 'their efforts to foster peace, democracy, respect for human rights and economic prosperity in order to achieve stability in the whole region'. The Stability Pact promotes regional co-operation among the countries of the region and assists them to take steps towards integrating European standards. The efforts include large-scale financial support to promote respect for human rights in the South Eastern European countries.

4. THEMATIC ISSUES OF PARTICULAR IMPORTANCE TO THE EU IN INTERNATIONAL RELATIONS

In the last decade, the EU has substantially increased its focus on certain themes in its promotion of human rights. While the abolition of the death penalty and the prevention of torture were the centre of attention in the 1980s, the focus has recently been on the situation in individual countries. Recent years have seen a substantial drive to deepen and broaden the EU's stance on a number of themes and issues. The EU Annual Report on Human Rights 2002-2003 mentions some

16 themes of particular importance: 1) terrorism, 2) civil and political rights, 3) economic, social and cultural rights, 4) death penalty, 5) torture, 6) the International Criminal Court, 7) election support, 8) the right to development, 9) rights of the child, 10) racism, xenophobia, non-discrimination and respect for diversity, 11) human rights of women, 12) persons with disabilities, 13) persons belonging to minorities, 14) persons belonging to indigenous communities, 15) refugees and internationally displaced persons, and 16) human rights defenders. Three issues are discussed briefly here to give an impression of the positions and interventions undertaken.

Death penalty

The EU is opposed to the death penalty in all circumstances. It considers that abolition of the death penalty contributes to the enhancement of human dignity and the progressive development of human rights. This position is rooted in respect for the inherent dignity of all human beings and the inviolability of the human person. Therefore, the Union undertakes systematic action in regard to abolition in its relations with third countries. In 1998, the EU drew up guidelines on its death penalty policy; these include criteria for making *démarches* to countries that retain the death penalty. Under the guidelines, the EU will make representations: a) in individual cases where the use of the death penalty falls below UN minimum standards (such as executing pregnant women, mentally retarded persons or those aged under eighteen when the crime was committed); and b) in situations where a government's policy on the death penalty is in flux (for example when it is considering lifting a moratorium, or *de facto* moratorium, on the use of the death penalty). While it is difficult to measure the effects of these policies, there are indications of success: in the 1970s there were only some 40 abolitionist countries in the world and death penalties were still carried out on a large scale in parts of Europe, today there are at least 110 abolitionist countries and in the Council of Europe area (45 countries, 800 million people) the death penalty has been outlawed.

Torture

EU actions against torture are based on a set of Guidelines on Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, adopted by the Council in April 2001. The EU Heads of Mission monitor possible patterns of torture in all third countries. These reports may result in *démarches* and statements in international fora. One element of the Union's actions against torture was the large-scale effort to have the Optional Protocol to the UN Convention Against Torture adopted by the UN General Assembly in 2002. Other actions are joint statements and co-sponsoring of resolutions against torture. Furthermore, financial support is provided; for the period 2002-2003, 25 million have been allocated to torture rehabilitation centres and for the prevention of torture.

Free elections

Support for free elections is a key component of the overall EU strategy to support democratisation in third countries. The EU considers free expression of the political will of the people, by a secret and equal vote through a universal, fair, transparent and participatory election process, a cornerstone of an inclusive and sustainable democracy. Election assistance takes various forms, including the provision of material and financial support to national election management bodies. The European Commission provides financial support of 20 million annually. Between July 2002 and June 2003, the EU deployed seven Election Observation Missions.

The above three examples provide an indication of the work undertaken in the external relations of the Union. It may be mentioned here that several other guidelines have been developed or are under development in the working group on human rights. Specific mention may be made of:

- guidelines on human rights dialogues (currently with Iran and China)
- guidelines on children and armed conflict
- guidelines on human rights defenders

The above guidelines and other relevant documents can be found on the web site of the European Union (http://europa.int/comm/external_relations/human_rights).

CHAPTER 3

THE ROLE OF NON-STATE ENTITIES

The Preamble of the Universal Declaration proclaims that:

> [E]very individual and every organ of society [...] shall strive by teaching and education to promote respect for these [human] rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance, both among the peoples of the Member States themselves and among other peoples of territories under their jurisdiction.

Every individual and every 'organ of society' has an obligation to contribute to an atmosphere conducive to the enjoyment of human rights. This obligation is universal and concerns all - state and non-state - actors. Although the primary responsibilities and obligations in the field of human rights enjoyment remain with the state, it cannot relieve themselves of these obligations by 'delegating' human rights obligations to non-state entities or, for that matter, international organisations. This does not, however, mean that non-state entities do not have responsibilities, both in a positive and in a negative sense: abstaining from violating human rights on the one hand and contributing to human rights compliance on the other.

Non-state entities take on various forms: NGOs, both national and international; indigenous and minority groups; (semi-) autonomous groups; human rights defenders; terrorists; paramilitary groups; autonomous areas; internationalised territories; multinational enterprises; and, finally, individuals. Many of these groups promote human rights while others, on the contrary condone crimes or even commit crimes affecting the lives and human rights of individuals.

The role of non-state actors cannot be discussed without touching upon the question as to what extent human rights also apply to relations between private individuals and/or enterprises. This question is also discussed under the term 'horizontal effects of human rights', or identified with the German term *Drittwirkung*. There is no universal consensus on the phenomenon of *Drittwirkung*: Should individual citizens have some sort of minimum guarantee as to his or her human rights in relation to other persons? Can paramilitary groups

be called upon to respect human rights? To what extent should states legally recognise and give effect to *Drittwirkung*. One may maintain that it is the responsibility of the state to secure that an individual human right - such as the right to freedom of expression - is not unjustifiably interfered with by others. Such a right should be protected and infringements by others should be prevented. Some experts argue that a distinction can be made between rights which largely depend on state intervention such as the right to elections or the right to a fair trial on the one hand and rights which are more free-standing, such as freedom of expression, freedom of religion and freedom of movement on the other.

Another element in this context is the question whether an individual acts in the public sphere or only in the private sphere. In the public sphere, *e.g.* in the case of health personnel, codes of conduct (see II.§1.) prescribe a certain standard of behaviour aimed at respecting the human rights of others. Behaviour affecting the human rights of others in the private sphere needs to be addressed also; experts maintain that non-state entities are obliged, as a minimum, to comply with peremptory norms of general international human rights law.

When non-state entities do not comply with international human rights law, one can of course address states and require compliance. There is now an emerging trend towards taking legal steps against the state concerned, but at the same time addressing the non-compliance of non-state entities and arbitrary use of power.

Whenever power is exercised, there is the risk that it is used in an unrestricted manner violating the human rights of individuals. In the fine-tuning of the rule of law it is of the utmost importance to ensure that all institutions and individuals who are charged with enforcement or exert power do so in accordance with human rights law. In this context it is also important to address certain phenomena in society often described as 'traditional', that violate human rights, such as violence against women or discrimination against persons belonging to indigenous groups. A good example is the Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women (1994), which spells out in its Preamble that 'Violence against women is an offence against human dignity and a manifestation of the historically unequal power relations between women and men.' This Convention calls on individual men and also the state concerned to prevent violations that are 'condoned by the state or its agents'(see II.§3.B).

Finally, mention should be made of individual criminal responsibility in cases of human rights abuses. As traditionally only states can be held accountable for violations of human rights, powerful individuals, instrumental in gross human rights violations often escape liability; political leaders such as Pol Pot and Idi Amin, complicit in atrocious human right abuses did not have to answer for their crimes. The Convention on the Prevention and Punishment of the Crime of Genocide of 1948 required persons committing genocide to be punished (Article 4), but the provision had little impact in practice. Fortunately, in recent decades, international, individual criminal responsibility for human rights violations is being increasingly accepted. A major development in this respect was the adoption of the Convention Against Torture, which establishes in Articles 5 to 8 the

principle of universal jurisdiction in cases against torturers, whereby states are obliged to prosecute or extradite alleged offenders. The practical application of this Convention through the arrest, in October 1998, of Chilean dictator Augusto Pinochet proved an important stepping stone in the fight against impunity. That same year the Rome Statute of the International Criminal Court was adopted establishing individual criminal responsibility of persons who have committed crimes within the jurisdiction of the Court (Article 25) (see II.§1.B.2). Meanwhile, *ad-hoc* tribunals have tried several individuals accused of crimes against humanity; in 2001 the former Yugoslav president Slodoban Milosevic was turned over to the International Criminal Tribunal for the Former Yugoslavia. While the effective functioning of international criminal justice for individual human rights violators is in its infancy, it is apparent that powerful individuals committing gross human rights can no longer be sure to remain immune from prosecution.

This part discusses non-governmental organisations, human rights defenders and multinational companies as examples of non-state entities; demonstrating the complexities and variety of 'private' actors involved.

A. Non-governmental human rights organisations

The proliferation of non-governmental human rights organisations has gone hand in hand with the development of international norms, institutions and procedures for the protection of human rights. NGOs have come to form an essential part of a pluralist society and a well-functioning human rights system is unthinkable without their contributions. Some NGOs have long and distinguished histories: the Anti-Slavery Society was founded in 1838, while the French *Ligue des Droits de l'Homme* was created in 1898 in the wake of the Dreyfus affair. Most NGOs, however, were established in the 1960s and the 1970s alongside the human rights monitoring by international organisations such as the United Nations and the Council of Europe. The role of NGOs is essential for the effective protection of human rights at both national and international levels; NGOs raise public awareness of human rights issues and bring attention to those responsible issues and bring attention to those responsible.

Before looking at the work of NGOs at the international and regional level, it is important to address what a human rights NGO is. It is difficult to define NGOs because they come in very different shapes and sizes; large and small, well-off or poor, professional or less professional. There is, however, consensus on certain characteristics. What distinguishes human rights NGOs from other private associations is that NGOs are private non-profit-seeking organisations independent from governments, both financially and politically. With regard to the financial aspect, ECOSOC resolution 1996/31 concerning consultative status for NGOs explains that NGOs can accept some government funding, but it should not form the main source of income. Article 14 stipulates:

> The basic resources of the organisation shall be derived in the main part from contributions of the national affiliates or other components or from individual members. Where voluntary contributions have been received, their amounts and donors shall be faithfully revealed to the Council Committee on Non-Governmental Organizations. Where, however, the above criterion is not fulfilled and an organization is financed from other sources, it must explain to the satisfaction of the Committee its reasons for not meeting the requirements laid down in this paragraph [...].

Moreover, NGOs are distinctly different from private associations, such as political parties, because they do not seek political power. Thus, unlike political parties that mainly seek to protect the rights of their own constituents and advance their own self-interests, NGOs seek to protect the rights of all members of society and to serve the public as a whole.

During the drafting of the UN Charter, many NGOs played an important role in pressing for the inclusion of human rights provisions in the Charter. They also lobbied for a system that would give them official standing before UN organs. As a result, Article 71 was included in the UN Charter, which provides that the ECOSOC 'may make suitable arrangements for consultations with non-governmental organisations which are concerned with matters within its competence'.

In 1968, the ECOSOC adopted a resolution, revised and expanded in 1996, to establish a formal system giving qualified NGOs three types of consultative status within the organisation: a) Category I: NGOs which have, on the basis of their mandate, a special interest in all activities of the ECOSOC; b) Category II: organisations with a special mandate which are interested only in some activities of the ECOSOC and which can make essential contributions; and c) Category III: NGOs which have been placed on the roster; such organisations may be consulted on an *ad hoc* basis.

This status permits NGO representatives to attend and speak at meetings held by ECOSOC and its subsidiary bodies, to be heard by UN human rights committees and commissions and, in certain cases, to affect the agendas of these bodies. Under the UN Charter-based system, NGOs submit information to the UN Commission on Human Rights, under both the confidential 1503 procedure and the thematic and country-specific procedures (see II.§1.C). This role is very important since the UN's own information gathering capacity is very limited.

NGOs are also involved in the drafting of resolutions and international treaties and their initiatives in standard-setting have been very significant. Examples include Amnesty International's role in the drafting of the Convention against Torture; the impact of NGOs working for children's rights on the text of the Convention on the Rights of the Child and the pressure exerted by, *inter alia*, the International Commission of Jurists, Amnesty International and Human Rights Watch for the treaty establishing the International Criminal Court.

NGOs have also come to play an important role under the UN treaty-based system, especially with regard to the strengthening of reporting mechanisms. As it is impossible for the Committees supervising the implementation of the UN

Conventions to be experts on the human rights situation of every country, they rely on NGOs to counter-balance information provided by states. NGOs serve to provide them with dependable information on the human rights situation and main areas of concern in specific countries. Many NGOs prepare their own parallel reports to the state reports ('shadow reports'), which they pass on to the relevant committees prior to the meetings with the representatives of the reporting states.

The International Labour Organisation (ILO) gives membership status to representatives of workers' and employers' organisations under its tripartite structure (see II.§1.D) and it has in recent years given observer status to NGOs allowing them to have access to ILO documentation as well as meetings. UNESCO gives NGOs consultative status and allows them to lodge complaints of alleged violations of rights that fall under the field of expertise of UNESCO without themselves having to be the victim.

NGOs also play an active role as regards the different human rights regional bodies such as the Council of Europe (COE), the African Union (AU) and the Organisation of American States (OAS). Under the auspices of the Council of Europe, NGOs hold consultative status similar to the one at the UN. Moreover, NGOs can bring cases to the European Court of Human Rights, but only if they are themselves the victims (Article 34 ECHR). NGOs have contributed to the European case-law by assisting and advising applicants and by providing the European Court of Human Rights with *amicus curiae* briefs (*e.g.* Amnesty International in *Soering* v. *The United Kingdom*). The 1995 Additional Protocol to the European Social Charter Providing for a System of Collective Complaints allows international NGOs with consultative status with the Council of Europe to lodge complaints against states parties that have failed to apply the Charter properly in their domestic systems (Article 1). National NGOs can also lodge complaints, but only if the state party makes a declaration to that effect when or after it becomes party to the Additional Protocol (Article 2). A body heavily dependent on NGO information is the European Committee for the Prevention of Torture. The Committee relies on information from NGOs about which countries and detention centres are a cause of concern, and based on that information the Committee may decide to undertake an on site-visit to the country in question.

Under the OAS, the American Convention on Human Rights permits 'any non-governmental entity legally recognised in one or more member states' of the OAS to lodge petitions about any violations of the Convention. In practice, a handful of NGOs, of which the most important one is CEJIL (Center for Justice and International Law) have become very influential as they represent most of the victims and bring the majority of cases to the Inter-American Commission and the Inter-American Court of Human Rights.

Under the AU, NGOs play a crucial role and have provided substantial support to the African Commission on Human and Peoples' Rights. The African Charter on Human and Peoples' Rights recognises the role of NGOs in several

articles even though it does not always mention them specifically. Article 45(1)(a) requires the Commission to promote human and peoples' rights by encouraging 'national and local institutions concerned with human rights' and Article 45(1)(c) states that the Commission should 'co-operate with other African and international institutions concerned with the promotion and protection of human rights'. Moreover, Article 55 allows NGOs to submit communications to the African Commission without requiring that the organisation itself be the victim of the alleged violation. Furthermore, many NGOs have been granted observer status that allows them to participate in the sessions of the Commission, access documentation and information and propose items for the Commission's agenda.

As has been highlighted above, NGOs play a significant role in the human rights arena. They have made important contributions to human rights standard setting through their active involvement in the drafting of international treaties such as the Convention on the Rights of the Chile and the Rome Statue of the International Criminal Court. They have also helped strengthen supervisory mechanisms by providing reliable information to supervisory bodies both at the international and regional level and many NGOs help advise and represent individuals who have suffered human rights violations. All of these factors have contributed to making the work of NGOs essential to the promotion and protection of human rights.

NON-GOVERNMENTAL ORGANISATIONS: A VOICE FOR THE VOICELESS

In striving to influence states and other socio-economic actors to prioritise social, humanitarian and/or human rights concerns, Non-Governmental Organisations or NGOs, as they are commonly known, collectively stand as a powerful voice for the disempowered. Employing a wide range of techniques from behind the scenes, including persuasion to 'name and shame reports' and civil society/media campaigns, NGOs are non-profit organisations neither created nor controlled by states, corporate or military interests. Guided by principles of 'natural justice' and motivated to protect and promote the inherent dignity of human kind, NGOs fulfil a broad range of social/development functions originating from the expressed needs of people.

Relating in varying degrees of opposition to or in concordance with state interests, due to their diverse constituencies, varying sizes, operational strategies, structures, ideologies, specialisations and sources of funding, it is not possible to accurately describe 'average' NGOs. They may specialise in a specific technical/scientific field, restrict their activities to political advocacy on the local, national, regional and/or international levels, operate for multiple purposes and/or base their operations on religious or secular values. Whatever their objectives, structure and auspices, the majority of NGOs in democratic societies devote attention to humanitarian/human rights service, advocacy, and/or social change efforts. Many target the protection and promotion of

groups that are marginalized by state programs: women; the aged; physically and mentally disabled persons; the poor; and various social groups marginalised by virtue of their race, sexual orientation, religion, ethnicity, caste and/or social class etc.

Generally speaking, NGOs may be classified as follows:

Policy Advocacy Groups - serve as voices for local, national, regional and/or international interests that tend to be politically ineffective (the environment, those affected by HIV/AIDS and/or those living in extreme poverty);

Service Providing Organisations - engage in the provision of a broad spectrum of essential services to populations that the state fails to reach; and

Community Associations - provide information, assistance and leadership to communities and bridge gaps between public institutions and local needs.

While most NGOs operate in the interests of protecting and promoting human dignity, attention should also be drawn to the following types of organisations:

Business Non-Governmental Organisations (BINGOs) have expropriated the form and structure of NGOs in the name of promoting corporate interests even when such interests clash with human rights and/or social welfare concerns; and

Government Non-Governmental Organisations (GONGOs), similar to BINGOs except they promote state interests.

As the humanitarian, social service and human rights 'conscience of States', NGOs have changed the terms and conditions under which local, national, regional and international public policy is formulated. Through persuasion, persistence and widespread media exposure, NGOs have ensured and continue to ensure that humanitarian and human rights concerns are a major focus before the global community. As such human rights concerns were virtually unknown as guidelines for state conduct when, in the days following World War II, NGOs fought for the inclusion of such rights as core elements of the 1944 United Nations Charter. Indeed, throughout the history of the United Nations, NGOs have played a leading role in the creation of international standards and legally binding treaties that incorporate these standards. Furthermore, NGOs have and will continue to be central in the process of developing implementing organs to these treaties and, completing the cycle, in providing the essential documentary evidence to bring these organs to life. Functioning as a distinctive force influencing local, national, regional and international state policy and as an intermediary through which principles of human rights and humanitarian values are voiced, NGOs have progressively come to occupy an essential (and necessary) stratum within the global community.

Edwin Berry

B. The role of human rights defenders

Positive developments in the field of human rights are to a substantial extent the result of the unrelenting efforts of thousands of individuals who, through their activism, through raising their voice, through their active membership of NGOs and through their personal courage have defended human rights and brought the issue to the attention of the world.

Promoting respect for human rights in countries where grave violations take place is often a dangerous enterprise. Human rights defenders risk their lives, sometimes disappear or are tortured; nevertheless, thousands of individuals around the world put their lives at stake every day for the protection and promotion of human rights and fundamental freedoms. Courageous and persevering these individuals come from all spheres of society: Lawyers who seek to ensure that human rights violations do not go unpunished; journalists who denounce crimes in which their government or military are involved; doctors who treat victims of torture and want to bring the perpetrators to justice; trade unionists, representatives of churches and religious communities, mothers, students, and indigenous groups. The Mothers of Argentina's Plaza de Mayo in the 1980s and the trade unionists in Gdansk, Poland, the demonstrators in Prague in 1989, the students at the Tiananmen Square in 1989 and in the streets of Jakarta in 1998 all show that initiatives by individuals can bring about peaceful change and improvement of human rights and fundamental freedoms.

Those who defend the rights of others often become victims of human rights violations themselves. Human rights defenders and their families risk to be defamed, threatened, expelled, arbitrarily arrested, convicted of 'subversive' activities, mentally and physically tortured or even murdered. Some people who are considered 'undesirable' disappear forever.

The UN General Assembly paid tribute to the commitment of human rights defenders in 1998, when it adopted the Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognised Human Rights and Fundamental Freedoms. The work on this declaration first began in 1984 by the UN Commission on Human Rights, and was eventually adopted by consensus in the General Assembly. It is the first United Nations instrument setting out existing international standards and applying them to the work and protection of human rights defenders, as well as recognising the legitimacy of their work.

In August 2000, the UN Commission on Human Rights requested the appointment of a Special Representative of the Secretary-General on Human Rights Defenders to report on the situation of human rights defenders in all parts of the world and on possible means to enhance their protection in full compliance with the Declaration. In her 2003 annual report on the global situation of human rights defenders, the Special Representative discusses two related concerns: the use of security legislation against human rights defenders, and the role and situation of human rights defenders in emergencies.

Several international organisations also seek to protect human rights defenders. The Committee on Legal Affairs and Human Rights of the Parliamentary Assembly of the Council of Europe monitors the extent to which human rights defenders in its member states are permitted to carry out their work. The Office of the OSCE Representative on Freedom of the Media also plays an important role in protecting human rights defenders.

Lastly, mention should be made of NGOs who work to protect human rights defenders themselves. Amnesty International and Reporters Without Borders both send appeals and petitions on behalf of individual human rights defenders facing specific threats in order to protect them and to send an important signal to policy makers.

Many states recognise the importance of the role of individuals in the promotion of human rights. Individual governments intervene (through *demarchés* and political pressure) regularly on behalf of individuals. Well-known are, for example, the cases of Nelson Mandela (South Africa), Aung San Su Kyi (Myanmar) and Salman Rushdie (Iran/UK). International fora often intervene on behalf of individuals, particularly if the individual(s) concerned show outstanding courage and initiative, or fulfil a symbolic function. Although, in its first twenty years, the UN Commission on Human Rights discussed only serious violations and naming of individuals or even states was avoided; this has now changed. In 1983, the UN Commission on Human Rights adopted a resolution on an individual case for the first time, asking for the release of Malawians Mr. Orton and Mrs. Vera Chirwa. Mr Orton was abducted from Zambia in 1981 where he lived as a refugee. He was sentenced to death by a 'traditional' court, tortured and kept in jail until he died in prison in November 1992. On 24 January 1993 Vera Chirwa was finally released from prison after pleas from NGO's and diplomats for more than ten years. For Orton Chirwa international efforts did not have much effect, but he will be remembered as his actions were exemplary and his distressing fate prompted the UN Commission on Human Rights to include individuals in their deliberations.

C. The role of multinational enterprises

At the dawn of the 21st century, one of the most significant changes in the human rights debate is the increased recognition of the link between business and human rights. States are to a greater extent being held responsible for breaches of obligations under international human rights law. Women's rights activists have long fought for 'private sphere human rights' with regard to state obligations to prevent domestic abuse; and in an era of privatisation of public services, private entities are taking on roles previously held by the state. Local and international companies can now wield immense power and have a direct impact on

governmental policies and the enjoyment of human rights. This has led to the recognition that business has an obligation to contribute to the promotion and protection of human rights.

The Preamble of the Universal Declaration of Human Rights sets out that 'every individual and every organ of society' shall strive to promote respect for human rights and fundamental freedoms. Multinational companies and businesses, as organs of society, have an important role to play in securing observance of human rights. Companies have, as a minimum, responsibilities towards: a) their employees: rights of employees must be ensured, for instance, freedom from discrimination, the right to life and security, freedom of association and collective bargaining, the right to join and form trade unions, freedom from slavery, fair working conditions and abolition of child labour for both companies and their business partners; and b) those who are affected by their operations: for example, many multinationals hire the services of private security companies and they have a duty to ensure that the security personnel working for them do not violate human rights. They also have a duty to address the impact of their operations on vulnerable groups such as indigenous peoples and migrant labourers. In addition, issues such as corruption and bribery serving to deprive persons of their human rights need to be addressed.

While international law requires states to prohibit and punish certain actions of private actors one may argue that companies should have a wider international responsibility. The argument can be made that if the state is responsible for preventing certain actions by private actors, the conduct itself is indirectly prohibited by international law. Furthermore, companies influence governments' policies on various issues and have a moral if not legal responsibility to use this influence to further policies and actions promoting human rights; with greater power should come greater responsibility.

Efforts have been made to formulate the responsibilities of businesses in regard to their working environment and several specific international standards, declarations and codes of conduct have been drafted. General human rights standards also apply. Relevant in the context of human rights and business are, for instance:

- The ILO Conventions and Recommendations on labour standards;
- ILO Declaration on Fundamental Principles and Rights at Work;
- UN Secretary-General's Global Compact;

In addition, mention should be made of the United Nations Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights (2003) set out in their preamble that states have the primary responsibility to promote, secure and protect human rights, but that:

> [W]ithin their respective spheres of activity and influence, transnational corporations and other business enterprises have the obligation to promote, secure the fulfilment

of, respect, ensure respect of and protect human rights recognised in international as well as national law, including the rights and interests of indigenous peoples and other vulnerable groups.

Similarly, the 'Global Compact', launched by UN Secretary General Kofi Annan in 1999, calls upon business to 'support and respect the protection of international human rights within their sphere of influence and [to] make sure their own corporations are not complicit in human rights abuses'. A tenth principle was added to the Global Compact in June 2004.

THE GLOBAL COMPACT

The Global Compact, launched by the Secretary-General at the 1999 annual meeting of the World Economic Forum, challenges individual corporations and representative business associations to support the nine principles listed below which emanate from universally agreed standards found in United Nations documents.

Human Rights:

1. Businesses should support and respect the protection of international human rights within their sphere of influence; and
2. Make sure their own corporations are not complicit in human rights abuses.

Labour:

3. Businesses should uphold the freedom of association and the effective recognition of the right to collective bargaining;
4. The elimination of all forms of forced and compulsory labour;
5. The effective abolition of child labour;
6. The elimination of discrimination in respect of employment and

Environment:

7. Businesses should support a precautionary approach to environmental challenges;
8. Undertake initiatives to promote greater environmental responsibility; and
9. Encourage the development and diffusion of environmentally friendly technologies.

Anti-Corruption:

10. Businesses should work against all forms of corruption, including extortion and bribery.

Multilateral guidelines such as the OECD Guidelines for Multinational Enterprises and the ILO Tripartite Declaration of Principles on Multinational Enterprises are also important, as well as global stakeholder initiatives, for

instance, Amnesty International's Human Rights Guidelines for Companies, the Global Sullivan Principles, Social Accountability 8000 and the Ethical Trading Initiative. Furthermore, several case-specific stakeholder initiatives have been established, for instance, actions recommended by Human Rights Watch regarding the oil industry in Nigeria, and Business Principles for Operations in China agreed to by a group of companies and NGOs in the United States.

WHAT THE COMMISSION ON HUMAN RIGHTS SAYS ...

Globalisation should be guided by the fundamental principles that underpin the corpus of human rights, such as equality, participation, accountability, non-discrimination, at both the national and international levels, respect for diversity and international co-operation and solidarity.

Commission on Human Rights resolution 'Globalisation and its impact on the full enjoyment of human rights' (E/CN.4/RES/2003/23)

In recent years, a number of companies have responded to the call for increased accountability by beginning to incorporate concern for human rights into their daily operations. This development is demonstrated through several recent trends such as: a) the proliferation of corporate codes of conduct protecting human and labour rights of workers; b) inclusion of human rights and references to the UDHR into business principles; c) growing attention paid by human rights organisations, consumers and the media to the impact multinationals have on human rights; d) increased dialogue between companies and stakeholders groups concerned with human rights; and e) discourse about possible imposition of trade sanctions on nations grossly disregarding international human rights standards.

Several cases brought before international mechanisms supervising human rights standards indicate that state responsibility for actions of non-state actors is being established. However, the accountability of multinational corporations is a very complex issue. Most states are dwarfed by multinational companies and many are in dire need of foreign investment. Many countries do not have the means to ensure compliance by corporations; others are reluctant to restrain international companies and thereby risk that the companies move to countries where less stringent human rights regulations apply. Others argue that economic gains brought by investment by these companies contribute to the promotion of economic and social rights and that enjoyment of other rights will follow automatically. At times governments actively assist companies by deploying security forces and in extreme cases governments grant corporations *de facto* control over territories where the companies wield state-like power and corrupt state agents reap the benefits. Furthermore, repressive governments may need

the funds and materials supplied by the multinationals to stay in power.

The complexity of the operations of multinationals is another important factor that results in it being difficult to hold them accountable. Companies are becoming ever more multifarious; headquartered in one country, with shareholders in another and operating globally. It is increasingly difficult for states to regulate their activity or to identify who is responsible for what and where. This leads to reluctance to regulate, and when the host-state does not regulate the company, others, including the state of nationality, may abstain from regulation, based on the extraterritorial nature of the acts.

While the international community has taken steps towards establishing the responsibility of companies for securing observance of human rights for persons within their sphere of influence, the operations of many international businesses still leave much to be desired. In order to generate stronger adherence to international norms for human rights protection, civil society, the private sector, national governments and international organisations have to concert their efforts towards accountability; national governments need to commit, in co-operation with the private sector, to embed norms and standards into national legislation where more possibilities for enforcement exist.

GLOSSARY

This glossary gives equivalents of commonly used human rights terms and relevant institutions in three languages - English, French and Spanish. A list of common Latin terms is also included.

1. General terms

asylum seeker
demandeur d'asile
solicitante de asilo

civil rights
droits civils
derechos civiles

code of conduct
code de conduite
código de conducta

collective rights
droits collectifs
derechos colectivos

cultural rights
droits culturels
derechos culturales

refugee
réfugié
refugiado

derogation of human rights
dérogation aux droits de l'homme
derogación de derechos

displaced persons
personnes déplacées
desplazados

due process rights
droit à un procès équitable
derecho a un debido proceso legal

economic rights
droits économiques
derechos económicos

state of emergency
état d'exception
estado de excepción

fundamental rights
droits fondamentaux
derechos fundamentales

grounds for derogation/suspension (of certain rights)
motifs de dérogation/suspension (de certain droits)
causas de derogación/suspensión (de determinados derechos)

human rights
droits de l'homme
derechos humanos

human rights violations
violations des droits de l'homme
violaciones de los derechos humanos

individual petition
requête individuelle
petición individual

individual rights
droits individuels
derechos individuales

interference in internal/domestic affairs
ingérence dans les affaires intérieures
injerencia en los asuntos internos

international armed conflict
conflit armé international
conflicto armado internacional

international humanitarian law
droit humanitaire international
derecho internacional humanitario

inter-state complaint
requête interétatique
demanda interestatal

Internally displaced persons
Personnes déplaces dans leur propere pays
Personas internamente desplazados

migrant
migrant
migrante

non-international armed conflict
conflit armé non international
conflicto armado no internacional

non-derogable rights
droits auxquels il ne peut être dérogé
derechos no derogables

political rights
droits politiques
derechos políticos

right of petition
droit de pétition
derecho de petición

social rights
droits sociaux
derechos sociales

2. Rights

right to self-determination
droit à l'autodétermination
derecho de libre determinación

right to protection against discrimination
droit à la protection contre la discrimination
derecho a la protección contra la discriminación

right to life
droit à la vie
derecho a la vida

right to liberty and security of the person
droit à la liberté et à la sécurité de la personne
derecho a la libertad y a la seguridad personal

right to protection against torture
droit à la protection contre la torture
derecho a la protección contra la tortura

right to protection against slavery or servitude
droit à la protection contre l'esclavage et la servitude
derecho a la protección contra la esclavitud y la servidumbre

right to protection against arbitrary arrest or detention
droit à la protection contre l'arrestation ou

la détention arbitraires
derecho a la protección contra la detención o prisión arbitrarias

right to freedom of movement
droit à la libre circulation
derecho a circular libremente

right to leave a country
droit de quitter un pays
derecho a salir de cualquier país

right to return to one's own country
droit de revenir dans son pays
derecho a regresar a su propio país

right to protection against arbitrary interference with privacy
droit à la protection contre l'immixtion arbitraire dans la vie privée
derecho a la protección contra injerencia arbitraria en la vida privada

right to freedom of religion
droit à la liberté de religion
derecho a la libertad de religión

right to freedom of opinion
droit à la liberté d'opinion
derecho a la libertad de opinión

right to freedom of expression
droit à la liberté d'expression
derecho a la libertad de expresión

right to peaceful assembly
droit à la liberté de réunion pacifique
derecho a la libertad de reunión pacífica

right to freedom of association
droit à la liberté d'association
derecho a la libertad de asociación

right to vote
droit de vote
derecho de voto

right to stand for election
droit d'éligibilité
derecho de ser elegido/de sufragio pasivo

right to equal protection of the law
droit à une égale protection de la loi
derecho a igual protección de la ley

right freely to participate in cultural life
droit de prendre part librement à la vie culturelle
derecho a tomar parte libremente en la vida cultural

right to employment
droit au travail
derecho al trabajo

right to free choice of employment
droit au libre choix du travail
derecho a la libre elección de trabajo

right to just remuneration
droit à une rémunération équitable
derecho a una remuneración equitativa

right to an adequate standard of living
droit à un niveau de vie suffisant
derecho a un nivel de vida adecuado

trade union rights
droits syndicaux
derechos sindicales

right to strike
droit de grève
derecho de huelga

right to social security
droit à la sécurité sociale
derecho a la seguridad social

right to food
droit à l'alimentation
derecho a la alimentación

right to clothing
droit à l'habillement
derecho al vestido
right to housing
droit au logement
derecho a la vivienda

right to medical care
droit aux soins médicaux
derecho a la asistencia médica

right to education
droit à l'éducation
derecho a la educación

3. Treaties and declarations (by forum)

United Nations

Charter of the United Nations
Charte des Nations Unies
Carta de las Naciones Unidas

International Bill of Rights
Charte Internationale des droits de l'homme
Carta Internacional de Derechos Humanos

Universal Declaration of Human Rights
Déclaration universelle des droits de l'homme
Declaración Universal de Derechos Humanos

International Covenant on Civil and Political Rights
Pacte international relatif aux droits civils et politiques
Pacto Internacional de derechos civiles y políticos

Optional Protocol
Protocole Facultatif
Protocolo Facultativo

International Covenant on Economic, Social and Cultural Rights
Acte international relatif aux droits économiques, sociaux et culturels
Pacto Internacional de derechos económicos, sociales y culturales

Proclamation of Teheran
Proclamation de Téhéran
Declaración de Teherán

International Convention on the elimination of all forms of racial discrimination
Convention internationale sur l'élimination de toutes formes de discrimination raciale
Convención Internacional sobre la eliminación de todas las formas de discriminación racial

Convention on the Elimination of All Forms of Discrimination against Women
Convention sur l'élimination de toutes les formes de discrimination à l'égard des femmes
Convención sobre la eliminación de todas las formas de discriminación contra la mujer

Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
Convention contre la torture et autres peines ou traitements cruels, inhumains ou dégradants
Convención contra la tortura y otros tratos o penas crueles, inhumanos o degradantes

Code of Conduct for Law Enforcement Officials
Code de conduite pour les responsables de l'application des lois
Código de Conducta para funcionarios encargados de hacer cumplir la ley

Principles of Medical Ethics relevant to the Role of Health Personnel, Particularly Physicians, in the Protection of Prisoners and Detainees against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
Principes d'éthique médicale applicables au rôle du personnel de santé, en particulier des médecins, dans la protection des prisonniers et des détenus contre la torture et autres peines ou traitements cruels, inhumains ou dégradants
Principios de Etica Médica aplicables a la función del personal de salud, especialmente los médicos, en la protección de personas presas y detenidas contra la tortura y otros tratos o penas crueles, inhumanos o degradantes

Convention relating to the Status of Refugees
Convention relative au statut des réfugiés
Convención sobre el estatuto de los refugiados

Convention on the prevention and punishment of the crime of genocide
Convention pour la prévention et la répression du crime de génocide
Convención para la prevención y la sanción del delito de genocidio

Council of Europe

Statute of the Council of Europe
Statut du Conseil de l'Europe
Estatuto del Consejo de Europa

European Convention for the Protection of Human Rights and Fundamental Freedoms, with Protocols
Convention européenne de sauvegarde des droits de l'homme et des libertés fondamentales, avec protocoles annexes
Convenio Europeo para la Protección de los Derechos Humanos y de las Libertades Fundamentales, con protocolos

European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment
Convention européenne pour la prévention de la torture et d'autres peines ou traitements inhumains ou dégradants
Convención europea para la prevención de la tortura y de otras penas o tratamientos inhumanos o degradantes

European Social Charter
Charte sociale européenne
Carta Social Europea

EC/EU

Single European Act
Acte Unique européen
Acta Unica Europea

Declaration on Human Rights
Déclaration sur les droits de l'homme
Declaración sobre los derechos humanos

Declaration against Racism and Xenophobia
Déclaration contre le Racisme et la Xénophobie
Declaración contra el Racismo y la Xenofobia

Code of Conduct for Transnational Corporations
Code de conduite pour les sociétés transnationales
Código de conducta para las empresas multinacionales

Lomé Conventions
Conventions de Lomé
Convenciones de Lomé

Schengen Agreement
Accords de Schengen
Acuerdo de Schengen

CSCE/OSCE

Final Act of the Conference on Security and Co-operation in Europe (Helsinki Final Act)
Acte Final de la Conférence sur la sécurité et la coopération en Europe (Acte Final d'Helsinki)
Acta Final de la Conferencia sobre la seguridad y la cooperación en Europa (Acta Final de Helsinki)

Concluding Document of the Madrid Meeting of Representatives of the Participating States of the Conference on Security and Co-operation in Europe, *etc*
Document de clôture de la réunion de Madrid des représentants des Etats ayant participé à la Conférence sur la sécurité et la coopération en Europe, *etc*
Documento de clausura de la reunión de Madrid de los representantes de los estados participantes en la CSCE, *etc*

4. Other treaties and declarations

American Convention on Human Rights
Convention américaine relatif aux droits de l'homme
Convención Americana sobre derechos humanos

American Declaration of the rights and duties of man
Déclaration américaine des droits et devoirs de l'homme
Declaración Americana de los derechos y deberes del hombre

African Charter on human and peoples' rights
Charte africaine des droits de l'homme et des peuples
Carta Africana de derechos humanos y de derechos de los pueblos

Syracuse Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights
Principes de Syracuse sur les clauses de limitation et de dérogation du Pacte international relatif aux droits civils et politiques
Principios de Siracusa sobre las disposiciones de limitación y derogación del Pacto Internacional de derechos civiles y políticos

Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights
Principes du Limbourg sur l'application du Pacte international relatif aux droits économiques, sociaux et culturels
Principios de 'Limburg' sobre la aplicación del Pacto Internacional de derechos económicos, sociales y culturales

Geneva Conventions (Red Cross)
Conventions de Genève (Croix-Rouge)
Convenciones de Ginebra (Cruz Roja)

5. Fora

United Nations

General Assembly
Assemblée générale
Asamblea General

Special Committee on Decolonisation
Comité spécial sur la décolonisation
Comité Especial sobre la Descolonización

Special Committee against apartheid
Comité spécial contre l'apartheid
Comité Especial contra el apartheid

Special Committee to investigate Israeli practices affecting human rights of the population of the occupied territories
Comité spécial chargé d'enquêter sur les pratiques israéliennes affectant les droits de l'homme de la population des territoires occupés
Comité Especial encargado de investigar las prácticas israelíes que afectan a los derechos humanos de la población de los territorios ocupados

International Law Commission
Commission du droit international
Comisión del derecho internacional

UN High Commissioner for Refugees
Haut Commissaire des NU pour les réfugiés
Alto Comisionado de las NU para los Refugiados

Economic and Social Council
Conseil économique et social
Consejo Económico y Social

Commission on the Status of Women
Commission de la condition de la femme
Comisión de la condición jurídica y social de la mujer

Commission for Social Development
Commission du développement social
Comisión de desarrollo social

Committee on crime prevention and control
Comité pour la prévention du crime et la lutte contre la délinquance
Comité de prevención del delito y lucha contra la delincuencia

Committee on Narcotic Drugs
Comité des stupéfiants
Comité de estupefacientes

Commission on Human Rights
Commission des droits de l'homme
Comisión de derechos humanos

Sub-Commission on the promotion and protection of human rights
Sous-commission de la promotion et de la protection des droits de l'homme
Subcomisión para la promoción y protección de los Derechos Humanos

Special Rapporteur on Summary or Arbitrary Executions
Rapporteur spécial sur les exécutions sommaires ou arbitraires
Relator Especial sobre las ejecuciones sumarias o arbitrarias

Special Rapporteur on Torture
Rapporteur spécial sur la torture
Relator Especial sobre la tortura

Special Rapporteur on the Elimination of All Forms of Religious intolerance
Rapporteur spécial sur l'élimination de toutes les formes d'intolérance religieuse
Relator Especial sobre la eliminación de todas las formas de intolerancia religiosa

Working Group on Enforced or Involuntary Disappearances
Groupe de travail sur les disparitions forcées ou involontaires
Grupo de trabajo sobre desapariciones forzadas o involuntarias

Special Representative of the Secretary-General of the United Nations
Représentant spécial du Secrétaire général des Nations Unies
Representante Especial del Secretario General de las Naciones Unidas

Committee on the Elimination of Racial Discrimination
Comité pour l'élimination de la discrimination raciale
Comité para la eliminación de la discriminación racial

Human Rights Committee
Comité des droits de l'homme
Comité de Derechos Humanos

Committee on the Elimination of Discrimination Against Women
Comité pour l'élimination de la discrimination à l'égard des femmes
Comité para la eliminación de la discriminación contra la mujer

Committee on Economic, Social and Cultural Rights
Comité des droits économiques, sociaux et culturels
Comité de derechos económicos, sociales y culturales

Centre for Social Development and Humanitarian Affairs
Centre pour le développement social et les affaires humanitaires
Centro de desarrollo social y asuntos humanitarios

International Labour Organisation (ILO)
Organisation intenationale du travail (OIT)
Organización Internacional del Trabajo (OIT)

International Labour Conference
Conférence internationale du travail
Conferencia Internacional del Trabajo

Committee on Freedom of Association
Comité de la liberté syndicale
Comité de la libertad de asociación

Office of the High Commissioner for Human Rights
Haut Commissariat aux droits de l'homme
Oficina del Alto Comisionado para los Derechos Humanos

United Nations Educational, Scientific and Cultural Organisation
Organisation des Nations Unies pour l'éducation, la science et la culture
Organización de las Naciones Unidas para la Educación, la Ciencia y la Cultura

United Nations Food and Agriculture Organisation
Organisation des Nations Unies pour l'alimentation et l'agriculture
Organización de las Naciones Unidas para la Agricultura y la Alimentación

United Nations Habitat and Human Settlement Foundation
Fondation des Nations Unies pour l'habitat et les établissements humains
Fundación de las Naciones Unidas para el hábitat y los asentamientos humanos

Council of Europe

Council of Europe
Conseil de l'Europe
Consejo de Europa

Committee of Ministers
Comité des Ministres
Comité de Ministros

Ministers' Deputies
Délegués des Ministres
Delegados de Ministros

Parliamentary Assembly
Assemblée Parlementaire
Asamblea Parlamentaria

European Court of Human Rights
Cour européenne des Droits de l'Homme
Tribunal europea de los Derechos Humanos

Committee of Independent Experts
Comité d'experts indépendants
Comité de expertos independientes

Governmental Social Committee
Comité social gouvernemental
Comité social gubernamental

EC/EU

European Communities
Communautés européennes
Comunidades europeas

European Political Co-operation
Coopération politique européenne
Cooperación política europea

European Council
Conseil européen
Consejo Europeo

Council of Ministers
Conseil de ministres
Consejo de ministros

European Parliament
Parlement européen
Parlamento europeo

European Commission (Commission of the European Community)
Commission européenne (Commission des Communautés européennes)
Comisión Europea

Economic and Social Committee
Comité économique et social
Comité económico y social

Court of Justice of the European Communities
Cour de justice des Communautés européennes
Tribunal de Justicia de las Comunidades Europeas

European Development Fund
Fonds européen de développement
Fondo europeo de desarrollo

CSCE/OSCE

Conference on Security and Co-operation in Europe
Conférence sur la sécurité et la coopération en Europe
Conferencia sobre la seguridad y la cooperación en Europa

Meeting of experts on human rights
Réunion d'experts sur les droits de l'homme
Reunión de expertos sobre los derechos humanos

Meeting of experts on human contacts
Réunion d'experts sur les contacts humains
Reunión de expertos sobre los contactos humanos

Cultural Forum
Forum de la culture
Foro de la cultura

Other fora

African Union
Union Africaine
Union Africana

Organisation of American States
Organisation des Etats américains
Organización de los Estados Americanos

Inter-American Commission on Human Rights
Commission interaméricaine des droits de l'homme
Comisión Interamericana de derechos humanos

Inter-American Court of Human Rights
Cour interaméricaine des droits de l'homme
Corte Interamericana de derechos humanos

Organisation of African Unity
Organisation de l'Unité africaine
Organización para la Unidad Africana

African Commission on human and peoples' rights
Commission africaine des droits de l'homme et des peuples
Comisión Africana de derechos humanos y de derechos de los pueblos

International Confederation of Free Trade Unions
Confédération internationale des syndicats libres
Confederación internacional de Organizaciones Sindicales Libres

Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts
Conférence diplomatique sur la réaffirmation et le développement du droit international humanitaire applicable dans les conflits armés
Conferencia diplomática sobre la reafirmación y el desarrollo del derecho internacional humanitario aplicable en los conflictos armados

Non-Governmental Organisations

Amnesty International
Amnesty International
Amnistía Internacional

International Commission of Jurists
Commission internationale de juristes
Comisión Internacional de Juristas

International Conference of the Red Cross
Conférence internationale de la Croix-Rouge
Conferencia internacional de la Cruz Roja

International Committee of the Red Cross
Comité international de la Croix-Rouge
Comité Internacional de la Cruz Roja

Latin and other terms used in the Handbook

ad hoc: For this purpose or occasion
amicus curiae: 'friend of the court' brief
de facto: In fact, in deed or actually
de jure: Of right, lawful
habeas corpus: Writ commanded to the custodian of a person to produce the body now
inter alia: Among other things
jus: Law or right
jus gentium: The law of nations or international law
lex: Law
onus probandi: Burden of Proof
per capita: By the head, equally shared
per se: Taken alone
post: After, later
prima facie: At first sight, on the face of it
quasi: As if, as if it were true
ultra vires: Without power
versus: Against
vis-à-vis: One who is face to face with another

CONTRIBUTORS

The following individuals have contributed to this handbook, with text-boxes on topics in their respective fields of expertise or otherwise.

Edwin Berry BA, LLB BCL. A Canadian national, Edwin studied at Queens University, the University of Toronto and McGill University where he specialised in international relations, advocacy, economic, social and cultural rights and international protection of minority rights. In 2001, Edwin became a legal officer with the International Commission of Jurists in Geneva, Switzerland. He is charged with efforts dedicated to the further protection and promotion of economic, social and cultural rights with a focus on sub-Saharan Africa.

Dr. Joshua Castellino completed his PhD in International Law at the University of Hull, the United Kingdom in 1998. He has worked as a journalist in Bombay, India, covering a wide range of issues including human- and environmental rights. He has published articles on different subjects and is the author of two books: International Law and Self-determination (The Hague: Kluwer 2000) and International Law and the Acquisition of Territory (Dartmouth: Ashgate, 2003). He currently lectures in post-graduate programmes at the Irish Centre for Human Rights, NUI Galway.

Aaron A. Dhir is Assistant Professor at the Faculty of Law of the University of Windsor (Ontario, Canada). He was an NGO Delegate to the UN Working Group Meeting respecting the proposed *International Convention on Protection and Promotion of the Rights and Dignity of Persons with Disabilities* and has particular expertise litigating issues pertaining to mental disability. In 2003, he acted as co-counsel before the Supreme Court of Canada in the forced psychiatric treatment case of *Starson* v. *Swayze*. In 2002, he successfully litigated the case of *Daugherty* v. *Stall*, which, for the first time in Canadian law, enshrined key procedural safeguards for psychiatric patients. He has represented numerous psychiatric patients on issues such as involuntary civil commitment, capacity to consent to treatment/manage finances and community treatment orders.

Dr. Elvira Dominguez completed her PhD in International Law at the University Carlos III de Madrid, Spain in 2004. She is Assistant Professor at the Faculty of Law of the University Carlos III de Madrid. Her main area of

specialisation is public international law with particular emphasis on international organisations and non-conventional procedures to promote and protect human rights. She has worked as consultant to the Office of the United Nations High Commissioner for Human Rights in Geneva, Switzerland. She participates as European expert in the *EU-China Network of Experts on Human Rights.*

María Herminia Graterol Garrido has a LL.B. from Universidad Católica Andres Bello (Caracas-Venezuela) and an LL.M. from Columbia University Law School (Human Rights Fellow, Human Rights Institute). María Herminia is the IWRAW Asia Pacific Programme -Officer International Advocacy. She has been working on women's human rights issues since 1996 and has been involved in various United Nations related processes such as the Beijing+5 and the UN World Conference on Racism, Racial Discrimination, Xenophobia and Related Intolerance. She was the project manager of the Race, Ethnicity and Gender Justice Project in the Americas (American University) and has published various articles on women's human rights.

Dr. Jose Antonio Guevara has a degree in Law from the Iberoamericana University of Mexico City and a PhD. in Human Rights from the Carlos III University of Madrid. His dissertation is on 'Secrets of State and its controls under Democratic Societies'. He is a lecturer in International Human Rights Law, Inter-American Human Rights Law and International Criminal Law at the Iberoamericana University. He is the Co-ordinator of the Human Rights Programme of the Iberoamericana University in Mexico City and Latin American and Caribbean Coordinator of the Coalition for an International Criminal Court.

Dr. Christian Hainzl completed his PhD in Law from the University of Vienna in 2002. Christian has worked with Austrian Development Co-operation and with the German Development Institute. He was an expert member of the Austrian delegation to the 58th, 59th and 60th session of the UN Commission on Human Rights and senior researcher and project manager at the Ludwig Boltzmann Institute of Human Rights (a non-governmental human rights research institution in Vienna, Austria) with a focus on the promotion of human rights within the framework of international development co-operation (1996-2002). He has lectured in the 'European Master's programme on Human Rights and Democratisation' and worked in development related human rights projects in Africa and Asia.

Malcolm Langford completed his Master's in International, European and Comparative Law at the European University Institute, Italy. He is now a senior legal officer at the Center on Housing Rights and Evictions, Switzerland, where he established globally-focused Programmes on the Right to Water and ESC Rights Litigation. He has written on a range of current and legal issues concerning economic, social and cultural rights and conducted various litigation projects in Africa and Europe. He previously worked for the Australian Human Rights and Equal Opportunity Commission on Indigenous Deaths in Custody.

Regina Tamés Noriega has a degree in Law from the Iberoamericana University of Mexico City and a Masters in International Law from Washington

College of Law, American University. She has worked for the National Human Rights Commission in Mexico and the Inter-American Commission on Human Rights as well as NGOs such as the Center for Reproductive Rights and the Center for Justice and International Law. She currently works for the Mexican office of the High Commissioner for Human Rights of the United Nations.

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African Union (AU)
http://www.africa-union.org/

American Society International Law
http://www.asil.org/resource/humrts1.htm#SectionD

Commission on Human Rights: Country and Thematic Mechanisms, Resolutions and Decisions
http://www.unhchr.ch/html/menu2/2/chr.htm

Committee Against Torture (CAT):Individual complaints, Decisions, Official records and Country Reports
http://www.unhchr.ch/html/menu2/6/cat.htm

Committee on Economic, Social, and Cultural Rights: Country Reports and Other Documents
http://www.unhchr.ch/html/menu2/6/cescr.htm

Committee on the Elimination of Discrimination Against Women (CEDAW): Country Reports and Other Documents
http://www.unhchr.ch/html/menu2/6/cedw.htmhttp://www.un.org/womenwatch/daw/cedaw/committ.htm

Committee on the Elimination of Racial Discrimination (CERD): Individual complaints, Decisions, Official records and Country Reports
http://www.unhchr.ch/html/menu2/6/cerd.htm

Committee on the Rights of the Child (CRC): Country Reports and Other Documents
http://www.unhchr.ch/html/menu2/6/crc.htm

Council of Europe: Human Rights Directorate
http://www.coe.int/T/E/Human_rights/

European Committee for the Prevention of Torture
http://www.cpt.coe.int

European Court of Human Rights
http://www.echr.coe.int

European Union (EU)
http://europa.eu.int/

Global IDP Project
www.idpproject.org

HUDOC Case-Law Collection
http://hudoc.echr.coe.int/

Human Rights Committee: (HRC) Individual complaints, Decisions, Official records and Country
http://www.unhchr.ch/html/menu2/6/hrc.htm

ILOLEX (Database on International Labour Standards)
http://www.ilo.org/ilolex/english/

Inter-American Commission of Women
http://www.oas.org/cim/default.htm

Inter-American Commission on Human Rights
http://www.cidh.oas.org

Inter-American Court of Human Rights
http://www.corteidh.or.cr/

International Committee of the Red Cross (ICRC)
http://www.cicr.org/eng

Netherlands Institute of Human Rights (SIM)
http://www.law.uu.nl/english/sim/instr/

Organisation of American States (OAS)
http://www.oas.org

OSCE
http://www.osce.org

ReliefWeb
http://www.reliefweb.int/w/rwb.nsf

Southern African Development Community
www.sadc.int

Thesaurus of Economic, Social, and Cultural Rights
http://shr.aaas.org/escr/thesaurus.htm

Tufts University
http://fletcher.tufts.edu/multilaterals.htm

UNESCO
http://www.unesco.org/

United Nations High Commissioner for Human Rights (UNHCHR)
http://www.unhchr.ch/

United Nations High Commissioner for Refugees (UNHCR)
http://www.unhcr.ch

United Nations Treaty Collection
http://untreaty.un.org

University of Minnesota Human Rights Library
http://www1.umn.edu/humanrts/

University of Minnesota
http://www1.umn.edu/humanrts/asylum/refugee_index.html

Selected Non-Governmental Organisations

Bayefski.com: The United Nations Human Rights Treaties
http://www.bayefsky.com/

Canadian Council for Refugees
http://www.web.net/~ccr/fronteng.htm

Center for Housing Rights and Evictions (COHRE)
http://www.cohre.org

ESCR-NET: The International Network for Economic, Social and Cultural Rights
http://www.escr-net.org/

European Council for Refugees
http://www.ecre.org/

FIAN International (For the Right to Feed Oneself)
http://www.fian.org

Human Rights Campaign: Working for lesbian, gay, bisexual and transgender equal rights
http://www.hrc.org/

Human Rights First
http://www.humanrightsfirst.org/

Human Rights Internet
http://www.hri.ca/

Human Rights Network International
http://www.hrni.org/

INTERIGHTS: The International Center for the Legal Protection of Human Rights
http://www.interights.org/

International Council on Human Rights
http://www.ichrp.org/

International Service for Human Rights
http://www.ishr.ch/

International Women's Rights Action Watch Asia Pacific (IWRAW)
http://www.iwraw-ap.org

Policy Project: Improving reproductive health through policy change
http://www.policyproject.com/

Project Diana: An Online Human Rights Archive at Yale Law School
http://www.yale.edu/lawweb/avalon/diana/

Project on International Courts and Tribunals
http://www.pict-pcti.org/

The Central American Refugee Center
http://www.icomm.ca/carecen/

The Danish Institute for Human Rights
http://www.humanrights.dk/

West African for Refugees and Internally Displaced Persons Network
www.waripnet.org

Yourrights: Liberty's guide online guide to Human Rights Law in England and Wales
http://www.yourrights.org.uk/

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HUMAN RIGHTS REFERENCE HANDBOOK

This *Human Rights Reference Handbook* provides an overview of international human rights protection, including:

- The historical background of human rights
- The principal organisations relevant to human rights
- Substantive human rights in international treaties
- The latest developments in standard-setting and supervision regarding specific rights
- The role of states, nongovernmental organisations and individuals

The *Handbook* forms part of the *Human Rights Education Project* carried out by the University for Peace with funding from the Government of the Netherlands. The aim is to provide rigorous, multicultural materials for teaching and training in human rights for use by educational institutions, governments and nongovernmental organizations. While this book stands alone and can be used independently it should nonetheless be seen as one component of a comprehensive 'package' or kit for human rights education which is comprised of three books: *The Human Rights Reference Handbook*, *Universal and Regional Human Rights Protection: Cases and Commentaries* and *Human Rights Instruments*. A CD-ROM, *Human Rights Concepts, Ideas and Fora*, contains this *Handbook*, the full texts of the documents excerpted in *Human Rights Instruments* and the cases analysed in the *Cases and Commentaries* publication, as well as additional useful materials on a broad spectrum of human rights topics.

MAGDALENA SEPULVEDA holds a PhD from the University of Utrecht and an LL.M from the University of Essex. She was a researcher for the Netherlands Institute for Human Rights, Staff Attorney at the Inter-American Court of Human Rights and Co-Director of the International Law and Human Rights Programme at the University for Peace. She has lectured on human rights law at numerous universities and worked with several civil society organisations in Latin America.

THEO VAN BANNING holds a PhD from the University of Utrecht. He is Counsellor at the Netherlands Embassy in Costa Rica. He was Human Rights Co-ordinator at the Netherlands Foreign Ministry.

GUDRUN D. GUDMUNDSDOTTIR holds a Master's degree from the University for Peace. She is the Director of the Icelandic Human Rights Center and member of the Editorial Board of the Nordic Journal of Human Rights. She was a Programme Officer with the International Law and Human Rights Programme at the University for Peace.

CHRISTINE CHAMOUN holds a Master's degree from the University for Peace. She forms part of the Ecumenical Accompaniment Programme in Palestine and Israel. She was a Programme Officer with the International Law and Human Rights Programme at the University for Peace.

WILLEM J.M. VAN GENUGTEN, PhD. He is Professor of Human Rights Law at the University of Nijmegen and Dean of the Law Faculty of the University of Tilburg. He is Chairperson of the Human Rights Commission in the Advisory Committee on International Affairs of the Netherlands Government.

HREP

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