I

INTERNATIONAL LEGAL SYSTEM AND HUMAN RIGHTS

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INTERNATIONAL LAW AND HUMAN RIGHTS

INTRODUCTION[1]

In order properly to comprehend the structure of international human rights law, a basic understanding of the nature and operations of international law is required. International human rights law is a branch of international law and shares characteristics and sources of international law. The introductory comments on the nature of international law will be particularly useful for those students who have no previous experience of international law. The chapter considers first the nature and definition of international law. As will be established by our discussion, international law has a character distinct from national laws. International law, unlike national systems, does not base itself on a single unified legislature which makes the laws, an executive organ which enforces them and a judiciary with jurisdiction to decide upon any disputes. This *sui generis* character has led international law to develop itself through a range of sources. Treaty law and custom are well established and classed as recognised sources of international law. There are also others, less conventional and traditionally regarded as subsidiary sources, although as this chapter elaborates the role of General Assembly Resolutions has been significant in developing international law. The chapter concludes with a consideration of those norms of international law from which no derogation is permissible.

[1] See A.H. Robertson and J.G. Merrills, *Human Rights in the World: An Introduction to the Study of International Protection of Human Rights*, 4th edn (Manchester: Manchester University Press) 1996; D.J. Harris, *Cases and Materials on International Law*, 5th edn (London: Sweet and Maxwell) 1998, pp. 624–764; A. Cassese, *Human Rights in a Changing World* (Philadelphia: Temple University Press) 1990; M.N. Shaw, *International Law*, 4th edn, (Cambridge: Grotius Publication) 1997, pp. 196–294.

NATURE AND DEFINITION OF INTERNATIONAL LAW

The issues related to the nature and definition of international law are of significant value in establishing the sphere of modern human rights law. As noted in the introductory chapter, international law has traditionally been seen as law that regulates relations between independent and sovereign States, and while the impact of individual human rights has been significant, international law continues to be primarily concerned with the relationship among States. States are the principal subjects of international law, and not only play a key role in the creation of international law but also remain pivotal in its execution and enforcement. International law has been defined by Sir Robert Jennings and Sir Arthur Watts as:

> the body of rules which are legally binding on states in their intercourse with each other. These rules are primarily those which govern the relations of states, but are not the only subjects of international law. International organisations and, to some extent also individuals may be subjects of rights conferred and duties imposed by international law.[2]

Notwithstanding the recognition of a limited role which international organisations and individuals play in the international legal system, the predominant position of States remains firmly established. States retain an exclusive position in the creation of norms of international law. Their exclusive membership of the United Nations ensures their absolute control of the principal organs such as the General Assembly, the Security Council and the Economic and Social Council. It is only the States which could appear before the International Court of Justice in contentious proceedings. As subsequent chapters elaborate, the recognition of international human rights and the enhanced procedural standing has been a product of international treaty agreements, obligations which have been undertaken by States themselves to allow the individual the *locus standi* to make claims to international bodies. In the light of these observations, Professor Cassese's analogy to 'puny Davids confronted by overwhelming Goliaths holding all the instruments of power' when describing the relationship between individuals and States is an accurate one.[3]

CHARACTERISTICS OF INTERNATIONAL LAW

International law is distinct from national legal systems. Unlike domestic legal systems, there is as such no legislature (making laws for the entire international community) nor is there an executive which enforces the decisions

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2 R. Jennings and A. Watts, *Oppenheim's International Law*, 9th edn (Harlow: Longman) 1992, Vol. 1, p. 4.

3 A. Cassese, *International law* (Oxford: Oxford University Press) 2001, p. 4.

made by the legislature.[4] There are also no comparable judicial institutions which would try violations of law and award a judgment against the offender.[5] Our analysis of the position of the United Nations will establish that none of the principal organs are comparable to those that are found on the national level. Thus the United Nations General Assembly, while representing all member States, is not the equivalent to a national legislature. The General Assembly Resolutions, save for limited exceptions, are of a recommendatory nature and as such cannot bind member States. The executive functions of the Security Council are circumscribed both 'legally and politically'.[6] The powers of enforcement actions are triggered not by any mis-demeanour but only through a determination of 'breach of the peace and security'. The consent of State parties remains the critical element in invoking the contentious jurisdiction of the International Court of Justice.

The absence of a legislature, an executive body, and a judiciary with compulsory jurisdiction over all its members, makes international law very different from national legal systems. The absence of a sovereign authority has led critics to doubt whether international law could be termed as 'law'; some would treat it more as an aspect of 'positive morality' than as law. The essence of proper understanding of the nature of law, it is submitted, is to acknowledge its differences from national law and its *sui generis* characteristics. Commenting on these characteristics Professor Shaw notes:

> While the legal structure within all but the most primitive societies is hierarchical and authority is vertical, rather like a pyramid with the sovereign person or unit in a position of supremacy on top, the international system is horizontal consisting of over 180 independent states, all equal in legal theory (in that they all possess the characteristics of sovereignty) and recognising no one in authority over them. The law is above individuals in domestic systems, but international law only exists as between the states. Individuals only have the choice as to whether to obey the law or not. They do not create it. That is done by specific institutions. In international law, on the other hand, it is the states themselves that create the law and obey or disobey it. This, of course, has profound repercussions as regards the sources of law as well as the means for enforcing legal rules.[7]

SOURCES OF INTERNATIONAL LAW

The *sui generis* character of international law is not only evident in its organisation of the system but is also reflected through the manner in which

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[4] Shaw, above n. 1, at p. 3.
[5] Ibid.
[6] P. Malanczuk, *Akehurst's Modern Introduction to International Law*, 7th edn (London: Routledge) 1997, p. 3.
[7] Shaw, above n. 1, at pp. 5–6.

international laws are created. Within domestic legal systems sources of law can be readily identified. In the case of the United Kingdom, we would consider Acts of Parliament as primary sources of law. As noted earlier, within international law there are no institutions comparable to a domestic legislative body. The absence of any single identifiable legislature is substituted by a range of means, all of which essentially emanate from the consent of States. Concomitant with the absence of a legislative organ, there is also a lack of consensus regarding the list of sources of international law. Article 38(1) of the Statute of the International Court of Justice[8] is often invoked as providing sources of international law. Article 38(1) provides as follow

> The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:
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> (a) international conventions, whether general or particular, establishing rules expressly recognized by the contesting States;
> (b) international custom, as evidence of a general practice accepted as law;
> (c) the general principles of law recognized by civilised nations;
> (d) subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

International conventions

The reference in Article 38(1)(a) is directed to international treaties, which are also varyingly described as covenants, charters, pacts, declarations, protocols and conventions. In our study we will come across various examples of treaties, which include the United Nations Charter,[9] ICCPR[10] and ICESCR,[11] the International Convention on the Elimination of All Forms of Racial Discrimination,[12] and the Convention on the Elimination of All Forms of Discrimination against Women.[13] Treaties represent legally binding obligations undertaken by States parties and represent 'a more modern and more

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[8] Adopted at San Francisco, 26 June 1945. Entered into force 24 October 1945, 59 Stat. 1055, 3 Bevans 1179.

[9] Adopted at San Francisco 26 June 1945. Entered into force 24 October 1945. 1 U.N.T.S. xvi; U.K.T.S. 67 (1946); 59 Stat. 1031.

[10] Adopted at New York, 16 December 1966. Entered into force 23 March 1976. GA Res. 2200A (XXI) UN Doc. A/6316 (1966) 999 U.N.T.S. 171, 6 I.L.M. (1967) 368.

[11] Adopted at New York, 16 December 1966. Entered into force 3 January 1976. GA Res. 2200A (XXI) UN Doc. A/6316 (1966) 993 U.N.T.S. 3 (1967), 6 I.L.M. (1967) 360.

[12] Adopted 21 December 1965. Entered into force, 4 January 1969. 660 U.N.T.S. 195. 5 I.L.M (1966) 352.

[13] Adopted at New York, 18 December 1979. Entered into force 3 September 1981. UN GA Res. 34/180(XXXIV), GA. Res. 34/180. 34 GAOR, Supp. (No. 46) 194, UN Doc. A/34/46, at 193 (1979), 2 U.K.T.S. (1989); 19 I.L.M (1980) 33.

deliberate method'[14] of creating laws. The most widely recognised definition of a treaty can be found in the Vienna Convention on the Law of Treaties (1969).[15] According to Article 2, a treaty for the purposes of the Vienna Convention is:

> an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation.[16]

The binding nature of treaties can be likened to contractual agreements in domestic law, although such an analogy is most suited to the so-called treaty-contracts. Treaty-contracts are those treaties which are entered into by two or a few States and deal with a particular matter. By contrast, the law-making treaties create legal obligations, the observance of which does not dissolve treaty obligations. A vital characteristic of law-making treaties is the laying down of rules of general or universal application. It is in this context that the role of treaties as a source of international law is of great significance. Examples of law-making treaties include the United Nations Charter,[17] the Convention on the Prevention and Punishment of the Crime of Genocide,[18]and the Geneva Conventions.[19]

An essential feature of treaty law is that a treaty does not bind non-State parties. However, law-making treaties can in fact bind non-parties, not as a treaty obligation, but as part of customary international law. We shall consider the elements which constitute customary law in the next section. Suffice it to note

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[14] Shaw, above n. 1. at p. 73.

[15] Concluded at Vienna 23 May 1969. Entered into force 27 January 1980; 58 U.K.T.S (1980), Cmnd 7964; 1154 U.N.T.S. 331.

[16] This definition excludes a number of agreements (e.g. unwritten agreements between States and those between States and international organisations). Such an exclusion however does not mean that these agreements cannot be characterised as binding or as treaties. An agreement would be established so long as the parties intend to create binding legal relationship among themselves. See Shaw, above n. 1. at p. 636.

[17] Signed in San Francisco 26 June 1945. Entered into force 24 October 1945. 1 U.N.T.S. xvi; U.K.T.S 67 (1946); 59 Stat. 1031.

[18] Convention on the Prevention and Punishment of the Crime of Genocide, adopted 9 December 1948. Entered into force 12 January 1951. 78 U.N.T.S. 277. Considered below Chapter 11.

[19] See Geneva Convention (No: I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field. Concluded at Geneva, 12 August 1949. Entered into force 21 October 1950. 75 U.N.T.S. 31; Geneva Convention (No: II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea Concluded at Geneva, 12 August 1949. Entered into force 21 October 1950. 75 U.N.T.S. 85; Geneva Convention (No: III) Relative to the Treatment of Prisoners of War (without Annexes) Concluded at Geneva 12 August 1949. Entered into force, 21 October 1950. 75 U.N.T.S. 135. Geneva Convention (No: IV) Relative to the Protection of Civilian Persons in Time of War (without annexes) Concluded at Geneva 12 August 1949. Entered into force 21 October 1950, 75 U.N.T.S. 287.

here that a treaty provision could possess the customary force if it fulfils the basic criterion of the establishment of custom – it could reflect customary law if its text declares or its *travaux préparatoires* state, with the requisite *opinio juris*, that its substance is declaratory of existing law. Another significant feature of treaty law is the freedom which it provides to States in their decision to commit themselves to international legal obligations. In the case of multilateral treaties, while a State may be prepared to accept most of the provisions contained in the treaty, it may object to some articles. In these circumstances, it may decide to make a reservation to those provisions it does not wish to be bound by. The effect of a reservation made by a State party is to exclude or modify the obligations of a treaty provision in its application to that State. Article 2(1)(d) of the Vienna Convention on the Law of Treaties defines a reservation as:

> [A] unilateral statement, however phrased or named, made by a State, when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State.

According to the traditional practice, reservations to multilateral treaties were only accepted as valid if the treaty allowed such a reservation and all the other parties consented to it.[20] However, significant flexibility was added to this practice by the International Court of Justice in its ruling in the *Reservations to the Genocide Convention Case*.[21] In the light of special characteristics of the Genocide Convention, the Court refused to follow the earlier rigid practice. The Court, relying upon the so-called 'Object and purposes' test, stated that it was 'the incompatibility of a reservation with the object and purpose of the Convention that must furnish the criterion'[22] for States that present a reservation as well as for States adhering to it. The indication of the element of subjective judgment has meant disagreements as to the compatibility of a reservation, and consequently the status of a State as a party to a convention. As our subsequent discussion will confirm, the issue of reservations has raised substantial difficulties in not only determining the nature of the obligations undertaken by reserving States, but also the effect such reservations have upon those States which have objected to these reservations. The extensive usage of reservations and the less common deployment of vague expressions to restrict legal obligations are particularly evident with regard to conventions that relate to the rights of women and children.[23]

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[20] C. Redgwell, 'Universality or Integrity: Some Reflections on Reservations to General Multilateral Treaties' 64 *BYIL* (1993) 245, at p. 236; see also the General Comments by the Human Rights Committee, General Comment No. 24 on Reservations to ICCPR, 15 *HRLJ* (1995) 464; 2 *IHRR* (1995) 10.

[21] *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, Advisory Opinion 28 May 1951 (1951 ICJ Reports, 15).

[22] Ibid. p. 124.

[23] See below Chapters 13 and 14.

procedure and evidence.[35] General principles have a notable contribution in human rights law. Many principles, particularly those in the criminal justice system (e.g. presumption of innocence and right to free trial), can be identified as general principles of law.

Subsidiary sources of international law

The subsidiary sources of international law include judicial decisions and the teachings of the most highly qualified publicists. Despite this subsidiary position, as we shall consider in this book, judicial decisions have been of great value in developing human rights law. In this regard judicial decisions made by both domestic and international courts are worthy of consideration. The decisions of the International Court of Justice have no binding force except between the parties and in respect of the particular case.[36] Notwithstanding the absence of universal jurisdiction and without the power to establish precedents, the work of the International Court of Justice has been of great significance in developing many areas of international law.[37] The International Court of Justice has played an instrumental role in the development of fundamental principles such as the right to self-determination. The regional human rights courts, notably the European Court of Human Rights, have dispensed judgments which have added to human rights protection. Similar to international and regional courts decisions, domestic courts have, for example, provided important rulings on key concerns such as torture (see e.g. *Filártiga* v. *Pena-Irala*[38] and the *Pinochet* cases).[39]

The writing and teachings of publicists such as Hugo Grotius had astronomical influence during the formative stages of the modern law of nations. With the rapid growth of treaties and greater recognition of customary law, the influence of jurists in developing international law has declined. Having said

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[35] *Corfu Channel* (*United Kingdom* v. *Albania*) (Merits) Judgment 9 April 1949 (1949) ICJ Reports 4, 18.

[36] Article 59 Statute of the International Court of Justice.

[37] See S. Rosenne, *The World Court: What It Is and How it Works* (Dordrecht: Martinus Nijhoff Publishers) 1995; G. Fitzmaurice, *The Law and Procedure of the International Court of Justice* (Cambridge: Grotius Publications) 1986; for a detailed survey see H. Thirlway, 'The Law and Procedure of the International Court of Justice: 1960–1989' 60 *BYIL* (1989) 1, and its following ten volumes at p. 1; E. Schweib, 'The International Court of Justice and the Human Rights Clauses of the Charter' 66 *AJIL* (1972) 337; N.S. Rodley, 'Human Rights and Humanitarian Intervention: The Case Law of the World Court' 38 *ICLQ* (1989) 321; J. Rehman, 'The Role and Contribution of the World Court in the Progressive Development of International Environmental Law' 5 *APJEL* (2000) 387.

[38] 630 F. 2d 876 (1980); 19 I.L.M 966. US. Circuit Court of Appeals, 2nd Circuit.

[39] *R.* v. *Evans ex p. Pinochet Ugarte* (No. 1) (HL) 25 November 1998 [1998] 3 WLR 1456; *R.* v. *Bow Street Metropolitan Stipendiary Magistrate ex p. Pinochet Ugarte* (No. 2), (HL) 15 January 1999, [1999] 2 WLR 272; *R.* v. *Bow Street Metropolitan Stipendiary Magistrate ex p. Pinochet Ugarte* (No. 3) (HL) 24 March 1999 [1999] 2 WLR 827.

that, as this study establishes, the teachings of jurists remain of value in many areas of international human rights. During the course of this study we shall consistently rely upon authorities such as Oppenheim, Harris and Brownlie.

Additional sources of international law

A notable omission from the list of sources provided by Article 38(1) is a reference to the actions of intergovernmental organisations such as the United Nations (UN), the International Labour Organisation (ILO), the Council of Europe (COE) and the Organisation for Security and Cooperation in Europe (OSCE). We have already considered the significance of United Nations General Assembly Resolutions as sources of international law; the influence of the Assembly's Resolutions in developing and re-shaping principles of international law is a theme referred to throughout this book. Other organs of the United Nations (e.g. the Security Council and the Economic and Social Council) represent important vehicles for advancing norms of international law and international human rights law. The OSCE has adopted a number of instruments which, although not legally binding *per se* (and recognised as 'soft-law'), are important expressions of State practice. Instruments such the Helsinki Final Act have, in the case of the former Soviet Union, been of greater significance than binding human rights treaties.[40] Another example of 'soft-law' is the Standard Minimum Rules for the Treatment of Prisoners which, as we shall see, established important standards in the treatment of prisoners and young offenders.[41]

JUS COGENS AND HUMAN RIGHTS LAW

As noted in our earlier discussion, through treaties or customary law States establish or develop international law. At the same time, the discretion to formulate new laws is not unlimited and there remain certain rules of international law from which no derogation or reservation is permissible. In strict legal terms these rules have attained the status of norms of *jus cogens*. The elaboration of the doctrine of *jus cogens* is provided by the 1969 Vienna Convention on the Law of Treaties.[42] According to Article 53 of the Convention:

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[40] See below Chapter 7.

[41] Standard Minimum Rules for the Treatment of Prisoners, adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held in Geneva 1955, and approved by UN ECOSOC Resolution 663 C (XXIV) 31 July 1957. (Amended – New Rule 95 added – by ECOSOC Resolution 2076 (LXII) 13 May 1977.

[42] For a consideration of the meaning of *jus cogens* see Articles 53 and 64 of the Vienna Convention on the Law of Treaties; see E. Schwelb, 'Some Aspects of International *Jus Cogens* as Formulated by the International Law Commission' 61 *AJIL* (1967) 946; M.M. Whiteman, '*Jus Cogens* in International Law, with a Projected list' 7 *GAJICL* (1977) 609.

A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present convention, a peremptory norm of general international law is a norm accepted and recognised by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.

Two important features of Article 53 need to be noted. First, the provisions of Article 53 are now subsumed into customary law thereby binding all States, parties and non-parties to the Vienna Convention. Secondly, the restrictions contained within Article 53 apply equally to other sources such as customary law or general principles of international law. Although there is no specification as to what constitutes such a norm, fundamental rights such as the right of all peoples to self-determination, and the prohibition of slavery, genocide, torture and racial discrimination represent settled *jus cogens* examples. This point is well established by various commentaries on the subject. According to the Commentary of the International Law Commission's analysis of 'best and settled rules' of *jus cogens*, these include prohibitions of:

(b) a treaty contemplating the performance of any other act criminal under international law and
(c) a treaty contemplating or conniving at the commission of acts, such as trade in slaves, piracy or genocide.[43]

In Professor Brownlie's categorisation, the 'least controversial examples are the prohibition of the use of force, the law of genocide, the principle of racial non-discrimination, crimes against humanity and the rules prohibiting trade in slaves and piracy'.[44] To this, we can add the prohibition on torture, the right to life, and liberty and security of the person.

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[43] See *YBILC* (1966) vol. II. pp. 247–248; I. Brownlie, *Principles of Public International law*, 4th edn (Oxford: Clarendon Press) 1990, p. 513.
[44] Ibid.

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THE UNITED NATIONS SYSTEM AND THE MODERN HUMAN RIGHTS REGIME (1945–)[1]

INTRODUCTION

> If we fail to use the Charter and the organization we have created with it, we shall betray all of those who died in order that we might live in freedom and in safety.... This Charter is no more perfect than our own Constitution, but like that Constitution it must be made to live.[2]

The progression of international human rights law is generally related to the developments that took place at the end of the Second World War. After the war, the United Nations was established to 'save succeeding generations from the scourge of war ... and to reaffirm faith in fundamental human rights'.[3] The United Nations Charter,[4] which represents the constitution of the organisation, is also an international treaty the provisions of which bind all

[1] See P. Alston (ed.), *The United Nations and Human Rights: A Critical Appraisal* (Oxford: Clarendon Press) 1992; S.C. Khare, *Human Rights and United Nations* (New Delhi: Metropolitan Book Co.) 1977; J.P. Humphrey, *Human Rights and the United Nations* (Toronto: Published for the Canadian Institute of International Affairs by Baxter Pub. Co.) 1963; T. Meron, *Human rights law-making in the United Nations: A Critique of Instruments and Process* (Oxford: Clarendon Press) 1986; H.J. Steiner and P. Alston, *International Human Rights in Context: Law, Politics, Morals: Text and Materials*, 2nd edn (Oxford: Clarendon Press) 2000, pp. 592–704; D.J. Harris, *Cases and Materials on International Law*, 5th edn (London: Sweet and Maxwell) 1998, pp. 624–631; M.N. Shaw, *International Law*, 4th edn (Cambridge: Grotius Publication) 1997, pp. 824–931.

[2] President Harry S. Truman, Address to the Delegates in San Francisco at the adoption of the United Nations Charter (1948), cited in R.C. Hottelet, 'Ups and Down in UN History' 5 *Washington University Journal of Law and Policy* (2001) 17 at p. 17.

[3] Preamble of the United Nations Charter (1945).

[4] Adopted in San Francisco 26 June 1945. Entered into force 24 October 1945. 1 U.N.T.S xvi; U.K.T.S 67 (1946); 59 Stat. 1031.

States that are parties to it.[5] The Charter assigns a range of functions to the United Nations, and although there are references to human rights, there has been considerable debate over the priorities which dictate the role and performance of this organisation. The UN Charter contains a number of references to human rights. According to the preamble of the Charter:

> We the peoples of the United Nations, determined ... to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small ... have resolved to combine our efforts to accomplish these aims.[6]

Article 1(3) states that one of the purposes of the United Nations is the promotion and encouragement of respect for human rights and fundamental freedoms for all 'without distinction as to race, sex, language or religion'. According to Article 8, the United Nations shall place no restrictions on the eligibility of men and women to participate in any capacity in its principal and subsidiary organs. According to Article 55, the United Nations shall 'promote universal respect for, and the observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language or religion'. In accordance with Article 56 'all members of the United Nations 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'. Articles 56 and 55 should be read together to formulate what one learned commentator has termed as '[probably] the only clear legal obligations in the Charter on members to promote respect for human rights'.[7] The Charter also devolves authority on the Economic and Social Council (ECOSOC) to initiate studies and reports in relation to 'international economic, social, cultural, educational, health, and related matters and may make recommendations with respect to any such matters to the General Assembly, to the Members of the United Nations, and to the specialised agencies concerned'.[8] According to Article 62(2) ECOSOC may 'make recommendations for the purpose of promoting respect for, and observance of, human rights and fundamental freedoms for all'. The trusteeship system incorporated in the United Nations Charter also carries with it the notion of equality and human rights for all.[9] One of the objectives of the trusteeship system has been

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[5] The substantive provisions of the Charter also bind non-State parties in general international law. See P. Sands and P. Klein, *Bowett's Law of International Institutions*, 5th edn (London: Sweet and Maxwell) 2001, p. 24.

[6] Preamble of the United Nations Charter (1945).

[7] J.P. Humphrey, 'The UN Charter and the Universal Declaration of Human Rights' in E. Luard (ed.), *The International Protection of Human Rights* (London: Thames & Hudson) 1967, 39–56 at p. 42. For further analysis of the human rights obligations see E. Schwelb, 'The International Court of Justice and the Human Rights Clauses of the Charter' 66 *AJIL* (1972) 337.

[8] Article 62(1).

[9] For further consideration of trusteeship see below.

'to encourage respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion, and to encourage recognition of the interdependence of the peoples of the world'.[10]

In addition to these explicit references to human rights, there is more implicit recognition of the role which the UN organs can play in promoting human rights. Thus in accordance with Article 10, the General Assembly may discuss (and has discussed on a number of occasions) matters within the scope of the Charter including human rights issues. Article 66(2), which grants authority to ECOSOC with the approval of the General Assembly to 'perform services', has been used as the basis of various UN human rights initiatives including awards and fellowship programmes and human rights seminars.[11]

LIMITATIONS OF THE CHARTER

Notwithstanding these references to human rights, it must not be assumed that human rights, equality and self-determination were the primary concerns of the politicians who engaged themselves in the drafting of the United Nations Charter.[12] The Dumbarton Oaks proposals of 1944 (representing the blueprint for the establishment of a world organisation) made only one general reference to human rights.[13] The major powers, prominently the United States and the United Kingdom, had been reluctant to sanctify the cause of complete equality and non-discrimination.[14] They were also not fully committed to an international regime of human rights. A Chinese proposal to uphold the principle of equality proved unacceptable to the United States, British and Soviet delegates at Dumbarton Oaks and hence was eliminated.[15] It was eventually the pressure from various NGOs and lobbying from a number of States that highlighted the necessity for greater recognition of human rights provisions in the Charter. At the time of its drafting several proposals were put forward including one from Panama for the incorporation of a bill

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[10] Article 76(c).

[11] Humphrey, above n. 7, at p. 46.

[12] See L. Henkin, 'International Law: Politics, Values and Functions' 216 (IV) Rec. des Cours (1989) 13, at p. 215.

[13] See Ch. 9 Sect. A(I) Dumbarton Oaks Proposals UNCIO iv, 13; Text in L.M. Goodrich, E. Hambro, and A. Patricia Simons, *Charter of the United Nations: Commentary and Documents* (New York: Columbia University Press) 1969, pp. 664–672; A.H. Robertson and J.G. Merrills, *Human Rights in the World: An Introduction to the Study of International Protection of Human Rights*, 4th edn (Manchester: Manchester University Press) 1996, p. 26.

[14] A.D. Renteln, *International Human Rights: Universalism versus Relativism* (Newbury Park: Sage Publications) 1990, p. 21.

[15] P.G. Lauren, 'First Principles of Racial Equality: History and the Politics and Diplomacy of Human Rights Provisions in the United Nations Charter' *5 HRQ* (1983) 1 at p. 2.

of rights within the Charter.[16] None of these proposals materialised. One proposal, however, which was accepted and has proved significant, is for the inclusion in Article 68 of the Charter of an authorisation for ECOSOC to establish a Commission on Human Rights.[17] The Commission which was formed in 1946 held its first meeting in January 1947. After its establishment, ECOSOC entrusted the Commission with the task of submitting proposals, recommendations and reports with a view to formulating an International Bill of Rights.[18]

The Charter does not establish any particular regime of human rights protection and the emphasis is upon the non-intervention in the affairs of member States of the United Nations.[19] The main focus of the Charter is the promotion of international peace and security. With regard to the right to equality and non-discrimination, it must be emphasised that at the time when the Charter came into operation in October 1945 there were serious impediments to the establishment of a regime based on equality and non-discrimination: colonialism persisted in large measure; racial, religious and sex-based apartheid was widely practiced; and the right to self-determination of all peoples, although inscribed in the text of the Charter, was considered by many to be a pious hope rather than a firmly established legal right.[20]

Notwithstanding these shortcomings, over the years the United Nations (as an organisation of almost universal membership) has confirmed its

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16 See J. Huston, 'Human Rights Enforcement Issues at the United Nations Conference on International Organization' 53 *Iowa LR* (1967) 272; P. Alston, 'The Commission on Human Rights' in P. Alston (ed.), above n. 1, at p. 127; Document of the United Nations Conference on International Organisation (1945) vi 545–9; A.H. Robertson and J.G. Merrills, *Human Rights in the World: An Introduction to the Study of International Protection of Human Rights*, 4th edn (Manchester: Manchester University Press) 1996, p. 26; G. Alfredsson and A. Eide, 'Introduction' in G. Alfredsson and A. Eide (eds), *The Universal Declaration of Human Rights: A Common Standard of Achievement* (The Hague: Martinus Nijhoff Publishers) 1999, xxv–xxxv at p. xxvii.

17 J. Humphrey, 'The Universal Declaration of Human Rights: Its History, Impact and Juridical Character' in B.G. Ramcharan (ed.), *Human Rights: Thirty Years after the Universal Declaration: Commemorative Volume on the Occasion of the Thirtieth Anniversary of the Universal Declaration of Human Rights* (The Hague: Martinus Nijhoff Publishers) 1979, 21–37 at p. 21.

18 See ECOSOC Res. 5(I) and 9(II). ECOSOC OR 1st Year, 2nd Session, pp. 400–402.

19 See Article 2(7) of the United Nations Charter, which provides that 'Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII'. Article 2(7) has been given great prominence by States. According to one commentator 'the discussion of the San Francisco Conference on the Charter indicates that there was a general agreement that the general prohibition of intervention in domestic affairs is an overriding principle or limitation, and controls each and every organ of the U.N.' A. Boulesbaa, *The U.N. Convention on Torture and Prospects for Enforcement* (The Hague: Martinus Nijhoff Publishers) 1999, pp. 92–93.

20 Y. Blum, 'Reflections on the Changing Concept of Self-Determination' 10 *Israel Law Review* (1975) 509 at p. 511; R. Emerson, 'Self-Determination' 65 *AJIL* (1971) 459 at p. 471. See below Chapter 12.

influence in international legal and political developments. Since the establishment of the organisation in 1945 the role of the United Nations has been critical in the global promotion and protection of human rights. The role has been performed through a wide range of mechanisms and methods – some proving more effective than the others. The UN consists of the following principal organs: the General Assembly, the Security Council, the Economic and Social and Council (ECOSOC), the International Court of Justice, The Trusteeship Council, and the Secretariat. In order to gain an adequate understanding of the United Nations' involvement with international human rights law, it is important we consider each of its principal organs in turn.

THE GENERAL ASSEMBLY[21]

The General Assembly is the plenary organ of the United Nations currently representing 189 States.[22] The UN Charter establishes the General Assembly as a platform where all States can debate any relevant matter with the Assembly having a broad competence to consider human rights issues. All members of the UN are represented in the General Assembly. Each member may have up to five representatives but only one vote. Decisions on important questions require a two-thirds majority vote, others a simple majority. A non-exhaustive definition of 'important questions' is given in Article 18(2). These include election, suspension or expulsion of members, election of non-permanent members of the Security Council and recommendations in relation to the maintenance of international peace. The single vote for each State means no account is taken of size, economic strength or world influence so the vote of, for example, the USA has the same value as that of, say, Bangladesh. This may be seen as unrealistic but on the other hand it does mean that decisions of the General Assembly are genuinely representative of world opinion.[23]

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[21] See Sands and Klein, above n. 5, at pp. 27–39; S. Bailey, *The General Assembly of the United Nations: A Study of Procedure and Practice* (Praeger: New York) 1964; M.J. Peterson, *The General Assembly in World Politics* (Boston: Allen and Unwin) 1986; B. Sloan, *United Nations General Assembly resolutions in our changing World* (Ardsley-on-Hudson, NY: Transnational Publishers) 1991; J. Andrassy, 'Uniting for Peace' 50 *AJIL* (1956) 563; T. Rowe, 'Human Rights Issues in the UN General Assembly 1946–1966' 14 *Journal of Conflict Resolution* (1970) 425; D.H.N. Johnson, 'The Effect of Resolutions of the General Assembly of the United Nations' 32 *BYIL* (1955–56) 97; A. Cassese, 'The General Assembly: Historical Perspective 1945–1989' in P. Alston (ed.), above n. 1, pp. 25–54; J. Quinn, 'The General Assembly in the 1990s' ibid. pp. 55–106.

[22] For a list of the UN member States and the dates of their membership, see http://www.un.org/Overview/unmember.html (1 May 2002).

[23] For a list of the UN member States and the dates of their membership, see http://www.un.org/Overview/unmember.html (1 May 2002).

The rules relating to the membership of the General Assembly are contained in Article 4 of the Charter. Article 4 provides:

1. Membership in the United Nations is open to all other peace-loving states which accept the obligations contained in the present Charter and, in the judgement of the Organization, are able and willing to carry out these obligations.
2. The admission of any such state to membership in the United Nations will be effected by a decision of the General Assembly upon the recommendation of the Security Council.

In practice, however, the issue of admission and expulsion has been surrounded by political rivalries, particularly during the cold war years.[24] According to Article 5 of the UN Charter a member of the United Nations may be suspended on recommendation of the Security Council. Article 6 allows for the expulsion of a member from the UN where that member has persistently violated principles of the UN. According to the provisions of the Charter, the powers of the General Assembly are (with one exception) of deliberative or recommendatory nature. The exception concerns the internal budgetary obligations of member States.[25] The authority to discuss and make recommendations derives largely from Articles 10–13 of the UN Charter although, as we shall see, the scope of its authority has been enhanced considerably through subsequent developments of international law.

Articles 10 and 11 authorise the General Assembly to discuss 'any questions or on any matters'[26]within the scope of the UN Charter (except where the Security Council is dealing with the same subject)[27] and make appropriate recommendations to the State(s) concerned and the Security Council.[28] In accordance with the mandate provided under Article 13 of the UN Charter, the General Assembly has commissioned a number of studies for the purpose of promoting international cooperation in various fields and 'assisting in the realisation of human rights'.

In strict interpretation of the provisions of the Charter, the General Assembly is not a legislative body. It is not to be treated as a substitute for the Security Council nor has it been accorded a primary role in the promotion and protection of international human rights. A number of factors, however, led the General Assembly to become a forum of enormous significance.[29] During

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[24] See Article 4 UN Charter; G. Abi-Saab, 'Membership and Voting in the United Nations' in H. Fox (ed.), *Membership and Voting in the United Nations* (London: BIICL) 1997, pp. 19–39.
[25] See Article 17 UN Charter.
[26] Article 10 UN Charter.
[27] Article 12 UN Charter.
[28] Article 11(2) UN Charter.
[29] A. Cassese, 'The General Assembly: Historical Perspective 1945–1989' in P. Alston (ed.), above n. 1, pp. 25–54, at p. 29.

the cold war, the inability of the Security Council to attain consensus on areas affecting peace and security provided the General Assembly with the opportunity to exert political authority. A step towards establishing such authority was taken by the Assembly when it adopted the Uniting for Peace Resolution on 3 November 1950.[30] The Resolution provides that:

> if the Security Council, because of lack of unanimity of the permanent members fails to exercise its primary responsibility for the maintenance of international peace and security, breach of the peace, or act of aggression, the General Assembly shall consider the matter immediately with a view to making appropriate recommendations to Members for collective measures, including in the case of breach of peace or act of aggression the use of armed force when necessary, to maintain or restore international peace and security.

Through the adoption of this Resolution, the Assembly assumed a role in the determination of threats to peace and security, including making recommendations on the usage of armed force. While invoked sparingly, the Resolution nevertheless enhanced the position of the Assembly *vis-à-vis* the Security Council. A second factor influential in enhancing the power of the General Assembly arose as a consequence of the increased membership of the new States from Asia and Africa. These new States (which came to form the majority of UN membership) have influenced not only the role and proceedings of the General Assembly but also international law generally. While General Assembly Resolutions are recommendatory and cannot as such establish binding legal obligations, they do present evidence of State practice. State practices provide an important ingredient in the development of binding customary law.[31] The developing world has also used the Resolutions to advance their agenda with regard to international law. In this context it is important to note the highly authoritative General Assembly Resolutions such as the Declaration on the Granting of Independence to Colonial Countries and Peoples (1960)[32] and the Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations (1970).[33] Reference can also be made to other General Assembly Resolutions which have been used to advance the political aspirations of the developing world. These would include *inter alia* the Charter of

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[30] Adopted 3 November 1950, UN GA Res. 377(V), GAOR, 5th Sess. Supp. 20, at 10.

[31] For the elements required to establish customary international law, see above Chapter 1.

[32] Adopted on 14 December 1960. UN GA. Res. 1514 (XV); UN GAOR 15th Sess., Supp. 16, at 66, UN Doc. A/4684 (1961).

[33] Adopted on 24 October 1970, UN GA Res. 2625, 25 UN GAOR, Supp. 28 at 121, UN Doc. A/8028 (1971); 9 I.L.M. (1971) 1292. On the value of General Assembly Resolutions in general international law see B. Sloan, 'General Assembly Resolutions Revisited: (Forty Years Later)' 58 *BYIL* (1987) 39; S.A. Bleicher, 'The Legal Significance of Re-Citation of General Assembly Resolutions' 63 *AJIL* (1969) 444; B. Cheng, 'United Nations Resolutions on Outer Space: "Instant" International Customary Law?' 5 *IJIL* (1965) 23.

Economic Rights and Duties of States[34] the Declaration on the Establishment of a New International Economic Order[35] and the Declaration on the Right to Development[36] containing claims of economic self-determination and sovereignty of national resources.[37]

A distinct, though important role, is played by the General Assembly in preparing, drafting and adopting international treaties. While annexed to General Assembly Resolutions, these treaties are opened for accession by member States and, as legal obligations, bind States which are party to the treaties. The normal Assembly voting procedures are used to adopt these treaties.[38] Examples of such annexations include the International Covenants[39] and the International Convention on the Elimination of All Forms of Racial Discrimination.[40] When considering the implementation mechanism of the various UN sponsored treaties, we see that the General Assembly plays a vital role in receiving and reviewing the compliance of States with their international obligations.[41]

THE SECURITY COUNCIL[42]

The Security Council, like the General Assembly, is one of the principal organs of the United Nations. The Security Council acts as the executive body of the United Nations with its primary responsibility being to maintain international peace and security.[43] The Security Council has fifteen members,

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[34] GA Res. 3281(XXIX) 14 I.L.M. (1975) 251.

[35] GA Res. 3201 (S-VI) 13 I.L.M. (1974) 715.

[36] GA Res. 128, UN GAOR, 41 Sess., Supp. 53 at 186, UN Doc. A/Res/41/128.

[37] See A. Cassese, *International Law* (Oxford: Clarendon Press) 2001, p. 400.

[38] Shaw, above n. 1, at p. 638.

[39] ICCPR. Adopted at New York, 16 December 1966. Entered into force 23 March 1976. GA Res. 2200A (XXI) UN Doc. A/6316 (1966) 999 U.N.T.S. 171; 6 I.L.M. (1967) 368. ICESCR. Adopted at New York, 16 December 1966. Entered into force 3 January 1976. GA Res. 2200A (XXI) UN Doc. A/6316 (1966) 993 U.N.T.S. 3, 6 I.L.M. (1967) 360.

[40] Adopted 21 December 1965. Entered into force, 4 January 1969. 660 U.N.T.S. 195, 5 I.L.M. (1966) 352.

[41] See S. Davidson, *Human Rights* (Buckingham: Open University Press) 1993, p. 67.

[42] See Sands and Klein, above n. 5, at pp. 39–55; S.D. Bailey, 'The Security Council' in P. Alston (ed.), above n. 1, pp. 304–336; S.D. Bailey, *Voting in the Security Council* (Bloomington, Ind.: Indiana University Press) 1969; S.D. Bailey, *The Procedure of the UN Security Council* (Oxford : Clarendon Press) 1988; R. Higgins, 'The Place of International Law in the Settlement of Disputes by the Security Council' 64 *AJIL* (1970) 1; R.A. Brand, 'Security Council Resolutions: When do they Give Rise to Enforceable Legal Rights? The United Nations Charter, the Byrd Amendment and a Self Executing Treaty Analysis' 9 *Cornell International Law Journal* (1976) 298; M.C. Woods, 'Security Council Working Methods and Procedures: Recent Developments' 45 *ICLQ* (1996) 100; B. Fassbender, *UN Security Council Reform and the Right of Veto: A Constitutional Perspective* (The Hague: Kluwer Law International) 1998; D. Sarooshi, *The United Nations and the Development of Collective Security: The delegation by the UN Security Council of its Chapter VII Powers* (Oxford: Clarendon Press) 1999.

[43] See Article 24(1) UN Charter.

five of which are permanent. The permanent members of the Council are China, France, the Russian Federation, the United Kingdom and the United States. The other ten members are elected by the Assembly for two years. They are elected by a two-thirds majority vote of the General Assembly. The UN Charter Article 23(1) refers to equitable geographical distribution and there is an informal agreement that there should be five from Afro-Asian States, one from Eastern Europe, two from Latin America and one from Western Europe and other States (e.g. Canada, Australia). The justification for the five permanent members is that concerted action in the face of opposition from one or more of the major powers would be an unrealistic expectation. The five in question can all be described as major powers. Amendment of the Charter would require the consent of the five concerned[44] and a consensus on who should be included instead would be very hard to obtain. The tacit acceptance that Russia could succeed to the seat that the Charter allocated to the former Soviet Union illustrates a reluctance to open up discussion of the general issue of which of the States are appropriate permanent members.

The Security Council (unlike the General Assembly) does not hold regular meetings. Instead, it can be called together at any time on short notice. Any country (member or non-member) or the Secretary-General may bring to the Security Council's attention a dispute or threat to peace and security. The voting system in the Security Council is different to that of the General Assembly. To pass a resolution in the Security Council, an affirmative vote of nine members is required. However, a negative vote by any of the permanent members on a resolution that relates to a non-procedural matter would veto the resolution.[45] The power to veto resolutions was incorporated into the Charter to prevent the Council taking any substantial decision detrimental to the interests of any of the permanent members. The power of veto was used extensively at the height of the cold war, leading to an inability on the part of the Security Council to take any effective steps to maintain peace and security or to prevent extensive violations of human rights.

According to Article 24 of the UN Charter, member States agree to confer primary responsibility upon the Security Council for the maintenance of

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[44] See Article 108 of the UN Charter.

[45] See Article 27 the UN Charter. Abstention should be distinguished from absence. In 1950 the Soviet Union boycotted meetings because the government of China had not been permitted to take its country's place on the Security Council. At this point the Korean War broke out and the Security Council authorised military action by UN members, action which the Soviet Union would certainly have vetoed if it had been present. It subsequently argued that the action was illegal, as being present and abstaining was very different from not being present at all. On the other hand, Article 28 of the Charter imposes a duty on members to be represented at all times and if the Soviet argument was correct a State could prevent the Council from acting at all by absenting itself. The situation has never been repeated.

international peace and security. By virtue of Article 25, member States undertake to accept and carry out the decisions of the Council. The powers conferred upon the Security Council are elaborated in subsequent chapters of the Charter. Chapter VI (Articles 33–38) assigns recommendatory powers to the Security Council in relation to the peaceful settlement of disputes whereas Chapter VII (Articles 39–51) confers upon the Council the authority to deal with threats to peace, breaches of the peace and acts of aggression. Acting under Chapter VII, the Security Council has an absolute discretion in the determination of whether there exists a threat to peace and security under Chapter VII.[46] The Council also has significant enforcement powers, namely economic sanctions or military action.

The role played by the Security Council under Chapters VI and VIII has important implications for human rights. After the collapse of the Soviet Union and the thaw in East–West relations there had been expectations that the Security Council would work as a more effective body to promote and protect human rights. With the authorisation of the Security Council, allied forces were successful in expelling Iraqi forces from Kuwait. Subsequently the Security Council passed Resolution 688 (1991) against Iraqi repression of the Kurdish people which was relied upon by the allied powers to establish a 'safe-haven' and maintain a 'no-fly zone' in Northern Iraq.[47] The Security Council has also made extensive use of its resolutions and enforcement powers in the territories of former Yugoslavia,[48] Somalia,[49] Haiti[50] and more recently in East Timor. In the absence of an international criminal court, the Security Council also undertook the unprecedented step of establishing ad hoc tribunals for the trials of those accused of gross violations of human rights in Rwanda and the former Yugoslavia.

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[46] See the *Prosecutor* v. *Tadic*, Case IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, paras. 29–30; V. Gowland-Debbas, 'The Relationship Between the International Court of Justice and Security Council in the Light of the Lockerbie Case' 88 *AJIL* (1994) 643 at p. 662.

[47] In this regard note the absence of a specific authorisation by the Security Council to establish the safe-havens. See T.M. Franck, 'When, If Ever, May States Deploy Military Force without Prior Security Council Authorization' 5 *Washington Journal of Law and Policy* (2001) 51 at pp. 62–63; also see Shaw, above n. 1, at pp. 874–875.

[48] See SC Res. 757 (30 May 1992); SC Res. 770 (13 August 1992); SC Res. 787 (16 November 1992); SC Res. 815 (30 March 1993); SC 819 (16 April 1993); SC Res. 824 (1993).

[49] See SC Res. 733 (23 June 1992) adopted at the 3039th mtg. by unanimous vote; SC Res. 751 (24 April 1992) and adopted at the 3069th mtg.; SC Res. 775 (28 August 1992) adopted 3110th mtg. by unanimous vote and SC Res. 794 (3 December 1992) adopted at 3145 mtg.

[50] See SC Res. 841 (16 June 1993); SC Res. 940 (31 July 1994).

THE ECONOMIC AND SOCIAL COUNCIL (ECOSOC)[51]

ECOSOC is concerned with a number of economic and general welfare issues. These include trade, developmental and social matters including population, children, housing and racial discrimination. While the mandate of the ECOSOC covers wide-ranging issues, its actual powers are limited to recommendations which are not binding on States. ECOSOC consists of 54 members, who are elected for a three-year term of office. Until 1991 ECOSOC had two annual sessions, each lasting for four weeks. However, the General Assembly in May 1991 decided that from 1992 ECOSOC would hold an organisational session of up to four days in New York in early February of each year and one substantive session of four to five weeks, to take place, between May and July, and alternate between New York and Geneva. Unlike the position within the Security Council, no provisions are made for the permanent membership of ECOSOC, although in practice the permanent members (within the Security Council) are repeatedly elected.[52] It is also the case that the issue of being elected to the ECOSOC is not as politically volatile as compared to its own subsidiary organs such as the Human Rights Commission. In the ECOSOC sessions it is the usual practice for a State to be represented by its permanent representative stationed either in New York or Geneva. In the light of the rapidly declining prestige of the Council, the most articulate political and governmental representatives prefer to be part of the Commission as opposed to the Council.

According to Article 62 of the UN Charter, ECOSOC may initiate or make studies on a range of subjects and may make recommendations to the General Assembly, members of the UN and to relevant specialised agencies. The UN Charter makes provisions for the ECOSOC to consult NGOs in its work. ECOSOC may also prepare draft conventions and call international conferences. The functional commissions of ECOSOC include the Commission on Human Rights and the Commission on the Status of Women.[53] ECOSOC also

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[51] See D. O'Donovan, 'The Economic and Social Council' in P. Alston (ed.), above n. 1, pp. 107–125; G.J. Margone, *UN Administration of Economic and Social programs* (New York: Columbia University Press) 1966; L.D. Stinebower, *The Economic and Social Council: An Instrument of International Cooperation* (New York, NY: Commission to Study the Organization of Peace) 1946; A. Loveday, 'Suggestions for the Reform of the United Nations Economic and Social Machinery' 7 *International Organization* (1953) 325; W.R. Malinowski, 'Centralization and Decentralization in the United Nations Economic and Social Activities' 16 *International Organization* (1962) 521.

[52] D. O'Donovan, 'The Economic and Social Council' in P. Alston (ed.), above n. 1, pp. 107–125, at p. 108.

[53] In all there are nine functional commissions. Apart from the Commission on Human Rights and the Commission on the Status of Women, there are the following: Statistical Commission, Commission on Population and Development, Commission for Social Development, Commission on Narcotic Drugs, Commission on Crime Prevention and Criminal Justice, Commission on Science and Technology for Development and Commission on Sustainable Development.

has a number of regional commissions[54] and several standing committees and expert bodies.[55] It also runs a number of programmes such as the UN Environment Programme and has established bodies such as the UN High Commissioner for Refugees. The UN work on human rights has focused around ECOSOC and its subsidiary organs, in particular the Commission on Human Rights to which we shall now turn our attention.

The Commission on Human Rights and the Sub-Commission on the Promotion and Protection of Human Rights[56]

The UN Charter requires that ECOSOC 'shall set up Commissions in the economic and social field and for the promotion of human rights'.[57] In its first meeting in 1946 the Council established two functional commissions: the Commission on Human Rights and the Commission on the Status of Women. Over the years the representation of the Commission has grown and it currently consists of 53 individuals who sit in their capacity as governmental representatives.[58] The Commission meets for an annual session of six weeks in Geneva during March and April. The proceedings of the Commission are reported to the General Assembly via ECOSOC.

Since the Commission members are nominated by their governments, their political positions often mirror those of their governments. Professor Harris correctly makes the point that 'the Commission is a highly political animal, with its initiatives and priorities reflecting bloc interests'.[59] By the same token, the presence of governmental representatives and the positions they adopt in the proceeding of the Commission raises the profile and significance of the institution. The initial terms of reference of the Human Rights Commission

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[54] The five Regional Commissions: Economic Commission for Africa (Addis Ababa, Ethiopia), Economic and Social Commission for Asia and the Pacific (Bangkok, Thailand), Economic Commission for Europe (Geneva, Switzerland), Economic Commission for Latin America and the Caribbean (Santiago, Chile) and Economic and Social Commission for Western Asia (Beirut, Lebanon).

[55] The five standing committees and expert bodies are: Committee for Programme and Coordination, Commission on Human Settlements, Committee on Non-Governmental Organisations, Committee on Negotiations with Intergovernmental Agencies and Committee on Energy and Natural Resources. In addition the Council has a number of expert bodies on subjects including development planning, natural resources, and economic, social and cultural rights.

[56] See P. Alston, 'The Commission on Human Rights' in P. Alston (ed.), above n. 1, at pp. 126–210; A. Eide, 'The Sub-Commission on Prevention of Discrimination and Protection of Minorities' ibid. pp. 211–264.

[57] Article 46 UN Charter.

[58] The allocation of these seats is on a geographical basis. The current membership is based on the following: 15 African States, 13 Asian States, 11 Latin American States, 5 Eastern European States and 10 Western European and Other States.

[59] Harris, above n. 1, at p. 628.

were that the Commission should submit proposals, recommendations and reports to ECOSOC concerning:

(a) An international bill of rights
(b) International Declarations or Conventions on Civil Liberties, the Status of women, freedom of information and similar matters
(c) The Protection of Minorities
(d) The Prevention of discrimination on grounds of race, sex, language or religion
(e) Any other matter concerning human rights not covered by items (a), (b), (c), (d).[60]

Further extensions to the mandate of the Human Rights Commission have taken place.[61] Among the Commission's significant achievements has been its standard-setting through preparation of human rights instruments. The list of accomplishments in this regard is extensive. The Jewel in the Crown is the Commission's work in the drafting of the Universal Declaration of Human Rights[62] and the two International Covenants.[63] There are other human rights treaties including the International Convention on the Elimination of All forms of Racial Discrimination (1966),[64] the Convention on the Rights of the Child (1989)[65] and the Convention on the Elimination of All Forms of Discrimination against Women.[66] The Commission has engaged itself in the preparation *inter alia* of the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief,[67] and the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities.[68] In addition, as we shall consider further, it has authorised the setting-up of various working groups and special rapporteurs.

The Commission has a subsidiary organ, the Sub-Commission on the Promotion and Protection of Human Rights. Until 1999, the Sub-

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[60] ECOSOC Res. 5(1) of 16 February 1946 and Resolution 5(11) of 21 June 1946.
[61] ECOSOC Res. E/1979/36.
[62] 10 December 1948, UN GA Res. 217 A(III), UN Doc. A/810 at 71 (1948).
[63] ICCPR. Adopted at New York, 16 December 1966. Entered into force 23 March 1976. GA Res. 2200A (XXI) UN Doc. A/6316 (1966) 999 U.N.T.S. 171; 6 I.L.M. (1967) 368. ICESCR. Adopted at New York, 16 December 1966. Entered into force 3 January 1976. GA Res. 2200A (XXI) UN Doc. A/6316 (1966) 993 U.N.T.S. 3, 6 I.L.M. (1967) 360.
[64] Adopted 21 December 1965. Entered into force, 4 January 1969. 660 U.N.T.S. 195, 5 I.L.M. (1966) 352.
[65] Adopted in New York, 20 November 1989. Entered into force 2 September 1990. UN GA Res. 44/25 Annex (XLIV), 44 UN GAOR Supp. (No. 49) 167, UN Doc. A/44/49 (1989) at 166; 1577 U.N.T.S. 3. 28 I.L.M (1989) 1448.
[66] Adopted at New York, 18 December 1979. Entered into force 3 September 1981. UN GA Res. 34/180(XXXIV), GA. Res. 34/180, 34 GAOR, Supp. (No. 46) 194, UN Doc. A/34/46, at 193 (1979), 2 U.K.T.S. (1989); 19 I.L.M (1980) 33.
[67] Adopted by the General Assembly on 25 November 1981. GA Res. 55, UN GAOR, 36 Sess., Supp. 51 at 171, UN Doc. A/36/684. See below Chapter 10.
[68] Adopted by the General Assembly 18 December 1992, GA Res. 135, UN GAOR 47 Sess. Supp. 49 at 210, UN Doc. A/Res/47/135. 32 I.L.M. (1993) 911. See below Chapter 11.

Commission was known as the Sub-Commission on the Prevention of Discrimination and the Protection of Minorities. The Sub-Commission consists of 26 members who serve in their individual capacity independently of their governments. The Sub-Commission was established by ECOSOC in 1947. The terms of reference under which the Sub-Commission works are:

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

The Sub-Commission members are elected by the Human Rights Commission on regional distribution from among individuals nominated by governments. Unlike the Human Rights Commission, the members of the Sub-Commission work in an independent capacity. The Sub-Commission has one annual session of three weeks (during late July to early August) preceded by working groups lasting for one or two weeks, which are attended by non-governmental organisations and by governmental observers.

The activities of the Commission and the Sub-Commission represent the focal point in terms of the practices and procedures of human rights activities within the United Nations. As this book establishes, the Commission has made a significant contribution to standard-setting, and more recently to the monitoring and implementation of human rights obligations. In addition the Commission has engaged itself in such activities as studies and seminars, fellowship programmes and the provision of advisory services. The Commission has been criticised on several occasions for its political bias and for its lack of sensitivity on major human rights issues. However, Alston's comments are pertinent when he notes that the Human Rights Commission 'has firmly established itself as a single most important United Nations organ in the human rights field, despite its subordinate status as one of several specialised "functional" commissions answerable to the Economic and Social Council and through it, to the General Assembly'.[69]

The petitioning system

For the first twenty years, the Human Rights Commission confined itself to standard-setting mechanisms. In 1947 the Commission adopted the statement (which was subsequently heavily criticised) that it had 'no power to take any

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[69] P. Alston, 'The Commission on Human Rights' in P. Alston (ed.), above n. 1, 126–210 at p. 126.

action in regard to any complaints concerning human rights'.[70] Until 1967 the Commission refused to consider complaints of human rights violations in member States of the United Nations. Substantial issues confronted the domestic policies of major States, including the United States, the United Kingdom and France. These included the existence of colonialism and difficult race relations. In addition, until 1967 it had been anticipated that the Commission would focus on standard setting and that effective implementation of International Covenants would redress the human rights situation. The limitations of review led one critic to note that by mid 1960s the system had become 'the world's most elaborate waste-paper basket'.[71] However, in the 1960s there was also a discernible change in the political environment. A number of States had emerged which were anxious to promote international action against colonialism and racial discrimination. The increased membership of the UN also allowed them to have greater representation in the Commission. In 1966, ECOSOC decided almost to double the size of the original membership of the Commission to 32 members, 20 of whom came from the developing world.[72] Perceiving racial oppression and apartheid as a great threat to world peace, these State representatives were strong advocates of an international petitioning system receiving and acting upon complaints of racial discrimination and apartheid. The successful and rapid adoption of the Convention on the Elimination of All Forms of Racial Discrimination was a major encouragement.

In 1967, ECOSOC passed Resolution 1235 (XLII) which has proved to be of enormous significance. In this Resolution ECOSOC authorised the Human Rights Commission and its Sub-Commission on the Prevention of Discrimination and the Protection of Minorities to 'examine information relevant to gross violations of human rights and fundamental freedoms, as exemplified by the policy of apartheid as practised in the Republic of South Africa ... and racial discrimination as practised notably in Southern Rhodesia, contained in the communications listed by the Secretary-General to [ECOSOC] Resolution 728F' and 'to make a thorough study of situations which reveals a consistent pattern of violations of human rights, and report, with recommendations thereon, to the Economic and Social Council'.[73]

The procedures adopted under Resolution 1235 (unlike Resolution 1503) are not confidential and are of a public nature. They can be commenced by the

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[70] E/259 (1947) paras 21–22; See T.J.M. Zuijdwijk, *Petitioning the United Nations: A Study in Human Rights* (Aldershot: Gower) 1982, pp. 1–14; J.Th. Moller, 'The Right to Petition: General Assembly Resolution 217B' in G. Alfredsson and A. Eide (eds), *The Universal Declaration of Human Rights: A Common Standard of Achievement* (The Hague: Martinus Nijhoff Publishers) 1999, 653–659 at p. 653.

[71] J. Humphrey, 'The Right of Petition in the United Nations' *2/3 Human Rights Journal* (1971) at p. 463.

[72] P. Alston, 'The Commission on Human Rights' in P. Alston (ed.), above n. 1, 126–210 at p. 143.

[73] ESCOR 42nd Sess., Supp. 1 (1967).

Sub-Commission or by a State themselves and operate in variety of ways. These may be country-specific mandates, may consider States with similar patterns of violations or target gross violations of human rights. The resolutions originate in the Sub-Commission and are passed on to the Commission. The Sub-Commission's resolutions can highlight the issue of human rights violation in a particular country. The Sub-Commission may also request the UN Secretary-General to prepare a report on a particular country; this report may contain extensive information.[74] The Commission makes the ultimate decisions as to the action on these resolutions and also retains the authority (subject to the approval of ECOSOC) for the appointment of a rapporteur or any other mechanism for studying a given country situation or acting on a thematic basis.

In reliance upon Resolution 1235, the Commission has established a number of public procedures.[75] These include investigations into alleged violations of human rights in various States. The Commission has also created various working groups, special Rapporteurs and expert bodies to monitor human rights situations. One of the earliest activities in this regard (and indeed the first of the thematic mechanisms) was the establishment of the Working Group on Enforced and Involuntary Disappearances in 1980.[76] Since its establishment, the Working Group has considered 50,000 cases from over seventy countries. The Working Group is mandated to examine questions concerning enforced or involuntary disappearances. Its primary role is to provide assistance to families of the disappeared and detained persons to ascertain the fate of their family members.[77] The Working Group works on individual cases, country reports, and the general phenomenon of disappearances, including the question of impunity. Members of the group have also conducted visits to various countries including Mexico, Bolivia, Peru, the Philippines and Somalia.[78] The Working Group has called for investigations, and the prosecution and punishment of those responsible for disappearances. The contributions and role of the Working Group encouraged the General Assembly to adopt the Declaration on the Protection of All Persons from Enforced Disappearances.[79] The Declaration expanded the Working Group's mandate to monitor compliance with duties under the Declaration, including the obligation to establish civil liability as well as criminal responsibility for disappearances.

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[74] N.S. Rodley, 'United Nations Non-Treaty Procedures for Dealing with Human Rights Violations' in H. Hannum (ed.), *Guide to International Human Rights Practice*, 3rd edn (New York: Transnational Publishers) 1999, 61–83 at p. 63.

[75] Harris, above n. 1, at p. 629.

[76] See N.S. Rodley, *The Treatment of Prisoners in International Law*, 2nd edn (Oxford: Clarendon Press) 1999, pp. 270–276.

[77] See United Nations, *Enforced or Involuntary Disappearances: Fact Sheet* No. 6 (Rev. 2) (Geneva: United Nations), pp. 5–6.

[78] See Rodley, above n. 76, at p. 274.

[79] Adopted by the General Assembly 16 December 1992; GA Res. 133, UN GAOR, 47 Sess., Supp. 49 at 207; UN Doc. A/Res/47/133. 32 I.L.M. (1993) 903.

Another valuable thematic mechanism established under the Resolution 1235 procedure is the Working Group on Arbitrary Detention. The Working Group was set up by the Commission in 1991 and operates under the following mandate:

(a) To investigate cases of detention imposed arbitrarily or otherwise inconsistently with relevant international standards set forth in the Universal Declaration of Human Rights or in the relevant international legal instruments accepted by the States concerned provided that no final decision has been taken in such cases by domestic courts in conformity with domestic law;

(b) To seek and receive information from Governments and intergovernmental and non-governmental organisations, and receive information from the individuals concerned, their families or their representatives

(c) To present a comprehensive report to the Commission at its annual session

The Working Group may investigate cases of arbitrary deprivation of liberty, and accepts communications from detained individuals or their families as well as from governments and intergovernmental and non-governmental organisations (NGOs). It is the only non-treaty based mechanism whose mandate expressly provides for consideration of individual complaints. If the Working Group decides after its investigation that arbitrary detention has been established then it makes recommendations to the government concerned. It transmits these recommendations to the complainant three weeks after sending them to the relevant government. The opinions and recommendations of the Working Group are published in an annex to the report presented by the group to the Commission on Human Rights at each of its annual sessions.

In addition to the thematic mandates accorded to the Working Group on Enforced and Involuntary Disappearances and the Working Group on Arbitrary Deprivation of Liberty, a number of other mandates are in force although the tasks are entrusted to individual experts described varyingly as Special Rapporteurs, Independent Experts, Representatives of the Secretary-General or Representatives of the Commission. Fourteen of these experts are in charge of country mandates which include Afghanistan (since 1984), Iran (1984), Iraq (1991), the former Yugoslavia (1992), Myanmar (1992), Cambodia (1993) Equatorial Guinea (1993) the Palestinian Occupied Territories (1993) Somalia (1993) Sudan (1993) the Democratic Republic of Congo (1994) Burundi (1995) Haiti (1995) and Rwanda (1997).

Among the Rapporteurs are the Special Rapporteur on Extra-Judicial, Summary and Arbitrary Execution (1982), Torture (1985), Religious Intolerance (1986), Mercenaries (1987), Sale of Children, Child Prostitution and Pornography (1990), Internally-Displaced Persons (1992), Contemporary Forms of Racism and Xenophobia (1993), Freedom of Opinion and Expression (1993) Children in Armed Conflict (1993), Extreme Poverty

(1998), the Right to Development (1998), the Right to Education (1998), the Rights of Migrants (1999) the Right to Adequate Housing (2000), the Right to Food (2000) Human Rights Defenders (2000) and Structural Adjustment Policies and Foreign Debt (2000).

The country-specific mandates are reviewed annually whereas thematic mandates are reviewed every three years. The functions of the Special Rapporteurs include study and research into the area, conduct country visits and on-site investigations, receive, consider and deal with complaints from victims and intervene on their behalf.[80] The nature of their mandate often requires them to make urgent appeals to the appropriate government in case of imminent human rights violations. The Special Rapporteurs and Independent Experts have performed valuable tasks in promoting good practice in the field of human rights. At the same time they are ultimately reliant upon the cooperation of the States and governments themselves. Their mandates are limited to reporting to the Commission and they do not have any means to enforce their views. Commenting on some of the contributions and limitations of the work of Rapporteurs, a United Nations document notes:

> Through their reports to the Commission, the experts highlight situations of concern. Their reports often provide an invaluable analysis of the human rights situation in a specific country or on a specific theme. Some reports bring to the attention of the international community issues that are not adequately on the international agenda. Many reports name victims and describe the allegations of violations of their human rights. Throughout the year, many experts intervene on behalf of victims. While the work of experts is often a major driving force contributing to change, it is difficult to attribute concrete results in the field of human rights to one factor. Much depends on how Governments, the civil society in a particular country and the international community react to the violations and to the findings, conclusions and recommendations of experts.
>
> The continuous examination of a particular situation, however, signals to victims that their plight is not forgotten by the international community and provides them with the opportunity to voice their grievances. The perpetrators of human rights violations know that they are being watched. The authorities concerned know that the assessment of their human rights record will have an impact on political, developmental and humanitarian considerations. This sometimes brings improved accountability and therefore change for the better.[81]

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[80] United Nations, *Seventeen frequently asked questions about United Nations Special Rapporteurs: Fact Sheet No: 27* (United Nations: Geneva) 2001, pp. 8–9.

[81] Ibid. pp. 12–13.

Resolution 1503 procedure[82]

At the time of the adoption of ECOSOC Resolution 1235 the intention was primarily to focus on pariah States such as South Africa, Namibia and the Portuguese African Colonies. At that time NGOs were not authorised to make representations and submissions regarding violations taking place in any member State of the United Nations.[83] However, in 1967, the Sub-Commission recommended to the Commission that they should establish a special committee of experts to consider in addition to the South African situation, situations in Haiti (under François Duvalier) and in Greece (under the Colonels). This submission encouraged the Commission to develop a confidential procedure to consider information from a variety of sources. Resolution 1503 (XLVIII) was adopted as an ECOSOC Resolution on 27 May, 1970.[84] The procedure allows the Commission and its Sub-Commission to consider in private those communications received by the Secretary-General and referring to the Commission those 'situations which appear to reveal a consistent pattern of gross and reliably attested violations of human rights'.[85]

Resolution 1503 is a 'petition-information' system because the objective is to use complaints as a means by which to assist the Commission in identifying situations involving a 'consistent pattern of gross and reliably attested violations'. The violation of an individual's human rights is a piece of evidence and his case, in combination with other related cases, would be of sufficient importance to spur the United Nations to some form of action.

The following procedure must be followed:

- Communications are to be sent to the offices of the United Nations High Commission on Human Rights in Geneva.
- UN Secretariat will acknowledge receipt of communication.
- UN Secretariat sends communication to the government concerned and summarises the contents in a monthly confidential list. Governmental replies are also placed in a monthly list.

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[82] T. Van Boven, 'United Nations and Human Rights: A Critical Appraisal' in A. Cassese (ed.), *UN Law: Fundamental Rights* (Alpen aan den Rijn: Sijthof and Noordhoff) 1979, pp. 119–135; M. Schreiber, 'La Protection des droits de l'homme' 145(II) Rec. des Cours (1975) 299 at p. 351; J.P. Humphrey, 'The United Nations Sub-Commission on the Prevention of Discrimination and the Protection of Minorities' 62 *AJIL* (1968) 869; M.J. Bossuyt, 'The Development of Special Procedures of the United Nations Commission on Human Rights' 6 *HRLJ* (1985) 179.

[83] N.S. Rodley, 'United Nations Non-Treaty Procedures for Dealing with Human Rights Violations' in H. Hannum (ed.), above n. 74, at p. 65.

[84] Resolution 1503 (XLVIII) 27 May 1970, ECOSOC.

[85] Ibid. para 1.

- Working Group of the Sub-Commission begins the procedure by sorting through various complaints received in the preceding year.[86] The Working Group on Communications consists of five Sub-Commission members and each one takes responsibility for a group of rights. The Working Group holds closed meetings once a year for ten days before the session of the Sub-Commission to consider the communications submitted, including the replies of the relevant government. A majority among the Working Group (that is at least three members) need to be of the view that the communication reveals a consistent pattern of gross violations of human rights before the situation can be forwarded to Sub-Commission.[87] Only a very small percentage of communications (around 1 per cent) are regarded by the Working Group as revealing a consistent pattern of gross violations of human rights and to be of sufficient merit to be referred to the Sub-Commission.

- Sub-Commission decides in closed sessions which of the situations referred to it should be forwarded to the Commission. On average, the Sub-Commission has passed a list of eight to ten countries to the Commission every year, with situations in over seventy-five countries having been to the Commission since the establishment of the procedure.[88] The relevant government is at this stage invited to make comments and observations, although the complainant is not invited or even informed.

- The Sub-Commission establishes a communications Working Group which is required to draft recommendations made by the Commission as to any proposed action.

Communications must be written within a reasonable period of time of the exhaustion of domestic remedies.[89] Generous rules in terms of petitioners of communications are applied; any one – an individual or a group – may apply provided he or she is a victim or has a direct or reliable knowledge of the alleged violations. Most often the petitions are submitted by NGOs. They must also not be anonymous, lacking in evidence, abusive, manifestly of a political nature or exclusively based on reports from the media.[90]

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[86] Ibid. para 1.

[87] Ibid. para 5.

[88] N.S. Rodley, 'United Nations Non-Treaty Procedures for Dealing with Human Rights Violations' in H. Hannum (ed.), above n. 74 at p. 67.

[89] See ibid. para 6(b)(ii).

[90] The Human Rights Committee has distinguished Resolution 1503 as a procedure dealing with *situations* and therefore not precluding its consideration of *cases* based on the same matter. See Report of the Human Rights Committee, GAOR, XXXIII, Supp. No. 40 (A/33/40) para 582.

The overriding feature of the communication must be that it reveals a consistent pattern of gross violations of human rights.[91] Thus it needs to show a significant number of cases of violations of human rights, for example, imposition of the death penalty without a fair trial, torture, prolonged detention, etc. It may also be possible to make a number of communications revealing a pattern of violation of rights. The petitioner needs to provide detailed facts, such as names, places and authorities concerned, backed by sufficient evidence such as the testimony of victims, etc. He must show that violations have taken place and that all domestic remedies that are effective and not unreasonably prolonged have been exhausted. It also needs to be shown that the situation is not being dealt with by an international procedure. To establish the pattern of violations, reliance should be placed on violations of the rights as provided for in the international bill of rights or other major human rights treaties.

The communication should also consist of a covering letter referring to Resolution 1503; a summary of allegations and all relevant facts; and all documents, annexes, testimonials, etc. The Commission takes several days to consider the complaints which have been forwarded to it by the Sub-Commission. At the end of its consideration, the chairperson of the Commission announces the names of the countries that have been considered. In the light of its consideration the Commission may submit to ECOSOC its 'report and recommendations'. The confidential nature of the procedure means that all actions under Resolution 1503 'shall remain confidential until such time as the Commission may decide to make recommendations to ECOSOC'.[92] The Commission may keep the situation under review, it may appoint an envoy to seek further information on the spot and report back, or appoint an ad hoc committee aimed at finding a friendly solution.[93] The Commission may also transfer this action to Resolution 1235, thus allowing 'a thorough study by the Commission and a report and recommendations thereon to the Council'.[94]

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91 The previous history of the Sub-Commission's determination of what constitutes 'a consistent pattern' has been disappointing. The case of the former East Pakistan could be presented as an example. The civil war in the former East Pakistan lasted for nine months (from March–December 1971). During August 1971, when the matter was considered by the Sub-Commission under Resolution 1503, the Sub-Commission agreed with the Pakistani representative that in August 1971 'insufficient time had elapsed to draw the conclusion that "a consistent pattern of violation of human rights" had occurred. See the Commission on Human Rights, Sub-Commission on the Prevention of Discrimination and Protection of Minorities.' UN Doc. E/CN. 4/Sub.2/SR 633 (1971) p. 143. See Boulesbaa, above n. 19, at p. 105; also see J. Rehman, *The Weaknesses in the International Protection of Minority Rights* (The Hague: Kluwer Law International) 2000, pp. 92–93; J. Salzberg, 'UN Prevention of Human Rights Violations: The Bangladesh Case' 27 *International Organization* (1973) 115.

92 Resolution 1503 (XLVIII) 27 May 1970; ECOSOC para 8.

93 Ibid. para 6(b).

94 ESC Res. 1503 (1970) para 6 (a).

In the final analysis it is worth reiterating that in the absence of 'going public', Resolution 1503 remains a secret and confidential procedure.[95]

The Commission on the Status of Women[96]

The Commission on the Status of Women (CSW) is one of the nine functional commissions of the ECOSOC. The CSW currently consists of 45 members who are elected by ECOSOC for a four-year term. Like the Commission on Human Rights members are appointed by their governments and the representation is on a geographically equitable basis. The meetings of the Commission are held annually in Vienna for eight working days. The CSW was a product of ECOSOC Resolution 11(II) of June 1946 to prepare reports and recommendations for the Council to advance and promote women's rights. In practice the most prominent achievement of the CSW has been in the field of standard setting. While it has played a pivotal role in the drafting of a number of instruments including the Convention on the Political Rights of Women[97] and the Convention on the Nationality of Married Women[98], its single most significant achievement is the work on the drafting of the Convention on the Elimination of All Forms of Discrimination Against Women.[99] The CSW has a continuing involvement with the Convention as it receives reports from the Committee on the Elimination of All Forms of Discrimination Against Women (CEDAW) under the 1979 Convention.[100] The CSW has been involved in information gathering, cooperation with other international agencies, and preparing recommendations and reports on the rights of women in political, economic, civil, social and educational fields. Like the Commission on Human Rights, it is also possible for this Commission to appoint a sessional working group to review confidential communications 'which appear to reveal a consistent pattern of reliably attested injustice and discriminatory practice against women', and to prepare a report which will indicate the categories in which communications are most frequently submitted to the Commission.[101]

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[95] Ibid. para 8.

[96] See L. Reanda, 'The Commission on the Status of Women' in P. Alston (ed.), above n. 1, pp. 265–305.

[97] Opened for signature and ratification by General Assembly resolution 640 (VII) of 20 December 1952. Entry into force 7 July 1954.

[98] Opened for signature and ratification by General Assembly resolution 1040 (XI) of 29 January 1957. Entry into force 11 August 1958.

[99] See below Chapter 13.

[100] Article 21(2).

[101] L. Reanda, 'The Commission on the Status of Women' in P. Alston (ed.), above n. 1, at p. 274.

INTERNATIONAL COURT OF JUSTICE[102]

The International Court of Justice (ICJ) is 'the principal judicial organ of the United Nations'.[103] The ICJ was established in 1946 as the successor to the Permanent Court of International Justice (PCIJ). The Statute of the ICJ forms an integral part of the UN Charter and all UN members are automatically members of the ICJ.[104] The Court consists of 15 judges elected by concurrent votes of the Security Council and the General Assembly. The jurisdiction of the ICJ is either contentious or advisory. Only States can be parties to the contentious jurisdiction, a jurisdiction that is based upon the consent of the parties in dispute.[105] In contentious cases, the judgment of the Court is final and binds only States which are parties to the case.[106] The ICJ is also authorised to deliver advisory opinions. A request for such an opinion could be brought forth by a number of organs including the General Assembly or the Security Council, although the advisory jurisdiction is not open to States. In effecting the advisory jurisdiction, the objective of the Court is to 'offer legal advice to the organ and institutions requesting the opinion'.[107]

As the principal judicial organ of the UN, the ICJ's task is to decide upon matters involving judicial disputes. It is neither the Court's role to create new law, nor to decide upon matters without a legal basis. Having said that, in reality it is often difficult to isolate legal from political matters, a situation that becomes apparent in cases involving allegations of human rights violations. Furthermore, the limitation of adjudication rather than the development of law is also unrealistic. The decisions and advisory opinions of the Court are of great value and have in a number of instances been greatly significant in the advancement of international law. Indeed so significant has been the Court that its principal provision for adjudication of a dispute is regarded as providing the catalogue of primary sources of international law.[108]

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[102] See Chapter XIV UN Charter. See S. Rosenne, *The World Court: What It Is and How it Works* (Dordrecht: Martinus Nijhoff Publishers) 1995; G. Fitzmaurice, *The Law and Procedure of the International Court of Justice* (Cambridge: Grotius Publications) 1986; for a detailed survey see H. Thirlway, 'The Law and Procedure of the International Court of Justice: 1960–1989' 60 *BYIL* (1989) 1, and its following ten volumes at p. 1; E. Schwelb, 'The International Court of Justice and the Human Rights Clauses of the Charter' 66 *AJIL* (1972) 337; N.S. Rodley, 'Human Rights and Humanitarian Intervention: The Case Law of the World Court' 38 *ICLQ* (1989) 321; J. Rehman, 'The Role and Contribution of the World Court in the Progressive Development of International Environmental Law' 5 *APJEL* (2000) 387.

[103] Article 92, UN Charter.

[104] According to Article 93(1) 'All members of the United Nations are ipso facto parties to the Statute of the ICJ' and Article 94(1) provides that 'Each member of the United Nations undertakes to comply with the decisions of the ICJ in any case to which it is a party'.

[105] See Article 36 Statute of the ICJ.

[106] Ibid. Article 59.

[107] *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, Advisory Opinion 8 July 1996, (1996) ICJ Reports 66, paras 15 and 35.

[108] See above Chapter 1.

Since its establishment, the Court has not been used as extensively as one might have expected. Nevertheless, in so far as human rights issues are concerned there is an enormous body jurisprudence which has been accumulated over the years. Among the innumerable judgments and advisory opinions where the Court has expanded on the jurisprudence of international human rights norms, reference could be made to the *Reservations to the Genocide Convention Case*,[109] the *Barcelona Traction case*,[110] the *Namibia case*,[111] the *Tehran Hostages case*[112] and the *East Timor case*.[113]

THE TRUSTEESHIP COUNCIL[114]

The work of the Trusteeship Council is predominantly of historical interest though it has significant contemporary implications for modern developments of international human rights law. The objectives of the trusteeship system included *inter alia*:

> to encourage respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion, and to encourage recognition of the interdependence of the peoples of the world

After the formation of the UN, former mandatory territories under the Covenant of the League of Nations were placed under the protection of the UN trusteeship system, with a council in charge of supervising the system. The only mandatory territory not placed under the trusteeship system or granted independence was South West Africa. The issue became a subject of contention, in the process creating substantial human rights jurisprudence in the areas of racial non-discrimination and the right to self-determination. The International Court of Justice provided four advisory opinions and one judgment. The matter was also the subject of a series of General Assembly Resolutions. The main aim of the Council was to supervise the social advancement of the people of

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[109] *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, Advisory Opinion 28 May 1951 (1951) ICJ Reports, 15.

[110] See *Barcelona Traction, Light and Power Company, Limited* (*Belgium* v. *Spain*), Preliminary Objection, Judgment 24 July 1964 (1964) ICJ Reports 6.

[111] *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276* (1970), Advisory Opinion 21 June 1971, (1971) ICJ Reports 16.

[112] See *United States Diplomatic and Consular Staff in Tehran* (*United States of America* v. *Iran*), Judgment 24 May 1980 (1980) ICJ Reports 3.

[113] *East Timor Case* (*Portugal* v. *Australia*), Judgment 30 June 1995 (1995) ICJ Reports 90.

[114] See Sands and Klein, above n. 5, at pp. 63–68; J.L. Kunz, 'Chapter XI of the United Nations Charter in Action' 48 *AJIL* (1954) 103; M. Reisman, 'Reflections on State Responsibility for Violations of Explicit Protectorate, Mandate and Trusteeship Obligations' 10 *Michigan Journal of International Law* (1989) 231; R.E. Gordon, 'Some Legal Problems with Trusteeship' 28 *Cornell Journal of International Law* (1995) 231.

trust territories, with the aim ultimately of preparing them for self-government and independence. Originally there were eleven trust territories, mostly in Africa and the Pacific Ocean, but the last of these – Palau – gained independence in 1994. Consequently, on 1 November 1994 the Council suspended its operations. Although currently in suspension, the system may have a future role to play for those territories where the State and government have collapsed leading to a situation of complete anarchy. It might be worth considering whether a State such as Afghanistan for example (ravaged by years of civil war and suffering from famine and natural calamities) should be placed under trust to an international organisation or a willing State.

THE SECRETARIAT[115]

Headed by the Secretary-General, the Secretariat provides staff for the day-to-day functioning of the UN. The Secretary-General is appointed by the General Assembly on the unanimous recommendation of the Security Council.[116] The charter does not specify a term of office but by convention he or she serves for five years and may then be reappointed for a further five years. Article 98 provides that the Secretary-General shall carry out such functions as may be assigned to him by either the General Assembly or the Security Council and Article 99 gives him an independent role: he may bring to the attention of the Security Council any matter which, in his opinion, may threaten international peace and security. He or she may propose issues to be discussed by the General Assembly or any other organ of the United Nations. The Secretary-General often acts as a 'referee' in disputes between member States and on a number of occasions his 'good offices' have been used to mediate in international disputes. Since the creation of the UN, a total of seven Secretary-Generals have been appointed, the current incumbent being Kofi Annan from Ghana. The Secretary-General can play a notable part in the future developments of international law. One recent example is that of the publication of Agenda for Peace by the former Secretary-General, Dr Boutros Boutros-Ghali, which has encouraged States to re-evaluate their practices to secure peace and human rights.[117] The role of the Secretary-General in human rights, although variable and dependent on individual personalities, is potentially very significant. Successive Secretary-Generals have maintained that it is within their mandate to use their offices to raise and resolve human rights concerns. Many examples of the

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115 See B.G. Ramcharan, *Humanitarian Good Offices in International Law: The Good Offices of the United Nations Secretary-General in the Field of Human Rights* (The Hague: Martinus Nijhoff Publishers) 1983; T.C. Van Boven, 'The Role of the United Nations Secretariat' in P. Alston (ed.), above n. 1, pp. 549–579.

116 See Article 97 of the UN Charter.

117 Shaw, above n. 1, at p. 834.

involvement of the Secretary-General could be found in his intervention to prevent serious violations of human rights, the most recent being the initiatives of Kofi Annan to condemn the terrorist attacks of 11 September 2001 and to make efforts to end all forms of terrorism. He has made substantial attempts to encourage the international community to provide humanitarian assistance to the Afghan people and on 27 September 2001 launched a $584 million appeal to help the Afghans in their current crisis.[118] Other notable examples include the Secretary-General's involvement during the invasion of Kuwait (1990–1991), attempts during 1998 to enforce the compliance of Iraq with the Security Council's Resolutions, the 1999 agreement with Libya leading to the Lockerbie bombing trials and the efforts to resolve the East Timor conflict (2000). At the same time, it cannot be stated with certainty in which human rights situations the Secretary-General would exercise his good offices. There is also no definitive and specific procedure invoking the good offices of the Secretary-General.[119] Applications should be made to him or her via the High Commission on Human Rights in Geneva or in New York.[120] In practice, in terms of petitioning it would perhaps be more useful to approach the United Nations High Commissioner on Human Rights. The High Commissioner has a specific mandate in this regard. Significant information is available about the activities of the High Commissioner on the UN web-site.[121]

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[118] See UN Web-Site http://www.un.org/News/dh/latest/sg_afghan.htm (1 November 2001).

[119] N.S. Rodley, 'United Nations Non-Treaty Procedures for Dealing with Human Rights Violations' in H. Hannum (ed.), above n. 74, at p. 80.

[120] Ibid.

[121] For details of the web-site see appendix I.

II

THE INTERNATIONAL BILL OF RIGHTS

3

THE UNIVERSAL DECLARATION OF HUMAN RIGHTS[1]

INTRODUCTION

We have noted that the United Nations Charter contains a number of references to 'human rights', though no elaboration is provided to the meaning of the concept within the Charter itself. It has also been noted that efforts by certain States, notably Panama, to have a 'Bill of Rights' included within the United Nations Charter proved unsuccessful.[2] After the coming into operation of the United Nations Charter, there was a move to spell out the meaning of the concept of 'human rights' in greater detail. In 1945, the preparatory

[1] See G. Alfredsson and A. Eide (eds), *The Universal Declaration of Human Rights: A Common Standard of Achievement* (The Hague: Kluwer Law International) 1999; J. Morsink, *The Universal Declaration of Human Rights: Origins, Drafting and Intent* (Philadelphia: University of Pennsylvania Press) 1999; B. van der Heijden and B. Tahzib-Lie (eds), *Reflections on the Universal Declaration of Human Rights: A Fiftieth Anniversary Anthology* (The Hague: Martinus Nijhoff Publishers) 1998; M.G. Johnson, *The Universal Declaration of Human Rights: A history of its Creation and Implementation, 1948–1998* (Paris: UNESCO Pub.) 1998; P. Baehr, C. Flinterman and M. Senders (eds), *Innovation and Inspiration: Fifty Years of the Universal Declaration of Human Rights* (Amsterdam: Royal Academy of Arts and Sciences) 1999; J. Humphrey, 'The Universal Declaration of Human Rights: Its History, Impact and Juridical Character' in B.G. Ramcharan (ed.), *Human Rights: Thirty Years after the Universal Declaration: Commemorative Volume on the Occasion of the Thirtieth Anniversary of the Universal Declaration of Human Rights* (The Hague: Martinus Nijhoff Publishers) 1979, pp. 21–37; E. Schwelb, 'The Influence of the Universal Declaration of Human Rights on International and National Law' *PASIL* (1959) 217.

[2] See above Chapter 2; also see J.P. Humphrey, 'The UN Charter and the Universal Declaration of Human Rights' in E. Laurd (ed.), *The International Protection of Human Rights* (London: Thames & Hudson) 1967, 39–56 at p. 47.

commission recommended that ECOSOC should establish a Commission on Human Rights which would then prepare a Bill of Rights. The recommendation was approved by the General Assembly and a Human Rights Commission was established in 1946. The first regular sessions of the Human Rights Commission began on 27 January 1947. The Human Rights Commission immediately got down to its first task, that is the drafting of the International Bill of Rights. A consideration of the proceedings of the Human Rights Commission (and a specifically established Drafting Committee) represents divisions as to the form the International Bill of Rights should take. The primary divisions were among those who wanted a declaration and those in favour of a binding convention or treaty.[3] In the second session of the Human Rights Commission late in 1947, it was decided that the International Bill of Rights should have three parts: a declaration; a Convention; and 'measures of implementation' (i.e. a system of international supervision).[4] It was subsequently decided to split the Covenant into two separate Covenants.

The Declaration was adopted on 10 December 1948 with forty-eight votes in favour, none against and eight abstentions.[5] The UDHR was adopted by Resolution 217(III) which consisted of five parts. Part A consisted of the UDHR whereas part B was entitled the Right to Petition.[6] In part C of the Resolution, the General Assembly called upon the United Nations Sub-Commission 'to make a thorough study of the problem of minorities, in order that the United Nations may be able to take effective measures for the protection of racial, national, religious or linguistic minorities'.[7] Part D related to the publicity to be given to the UDHR and Part E was entitled 'Preparation of a Draft Covenant on Human Rights and Draft Measures of Implementation'. The Declaration has thirty articles covering the most important fundamental human rights. The General Assembly adopted the Declaration as a 'common standard of achievement for all peoples and all nations'. The catalogue of rights contained within the Declaration, provides for both civil and political rights as well as economic, social and cultural rights. These rights are contained in the following Articles:

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[3] H.J. Steiner and P. Alston, *International Human Rights in Context: Law, Politics and Morals: Text and Materials*, 2nd edn (Oxford: Clarendon Press) 2000, p. 138.

[4] Humphrey, above n. 1, at pp. 22–23.

[5] 10 December, 1948, UN GA Res. 217 A(III), UN Doc. A/810 at 71 (1948). Byelorussia, Czechoslovakia, Poland, Ukraine, USSR, Yugoslavia, Saudi Arabia, and South Africa.

[6] See T.J.M. Zuijdwijk, *Petitioning the United Nations: A Study in Human Rights* (Aldershot: Gower) 1982, pp. 90–93.

[7] G.A. Resolution 217 C(III) (1948) para 5. See A. Eide, 'The Sub-Commission on Prevention of Discrimination and Protection of Minorities' in P. Alston (ed.), *United Nations and Human Rights: A Critical Appraisal* (Oxford: Clarendon Press) 211–264, at p. 220; A. Eide, 'The Non-inclusion of Minority Rights: Resolution 217C (III)' in G. Alfredsson and A. Eide (eds), *The Universal Declaration of Human Rights: A Common Standard of Achievement* (The Hague: Kluwer Law International) 1998, 701–723 at p. 723.

Article 1	Recognition of being born free and equal in dignity and rights
Article 2	Right to equality
Article 3	Right to life, liberty and security of person
Article 4	Freedom from slavery or servitude
Article 5	Freedom from torture or cruel, inhuman or degrading treatment or punishment
Article 6	Right to recognition everywhere as a person before the law.
Article 7	Right to equality before the law
Article 8	Right to an effective remedy by competent national tribunals
Article 9	Right not to be subjected to arbitrary arrest, detention or exile
Article 10	Right to fair trial
Article 11	Presumption of innocence and prohibition of retroactive criminal law
Article 12	Prohibition of arbitrary interference with privacy, family, home or correspondence
Article 13	Right to freedom of movement
Article 14	Right to seek asylum
Article 15	Right to a nationality
Article 16	Right to marry and found a family
Article 17	Right to own property
Article 18	Right to freedom of thought, conscience and religion
Article 19	Right to freedom of opinion and expression
Article 20	Right to freedom of peaceful assembly
Article 21	Right to participate in the governance of the State, and the right to democracy
Article 22	Right to social security
Article 23	Right to work
Article 24	Right to rest and leisure
Article 25	Right to a decent standard of living
Article 26	Right to education
Article 27	Right to cultural life
Article 28	Right to social and international order suitable for the realisation of human rights

RANGE OF RIGHTS CONTAINED AND THE RATIONALE FOR INTERNATIONAL CONSENSUS

The Declaration contains a remarkable range of rights. It includes classical civil and political rights,[8] social, economic and cultural rights[9] and group or people's rights.[10] The civil and political rights bear a resemblance to those

[8] Also known as first generation rights. See above Introduction.
[9] Also referred to as second generation rights. See above Introduction.
[10] Also known as third generation rights or solidarity rights. See above Introduction. Also See P. Alston, 'The Commission on Human Rights' in P. Alston (ed.), above n. 7, at p. 188.

rights contained in the eighteenth and nineteenth-century classical human rights documents; like the French Declaration of the Rights of Man, the Universal Declaration thrives on the rights to liberty, equality and fraternity.[11] The Declaration provides a comprehensive set of civil and political rights. These rights, also known as first generation rights, include the right to equality, to life, to an effective remedy by national tribunals, to fair trial, to freedom of assembly, opinion and expression, and thought, conscience and religion. The Declaration condemns torture and slavery and prohibits arbitrary interference with privacy, family, home or correspondence. The Declaration also contains certain civil and political rights which have remained controversial. One example is the right to property. The right to property, although included in Article 17 of the UDHR, could not be provided for either in the ICCPR (1966) or in the ICESCR (1966).[12] Another example is that of the right to seek asylum.[13]

In addition to the aforementioned civil and political rights, the Declaration contains a number of social, economic and cultural rights. These rights, also referred to as second generation rights, include the right to social security, to work, to rest and leisure and the right to education. The right to cultural life is accorded by Article 27. Article 28 takes a broad approach and provides for the third generation rights of a suitable international order and the right to peace. According to this Article, everyone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realised.

This cataloguing of rights in a single document appears even more remarkable when considered in light of the great consensus showed in adopting the document. Various reasons for such a consensus can be put forward, some more obvious than others. First and most importantly, it was relatively easy to find acceptance among UN States because of the belief that the Declaration, as a General Assembly Resolution, was a non-binding instrument.[14] International consensus would have been much harder had State representatives been faced with the prospect of accepting legally binding obligations. Second, at the time of adoption of the Declaration, there were far fewer member States, making it relatively more easy to find common ground. As we shall be considering, soon after the adoption of the Declaration rapid changes in

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[11] See S.P. Marks, 'From the "Single Confused Page" to the Decalogue for Six Billion Persons: The Roots of the Universal Declaration of Human Rights in the French Revolution' 20 *HRQ* (1998) 459.

[12] C. Krause and G. Alfredsson, 'Article 17' in G. Alfredsson and A. Eide (eds), above n. 1, pp. 359–378.

[13] R.B. Lillich, 'Civil Rights' in T. Meron (ed.), *Human Rights in International Law: Legal and Policy Issues* (Oxford: Clarendon Press) 1984, 115–170 at p. 152; M. Kjärum, 'Article 14' in G. Alfredsson and A. Eide (eds), above n. 1, 279–295 at p. 285.

[14] Schwelb, above n. 1, at p. 218.

global political geography took place. The former colonies emerged as new States and did not share the same priorities and claims of the founder member States. Finally, a range of strategies was adopted by the drafters to achieve consensus and have the Declaration adopted by the international community. Pointing to these strategies, Samnoy mentions the exclusion of controversial issues and the use of generalised and vague terminology.[15]

NATURE OF OBLIGATIONS AND RELEVANCE FOR HUMAN RIGHTS PRACTITIONER

As already indicated, the Declaration was adopted by General Assembly Resolution 217 (III) and was not intended to be legally binding. The intention of those who drafted the Declaration was to provide guidelines which States would aim to achieve. Thus according to Mrs Eleanor Roosevelt, the Chairman of the Human Rights Commission, 'it [the Declaration] is not, and does not purport to be a statement of law or of legal obligation'; it is instead 'a common standard of achievement for all peoples of all nations'. Given the prima facie non-binding character of the Declaration, the immediate question arises as to the practical relevance of consideration of this instrument. The most direct answer to this question is that, despite the intention being to draft guidelines, over a period of time the substantive provisions of the Declaration have become binding on all States. The binding authority derives from sources described below.

UDHR as an authoritative interpretation of the Charter

The United Nations Charter, while making references to human rights does not itself provide a catalogue of human rights. After the enforcement of the Charter, it was intended that a detailed bill of rights would provide an explanation as to the definition of human rights. As the first part of such a Bill, the Declaration is arguably an authoritative interpretation of the meaning of human rights as prescribed within the United Nations Charter. This argument is substantiated both from the *travaux préparatoires* of the Declaration and from its text. The preamble to the Declaration makes reference to Articles 55 and 56 of the United Nations Charter. As one leading authority has pointed out such references can lead to the argument that 'each right contained in the Universal Declaration is effectively incorporated into the Charter'.[16]

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[15] A. Samnoy, 'The Origins of the Universal Declaration of Human Rights' in G. Alfredsson and A. Eide (eds), above n. 1, 3–22 at p. 14.

[16] See N.S. Rodley, *The Treatment of Prisoners in International Law*, 2nd edn (Oxford: Clarendon Press) 1999, p. 63.

During the drafting stages of the Declaration, representatives of a number of States treated the Declaration as a document interpreting human rights provisions of the Charter. The Chinese representative was of the view that, while the United Nations Charter placed member States under an obligation to observe human rights, the Universal Declaration 'stated these rights explicitly'.[17] According to Professor Réne Cassin of France, a member of the Commission and the Drafting Committee, the Universal Declaration 'could be considered as an authoritative interpretation of the Charter'.[18] Similarly the Chilean representative remarked that 'violations by any State of the rights enumerated in the Declaration would mean violation of the principles of the United Nations'.[19] Among the Islamic States, the Egyptian representative took the view that the Declaration was an 'authoritative interpretation of the [UN] Charter',[20] supported by the Syrian and Pakistan delegates. Ironically, it was the concern that the non-binding General Assembly Resolution might in fact come to have binding effect (through its recognition as an authoritative interpretation of the UN Charter's human rights provisions) that produced substantial disquiet on the part of South Africa, leading ultimately to its abstention from the vote.[21]

UDHR as part of customary international law

A significant proportion of this book deals with human rights treaties, such as the ICCPR,[22] the ICESCR,[23] the ECHR,[24] and the AFCHPR.[25] As we saw in Chapter 1, treaties are legally binding obligations undertaken by State parties.[26] However, treaty law represents one aspect, albeit a significant one, of the international law-making process. We have also noted that other sources of international law include international customary law and general principles of law. International customary law, which binds all States, consists of two key ingredients: State practice and the conviction that such practice amounts to law (*opinio juris*).[27]

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[17] Cited in Humphrey, above n. 2, at p. 50.
[18] Ibid. p. 51.
[19] A/C.3/SR 91 at 97.
[20] UN Doc. A/C.3/SR 92 at 12. See D.E. Arzt, 'The Application of International Human Rights Law in Islamic States' 12 *HRQ* (1990) 202 at pp. 215–216.
[21] See Humphrey, above n. 2, at pp. 32–33.
[22] Adopted at New York, 16 December 1966. Entered into force 23 March 1976. GA Res. 2200A (XXI) UN Doc. A/6316 (1966) 999 U.N.T.S. 171; 6 I.L.M. (1967) 368.
[23] Adopted at New York, 16 December 1966. Entered into force 3 January 1976. GA Res. 2200A (XXI) UN Doc. A/6316 (1966) 993 U.N.T.S. 3; 6 I.L.M. (1967) 360.
[24] Signed at Rome, 4 November 1950. Entered into force 3 September 1953. 213 U.N.T.S. 221; E.T.S. 5.
[25] Adopted on 27 June 1981. Entered into force 21 October 1986. OAU Doc. CAB/LEG/67/3 Rev. 5, 21 I.L.M (1982) 58.
[26] See above Chapter 1.
[27] Ibid.

In the light of existing State practices it can be strongly argued that a vast majority of the provisions of the Declaration now represent customary international law.[28] There is overwhelming evidence of State practice, with the requisite *opinio juris*, to confirm the customary binding nature of many of the provisions of the Declaration.[29] Such evidence can be derived from its constant reaffirmation by the General Assembly.[30] According to one source, in the first twenty-one years after its adoption, the Declaration was cited no fewer than seventy-five times by the General Assembly, an exercise that has remained prevalent in the subsequent human rights activities of the Assembly.[31] There is also a consistent referral to the Universal Declaration in international instruments, in bilateral agreements[32] and multilateral human rights treaties.[33] In the context of multilateral human rights treaties it is important to note that the International Covenants and three regional human rights treaties make specific reference to the Declaration. In his consideration, Professor Brownlie points to the Final Act of the Conference on Security and Cooperation in Europe,[34] and the Proclamation of Tehran[35] whereby States express their intention to follow the principles of the Universal Declaration on Human Rights.[36] To this one could add the Vienna Declaration and Programme of Action, which was adopted by a consensus of representatives

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[28] According to one authority 'the Universal Declaration is the ius constituendum of the United Nations Charter to the term "human rights" and most of the international lawyers support the opinion that its principles are customary international law': H-J. Heintze, 'The UN Convention and the Network of International Human Rights Protection by the United Nations' in M. Freeman and P. Veerman (eds), *Ideologies of Children's Rights* (Dordrecht: Martinus Nijhoff Publishers) 1992, 71–78, at p. 72.

[29] See e.g. the Preambles to European Convention on Human Rights (1950) and the African Charter on Human and People's Rights (1981).

[30] See the Colonial Declaration, which provides 'All States shall observe faithfully and strictly the provisions of the Charter of the United Nations, Universal Declaration of Human Rights and the present Declaration'. GA Resolution 1514 (XV) 1960.

[31] S. Bleicher, 'The Legal Significance of Re-citation of General Assembly Resolutions' 63 *AJIL* (1969) 444 at p. 449; T.J.M. Zuijdwijk, above n. 6, at p. 101.

[32] See e.g. the Franco–Tunisian Convention (1955) *UNYBH* (1955) 340, at p. 342.

[33] See A.H. Robertson and J.G. Merrills, *Human Rights in the World: An Introduction to the Study of International Protection of Human Rights*, 4th. edn., (Manchester: Manchester University Press) 1996, p. 29; J. Humphrey, 'The International Bill of Rights: Scope and Implementation' 17 *William and Mary Law Review* (1975) 527; Humphrey, above n. 1, at pp. 28–29.

[34] See the Final Act of the Conference on Security and Cooperation in Europe, Adopted by the Conference on Security and Co-operation in Europe at Helsinki, August 1, 1975. Reprinted in 14 I.L.M (1975) 1292. Discussed below Chapter 7.

[35] See the Proclamation of Tehran, *The Final Act of the United Nations Conference on Human Rights*, Tehran, 22 April–13 May, 1968, UN Doc. A/CONF. 32/41 (New York: United Nations) E. 68, XIV. 2.

[36] I. Brownlie (ed.), *Basic Documents on Human Rights*, 2nd edn (Oxford: Clarendon Press) 1981, p. 21.

from 171 States.[37] In addition to containing numerous references to the Universal Declaration, it emphasises

> That the Universal Declaration of Human Rights, which constitutes a common standard of achievement for all peoples and all nations, is the source of inspiration and has been the basis for the United Nations in making advances in standard setting as contained in the existing international human rights instruments, in particular the International Covenant on Civil and Political Rights and the International Covenant of Economic, Social and Cultural Rights.[38]

Further recognition by States of the binding nature of the Declaration found in the replication of its provisions in their national constitutions or in referrals to it in their constitutional documents.[39] National and international tribunals have also relied upon the Declaration, treating it as a binding document.[40]

While endorsing the customary value of many of the rights contained in the Declaration, at the same time some caution is recommended. As we shall see during the course of this study, not all rights contained in the Universal Declaration have generated a sufficient degree of consensus to be recognised as binding in customary law. There is debate about the legal value and content of a number of rights, in particular of economic, social and cultural rights.[41] Thus questions have been raised about the legal and juridical value of such rights as the right to rest and leisure, the right to a decent standard of living, and the right to participate in the cultural life of the community. In the light of divisions it is sensible to take account of the views of one leading authority when he writes 'it must not be assumed without more that any and every human right referred to [in UDHR] is part of customary international law'.[42]

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[37] *Vienna Declaration and Programme of Action* (New York: United Nations Department of Public Information) 1993. Adopted by the United Nations World Conference on Human Rights, 25 June 1993.

[38] Ibid. Preamble to the Declaration.

[39] See e.g. the Constitution of Bosnia and Herzegovina (1995).

[40] See e.g. *United States Diplomatic and Consular Staff in Tehran* (*United States of America* v. *Iran*), Judgment 24 May 1980. (1980) ICJ Reports 3, where the International Court notes 'Wrongfully to deprive human beings of their freedom and to subject them to physical constraint in conditions of hardship is in itself manifestly incompatible with ... the fundamental principles enunciated in the Universal Declaration of Human Rights' ibid. para 91. Commenting on the Tehran case, Professor Rodley, makes the valid point that '[a] more natural interpretation is that the Court was simply stating that the Declaration as a whole propounds fundamental principles recognised by general international law' N.S. Rodley, 'Human Rights and Humanitarian Intervention: The Case Law of the World Court' 38 *ICLQ* (1989) 321 at p. 326. See also *Filártiga* v. *Peña-Irala* 630 F. 2d 876 (1980); 19 I.L.M (1980) 966. US Circuit Court of Appeals, 2nd Circuit.

[41] See below Chapter 5.

[42] P. Thornberry, *International Law and the Rights of Minorities* (Oxford: Clarendon Press) 1991, p. 322.

UDHR binding states with its *jus cogens* character

The chapters in the book confirm that a number of the rights contained in the UDHR have become so firmly established in international law that they are now treated as having a *jus cogens* character. We have already noted that no specification has been provided on the norms forming *jus cogens*. At the same time several of the fundamental rights enunciated in the Declaration, such as the right to equality (Article 2), right to life, liberty and security (Article 3), freedom from slavery or servitude (Article 4), freedom from torture or cruel, inhuman or degrading treatment or punishment (Article 5), the right to a fair trial (Article 10), the presumption of innocence and the prohibition of retroactive criminal law (Article 11), represents aspects of the norm of *jus cogens*.

The existence of such substantial affirmation of the rights has led many commentators to take the position that the normative provisions of the Declaration form part of *jus cogens*, and thereby bind all States.[43] As this book analyses in detail, the fundamental rights of the Declaration now form part and parcel of every human rights instrument. It is well established that it is not possible to derogate from these rights. At the same time, a number of rights are arguably not even part of customary law and categorising those as part of the *jus cogens* would be inaccurate. There is significant debate on the customary position not only on economic, social and cultural rights such as the right to social security (Article 22), right to rest and leisure (Article 24), right to a decent standard of living (Article 25), and right to participate in cultural life (Article 27) but also on civil and political rights which include the right to seek asylum (Article 14) and upon the various facets of the right to freedom of thought, conscience and religion (Article 18).[44]

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[43] See M.S. McDougal, H.D. Lasswell and L-C. Chen. *Human Rights and World Public Order: The Basic Policies of an International Law of Human Dignity* (New Haven and London: Yale University Press) 1980. p. 64.

[44] See below Chapters 10 and 11.

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INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS[1]

INTRODUCTION

After the adoption of the Universal Declaration of Human Rights (UDHR),[2] the next stage was to establish legally binding principles on international human rights. In its Resolution 217B and E(III) of 10 December 1948, the General Assembly, through the ECOSOC, requested the Human Right Commission to continue to give priority to the drafting of the International Covenant and measures of implementation.[3] Originally it had been intended to draft a single Covenant covering all the fundamental rights. However, with the onset of the cold war and the rise of new nation States (with their own priorities) it became impossible to incorporate all the rights within one

[1] S. Joseph, J. Schultz and M. Castan, *The International Covenant on Civil and Political Rights: Cases and Material and Commentary* (Oxford: Clarendon Press) 2000; D. McGoldrick, *The Human Rights Committee: Its Role in the Development of the International Covenant on Civil and Political Rights* (Oxford: Clarendon Press) 1991; D.J. Harris and S. Joseph (eds), *The International Covenant on Civil and Political Rights and United Kingdom Law* (Oxford: Clarendon Press) 1995; M. Nowak, *U.N. Covenant on Civil and Political Rights: CCPR Commentary* (Kehl: Arlington: N.P. Engel) 1993; M.J. Bossuyt, *Guide to the 'Travaux Préparatoires' of the International Covenant on Civil and Political Rights* (Dordrecht: Martinus Nijhoff Publishers) 1987; P.R. Ghandhi, *The Human Rights Committee and the Right of Individual Communication: Law and Practice* (Aldershot: Ashgate Publishing Ltd.) 1998; D.J. Harris, *Cases and Materials on International Law*, 5th edn (London: Sweet and Maxwell) 1998, pp. 624–764; H.J. Steiner and P. Alston, *International Human Rights in Context : Law, Politics, Morals: Text and Materials*, 2nd edn (Oxford: Clarendon Press) 2000, pp. 592–704.

[2] 10 December 1948, UN GA Res. 217 A(III), UN Doc. A/810 at 71 (1948).

[3] Ghandhi, above n. 1, at p. 3.

document.[4] The western States put emphasis on civil and political rights whereas the focus of the socialist and newly independent States was on economic, social and cultural rights and the right to self-determination. There were divisions and difficulties around having civil and political rights alongside economic, social and cultural rights, within the text of a single treaty. Those in favour of a single covenant argued that:

> human rights could not be clearly divided into different categories, nor could they be so classified as to represent a hierarchy of values. All rights should be promoted and protected at the same time. Without economic, social and cultural rights, civil and political rights might be purely nominal in character; without civil and political rights, economic, social and cultural rights could not be ensured.[5]

However, the opposing camp prioritised civil and political rights as more significant. They also pointed to the progressive nature of the social and economic rights, some even doubting that they were rights in the true sense. A critical issue related to the implementation mechanism. While it was thought possible to set up a scheme to implement civil and political rights, the same was not thought to be feasible for social and economic rights.[6]

It was ultimately decided to have two different treaties, one covering primarily civil and political rights (i.e. ICCPR)[7] and the other economic, social and cultural rights (i.e. ICESCR).[8] As we shall analyse in detail, although some rights contained within these treaties overlap, there are nevertheless substantial differences in the content, nature of obligations and the implementation mechanisms. The ICCPR and the ICESCR were approved by the Third Committee of the General Assembly in December 1966. Each Covenant required 35 ratifications and both came into force in 1976. The Optional Protocol was approved in 1966 and required 10 ratifications. As of 31 March 2002, there were 148 States parties to the ICCPR. In addition, 101 States have made declarations pursuant to the First Optional Protocol to the ICCPR. The Second Optional Protocol, aimed at the Abolition of the Death Penalty, was adopted

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[4] See Steiner and Alston (eds), above n. 1, at p. 139.

[5] Annotations on the Text of the Draft International Covenants on Human Rights, UN Doc. A/2929 (1955), 7 para. 8.

[6] McGoldrick, above n. 1, at pp. 11–13; for a consideration of implementation mechanism in the Covenants see J.Th. Moller, 'The Right to Petition: General Assembly Resolution 217B' in G. Alfredsson and A. Eide, 'Introduction' in G. Alfredsson and A. Eide (eds), *The Universal Declaration of Human Rights: A Common Standard of Achievement* (The Hague: Martinus Nijhoff Publishers) 1999, pp. 653–659.

[7] Adopted at New York, 16 December, 1966. Entered into force 23 March 1976. GA Res. 2200A (XXI) UN Doc. A/6316 (1966) 999 U.N.T.S. 171; 6 I.L.M. (1967) 368.

[8] Adopted at New York, 16 December, 1966. Entered into force 3 January 1976. GA Res. 2200A (XXI) UN Doc. A/6316 (1966) 993 U.N.T.S. 3; 6 I.L.M. (1967) 360.

and opened for signature, accession or ratification on 15 December 1989.[9] It came into operation on 11 July 1991. There are currently 46 States parties to this Protocol. The ICCPR consists of a preamble and 53 articles, which are divided into eight parts. The ICCPR consists of the following rights:

Article 1	The right to self-determination
Article 6	The right to life
Article 7	Freedom from torture or cruel, inhuman or degrading treatment or punishment
Article 8	Freedom from slavery and the slave trade
Article 9	The right to liberty and security
Article 10	The right of detained persons to be treated with humanity
Article 11	Freedom from imprisonment for debt
Article 12	Freedom of movement and choice of residence
Article 13	Freedom of aliens from arbitrary expulsion
Article 14	Right to a fair trial
Article 15	Prohibition against retroactivity of criminal law
Article 16	Right to recognition everywhere as a person before the law
Article 17	Right to privacy for every individual
Article 18	Right of freedom of thought, conscience and religion
Article 19	Right of opinion and expression
Article 20	Prohibition of propaganda for war and of incitement to national, racial or religious hatred
Article 21	Right of peaceful assembly
Article 22	Freedom of association
Article 23	Right to marry and found a family
Article 24	Rights of the child
Article 25	Political rights
Article 26	Equality before the law
Article 27	Rights of persons belonging to minorities

The ICCPR has many rights which are covered by UDHR or other international and regional human rights treaties. However, unlike the UDHR, the ICCPR does not accord protection to the right to property (covered by UDHR and ECHR First Protocol).[10] For the most part the ICCPR grants rights to all individuals who are within the territories of state parties and are subject to their jurisdiction, regardless of their constitutional or political status. Thus the protection covers nationals, aliens, refugees and illegal immigrants. The reference in the ICCPR to 'everyone' or 'all persons' in relation to a majority

[9] Annex to GA Res. 44/128. Reprinted in 29 I.L.M (1990) 1464. See generally W. Schabas, *The Abolition of Death Penalty in International Law*, 2nd edn (Cambridge: Cambridge University Press) 1997.

[10] See Chapters 3 and 6 respectively. ECHR, First Protocol (adopted 20 March 1952) entered into force 18 May 1954, ETS 9.

of rights confirms this view.[11] In order to ensure the rights within the Covenant, States parties undertake to provide for an effective remedy, by competent and judicial authorities, and to ensure the enforcement of these remedies by competent authorities.[12]

THE INTERNATIONAL COVENANTS AND THE RIGHT TO SELF-DETERMINATION[13]

Both the ICCPR and the ICESCR begin with identical provisions on the right to self-determination. Article 1 of the Covenants provides that

(1) All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

(2) All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.

(3) The States Parties to the present Covenant, including those having responsibility for the administration of Non-Self-Governing and Trust Territories, shall promote the realization of the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations.

Self-determination is a difficult right to define in international law and there is significant controversy as to the exact parameters of this right. The implementation of the right to self-determination has also raised controversy and debate. In the drafting process, several States questioned the value of this right in the post-colonial world. Many States were particularly concerned that minority groups within independent States may use this right as a basis of their claim to secession. In its General Comment, the Human Rights

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[11] McGoldrick, above n. 1, at pp. 20–21.

[12] Article 2(3).

[13] See R. McCorquodale, 'The Right of Self-Determination' in Harris and Joseph (eds), above n. 1, pp. 91–119; A. Cassese, *Self-Determination of Peoples: A Legal Reappraisal* (Cambridge: Cambridge University Press) 1995; H. Hannum, *Autonomy, Sovereignty and Self-Determination: The Accommodation of Conflicting Rights* (Philadelphia: University of Pennsylvania Press) 1990; C. Tomuschat (ed.), *Modern Law of Self-Determination* (Dordrecht: Martinus Nijhoff Publishers) 1993; H. Hannum, 'Rethinking Self-Determination' 34 *Va.JIL* (1993) 1; M. Koskenniemi, 'National Self-Determination Today: Problems of Legal Theory and Practice' 43 *ICLQ* (1994) 241; V.P. Nanda, 'Self-Determination in International Law: The Tragic Tale of Two Cities – Islamabad (West Pakistan) and Dacca (East Pakistan)' 66 *AJIL* (1972) 321; E. Suzuki, 'Self-Determination and World Public Order: Community Response to Territorial Separation' 16 *Va.JIL* (1976) 779; P. Thornberry, 'Self-Determination, Minorities, Human Rights: A Review of International Instruments' 38 *ICLQ* (1989) 867; R. White, 'Self-Determination: Time for a Reassessment' 28 *NILR* (1981) 147. For further analysis see below Chapter 12.

Committee (the committee in charge of implementing the Covenant) has been assertive and has advocated a continuing obligation to advance the right to self-determination.[14] At the same time the Committee has shown a lack of satisfaction in the coverage of this right in State reports. The Committee notes:

> Although the reporting obligations of all States parties include article 1, only some reports give detailed explanations regarding each of its paragraphs. The Committee has noted that many of them completely ignore article 1, provide inadequate information in regard to it or confine themselves to a reference to election laws. The Committee considers it highly desirable that States parties' reports should contain information on each paragraph of article 1.[15]

It has urged States parties to present their constitutional and political processes which allow for the exercise of this right to self-determination.[16] On the other hand, it seems certain that violations of Article 1 cannot be the subject of a complaint under the First Optional Protocol.[17] In a number of cases the Human Rights Committee has taken the position that as a right belonging to peoples, it is not open to individuals to claim to be victims of the violation of the right to self-determination.[18] Equally, reservations have been entered upon the Article. India, at the time of its ratification, entered a reservation to Article 1 according to which:

> The Government of the Republic of India declares that the words the 'right of self-determination' appearing in this Article apply only to the peoples under the foreign domination and that these words do not apply to sovereign independent States or to a section of a people or nation – which is the essence of national integrity.[19]

GENERAL NATURE OF OBLIGATIONS[20]

Articles 2–5 of both the Covenants constitute Part II, containing in each instance an undertaking to respect or to take steps to secure progressively the

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[14] The Right to Self-determination of Peoples (Art. 1) 13/04/84. CCPR General Comment 12. (General Comments) para 3.

[15] Ibid.

[16] Ibid. para 4.

[17] S. Lewis-Anthony, 'Treaty-Based Procedures for Making Human Rights Complaints within the UN System' in H. Hannum (ed.), *Guide to International Human Rights Practice*, 3rd edn (New York: Transnational Publishers) 1999, 41–59, at p. 44.

[18] See *Lubicon Lake Band* v. *Canada*, Communication No. 167/1984 (26 March 1990), U.N. Doc. Supp. No. 40 (A/45/40) at 1 (1990). Also see General Comment 23(50) Article 27, U.N. Doc. CCPR/C/21/Rev. 1/Add.5 (1994) at para 3.1.

[19] UN Centre for Human Rights, Human Rights: Status of International Instruments (1987) 9 UN Sales No. E.87.XIV.2.

[20] See Joseph, Schultz and Castan, above n. 1, at pp. 3–29; McGoldrick, above n. 1, at pp. 3–43; D. Harris, 'The International Covenant on Civil and Political Rights and the UK' in D.J. Harris and S. Joseph (eds), above n. 1, pp. 1–67.

substantive rights which follow in Part III together with certain other provisions. According to Article 2(1) of the ICCPR 'each State Party undertakes to respect and to ensure to allow individuals within its territory and subject to its jurisdiction the rights recognised in the present Covenant'.

While there is an obligation undertaken by States to 'respect and to ensure rights recognised in the Covenant' there is no obligation to incorporate the treaty into domestic law.[21] The Human Rights Committee has tried to investigate the exact status which the Covenant has in relation to the constitutional regimes of States parties. In elaborating the provisions of this article, the Committee has noted that, in order to ensure the rights, States are under an obligation to undertake positive and specific action. In its General Comment, the Committee considered it:

> necessary to draw the attention of States parties to the fact that the obligation under the Covenant is not confined to the respect of human rights, but that States parties have also undertaken to ensure the enjoyment of these rights to all individuals under their jurisdiction. This aspect calls for specific activities by the States parties to enable individuals to enjoy their rights. This is obvious in a number of articles (e.g. article 3 [on the equal rights between men and women to the enjoyment of the rights] in the ICCPR) but in principle this undertaking relates to all rights set forth in the Covenant.[22]

Article 2(2) provides that the States parties undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.[23] Equality upon the basis of gender is also an issue addressed in Article 3 according to which States parties undertake to ensure the equal rights of men and women to the enjoyment of all civil and political rights set forth in the present Covenant. Article 4 is a provision permitting State parties to make derogations from the ICCPR 'in time of public emergency which threatens the life of the nations'. The capacity to make derogations is, however, limited to 'strict exigencies of the situation'.[24] No derogations are permissible from Articles 6, 7, 8 (paras 1 and 2), 11, 15, 16 and 18. The scope of derogation has also been narrowly construed by the Committee

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[21] See ICCPR General Comment No: 3 Implementation at the National Level (Article 2) 31/07/81 13th Sess., 1981, para 1. Several States parties, including the United Kingdom have not incorporated the ICCPR in their domestic laws. For the United Kingdom's position see R. Higgins, 'The Role of Domestic Courts in the Enforcement of International Human Rights: The United Kingdom' in B. Conforti and F. Francioni (eds), *Enforcing International Human Rights in Domestic Courts* (The Hague: Maritnus Nijhoff Publishers) 1997, pp. 37–58.

[22] General Comment 3 (13), Doc. A/36/40, p. 108.

[23] For further elaboration of the Committee on the Article see Equality of Rights between Men and Women (Article 3) 29/03/2000 General Comment No: 28 CCPR/C/21/Rev. 1/Add 10.

[24] Article 4(1).

and it retains the ultimate discretion in construing whether a particular derogation satisfies the requirement.[25]

ANALYSIS OF SUBSTANTIVE RIGHTS

The right to life, prohibition of torture and the issues concerning capital punishment[26]

The right to life, contained in Article 6, represents the most fundamental of all human rights.[27] It has been protected by all international and regional human rights instruments.[28] According to Article 6(1) 'Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of life.' The Committee has pronounced it as the supreme right and the provisions of the treaty establish firmly that no derogations are permissible from this right.[29] Article 6 does not provide an absolute prohibition of taking life but only 'arbitrary' deprivation of life, which raises questions about the nature and scope of the right to life. According to Professor Shestack:

> Surely the right to life guaranteed by Article 6(1) of [ICCPR] would seem to be so basic as to be considered absolute. Yet Article 6(1) only offers protection against

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[25] General Comment No: 5 Derogation of Rights (Article 4) (13th Sess., 1981) 31/07/81. The Committee has taken the view that 'measures taken under article 4 are of an exceptional and temporary nature and may only last as long as the life of the nation concerned is threatened and that, in times of emergency, the protection of human rights becomes all the more important, particularly those rights from which no derogations can be made. The Committee also considers that it is equally important for States parties, in times of public emergency, to inform the other States parties of the nature and extent of the derogations they have made and of the reasons therefore and, further, to fulfil their reporting obligations under article 40 of the Covenant by indicating the nature and extent of each right derogated from together with the relevant documentation'. Ibid. para 3. See also See R. Higgins, 'Derogations under Human Rights Treaties' 48 *BYIL* (1976–77) 281 at p. 281; A. Kiss, 'Permissible Limitations on Rights' in L. Henkin (ed.), *The International Bill of Rights: The Covenant on Civil and Political Rights* (New York: Columbia University Press) 1981, pp. 290–310.

[26] See W.P. Gromley, 'The Right to Life and the Rule of Non-Derogability: Peremptory Norms and Jus Cogens' in B.G. Ramcharan (ed.), *The Right to Life in International Law* (Dordrecht: Martinus Nijhoff Publishers) 1985, pp. 120–159; N.S. Rodley, *The Treatment of Prisoners in International Law*, 2nd edn (Oxford: Clarendon Press) 1999; S. Joseph, 'The Right to Life' in D.J. Harris and S. Joseph (eds), above n. 1, pp 153–183; Joseph, Schultz and Castan, above n. 1, at pp. 108–243.

[27] Y. Dinstein, 'The Right to Life, Physical Integrity and Liberty' in L. Henkin (ed.), above n. 25, pp. 114–137; P. Sieghart, *The Lawful Rights of Mankind: An Introduction to the International Legal Code of Human Rights* (Oxford: Clarendon Press) 1985, p. 107.

[28] See Article 3 UDHR; Article 2 ECHR; Article 1 UDHR, Article 4 ACHR; Article 4 AFCHPR.

[29] See Article 4(2) ICCPR; General Comment No: 6; also see General Comment No: 14, *Nuclear Weapons and the Right to Life* (Article 6) (23rd Sess.) 1984, para 1.

'arbitrary' deprivation of life. What is the effect of this qualification on the nature of the rights involved?[30]

Some elaboration has been provided by the Committee on the meaning of 'arbitrary'. In *Guerrero* v. *Columbia*[31] (also referred to as the *Camargo* case), the Colombian police had raided a house in which they believed a kidnapped person was being detained. The kidnapped person was not found in the house. However, the police waited for the suspected kidnappers and seven individuals, who were not proved to be connected with the kidnap, were shot without warning on their arrival at the house. The forensic evidence repudiated initial police claims that the deceased persons had died while resisting arrest. On the contrary, forensic evidence was produced confirming that the individuals concerned had been shot from point-blank range and without any warning. They had also been shot down at varying intervals. Guerrero, the victim herself, had been shot several times after she had died of a heart attack.[32] The police action was justified by the State because of a Legislative Decree No. 0070. This decree provided the Colombian police with a defence to any criminal charge 'in the course of operations planned with the object of preventing and curbing kidnapping'[33] for so long as the national territory remained 'in a state of siege'.[34] The Committee found that the police in this incident could not justify their action on the basis of the national legislation. According to the Committee, the police action had resulted in arbitrary deprivation of life violating Article 6 of the ICCPR. In the *Guerrero* case the Committee, while expanding on the concept of 'arbitrary', noted that the mere fact that the taking of life is lawful under national law does not by itself prevent it from being 'arbitrary'. In its views the Committee implies that there are limited exceptions to the right to life (that is self-defence, arrest and the prevention of escape) applicable in nationl and international law.[35]

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[30] J. Shestack, 'The Jurisprudence of Human Rights' in T. Meron (ed.), *Human Rights in International Law: Legal and Policy Issues* (Oxford: Clarendon Press) 1984, 69–113 at p. 71.

[31] *Husband of Maria Fanny Suarez de Guerrero* v. *Colombia*, Communication No. R.11/45 (5 February 1979), UN Doc. Supp. No. 40 (A/37/40) at 137 (1982).

[32] The Committee's decision on the issue of causing Guerrero's death remains unclear. See McGoldrick, above n. 1, at p. 341.

[33] The Decree Doc. A/37/40, 137, paras. 1.4, 7.1, 7.2.

[34] Ibid. para 1.5.

[35] The same exceptions to right to life are provided in other instruments see e.g. ECHR Article 2(2); see Rodley, above n. 26, at pp. 181–184; also see Harris, above n. 1, at p. 654. For exposition of the meaning of 'Arbitrary' as used in Article 4(1) see the Inter-American Commission on Human Rights report in Case 10.559 (Peru) 136 at pp. 147–148. The case is discussed by S. Davidson, 'The Civil and Political Rights Protected in the Inter-American Human Rights System' in D.J. Harris and S. Livingstone (eds), *The Inter-American System of Human Rights* (Oxford: Clarendon Press) 1998, 213–288, at p. 218.

In *Baboeram-Adhin and Others* v. *Suriname*,[36] the State attempted to justify the execution of 15 individuals on the basis that the men were killed while trying to escape after an unsuccessful coup attempt. The Committee in the absence of adequate evidence provided by the State found a violation of Article 6. The Committee took the view that:

> it was evident from the facts that fifteen prominent persons had lost their lives as a result of deliberate action by the military police that the deprivation of life was intentional. The state party has failed to submit any evidence proving that these persons were shot while trying to escape.[37]

The Committee has also found violations of Article 6 where capital punishment has been imposed in absentia,[38] or has been imposed in a discriminatory or arbitrary manner in conjunction with a breach of the right to fair trial,[39] or there has been a failure by the State to inform the victim of an appeal hearing until after it had been conducted,[40] or the manner of execution is inhuman or degrading.[41] Article 6 does not abolish capital punishment but provides that:

> [i]n 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. ... This penalty can only be carried out pursuant to a final judgment rendered by a competent court.

Issues surrounding capital punishment have been and continue to be complex; we will address them shortly. In so far as other aspects of the right to life are concerned, no specific guidelines are provided as to the points in time at which life terminates or commences. Abortion *per se* is not contrary to the provisions of the ICCPR and attempts to incorporate a prohibition on abortion proved unsuccessful.[42] Similarly, from the jurisprudence of the Committee, it would

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[36] *K. Baboeram-Adhin, and J. Kamperveen et al.* v. *Suriname*, Communication Nos. 146/1983 and 148–54/1983, UN Doc. CCPR/C/21/D/146/1983 (1984), U.N. Doc. CCPR/C/OP/2 AT 5 (1990), para. 6.3.

[37] Para 14.1.

[38] *Daniel Monguya Mbenge* v. *Zaire*, Communication No. 16/1977 (8 September 1977), U.N. Doc. Supp. No. 40 (A/38/40) at 134 (1983).

[39] *Lloydell Richards* v. *Jamaica*, Communication No. 535/1993, UN Doc. CCPR/C/59/D/535/1993 (31 March 1997), paras 7.2, 7.5; *Earl Pratt and Ivan Morgan* v. *Jamaica*, Communication No. 210/1986 and 225/1987 (6 April 1989), UN Doc. Supp. No. 40 (A/44/40) at 222 (1989); *Little* v. *Jamaica*, Communication No. 283/1988 (19 November 1991), UN Doc. CCPR/C/43/D/283/1988 (1991), paras 8.4 and 3.2; *Pinto* v. *Trinidad and Tobago*, Communication No. 232/1987 (20 July 1990), Report of the HRC, Vol. II (A/45/40), 1990, at 69, paras 12.5–12.6.

[40] *Thomas* v. *Jamaica*, Communication No. 321/1988 (3 November 1993), UN Doc. CCPR/C/49/D/321/1988 (1993).

[41] McGoldrick, above n. 1, at p. 346; within the ECHR see *Soering* v. *United Kingdom*, Judgment of 7 July 1989, Series A, No. 161.

[42] L.A. Rehof, 'Article 3' in Alfredsson and Eide (eds), above n. 6, 89–101, at p. 96.

appear that voluntary euthanasia is not unlawful. Article 7 is a very significant Article, the provisions of which are non-derogable,[43] and has been addressed by the Committee in State reports, in its General Comment and in the Optional Protocol.[44] A useful example of the Committee's jurisprudence under the Optional Protocol is provided through the *Conteris* v. *Uruguay case*.[45] Mr Conteris was a Methodist pastor, a journalist and a university professor who had been arrested and detained by the Uruguayan police because of his previous connections with the Tupamaros movement. He was held incommunicado for three months and subjected to various forms of physical torture, including hanging by the wrists and burning. After having been forced to sign a confession he was sentenced by a military court to 15 years' imprisonment. After a change in government he was subsequently released. The Committee found violations of several articles of ICCPR. These were Article 7, Article 9(1), 9(2), 9(3), 9(4), 10(1), 14(1) and 14(3).

While reporting on this Article, the Committee requires States Parties not only to describe the steps undertaken for the general protection of Article 7 but in addition to:

> provide detailed information on safeguards for the special protection of particularly vulnerable persons. It should be noted that keeping under systematic review interrogation rules, instructions, methods and practices as well as arrangements for the custody and treatment of persons subjected to any form of arrest, detention or imprisonment is an effective means of preventing cases of torture and ill-treatment. To guarantee the effective protection of detained persons, provisions should be made for detainees to be held in places officially recognized as places of detention and for their names and places of detention, as well as for the names of persons responsible for their detention, to be kept in registers readily available and accessible to those concerned, including relatives and friends. To the same effect, the time and place of all interrogations should be recorded, together with the names of all those present and this information should also be available for purposes of judicial or administrative proceedings. Provisions should also be made against incommunicado detention. In that connection, States parties should ensure that any places of detention be free from any equipment liable to be used for inflicting torture or ill-treatment. The protection of the detainee also requires that prompt and regular access be given to doctors and lawyers and, under appropriate supervision when the investigation so requires, to family members.[46]

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[43] Rodley, above n. 26, at p. 83.

[44] General Comment Concerning Prohibition of Torture and Cruel Treatment or Punishment (Article 7): 10/04/92. CCPR General Comment No: 20.

[45] *Hiber Conteris* v. *Uruguay*, Communication No. 139/1983 (17 July 1985), UN Doc. Supp. No. 40 (A/40/40) at 196 (1985).

[46] General Comment Concerning Prohibition of Torture and Cruel Treatment or Punishment (Article 7): 10/04/92, para 11.

In its consideration of periodic reports, the Committee has requested States parties to provide detailed information on the measures taken to implement this Article. States have been asked to ensure compliance with international standards such as the UN Standard Minimum Rules for the Treatment of Prisoners, the UN Code of Conduct for Law Enforcement Officials or the UN Standard Minimum Rules for the Administration of Juvenile Justice ('The Beijing Rules'). The Committee has questioned various forms of punishments and practices such as interrogation techniques,[47] the use of illegally obtained information,[48] stoning and flogging,[49] collective punishment for those found guilty,[50] and loss of nationality.[51]

At the same time it has to be conceded that the Committee has tended to avoid (or be consistent in dealing with) the problematic issue of distinguishing between the various facets of Article 7, that is 'torture', 'cruel', 'inhuman' or 'degrading treatment or punishment'. Instead it has relied generally on the broad prohibitions contained in the Article.[52] There also remain the difficult issues in relation to the nature of punishment and what constitutes inhuman and degrading treatment. Issues of cultural relativism have inhibited the development of a consensus on subjects such as corporal punishment.[53] Further controversial issues are raised in debates surrounding capital punishment and extradition to States where the convicted person may be given a death penalty. The position in international law is not established and State practices are inconsistent. As noted earlier, in 1989 the United Nations adopted the Second Optional Protocol to the ICCPR, Aiming at the Abolition of the Death Penalty,[54] a treaty that has not yet been widely ratified. Nearly half of the world's States retain capital punishment as a sentence for a range of offences, some of which may not (in objective terms) be regarded as the 'most serious crimes'.[55] In view of the numbers and influence of the retentionist States one leading authority on the subject has noted that 'it is hardly surprising that general international law does not expressly require the abolition of the death penalty'.[56]

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[47] SR 65 para 3 (Tomuschat on Czechoslovakia), SR 69 para 18 (Graefrath), SR 148 paras 3–6 (Lallah on UK).

[48] SR 69 para 32 (Tarnopolsky on UK), SR 98 para 64 (Tomuschat on Yugoslavia), SR 143 para 28 (Tomuschat on Austria).

[49] See Human Rights Committee, 64th Sess., *Concluding Observations of the Human Rights Committee: Libyan Arab Jamahiriya*. 06/11/98. CCPR/C/79/Add.101. (Concluding Observations/Comments), para 11.

[50] Ibid. para 12.

[51] SR 129 para 5 (Bouziri on Chile).

[52] Cf. the position in ECHR, below Chapter 6; Rodley, above n. 26, at p. 96.

[53] See General Comment 7(16) para 2. Cf. ECHR.

[54] Annex to GA Res. 44/128. Reprinted in 29 I.L.M (1990) 1464. For details of ratification see Appendix II.

[55] Criminal laws of some States includes capital punishments for activities such as blasphemy, adultery, sodomy, etc.

[56] Rodley, above n. 26, at p. 96.

With regard to the issue of whether a significant delay in the execution of a convicted person (the so-called death row phenomenon) *per se* constitutes inhuman, cruel and degrading treatment which violates Article 7, there exist substantial disagreements – even among international tribunals. The European Court of Human Rights has held that extradition of an individual in circumstances where he is likely to spend long periods awaiting execution would amount to cruel, inhuman or degrading treatment.[57] A similar position was adopted by the United Kingdom's Privy Council in *Pratt and Morgan* v. *Jamaica*.[58] However the Human Rights Committee has taken a different approach on the subject in *Pratt and Morgan* v. *Jamaica*[59] and *NG* v. *Canada*.[60] The case of *NG* is a striking one in that the Committee relied on the manner of execution (gas asphyxiation) rather than the fact of execution as a ground for finding a violation of Article 7. In 1985, Mr NG, the author, a resident of the US, was convicted in Canada of shooting a security guard. In 1990, the Canadian courts ordered his extradition to the US (California) to stand trial for kidnapping and twelve other murders. The Canadian government, after a substantial review of the case took the decision not to exercise their power to obtain assurances that the death penalty would not be imposed as a condition of extradition. In 1991, the author appealed to the Committee claiming that his extradition was in violation of Article 6 and 7 of the ICCPR. The Human Rights Committee took the view that Canada's decision to extradite Mr NG in the present circumstances did not violate Article 6. The Committee endorsed the Canadian Minister of Justice's position that there was 'the absence of exceptional circumstances, the availability (in California) of due process and of appeal against conviction and the importance of not providing a safe haven for those accused of murder'.[61] However, in finding a violation of Article 7, the Committee did take the position that:

> the author has provided detailed information that 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 10 minutes. The State party had the opportunity to refute these allegations on the facts; it has failed to do so. Rather, the State party has confined itself to arguing that in the absence of a norm of international law which expressly prohibits asphyxiation by cyanide gas, 'it would be interfering to an unwarranted degree with the internal laws and practices of the United States to refuse to extradite a fugitive to face the possible

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[57] See *Soering* v. *United Kingdom*, Judgment of 7 July 1989, Series A, No. 161; See below Chapter 6.

[58] *Pratt* v. *Attorney General of Jamaica* (PC (Jam)) Privy Council (Jamaica), 2 November 1993 [1994] AC 1 at 35.

[59] *Earl Pratt and Ivan Morgan* v. *Jamaica*, Communication No. 210/1986 and 225/1987 (6 April 1989), UN Doc. Supp. No. 40 (A/44/40) at 222 (1989).

[60] *Chitat Ng* v. *Canada*, Communication No. 469/1991 (7 January 1994), UN Doc. CCPR/C/49/D/469/1991 (1994).

[61] Ibid., para 15.6.

imposition of the death penalty by cyanide gas asphyxiation'. The Committee concludes that execution by gas asphyxiation, should the death penalty be imposed on the author, would not meet the test of 'least possible physical and mental suffering', and constitutes cruel and inhuman treatment, in violation of article 7 of the Covenant.[62]

Rights to liberty and security of person, prohibitions of arbitrary detentions and unfair trials[63]

Denials of liberty and security of person and arbitrary detentions have been sources of substantial concern. A recent United Nations document correctly expresses this concern in that '[a]ll countries are confronted by the practice of arbitrary detention. It knows no boundaries, and thousands of persons are subjected to arbitrary detention each year.'[64] We noted above that the continued practices of arbitrary and unlawful detention led the Commission on Human Rights to establish a Working Group on Arbitrary Detention.[65] Article 9 protects the valuable right of liberty and security of the person. The Article confirms that, in pursuance of this right,

> no one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedures as are established by law.[66]

The Article goes on to provide procedural guarantees for the detained person.[67] The reasons for arrest must be given at the time of arrest and the arrested person must be promptly informed of the charges against him.[68] Persons arrested or detained for criminal offences are to be brought promptly before a judge and must be tried within a reasonable period or released.[69] Persons deprived of their liberty are entitled to challenge the legality of their detention and in case of unlawful detention are entitled to the right of compensation.[70]

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[62] Ibid. paras 16.3 and 16.4.

[63] See Joseph, Schultz and Castan, above n. 1, at pp. 206–339; R.B. Lillich, 'Civil Rights' in T. Meron (ed.), above n. 30, pp. 115–170; Y. Dinstein, 'The Right to Life, Physical Integrity and Liberty' in L. Henkin (ed.), above n. 25, pp. 114–137; L.A. Rehof, 'Article 3' in Alfredsson and Eide (eds), above n. 6, 89 –101 at p. 89; Harris, above n. 1, pp. 637–680; Steiner and Alston, above n. 1, pp. 136–237; McGoldrick, above n. 1, at pp. 362–458.

[64] United Nations, *The Working Group on Arbitrary Detentions: Fact Sheet No: 26* (Geneva: United Nations).

[65] See above Chapter 2.

[66] Article 9(1).

[67] Article 9(2)–(5).

[68] Article 9(2).

[69] Article 9(3).

[70] Article 9(4) and 9(5).

A useful example of a State violation of rights contained in Article 9 and the Human Rights Committee's analysis is provided by the case of *Mukong* v. *Cameroon*.[71] M was a journalist and long-standing critic of the government. He had been campaigning for multiparty democracy in Cameroon for a long time. In 1988 he was arrested and detained after a BBC broadcast in which he had criticised the Cameroonian government. The reason given for his arrest was that he had made subversive comments contrary to a State Ordinance. He was subsequently charged with offences under the Ordinance. He was released only to be rearrested in 1990 for his campaign for the creation of a multiparty democracy. M appealed to the Committee claiming violations of various provisions of the Covenant. In its response the Committee found violations of Articles 7, 9 and 14, and it took the view that M's detention in the period during 1988–1990 and subsequently in 1990 were in violation of Article 9.

In another case *Carballal* v. *Uruguay*,[72] Carballal was arrested on 4 January 1976 and held incommunicado for more than five months. During his detention, for long periods he was tied and blindfolded and kept in secret places. Attempts to have recourse to habeas corpus proved unsuccessful. He was brought before a military judge on 5 May 1976 and again on 28 June but was detained for over a year. The Committee found *inter alia* violations of Article 9(1), 9(2), 9(3), and 9(4).

Article 10 provides for the right of detained persons to be treated with humanity. The Committee has given this Article a broad ambit, noting its application to anyone who has been deprived of his liberty including such people as those who are detained in prisons and hospitals, in particular psychiatric or mental hospitals.[73] It has insisted that:

> [t]reating all persons deprived of their liberty with humanity and with respect for their dignity is a fundamental and universally applicable rule. Consequently, the application of this rule, as a minimum, cannot be dependent on the material resources available in the State party. This rule must be applied without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.[74]

Article 14 represents the core of the criminal justice system within international law. Compliance with the provisions of Article 14 are an essential prerequisite to ensuring fairness in criminal proceedings. The Committee has elaborated on the right to fair trial through its General Comment, review of

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[71] *Womah Mukong* v. *Cameroon*, Communication No. 458/1991 (10 August 1994), UN Doc. CCPR/C/51/D/458/1991 (1994).

[72] *Leopoldo Buffo Carballal* v. *Uruguay*, Communication No. 33/1978 (8 April 1981), UN Doc. CCPR/C/OP/1 at 63 (1984).

[73] General Comment No: 21 (44th Sess.) 1992, para 2.

[74] General Comment No: 21 (44th Sess.) 1992, para 4.

State reports and decisions from individual communications.[75] The Article ordains that all persons be equal before courts and tribunals.[76] The concept of equality of arms is applicable not only in the courts and judicial tribunals but there also needs to be 'equality of the citizen *vis-à-vis* the executive'.[77] Unlike the European Court of Human Rights, the Committee has not elaborated significantly on the meaning of 'criminal charge' or 'rights and obligation in a suit at law';[78] the committee has, however, formulated substantial jurisprudence on fair and public hearings by a competent, independent and impartial tribunal. The Committee has viewed with concern developments such as the setting-up of special or military courts,[79] *Sharia* courts,[80] State security courts,[81] temporary appointments of judges,[82] and threats to the independence of the judiciary and the liberty of advocates freely to exercise their profession.[83]

The Committee has also put emphasis on the independence of the judiciary and the separation of State organs, in particular the executive from the judiciary. Attached to the right to fair trial is the presumption of innocence. In criminal trials, in order to secure conviction the prosecution must establish its case beyond reasonable doubt.[84] In order to ensure a fair trial, Article 14 provides for a number of minimum guarantees. These consist of: being informed promptly and in detail in a language which the accused understands;[85] having adequate time and facilities for the preparation of a defence;[86] being tried without undue delay;[87] being tried in person and being

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[75] General Comment No: 13 Equality before the courts and the right to a fair and public hearing by an Independent Court Established by Law (Article 14) 13/04/84.

[76] Article 14(1).

[77] SR 187 para 26 (Tomuschat on Poland).

[78] For further consideration see *Y. L. v. Canada*, Communication No. 112/1981 (8 April 1986), UN Doc. Supp. No. 40 (A/41/40) at 145 (1986) *a*; also see *Larry James Pinkney v. Canada*, Communication No. 27/1978 (2 April 1980), UN Doc. CCPR/C/OP/1 at 12 (1984). On the European Court of Human Rights, see below Chapter 6.

[79] See Concluding Observations by the Human Rights Committee: Peru. 15/11/2000. CCPR/CO/70/PER. (Concluding Observations/Comments) 70th Sess., para 12.

[80] See SR 200 para 8 (Graefrath on Iraq).

[81] SR 282 para 22 (Opsahl on Mali).

[82] See the Concluding Observations/Comments of the Human Rights Committee: Syrian Arab Republic CCPR/CO/71/SYR, para 15.

[83] See Human Rights Committee, 64th Sess., *Concluding Observations of the Human Rights Committee: Libyan Arab Jamahiriya*. 06/11/98. CCPR/C/79/Add.101. (Concluding Observations/Comments), para 14; Concluding Observations of the Human Rights Committee: Democratic People's Republic of Korea. 27/07/2001. CCPR/CO/72/PRK. (Concluding Observations/Comments) 72nd Sess., para 8.

[84] See General Comment 13 (21) para 7.

[85] Article 14(3)(a).

[86] Article 14(3)(b).

[87] Article 14(3)(c).

able adequately to defend his case;[88] and not being forced into making a guilty plea.[89] The Committee acting under the First Optional Protocol has on a number of occasions elaborated on the meaning and content of this right. In *Pratt and Morgan* v. *Jamaica*, the Committee found a breach of Article 14 when it took 20 hours (thereby meaning waiting for the accused until 45 minutes before his scheduled execution) before communication of a reprieve was received.[90] In another case involving appeal against imposition of the death penalty in Jamaica, the Committee found a violation of Article 14(3)(d). In this case the victim claimed that his lawyer had, without consulting him, withdrawn his appeal against conviction. The victim contended that had he foreseen the likely action of his lawyer, he would have sought another counsel. In finding violations of the Article, the Committee took the view that,

> while article 14, paragraph 3(d) does not entitle the accused to choose counsel provided to him free of charge, measures must be taken to ensure that counsel, once assigned, provides effective representation in the interests of justice. This includes consulting with, and informing, the accused if he intends to withdraw an appeal or to argue before the appeals court that the appeal has no merit.[91]

Rights to privacy, freedom of expression, conscience, opinion, assembly and association[92]

Among the essential ingredients of modern human rights law are rights to privacy, and freedom of expression, opinion, assembly and association. These rights are protected by all international and regional human rights instruments. Within the ICCPR, these rights can be found in Articles 17–20. Article 17 protects the important right to privacy, family, home and correspondence. The article has been elaborated further by the Committee's General Comment

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[88] Article 14(3)(d)(e).

[89] Article 14(3)(g).

[90] *Earl Pratt and Ivan Morgan* v. *Jamaica*, Communication No. 210/1986 and 225/1987 (6 April 1989), UN Doc. Supp. No. 40 (A/44/40) at 222 (1989), para 137; Rodley, above n. 26, at p. 235.

[91] *Kelly* v. *Jamaica*, Communication No. 253/1987 (8 April 1991) Annual Report 1991 (A/46/40), Annex XI.D.

[92] McGoldrick, above n. 1, at pp. 459–497; J.P. Humphrey, 'Political and Related Rights' in T. Meron (ed.), above n. 30, pp. 171–203; J. Michael, 'Privacy' in D.J. Harris and S. Joseph (eds), above n. 1, pp. 333–353; P. Cumper, 'Freedom of thought, Conscience and Religion' ibid. pp. 355–389; D. Feldman, 'Freedom of Expression' ibid. pp. 391–437; K. Ewing, 'Freedom of Association and Trade Union Rights' ibid. pp. 465–489; Joseph, Schultz and Castan, above n. 1, at pp. 348–441.

and also by its case law under the Optional Protocol.[93] In the *Aumeeruddy-Cziffra case*,[94] a number of Mauritian women claimed violations of their rights under *inter alia* Articles 17(1), 2(1), 3 and 26 of ICCPR. They claimed that the laws were being applied discriminatorily by the Mauritian immigration authorities, who were discriminating between Mauritian men on the one hand and Mauritian women who had married foreign men on the other hand. The claim in relation to Article 17(1) arose because of the interference with their rights to family life. The Committee reviewed the existing laws and found violations of the right to family life. It also found that the existing distinction in Mauritius breached the non-discriminatory provisions contained in the ICCPR. In *Toonen* v. *Australia*,[95] a claim that the Tasmanian Criminal Code making private homosexual conduct a criminal offence was upheld to be in breach of Article 17.

Article 19 represents the right of opinion and expression. It is an important right; parallel rights can be found in Article 19 UDHR, Article 10 ECHR and Article 9 ACHR. Article 19(1) provides that 'everyone shall have the right to hold opinions without interference'. Thus the right to hold an opinion is an absolute right and no interference from any source is permissible. By contrast, the provisions relating to freedom of expression are subject to restrictions. According to Article 19(2):

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[93] In its General Comment on this Article the Committee notes 'Article 17 provides for the right of every person to be protected against arbitrary or unlawful interference with his privacy, family, home or correspondence as well as against unlawful attacks on his honour and reputation. In the view of the Committee this right is required to be guaranteed against all such interferences and attacks whether they emanate from State authorities or from natural or legal persons. The obligations imposed by this article require the State to adopt legislative and other measures to give effect to the prohibition against such interferences and attacks as well as to the protection of this right'. It goes on to provide that 'relevant legislation must specify in detail the precise circumstances in which such interferences may be permitted. A decision to make use of such authorized interference must be made only by the authority designated under the law, and on a case-by-case basis. Compliance with article 17 requires that the integrity and confidentiality of correspondence should be guaranteed *de jure* and *de facto*. Correspondence should be delivered to the addressee without interception and without being opened or otherwise read. Surveillance, whether electronic or otherwise, interceptions of telephonic, telegraphic and other forms of communication, wire-tapping and recording of conversations should be prohibited. Searches of a person's home should be restricted to a search for necessary evidence and should not be allowed to amount to harassment. So far as personal and body search is concerned, effective measures should ensure that such searches are carried out in a manner consistent with the dignity of the person who is being searched. Persons being subjected to body search by State officials, or medical personnel acting at the request of the State, should only be examined by persons of the same sex'. Human Rights Committee, General Comment No: 16 The Right to Respect of Privacy, Family, Home and Correspondence, and Protection of Honour and Reputation (Article 17): 08/04/88. (32nd Sess., 1988), paras 1 and 8.

[94] *Shirin Aumeeruddy-Cziffra and 19 other Mauritian women* v. *Mauritius*, Communication No. 35/1978 (9 April 1981), UN Doc. CCPR/C/OP/1 at 67 (1984).

[95] *Toonen* v. *Australia*, Communication No. 488/1992 (4 April 1994), UN Doc CCPR/C/50/D/488/1992 (1994).

> Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.

However, restrictions are provided by Article 19(3) which states:

> The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these 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 or of public order (ordre public), or of public health or morals.

In their survey of reports the Committee has examined and raised concerns over many issues, for example banning or censorship,[96] governmental controls of various forms,[97] limitations on certain groups such as civil servants and armed forces,[98] and imposition of criminal liability for producing published works.[99] The Committee has also been unhappy over the applicable limitations embodied in criminal laws for offences including blasphemy or blasphemous libel,[100] sedition,[101] subversive propaganda,[102] etc. In *Hertzberg and Others* v. *Finland*,[103] the authors of the communication alleged violation of their rights of freedom of expression and opinion by the State-controlled broadcasting company (FBC). Their claim was that Article 19 rights were breached in relation to the sanctions imposed on expression and information through censorship of radio and TV programmes on homosexuality. In its defence, Finland relied *inter alia* upon protection of public morals and claimed that these actions were fully supported by public opinion. Furthermore, the State also argued that the decision on sanctions represented the internal ruling of the autonomous broadcasting company. The Committee took account of the Finnish argument pertaining to the defence of public morals. It came to the conclusion that 'since a certain "margin of discretion" must be accorded to the responsible national authorities'[104] in issues concerning public morals, the application of Article 19(3) meant that no violation had taken place of the

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96 SR 26 para 10 (Vincent-Evans on Syria).
97 SR 89 para 41 (Esperson on Iran).
98 SR 321 para 27 para 27 (Movchan on the Netherlands).
99 SR 54 para 36 (Tarnopolsky on Denmark).
100 SR 161 para 23 (Bouziri on Belize, then UK Dependency).
101 See e.g. SR 402 para 6 (Tarnopolsky on Australia).
102 See e.g. SR 222 para 32 (Tomuschat on Columbia).
103 *Leo R- Hertzberg, Uit Mansson, Astrid Nikula and Marko and Tuovi Putkonen, represented by SETA (Organization for Sexual Equality)* v. *Finland*, Communication No. R.14/61 (7 August 1979), UN Doc. Supp. No. 40 (A/37/40) at 161 (1982).
104 Ibid. paras 10.3.

freedom of opinion and expression. The Committee's view is in line with other international bodies such as the European Court of Human Rights.[105]

Another related concern for human rights law has been the advocacy of religious and racial hatred and propaganda for war. The prohibition of such forms of expression is provided for by Article 20. Elaborating on the provisions of this Article, the Committee in its General Comment has noted that:

> Not all reports submitted by States parties have provided sufficient information as to the implementation of Article 20 of the Covenant. ... State parties are obliged to adopt the necessary legislative measures prohibiting the actions referred to therein. However the reports have shown that in some States such actions are neither prohibited by law nor are appropriate efforts intended or made to prohibit them. Furthermore, many reports failed to give sufficient information concerning the relevant national legislation.[106]

A number of States have entered reservations to this article pointing to the vagueness of the provisions and the lack of definition of the terms: 'propaganda' and 'war'. These States include France, Australia, Finland, Denmark, the Netherlands, Luxembourg, Iceland, New Zealand, Norway and Sweden.[107] Article 20(2) prohibits by law any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence. While in itself a worthy aspiration, there nevertheless remains potential for conflict with Article 19, freedom of opinion and expression, and in this regard a careful balance needs to be established.[108]

The interaction between principles of equality and non-discrimination with minority rights[109]

The strong focus of modern human rights law on the principles of equality and non-discrimination necessitates constant referrals and analysis. In their application to ICCPR, equality and non-discrimination represent the most dominant subjects; a following Chapter, in presenting a detailed analysis, considers the value of Articles 2, 3, 25 and 26 of the Covenant.[110] For the present purposes,

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[105] See *Handyside* v. *United Kingdom*, Judgment of 7 December 1976, Series A, No. 24; below Chapter 6.

[106] Human Rights Committee, *General Comment No 11: Prohibition of Propaganda for War and Inciting National, Racial or Religious Hatred* (Article 20) 29/07/83 (19th Sess., 1983).

[107] McGoldrick, above n. 1, at p. 494.

[108] McGoldrick, above n. 1, at pp. 486–490.

[109] Joseph, Schultz and Castan, above n. 1, at pp. 518–595; Lord Lester and S. Joseph in Harris and Joseph (eds), above n. 1, pp. 597–627; B.G. Ramcharan, 'Equality and Non-Discrimination' in L. Henkin (ed.), above n. 25, at pp. 246–269; P. Thornberry, *International Law and the Rights of Minorities* (Oxford: Clarendon Press) 1991, pp. 141–319; for detailed consideration of the issues in international law, see below Chapters 10–12.

[110] See below Chapter 10.

two points need to be made. First, the principles of equality and non-discrimination as utilised in the Covenant incorporate de facto equality, thereby sanctioning affirmative action policies.[111] Secondly, equality and non-discrimination represent independent rights and (unlike ECHR Article 14) do not need to be linked to violations of substantive rights.[112] Thus, in the cases of *Broeks* v. *The Netherlands*[113] and *Zwaan De Vries* v. *The Netherlands*[114] the Committee found the social security legislation discriminated against women and thereby contravened Article 26. This view was taken notwithstanding the absence of a substantive right to social security in the Covenant.

While the emphasis on the individual's right to equal treatment and non-discrimination is overwhelming, modern international law has remained reluctant to accord collective rights to minority groups.[115] The dominant theories of non-discrimination were for a long time regarded as a substitute for minority rights, an approach confirmed by the non-incorporation of minority rights articles in the United Nations Charter, UDHR and the ECHR. This point is reiterated by the United Nations Special Rapporteur Francesco Capotorti who, while preparing his study pursuant to Article 27 of ICCPR, comments that the prevention of discrimination and the implementation of special measures to protect minorities 'are merely two aspects of the same problem; that of fully ensuring equal rights to all persons'.[116] Article 27 itself is structurally incoherent and does not accord minorities collective rights. Having said that, the ICCPR is unique among international law treaties for its inclusion of an article which provides rights on the basis of an individual's minority characteristic. Article 27 provides that:

> 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 practise their own religion, or to use their own language.

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[111] See e.g. the Human Rights Committee, General Comment 25, *The Right to Participate in Public Affairs, Voting Rights and the Right of Equal Access to Public Service* (Article 25) (12/07/96) para 23.

[112] Note however the developments since the adoption of Protocol 12 to the ECHR. See below Chapter 6.

[113] *S.W.M. Broeks* v. *The Netherlands*, Communication No. 172/1984 (9 April 1987), UN Doc. Supp. No. 40 (A/42/40) at 139 (1987).

[114] *F.H. Zwaan-de Vries* v. *The Netherlands*, Communication No. 182/1984 (9 April 1987), UN Doc. Supp. No. 40 (A/42/40) at 160 (1987).

[115] See below Chapter 11.

[116] F. Capotorti, *Special Rapporteur, Study on the Rights of Persons Belonging to Ethnic, Religious and Linguistic Minorities*, UN Sales NoE.78.XIV.I (1978) Reprinted in 1991 by the United Nations Centre for Human Rights, UN Sales NoE.91.XIV.2, 26.

A number of communications have involved a discussion of the provisions of Article 27,[117] though the case that has attracted most attention is that of *Lovelace* v. *Canada*.[118] Mrs Lovelace had lost her status as a Maliseet Indian after her marriage to a non-Indian according to the Indian Act of Canada.[119] She claimed that an Indian man who married a non-Indian woman would not have lost his status and that the law was discriminatory. The essence of the original communication filed by her had been that this loss of status and deprivation of the right to return to her original reserve lands had been in breach of Articles 2(1), 3, 23(1), 23(4), 26 and 27 of the Covenant.

In relation to admissibility, she had argued that she was not obliged to exhaust the domestic remedies that are provided in Article 5(2)(a) of the Optional Protocol since the Canadian Supreme Court had already declared that regardless of any inconsistencies with the Canadian Bill of Rights and legislation prohibiting discrimination, the relevant provisions[120] remained operative.[121] The communication was declared admissible in August 1979 and the Committee provided its interim decision in July 1980. In giving its decision, the Committee took the view that the denial of opportunity to Sandra Lovelace to return to her reserves was essentially a breach of Article 27. After having found a violation of Article 27, the Committee considered it unnecessary to examine general provisions of discrimination contained in Articles 2, 3 and 26.[122] However, in an individual opinion, Mr Bouziri was of the view that there had also been violations of Articles 2(1), 3, 23(1) and (4), and 26 since the provisions of the Indian Act were discriminatory, especially on the basis of gender.[123]

Kitok v. *Sweden*[124] is another example of issues arising out of minority or indigenous rights. In this case, the petitioner alleged that he had inherited rights in reindeer breeding, land and water in Sorkaitum Sam village but, through the operation of a Swedish law, he was denied the power to exercise those rights resulting from the loss of his membership of Sam

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[117] See e.g. *Ivan Kitok* v. *Sweden*, Communication No. 197/1985 (27 July 1988), UN Doc. Supp. No. 40 (A/43/40) at 221 (1988); *Lubicon Lake Band* v. *Canada*, Communication No. 167/1984 (26 March 1990), UN Doc. Supp. No. 40 (A/45/40) at 1 (1990).

[118] *Sandra Lovelace* v. *Canada*, Communication No. 24/1977 (30 July 1981), UN Doc. CCPR/C/OP/1 at 83 (1984). For commentaries see A.F. Bayefsky, 'The Human Rights Committee and the Case of Sandra Lovelace' 20 *CYBIL* (1982) 244; D. McGoldrick, 'Canadian Indians, Cultural Rights and the Human Rights Committee' 40 *ICLQ* (1991) 658.

[119] S.12(1)(b); Can. Rev. Stat., C.1–6.

[120] Ibid.

[121] *A-G of Canada* v. *Jeanette Lavelle, Richard Isaac et al* v. *Yvonne Bedard (1974), SCR 1349.*

[122] paras 13.2–13.19.

[123] Ibid. p. 175.

[124] *Ivan Kitok* v. *Sweden*, Communication No. 197/1985 (27 July 1988), UN Doc. Supp. No. 40 (A/43/40) at 221 (1988); Prior decisions CCPR/C/WG/27/D/197 1985; CCPR/C/29D/197 1985 (admissibility 25 March 1987).

village. The communication alleged violations of Articles 1 and [illegible] of the ICCPR. The Committee declared his claim inadmissible under Art[illegible] 1 viewing that the

> author, as an individual, could not claim to be the victim of a violation of the right to self-determination. Whereas the Optional Protocol provides recourse to individuals claiming that their rights have been violated, Article 1 deals with rights conferred upon people as such.[125]

As far as the provisions of Article 27 were concerned, the Committee decided to consider the communication on its merits. However, it observed that the overall provisions of Swedish law were consistent with the spirit of Article 27.

THE HUMAN RIGHTS COMMITTEE[126]

The Human Rights Committee is a body of experts in charge of the implementation of the ICCPR. It works on a part-time basis. The functions of the Committee are detailed in ICCPR, the First Optional Protocol, and rules of procedure. Part IV of the ICCPR provides for the setting up of the Committee and elaborates on its role and activities. The Committee consists of 18 members elected from among nationals of States Parties to the ICCPR.[127] These members are anticipated to be of a high moral character with established competence in the field of human rights.[128] The members of the Committee are elected to serve in their personal capacity for four-year terms.[129] They are eligible for re-nomination. The elections to the Committee take place by secret ballot of States parties to the Covenant, at meetings that are convened by the United Nations Secretary-General. In the elections:

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[125] Para 6.3.

[126] See above McGoldrick, above n. 1; Ghandhi, above n. 1; T. Opsahl, 'The Human Rights Committee' in Alston (ed.), *The United Nations and Human Rights* (Oxford: Clarendon Press) 1992, pp. 369–443; L. Heffernan, 'A Comparative View of Individual Petitions Procedures under the European Convention on Human Rights and the International Covenant on Civil and Political Rights' 19 *HRQ* (1997) 78; B.G. Ramcharan, 'Implementing the International Covenants on Human Rights' in B.G. Ramcharan (ed.), *Human Rights: Thirty Years after the Universal Declaration Commemorative Volume on the Occasion of the Thirtieth Anniversary of the Universal Declaration of Human Rights* (The Hague: Martinus Nijhoff Publishers) 1979, pp. 159–195; A. De Zayas, J.Th. Möller and T. Opsahl, 'Application of the International Covenant on Civil and Political Rights under the Optional Protocol by the Human Rights Committee' 28 *GYBIL* (1985) 9; P.R. Ghandhi, 'The Human Rights Committee and the Right of Individual Communication' 57 *BYIL* (1986) 201; J. Rehman, 'The Role of the International Community in Dealing with Individual Petitions under the Optional Protocol' 9 *JOLS* (1992) 13.

[127] Article 28(1) Rule 13 of Rules of Procedure provided that the 'members of the Committee shall be the 18 persons appointed in accordance with articles 28–34 of the Covenant'.

[128] Article 28(2).

[129] Article 28(3).

consideration shall be given to equitable geographic distribution of membership and to the representation of the different forms of civilization and of the principal legal systems.[130]

Each State party is entitled to nominate a maximum of two persons, who should also be its nationals.[131] The Committee may not include more than one national from the same State.[132] The persons elected are those nominees who obtain the largest majority of votes and an absolute majority of votes of the representatives of States parties present and voting.[133] The Committee meets three times a year in spring,[134] summer and autumn[135] for three weeks' sessions. As noted earlier, the Committee members serve in their personal capacity and not as representatives of their States. This independent stance is reinforced by the requirement that each member must make a solemn declaration on appointment that they will perform their functions impartially and conscientiously. While it is important for members of the Committee to be independent, the Covenant itself does not provide a condition for them to have complete independence from their governments. The Committee members have included individuals having various governmental positions, including ministers and members of Parliament. As part-time workers, the Committee members receive emoluments.[136]

There are three main mechanisms of implementation carried out by the Committee. First, there is the compulsory reporting procedure whereby all States parties are obliged to present reports showing compliance with the ICCPR. Secondly, there exists an inter-State complaints procedure. Finally, an individual complaints procedure is in place. We shall be dealing with each of these mechanisms in greater detail in the remainder of this chapter.

THE REPORTING PROCEDURE

There are three types of reports: initial, supplementary and periodic reports. Initial reports are required after one year of the entry into force for the State party concerned, and periodic reports follow after every five years.[137] As we shall consider, the Committee has provided guidelines for initial and periodic reports.[138] Notwithstanding these guidelines the reports are often incomplete.

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130 Article 31(2).
131 Article 29(2).
132 Article 31(1).
133 Article 30(4).
134 In New York.
135 In Geneva.
136 Article 35.
137 See below.
138 See Guidelines Regarding the Form and Content of Reports from States Parties under Article 40 of the Covenant. Doc.CCPR/C/5; Doc A/32/44.

Additional guidelines have been provided for periodic reports. Only Article 40(3) deals with the provision of information by specialised agencies. No provisions are made explicitly for NGOs to provide information,[139] nor has the committee decided to allow specialised agencies and NGOs to comment on the States' reports.[140] However, it has been possible to acquire information from various non-governmental sources. NGOs are allowed to submit information to individual members of the Committee in their individual capacity.

The reporting procedure, it should be emphasised, is the principal mechanism of implementation and is the only compulsory procedure to which all States parties must comply. The obligation falling upon each State is to report upon the 'measures [it] has adopted' to give effect to the provisions of the ICCPR and also, under Article 40(2), to report on 'the factors and difficulties, if any, affecting the implementation of the Covenant'. Initial reports are made within one year of entry of the Covenant for that State. The reports are to be considered by the Committee. The role of the Committee is to 'study' the reports and to transmit its reports, and such general comments as it may consider appropriate, to the States parties.[141] The Committee may also submit to ECOSOC those general comments in addition to the State reports received from States parties.

The Committee has decided that subsequent reports are to be required every five years.[142] Since 1992 the Committee has allowed itself the authority to request a report at any time it considers appropriate and to allow the chairperson to request a special report in exceptional cases or in cases of emergency. Under this procedure, urgent reports have been required from a number of States.[143] Prior to the consideration of the State report, the report is scrutinised by a working group of the Committee. The working group prepares a list of questions arising from the analysis of the report and these questions are then put to the State representative. The questions typically involve omissions from the report, follow-up from the previous report and any other issues arising from the report. The list of questions may be made public once the session has started. The consideration of a report takes place over two to three public meetings. A representative of the reporting State is invited to introduce the report and answer questions as contained in the list prepared by the working group. The Committee also receives information from other informal sources. It may seek additional information from the State party concerned through

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[139] See UN Doc. E/2575.

[140] Harris, above n. 1, at p. 648.

[141] Cited in McGoldrick, above n. 1, at p. 9.

[142] UN Doc. CCPR/C/19/Rev.1

[143] In 1992 special reports were asked for by the Committee from Bosnia-Herzegovina, Croatia and the Federal Republic of Yugoslavia; in 1993 from Angola and Burundi; and in 1994 from Haiti and Rwanda.

supplementary reports.[144] At the completion of the session, the Committee proceeds to draft and adopt its comments. The comments represent the Committee's view on a State party's report. It consists of the positive and negative features in the reports, concerns and constraints. It also includes suggestions and recommendations. Periodic reports follow a similar pattern, with the Committee continually emphasising the elaboration of the follow-up procedures in the light of the Committee's comments on the previous report.[145] According to Article 40(5) the Committee is to 'submit to the General Assembly of the United Nations through ECOSOC annual reports of its activities'. Within the United Nations, the third committee considers the Annual Reports of the Committee. A procedure was devised in 1985 to deal with supplementary reports.[146]

Reporting guidelines

While the reporting procedure appears an attractive mechanism for monitoring progress, in practice there are substantial difficulties and hurdles. The States' reports are frequently delayed and are often incomplete, failing to provide the required information. In the light of these hurdles, the Committee has also made a significant concession to those States which submit supplementary reports. Thus if a State party submits additional or supplementary information within a year of its initial or periodic report, the Committee makes provision for deferring the periodicity of report.[147]

In order to assist States regarding the required content of the reports, in 1977 the Committee set out general guidelines.[148] According to these guidelines, reports should describe measures adopted giving effect to the rights in the Convention. Reports should also refer to the difficulties and other factors affecting the implementation of the rights. The guidelines also require States to outline their legislative, administrative or other mechanisms in place with regard to the rights contained in the ICCPR and to include information on restrictions of these rights. According to these guidelines States parties are reminded of their obligations to ensure the rights contained within the Convention. Such obligations may entail affirmative action policies and may relate to situations within the private sphere. In 1981 and 1995 these guidelines were supplemented by additional sets of guidelines. The 1995

[144] While seeking additional information from the State party, the Committee has used a method of asking questions on a topic-by-topic basis.
[145] Ghandhi, above n. 1, at p. 24.
[146] Doc A/41/40, para. 45.
[147] Doc A/3740, Ax IV; adopted by Human Rights Committee at its 380th meeting 28 July, 1982.
[148] See General Guidelines Regarding the Form and Content of Reports from States Parties under Article 40 of the Covenant GAOR 32nd Sess. No. 44 (A/32/44). Report of the Human Rights Committee.

guidelines emphasise that the reports should include factors 'affecting the difficulties experienced in the implementation of the Covenant, including any factors affecting the equal enjoyment by women of that right'.[149] Guidelines have also been provided for periodic reports under Article 40(1)(b). The effect of these efforts has, however, been limited and various examples could be found of incomplete or inadequate compliance with the reporting procedures. Since there are no sanctions attached to non-compliance, the powers of the Committee remain limited.

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GENERAL COMMENTS[150]

The Human Rights Committee is also entitled to provide General Comments, comments which relate to various rights within the Covenant and are non-country specific.[151] The practice of producing General Comments began in 1981. The overall purpose behind these General Comments is to:

> make the Committee's experience available for the benefit of all States Parties, so as to promote more effective implementation of the Covenant; to draw the attention of States parties to insufficiencies disclosed by a large number of reports; to suggest improvements in the reporting procedure; to clarify the requirements of the Covenant; and to stimulate the activities of States Parties and International Organisations in the promotion and protection of human rights. General Comments are intended also to be of interest to other States, especially those preparing to become parties to the Covenant. They are intended, in addition, to strengthen cooperation amongst States in the universal protection and promotion of human rights.[152]

In its initial set of General Comments, the Committee considered aspects of the reporting obligations of States, procedures and the obligations on States parties under Article 2 to undertake specific activities to enable individuals to enjoy their rights. General Comments have been made on Articles 1–4, 6, 7, 9, 10, 12, 14, 17–20, 23–25, 27 and 41. The General Comments delivered have been addressed to all States parties, and in its consideration of States reports the Committee has increasingly referred to these General Comments. The General Comments not only act as an invaluable guide to the interpretation of particular articles, but also have added considerably to the existing jurisprudence regarding civil and political rights. We have already considered the value of the General Comments in our analysis of the substantive rights of

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[149] UN Doc. CCPR/C/20Rev. para 6.

[150] See T. Opsahl, 'The General Comments of the Human Rights Committee' in J. Jekewitz et al., *Des Menschen Recht Zwischen Freiheit Und Verantwortung, Festschrift für Karl Josef Partsch zum 75. Geburstag* (Berlin: Duncker and Humblot) 1989. pp. 273–286.

[151] ICCPR Article 40(4).

[152] Ghandhi, above n. 1, at p. 25.

the Covenant, but the significance of these Comments upon controversial subjects such as the rights of the child,[153] minorities[154] and freedom of religion[155] cannot be overstated.

INTER-STATE APPLICATIONS[156]

The second mode of implementation is the inter-State complaints procedure as authorised under Articles 41 and 42 of the ICCPR. Although part of the same treaty, the procedure is optional with States interested in using this mechanism being required to make an additional declaration.[157] Both parties, the complainant and the State against whom the complaint is made, must have made a declaration under Article 41. According to this procedure a State (A) which considers another State (B) is violating the Covenant can bring that fact to the attention of the State Party concerned. State (B) must respond to the allegations within three months.[158] If, however, the matter has not been resolved within six months of the receipt of the initial communication, either State may bring the matter to the attention of the Committee.[159] The Committee must decide whether all local remedies have been exhausted before considering the case in closed sessions.[160] The Committee's task is to make an attempt to resolve the dispute through its good offices.[161] The Committee is obliged to produce a written report within twelve months of the date of receipt of notice of complaint. If a solution is reached, then the Committee's report will be brief and confined to facts and the solution reached.[162] If a friendly solution has not been reached then the Committee is required to confine its report to a brief statement of facts. The written submissions and a record of the oral submissions made by the States parties involved are to be attached to the report.[163]

According to Article 42 (if the matter is not resolved amicably) the Committee may, with the consent of the States parties concerned, appoint a five-member ad hoc conciliation commission.[164] The Commission is required

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[153] Human Rights Committee, *General Comment No: 17, Rights of the Child (Art. 24)*: 35th Sess., 1989, 07/04/89.

[154] Human Rights Committee, *General Comment No: 23, The Rights of Minorities (Art. 27)*: 50th Sess., 1994, 08/04/94.

[155] Human Rights Committee, *General Comment No: 22, The Right to Freedom of Thought, Conscience and Religion (Art. 18)*: 48th Sess. 1993, 30/07/93.

[156] See S. Leckie, 'The Inter-State Complaint Procedure in International Law: Hopeful Prospects or Wishful thinking?' 10 *HRQ* (1988) 249.

[157] Article 41(1).

[158] Article 41(1)(a).

[159] Article 41(1)(b).

[160] Article 41(1)(c)(d).

[161] Article 41(1)(e).

[162] Article 41(1)(h)(i).

[163] Article 41(1)(h)(ii).

[164] Article 42(1)(a)(b).

to report its findings to the Chairman of the Committee within twelve months of having taken up the matter.[165] If no solution has been reached then the Commission report must state the facts and indicate 'its views on the possibilities of an amicable solution'.[166] A conciliation commission has the power to make recommendations, however, these recommendations are not binding upon States. In each case the matter will be referred to the General Assembly – through ECOSOC being informed, in due course, by the Committee in its annual report. Like other international procedures of a similar nature the inter-State complaints procedure has not proved to be of any major significance. Inter-State proceedings, in the words of one commentator, 'are undeniably complex, cumbersome and elongated'.[167] States often feel reluctant to challenge other States for political and diplomatic reasons. As yet the inter-State complaints procedure has not been used.[168]

THE INDIVIDUAL COMPLAINTS

A third mechanism, and by far the most significant in so far a
concerned, is the individual complaints procedure under the first optional protocol to the ICCPR. At the time of drafting of the ICCPR it had been proposed to incorporate a mechanism of individual complaints within the Covenant itself, an effort which proved abortive in the light of widely differing views and disagreements. The Protocol, which emerged as a separate treaty, came into operation on 23 March 1976 and by 31 March 2002 there were 101 States parties to it – covering a population of well over one billion people from all continents of the world. Under this Protocol, the Committee has provided consideration to more than 1,000 cases emerging from 69 States parties.

According to Article 1 of the Protocol, a State party to the Covenant that also becomes a party to the Protocol:

> recognises the competence of the Committee to receive and consider communications from individuals subject to its jurisdiction who claim to be victims of violation by that State Party of any of the rights set forth in the Covenant. No Communication shall be received by the Committee if it concerns a State Party to the Covenant which is not a party to the present Protocol.[170]

The Communication should be sent to the Secretariat of the Office of the High Commissioner for Human Rights. Communications must be in written form. There is no restriction of language and, unlike the European system,

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[165] Article 42(7).
[166] Article 42(7)(c).
[167] Ghandhi, above n. 1, at p. 26.
[168] Ibid. at p. 27.
[169] For a detailed consideration see Ghandhi, above n. 1.
[170] Article 1, Protocol 1.

there is no time limit on submission after the exhaustion of domestic remedies. However, prior to submission, and in accordance with Article 2, the individual who claims to be the victim of violations of his or her rights must have exhausted all available domestic remedies.

The communication must provide essential prerequisite information. This consists of the name, address and nationality of the victim and the author. The State against which the complaint is being made must be identified clearly. When a State is not a party to the Optional Protocol, the Secretary-General returns the communications with the notification that the State concerned is not a party to the Protocol. There should also be identification of the breach and the articles which are alleged to have been breached. There must also be a statement to the effect that, having satisfied the admissibility requirements (i.e. the exhaustion of domestic remedies), the same matter is not being considered by another international procedure etc.[171] The communication must be signed and dated. Article 3 of the Protocol provides that the Committee shall consider inadmissible any communication which is anonymous or which the Committee considers to be an abuse of the right of submission or incompatible with the provisions of the Covenant. Article 5(2) provides for the exclusion of those communications where the same matter is the subject of another international investigation or settlement.

Consideration of the communication under the OP is confidential at the merit and admissibility stage. On receipt of the communication, it is screened by a member of the Secretariat of the offices of the High Commissioner for Human Rights. The communication is registered by the Secretariat and is forwarded to the Human Rights Committee's Special Rapporteur for New Communications.[172] The Special Rapporteur, a member of the Committee, provides the initial scrutiny and ensures that the necessary information is provided or contained in the communication. He seeks observations or further information from the relevant State party and the individual, and then passes them to the five-member Working Group on Communications. The latter meets for one week before the session and can declare a communication admissible so long as the Working Group is unanimous.[173] Otherwise the issue of admissibility is considered by the whole committee.[174]The general practice is that the recommendations of the Working Group are normally followed by the Committee.[175]

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[171] Article 5(2)(a)(b).

[172] For the terms of reference for the Special Rapporteur on New Communications, see GAOR, 46th Sess., Supplement No. 40 (A/45/40) Report of the Human Rights Committee, p. 218.

[173] Rule 87(2).

[174] S. Lewis-Anthony, 'Treaty-Based Procedures for Making Human Rights Complaints within the UN System' in H. Hannum (ed.), above n. 17, at p. 47.

[175] Ghandhi, above n. 1, at p. 75.

The Committee is under an obligation to bring any communication submitted to it to the attention of the concerned State party.[176] Within six months the State party must provide the Committee with written explanations or statements clarifying the matter.[177] Cases found to be admissible are considered on their merits after further consultation with the State party and the author of the Communication. The Committee holds closed meetings when examining individual communications and the pleadings are treated as confidential. The Committee formulates its views in the light of all the written information made available to it by the individual and by the State party concerned. There are thus no apparent mechanisms for oral on-site investigations.[178]

The Human Rights Committee presents its views through consensus, though individual members can write concurring or dissenting opinions.[179] The Committee forwards its formulated views to the State party and to the individual. According to Article 6, the Committee includes in its annual report under Article 45 of the Covenant a summary of its activities under the Optional Protocol. The Committee's views are not legally binding, carrying only moral and political obligations.[180] The terminology, such as using 'communications' rather than 'complaints' and 'views' as opposed to 'decisions', confirms the limited nature of the mandate of the Human Rights Committee.

The Committee's views have not been readily endorsed by States parties and the lack of compliance with the views of the Committee has been a source of some concern. Between 1982 and 1990, the committee sent out letters to the States parties concerned, requesting that they take action in response to its views. This process has proved to be unsatisfactory. From 1990 onwards the Committee has undertaken greater efforts to ensure compliance. A Committee member is now designated as a Special Rapporteur to follow the implementation process through. The Committee's practice in cases of violation is to require the State concerned to inform the Committee of any actions undertaken in response to the Committee's findings. In order to ensure monitoring of State compliance, the special Rapporteur has a wide mandate: to make 'such contacts and take such action as appropriate for the due performance of the follow-up mandate'.[181] In pursuit of this mandate the Special Rapporteur has contacted a number of permanent representatives or missions of States

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176 Article 4(1).

177 Article 4(2).

178 S. Lewis-Anthony, 'Treaty-Based Procedures for Making Human Rights Complaints within the UN System' in Hannum (ed.), above n. 17, at p. 48.

179 For the difficulties surrounding decision making by consensus, see Ghandhi, above n. 1, at pp. 32–35.

180 De Zayas, Moller and Opsahl, above n. 126, at p. 11.

181 Rules of Procedure Rule 95(2).

parties to discuss the actions taken by the State.[182] A further initiative to ensure compliance involves on-site visits.[183] In August 1995, the Special Rapporteur conducted his first – and as yet only – on-site investigation mission to monitor the compliance of Jamaica with the Committee's view on administration of Justice in cases involving the death penalty and death row phenomena. It must be noted that lack of funding for such visits can be a discouraging factor for planning future initiatives. The Committee's annual report submitted to the General Assembly includes not only reference to those States which have not complied with the Committee's views but also information on the follow-up activities. States are also required to provide information on action undertaken in response to the Committee's view in their periodic reports submitted under Article 40 of the Covenant.

Admissibility requirements under the Optional Protocol

Who may submit a petition?

According to Article 1 of the OP, the Committee may receive communications from:

> individuals subject to [the State Party's] jurisdiction who claim to be victims of a violation by the State party of any of the rights set forth in the Covenant.

There is no requirement of nationality provided that the victim has been within the jurisdiction of the State. The Committee, therefore, is authorised to receive communication from nationals, aliens, refugees or anyone else so long as the individual concerned is subject to jurisdiction.[184] Organisations or associations, as such, are not entitled to submit communications.[185] The person submitting the communication is identified as the 'author'.[186] Only one or several 'individuals' (acting either on their own behalf or through his/their representatives) may submit a communication under Article 1 of the Protocol. The committee has taken the term 'representative' to mean a 'duly appointed representative', for example the alleged victim's lawyer.[187] The Committee, however, has adopted a flexible approach in circumstances where it has not

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[182] S. Lewis-Anthony, 'Treaty-Based Procedures for Making Human Rights Complaints within the UN System' in H. Hannum (ed.), above n. 17, at p. 49.

[183] Ibid.

[184] See *Miguel Angel Estrella v. Uruguay*, Communication No. 74/1980 (17 July 1980), UN Doc. Supp. No. 40 (A/38/40) at 150 (1983).

[185] *Disabled and handicapped persons in Italy v. Italy*, Communication No. 163/1984 (10 April 1984), UN Doc. CCPR/C/OP/1 at 47 (1984); *J. R. T. and the W. G. Party v. Canada*, Communication No. 104/1981(6 April 1983), UN Doc. CCPR/C/OP/1 at 25 (1984) (an unincorporated political party).

[186] McGoldrick, above n. 1, at p. 170.

[187] UN Doc. A/33/40 para 580.

been possible for the victim to submit the communication because of arbitrary detention, being held incommunicado, strict mail censorship, an incapacitating illness consequent upon detention, or death occurring as a result of State actions or omissions.[188] In these circumstances the Committee has allowed others to petition on behalf of the victim provided there is a strong enough link between the individual and the complainant, and that the victim has (or would have) consented himself or herself to such an action. This position is reconfirmed by Rule 90 of the Committee Rules of Procedure according to which a 'communication should normally be submitted by the individual himself or by his representative' although it may be submitted on behalf of the alleged victim 'when it appears that he is unable to submit [it] himself'.[189]

In *Massera* v. *Uruguay* the author's communication on behalf of her husband, her stepfather, and her mother was held admissible.[190] Similarly, communications on behalf of daughter,[191] an uncle and aunt,[192] a son-in-law[193] and a niece[194] have been admissible by reason of close family connections. The onus is upon the authors to establish sufficient linkage with the victim and convince the Committee that he or she has (or would have) authorised submission to the Committee. The Committee has not limited the acceptance of communications from close family members. At present NGOs are not authorised to present communications on behalf of the alleged victim, and organisations in general may not act as authors of communications since Articles 1 and 2 of the Protocol explicitly refer to 'individuals'.

Are actio popularis *communications permissible?*

Under the provisions of the Protocol a person can claim to be the 'victim' only if his or her rights are actually being affected. It is undeniably a matter of degree how concretely this requirement should be taken. However, it is clear that no individual could in the abstract – by way of *actio popularis* – challenge

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188 See *Herrera Rubio* v. *Colombia*, Communication No. 161/1983 (2 November 1987), UN Doc. Supp. No. 40 (A/43/40) at 190 (1988; *Miango* v. *Zaire*, Communication No. 194/1985 (27 October 1987), UN Doc. Supp. No. 40 (A/43/40) at 218 (1988). See Ghandhi, above n. 1, at p. 85.

189 Rule 90(b) Rules of Procedure.

190 *Moriana Hernandez Valentini de Bazzano, Luis Maria Bazzano Ambrosini, Martha Valentini de Massera and Jose Luis Massera* v. *Uruguay*, Communication No. R.1/5 (15 February 1977), UN Doc. Supp. No. 40 (A/34/40) at 124 (1979).

191 *Maria del Carmen Almeida de Quinteros, on behalf of her daughter, Elena Quinteros Almeida, and on her own behalf* v. *Uruguay*, Communication No. 107/1981 (17 September 1981), UN Doc. Supp. No. 40 (A/38/40) at 216 (1983).

192 *Beatriz Weismann Lanza and Alcides Lanza Perdomo* v. *Uruguay*, Communication No. R. 2/8 (20 February 1977), UN Doc. Supp. No. 40 (A/35/40) at 111 (1980).

193 *Daniel Monguya Mbenge* v. *Zaire*, Communication No. 16/1977 (8 September 1977), UN Doc. Supp. No. 40 (A/38/40) at 134 (1983).

194 *Beatriz Weismann Lanza and Alcides Lanza Perdomo* v. *Uruguay*, Communication No. R. 2/8 (20 February 1977), UN Doc. Supp. No. 40 (A/35/40) at 111 (1980).

a law or practice claiming it to be contrary to the Covenant.[195] If the law has not already been concretely applied to the detriment of the individual, it must in any event be applicable in such a way that the alleged victim's risk of being affected is more than a theoretical possibility.[196] In *Shirin Aumeeruddy-Cziffra and 19 Other Mauritian Women* v. *Mauritius*,[197] the authors of the communication complained that two pieces of legislation on immigration and deportation resulted in gender discrimination, violating the right to found a family and home and removed the protection of courts of law, breaching Articles 2–4, 17, 23, 25 and 26 of the Covenant. To further their complaints, the authors argued that, under the new laws,

> alien husbands of Mauritian women lost their residence status in Mauritius and must now apply for a resident permit which may be refused or removed at any time. These new laws, however, do not affect the status of alien women married to Mauritian husbands who retain their legal right to residence in the country. The authors further contend that under the new laws alien husbands of Mautirian woman may be deported under a ministerial order which is not subject to Judicial Review.[198]

At the time of the communication, seventeen authors were unmarried and only three co-authors were married to foreign husbands. The Committee applying the test of 'alleged victim's risk being more than a theoretical possibility' held that only those women directly affected by Mauritian legislation could claim to be victims. This excluded the seventeen unmarried Mauritian women. The Committee however held the three married women to be 'victims'. Despite the apparently narrow view taken in the Mauritian women's case, the existence of a risk will suffice and the petitioner need not show that the law has in fact been applied to their detriment.

The existence of risk was used as a criterion in *Toonen* v. *Australia*[199] where a practising homosexual was regarded as a 'victim' when he challenged a law criminalising homosexual acts, a law that not been enforced for ten years. Justifying its views, the Committee noted that 'the threat of enforcement and the pervasive impact of the public opinion had affected [the author] and continued to affect him personally'.[200] The existence of risk is also a critical factor in cases where the victim faces being extradited to a non-State party

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[195] See *A. R. S.* v. *Canada*, Communication No. 91/1981 (28 October 1981), UN Doc. CCPR/C/OP/1 at 29, 30 (1984). Contrast with the requirement laid down in ACHR (Article 44). below Chapter 8.

[196] *Shirin Aumeeruddy-Cziffra and 19 other Mauritian women* v. *Mauritius*, Communication No. 35/1978 (9 April 1981), UN Doc. CCPR/C/OP/1 at 67 (1984), para 9.2.

[197] Ibid.

[198] Ibid.

[199] *Toonen* v. *Australia*, Communication No. 488/1992 (4 April 1994), UN Doc. CCPR/C/50/D/488/1992 (1994).

[200] Ibid. para 8.2

with a strong possibility of facing torture. In *Kindler* v. *Canada*, the Committee noted:

> A State party would itself be in violation of the Covenant if it handed over a person to another State in circumstances in which it was foreseeable that torture would take place. The foreseeability of the consequence would mean that there was a present violation by the State party, even though the consequence would not occur until later on.[201]

Communications ratione materia

The Committee's competence to examine communications is limited to violations of rights contained within the ICCPR. Other alleged violations (not contained in the Convention) are not admissible.[202] Thus allegations of being over-taxed (based on racial discrimination),[203] right to property,[204] the right to asylum,[205] or the right to conscientious objection are outside the remit of the Committee's consideration.[206] However, an overlap with rights contained in other international instruments does not render the alleged violation inadmissible.[207]

Against whom?

It is only possible to bring an action against a State party and not an international or regional organisation.[208] It is also important to verify that the concerned State is a party to both the ICCPR and the Optional Protocol. Once a State is identified as having accepted obligations under the ICCPR and the Protocol, there are two additional issues which have generated complexities. First, sometimes it can be difficult to identify whether a particular organ is part of the State or a private body, and in this regard our earlier discussion (on

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201 *Kindler* v. *Canada*, Communication No. 470/1991 (11 November 1993), UN Doc. CCPR/C/48/D/470/1991 (1993), p. 141 (para 6.2).

202 *K. L.* v. *Denmark*, Communication No. 59/1979 (26 March 1980), UN Doc. CCPR/C/OP/1 at 24 (1984); *C. E.* v. *Canada*, Communication No. 13/1977 (25 August 1977), UN Doc. CCPR/C/OP/1 at 16 (1984).

203 *I. M.* v. *Norway*, Communication No. 129/1982 (6 April 1983), UN Doc. CCPR/C/OP/1 at 41 (1984).

204 *K. L.* v. *Denmark*, Communication No. 59/1979 (26 March 1980), UN Doc. CCPR/C/OP/1 at 24 (1984).

205 *V. M. R. B.* v. *Canada*, Communication No. 236/1987 (18 July 1988), UN Doc. Supp. No. 40 (A/43/40) at 258 (1988).

206 *L. T. K.* v. *Finland*, Communication No. 185/1984 (9 July 1985), UN Doc. Supp. No. 40 (A/40/40) at 240 (1985).

207 See *S. W. M. Broeks* v. *The Netherlands*, Communication No. 172/1984 (9 April 1987), UN Doc. Supp. No. 40 (A/42/40) at 139 (1987), 160; McGoldrick, above n. 1, pp. 163–165.

208 *H.d.P* v. *The Netherlands*, Communication No. 217/1986 (24 March 1988), UN Doc. CCPR/C/OP/1 at 70 (1984). Similar to ECHR decision *CFDT* v. *European Communities/their Members* A. 8030/77, 13 D & R 231 (1978) (European Commission).

public/private divide) needs to be recalled. State responsibility extends to officially or semi-officially controlled agencies (for example, an industrial board[209] or a broadcasting corporation).[210] Secondly, since the undertaking on the part of the State is 'to respect and to ensure all individuals ... the rights', it is also possible to hold the State accountable in situations where although the breach was conducted by a private party, the State had nevertheless the duty to prevent that breach.[211]

Communications ratione temporis

In accordance with the general rules of international law, alleged breaches of the Covenant which occurred before the Covenant and the Protocol had entered into force[212] with regard to the State party concerned are beyond the scope of consideration.[213] If, however, the alleged violations continued after the relevant date,[214] or the alleged offences began and continued even though the initial arrest took place before the entry into force for the relevant State of the Covenant and the Protocol,[215] or the alleged offences have produced long-term effects, the communication could be declared admissible.

Communications between petitioner and the State complained against

(Interpretation of Article 1 of the Protocol in relation to Article 2(1) of the Covenant – meaning of 'within its territory and subject to its jurisdiction').

According to Article 2(1) of the Covenant, 'each State Party undertakes to respect and ensure to all individuals within its territory and subject to its jurisdiction the rights recognised in the present Covenant without distinction of any kind'. In contrast Article 1 of the Protocol refers to the requirement of

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[209] *B. d. B. et al.* v. *The Netherlands*, Communication No. 273/1989 (30 March 1989), UN Doc. Supp. No. 40 (A/44/40) at 286 (1989).

[210] *Lea R- Hertzberg, Uit Mansson, Astrid Nikula and Marko and Tuovi Putkonen, represented by SETA (Organization for Sexual Equality)* v. *Finland*, Communication No. R.14/61 (7 August 1979), UN Doc. Supp. No. 40 (A/37/40) at 161 (1982).

[211] See the Committee's approach in *Herrera Rubio* v. *Colombia*, Communication No. 161/1983 (2 November 1987), UN Doc. Supp. No. 40 (A/43/40) at 190 (1988) and *Alfredo Rafael and Samuel Humberto Sanjuán Arévalo* v. *Colombia*, Communication No. 181/1984 (3 November 1989), UN Doc. Supp. No. 40 (A/45/40) at 31 (1990).

[212] *Miguel A. Millán Sequeira* v. *Uruguay*, Communication No. 6/1977 (29 July 1980), UN Doc. CCPR/C/OP/1 at 52 (1984); *Lucía Sala de Touron* v. *Uruguay*, Communication No. 32/1978 (31 March 1981), UN Doc. CCPR/C/OP/1 at 61 (1984).

[213] *A. R. S.* v. *Canada*, Communication No. 91/1981 (28 October 1981), UN Doc. CCPR/C/OP/1 at 29 (1984).

[214] *William Torres Ramirez* v. *Uruguay*, Communication No. 4/1977 (26 August 1977), UN Doc. CCPR/C/OP/1 at 3 (1984).

[215] *Luciano Weinberger Weisz* v. *Uruguay*, Communication No. 28/1978 (29 October 1980), UN Doc. CCPR/C/OP/1 at 57 (1984); *Leopoldo Buffo Carballal* v. *Uruguay*, Communication No. 33/1978 (8 April 1981), UN Doc. CCPR/C/OP/1 at 63 (1984).

'jurisdiction' but not to that of territory. The Committee has adopted a broad approach to the meaning of jurisdiction. Thus in a number of circumstances, complaints have been held admissible for individuals not physically within the territory of the State concerned. In *Samuel Lichtensztejn* v. *Uruguay*[216] the Committee held a petition admissible by a Uruguayan citizen who was resident in Canada in relation to the non-renewal of her passport. According to the Committee the words, 'subject to its jurisdiction, in Article 1 of the Protocol, refer to the relationship between the individual and the State concerned, and not to the place where the violation occurred'.[217]

Thus, depending on the nature of the alleged complaint, it is possible for the victim to be outside the territory of the State party. Therefore refusal to renew a passport in another State would result in the denial of the right to freedom of movement. Abduction in the territory of another State,[218] or atrocities committed after occupation of foreign land also provide examples.[219] Furthermore the victim does not have to be in the territory or jurisdiction of the concerned State at the time of the alleged violation or at the time of the filing of the communication. The decision in the *Lilian Celiberti de Casariego case*[220] confirms that the Committee sees no problem in declaring a communication from a refugee admissible.[221] It would also appear that a communication would be held admissible on the basis that at the relevant time the individual concerned was under the effective control of the respondent State, regardless of the theoretical territorial boundaries.

Admissibility and procedural requirements connected with the content of the petition

Effect on admissibility of the existence of international procedures (Article 5(2)(a))

According to this Article a communication cannot be considered if it contains the same matter as that which is being examined by another international

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[216] *Samuel Lichtensztejn* v. *Uruguay*, Communication No. 77/1980 (30 September 1980), UN Doc. Supp. No. 40 (A/38/40) at 166 (1983).

[217] *Delia Saldias de Lopez* v. *Uruguay*, Communication No. 52/1979 (29 July 1981), UN Doc. CCPR/C/OP/1 at 88 (1984).

[218] Ibid. *Attorney-General of the Government of Israel* v. *Eichmann* 36 ILR (1961) 5; J.E.S. Fawcett, 'The Eichmann Case' 58 *BYIL* (1962) 181; L.C. Green, 'The Eichmann Case' 23 *MLR* (1960) 507.

[219] See Committee Against Torture, *Initial Reports of States parties Due in 1997*: Kuwait. 15/10/97. CAT/C/37/Add.1. (State Party Report) paras 53, 54.

[220] *Lilian Celiberti de Casariego* v. *Uruguay*, Communication No. R.13/56 (17 July 1979), UN Doc. Supp. No. 40 (A/36/40) at 185 (1981).

[221] In fact most communications seem to be presented by individuals in similar situations.

procedure, for example by the European Court of Human Rights[222] or by the Inter-American Commission on Human Rights.[223] This limitation does not apply to the State reporting system such as those prescribed by Article 16 of the ICESCR[224] or considerations under the ECOSOC Resolution 1503 procedure,[225] the ILO Freedom of Association Committee,[226] those pending before the United Nations Working Group on Enforced or Involuntary Disappearance established by the Commission on Human Rights in its Resolution 20(XXXVI) 29 February 1980,[227] or the Country-Studies by the Inter-American Commission on Human Rights.[228] Only procedures implemented by inter-State or intergovernmental organisations fall under this provision. Those established by NGOs, such as inter-parliamentary councils, do not affect admissibility, nor do procedures such as the e.g. petition system of the General Assembly Special Committee against Apartheid, and those of several ad hoc fact-finding bodies on human rights in particular countries.[229] The examination of State reports under the ICESCR does not come within the terms of Article 5(2)(a).[230] Equally there is nothing to prevent an applicant exhausting another international procedure and then submitting a communication to the Committee. Similarly the Committee is not precluded from consideration of a communication which has been withdrawn from another international procedure[231] or submitted by an unrelated third party.

Even in the case of communications being considered by another international procedure, the Committee has adopted generous rulings. In one case, the Committee determined that a two-line reference to the author in a list of over 100 persons detained did not breach the provisions of Article 5(2)(a).[232] In *Miguel A.*

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[222] See *D.F. et al.* v. *Sweden*, Communication No. 183/1984 (26 March 1985), UN Doc. Supp. No. 40 (A/40/40) at 228 (1985).

[223] See *Miguel A. Millán Sequeira* v. *Uruguay*, Communication No. 6/1977 (29 July 1980), UN Doc. CCPR/C/OP/1 at 52 (1984).

[224] *S. W. M. Broeks* v. *The Netherlands*, Communication No. 172/1984 (9 April 1987), UN Doc. Supp. No. 40 (A/42/40) at 139 (1987).

[225] *A et al.* v. *S*, Communication No. 1/1976 (26 January 1978), UN Doc. CCPR/C/OP/1 at 17 (1984).

[226] *John Khemraadi Baboeram et al* v. *Suriname*, Communication No. 146/1983 and 148 to 154/1983 (4 April 1985), UN Doc. Supp. No. 40 (A/40/40) at 187 (1985).

[227] *Basilio Laureano Atachahua* v. *Peru*, Communication No. 540/1993 (16 April 1996), CCPR/C/56/D/540/1993.

[228] Harris, above n. 1, at p. 650.

[229] See Doc. A/33/40 para 582.

[230] McGoldrick, above n. 1, at p. 183.

[231] *Raul Sendic Antonaccio* v. *Uruguay*, Communication No. R.14/63 (28 November 1979), UN Doc. Supp. No. 40 (A/37/40) at 114 (1982). According to the Human Rights Committee 'same matter refers to having "identical parties to the complaints advanced and facts adduced in support of them"' *V. O.* v. *Norway*, Communication No. 168/1984 (17 July 1985), UN Doc. CCPR/C/OP/1 at 48 (1984), para 6(a).

[232] *Miguel A. Millán Sequeira* v. *Uruguay*, Communication No. 6/1977 (29 July 1980), UN Doc. CCPR/C/OP/1 at 52 (1984).

statements from the State party concerned regarding the non-exhaustion of domestic remedies. The Committee has noted on a number of occasions that the State is required to show that remedies are available and effective.[241]

The Committee has also placed the burden of proof on the State party to rebut the allegations made by the individual because it is the State which is in a stronger position and has access to pertinent information. In *Eduardo Bleier* v. *Uruguay*, the Committee said in relation to the burden of proof that this cannot rest on the author of the communication, especially considering that the author and the State do not always have equal access to the evidence, and that frequently the State party alone has access to the information. It is implicit in Article 4(2) of the OP that the State party has the duty to investigate in good faith that all the allegations are corroborated by evidence submitted by the author. In cases where the author has submitted allegations supported by substantial witness testimony, and where clarification of the case depends on information exclusively in the hands of the State party, the committee may consider allegations as substantial in the absence of satisfactory evidence and explanation by State party.[242] Similarly in *William Torres Ramirez* v. *Uruguay*, a general denial by Uruguay of non-exhaustion of domestic remedies was declared to be entirely insufficient.[243] The author's allegations, where they have been either uncontested or the details are of a general character, have often been accepted unconditionally. This approach of the Committee in relation to burden of proof issues is commendable, commenting on which Davidson notes that the Human Rights Committee has signalled

> quite clearly in its jurisprudence that it is the State which must show which remedies are specifically available to a complainant when it denies that local remedies have not been exhausted.[244]

Other admissibility requirements

In general the victim needs to establish a prima facie case. In other words, the communication must not be 'entirely without foundation or merit in legal principle'.[245] Thus, where a petitioner is complaining, for example of breach

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[241] 'It is incumbent on the State party to prove the effectiveness of remedies the non-exhaustion of which it claims' and the availability of the alleged remedy must be 'reasonably evident'; *C. F. et al.* v. *Canada*, Communication No. 113/1981, 25 July 1983 (19th Sess.), 12 April 1985 (24th Sess.), UN Doc. CCPR/C/OP/1 at 13 (1984).

[242] *Eduardo Bleier* v. *Uruguay*, Communication No. R.7/30 (23 May 1978), UN Doc. Supp. No. 40 (A/37/40) at 130 (1982), para 13.

[243] *William Torres Ramirez* v. *Uruguay*, Communication No. 4/1977 (26 August 1977), UN Doc. CCPR/C/OP/1 at 3 (1984).

[244] S. Davidson, *The Inter-American Court of Human Rights* (Aldershot: Dartmouth) 1992, at pp. 71–72.

[245] Ghandhi, above n. 1, at p. 181.

Millán Sequeira v. *Uruguay* the Committee also decided that a communication submitted to the Inter-American Commission on Human Rights prior to the entry into force of the ICCPR and OP could not relate to the event alleged to have taken place after that date. Similarly the rule was not breached by a subsequent opening of the case by an unrelated third party.[233] A case which has already been examined under another procedure on international investigation could not concern the same matter if it was submitted to that particular procedure prior to the entry into force of the Protocol and the Covenant for that particular State.[234]

Effect on admissibility by non-exhaustion of domestic remedies (Article 5(2)(b))

One of the most significant admissibility requirements is that the victim must have exhausted all domestic remedies before attempting to have recourse to the Committee.[235] Thus in the event of available (and not unreasonably prolonged) domestic remedies, the Committee is barred from considering the communication. While not stated explicitly, the Committee has considered this provision in the light of existing principles of general international law. Unlike ECHR, there are no time limits and the approach of the Committee has been flexible and generous. The applicant has the initial burden of proof to show that he has exhausted domestic remedies. After having established the prima facie case, the burden of proof shifts to the State to refute the alleged violations. If the domestic remedies are ineffective,[236] unreasonable in nature or excessively onerous,[237] unduly prolonged[238] or are no longer open or are, in fact, unavailable[239] to the victim then he is not under obligation to exhaust these remedies. Similarly there is no obligation on the victim to resort to extraordinary remedies.[240]

In the absence of evidence suggesting the existence of ineffective and unreasonably prolonged remedies, the Committee has declined to accept general

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[233] *Lilian Celiberti de Casariego* v. *Uruguay*, Communication No. 56/1979 (29 July 1981), UN Doc. CCPR/C/OP/1 at 92 (1984).

[234] *Alberto Grille Motta* v. *Uruguay*, Communication No. 11/1977 (29 July 1980), UN Doc. CCPR/C/OP/1 at 54 (1984).

[235] *N. S.* v. *Canada*, Communication No. 26/1978 (28 July 1978), UN Doc. CCPR/C/OP/1 at 19 (1984).

[236] *Guillermo Ignacio Dermit Barbato and Hugo Haroldo Dermit Barbato* v. *Uruguay*, Communication No. 84/1981, 27 February 1981, UN Doc. Supp. No. 40 (A/38/40) at 124 (1983).

[237] See *T.K* v. *France*, Communication No. 220/1987 (08 December1989). CCPR/C/37/D/220/1987; *H.K.* v. *France*, Communication No. 222/1987 (08 December 1989). CCPR/C/37/D/222/1987.

[238] *Alba Pietraroia* v. *Uruguay*, Communication No. 44/1979 (27 March 1981), UN Doc. CCPR/C/OP/1 at 65 (1984).

[239] *Eduardo Bleier* v. *Uruguay*, Communication No. R.7/30 (23 May 1978), UN Doc. Supp. No. 40 (A/37/40) at 130 (1982).

[240] *Earl Pratt and Ivan Morgan* v. *Jamaica*, Communication No. 210/1986 and 225/1987 (6 April 1989), UN Doc. Supp. No. 40 (A/44/40) at 222 (1989).

of the right to fair trial and racial discrimination, he needs to substantiate his claims with some evidence.[246] According to Article 3 of the Optional Protocol, the Committee is barred from considering any communication that is anonymous. The author of the communication is required to identify himself or herself, though the Committee may agree (depending on the circumstances) not to reveal his or her identity to the State. The communication must also not abuse the right of submission, or be incompatible with the provisions of the Covenant.[247] Communications have rarely been held inadmissible because of abuse of the right to petition.[248]

CONCLUSIONS

Since the procedure came into effect in March 1979, the Committee has found 282 violations of various rights contained in the ICCPR. An analysis of the jurisprudence of the Committee provides an impressive exhibition of the manner in which a body with limited resources and powers could nevertheless exert influence to protect the rights of individuals. The Committee has, over the last two decades, emerged as the most important organ striving for the universal enforcement of human rights within the framework of the United Nations. Imaginative and ambitious ideas have been taken up. Reference could be made to the provisions for informing the respondent State of desirable interim measures 'to avoid irreparable damage to the victim'[249] and the publication of its final decisions without abridgement in spite of Article 6 of the Protocol providing merely for a 'summary of its activities'.[250] In contrast to the ECHR, the grounds for rejecting individual communications are restrictively applied. There is no time limit, again in contrast to the ECHR's six-month rule. While the Committee has utilised concepts found in other human

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[246] *C. L. D. v. France*, Communication No. 228/1987 (18 July 1988), UN Doc. Supp. No. 40 (A/43/40) at 252 (1988).

[247] Article 3 Optional Protocol.

[248] See *K. L. v. Denmark*, Communication No. 59/1979 (26 March 1980), UN Doc. CCPR/C/OP/1 at 24 (1984). The Committee found the author's submission an abuse of the right to petition. K.L.'s communication related to the author's taxable income with the author claiming violation of Articles 14 and 26 of ICCPR. He had previously submitted a similar communication, which had been held inadmissible because of lack of factual evidence and substantiation of the actual violation of the rights. In the present instance there was a similar lack of substantiation. It was held inadmissible and an abuse of the right to petition.

[249] Rule 86 of the Rules of Procedure provides authority to the Committee before forwarding its [final] views on the communication to the relevant State party to inform that State 'of its views as to whether interim measures may be desirable to avoid irreparable damage to the victim of the alleged violation'. See *O. E. v. S*, Communication No. 22/1977 (25 January 1978), UN Doc. CCPR/C/OP/1 at 5 (1984); *Alberto Altesor v. Uruguay*, Communication No. 10/1977 (26 July 1978), UN Doc. CCPR/C/OP/1 at 6 (1984).

[250] Article 6 Optional Protocol.

rights systems, such as the ECHR's doctrine of 'margin of appreciation',[251] it has been very restrictive in granting discretionary powers which are likely to be misused.[252] With regard to submitting communications, the costs of petitioning are relatively small and there are no specific requirements relating to the language in which communications ought to be made. Despite these positive features, there are significant difficulties faced by the Committee.

It is not a court of law and its views are not binding upon the relevant parties.[253] There is no possibility of sanctions (comparable to ECHR) attached to the Committee's decisions nor are any provisions made for the appointment of an ad hoc investigation committee (as in ECOSOC Resolution 1503)[254] nor for the appointment of an ad hoc conciliation commission as in its own inter-State procedure.[255] There are no judicial sanctions attached to the Committee's views although the basic spirit of the Protocol and the purpose for which the Committee was established must not be overlooked. The Committee was never perceived to be a Supreme Court for international protection of human rights. The Protocol and any international human rights system can only work effectively in cooperation with State parties' involvement and cooperation. Although limited to those States that are parties to the Protocol, the procedure presents the only attempt within the UN system to deal with cases from individuals in a quasi-judicial procedure and to render an opinion upon the merits of the case.

Before concluding, a number of concerns and limitations faced by the Committee under the Optional Protocol have to be mentioned. First, the absence of sanctions attached to the Committee's views does in fact mean that the full potential of the international system of human rights protection is not realised. While the Committee has persuaded many states to change their laws and administrative practices, the overall position has appropriately been described as 'disappointing'.[256] It is certainly unsatisfactory when compared to the European human rights system. Second, attached to this lack of sanctions is the concern regarding non-cooperation with, or even non-recognition of, the Committee's decisions. We have already considered the Committee's

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[251] *Leo R- Hertzberg, Uit Mansson, Astrid Nikula and Marko and Tuovi Putkonen, represented by SETA (Organization for Sexual Equality) v. Finland*, Communication No. R.14/61 (7 August 1979), UN Doc. Supp. No. 40 (A/37/40) at 161 (1982). See below Chapter 6.

[252] According to Professor Harris 'No margin of appreciation doctrine is applied under the International Covenant on Civil and Political Rights either, largely for fear of State abuse' See D. Harris, 'Regional Protection of Human Rights: The Inter-American Achievement' in D.J. Harris and S. Livingstone (eds), above n. 35, 1–29 at p. 10, n. 52.

[253] J. Crawford, 'The UN Human Rights Treaty System: A System in Crisis' in P. Alston and J. Crawford (eds), *The Future of UN Human Rights Treaty Monitoring* (Cambridge: Cambridge University Press) 2000, 1–12, at p. 2.

[254] See above Chapter 2.

[255] See above inter-State procedure.

[256] McGoldrick, above n. 1, at p. 202.

efforts to ensure compliance and cooperation. These efforts are only partially successful. Last but not least, the Committee, like other UN bodies, is facing a substantial crisis of personnel and funding. In its work it is facing a huge backlog of at least three years.[257] There is an urgent need to support the Committee with additional funds, and it would be useful to hold a number of extraordinary sessions to reduce or remove the current backlog.

[257] H.J. Steiner, 'Individual Claims in a World of Massive Violations: What Role for the Human Rights Committee' in P. Alston and J. Crawford (eds), above n. 253, 15–53 at p. 33.