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THE RIGHTS OF MINORITIES[1]

"Each nation has a unique tone to sound in the symphony of human culture; each nation is an indispensable and irreplaceable player in the orchestra of humanity."[2]

INTRODUCTION

Minorities as groups exist everywhere in varied forms and sizes. There are ethnic, linguistic, cultural, racial, religious, linguistic, sociological and political minorities in practically every State of the world. State practice has been inconsistent and incoherent in so far as protection of minority rights is concerned. Some States have adopted generous policies not only in recognising the existence of minorities but also in protecting their cultural and linguistic identity. However, there have been other States where genocide and the physical extermination of minority groups have taken place. In their practices, many States continue to refuse to recognise that minorities physically exist and have used forcible mechanisms of assimilation.[3] In view of the ambiguities emergent from State practices, international law has historically found it difficult to provide firm guidelines in defining 'minorities' and in articulating a detailed set of rights. An underlying theme in relation to the subject is that

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[1] See J. Rehman, *The Weaknesses in the International Protection of Minority Rights* (The Hague: Kluwer Law International) 2000; S.S. Ali and J. Rehman, *Indigenous Peoples and Ethnic Minorities of Pakistan* (London: Curzon Press 2001; P. Thornberry, *International Law and the Rights of Minorities* (Oxford: Clarendon Press) 1991; P. Thornberry, *Minorities and Human Rights Law* (London: Minority Rights Group) 1991; C. Brölmann, R. Lefeber and M. Zieck (eds), *Peoples and Minorities in International Law* (Dordrecht: Martinus Nijhoff Publishers) 1993; G. Alfredsson and A. de Zayas, 'Minority Rights: Protection by the United Nations' 14 *HRLJ* (1993) 1.

[2] I.L. Claude Jr., *National Minorities: An International Problem* (Cambridge, Mass.: Harvard University Press) 1995, p. 85.

[3] See R.G. Wirsing (ed.), *Protection of Minorities. Comparative Perspectives* (New York: Pergamon Press) 1981.

by way of contrast to individual human rights; minority rights – as collective rights – are also liable to pose more substantial threats to the territorial integrity of States or to those who form the government of those States.

At the time of the establishment of the League of Nations, an elaborate regime on minorities treaties was set. The mechanisms that were adopted by the League of Nations to protect minorities were limited in nature and the minority protection regime collapsed well before the start of the Second World War. With the establishment of the United Nations, emphasis shifted to the position of individual human rights. The United Nations Charter contains several references to human rights. The Universal Declaration is committed to promoting individual rights and non-discrimination. There is no reference to minorities in either the United Nations Charter or the UDHR.[4] The Human Rights Commission, one of the principal functional commissions of the ECOSOC, nevertheless established a Sub-Commission whose specific mandate included the promotion and protection of minority rights. Since the establishment of the Sub-Commission, efforts have been made to project the subject of minority rights in the international arena. However, such efforts have been stalled far too frequently not only because of divisions over substantive claims put forward by minorities but because the subject of definition and identification has proved an intractable one.

DEFINITION OF MINORITIES[5]

The issue of defining minorities in independent States has been a problematic one. In 1966 Special Rapporteur Franceso Capotorti was assigned to the task of preparing a study pursuant to Article 27 of the ICCPR. In producing a detailed examination of the Rights of the Persons Belonging to Ethnic, Religious and Linguistic Minorities, Capotorti also formulated a definition, which is generally regarded as authoritative. According to his definition a 'minority' is a:

> (group numerically inferior to the rest of the population of a State, in a non-dominant position, whose members – being nationals of the State – possess ethnic, religious or linguistic characteristics differing from those of the rest of the population and show, if only implicitly, a sense of solidarity, directed towards preserving their culture, traditions, religion or language.[6]

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[4] See 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: Martinus Nijhoff Publishers) 1999, 701–723 at p. 723.

[5] J. Rehman, 'Raising the Conceptual Issues: Minority Rights in International Law' 72 *ALJ* (1998) 615; O. Andrýsek, *Report on the Definition of Minorities* (Utrecht: SIM, Netherlands Institute of Human Rights, Studie-en Informatiecentrum Mensenrechten) 1989; N.S. Rodley, 'Conceptual Problems in the Protection of Minorities: International Legal Developments' 17 *HRQ* (1995) 48.

[6] F. Capotorti, Special Rapporteur, *Study on the Rights of Persons Belonging to Ethnic, Religious and Linguistic Minorities* UN Sales No E. 78.XIV.2, 1991, 96.

This definition proposed by Capotorti has been challenged and criticised on a number of grounds. The primary feature of the definition seems to be a combination of both objective and subjective elements in ascertaining a minority group.[7] Objective criteria would involve a factual analysis of a group as a distinct entity within the State '[P]ossessing stable ethnic, religious or linguistic characteristics that differ sharply from those of the rest of the population'.[8] The subjective criteria would be found on the basis that there exists 'a common will in the group, a sense of solidarity, directed towards preserving the distinctive characteristics of the group'.[9] However, it could be argued that in view of the rather onerous considerations of evaluating both the objective and the subjective criterion, identification of a minority group might prove to be a difficult task.

The second proposition which needs to be addressed is that of the numerical strength of the group in question. It seems acceptable that the numerical strength must at least account for 'a sufficient number of persons to preserve their traditional characteristics',[10] hence a single individual could not form a minority group. On the other hand, it is contended that to put in place an absolute principle that in order to be recognised as a minority an entity must necessarily be 'numerically inferior' places an unnecessarily heavy burden on the group and may well be factually incorrect. The minority concept, controversial as it is, cannot be treated in such a restrictive manner. A consideration of the case of the Bengalis of East Pakistan clearly reinforces this point. At the time of its emergence as an independent State, Pakistan was divided into two 'wings' of unequal sizes: East Bengal (subsequently renamed East Pakistan) and Western Pakistan. East Bengalis constituted nearly 54 per cent of the total population and in this sense the provincial population formed a numerical majority. On the other hand, the Bengalis had very little share in the political and constitutional affairs of the State. They were heavily discriminated against and suffered from the characteristic minority syndromes.[11] This minority syndrome was also evident in the cases of the Black African majorities of South Africa and Rhodesia under the apartheid regimes.

Among the contemporary situations, the tragedies of 'ethnic cleansing' in the two Central African States of Rwanda and Burundi also defy this

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[7] 'The prevailing approach to the definition of minorities [is one] which intermingles objective and subjective criteria'. M.N. Shaw, *International Law*, 4th edn (Cambridge: Grotius Publications) 1997, p. 222.

[8] L.B. Sohn, 'The Rights of Minorities' in L. Henkin (ed.), *The International Bill of Rights: The Covenant on Civil and Political Rights* (New York: Columbia University Press) 1981, pp. 270–289 at p. 278.

[9] Ibid. at p. 279.

[10] UN Doc. E/CN.4/703 (1953), para. 200.

[11] See Y. Dinstein, 'Collective Human Rights of Peoples and Minorities' (1976) 25 *ICLQ* 102 at p. 112.

conception of a minority being necessarily 'numerically inferior'. As a fact of *realpolitik*, minorities are possibly undermined not so much by their weaknesses in numbers, but by their exclusion from power. As one commentator has aptly pointed out, 'the distinction ... between nations and minorities is one of power. The element of power or powerlessness is the distinguishing characteristic of national and minority discourses'.[12] It may well be that a definition similar in nature to that of the one provided by Professor Palley, with its focus on the power-politics of a group may be more appropriate in these circumstances. According to her, a minority is 'any racial, tribal, linguistic, religious, caste or nationality group within a nation state and which is not in control of the political machinery of the state'.[13] Capotorti's insistence on numerical inferiority to the rest of the population would also generate difficulties in multi-minority situations where no single group forms an ascertainable majority. The *World Directory of Minorities* lists a number of States where it is difficult to isolate this straightforward majority–minority numerical relationship.[14]

The third issue to arise out of the Capotorti definition is that of the position of non-nationals within the State.[15] Non-nationals could form a significant proportion of a State's population, and although the main thrust of the development of the international law of human rights has devoted itself to a consideration of the plight of nationals within the State, the rights of non-nationals, as individuals, are also increasingly becoming a concern of human rights law. Indeed, as Lillich correctly points out:

> the question of rights of aliens is inextricably linked to the contemporary international human rights law movement because it poses a clear test of relevance and enforceability of international human rights norms which have developed since World War II.[16]

Non-nationals include migrant workers, refugees and Stateless persons and the phenomenal increase in their numbers in recent years has brought considerable

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[12] H. Cullen, 'Nations and Its Shadow: Quebec's Non-French Speakers and the Courts' 3 *Law and Critique* (1992) 219 at p. 219.

[13] C. Palley, *Constitutional Law and Minorities* (London: Minority Rights Group) 1978, p. 3; also see J. Fawcett, *The International Protection of Minorities* (London: Minority Rights Group) 1979, p. 4; J.A. Laponce, *The Protection of Minorities* (Berkeley and Los Angeles: University of California Press) 1960, pp. 8–9.

[14] See Minority Rights Group (ed.), *World Directory of Minorities* (London: Minority Rights Group) 1997.

[15] See P. Weis, *Nationality and Statelessness in International Law*, 2nd edn (Alphen aan den Rijn: Sijthoff and Noordhoff) 1979.

[16] R. Lillich, *The Human Rights of Aliens in Contemporary International Law* (Manchester: Manchester University Press) 1984, p. 2; 'the whole human rights movement may be seen as an attempt to extend the minimum international standards from aliens to nationals' M. Akehurst, *A Modern Introduction to International Law*, 6th edn (London: Harper Collins Academic) 1987, p. 91.

attention to their position in international human rights law.[17] The *travaux préparatoires* of the ICCPR are not extremely helpful on the matter, though whatever guidance can be obtained points more in the direction of the exclusion of non-nationals from the category of minorities as envisaged in Article 27.[18] On the other hand, it must be noted that Article 27 of the International Covenant on Civil and Political Rights, unlike Article 25, refers to persons.[19] It is also significant to note the views put forward by the Human Rights Committee in its general comment on Article 27. According to the Committee:

> The term used in article 27 indicates that the persons designed to be protected are those who belong to a group and who share in a common culture, a religion and/or a language. Those terms also indicate that the individuals designed to be protected need not be citizens of the State party. In this regard, the obligations deriving from article 2.1 are also relevant, since a State party is required under that article to ensure that the rights protected under the Covenant are available to all individuals within its territory and subject to its jurisdiction, except rights which are expressly made to apply to citizens, for example, political rights under article 25. *A State party may not, therefore, restrict the rights under article 27 to its citizens alone.*[20]

The Committee's views on the position of those groups whose degree of permanence could be questioned are also interesting. The Committee spells out its views in para 5.2 of the Comment:

> Article 27 confers rights on persons belonging to minorities which 'exist' in a State party. Given the nature and scope of the rights envisaged under that article, it is

[17] See Weis, above n. 15; G.S. Goodwin-Gill, *The Refugee in International Law*, 2nd edn (Oxford: Clarendon Press) 1996; F. D'Souza and J. Crisp, *The Refugee Dilemma* (London: Minority Rights Group) 1985; J. Hathaway, *The Law of Refugee Status* (Toronto: Butterworths) 1991.

[18] See the additional draft clause to [Article 27] that was proposed by Yugoslavia limiting the Article to 'citizens', UN Doc. A/C.3/SR.1103 para 54; the Indian delegate Mr Kaslival 'wondered whether the committee would not prefer to replace the word "persons" by "citizens"'. According to Mrs Afnan, the Iraqi delegation understood 'the obligation of a state within its own territory could only be towards its own citizens. It was in that sense that she understood the word "person" used in the Article', UN Doc. A/C.3/SR.1104, para 7; also note the Pakistani position UN Doc. A/C.3/SR. 1104, para 17; cf. the position of the representative from Equador Ibid. para 45.

[19] Attempts to replace in Article 2(1) the term individuals with 'nationals' or 'citizens' could not succeed. UN Doc. A.C.3/SR. 1103, para 38; The exclusive focus of Capotorti has come under considerable academic criticism. According to Tomuschat 'One cannot fail to observe that the word employed [in Article 27] is "persons", not "nationals".' C. Tomuschat, 'Protection of Minorities under Article 27 of the International Covenant on Civil and Political Rights' (1983) *Völkerrecht als Rechtsordnung, Internationale Gerichtsbarkeit, Menschenrechte, Festschrift für Herman Mosler*, 945, at p. 960; similarly Dinstein is critical of this view of the special Rapporteur 'this interpretation cannot be endorsed'. Y. Dinstein, 'Freedom of Religion and the Protection of Religious Minorities' in: Y. Dinstein and M. Tabory (eds), *The Protection of Minorities and Human Rights* (Dordrecht: Martinus Nijhoff Publishers) 1992, 145–169 at p. 157.

[20] Para. 5.1. Italics added. Human Rights Committee, *General Comment No 23* (Fiftieth Session 1994) Report of the Human Rights Committee 1 GAOR 49th Session, Supp. No (A/49/40) pp. 107–110.

not relevant to determine the degree of permanence that the term 'exist' connotes. Those rights simply are that individuals belonging to those minorities should not be denied the right, in community with other members of their group, to enjoy their own culture, to practice their religion and speak their language. Just as they need not be nationals or citizens, they need not be permanent residents. *Thus, migrant workers or even visitors in a State party constituting such minorities are entitled not to be denied the exercise of those rights.*[21]

Notwithstanding these views put forward by the Human Rights Committee, confusion remains prevalent as to the national status of claimant groups. Several of the recent minority rights instruments make reference to the term 'National'. This includes the United Nations Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities (1992)[22] and the Council of Europe's Framework Convention for the Protection of National Minorities (1994).[23] This has provided some States with the opportunity to claim a limitation on the scope of minority status – a criticism reiterated in the fifth session of the Working Group on Minorities.[24] In the view of these States, nationality is the essential prerequisite for making any claims to the status of a minority. South Asia provides a number of examples, including those of the Biharis of Bangladesh, the Tamils of Sri Lanka and the Nepali-speaking Bhutanese, where the relevant State has exploited the nationality issue in order to discriminate against and persecute a minority group.

Another area on which Capotorti's definition could be challenged is its narrowness by concentrating almost exclusively upon what has been termed as 'minorities by will' and overlooking the position of 'minorities by force' – 'minorities by will' and 'minorities by force' are terms engineered by Laponce.[25] Explaining the distinctions between the two kinds of minorities, he comments: 'two fundamentally different attitudes are possible for a minority in its relationship with the majority: it may wish to be assimilated or it may refuse to be assimilated. The minority that desires assimilation but is barred is a minority by force. The minority that refuses assimilation is a minority by will'.[26]

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[21] Ibid. para. 5.2; italics added.

[22] Adopted by the General Assembly 18 December 1992, GA Res. 135, UN GAOR 47 Sess. 49 at 210, UN Doc. A/Res/47/135. 32 I.L.M. (1993) 911.

[23] Opened for signature 1 February 1995, entered into force 1 February 1998. E.T.S. 157; 34 I.L.M. (1995) 351.

[24] See *Report of the Working Group on Minorities on its fifth Session* E/CN.4/Sub.2/1999/21 paras 19–20.

[25] Laponce, above n. 13, pp. 12–13.

[26] Ibid.

ANALYSING THE SUBSTANTIVE RIGHTS OF MINORITIES

It is well established that the rights of minorities are interrelated and are dependant upon the rights of the individual. Minority rights are built upon the existing framework of rights of the individual human being. The right to existence, the right to equality, non-discrimination, freedom of religion, expression and culture, therefore, are integral parts of individual and minority rights. The rights of minorities, however, have a collective dimension.[27] As we shall see in greater detail, the minority right to existence is not exclusive to the physical existence of members of a particular minority but would also include *inter alia* a cultural, religious, linguistic existence, without which the group in question would lose its distinctiveness.[28] In the context of groups, the right to equality and non-discrimination often raises issues of affirmative active and positive discrimination for the groups that have historically been deprived of equal opportunities.[29] Freedom of religion, and of cultural, linguistic and political autonomy for minorities is often related to notions of self-determination and possibly independent Statehood.[30] This latter claim of political self-determination leading to secession and independence poses a major threat to the existing world order – States and the governments in charge are very sceptical of encouraging any such claims.

Right to life and physical existence

The right to life and physical existence represents the most fundamental right of all individuals. The right is protected in all human rights instruments.[31] It is an unfortunate historical and contemporary feature of human existence that individuals have in many cases been deprived of their right to life because of their religion, culture, race or colour. Activity involving the physical destruction of minority groups has a long and painful history. In more modern times

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[27] Thornberry, above n. 1, at p. 57.

[28] Ibid.

[29] See W. McKean, *Equality and Discrimination under International Law* (Oxford: Clarendon Press) 1983; N. Lerner, *Group Rights and Discrimination in International Law* (Dordrecht: Martinus Nijhoff Publishers) 1991; M. Banton, *International Action against Racial Discrimination* (Oxford: Clarendon Press) 1996. See above Chapter 10.

[30] See J. Rehman, 'Autonomy and the Rights of Minorities in Europe' in S. Wheatley and P. Cumper (eds), *Minority Rights in the New Europe* (The Hague: Kluwer Law International) 1999, pp. 217–231.

[31] See the UDHR Article 3; ECHR Article 2, and the Sixth Protocol (1983), ICCPR Article 6, ACHR Protocol to American Convention on Human Rights to Abolish the Death Penalty; AFCHPR, Article 4.

it has been labelled as genocide.[32] Raphael Lemkin, a Polish jurist of Jewish origin is accredited with developing the modern principles relating to the crime of genocide and for coining the term itself.[33]

In international legal discourse the use of the term 'genocide' is relatively new and appeared for the first time during the Nuremberg Trials in a separate category. Its recognition as a crime in international law was a direct consequence of the atrocities committed during the Second World War. After the establishment of the United Nations, international law confirmed genocide as a crime through the Convention on the Prevention and Punishment of the Crime of Genocide,[34] (hereafter called the Convention). According to Article 1 of the Convention:

> The contracting parties confirm that genocide whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and to punish.

According to Article II, genocide consists of:

> any of the following acts committed with intent to destroy in whole or in part a national, ethnical, racial or religious group, as such
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> (a) Killing members of the group;
> (b) Causing serious bodily or mental harm to members of the group;
> (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
> (d) Imposing measures intended to prevent births within the group;
> (e) Forcibly transferring children of the group to another group.

Despite the coming into operation of the Genocide Convention, there have been several instances where minority groups have faced death and destruction.[35] A number of cases have highlighted weaknesses both in the substance and the implementation of the Convention. The protected groups in the Convention are 'national, ethnical, racial or religious...'.[36] The Convention makes no reference to the political and 'other' groups. Several cases reveal that political opponents have been a primary target of destruction and this

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[32] Whitaker aptly describes this activity as 'the ultimate crime and gravest violation of human rights it is possible to commit'. Special Rapporteur B. Whitaker, *Revised and Updated Report on the Question of the Prevention and Punishment of the Crime of Genocide* UN Doc. E/CN.4/Sub.2/1985/6, 5.

[33] R. Lemkin, *Axis Rule in Occupied Europe* (Washington: Carnegie Endowment for International Peace) 1944, p. 79; J. Porter, 'What is Genocide? Notes towards a Definition' in J. Porter (ed.), *Genocide and Human Rights: A Global Anthology* (Washington D.C.: University Press of America) 1982, p. 5.

[34] 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.

[35] Rehman, above n. 1, p. 58.

[36] Article II.

omission is particularly unfortunate. The Convention does not criminalise the destruction of a culture, language or a religion.[37] Thus individuals may be deprived of their cultural upbringing, their language or their faith and yet those responsible cannot be held accountable under this Convention. There is no explanation regarding the meaning of 'national' or 'ethnical', 'racial' or 'religious' group as used in Article II.

A further gap in the Convention is the absence of a prohibition on demographic changes which could transform the proportion of a population.[38] Forced expulsions are not within the ambit of the genocide Convention. Recent international instruments have covered some ground to condemn forced or mass expulsions. It is encouraging, therefore, to note that the Statute of the International Criminal Court regards mass expulsions as a crime against humanity. Similarly the forced expulsions are likely to breach the provision of ICESCR on the right to housing.[39] Modern day developments have created new threats to the survival of certain groups which were not covered by the provisions of the Convention. Activities such as the use of nuclear and chemical explosions, toxic environmental pollution, acid rain or the destruction of rainforests all threaten the existence of peoples in several parts of the world.[40]

The commission of the crime of genocide requires two necessary ingredients: *actus reus*, which is the physical action of destruction, in whole or in part, of a national, ethnic, racial or religious group; and *mens rea*, which is the mental element or the intent to commit such a crime. The crime of genocide requires a specific intent. Thus no offence would be committed, regardless of the ruthlessness of the act and the barbarity of its consequences, without a specific intent of committing genocide.[41]

At the level of implementation, several situations have confirmed the ineffectiveness of the Convention in the actual prevention and punishment of the crime of genocide. Genocide of minorities has taken place in a number of States. These States include both those which are parties to the Convention and those which have not ratified the Convention. A number of genocidal conflicts have taken place in the newly independent States of Asia and Africa. At the same time, the implementation mechanisms within the Genocide

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[37] Rehman, above n. 1, p. 58.

[38] F. Ermacora, 'The Protection of Minorities before the United Nations' 182 *Rec. des cours* (1983) 251–366 at p. 314.

[39] See Article 11 Right to Adequate Housing. Discussion by M. Craven, *The International Covenant on Economic, Social and Cultural Rights: A Perspective on its Development* (Oxford: Clarendon Press) 1995, pp. 340–344.

[40] Whitaker, above n. 32, p. 17.

[41] N. Robinson, *The Genocide Convention: A Commentary* (New York: Institute of Jewish Affairs) 1960, pp. 58–59.

Convention have not come into operation or have proved fundamentally flawed.[42] According to Article V of the Convention:

> All Contracting parties undertake to enact in accordance with their respective constitutions, the necessary legislation to give effect to the provisions of the present convention and, in particular, to provide effective penalties for persons guilty of genocide or any other acts enumerated in article III.

This provision implies that each State party would introduce legislation that would meet the requirements of Article V. States are given considerable latitude as to the application of this provision within their constitutional framework. This has also meant differences in interpretation of the various provisions nationally, both by legislatures and judiciary. A number of States have not adopted any specific measures, implying that they regard the treaty as being self-executing. Finland and Poland are two key examples of States which have treated the Convention as directly applicable in their domestic laws.[43] Most States have claimed that their existing legislation satisfies the requirements of the Convention. The Special Rapporteur, M. Ruhashyankiko, in his report provides a number of examples where States have responded in this manner.[44] Egypt, for instance, stated: 'In application of these constitutional principles, Egyptian penal law contains provisions guaranteeing the individual's right to the physical and psychological safety of his person and the protection of his freedom. The penal code devotes a special chapter to the crimes of homicide and assault (Articles 230–251) and prescribes the death penalty for any person who leads such a band or holds a position of command therein. Any person who has joined such a band without taking part in its organisation or with holding a position of command therein is liable to a penalty of a term of hard labour or hard labour for life (Article 89).'[45] Ruhashyankiko's report similarly reveals that the domestic legislation introduced by a number of States is based on the provisions of the Convention. Indeed, in some cases the legislation uses the terminology of Article II verbatim.[46] The legislation incorporated by a few States, however, raises questions as to whether it complies with the provisions of Article II of the Convention.

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[42] See H. Hannum, *Guide to International Human Rights Practice* (London: Macmillan) 1984; L.B. Sohn, 'Human Rights: Their Implementation and Supervision by the United Nations' in T. Meron (ed.), *Human Rights in International Law: Legal and Policy Issues* (Oxford: Clarendon Press) 1984, pp. 369–401.

[43] M. Ruhashyankiko, *The Study of the Question of the Prevention and Punishment of the Crime of Genocide*, UN Doc/CN.4/Sub.2/416, 141.

[44] Ibid.

[45] Ibid. p. 142.

[46] See the Legislation introduced by UK (*Genocide Act 1969*), Ch 12, 40 Halsbury's Statutes of England 387–90, 3rd edn also see the *War Crimes Act 1991*; A Richardson, 'War Crimes Act 1991' *55 MLR* (1992) 73–87; G. Gaaz, 'The War Crimes Act 1991: Why No Constitutional Crisis' Ibid. pp. 87–95; for Canada see *Can.Rev. STAT. Supp 1, 171–181,1970.*

The case of Israel is the classic example as its legislation, although similar to the Convention, is deemed to apply only to crimes committed 'against the Jewish people' with the implication that other groups are not covered by the law.[47]

In his report, the Special Rapporteur provides a detailed analysis of efforts made by a number of States to incorporate legislative measures to adopt the Convention in their domestic laws; this includes those States who have had a satisfactory record of protection of minority rights. In another, more recent study, Marschik surveys the penal codes of a number of European States to confirm that these States have legislated in accordance with the provisions of the Genocide Convention to prohibit and punish the crime of genocide.[48] There are a number of States which, although claiming to have incorporated the Genocide Convention, have failed to respect its provisions. Although a number of East European States could be cited in this respect, the main focus lies on the States of Latin America, Africa and Asia. One prime example in the context of Africa is that of Rwanda. Despite its unfortunate record on physical protection of minorities, Rwanda has maintained that its domestic legislation contains adequate protection against acts of genocide.[49]

As far as the implementation of the Convention is concerned, according to Article VI of the Convention 'Persons Charged with genocide ... shall be tried by a competent tribunal of the State in the territory of which the act was committed or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction'. The Convention in its final draft presents two alternatives: that of a trial in the territory where the offence took place or trial by an international penal tribunal.

In relation to trial in the territory of the offence, the primary problem is that genocide in most instances is committed by the governments in power, and as long as those governments remain in power, it is almost impossible to rely on this territorial principle. The case of Germany after the Second World War, as the defeated power, was an exceptional one in providing the allied powers a forum – probably a manifestation of the prerogative of the victors against the losers. However, in most cases of genocide, it is the governments within the States that are involved, and unless and until they are removed, there is a huge difficulty in trying those who have been involved in committing genocide. It is quite possible for a genocidal regime to stay in power for a long time and defy

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[47] See the Nazi and Nazi Collaborators (Punishment) Law 1950.

[48] See A. Marschik, 'The Politics of Prosecution: European National Approaches to War Crime' in T.L.H. McCormack and G.J. Simpson (eds), *The Law of War Crimes: National and International Approaches* (The Hague: Kluwer Law International) 1997, pp. 65–101.

[49] Ruhashyankiko, above n. 43, pp. 150–151.

international law and municipal laws.[50] It is equally possible that the stance of successive governments might be based on the policy of genocide and forced assimilation of certain minority groups. Professor James Crawford recently reconfirmed this view by noting that '[t]he national jurisdiction envisaged by Article VI does not seem to work'.[51]

There also persists a strongly held view that the difficulties in the operation of the Convention are exacerbated by the apprehension of the accused: this point has recently been highlighted through the inability to arrest and try Radovan Karadzic and Ratko Mladic, two of the people indicted by the Yugoslav tribunal who have been 'on the run' for months.[52] Although, by Article VII, States parties to the Convention pledge to grant extradition wherever appropriate, political interests and subjective opinion seriously hamper the smooth operation of the provision. It is quite possible for the accused to flee to a State which is not a contracting party to the Convention. Since international law does not impose any specific obligations on States to cooperate with each other to extradite individuals, the last – and perhaps the only course of action – may be to resort to illegality to assume jurisdiction.[53] Even if the accused is captured and tried in the State in which the offences were committed, the sensitivity of the issue of genocide might make the possibility of a fair trial remote.

If the option of conducting trials on a territorial basis seems impractical, the second alternative – to have an international criminal court – has proved even more elusive. The large scale violations of human rights in the former Yugoslavia, Rwanda and elsewhere highlighted the need for a permanent international criminal court. In the absence of a permanent court, the United Nations Security Council acting under Chapter VII of the United Nations Charter in Resolution 827 (1993)[54] and Resolution 955 (1994),[55] established the ad hoc tribunals for former Yugoslavia and Rwanda.

The jurisdictional and territorial limitations of these ad hoc tribunals were obvious, generating an unprecedented momentum towards the creation of a

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[50] The recent example of the arrest and extradition of the former President of Yugoslavia, President Milosovich also confirms this position. It has only been possible to extradite the former President after the overthrow of his government.

[51] J. Crawford, 'Prospects of an International Criminal Court' *CLP* (1995) 303 at p. 319.

[52] See *Prosecutor* v. *Karadzic*, Case IT-95-5-R61; *Prosecutor* v. *Mladic*, Case IT-95-18-R61.

[53] K. Harris and R. Kushen, 'Surrender of fugitives to the War Crimes Tribunals for Yugoslavia and Rwanda: Squaring International Legal Obligations with the US Constitution' 7 *CLF* (1996) 561 at p. 587; J. Bridge, 'The Case of an International Court of Criminal Justice and the formulation of International Criminal Law' 13 *ICLQ* (1964) 1255 at p. 1258. On Rwanda, C. Cissé, 'The End of a Culture of Impunity in Rwanda? Prosecution of Genocide and War Crimes before Rwandan Courts and the International Criminal Tribunal for Rwanda' 1 *Yearbook of International Humanitarian Law* (1998) pp. 161–188.

[54] See S.C Res. 827, 48 UN SCOR (3217th mtg) UN Doc S/RES 827 (1993) reprinted 32 ILM 1203.

[55] See S.C Roes 955, UN SCOR (3453rd mtg) UN Doc S/RES/955 (1994) reprinted 33 ILM 1600.

court with a universal jurisdiction. The General Assembly, which had requested the ILC in 1990[56] to draft a statute of an international criminal court, reiterated its request underlining the significance and urgency of the matter.[57] A draft produced by a working group of the ILC was discussed in 1993 by the General Assembly.[58] The revised draft was discussed again in 1994 by the Sixth Committee, by an ad hoc Committee on the Establishment of an International Criminal Court and by a Special Preparatory Committee on the Establishment of an International Criminal Court. The Special Preparatory Committee during its three sessions in 1996, 1997 and 1998 focused on the text of the draft statute.

The text submitted by the Preparatory Committee to the Rome Conference in June 1998 consisted of 116 Articles. A number of these Articles were essentially in draft format, with crucial details yet to be finalised.[59] It is thus to the credit of the participants of the Rome Conference that within the space of six weeks a Statute was adopted. Having said that, the Statute contains many weaknesses; there are a number of serious inconsistencies and agreement could not be reached on several key issues. It is also significant to note that many of the provisions within the Statute were heavily criticised by the United States, which also decided publicly to indicate that it had voted against the Statute.[60]

As regards the substantive issues, various criticisms could be made. The principle of complementarity which grants priority to national jurisdictions *vis-à-vis* the Court could seriously undermine the system of accountability. The priority accorded to national courts is also in stark contrast to the position adopted by the Yugoslavia and Rwanda Tribunals.[61] These jurisdictional requirements highlight the limitations with which the Court would have to operate. The Statute authorises the Court to exercise jurisdiction for crimes as stated therein if consent has been provided by the State with jurisdiction for the territory where the crime occurred or the consent of the State of which the accused is a national.[62] The point had strongly been resisted by the United

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[56] GA Res. 45/41 UN GAOR, 45th Sess. Supp. No. 49, p. 363, UN Doc. A/RES/45/41 (1990).
[57] GA Res. 47/33 UN GAOR, 47th Sess. 73rd mtg, at 3, UN Doc. A/RES/47/33 (1992).
[58] J. Crawford, 'The ILC's Draft Statute for an International Criminal Tribunal' 88 *AJIL* (1994) 140 at p. 140; J. Crawford, 'The ILC Adopts a Statute for an International Criminal Court' 89 *AJIL* (1995) 404.
[59] P. Kirsch and J.T. Holmes, 'The Rome Conference on an International Criminal Court: The Negotiating Process' 93 *AJIL* (1999) 2 at p. 3.
[60] D.J. Scheffer, 'The United States and the International Criminal Court' 93 *AJIL* (1999) 12.
[61] GA Res. 47/33 UN GAOR, 47th Sess. 73rd mtg, at 3, UN Doc. A/RES/47/33 (1992). D. Sarooshi, 'The Statute of the International Criminal Court' 48 *ICLQ* (1999) 387 at p. 395. Sarooshi also highlights the position that 'decisions of the Court will not, in general terms, prevail over a State's other treaty obligations' at p. 390 and that 'there is no obligation under the Statute to waive [State or diplomatic] immunity' at p. 392 (footnotes omitted).
[62] See Article 12 of the Statute.

States as it would establish an arrangement whereby '[United States] armed forces operating overseas could conceivably be prosecuted by the ICC even if the United States had not agreed to be bound by the treaty. The United States took the position that such an overreaching by the ICC could inhibit its use of the military to meet alliance obligations and to participate in multinational operations, including humanitarian intervention to save civilian lives'.[63] Furthermore in the view of David Scheffer, the United States Ambassador at the Rome Conference, the position of non-parties was jeopardised through the amendment provisions as provided in Article 121(5). These provisions allow 'for the addition of new crimes to the jurisdiction of the Court or revisions of existing crimes in the treaty [entailing] an extraordinary and unacceptable consequence. After the states parties decide to add a new crime or change the definition of an existing crime, any state that is a party can decide to immunise its nationals from prosecution for the new or amended crime. Nationals of non-parties, however, are subject to potential prosecution'.[64]

The political dimension and role of the Security Council is underlined by the provision which authorises the Council to refer the matter to the Court even if crimes are committed in States that are non-parties, by the nationals of States not parties to the Statute and in the absence of any consent by the State of the nationality of the accused or by the territorial State.[65] In so far as the crimes over which the Court would have jurisdiction are concerned, these include genocide, crimes against humanity, war crimes and crimes of aggression.[66] While the list is limited to the 'most serious crimes', the emergent consensus is more apparent than real. The crime of genocide, encapsulating the definition accorded by the Genocide Convention, proved to be the least controversial. The Genocide Convention, however, as we have seen, presents serious limitations and weaknesses. Furthermore, notwithstanding the apparent inherent jurisdiction which is granted to the Court in the case of genocide, an uneasy relationship with the jurisdictional basis of the Genocide Convention would be formed. The position taken by the Statute is objectionable on two grounds. First, it tends to overlook the 'territorial jurisdictional' aspect in the Genocide Convention which, as we have noted, has hitherto remained the predominant one. Secondly, it brings into issue the position of States which are not parties to the Genocide Convention. Are they to be bound even by those treaty provisions from the Genocide Convention which are not settled and possibly do not form part of customary law? In addition, if the inherent jurisdiction of the International Criminal Court in matters of

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[63] M. H. Arsanjani, 'The Rome Statute of the International Criminal Court' 93 *AJIL* (1999) 22 at p. 26.

[64] Scheffer, above n. 60, at p. 20.

[65] Arsanjani, above n. 63, at p. 26.

[66] Article 5 of the Rome Statute.

genocide could be sustained on the ground that Article 6 provisions had customary value, further explanation would need to be given for the position of States who decline to become parties to the Statute of the International Criminal Court.

In relation to other crimes, the expanded nature of crimes against humanity and war crimes raised considerable debate and disagreement. While the wider inclusive view is welcoming, the operations and actual reliance upon these aspects by the Court remains speculative. Finally the crime of aggression which, although incorporated, generated unacceptable levels of controversy over its definition. As a compromise position, it was decided that notwithstanding incorporation, the Court would only be able to exercise jurisdiction in relation to crimes of aggression once a definition had been agreed upon. Judging by the protracted and controversial history of definitional issues, a consensus definition of aggression may be a long way off. The aforementioned jurisdictional and substantive limitations constitute a considerable hurdle to attaining the ultimate objectives of the Statute – the accountability and punishment of individuals involved in serious crimes against international law. The final hurdle may be the lack of interest in the operations of the Court. Although the Rome Statute enters into force on 1 July 2002, there remain serious question marks over the position of the US, the superpower whose interest and support will be required if the Court is ever to operate effectively. In the meantime and in so far as the punishment of those involved in breaching the right to physical existence is concerned, the global situation cannot be taken to represent a serious note of optimism. Many minority groups continue to suffer as the provisions of international criminal law (and more specifically those of the Genocide Convention) remain insufficient to punish the perpetrators of these crimes.

The right to religious, cultural and linguistic autonomy[67]

Religious, linguistic and cultural autonomy is not a novel concept for minorities. Its history stretches to the time when minorities as distinct groups came to be recognised. Medieval and Modern History presents many revealing instances of the granting of autonomy to religious minorities. A clear example

[67] For useful commentaries on the subject see H. Hannum, *Autonomy, Sovereignty and Self-Determination: The Accommodation of Conflicting Rights* (Philadelphia, University of Pennsylvania Press) 1990; R. Lapidoth, 'Some Reflections on Autonomy', *Mélanges Offerts à Paul Reuter* (1981) 379; R. Lapidoth, *Autonomy-Flexible Solutions to Ethnic Conflicts* (Washington DC: United States Institute of Peace Press) 1997; G. Kardos, 'Human Rights: A Matter of Individual or Collective Concern?' in I. Pogany (ed.), *Human Rights in Eastern Europe* (Aldershot: Edward Elgar) 1995, pp. 169–183; see also the proceedings of the colloquium, *Autonomy and Self-Determination: Theories and Application*, at the Institute of International and European Law, University of Liverpool, England, 27 May 1997.

of autonomy was presented by the League of Nations through its system of minority rights at the end of the First World War. The intervening years between the two world wars saw a number of imaginative attempts to realise meaningful autonomy, for example, in the Aaland Islands, the Free City of Danzig and the Memel territory. The mechanisms installed to protect minorities proved defective and, along with minority treaties, collapsed well before the Second World War.[68]

The legal and political developments that took place after the Second World War more or less resulted in the erosion of any independent concern that had previously existed for ethnic, linguistic and religious minorities and for their aspirations to autonomy and existence as distinct entities. The interest in the position of minorities that could be ascertained was largely of an indirect nature, namely the United Nations' preoccupation with upholding individual human rights and concern with non-self-governing territories. In the present context the provisions of Chapter XI of the UN Charter need to be noted. Chapter XI concerns non-self-governing territories and Article 73 applies to territories 'whose peoples have not yet attained a measure of self-government'. A focus of this nature upon territorial elements meant a lack of consideration for ethnic, linguistic and religious groups who were without a territorial base.

The issue of self-government became almost synonymous with independence to former colonies. At the same time United Nations' bodies started relying heavily on the concept of individual human rights and non-discrimination, neglecting the subject and concerns of minorities.[69] The United Nations Charter – in solely confining itself to references to human rights and non-discrimination – appears to have taken the view that minority rights could be adequately protected in a regime of non-discrimination.[70] Despite the absence of any specific mention of minorities or their rights within the UN Charter or UDHR, minorities have been able to benefit from a number of concepts enshrined in these instruments.

Within the UDHR, there is mention of a number of rights which can be treated as forming the basis of minority protection. The Declaration specifically provides, in Articles 1 and 2, the right of equality and non-discrimination.[71] The right to freedom of thought, conscience and religion is stated in Article 18, the right to freedom of opinion and expression is provided in Article 19, the right to peaceful assembly and association in Article 20, the

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[68] See Claude Jr, above n. 2; J. Kelly, 'National Minorities in International Law' 3 *JILP* (1973) 253–273 at p. 258.

[69] 'From the very beginning of the United Nations, emphasis has been put on the development of non-self-governing territories towards independence' L.B. Sohn, 'Models of Autonomy within the United Nations Framework' in Y. Dinstein (ed.), *Models of Autonomy* (New Brunswick and London: Transaction Books) 1981, 5–22 at p. 9.

[70] Claude Jr., above n. 2, at p. 211.

[71] See above Chapter 3.

right to education in Article 26 and the right freely to participate in the cultural life of the community.[72] All these right provide the necessary foundation for providing individual members with a natural claim for autonomy. Although the Universal Declaration has no explicit references to minorities, subsequent international instruments have given greater attention to minority or group rights. The International Convention on the Elimination of All Forms of Racial Discrimination,[73] while obviously emphasising the elimination of racial discrimination, also aims to protect racial minority groups. It provides an explicit recognition to affirmative action policies[74] and allows minority groups to institute a complaints procedure.[75] The ICESCR[76] represents a strong recognition of the value of cultural rights in the human rights context.[77] According to Article 15 of the ICESCR, States undertake to recognise that everyone has the right to 'take part in cultural life'.[78] There is also a recognition of legitimate differences in beliefs and traditions in Articles 13(3) and 13(4). Under Article 13, parents are given the right to establish and choose schools other than those established by the public authorities. The most significant of the international treaties with respect to protecting minority rights has been the ICCPR[79] Article 27 of the ICCPR is of special importance for minorities as it is the main provision in current international law which attempts to provide direct protection to ethnic, linguistic and religious minorities. Article 27 provides as follows:

> 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

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[72] Ibid, Article 27.

[73] Adopted 21 December 1965. Entered into force, 4 January 1969. 660 U.N.T.S. 195, 5 I.L.M (1966) 352. See above Chapter 10.

[74] See Articles 1(4) and 2(2).

[75] See Article 14(1).

[76] 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. Craven notes that the Covenant 'arguably recognises the different needs of ethnic minorities particularly as regards their cultural identity'. Craven, above n. 39, at p. 188.

[77] See above Chapter 5.

[78] Ibid.

[79] 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. There is no reference in the Covenant to according positive group rights or requirements that States should promote minority Rights, Craven, above n. 39, at p. 158. Craven however argues that the Covenant 'arguably recognize the different needs of ethnic minorities particularly as regards their cultural identity. Although article 15 merely states that everyone has the right to "take part in cultural life", a recognition of legitimate differences in belief and traditions is to be found in Article 13(3) and (4). Under that article, parents have the right to establish and choose schools other than those established by the public authorities. Similarly, the reference to self-determination in Article 1 of the Covenant may be interpreted as implying that minorities have a right to pursue their own "economic, social and cultural development" without excessive interference from the authorities'. Craven, above n. 39, at pp. 188–189.

other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language.

The Article, however, does not take a straightforward approach in extending protection to minorities. It is drafted in an awkward manner and appears to suggest that while the majority of States comprise of homogenous groups, the issue of minorities is confined to only a few. The aim behind such wording appears to be to provide protection only to the long established minorities and to prevent or discourage the formation of new minority groups. This phraseology invites States to deny the existence of minorities within their boundaries. Many States have, indeed, not hesitated to do so.[80]

The obligations in the Article require States 'not to deny the right [to persons belonging to minorities] to enjoy their own culture, to profess and practice their own religion, or to use their own language'. The wording of the provision, contrary to other articles, is negative in tone.[81]

The obligations that are to be imposed upon State parties have also been a matter of considerable debate. The text is not strong enough to place States and governments under the obligation of providing special facilities to members of minorities. The sole obligation that was placed on the States was not to deprive or deny members of the minority groups the status they were already enjoying.[82] Article 27 is not only weak in placing positive obligations on State parties, but it is also limited in scope as far as the issue of *locus standi* is concerned. The jurisprudence emanating from the operation of the first Optional Protocol confirms that the provisions of the article are limited to persons. Cases such *Sandra Lovelace* v. *Canada*[83] establish the possibility of vindication of minority rights using Article 27. At the same time, the article has proved inadequate in satisfying many of the claims put forward by minority groups, in particular when they may link across to the claims of self-determination.[84] Minorities as collective entities are not entitled to bring

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[80] Mr Kaliswali of India had warned that such phraseology 'might encourage dictatorial States to refuse to recognise the rights of minorities living in their territory, simply by denying their existence' 9 UN ESCOR, Commission on Human Rights, UN Doc. E/CN. 4/SR. 368–71 (1951) para 37.

[81] In contrast see e.g. Article 18(1): Every one shall have the right to freedom of thought, conscience and religion. Article 24(3) Every child has the right to require a nationality.

[82] According to Capotorti during the discussions at the Commission 'It was generally agreed that the text submitted by the Sub-Commission would not, for example, place States and governments under obligation of providing special schools for persons belonging to ethnic, religious and linguistic minorities. Persons who comprised of ethnic, religious or linguistic minorities could as such request that they should not be deprived of the rights recognised in the draft article. The sole obligation imposed upon them was not to deny that right'. Capotorti, above n. 6, at p. 36.

[83] *Sandra Lovelace* v. *Canada*. Communication No. 24/1977 (30 July 1981), UN Doc. CCPR/C/OP/1 at 83 (1984).

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

actions before the Committee. Nor has it been possible to claim violations of Article 1 under the Optional Protocol to the ICCPR.[85]

MODERN INITIATIVES IN INTERNATIONAL LAW

Since the adoption of the ICCPR a number of recent initiatives have reinforced the international provisions relating to minority protection. The primary instrument at the global level is the United Nations General Assembly's Resolution 47/135 of 18 December 1992.[86] The Declaration represents a concerted effort on the part of the international community to overcome some of the limitations in Article 27 of the ICCPR.[87] According to Article 1(1), States

> shall protect the existence and the national or ethnic, cultural, religious or linguistic identity of minorities within their respective territories and shall encourage conditions for the promotion of that identity.

Article 2(1) confirms and elaborates upon the position of Article 27 of ICCPR. The provisions of this article present a more positive attitude compared with the tentative position adopted by Article 27. It provides:

> Persons belonging to national or ethnic, religious and linguistic minorities (hereinafter referred to as persons belonging to minorities) have the right to enjoy their own culture, to profess and practice their own religion, and to use their own language, in private and in public, freely and without interference or any form of discrimination.

Article 2(2) provides for wide-ranging participatory rights to persons belonging to minorities in 'cultural, religious, social, economic and public life'. The provision is significant as the recognition and authorisation of such rights form an essential element of the concept of autonomy. Similarly, Article 2(3) provides for effective participation at national and regional levels and on matters which necessarily affect the position of minorities. Article 2(4) authorises persons belonging to minorities to establish and maintain their own institutions, a matter indispensable to the autonomous existence of minorities. Hence, Article 2 as a whole, could be taken to bear significant value in recognising autonomy for minorities, even though the right to autonomy itself failed to be incorporated in the Declaration. Article 3 of the Declaration also carries a similar message. It reinforces the collective dimension with

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[85] CCPR/C/33D/197/1985, 10 August 1988; Human Rights Committee, 33rd session; Prior decisions CCPR/C/WG/27/D/197 1985; CCPR/C/29D/197 1985 (admissibility 25 March 1987).

[86] UN Doc A/Res/47/135

[87] B. Dickson, 'The United Nations and Freedom of Religion' 44 *ICLQ* (1995) at p. 354.

encouragement of the communal enjoyment of rights without discrimination of any sort. Article 4 provides that:

(1) States shall take measure to ensure that persons belonging to minorities may exercise fully and effectively all their human rights and fundamental freedom without any discrimination and in full equality before the law.

(2) States shall take measures to create favourable conditions to enable persons belonging to minorities to express their characteristics and to develop their culture, language, religion, traditions and customs except where specific practices are in violation of national law and contrary to international standards.

(3) States should take appropriate measures so that, wherever possible persons belonging to minorities have adequate opportunities to learn their mother tongue.

(4) States should, where appropriate, take measures in the field of education, in order to encourage the knowledge of the history, traditions, language and culture of the minorities existing within their territory. Persons belonging to minorities should have adequate opportunities to gain knowledge of the society as a whole.

(5) States should consider appropriate measures so that persons belonging to minorities may participate fully in the economic progress and development in their country.

Articles 5, 6 and 7 also carry considerable value. According to Article 5, 'legitimate interests' of the persons belonging to minorities would be taken into account when formulating national policies or programmes of cooperation and assistance among States. The emphasis of Articles 6 and 7 is upon international cooperation in understanding the minority question in a more tolerant and rational manner. The Declaration has many positive elements. Aspects of ethnic, cultural and linguistic autonomy appear within the text of the Declaration and represent a considerable advance. The communal aspects of the existence of minorities are more pronounced; the references relating to State sovereignty and territorial integrity, although integral to the Declaration, are framed in a more accommodating manner. They are less confrontational to aspirations of autonomy and distinct identity.

The Declaration, however, is a General Assembly Resolution and its impact on the development of international law is not clear. Many of the substantive provisions of the Declaration are themselves framed in a rather general manner, enabling a number of States to claim that they already respect minority rights.[88] States may also prevent legitimate expression of minorities on the

[88] Hence the position adopted by Poland in the Human Rights Commission may be unduly optimistic according to which 'Even though the text was not perfect, it did appear to fulfil two essential requirements: firstly, it constituted a comprehensive international instrument in the field of protection of minorities, all of whose rights were clearly specified, and secondly, it clearly set out the commitments by which States could universally agree to be bound in so sensitive a sphere. It was thus a sound document, in line with the general approach to the question of international standards for the protection of the rights of minorities, and which, while ensuring a satisfactory balance between the rights of the nation as a whole.' UN Doc. E/CN.4/1992/SR.18, para 20.

pretext of being 'incompatible with national legislation'.[89] Even as a political and moral expression there have been controversies as to the rights of minorities and concern for State sovereignty and territorial integrity resurfaced frequently. Right to autonomy was not acceptable and even the 'lower level' right to 'self-management' failed to be incorporated.[90] The manner and circumstances of the adoption of the Declaration, as its critics would argue, was probably more in response to the inability of the United Nations to take appropriate action to protect the rights of minorities, even after the East–West détente and the ending of the cold war.

One ingenious method of overcoming historical weaknesses in the implementation of minority rights mechanisms has been through the setting-up of a Working Group on Minorities. The Working Group, which was established in 1995, has helped to eradicate some of the criticisms regarding the weaknesses existent in the practical realisation and implementation of the Declaration. The Working Group on Minorities has also been influential in promoting the issue of minority rights at the global level, and notwithstanding its brief history has already created a lasting impression within the United Nations as an effective forum for deliberation and producing mutual understanding between minorities and their governments.

The origins of the Working Group can be traced through the recommendations of Professor Asbjørn Eide. These recommendations, initially presented in his report entitled *Possible Ways and Means of Facilitating the Peaceful and Constructive Solutions of Problems Involving Minorities*, were endorsed by the Human Rights Sub-Commission, which made a further recommendation to the Commission on Human Rights in its Resolution 1994/4 of August 1994.[91] The establishment of the Working Group was authorised by the Human Rights Commission,[92] and subsequently endorsed by the Economic and Social Council in July 1995.[93] The Working Group was initially authorised for a period of three years; it was to consist of five members of the Sub-Commission on Human Rights and to meet for five working days every year. The mandate of the Working Group is constituted as follows:

(a) Review the promotion and practical realisation of the Declaration;
(b) Examine possible solutions to problems involving minorities, including the promotion of mutual understanding between and among minorities and governments;

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[89] See Articles 2(3) and 4(2) of the Declaration.
[90] P. Thornberry, 'International and European Standards on Minority Rights' in H. Miall (ed.), *Minority Rights in Europe: The Scope for a Transnational Regime* (London: Pinter) 1994, 14–21 at p. 20.
[91] See Sub-Commission on the Prevention of Discrimination and Protection of Minorities Res. 1994/4 (19 August 1994).
[92] See Commission on Human Rights Res. 1995/24 (3 March 1995).
[93] See ECOSOC Res. 1995/31 (25 July 1995).

(c) Recommend further measures, as appropriate, for the promotion and protection of the rights of persons belonging to national or ethnic, religious and linguistic minorities.

In accordance with its mandate, the Working Group has held seven sessions, the most recent being held in May 2001. The sessions of the Working Group consist of public meetings as well as private (closed) sessions. For the most part the sessions are open to individuals belonging to minority groups, representatives from intergovernmental organisations, non-governmental organisations (NGOs), State representatives and scholars interested in the subject. The sessions of the Working Group have not only succeeded in promoting the practical realisation of the United Nations Declaration but have also acted as an excellent forum for debate, deliberation and constructive dialogue. Delegates representing various non-governmental organisations and other bodies have been able to highlight their concerns and, where appropriate, make recommendations for necessary action. Issues of autonomy have been at the forefront of a number of debates, both minority groups as well as the State observers being participants in these debates.

The Working Group has been able to enhance the overall jurisprudence of minority rights through a number of initiatives. Members of the Working Group have produced commentaries on the Declaration, as well as on the various rights contained therein. Professor Asbjørn Eide, the chairman of the Working Group, has made a substantial impression on the proceedings and on the continuing success of the Working Group.[94] Other members of the Working Group have similarly provided valuable input. In March 1999, Mustafa Mehdi presented a working paper on Multicultural and Intercultural Education on the Protection of Minorities[95] as did another member of the Working Group on Universal and Regional Mechanisms for Minority Protection.[96]

In the Working Group's session of May 1999 numerous significant proposals were put forward, including the establishment of a database on minorities and enhanced strategies for further involvement of regional and sub-regional agencies.[97] At the present stage it appears premature to come to any conclusive views on the impact of the Working Group on the universal protection of minority rights. Nevertheless, it has already become certain that in the global framework, where there are substantial difficulties in the implementation mechanisms, the Working Group has tremendous potential to advance the cause of minority rights.

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[94] E/CN. 4/Sub.2/AC.5/1998 WP. 1 and observations thereon from governments, specialised agencies, non-governmental organisations and experts E/CN.4/Sub.2/AC.5/1999 WP. 1.
[95] E/CN.4.4/AC.5/1999 WP. 5.
[96] E/CN.4/Sub.2/AC.5/1999 WP 6 May 1999.
[97] E/CN.4/Sub.2/AC.5/1999 WP. 9.

REGIONAL PROTECTION OF MINORITY RIGHTS: AN OVERVIEW

Many of the difficulties which have characterised the United Nations approach towards minorities have been reflected at the regional level. The continents of Europe, America and Africa have established regional institutions for the protection of human rights, although concern for minority rights has not been a strength of any of these systems. The provisions of the European Convention on Human Rights as well as the jurisprudence arising from the Strasbourg institutions has reflected difficulties in advancing the cause of minorities as distinct entities; it is the absence of a focus on group rights that is problematic.[98] The ECHR contains a number of provisions relevant to protecting the interests of minorities. However, it is only in Article 14 (an article providing for a regime of non-discrimination) that a direct reference to minorities is made.

The European Court and Commission have not been forthcoming in advancing the cause of minorities. Efforts to adopt a minority rights protocol have, thus far, not borne fruit. The Council of Europe has however been successful in adopting two treaties which are directly relevant to minorities in Europe. The Framework European Convention for the Protection of National Minorities 1994[99] is the first binding instrument which has an exclusive focus on minorities. The treaty came into operation in 1998. The Convention emphasises the usual non-discriminatory norms. It provides for equality, prohibiting discrimination on the 'grounds of belonging to a national minority'.[100] The States parties also undertake to adopt 'measures in the fields of education and research to foster knowledge of the culture, history, language and religion of their national minorities and of the majority'.[101] There is an undertaking to promote minority languages,[102] and educational rights.[103] In accordance with Article 17, parties are also under an obligation 'not to interfere with the right of persons belonging to national minorities to establish and maintain free and peaceful contacts across frontiers with persons lawfully staying in other States, in particular those with whom they share an ethnic, cultural, linguistic or religious identity, or a common cultural heritage'.[104]

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[98] See D.J. Harris, M. O'Boyle and C. Warbrick, *Law of the European Convention on Human Rights* (London: Butterworths) 1995, at p. 487; S Poulter, 'The Rights of Ethnic, Religious and Linguistic Minorities' 2 *EHRLR* (1997) 254.

[99] For the text of the Convention see 16 *HRLJ* (1995) 98.

[100] Ibid. Articles 3–4.

[101] Article 12(1).

[102] Articles 10–11.

[103] Articles 12–14.

In spite of these positive features, the Convention has many weaknesses. The Framework Convention, like other minority rights instruments, fails to define the term 'national minority'. The Convention also does not detract from the path of according individual rights as opposed to collective group rights.[105] The authors of the text of the Framework Convention reiterate this point in an explanatory note, commenting that the application of the provisions of the Convention 'does not imply the recognition of collective rights'.[106] They also point out that the notion of collective rights is separate and distinct from the issue of enjoyment of rights by individuals who belong to minority groups.[107]

In addition, a number of provisions of the Framework Convention are structured in such a manner that there is an apparent distinction in the nature of obligations undertaken by States parties. For example, under Article 7, States parties undertake to ensure respect for the rights of persons belonging to a minority to enjoy freedom of peaceful assembly, association, expression, thought, conscience and religion. On the other hand, in a number of instances where positive action is required to promote the collective group rights dimension, the articles are framed in a manner which suggests an orientation towards 'progressive realisation' rather than an existence of immediate binding obligations – reminiscent of the principles enshrined in the ICESCR. Examples of the latter construction are apparent from the use of the terms such as 'undertake to recognise' or 'not to interfere with'.

There is little in the Convention for minorities from the standpoint of autonomy. The closest the Convention comes to the subject of autonomy is in the Article that provides that '[t]he Parties shall create the conditions necessary for the effective participation of persons belonging to national minorities in cultural, social and economic life and in public affairs, in particular those affecting them'.[108] The weak nature of the obligations contained in the Article have been the subject of criticism.[109] Furthermore this article represents a retreat from the statements already advanced through

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[105] See S. Wheatley, 'The Framework Convention for the Protection of National Minorities' 1 *EHRLR* (1996) 583; 'The Framework Convention is predicated upon the rights of individuals and not collective rights of the minority group' Ibid. p. 584.

[106] See the Framework Convention for the Protection of National Minorities and Explanatory Report (1995) paras 13. 22.

[107] See E. Aarnia, 'Minority Rights in the Council of Europe: Current Developments' in A. Phillips and A. Rosas (eds), *Universal Minority Rights* (Turku/Åbo, London: Åbo Akademi University Institute for Human Rights, Minority Rights Group, International) 1995, 123–133 at p. 131.

[108] Article 15.

[109] Gilbert treats the provisions of Article 15 as 'somewhat timid' G. Gilbert, 'The Council of Europe and Minority Rights' 18 *HRQ* (1996) 160 at p. 186.

Recommendation 1201 (1993) of the Parliamentary Assembly of the Council of Europe.[110]

The final and most significant of weaknesses in the Convention is that it does not have a complaints procedure. The Convention establishes general principles which are not directly applicable at the national level, with implementation being the 'prerogative of the States'.[111] States parties are required to submit reports to an advisory committee of the Committee of Ministers on the measures, legislative and administrative, taken in order to ensure compliance with the treaty. It would be useful to advance further the possibility of NGOs and minority groups commenting, or State reports making suggestions, when State practices are being considered by the Advisory Committee.[112]

The Council of Europe has also adopted the European Charter for Regional or Minority Languages (1992). The Charter, a binding treaty, as its title suggests aims to protect the regional and minority languages spoken within Europe. States parties to the Charter undertake to encourage and facilitate regional and minority languages *inter alia* 'in speech and writing, in public and private life'. There is also an undertaking to encourage the usage of these languages in studies, in education,[113] in administration of justice,[114] in public services,[115] in the media,[116] and in social and economic life,[117] and to establish institutions in order to advise the 'authorities on all matters pertaining to regional or minority languages'.[118] Implementation of the treaty is to be conducted through periodic reports to the Secretary-General of the Council of Europe in a manner prescribed by the Committee of Ministers.[119] The first report is to be presented within a year following entry into force of the Charter with respect to the State concerned and thereafter at three-year intervals.[120] These reports are to be examined by a Committee of Experts, consisting of one member from each State party,[121] nominated by the relevant

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[110] Article 11 of the Recommendation provided as follows: 'In the regions where they are in a majority the persons belonging to a national minority shall have the right to have at their disposal appropriate local or autonomous authorities or to have a special status, matching the specific historical and territorial situation and in accordance with the domestic legislation'.

[111] Wheatley, above n. 105, at p. 585.

[112] K. Boyle, 'Europe: The Council of Europe, the OSCE, and the European Union' in H. Hannum (ed.), *Guide to International Human Rights Practice*, 3rd edn (New York: Transnational Publishers) 1999, 135–161 at p. 155.

[113] Article 8.

[114] Article 9.

[115] Article 10.

[116] Article 11.

[117] Article 13.

[118] Article 7(4).

[119] Article 15(1).

[120] Article 15(2).

[121] Article 16.

State, appointed for a six-year term and eligible for reappointment.[122] Issues relevant to the undertakings of the State concerned may be brought to the attention of the Committee of Experts.

In the light of other information (including State reports) the Committee of Experts will prepare a report for the Committee of Ministers. This report is accompanied by comments which the Parties have been requested to make and may be made public by the Committee of Ministers. These reports are required to contain, in particular, the proposals of the Committee of Experts to the Committee of Ministers for the preparation of such recommendations of the latter body to one or more of the Parties, as may be required. The Secretary-General of the Council of Europe is required to make a biannual detailed report to the Parliamentary Assembly on the application of the Charter. The Committee of Ministers may, after the entry into force of the Charter, invite non-member States of the COE to accede to the Charter.[123]

In addition to work done by the Council of Europe, significant contributions in the field of minority rights are made by another intergovernmental organisation, the Organisation for Security and Cooperation in Europe (OSCE).[124] The concern shown for the subject of minority rights within the OSCE stretches back to the Helsinki Final Act. As was noted in an earlier chapter, significant progress was made in this direction during the course of the 'follow-up meetings' leading up to and beyond the Copenhagen Document.[125] The Copenhagen Document is valuable for the propagation of minority rights. There are important provisions relating to autonomy. Article 35 provides:

> The participating States note the efforts undertaken to protect and create conditions for the promotion of the ethnic, cultural, linguistic and religious identity of certain national minorities by establishing, as one of the possible means to achieve these aims, appropriate local and autonomous administrations corresponding to the specific historical and territorial circumstances of such minorities and in accordance with the policies of the State concerned.

Again, as has been discussed, the work of the OSCE High Commission on National Minorities has been of great value in promoting the interests of the minorities of Europe.[126] The post of High Commissioner was established in 1992 at the Helsinki meeting of the OSCE. The High Commissioner has performed a number of services for minority groups; his interventions to diffuse potentially volatile situations and his role as

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[122] Article 17.

[123] Shaw, above n. 7, at p. 278.

[124] J. Wright 'The OSCE and the Protection of Minority Rights' 18 *HRQ* (1996) 190.

[125] See above Chapter 7.

[126] See Helsinki Document 1992, reprinted 13 *HRLJ* (1992) 284.

a mediator remain the most important ones. The African Charter on Human and Peoples Rights, as we have seen, contains a number of rights designated as People's rights.[127] These rights as group rights have the potential to be of great significance to minorities. On the other hand, it is equally true that individual State practice, the OAU as an organisation and the African Commission as the principal organ of the Charter have shown great reluctance in equating the terms 'minorities' and 'peoples'. The fear is, generally, that such an equation would lead minorities to claim a right of self-determination resulting in the break up of existing States. Latin America has seen problems arising out of minority rights, though a serious debate has arisen in relation to the rights of indigenous peoples – a subject to which we shall direct our attention in the next chapter.

CONCLUSIONS

Minority rights has been a problematic issue for international law to handle. Although international law primarily operates through the medium of States, and minorities generally have no *locus standi*, the treatment which minorities receive from their States has increasingly become a matter of international concern. International law, however, has historically found it difficult to deal with the problems around minorities. Like the poor, the weak and the inarticulate, they have since time immemorial been treated as natural victims of persecution and genocide. Even in the contemporary period of relative tolerance and rationality, minorities are often subjected to persecution, discrimination and genocide. The stance of international law remains tentative and extremely cautious, for minorities pose questions of a serious nature; they exist in myriad forms, with their own social, political, cultural and religious particularities. Often transcending national frontiers, minorities are extremely capable of appealing to the sensitivities of their international sympathisers. Most national boundaries are arbitrarily drawn and a number of States contain turbulent factions artificially placed within their borders, often cutting across frontiers.

After considerable hesitation, there are now a number of notable initiatives. At the UN level, Article 27 of the ICCPR continues to represent the leading provision dealing with minority rights. It is inadequate and there is need for reform. The UN Declaration on Minorities has been a positive step though much remains to be done. The Declaration needs to be converted in a binding treaty, and States must acknowledge more firmly their commitment to protecting minority rights. At the regional level, the Council of Europe's adoption of the Framework Convention for the Protection of

[127] See above Chapter 9.

National Minorities and the European Charter for Regional or Minority Languages represents two positive initiatives. It is, however, an unfortunate reality that the regions where some of the worst minority rights violations have taken place, for example, South-Asia, the Middle East and Africa, remain devoid of initiatives to protect minorities.

12

THE RIGHTS OF 'PEOPLES' AND 'INDIGENOUS PEOPLES'[1]

INTRODUCTION

The identification of an entity as 'peoples' in international law, particularly in the post-colonial period, has proved to be controversial. The primary reason for this controversy is that if an entity is recognised as a 'people', it becomes a lawful claimant to the right of self-determination, a right which also includes independent Statehood.[2] The definitional debate as to the precise meaning of 'Peoples' has taken place ever since the term was used in the United Nations Charter. The Charter attaches the 'Right of Self-Determination to Peoples'.[3] The United Nations Secretariat commenting upon the term 'Peoples' in the Charter stated: 'Peoples refers to a group of human beings, who may or may not comprise States or Nations',[4] leading to the view, although a minority one, that the provisions of the Charter allowed secession for minorities.[5] International law is similarly moving towards allowing indigenous peoples a

[1] S.J. Anaya, *Indigenous Peoples in International Law* (New York: Oxford University Press) 1996; R. Barnes, A. Gray and B. Kingsbury (eds), *Indigenous Peoples of Asia* (Ann Arbor, MI: Association for Asian Studies) 1993; I. Brownlie, *Treaties and Indigenous Peoples: The Robb Lectures* (Oxford: Clarendon Press) 1992; W.S. Heinz, *Indigenous Populations, Ethnic Minorities and Human Rights*, (Berlin: Quorum Verlag) 1988; B. Kingsbury, '"Indigenous Peoples" in International Law: A Constructivist Approach to the Asian Controversy' 92 *AJIL* (1998) 414.

[2] Professor Malcolm Shaw appropriately points out '[t]he issue of what in law constitutes a "People" has proved to be one of the great controversies of the Post-World War II era. The reason for this has been the development of the concept of self-determination'. M.N. Shaw, 'The Definition of Minorities in international law' in Y. Dinstein and M. Tabory (eds), *The Protection of Minorities and Human Rights* (Dordrecht: Martinus Nijhoff Publishers) 1992, 1–31 at p. 2.

[3] See below.

[4] UNCIO Docs., XVIII, 657–658.

[5] UNCIO Docs., XVII, 142.

right to self-determination, and hence similar difficulties arise in identifying and defining 'indigenous peoples'.

Since the Charter became operational, the term 'peoples' has become a significant feature of many international and national instruments, though there has often been an inconclusive debate as to its meaning and scope. Notwithstanding the difficulties in identifying the term 'peoples' it is important to acknowledge and explore the meaning and content of the term 'People's Right to Self-Determination'. It is equally important to understand the relevance of considering the position of indigenous peoples in debates on self-determination. Indigenous peoples' claim to be recognised as 'Peoples' and their demand to self-determination includes a right to independent Statehood.

PEOPLES' RIGHT TO SELF-DETERMINATION

Self-determination in its modern form can be related to the experiences of the American, French and Bolshevik Revolutions, with their emphasis on popular sovereignty.[6] Though used widely by politicians and nationalists, in international law the concept remained in embryonic form until the events of the First World War when the United States President Wilson, the leading exponent of this ideal, attempted to assert his wishes in various forms.[7] However, as President Wilson was soon to discover, presenting Utopian ideals was one thing, putting them into practice was quite another. The fundamental difficulty with an otherwise attractive and even sensible proposition was the identification of its potential beneficiaries. Jennings' comments provide a fruitful analysis of this problem. He notes:

> Nearly forty years ago a Professor of Political Science who was also the President of the United States, President Wilson, enunciated a doctrine which was ridiculous, but which was widely accepted as a sensible proposition, the doctrine of Self-determination. On the surface it seemed reasonable: Let the people decide. It was in fact ridiculous because the people cannot decide until somebody decides who are the people.[8]

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[6] T. Franck, 'Post-Modern Tribalism and the Right to Secession' in C. Brölmann, R. Lefeber and M. Zieck (eds), *Peoples and Minorities in International Law* (Dordrecht: Martinus Nijhoff Publishers) 1993, 3–27 at p. 6; M. Pomerance, *Self-determination in law and practice: the new doctrine in the United Nations* (The Hague: Martinus Nijhoff Publishers) 1982; A. Rigo Sureda, *The Evolution of the Right of Self-determination: A study of United Nations practice* (Leiden: Sijthoff) 1973, p. 17.

[7] M.N. Shaw, *Title to Territory in Africa: International Legal Issues* (Oxford: Clarendon Press) 1986, pp. 60–61; M. Nawaz, 'The Meaning and Range of the Principle of Self-Determination' 82 *Duke LJ* (1965) 82 at p. 82.

[8] I. Jennings, *The Approach to Self-Government* (Cambridge: Cambridge University Press) 1956, p. 56.

Hence, beset by the inherent contradictions of different though competing and equally worthy 'selves', the uncertainty in ascertaining the proper mode of 'determination' and its content and the conflict of self-determination with the cardinal principles of sovereign equality, duty of non-intervention, maintenance of status quo, preservation of peace and security and the sanctity of international treaties, the Wilsonian ideal failed to flourish.[9] On a universal level, its application could not be taken seriously, it was generally ignored at the Paris Peace Conference 1919 and was not even mentioned in the final draft of the Covenant of the League of Nations. Though the final territorial settlements proved disappointing, self-determination left some of its mark in the form of the mandate system,[10] minority rights treaties[11] and was sometimes reflected in the judgments of the Permanent Court of International Justice.[12]

Despite repeated references to it, by both politicians and lawyers during the inter-war years, self-determination failed to be recognised as part of General International law;[13] this position being confirmed by the Council of the League of Nations in the *Aaland Island Case*.[14] Although events in Europe in the 1930s and during the course of the Second World War forced the allied powers to focus on the issue of human rights, references to self-determination remained ambivalent, only rarely making an appearance. The Atlantic Charter of August 1941 makes reference to it, but the Dumbarton Oaks proposals do not.

The United Nations Charter makes express reference to self-determination on two occasions. According to Article 1, one of the purposes of the UN is to 'develop friendly relations among nations based on respect for equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace'.[15] The other reference is made in Article 55, according to which: '[w]ith a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote' – followed by a

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[9] Pomerance, above n. 6, at pp. 1–9.

[10] See Article 22 of the Covenant of League of Nations; 225 CTS 195; 112 BFSP 13, 316; 13 *AJIL* Supp 128, 361.

[11] P. Thornberry, 'Is there a Phoenix in the Ashes? – International Law and Minority Rights' 15 *Tex.ILJ* (1980) 421 at p. 453.

[12] See e.g. *Minority Schools in Albania* (1935) PCIJ Ser. A/B, No. 64, 17.

[13] F.L. Kirgis Jr., 'The Degrees of Self-Determination in the United Nations Era' 88 *AJIL* (1994) 304 at p. 304; P. Thornberry, 'Self-Determination, Minorities and Human Rights: A Review of International Instruments' 38 *ICLQ* (1989) 867 at p. 871.

[14] *The Aaland Island Case* (1920) LNOJ Special Supp No. 3 3 [H, 103–104], 5; L. Hannikainen and F. Horn (eds), *Autonomy and Demilitarisation in International Law: The Aland Islands in a Changing Europe* (The Hague: Kluwer Law International) 1997.

[15] Article 1(2) of the United Nations Charter (1945).

number of objectives. Chapter XI, which was subsequently to form the basis of decolonisation, also implicitly recognises the principle of self-determination, although the term itself is not used.

There seems to be some debate as to whether it was, in fact, the intention of the drafters of the UN Charter to provide for a legally binding right of self-determination,[16] although the view appears to be persuasive that Charter provisions in relation to self-determination did create binding legal obligations, albeit in a rather vague and imprecise manner. In any event, as Professor Higgins points out, the self-determination principle – as enunciated in the Charter – was inherently conservative and radically different from how it came to be understood subsequently. Whatever the legal position as regards self-determination may have been at the time the Charter became operational, the rapid changes in the UN have ensured its conspicuous existence as a legal right, though its primary focus has been directed towards decolonisation. Although a number of States have adopted a negative stance on the issue,[17] it seems certain that the right to self-determination is applicable even in the post-colonial world. As we have already noted this view is forcefully asserted in the common article of the ICCPR and ICESCR.[18] The right to self-determination has also been the subject of a General Comment by the Human Rights Committee. In its General Comment, emphasising the significance of this right, the Committee notes that:

> [i]n accordance with the purposes and principles of the Charter of the United Nations, article 1 of the International Covenant on Civil and Political Rights recognises that all peoples have the right of self-determination. The right of self-determination is of particular importance because its realisation is an essential condition for the effective guarantee and observance of individual human rights and for the promotion and strengthening of those rights. It is for that reason that States set forth the right of self-determination in a provision of positive law in

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[16] H. Hannum, *Autonomy, Sovereignty and Self-Determination: The Accommodation of Conflicting Rights* (Philadelphia: University of Pennsylvania Press) 1990, p. 33; Y. Blum, 'Reflections on the Changing Concept of Self-Determination' 10 *Israel L.R.* (1975) 509 at p. 511; see also the views of Gross as discussed by Emerson, in R. Emerson, 'Self-Determination' 65 *AJIL* (1971) 459 at p. 461; I. Brownlie, *Principles of Public International Law*, 4th edn (Oxford: OUP) 1990, p. 596.

[17] See for example the Indian reservation to Article 1 of the ICCPR. According to this reservation, entered at the time of the ratification of the Covenant 'With reference to article 1 ... 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' UN Centre for Human Rights, *Human Rights: Status of International Instruments* (1987) 9 UN Sales No. E.87.XIV.2; Although there are inconsistencies in India's position, the views expressed in the reservation were reaffirmed by her representative to the Human Rights Committee stating that 'the right to self-determination in international context [applies] only to dependent territories and people' UN Doc CCPR/C/SR. 493 (1948) 3.

[18] See above Chapters 4 and 5.

both Covenants and placed this provision as article 1 apart from and before all of the other rights in the two Covenants'.[19]

Claims to self-determination have also been invoked in a number of cases before the Committee.[20] In our survey of instruments we have analysed the role and position of the right to self-determination as enshrined in the AFCHPR.[21] The Convention Concerning Indigenous and Tribal Peoples in Independent Countries (ILO) No. 169[22] also provides for the right to self-determination, but without defining the concept.[23] The Organisation for the Security and Cooperation in Europe (OSCE) has laid down a particular emphasis on the continuing role of self-determination.[24] The Helsinki Final Act which has carried substantial influence affirms the right to self-determination. Article VIII of the Act provides as follows:

> The Participating States will respect the equal rights of peoples and their right to self-determination ... By Virtue of the principle of equal rights and self-determination of peoples, all peoples always have the right, in full freedom, to determine, when as they wish, their internal and external political status, without external political interference, and to pursue as they wish their political, economic, social and cultural development

Customary international law affirms the view that self-determination is a binding legal right. We have already noted that General Assembly Resolutions are not *per se* binding, though they can be instrumental in providing evidence of State practice, and can in certain circumstances be regarded as interpreting the provisions of the Charter.[25] In this context it is important to note the highly authoritative UN General Assembly Resolutions which have been treated as authoritative interpretations of the Charter, and generally regarded as reflective of customary law, for example the Declaration on the Granting of Independence to Colonial territories and Peoples, GA Res 1514 (XV) and the Declaration of the Principles of International Law Concerning Friendly Relations and Co-operation Amongst States in Accordance with the Charter of the United Nations, GA Res 2625

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

[20] *Sandra Lovelace v Canada*, Communication No. 24/1977 (30 July 1981), UN Doc. CCPR/C/OP/1 at 83 (1984); *Ominayak Lake Band v Canada*, Communication No. 167/1984 (26 March 1990), UN Doc. Supp. No. 40 (A/45/40) at 1 (1990).

[21] Article 20(1) See above Chapter 9.

[22] 72 ILO Bulletin 59 (1989); 28 I.L.M. 1382.

[23] See N. Lerner, *Group Rights and Discrimination in International Law* (Dordrecht: Martinus Nijhoff Publishers) 1991, p. 29.

[24] See above Chapter 7; J. Wright, 'The OSCE and the Protection of Minority Rights' 18 *HRQ* (1996) 190; M. Koskenniemi, 'National Self-Determination Today: Problems of Legal Theory and Practice' 43 *ICLQ* (1994) 241 at p. 242.

[25] See above Chapter 3.

(XXV), 1970. There are many other General Assembly Resolutions which reaffirm this normative value.

Judicial discussion is heavily in support of this assertion. Dicta from the Advisory Opinion of the World Court in the *Namibia*[26] and the *Western Sahara cases*[27] are strong arguments to substantiate the point.[28] A further confirmation of this view came through the World Court's Judgment in the *Case Concerning East Timor (Portugal v. Australia)*.[29] In this case the Court found itself unable to look into the possible substantive breach of self-determination. According to the Court such a course would

> necessarily [involve ruling] upon the lawfulness of Indonesia's conduct as a prerequisite for deciding on Portugal's contention that Australia violated its obligation to respect Portugal's status as administering power, East Timor's status as a non-self-governing territory and the right of the people of the territory to self-determination and to permanent sovereignty over its wealth and natural resources.[30]

The Court, however, reconfirmed the value inherent in the right to self-determination. Thus according to the Court, 'Portugal's assertion that the right of Peoples to self-determination, as it evolved from the Charter and from the United Nations practice has *erga omnes* character is irreproachable ... it is one of the essential principles of international law'.[31] It could convincingly be argued that the inherent principles enshrined in the right to self-determination form part of the norms of *jus cogens*;[32] and their character of rights *erga omnes*[33] has been firmly engrained in the substance of international law.

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[26] *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.

[27] *Western Sahara*, Advisory Opinion 16 October 1975 (1975) ICJ Reports 12

[28] See the *Namibia case* 'the subsequent developments of international law in regard to non-self governing, as enunciated in the Charter of the United Nations, made the principle of self-determination applicable to all of them ... ' (1971) ICJ Reports, 6, 31; *Western Sahara*, Advisory Opinion 16 October 1975 (1975) ICJ Reports 12, pp. 31–33 and Judge Dillard's celebrated opinion especially at 122. For a succinct discussion see A. Cassese, 'The International Court of Justice and the Right of Peoples to Self-Determination' in V. Lowe and M. Fitzmaurice (eds), *Fifty Years of the International Court of Justice: Essays in Honour of Sir Robert Jennings* (Cambridge: Cambridge University Press) 1996, pp. 351–363.

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

[30] Ibid. para 33.

[31] Ibid. 29.

[32] See H. Gros Espiell, Special Rapporteur, *Implementation of United Nations Resolutions Relating to the Right of Peoples under Colonial and Alien Domination to Self-Determination*, Study for the Sub-Commission on Prevention of Discrimination and Protection of Minorities, UN Doc.E/CN.4/Sub.2/390, 1977, 17–19, paras 61–71; H. Gros Espiell, 'Self-Determination and *Jus Cogens*' in A. Cassese (ed.) *UN Law/Fundamental Rights: Two Topics in International Law*, (Alpen aan den Rijn: Sijthoff and Noordhoff) 1979, pp. 119–135; ILC, *Draft Articles on State Responsibility*, Part I, Article 19 3(c). See above Chapter 1.

[33] See *Barcelona Traction, Light and Power Company, Limited Case (Belgium v. Spain)*, Judgment 5 February 1970 (1970) ICJ Reports 3.

A recent practical manifestation of the right could be found in the reunification of Germany, the break-up of the former Soviet Union and Yugoslavia, and the emergence of East Timor as an independent State.

INDIGENOUS PEOPLES IN INTERNATIONAL LAW: THE ISSUE OF DEFINITION

Indigenous peoples in a number of States occupy the position of minorities and, being weak and inarticulate, many of their demands coincide with those of other minority groups.[34] As their name reflects, being indigenous to the land, many of them were killed off, while survivors were conquered or subjugated.[35] However, just as genocide, persecution and discrimination form part and parcel of human history they have also tragically not been confined to a particular region or time but have been experienced as a global phenomenon.

The indigenous peoples, having been relentlessly victimised in the contemporary age, remain in conditions which governments of modern States regard as less developed. Efforts to retain their aboriginal and autochthonous life have cost a number of the groups dearly – from forced assimilation to genocide. Unfortunately, persecution and discrimination against indigenous peoples is still existent in many societies, and the continuation of a number of discriminatory laws provide a sad commentary on their state of affairs.[36] A United Nations document eloquently summarises the contemporary position facing indigenous peoples:

> Often uprooted from their traditional lands and way of life and forced into prevailing national societies, indigenous peoples face discrimination, marginalisation and alienation. Despite growing political mobilization in pursuit of their rights, they continue to lose their cultural identity along with their natural resources. Some are in imminent danger of extinction.[37]

While similar concerns are shared as regards both indigenous peoples and other minorities, there remains a pronounced view that indigenous peoples

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[34] See e.g. H. O'Shaughnessy and S. Corry, *What Future for the Armindians of South America*, (London: Minority Rights Group) 1987; J. Wilson, *Canada's Indians*, (London: Minority Rights Group)1982; I. Creery, *The Inuit (Eskimo) of Canada* (London: Minority Rights Group) 1983; N. Vakhtin, *Native Peoples of the Russians Far North* (London: Minority Rights Group) 1992; M Jones, *The Sami of Lapland* (London: Minority Rights Group) 1982; D. Stephen and P. Wearne, *Central America's Indians* (London: Minority Rights Group) 1984.

[35] J.H. Clinebell and J. Thomson, 'Sovereignty and Self-Determination: The Rights of Native Americans under International Law' 27 *Buff LR* (1978) 669; L. Kuper, *International Action against Genocide*, (London: Minority Rights Group) 1984, p. 5; J.S. Davidson, 'The Rights of Indigenous Peoples in Early International Law' 5 *Canterbury Law Review* (1994) 391.

[36] See International Labour Conference, *Report of the Committee of Experts on the Application of Conventions and Recommendations*, 64th Session, 1978.

[37] United Nations, *Indigenous Peoples: International Year 1993* (Geneva: United Nations) 1992.

belong to a distinct category.[38] This, in fact, is the established view of indigenous peoples themselves and is grounded on the argument that indigenous claims are far more substantial than minorities in general – ranging from collective rights to self-determination (including a possible right to secession). In some cases, there is also a reaction to State practice which refuses to accord any distinct and separate recognition to indigenous peoples. Bangladesh's approach towards the *adivasis* of the Chittagong Hill Tracts provides one clear example; the conventional stance put forward by successive governments is that while all Bengalis are indigenous, no further distinctions could be made out.[39] Other States are following a similar line.[40]

While several States have proved to be extremely sensitive on the definitional issue, many of the indigenous groups themselves have asserted a prerogative to define their 'nations'.[41] In the midst of these conflicts, it is not surprising to perceive tensions regarding whatever definition is accorded to the indigenous peoples or communities. Thus neither general international law nor regional custom provides a recognised and fully accepted definition of 'Indigenous Peoples'.[42] The most widely publicised definition of indigenous peoples and communities is the one put forward by the United Nations Special Rapporteur José R. Martínez-Cobo. According to him:

> Indigenous communities, peoples and nations are those which, having continuity with pre-invasion and pre-colonial societies that developed on their territories, consider themselves distinct from other sectors of the societies now prevailing in those territories, or parts of them. They form at present non-dominant sectors of society and are determined to preserve, develop and transmit to future generations their ancestral territories and their ethnic identity, as the basis of their continued existence as peoples, in accordance with their own cultural patterns, social institutions and legal systems.

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[38] See the proceedings of the 11th meeting of the United Nations working group on indigenous rights 18 UN Doc E/CN.4/Sub.2/1992/33, 1992, 19; M.N. Shaw, 'The Definition of Minorities in international law' in Dinstein and Tabory (eds), above n. 2, pp. 13–16; N. Lerner, 'The Evolution of Minority Rights in International Law' in Brölmann, Lefeber and Zieck, (eds), above n. 6, 77–101 at p. 81.

[39] For a confirmation of this view see *Report of the Working Group on Indigenous Populations on its Fourteenth Session* E/CN.4/Sub.2/1996/21, 14 para 34.

[40] Barsh mentions Bangladesh, Indonesia, the former USSR, India and China which have maintained that there are no 'indigenous' peoples in Asia only minorities epitomising former Soviet Ambassador Solinsky's view before the Sub-Commission in 1985 that 'indigenous situations only arise in the Americas and Australasia where there are imported "populations" of Europeans'. R.L. Barsh, 'Indigenous Peoples: An Emerging Object of International Law' 80 *AJIL* (1986) 369 at p. 375.

[41] Ibid. 376.

[42] Anaya, above n. 1, pp. 3–5; E. McCandless, 'Indigenous Peoples: The Definitional Debate' in Minority Rights Group (eds), *Outsider* (London: Minority Rights Group) 1996, p. 1.

The historical continuity may consist of the continuation, for an external period reaching into present, of one or more of the following factors:

(a) Occupation of ancestral lands, or at least of part of them;
(b) Common ancestry with the original occupants of the lands;
(c) Culture in general, or in specific manifestation (such as religion, living under a tribal system, membership of international community, dress, means of livelihood, life-style etc.);
(d) Language (whether used as the only language, as mother-tongue, as the habitual means of communication at home or in the family, or as the main preferred, habitual general or normal language);
(e) Residence in certain parts of the country, or in certain regions of the World;
(f) Other relevant factors.[43]

According to Article 1(1) of the ILO Convention 169, adopted in 1989, the Convention applies to:

(a) Tribal peoples in independent countries whose social, cultural and economic conditions distinguish them from other sections of the national community, and whose status is regulated wholly or partially by their own customs or traditions or by special laws or regulations;
(b) Peoples in independent countries who are regarded as indigenous on account of their descent from the populations which inhabited the country, or a geographical region to which the country belongs, at the time of conquest or colonisation or the establishment of present State boundaries and who, irrespective of their legal status, retain some or all of their own social, economic, cultural and political institutions.

Article 1(2) goes on to provide:

Self-identification as indigenous or tribal shall be regarded as a fundamental criterion for determining the groups to which the provisions of this convention apply.

A number of distinct features are evident in the definitions provided by Martínez-Cobo as well as by the 1989 Convention. These include self-identification, non-dominance, historical continuity with pre-colonial societies, ancestral territories and ethnic identity.[44] Other attempts that have been made to elaborate the concept of 'indigenous' also rely to an extent on these criteria. Thus according to Professor Anaya, '[t]oday, the term indigenous refers broadly to the living descendants of pre-invasion inhabitants of lands now dominated by others. Indigenous peoples, nations or communities are culturally distinctive groups that find themselves engulfed by settler societies born of the forces of empire and conquest'.[45] Similarly the World Council

[43] Special Rapporteur, José R. Martínez-Cobo, *Study of the Problem of Discrimination Against Indigenous Populations*, UN Doc. E/CN.4/Sub.2/1986/7/Add.4, 1986, 29, paras 378–380.
[44] B. Kingsbury, '"Indigenous Peoples" as an International Legal Concept' in R. Barnes, A. Gray and B. Kingsbury (eds), above n. 1, 13–34 at p. 26.
[45] Anaya, above n. 1, at p. 3.

of Indigenous Peoples defines indigenous peoples as '[N]atives, usually descendants of earlier population, of a particular country, composed of different ethnic or racial groups, but who have no control over the government'.[46] This discussion reveals the tensions and divisive nature of the probable definition of 'indigenous' peoples in international law. It is also the case that indigenous peoples, themselves, like other groups or communities, are capable of differing radically from each other.

RIGHTS OF INDIGENOUS PEOPLES

Many of the claims made by indigenous peoples coincide with those of other minorities. The desire for autonomy and recognition as collective entities forms part of the vocabulary of the indigenous peoples as well as other minority groups, although the thrust and vibrancy of these may differ significantly. Historical association with land and environment dispenses a distinct flavour to the demands made by indigenous peoples. Their claims include, *inter alia*, that of collective property rights to land and natural resources, the special nature and form of relationships between individual members and tribes, and the right to impose obligations on individual members which may not necessarily be aspired by other minorities.[47]

International instruments have, in recent years, attempted to consider the position of indigenous people and a number of specialist instruments have been adopted which aim to concentrate solely on the position of indigenous populations.[48] This rather sudden resurgence of interest may be taken as an acknowledgement, at least in part, that the cause of indigenous peoples raises specific issues of concern which ought to be focused on. The organisation which has shown a significant interest in the plight of indigenous peoples and more generally in its efforts to 'establish universal and lasting peace' through the means of social justice is the International Labour Organisation (ILO).[49]

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[46] Cited in W. Roxanne, *What to Celebrate in the United Nations Year of Indigenous Peoples?* (Singapore: Department of Sociology, National University of Singapore) 1993, p. 5.

[47] G. Neithem, '"Peoples" and "Populations" Indigenous Peoples and the Rights of Peoples', in J. Crawford (ed.), *The Rights of Peoples* (Oxford: Clarendon Press) 1988, pp. 107–126; J. Rehman, 'International Law and Indigenous Peoples: Definitional and Practical Problems' 3 *Journal of Civil Liberties* (1998) 224.

[48] See e.g. Barsh, above n. 40; R.L. Barsh, 'Revision of the ILO Convention No. 107' 81 *AJIL* (1987) 756; R.L. Barsh, 'United Nations Seminar on Indigenous Peoples and States' 83 *AJIL* (1989) 599 at p. 762.

[49] Preamble to the Constitution of the ILO 62 Stat. 3485; TIAS No 1868, I. Brownlie (ed.), *Basic Documents in International Law*, 2nd edn (Oxford: Oxford University Press) 1981, p. 45; F. Wolf, [illegible] *Human Rights in*

The organisation, ever since its inception in 1919, has made evident its interest by establishing a Committee of Experts on Native Labour in 1926.[50] A natural projection of this agenda was reflected in the adaptation of various conventions and recommendations, including the Forced Labour Convention 1930 (ILO Convention 29),[51] the Recruiting of Indigenous Workers Convention 1936 (ILO Convention 50),[52] the Contracts of Employment (Indigenous Workers) Convention 1939 (ILO Convention 64),[53] the Penal Sanctions (Indigenous Workers) Convention 1940 (ILO 65)[54] and the Contracts of Employment (Indigenous Workers) Convention 1947 (ILO 86).[55]

A significant study for the protection of indigenous peoples was conducted under the auspices of the Organisation, Indigenous Peoples Living and Working Conditions of Aboriginal Population in Independent Countries.[56] The study published in 1953 has left its mark on the two texts adopted at the fortieth session of the organisation, culminating in Recommendations No 104 and the ILO Convention 107 Concerning the Protection and Integration of Indigenous and other tribal and Semi-tribal Populations in Independent Countries.[57] The adoption of the 1957 Convention was a significant step forward in projecting the views and aspirations of the indigenous peoples. The Convention, however, has been a product of its time with a considerable imprint of an assimilationist ideology. By its own admission it applies, *inter alia*, to those populations 'whose social and economic conditions are at a less advanced stage than the stage reached by other sections of the national community'. In 1986, the ILO organised meetings of representatives of indigenous peoples under the emblem of 'Meeting of experts'. The meetings forcefully advocated the case for revision of the Convention noting that 'the integrationist language of Convention No. 107 is outdated, and that the application of this principle is destructive in the modern world'.[58]

A prominent theme of Convention No. 107 is the emphasis on assimilation of indigenous peoples with other sections of the community, even at the cost of abandoning their heritage. The overwhelming feeling of discontentment with this provided the impetus to the adoption of a revised Convention Concerning Indigenous and Tribal Peoples in Independent Countries (ILO)

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[50] See H. Hannum (ed.), *Documents on Autonomy and Minority Rights* (Dordrecht: Martinus Nijhoff Publishers) 1993, p. 8.

[51] 39 U.N.T.S. 55; Cmd 3693; 134 BFSP 449.

[52] 40 U.N.T.S. 109; Cmd 5305; 21 ILO Bull III.

[53] 40 U.N.T.S. 281; Cmd 6141; 8 Hudson 359.

[54] 40 U.N.T.S. 311; Cmd 6141; 8 Hudson 377.

[55] 161 U.N.T.S. 113; Cmd 7437; 148 BFSP 664.

[56] ILO, *Studies and Reports, New Series No. 35* (Geneva: International Labour Office), 1953.

[57] 328 U.N.T.S. 247.

[58] *Report of the Meeting of Experts*, para 46; See *Partial Revision of the Indigenous and Tribal Populations Convention, 1957* (No 107) Report 6(1), International Labour Conference, 75th Sess. (1988), 100.

Convention No. 169 (1989).[59] The 1989 Convention is a reflection of a more liberal attitude and is biased against hitherto prevalent integrationist and assimilation orientations; its moderating effect on what, according to its preamble, were 'the assimilationist orientations of earlier standards' is worthy of appreciation. In the words of one commentator the 1989 Convention is 'international law's most concrete manifestation of the growing responsiveness to indigenous peoples' demands. Convention No. 169 is a revision of the ILO's earlier Convention No. 107 of 1957, and it represents a marked departure in world community policy from the philosophy of integration or assimilation underlying the earlier Convention'.[60]

On the substantive front, a number of features of the 1989 Convention reflect a degree of promise. Article 2, for instance, while improving upon the 1957 Convention, reinforces the issue stating that governments shall have a responsibility to develop the participation of the peoples concerned and to act to protect their rights. It lays stress upon the participation of the peoples concerned, while actions to protect their rights puts emphasis upon the need to respect their social and cultural identity, their customs and traditions and their institutions. These acts shall ensure equality of rights and opportunities, full realisation of the social, economic and cultural rights of the indigenous peoples, and would eliminate the socio-economic gaps.

While Article 3, in line with the norm of non-discrimination in international treaties, prohibits discrimination in the enjoyment of human rights and fundamental freedoms, Article 4 enjoins special measures for safeguarding the institutions, property, labour, culture and environment of indigenous peoples in a manner which is not inconsistent with their freely expressed wishes. Article 5 reaffirms the fundamental principle of recognising, respecting and promoting the social, cultural and religious values. The significance of Article 6 lies primarily in the fact that it requires governments to consult indigenous peoples in matters affecting them, allowing and establishing means for free participation and for development of their institutions. Article 7 reflects the cherished ideals of autonomy by stating that peoples concerned shall have the right to decide their own priorities for the process of development as it affects their lives, beliefs, institutions and spiritual well-being and the lands they occupy or otherwise use. They shall also have the right to exercise control, to the extent possible, over their own economic, social and cultural development. In addition, they shall participate in the formulation, implementation and evaluation of plans and programmes for national and regional development which may affect them directly.

The advance of the 1989 Convention is considerable over its predecessor, and deserves our attention in so far as it relates specifically to the position of

[59] 72 ILO Bulletin 59 (1989), 28 I.L.M. 1382.

[60] Anaya, above n. 1, p. 47.

indigenous peoples and their rights. Having said this, the 1989 Convention falls short of providing an adequate expression to the claims of indigenous peoples in many ways. There are a number of issues where there is very little international consensus. These relate, *inter alia*, to land rights, the right to autonomy, self-determination and international personality. Although Chapter II of the Convention deals in considerable detail with the subject of land, in its drafting stages there emerged considerable disagreement with more than 100 amendments being presented, and in the final resort only reflecting a compromise among divergent interests.[61]

The right to self-determination has proved to be particularly contentious and it needs to be borne in mind that while the Convention does apply to 'peoples', a number of State representatives were unhappy with the use of the term 'peoples' with all its paraphernalia, and wanted it replaced with 'populations'.[62] The Convention itself has grudgingly granted indigenous peoples a limited recognition to the right to self-determination, although the adoption of this text was only possible through the addition of an extra paragraph curtailing the effect of whatever the right has to offer. This occurs in the form of Article 1(3) which provides:

> The use of the term 'peoples' in this convention shall not be construed as having any implications as regards the rights which may attach to the term under international law.

INDIGENOUS PEOPLES AND THE UN SYSTEM

Efforts on the part of other international organisations have of late begun to match those of the ILO. The issue of the rights of indigenous peoples has been canvassed strongly by the United Nations Working Group on Indigenous Populations. The creation of the Working Group on Indigenous Populations was proposed by the United Nations Sub-Commission on the Prevention of Discrimination and Protection of Minorities in September 1981,[63] a proposal endorsed and approved by the Commission on Human Rights in its Resolution of March 1982.[64] The ultimate authorisation to establish a Working Group was provided by the Economic and Social Council in 1982,[65] with the first annual meeting of the Working Group taking place in August of the same year.[66] The Working Group, as a subsidiary organ of the Sub-Commission on the Promotion and Protection of Human Rights (formerly the Sub-Commission

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[61] See Lerner, above n. 23, p. 109.
[62] Ibid.
[63] See Sub-Commission Res. 2 (XXXIV) September 8, 1981.
[64] Commission on Human Rights Res 1982/19, March 10.
[65] See ECOSOC Res 1982/34, May 7.
[66] Hannum, above n. 16, p. 84; Barsh, above n. 40, p. 47

on the Prevention of Discrimination and Protection of Minorities), comprises five individuals who are members of the Sub-Commission (drawn from different regions) and who act in their capacity as independent experts and not as representatives of their governments. Since its creation, the Working Group has met every year with each session lasting for one or two weeks; its annual sessions taking place immediately prior to the annual session of the Sub-Commission. These sessions are conducted in the same conference room of the Palais des Nations where the Commission on Human Rights convenes.

The inspiration derived from the Rapporteur José R. Martínez-Cobo's study has been reflected in the activities of the Working Group, with many of the themes being used as a basis for developing international standard setting on indigenous rights. The original mandate of the Working Group comprised the following two parts:

(a) to review developments pertaining to the promotion and protection of the human rights and fundamental freedoms of indigenous populations;
(b) give special attention to the evolution of standards concerning the rights of indigenous populations throughout the world.[67]

For its first few sessions the Working Group concentrated on collecting useful data and information on the instances and forms of violations that take place against indigenous peoples. The information revealed killings, torture, inhuman and degrading treatment amounting to genocide and ethnocide. Serious violations of land rights of indigenous peoples all over the world through forcible occupation or destruction came to light. Indigenous peoples also used the forum of the Working Group sessions to publicise their experiences of forcible assimilation and erosion of their cultural and spiritual existence. The early successes achieved were a consequence of the enthusiastic and ingenious approach that was adopted by the Working Group. Thus at

> its first session, the Working Group took the almost unprecedented step of allowing oral (and written) interventions from all indigenous organizations which wished to participate in its work, not limiting such participation to those with formal consultative status. Approximately 380 persons took part in its sixth session in 1988, including representatives from over 70 indigenous organizations and observers from 33 Countries. As a result of this wide participation, the Working Group has provided a meaningful forum for exchange of proposals regarding indigenous rights and for the exposition of indigenous reality throughout the world. While the Working Group reiterates at each session that it is not a 'chamber of complaints' and has no authority to hear allegations of human rights violations, it has nevertheless permitted very direct criticism of government practices by NGOs, as a means of gathering data upon which standards will eventually be based.[68]

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[67] ECS/ Res.1982/34, UN ESCOR, Supp. No.1, UN Doc. E/1982/82 (1982) pp. 26–27.
[68] Hannum, above n. 16, p. 84.

Although review of the developments pertaining to indigenous peoples has remained a significant feature of the sessions, since 1985 the Working Group has paid particular attention to universal standard setting for indigenous peoples. In this regard a valuable contribution of the Working Group has been its determined effort to draw up a Declaration on the Rights of Indigenous Peoples. In 1985 approval was given by the Sub-Commission supporting the Working Group to its decision to prepare a draft Declaration on the Rights of the Indigenous Peoples for adoption by the General Assembly of the United Nations.[69] Three years later, a first complete draft Declaration was produced, a document largely representing and favourable to the views of the indigenous peoples.[70] Further refinements and the views of governments were incorporated into the 1989 draft of the Declaration.[71] There then followed a period of deliberations and discussion within the Working Group, involving all the concerned parties-representatives from the indigenous groups as well as the concerned States. With the progressive development of the draft Declaration,

> more and more governments responded with their respective pronouncements on the content of indigenous peoples' rights. Virtually every state of the Western Hemisphere came to participate in the Working Group discussion on the declaration. Canada, with its large indigenous population took a leading role. States of other regions with significant indigenous populations also became active participants, especially Australia and New Zealand. The Philippines, Bangladesh and India are just three of the other numerous states that at one time or another made oral or written submission to the Working Group in connection with the drafting of the declaration.[72]

In 1993, the Working Group produced its final version of the draft Declaration.[73] A year later in 1994, the Sub-Commission approved and adopted – without any changes – the Working Group's draft which was then submitted for the consideration of the Human Rights Commission.[74] In March 1995 the Commission decided to establish an open-ended inter-sessional Working Group with a view to elaborating the draft Declaration.[75] The procedure for participation in the inter-sessional Working Group has been generous and has allowed virtually everyone interested to deliberate and contribute to its work without prior accreditation. The final progression of the

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[69] Sub-Commission Res. 1985/22 (August 29 1985).
[70] Universal Declaration on Indigenous Rights: A Set of Preambular Paragraphs and Principles, UN Doc. E/CN.4/Sub.2/1988/25 at p. 2 (1988).
[71] See the first Revised Text of the Draft Universal Declaration on the Rights of Indigenous Peoples, UN Doc. E/CN.4/Sub.2/1989/33 (1989).
[72] See Anaya, above n. 1, at p. 52.
[73] See Annex to the Report of the Working Group on Indigenous Populations on its 11th Session, UN Doc. E/CN.4/Sub.2/1993/29 Annex I (1993).
[74] See UN Doc. E/CN.4/1995/2, E/CN.4/Sub.2/1994/56, p 105.
[75] See Commission on Human Rights Res. 1995/32 (3 March 1995).

Declaration, however, is proving to be a time-consuming and onerous task; by its third session, the inter-sessional Working Group had adopted at first reading two articles of the draft Declaration without any changes.[76] Further amendments have been proposed in subsequent sessions of the Working Group.

The draft Declaration in its existing form possibly represents the most substantial development in the move towards an international acknowledgement of the rights of indigenous peoples. Consisting of 19 preambular paragraphs and 45 substantive articles, the draft deals with a number of issues. It aims to ensure a number of the fundamental rights, such as the protection against genocide and ethnocide, preservation of ethnic and cultural characteristics, and the right to an autonomous development. More significantly, the draft Declaration accords indigenous peoples the right to self-determination,[77] without the apparent limitations contained in the ILO Convention No. 169.[78]

OTHER INITIATIVES

At the global and regional levels indigenous peoples continue to receive attention. A number of modern instruments contain articles with references to indigenous peoples. Rights of indigenous children are the subject of attention in the Convention on the Rights of the Child. According to Article 30 of the Convention:

> In those States in which ethnic, religious or linguistic minorities or persons of indigenous origin exist, a child belonging to such a minority or who is indigenous shall not be denied the right, in community with other members of his or her group, to enjoy his or her own culture, to profess and practise his or her own religion, or to use his or her own language.

Environmental concerns of indigenous peoples have been referred to by the Vienna Declaration and Programme of Action 1993, the 1992 Rio Declaration on Environment and Development,[79] and the 1992 Convention on Biological Diversity.[80] In many other instruments, while direct references are missing, the jurisprudence emanating from their implementation organs shows an interest in and growing concern for indigenous issues. The Human

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[76] See Ms Erica-Irene A. Daes, E/CN.4/Sub.2/1998/16 para 19.

[77] According to Article 3: Indigenous Peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development. See also E/CN.4/2000/WG.15/CRP.4.

[78] Note, however, Article 45 of the Draft Declaration.

[79] 31 I.L.M. (1992) 874 (in particular principle 22).

[80] 31 I.L.M. (1992) 818 (in particular the preamble, Article 10 and 18). Also see UN Framework Convention on Climate Change (1992); and UN Convention to Combat Desertification in Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa (1994).

Rights Committee has dealt with indigenous claims pertaining to non-discrimination, minority rights and the right to self-determination. Concern is also evident in United Nations treaties which do not deal directly with indigenous peoples. In its General Comment No. 14 on the right to health, the Committee on Economic, Social and Cultural Rights noted:

> In the light of emerging international law and practice and the recent measures taken by States in relation to indigenous peoples, the Committee deems it useful to identify elements that would help to define indigenous peoples' right to health in order better to enable States with indigenous peoples to implement the provisions contained in Article 12 of the Covenant. The Committee considers that indigenous peoples have the right to specific measures to improve their access to health services and care. These health services should be culturally appropriate, taking into account traditional preventive care, healing practices and medicines. States should provide resources for indigenous peoples to design, deliver and control such services so that they may enjoy the highest attainable standard of physical and mental health. The vital medicinal plants, animals and minerals necessary to the full enjoyment of health of indigenous peoples should also be protected. The Committee notes that, in indigenous communities, the health of the individual is often linked to the health of the society as a whole and has a collective dimension. In this respect, the Committee considers that development-related activities that lead to the displacement of indigenous peoples against their will from their traditional territories and environment, denying them their sources of nutrition and breaking their symbiotic relationship with their lands, has a deleterious effect on their health.[81]

We have already noted that the AFCHPR makes substantial references to 'peoples' rights; indigenous peoples may be able to claim many of these rights. Indigenous issues are also on the agenda of the African Commission on Human and Peoples' Rights. In its resolution on the rights of Indigenous Peoples/Communities, the commission reiterated and confirmed the decision to establish a working group to consider the concept of indigenous peoples and to devise mechanisms for their protection. The European and American human rights systems have also developed jurisprudence on indigenous rights. Within Europe although the problem of indigenous rights exists, it is less visible when compared with the situations in Australia and the Americas.[82] The issue of indigenous peoples has been elevated in the

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[81] CESCR General Comment 14, *The Right to Highest Attainable Standard of Health*, (Article 12) General Comment No. 14 (11/08/00). (E/C.12/200/4). para 27.

[82] H. Hannum, 'The Protection of Indigenous Rights in the Inter-American System' in D.J. Harris and S. Livingstone (eds), *The Inter-American System of Human Rights* (Oxford: Clarendon Press) 1998, 323–343 at p. 325.

Inter-American Institute, a specialised agency of the OAS.[83] The Institute organises congresses and conferences on indigenous issues and has also provided technical and advisory services to members of the OAS and to indigenous peoples.[84] The Inter-American Commission on Human Rights has also addressed a number of cases from indigenous peoples[85] and has also engaged in country reports focusing on indigenous rights.[86] Since 1992 the Commission has also been engaged in the drafting of the American Declaration on the Rights of Indigenous Peoples. The proposed Declaration was approved by the Commission in its 95th regular session during 1997.

CONCLUSIONS

The right to self-determination forms a critical though controversial aspect of modern human rights law. As discussed in earlier chapters, this right has been incorporated into the international Covenants and other modern human rights documents.[87] While during the decolonisation phase the right to self-determination was deployed to claim independent Statehood, its meaning, purposes and objectives have been questioned by many States in the post-colonial era. The right to self-determination continues to be invoked by many dissatisfied minority groups, who often equate self-determination with secession or independent Statehood. Modern States, on the other hand, are extremely reluctant to grant an explicit right of self-determination to minority groups, fearing rebellion and claims to secession. This conflict arising out of the right to self-determination has been painful. It has led to destruction and more recently resulted in violations of human rights through terrorist activities.[88]

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[83] See the Inter-American Commission on Human Rights, *Inter-American Year Book on Human Rights 1969–70* (Washington DC: OAS), 1976, 73–83; also see Inter-American Commission on Human Rights, *Report on the work accomplished by the Inter-American Commission on Human Rights during its 29th session* (October 16–27), 1972 OAS. Doc. OAS/Ser L/V/II.29 Doc.40 rev.1 1973, 63–65.

[84] H. Hannum, 'The Protection of Indigenous Rights in the Inter-American System' in D.J. Harris and S. Livingstone (eds), above n. 82, at p. 325.

[85] Case No. 1690 (Colombia), OEA/Ser.L/V/II.29, doc. 41, rev. 2, at 63; Case No. 1802 (Paraguay), OEA/Ser.L/V/II.43, doc. 21, 20 April 1978, at 36. Also see Report on the Situation of Human Rights of a segment of the Nicaraguan Population of Miskito Origin OAS OEA/Ser.L/V/II.62. doc 10 rev. 3 (1983) and OEA/Ser.L/V/II.62 doc 26 (1984), discussed by H. Hannum, 'The Protection of Indigenous Rights in the Inter-American System' in D.J. Harris and S. Livingstone (eds), above n. 82, at pp. 326–331.

[86] See IACHR Report on H. 332 fn. 48–52.

[87] See above Chapters 4 and 5.

[88] See below Chapter 16.

Indigenous peoples have a special claim to the right to self-determination. Being indigenous to the lands, their rights were violated by more powerful foreign forces. As this chapter has analysed, there is a growing recognition of the injustices that have been endured by indigenous peoples. International law has taken some steps, albeit very limited, to grant a measure of autonomy and land rights to indigenous peoples. A very significant step was undertaken through the adoption of ILO Convention 169. Some of the modern international law instruments have also shown a sensitivity towards issues which concern indigenous peoples. There is, however, much that remains to be done. The United Nations has struggled for decades to adopt a declaration on the rights of indigenous peoples. It is recommended that after the adoption of the declaration, the Commission on Human Rights must continue its work on the drafting of a treaty, aiming at the ultimate adoption of it as a legally binding instrument which would protect the rights of indigenous peoples.

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THE RIGHTS OF WOMEN[1]

INTRODUCTION

> From the very moment of her birth, the girl child confronts a world which values her existence less than that of boys. Girls face obstacles in education, nutrition, health and other areas solely because of their sex. They are viewed as having a 'transient presence' to be married young and then judged by their ability to procreate. As they mature into women, they are thrust into a cycle of disempowerment that is very likely to be their daughter's destiny as well.[2]

The issue of the rights of women remains highly divisive in most societies and regions of the world. These divisions are reflected in the developing norms of the international law of human rights. Discriminatory practices and violations of the rights of women are a historical as well as a contemporary

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[1] See A.F. Bayefsky, 'The Principle of Equality or Non-Discrimination in International Law' 11 *HRLJ* (1990) 1; C. Tinker, 'Human Rights for Women: The UN Convention on the Elimination of All Forms of Discrimination Against Women' 3(2) *HRQ* (1981) 32; L. Reanda, 'Human Rights and Women's Rights: The UN Approach' 3(2) *HRQ* (1981) 11; R. Eisler, 'Human Rights: Towards an Integrated Theory for Action' 9 *HRQ* (1987) 287; N. Hevener, 'An Analysis of Gender Based Treaty Law: Contemporary Developments in Historical Perspective' 8 *HRQ* (1986) 78; R.J. Cook, 'Women's International Human Rights Law: The Way Forward' 15 *HRQ* (1993) 230; S. Wright, 'Economic Rights and Social Justice: A Feminist Analysis of Some International Human Rights Conventions' 12 *AYIL* (1989–90) 241; T. Meron, 'Enhancing the Effectiveness of the Prohibition of Discrimination Against Women' 84 *AJIL* (1990) 213; J. Morsink, 'Women's Rights in the Universal Declaration' 13 *HRQ* (1991) 229; M.E. Galey, 'International Enforcement of Women's Rights' 6 *HRQ* (1984) 463; H. Charlesworth, C. Chinkin and S. Wright 'Feminist Approaches to International Law' 85 *AJIL* (1991) 613.

[2] United Nations, *Human Rights and the Girl Child* (United Nations: Vienna) 1993.

phenomenon.[3] In contemporary terms the discriminatory nature of the treatment which women receive transcends national frontiers and can be visualised as a global issue rather than a regional or national concern. Even among social and cultural entities proud and confident of their human rights standards, women are more frequently victims of violence, abuse and discrimination of poverty and discrimination than men.[4] In many societies women are perceived as inherently inferior, intellectually deficient, and physically and emotionally subservient to men.[5] While in the scarcity of resources men's demands are given priority, women are often denied educational, professional and economic opportunities. There are also denials of inheritance and property rights, and discouragement for those women wishing to take part in public and social life – at the national as well as international level.[6]

If civic order breaks down, leading to anarchy and civil war, women are most vulnerable to torture, physical abuse and rape. The treatment accorded to women in domestic and international conflicts suggests that among the civilian population, it is the women who are most vulnerable to abuse: targets of torture, slavery, mass rape and other crimes against humanity.[7] Women

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[3] M. Schuler (ed.), *Freedom from Violence Women's Strategies from Around the Globe* (New York: United Nations Development Fund for Women) 1992; 'significant numbers of the world's population are routinely subjected to torture, starvation, terrorism, humiliation, mutilation and even murder simply because they are female' C. Bunch, 'Women's Rights as Human Rights' 12 *HRQ* (1990) 486 at p. 486; 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, Conn.: Yale University Press) 1980, p. 612.

[4] Charlesworth, Chinkin and Wright, above n. 1, at p. 639; McDougal, Lasswell and Chen, above n. 3, at p. 618; P.F. Marshall, 'Violence Against Women in Canada by Non-State Actors: The State and Women's Human Rights' in K.E. Mahoney and P. Mahoney (ed.), *Human Rights in the Twenty-First Century: A Global Challenge* (Dordrecht: Martinus Nijhoff Publishers) 1993, pp. 319–333; C.A. Mackinnon, 'On Torture: A Feminist Perspective on Human Rights' ibid. pp. 21–31.

[5] A. Dearden et al., *Arab Women* (London: Minority Rights Group) 1983; R. Jahan et al., *Women in Asia* (London: Minority Rights Group) 1983; O. Harris, *American Women* (London: Minority Rights Group) 1983; E. Ivan-Smith et al., *Women in Sub-Saharan Africa* (London: Minority Rights Group) 1988.

[6] M. Makram-Ebeid, 'Exclusion of Women from Politics' in K.E. Mahoney and P. Mahoney (eds), above n. 4, pp. 89–94; N. Wikler, 'Exclusion of Women from Justice: Emergency Strategies for Reform' ibid. p. 950–108; M. Waring, 'The Exclusion of Women from "Work" and Opportunity' ibid. pp. 109–117; McDougal, Lasswell and Chen, above n. 3, p. 616.

[7] See M. Tabory, 'The Status of women in Humanitarian Law' in Y. Dinstein and M. Tabory (eds), *International Law at a Time of Perplexity: Essays in Honour of Shabtai Rosenne* (Dordrecht: Martinus Nijhoff Publishers) 1989, pp. 941–951; C. Chinkin, 'Rape and Sexual Abuse of Women in International law' 5 *EJIL* (1994) 326; D. Petrovic, 'Ethnic Cleansing – An Attempt at Methodology' ibid. p. 342. On the violation of Rights of women during the Gulf War (1990–91) see F. Hampson, 'Liability for War Crimes' in P. Rowe (ed.), *The Gulf War 1990–1991 in International and English Law* (London: Routledge) 1991, 241–260 at p. 248. On former Yugoslavia see T.A. Salzman, 'Rape Camps as a means of Ethnic Cleansing: Religious, Cultural and Ethical Responses to Rape Victims in the former Yugoslavia' 20 *HRQ* (1998) 348; Z. Pajic, *Violations of Fundamental Human Rights in the Former Yugoslavia: The Conflict of Bosnia-Herzegovina* (London: Institute of International Studies) Occasional Paper No 2 (1993) p. 7.

constitute the greatest numbers of refugees world-wide, and as refugees are often subjected to abuse and victimisation.[8]

RIGHTS OF WOMEN AND THE HUMAN RIGHTS REGIME

Women face discrimination, intimidation, harassment, torture and physical abuse not simply from State organs but also from their own family and other private institutions. A major problem which has led to a negative impact on the position of women is the reluctance of international human rights law to intervene in what is perceived as private (as opposed to public) matters.[9] Attempts to combat discrimination and violence against women in the private domain have been met with substantial opposition. Intrusion into private and family life is not viewed as a desirable undertaking for legal establishments. Such an intrusion is seen as contrary to the social, cultural and religious values prevalent in many societies.[10] Within the sanctity of the home, women in many parts of the world are regularly subjected to mental and physical violence or sexual abuse, such as incest, rape, 'dowry deaths', wife battering, genital mutilation, prostitution and forced sterilisation.[11] In these social structures women have to undergo a persistent cycle of rejection, subordination and shame. Old age and disability have a substantially negative impact on the lives of women. Disabled women, as the Committee on Economic, Social and Cultural Rights has noted, suffer from 'double discrimination'.[12]

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[8] A.C. Byrnes, 'The 'Other' Human Rights Treaty Body: The Work of the Committee on the Elimination of Discrimination Against Women' 14 *YJIL* (1989) 1–67 at p. 64; R.M.M. Wallace, 'Making the Refugee Convention Gender Sensitive: The Canadian Guidelines' 45 *ICLQ* (1996) 702.

[9] S.P. Subedi, 'Protection of Women Against Domestic Violence: The Response of International Law' 2 *EHRLR* (1997) 587; A. McGillivray, 'Reconstructing Child abuse: Western Definition and Non-Western Experience' in M. Freeman and P. Veerman (eds), *Ideologies of Children's Rights* (Dordrecht: Martinus Nijhoff Publishers) 1992, 213–236 at p. 213.

[10] A.C. Byrnes, 'Women, Feminism and International Human Rights Law – Methodological Myopia, Fundamental Flaws or Meaningful Marginalisation?' 12 *AYIL* (1988–90) 205 at p. 215.

[11] For a multitude examples of the literature see H.J. Steiner and P. Alston (eds), *International Human Rights in Context: Law, Politics, Morals: Text and Materials*, 2nd edn (Oxford: Clarendon Press) 2000, pp. 404–438; E. Dorkenoo and S. Elworthy, *Female Genital Mutilation: Proposals for Change* (London: Minority Rights Group) 1992; E. Dorkenoo, *Cutting the Rose: Female Genital Mutilation – the Practice and its Prevention* (London: Minority Rights Group) 1995; A. Slack, 'Female Circumcision: A Critical Appraisal' 10 *HRQ* (1988) 439; I. Gunning, 'Arrogant Perceptions, World Travelling and Multicultural Feminism: The Case of Female Genital Surgeries' *23 CHRLR* (1991–1992) 189 at p. 238; S. Skrobanek, *Exotic, Subservient and Trapped: Confronting Prostitution and Traffic in Women* in M. Schuler (ed.), above n. 3, pp. 121–137; J. Seager and A. Olson (eds), *Women in the Third World An International Atlas* (London: Pluto Press) 1986; G. Van Bueren, *The International Law on the Rights of the Child* (Dordrecht: Martinus Nijhoff Publishers) 1995, pp. 262–292.

[12] Committee on Economic, Social and Cultural Rights, General Comment No. 5, *Persons with Disability* (Eleventh Session, 1994) UN Doc. E/C.12/1994/13 (adopted) 25 November, 1994.

It is encouraging to note that the United Nations has undertaken positive steps to combat discrimination and violence against women in both the public and private domains. The United Nations Convention on the Elimination of All Forms of Discrimination against Women, the primary focus of this chapter, prohibits discrimination in 'any other field'. At the same time it is important to note that difficulties have arisen in enforcing the norm of non-discrimination in the domestic sphere. Such difficulties are apparent through a large number of reservations to significant provisions contained in, for example, Article 16 of the Convention.

Violence against women, an action frequent within the confines of family and home, has been dealt with specifically by the United Nations. In December 1993, the United Nations General Assembly adopted a Declaration on the Elimination of Violence against Women. The United Nations has also appointed a Special Rapporteur on violence against women. An Optional Protocol to the Convention has recently been adopted by the United Nations General Assembly. The protocol would allow individuals to complain to CEDAW regarding violations of the rights contained in the Convention.

COMBATING GENDER-BASED DISCRIMINATION AND THE INTERNATIONAL HUMAN RIGHTS MOVEMENT

Attempts to combat discrimination against women and to establish *de jure* and de facto equality have a substantial history. As we have noted in this book the norm of equality and non-discrimination, especially gender-based equality and non-discrimination, represents the core of the modern human rights regime.[13] The international bill of rights is established on the principle of non-discrimination between men and women. The UDHR and the International Covenants contain various provisions confirming gender equality and non-discrimination.[14] As we considered in earlier chapters gender equality as a commitment is evident in the provisions of all regional human rights treaties.[15] By virtue of Article 1 of the ECHR, States parties undertake to 'secure to everyone' the rights contained in the Convention. According to Article 14:

> The rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex...

The guarantees on non-discrimination in ECHR are further strengthened by Protocol 12.[16] Protocol 12 extends beyond the rights provided in the

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[13] See above Chapters 3, and 10.

[14] See above Chapters 3, 4 and 5.

[15] See above Chapters 6–9.

[16] Protocol No. 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms ETS No.:177; (opened for Signature. Rome Date: 04/11/00). See above Chapter 6.

Convention to 'any right set forth by law'.[17] Such an extension is clearly to the benefit of disadvantaged groups such as women, who have suffered from various discriminatory norms which are not necessarily covered by the ECHR.

The African and American regional human rights systems also prohibit discrimination *inter alia* on grounds of sex. In 1994, the General Assembly of the OAS. adopted the Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women at Belem do Para.[18] The illegality and unacceptability of discrimination on the basis of sex is now regarded as a firmly accepted principle of general international law, and applied to all States as well as to international organisations. The European Union, although not a human rights institution, has taken an unequivocal stance on non-discrimination against women and gender equality.[19] There is a growing concern regarding matters of sexual discrimination and violation of women's rights among members States of the Arab League. The South-Asian Association for Regional Cooperation (SAARC) has frequently raised the issue of violations of the rights of children and women. The years 1991–2000 were designated as the 'SAARC Decade of Girl Child'.[20] In the light of the evidence presented, some jurists have adopted the view that discrimination on the basis of gender is a norm of *jus cogens*.[21] In our study we exhibit that while there is an overall consensus in prohibiting gender discrimination, there are also substantial disagreements on various aspects of women's positions in particular societies and States. Hence, a more cautious and realistic approach is recommended.

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[17] Article 1, Protocol 12 provides as follows 'The enjoyment of any right set forth by law shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status'.

[18] Signed 9 June 1994. Entered into force March 3 1995. 33 I.L.M. (1994) 1534. See above Chapter 8.

[19] See e.g. Article 141 TEC; Council Directive 75/117 EEC of 10 February 1975 on the approximation of the laws of the Member States relating to the application of the principle of equal pay for men and women; Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions; Council Directive 97/80/EC of 15 December 1997 on the burden of proof in cases of discrimination based on sex. See also the Community Framework Strategy on Gender Equality (2001–2005) Com (2000) 335 Final Council Regulation 2836/98/EC on *Integrating of Gender Issues in Development Co-Operation*. Also see the proposed new Directive amending Equal Treatment Directive 1976.

[20] See J. Rehman, 'Women's Rights: An International Law Perspective' in R. Mehdi and F. Shahid (eds), *Women's Law in Legal Education and Practice: North–South Co-operation* (Copenhagen: New Social Science Monographs) 1997, 106–128 at p. 117; A. Ahsan, *SAARC: A Perspective* (Dhaka: University Press) 1991.

[21] For elaboration of the concept see above Chapter 2.

THE ROLE OF THE UNITED NATIONS

The United Nations Charter contains a number of references providing for gender equality and non-discrimination. According to Article 1 of the Charter one of the purposes of the Charter is:

> to achieve international cooperation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to ... sex.

Soon after the establishment of the United Nations, the United Nations' Economic and Social Council, in accordance with Article 68 of the Charter, set up a Commission on the Status of Women (CSW). As we have noted CSW is one of the nine functional commissions.[22] The CSW was established as a functional commission of the ECOSOC to prepare recommendations and reports for the Council on promoting women's rights in political, economic, civil, social and educational fields.[23] The Commission also makes recommendations to the Council on urgent problems requiring immediate attention in the field of women's rights. The objective of the Commission is to promote implementation of the principle that men and women shall have equal rights. Its mandate was expanded in 1987 by the Council in its resolution 1987/22. Following the 1995 Fourth World Conference on Women, the General Assembly mandated the Commission to integrate into its work programme a follow-up process to the Conference, in which the Commission should play a significant role, regularly reviewing the critical areas of concern in the Platform for Action.

The Commission, which initially began with 15 members, currently consists of 45 members elected by the Economic and Social Council for a period of four years. Members are nominated by the governments. They are elected on the following geographical criteria: thirteen from African states; eleven from Asian states; four from Eastern European states; nine from Latin American and Caribbean states; and eight from Western European and 'Other' States. It is normal for the Commission to meet for eight working days every year.

The status of the members of the CSW resembles that of members of the Commission on Human Rights (in the sense that members act as representatives of States rather than in their personal capacity) and as in the case of the Human Rights Commission, the course of the proceedings and their outcomes reflect a general governmental stance on human rights issues.[24] Unlike the

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[22] See above Chapter 2.

[23] By its resolution 11(II) of 21 June 1946.

[24] See ECOSOC Res. E/1979/36; S. Davidson, *Human Rights* (Buckingham: Open University Press) 1993.

Human Rights Commission, the CSW has not been able to develop its role much further than promotional, educational and standard-setting activities. Indeed, for sometime the future of the CSW remained under threat and there has been a pronounced resistance to the idea of expanding the scope and authority of CSW to receive and consider petitions similar in nature to the those received under the ECOSOC 1503 procedure. The specificity in the work of the CSW, with an exclusive focus on women's human rights, has also generated some concern and, as we note, there have been attempts to mainstream gender equality.

Notwithstanding its limitations the CSW should be given credit and commended for its contribution to establishing new standard-setting mechanisms. A number of international conventions were formulated under the sponsorship of the CSW, including the 1952 Convention on the Political Rights of Women,[25] the 1957 Convention on the Nationality of Married Women[26] and the 1962 Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages.[27] The most significant achievement of the Commission remains its role in the drafting of the Convention on the Elimination of All Forms of Discrimination against Women (1979).[28]

THE CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN

The Convention on the Elimination of All Forms of Discrimination Against Women was adopted by the General Assembly of the United Nations on 18 December 1979 and came into force on 3 September 1981. Like the Race Convention and the Convention against Torture, the Women's Convention was also preceded by a United Nations General Assembly Declaration. The Declaration on the Elimination of All Forms of Discrimination against Women was adopted in 1967.[29] The outcome of years of discussions, debates and ultimately compromises, the Convention asserts many of the fundamental rights of women.[30] It constitutes a comprehensive attempt at establishing

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[25] UN GA Res. 640 (VII) 1952.

[26] UN GA Res. 1040 (XI) 1957.

[27] UN GA Res. 1763 (XVII) 1962; For a consideration of these instruments see M. Galey, 'Promoting Non-Discrimination against Women: The United Nations Commission on the Status of Women' 23 *International Studies Quarterly* (1979) 273.

[28] 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.

[29] However in the case of the Race Convention the time-span between the adoption of the GA Resolution and a binding treaty was shorter as compared to the Women's Convention.

[30] See Res. 5 (XXIV), 52 UN ESCOR Supp. (No 6), 70; UN Doc. E/5109 and E/CN. 6/568 (1972); 52 UN ESCOR Supp. (No 5); UN Doc. E/CN. 6/573.

universal standards on the rights of women. The convention is one of the widely ratified human rights treaties and can be regarded as a milestone on the path to the goal of standard-setting for gender-based equality.

In the preamble to the Convention the State parties acknowledge that 'extensive discrimination continues to exist against women'.[31] The preamble also acknowledges the detrimental effect that discrimination has on the development of nations, thereby linking gender equality with development. The family as well as society is hampered by the denial of women's full and adequate participation in the political, economic, social, legal and cultural activities. Significantly, within the preamble there is a recognition of the link between gender-based discrimination and exploitation for political and economic goals. Article 1, following the definition as provided in the Convention on Elimination of All Forms of Racial Discrimination,[32] defines discrimination as:

> any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.

The definition in the Convention differs from the Race Convention in that, first, it omits any reference to the term 'preference'. Secondly, the Women's Convention appears to have a wider sphere of influence, applying to the 'political, economic, social, cultural, civil or any other field' in comparison to the 'political, economic, social, cultural or any other field of public life' as stated in Article 1 of the Race Convention. This wider sphere includes eradication of distinctions and discrimination in private life.

Issues of discrimination and of de facto equality

Article 2 of the Women's Convention represents what has been aptly described as the 'core of the Convention'.[33] According to this Article States parties condemn discrimination against women in all its forms and agree to eliminate discrimination. The agreement is to eliminate discrimination 'by all appropriate means' and without delay follow a policy to this effect. The sub-sections of Article 2 spell out details of this undertaking. According to Article 2(a), States parties undertake to:

> embody the principle of the equality of men and women in their national constitutions or other appropriate legislation if not yet incorporated therein and to ensure, through law and other appropriate means, the practical realization of this principle.

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[31] See Preamble to the Convention.

[32] See Article 1 of the Convention on the Elimination of All Forms of Racial Discrimination (1966).

[33] J. Nordenfield UN Doc. CEDAW/C/SR.35; UN Doc. A/39/45 Sec. 190.

In accordance with Article 2(b) States parties are under an obligation to 'adopt appropriate legislative and other measures, including sanctions where appropriate, prohibiting all discrimination against women' and Article 2(c) obliges States to 'establish legal protection of the rights of women on an equal basis with men to ensure through competent national tribunals and other public institutions the effective protection of women against any act of discrimination'. The underlying commitment of Article 2(d)–(g) is to prevent discrimination against women, and to ensure the abolition of all discriminatory laws, regulations, customs and practices.[34] Among the various subsections of the Article, Article 2(e) is worthy of specific mention. The Article represents an undertaking on the part of the parties to take 'all appropriate measures to eliminate discrimination against women by any person, organisation or enterprise'. In adopting a broad approach and condemning discrimination by any person or organisation, this provision further reinforces the reach of the Convention beyond the public sphere.

The provisions of Article 2 are particularly valuable in identifying and establishing a regime of non-discrimination and gender equality. As we see below, CEDAW has yet to deal with individual Communications under the Optional Protocol to the Convention. In its future analysis and application of Article 2, the Committee can usefully benefit from related jurisprudence of the ICCPR and ECHR. The discussion that follows, therefore, considers case law emerging from other human rights treaty provisions.

In *Shirin Aumeeruddy-Cziffra and 19 other Mauritian women* v. *Mauritius*[35] Aumeeruddy-Cziffra and nineteen women brought forward a claim against Mauritius under the first Optional Protocol to the ICCPR. These women complained that two pieces of legislation on immigration and deportation resulted in gender discrimination which violated 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 ICCPR. To further their complaints of the violation of norms of gender equality on non-discrimination, 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 husband of Mauritian woman may be deported under a ministerial order which is not subject to Judicial Review.[36]

[34] See Article 2(f).

[35] *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).

[36] Ibid.; also see above Chapter 4.

The Committee, while accepting that Mauritius could justifiably place restrictions on entry and expulsion of aliens, nevertheless found the pieces of legislation to be discriminatory since they subjected foreign spouses of Mauritian women to the restriction but not foreign spouses of Mauritian men.[37] The issue of gender discrimination was similarly raised in *Lovelace* v. *Canada*.[38] After finding violations of Article 27, the Committee did not feel the need to examine the subject of sex discrimination,[39] although in his individual opinion Mr Bouziri took the view that Canadian legislation discriminated against Indian women.[40]

Article 3 of the Convention represents a substantial obligation on the State parties to undertake all appropriate measures to 'ensure full development and advancement of women'. As an important provision, Article 3 has frequently been the subject of analysis of CEDAW in State reports. CEDAW in its review of reports has been critical of many States for failing to ensure compliance with this Article. In its Concluding Observations on the Report submitted by Cameroon, the Committee notes with concern

> that inadequate allocation of resources for the advancement of women, with the resultant incomplete execution of programmes and projects, seriously jeopardizes the improvement of women's living conditions.[41]

Article 4 of the Convention sanctions policies of affirmative action or reverse discrimination. According to this article temporary measures are required to accelerate the de facto equality while necessary steps are being taken to achieve *de jure* equality. In its General Recommendation No. 5, the Committee notes:

> the reports, the introductory remarks and the replies by States parties reveal that while significant progress has been achieved in regard to repealing or modifying discriminatory laws, there is still a need for action to be taken to implement fully the Convention by introducing measures to promote de facto equality between men and women [the Committee Recommends] that States Parties make more use of temporary special measures such as positive action, preferential treatment or quota systems to advance women's integration into education, the economy, politics and employment.[42]

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[37] Ibid. para 9.2(b)2(ii)3.

[38] *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.

[39] Paras 13.2–13.19.

[40] Ibid. p. 175. See above Chapter 4.

[41] Concluding Observations (Comments) of the Committee on the Elimination of All Forms of Discrimination Against Women: Cameroon 26/06/2000; A/55/38; para 47; Concluding Observations (Comments) of the Committee on the Elimination of All Forms of Discrimination Against Women: India 01/02/2000: A/55/38 para 56.

[42] General Recommendation No. 5 (seventh session, 1988), Special Temporary Measures.

However, these extraordinary steps to remedy past discrimination shall be discontinued 'when the objectives of equality of opportunity and treatment have been achieved'. A number of States including Bangladesh, India and Pakistan have a quota system for women in the fields *inter alia* of employment and higher education. Such initiatives representing affirmative action have been applauded by CEDAW in its consideration of State reports.[43] At the same time the subject of affirmative action is a controversial one. Article 4 is similar in nature and scope to Article 1(4) and 2(2) of the Convention on the Elimination of Racial Discrimination (save that it applies to women) and the debates arising out of its provisions have been similarly divisive.[44] Article 5(a) represents a significant commitment on the States parties to undertake 'all appropriate measures'

> to modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and other customary and all other practices which are based on the idea of inferiority or the superiority of either sexes or on stereotyped roles for men and women.

However, there is no specification as to what those 'appropriate measures' could amount to. Some elaboration has been provided by CEDAW in its General Recommendation No. 19 where the Committee observes that traditional attitudes representing stereotyped roles for men and women perpetuate practices of violence or coercion, forced marriages, dowry deaths and female circumcision.[45] The Committee goes on to observe that:

> Such prejudices and practices may justify gender-based violence as a form of protection or control of women. The effect of such violence on the physical and mental integrity of women is to deprive them of the equal enjoyment, exercise and knowledge of human rights and fundamental freedoms. While this comment addresses mainly actual or threatened violence the underlying consequences of these forms of gender-based violence help to maintain women in subordinate roles and contribute to the low level of political participation and to their lower level of education, skills and work opportunities. According to CEDAW comments these attitude also contribute to propagation of pornography and treatment of women as sexual objects.[46]

A number of States have been the object of criticism by CEDAW for their failure to comply with Article 5 or for entering reservations to the Article. Thus, for instance, the Republic of Ireland has been criticised for the provisions of Article 41.2 of the Irish Constitution, which according to the

[43] Concluding Observations (Comments) of the Committee on the Elimination of All Forms of Discrimination Against Women: Bangladesh 24/07/1997; A/52/38/Rev. para 415; Concluding Observations (Comments) of the Committee on the Elimination of All Forms of Discrimination Against Women: India 01/02/2000; A/55/38 para 32.

[44] See above Chapter 10.

[45] UN Doc. HRI/Gen 1/Rev. 1, 85–86

[46] Ibid. para 11.

Committee 'reflect a stereotypical view of the role of women in the home and as mothers'.[47] India is one of the States which has entered reservations to Article 5(a), representing tensions and male hegemony within the society.[48] Article 6 considers the important issue of female sexual slavery and the suppression of trafficking in women. In condemning such activities it requires States parties to take all appropriate steps to end trafficking in women and exploitation and prostitution of women.

Representation in public life and the issue of nationality

Article 7 of the Convention deals with the elimination of discrimination against women in the political and public life of a country. It attempts to ensure that women have the right to vote and have a right to be elected to office, with participatory rights in policy formulation, at all the governmental levels. It also attempts to ensure that women are able to participate in the activities of non-governmental organisations. While a majority of States accord equality to women in public life, there remain unfortunate remnants of legislative enactments and administrative policies barring women from political participation at the governmental level. This subject was recently raised by the Human Rights Committee in its analysis of the State Report from Kuwait. The Committee in its Concluding Comments expresses its concern that:

> in spite of constitutional provisions on equality, Kuwait's electoral laws continue to exclude entirely women from voting and being elected to public office. It notes with regret that the Amir's initiatives to remedy this situation were defeated in Parliament.[49]

CEDAW has shown concern on many occasions at the low levels of women in public office and women in ministerial posts.[50] It has elaborated on the provisions of the Convention through its General Recommendation No. 23 (1997) on women in political and public life.[51] In its recent consideration of Kazakhstan's initial report, the Committee expressed its concern at the very low representation of women in decision-making bodies, with only

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[47] Concluding Observations of the Committee on the Elimination of Discrimination Against Women. Ireland. 01/07/99. A/54/38, paras 161–201. (Concluding Observations/Comments) para 193.

[48] The Indian reservation notes 'With regard to articles 5 (a) and 16 (1) of the Convention on the Elimination of All Forms of Discrimination Against Women, the Government of the Republic of India declares that it shall abide by and ensure these provisions in conformity with its policy of non-interference in the personal affairs of any Community without its initiative and consent'.

[49] Concluding Observations (Comments) of the Human Rights Committee Kuwait 19 07/2000. A/55/40, paras 452–497, at para 461.

[50] Concluding Observations (Comments) of the Committee on the Elimination of All Forms of Discrimination Against Women: Cameroon 26/06/2000; A/55/38: paras 56–57.

[51] General Recommendation No. 23 (sixteenth session, 1997).

an 11 per cent representation in the National Parliament.[52] Such views on gender equality unfortunately continue to invoke the displeasure of States, leading some of them to place reservations to the Article, particularly in relation to the representation of women in armed forces and national security systems.[53]

According to Article 8 of the Convention, State parties are under an obligation to take all appropriate measures to ensure that women have the opportunity to represent their governments at all international levels. In its General Recommendation on the Implementation of Article 8, the Committee notes that:

> States parties take further direct measures in accordance with article 4 of the Convention to ensure the full implementation of article 8 of the Convention and to ensure to women on equal terms with men and without any discrimination the opportunities to represent their Government at the international level and to participate in the work of international organizations.[54]

Article 9 deals with the complex though highly important issue of nationality rights, emphasising equal rights for women in acquiring, changing and retaining nationality. States parties are required to ensure that:

> neither marriage to an alien nor change of nationality by the husband during marriage shall automatically change the nationality of the wife, render her stateless or force upon her the nationality of the husband.

Issues relating to nationality are vexed and controversial ones in general international law. Matters concerning nationality and citizenship have traditionally been seen as falling within the jurisdictional domain of sovereign States. International consensus is particularly thin when it comes to the capacity of women to change or retain their nationality and to pass it on to their children.[55] It has thus not been surprising that Article 9 has attracted reservations from a number of States. Several States continue to insist on granting the child the nationality of the father.[56] Iraq has placed reservations to Article 9(1) and (2) while Egypt, Jordan, Morocco, Tunisia and Turkey have reserved this position as regards Article 9(2). An analysis of the available State reports reveals divergent rationales behind the imposition of reservations, though one possible unifying thread among these reservations would appear to be the argument in relation to preservation of family solidarity and cultural integrity. In relation to the inheritance of nationality,

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[52] See the Initial Report of Kazakhstan CEDAW/C/KAZ/1, 490th, 491st and 497th meetings (18 and 23 January 2001).

[53] See UN Website (appendix 1)

[54] CEDAW (General Recommendation) Implementation of Article 8. Doc. A/43/38.

[55] For further analysis see *Unity Dow v. The Attorney General of Botswana*, [1992] Law Reports of the Commonwealth 623 (Count of Appeal). Case also considered in above Chapter 9.

[56] Article 9(1).

the arguments have less tenacity and indeed on occasions reflect a misunderstanding of the principles of gender equality.[57]

Educational, employment and health rights

Women frequently suffer from inequality of opportunities in education and vocational and professional training. Article 10 of the Convention attempts to eradicate such discrimination and inequality. Article 11 deals with elimination of discrimination in the workplace and in the field of employment. The Article recognises the right to work as an inalienable right of all human beings.[58] States parties undertake to adopt all appropriate measures to ensure equal opportunities in employment and to provide a free choice of profession and employment. There is also an undertaking to provide equal remuneration, right to social security and a right to protection of health and to safety in working conditions. Right to employment also needs to take account of the factors which concern women; in this context Article 11(2) is of enormous value. The provisions of Article 11(2) are also noteworthy since they move away from the sameness/equal treatment approach and recognise the biological uniqueness of pregnancy.

According to Article 11(2), States undertake to prohibit dismissals on grounds *inter alia* of pregnancy. Instead the commitment is to introduce maternity leave with pay or comparable social benefits without loss of former employment, seniority or social allowances. There is also an undertaking to provide special protection to women during their pregnancies, and to encourage the provision of necessary supporting social services to enable family obligations to operate in conjunction with obligations of employment. The provisions of this Article are enormously beneficial to women the world over. In many regions, women are deprived of equal opportunities of employment. Women of child bearing ages are particularly at a disadvantage as employers are reluctant to offer employment opportunities or have been known to terminate employment when these women become pregnant. Discriminatory actions are witnessed in the developing as well as the developed world. It is equally unfortunate to note that financially stable States such as Singapore have maintained reservations to Article 11.[59]

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[57] Egypt, for instance, has justified inheritance to father's nationality alone 'to prevent a child's acquisition of two nationalities, since this may be prejudicial to his future' but goes on to plead that 'It is clear that the Child's acquisition of his father's nationality is the procedure most suitable for the child and that this does not infringe upon the principles of equality between men and women, since it is the custom for a woman to agree, on marrying an alien, that her children shall be of the father's nationality'. See UN Doc. CEDAW/SP/13Rev.Add 1, 18. See D.E. Arzt, 'The Application of International Human Rights Law in Islamic States' 12 *HRQ* (1990) 202 at p. 219.

[58] Article 11(1)(a).

[59] This reservation was raised as a subject of concern. See CEDAW, 25 session, 13 July 2001.

Article 12 of the Convention deals with the important subject of equality in health care, including family planning assistance. CEDAW has made a General Recommendation in pursuance of Article 12.[60] The right to health has also been a subject of General Comment by the Committee on the ICESCR.[61] In its General Recommendation, CEDAW has urged States parties to report on their health legislation and policies for women.[62] They are also required to provide information on health conditions, conditions hazardous to the health of women and on related diseases.[63] The Committee has recommended that States should draw up health care policies affecting women with particular regard, *inter alia*, to biological, socio-economic and psychological factors.[64]

The General Comment made by the Committee on ICESCR is a useful elaboration on women's health rights jurisprudence. The Committee notes:

> To eliminate discrimination against women, there is a need to develop and implement a comprehensive national strategy for promoting women's right to health throughout their life span. Such a strategy should include interventions aimed at the prevention and treatment of diseases affecting women, as well as policies to provide access to a full range of high quality and affordable health care, including sexual and reproductive services. A major goal should be reducing women's health risks, particularly lowering rates of maternal mortality and protecting women from domestic violence. The realization of women's right to health requires the removal of all barriers interfering with access to health services, education and information, including in the area of sexual and reproductive health. It is also important to undertake preventive, promotive and remedial action to shield women from the impact of harmful traditional cultural practices and norms that deny them their full reproductive rights.[65]

Social and economic rights

Article 13 represents important provisions related to economic and social rights. It emphasises equality of rights particularly the right to family benefits, the right to bank loans, mortgages, other forms of financial credit and the right to participation in recreational activities, sports and all other aspects of cultural life. Women often suffer from inequalities in obtaining benefits, loans and credit from governmental agencies, banks and building societies. The provisions of the

[60] CEDAW, General Recommendation 24, Women and Health (Article 12) Doc A/54/38/Rev. 1, chapter 1.
[61] ICESCR General Comment 14, *The Right to Highest Attainable Standard of Health*, (Article 12) General Comment No. 14 (11/08/00) (E/C.12/200/4).
[62] Ibid. para 9.
[63] Ibid. para 10.
[64] Paras 12(a)–(c).
[65] Para 21.

Article aim *inter alia* to prevent sex discrimination in the payment of social security and similar benefits. In *Broeks* v. *The Netherlands* Ms Broeks appealed to the Human Rights Committee under the first Optional Protocol claiming violations of Article 26 of the ICCPR and Article 9 of the ICESCR.[66] Ms Broeks had been dismissed by her employer because of illness. At first she received payments as unemployment benefits, but the Dutch government discontinued these since she was not the 'breadwinner' in her household as was required by the Netherlands Unemployment Benefits Act. The Human Rights Committee found violations of Article 26 of ICCPR, because the Statute was discriminatory in its treatment of women *vis-à-vis* men, and no grounds could be ascertained to justify such a distinction between men and women.[67] Similarly gender discrimination has been found by the Human Rights Committee where a woman was not allowed to claim before domestic courts in relation to matters arising from matrimonial property.[68] The offending legislation in Peru had provided that 'when a woman is married only the husband is entitled to represent matrimonial property before the Courts', a provision which violated the terms of Article 26.

Article 14 deals with the specific position of rural women whose work is often not acknowledged. The Article is a detailed expression of the rights belonging to women in rural areas and provides as follows:

1. States Parties shall take into account the particular problems faced by rural women and the significant roles which rural women play in the economic survival of their families, including their work in the non-monetized sectors of the economy, and shall take all appropriate measures to ensure the application of the provisions of the present Convention to women in rural areas.
2. States Parties shall take all appropriate measures to eliminate discrimination against women in rural areas in order to ensure, on a basis of equality of men and women, that they participate in and benefit from rural development and, in particular, shall ensure to such women the right
   (a) To participate in the elaboration and implementation of development planning at all levels;
   (b) To have access to adequate health care facilities, including information, counselling and services in family planning;
   (c) To benefit directly from social security programmes;
   (d) To obtain all types of training and education, formal and non-formal, including that relating to functional literacy, as well as, *inter alia*, the benefit of all community and extension services, in order to increase their technical proficiency;

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[66] *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).
[67] Ibid. para 12.1.
[68] See *Graciela Ato del Avellanal* v. *Peru*, Communication No. 202/1986 (28 October 1988), UN Doc. Supp. No. 40 (A/44/40) at 196 (1988).

(e) To organize self-help groups and co-operatives in order to obtain equal access to economic opportunities through employment or self employment;
(f) To participate in all community activities;
(g) To have access to agricultural credit and loans, marketing facilities, appropriate technology and equal treatment in land and agrarian reform as well as in land resettlement schemes;
(h) To enjoy adequate living conditions, particularly in relation to housing, sanitation, electricity and water supply, transport and communications.

According to Article 15, equality before the law in matters of civil law must be accorded to women, including the legal capacity to contract, to own and to administer property, and to move and to chose a residence and domicile. Under this Article, State parties are obliged to conform their national legislation to this rule. In addition any contract or legal document 'whose effect is directed at restriction of the legal capacity of women' shall be null and void. It is also important to note that such a significant Article has attracted reservations from many States. These reserving States continue to be reluctant to allow women legal and contractual capacity equal to that enjoyed by men. Women have often been excluded from inheritance and property ownership through legal disabilities. Women are thus, in some parts of the world, legally dependant in matters of contract and litigation. Among States entering reservations to the various provisions of Article 15 are Niger, Malta and Switzerland. The primary objection that has emanated from Islamic States – such as Algeria, Tunisia, Morocco and Jordan – relates to the application of Article 15(4). The apparent reasoning behind the reservations to Article 15(4) is the conflict with their personal laws.

In a recent observation, the Human Rights Committee has expressed its concern not only at the continued existence of the institution of polygamy but also deprivation of women from their due share in inheritance. In presenting its Concluding Comments to the report by Gabon, the Human Rights Committee expresses the following view:

> The Committee notes that there are customs and traditions in the State party, having a bearing on, among other things, equality between men and women, that may hamper the full implementation of some provisions of the Covenant. In particular, the Committee deplores the fact that polygamy is still practiced in Gabon and refers to its general comment No. 28, which states that polygamy is incompatible with equality of treatment with regard to the right to marry. 'Polygamy violates the dignity of women. It is an inadmissible discrimination against women' (CCPR/C/21/Rev.1/Add.10, para 24). The Committee also observes that a number of legislative provisions in Gabon are not compatible with the Covenant, including article 252 of the Civil Code requiring a woman to be obedient to her husband. Lastly, the Committee notes that, in the event of her husband's death, a woman inherits only the usufruct of a quarter of the property left by her husband, and only after her children.

> The State party must review its legislation and practice in order to ensure that women have the same rights as men, including rights of ownership and inheritance. It must take specific action to increase the involvement of women in political, economic and social life and ensure that there is no discrimination based on customary law in matters such as marriage, divorce and inheritance. Polygamy must be abolished and article 252 of the Civil Code repealed. It is the duty of the State party to do everything necessary to ensure that the Covenant is respected.[69]

Marriage and family relations

In accordance with Article 16, States parties agree to undertake all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations. Assurances are provided by States that men and women shall have the same right to enter into marriage, the same right freely to choose a spouse and to enter into marriage only with their free and full consent. States also agree that both parties to marriage would have the same rights and responsibilities during its existence and at the time of its dissolution. By virtue of this Article, States undertake to adopt measures to allow women (on the basis of equality) to plan a family, and to give women equal rights on the parenting of children and all other relevant issues such as guardianship, wardship, trusteeship and adoption of children, or similar institutions where these concepts exist in national legislation. According to Article 16(2) the betrothal and the marriage of a child shall have no legal effect, and all necessary actions, including legislation, shall be taken to specify a minimum age for marriage and to make the registration of marriages in an official registry compulsory.

Through the provisions of Article 16 State parties undertake to eliminate discrimination in matters relating to marriage and family relations. The Article lays emphasis upon equal rights in choosing a spouse and in the entering into and the dissolution of marriage. The Article also establishes equality of rights of men and women in raising of the family and in the ownership of family property. The rights granted to women in Article 16 raised opposition in many quarters, particularly from some Islamic States. A number of the Islamic States have registered their reservations to this Article. These States include Iraq (Article 16(1)(c)(f)), Jordan (Article 16(c)(d)(g)), Morocco (Article 16(c)), and Tunisia (Article 16(c)(d)(f)(g)(h)). The viewpoints of the State representatives and the text of the State reports reveal that the rights contained in this Article confront directly existing cultural and perceived religious norms. It is also the case that a number of Islamic States have treated the provisions of Article 16 as being contrary to the *Sharia* (Islamic law).

[69] Concluding Observations of the Human Rights Committee: Gabon. 10/11/2000. CCPR/CO/70/GAB, (Concluding Observations/Comments) seventieth session, para 9.

Kuwait provides a good example. It has put in the following reservations, which notes:

> The Government of the State of Kuwait declares that it does not consider itself bound by the provisions contained in Article 16(f) in as much as it conflicts with the provisions of the Islamic Shariah, Islam being the official religion of the State.[70]

RESERVATIONS AND THE ATTEMPTS TO FIND CONSENSUS ON THE PROVISIONS OF THE CONVENTION

During the course of this chapter we have come across a number of reservations that have been made by State parties to the various provisions. While international law does permit reservations and derogations to be made in certain circumstances, a question arises regarding the extent to which States can make such reservations without compromising their commitments to the Convention. The existing dissensions on women's rights are reflected vividly by the significant number of reservations. A complex though significant element in the entire debate surrounding this subject is the influence of socio-cultural and religious perspectives. While the impact of human rights law has been significant, many societies hold their distinct religious, cultural and societal ordinances in the highest esteem.

The prioritisation of international human rights norms faces the risk of being labelled as an attempt to impose western cultural imperialism. This view of it as imposition of cultural imperialism is evident from the State responses, and while such reaction can be discerned from many non-western States, the Islamic States have very strongly asserted the superiority of their religious and moral values. According to these States, Islam is not merely a religion, it is a complete code of life – a recipe for social and moral behaviour. Such an attitude prompted Bangladesh to enter a reservation noting that 'The Government of the People's Republic of Bangladesh does not consider as binding upon itself the provisions of articles 2, [...] and 16(1)(c) and [...] as they conflict with Sharia law based on Holy Quran and Sunna'. The reservation was withdrawn in 1997, although the spirit of the laws in Bangladesh very much represent the superiority of Sharia over any other law. The issue of compatibility becomes more complex, since there is neither a single unified view of the Sharia, nor are there any detailed official views on women's rights in Islam. Islamic States vary radically in their approaches towards the position of women in Muslim States. Thus the vision of the Talaban on the *Sharia* and women's rights in Afghanistan were very different from the position adopted by the governments of Turkey or Pakistan. Considering the position of women in a number of Islamic States, sceptics argue that religion has very often been

70 See Reservations of the Government of the State of Kuwait to the Convention on the Elimination

used as an instrument of domination and exploitation. This view appears to be substantiated when the breadth, plurality and accommodating nature of the *Sharia* is analysed.[71]

THE COMMITTEE ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN (CEDAW)[72]

Part V of the Convention establishes the Committee on the Elimination of Discrimination Against Women (CEDAW), a body of twenty-three experts. CEDAW is elected by State parties with individual members to serve in their personal capacity,[73] for four-year terms. CEDAW members are required to be 'of high moral standing and competence in the field covered by the Convention'.[74] The CEDAW Committee secretariat, unlike other treaty-based Committees, is not provided by the office of the High Commissioner of Human Rights. Instead the Division of Women provides technical and substantive support to both the Committee and CSW.[75] Like the Human Rights Committee and the Economic, Social and Cultural Rights Committee, the expenses of CEDAW are borne out of the UN budget. Prior to 1994 CEDAW met in New York and Vienna, although the New York sessions were more highly publicised. Since its thirteenth session in 1994, the Committee's sessions have always been held in New York.

According to Article 20, CEDAW is required to meet for a two-week session every year. However the rapid expansion of State membership meant that more time was needed to consider State reports. As of 1990, a pre-sessional working group has been used to review periodic reports. In the light of the unexpected workload, since 1990 the General Assembly has also allowed the Committee to meet on an exceptional basis for an extra one week per year. An amendment to Article 20 to enhance the meeting period was introduced in 1995. However the operation of such an amendment is dependant on a two-thirds majority of the States accepting this and it has not yet come into force.

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[71] See the consideration on Universalism and Regionalism in the Introductory Chapter. See also S. Sardar Ali, *Gender and Human Rights in Islam and International Law: Equal Before Allah, Unequal Before Man?* (Boston: Kluwer Law International, 2000); J. Rehman, 'Accommodating Religious Identities in an Islamic State: International Law, Freedom of Religion and the Rights of Religious Minorities' 7 *IJMGR* (2000) 139.

[72] See Byrnes, above n. 8; R. Jackson, 'The Committee on the Elimination of Discrimination against Women' in P. Alston (ed.), *The United Nations and Human Rights: A Critical Appraisal* (Oxford: Clarendon Press) 1992, pp. 444–472; M.R. Busetlo, 'The Committee on the Elimination of Discrimination against Women at the Crossroads' in P. Alston and J. Crawford (eds), *The Future of UN Human Rights Treaty Monitoring* (Cambridge: Cambridge University Press) 2000, pp. 79–111. A.G. Martínez, 'Human Rights of Women' 5 *Washington University Journal of Law and Policy* (2001) 157.

[73] Article 17.

[74] Article 17(1).

[75] M.R. Busetlo, 'The Committee on the Elimination of Discrimination against Women at the Crossroads' in P. Alston and J. Crawford (eds), above n. 72, at pp. 81–82.

In the meanwhile the General Assembly has approved the holding of two, three-week sessions every year (pending the entry into force of the amendment) each preceded by a one week pre-sessional working group session, again pending entry into force of the amendment.[76] The sessional meetings of the Committee are held in January and June of each year.

CEDAW's overall structure and its composition resembles the Human Rights Committee, though the membership of the Committee is predominantly female. The Committee also has the largest membership of any of the United Nations treaties. The members of CEDAW come from a range of professions; they are nominated by States but serve in their personal capacity and not as government representatives. Until recently CEDAW has not had a judicial or quasi-judicial function. Its sole task has been to review the State reports; this will change when the Optional Protocol comes into operation.

The Committee's main task has been one of implementing the Convention, an exercise thus far conducted within the framework of reporting procedures.[77] An Optional Protocol to the Convention authorising communications from individuals or groups of individuals was adopted by the General Assembly on 6 October 1999.[78] As at 31 March 2002, there were thirty parties to the Protocol. The Protocol was opened for signature on 10 December 1999 and required 10 ratifications to come into operation. It came into force on 22 December 2000. In its twenty-fourth session (January–February 2001), the Committee adopted the rules of procedure for the Optional Protocol. The Protocol provides for an individual complaints procedure and also provides for a procedure under which the Committee can inquire into serious and systematic violations of the Convention. The overall pattern and the admissibility procedure are based on the first Optional Protocol of the ICCPR. A number of interesting variations and distinctions exist and should be noted. First, the Optional Protocol to the Women's Convention allows 'individuals or groups of individuals' to submit complaints to CEDAW. This represents a more generous rule when compared to the first Optional Protocol to the ICCPR which only allows 'individuals' to submit a Communication. In practice, however, as we have already considered, the Human Rights Committee using the existing rules of procedure has adopted a more flexible and realistic approach in relation to the submission of Communications.[79] Secondly, Article 8 establishes an inquiry procedure that allows the Committee to initiate a confidential investigation by

[76] GA Res 51/66.

[77] Article 29 provides that two or more States parties can refer a dispute arising from the interpretation and implementation of the Convention to arbitration and if the dispute is not settled, it can be referred to the ICJ. This procedure has thus far not been used.

[78] GA Res. 55/38.

one or more of its members where it has received reliable information of grave or systematic violations by a State Party of rights established in the Convention. Where warranted and with the consent of the State Party, the Committee may visit the territory of the State Party. Any findings, comments or recommendations will be transmitted to the State Party concerned, to which it may respond within six months. There are no parallel provisions in the first Optional Protocol to the ICCPR. This procedure draws upon a similar procedure in the Convention against Torture.[80] Finally, no allowance is made within the Optional Protocol to the Women's Convention for reservations; a reaction to the difficulties that have arisen under the ICCPR with Trinidad and Tobago attempting to withdraw from their obligations.[81] In the twenty-fourth session the Committee also decided to set-up a working group to monitor the progress of the protocol. The meetings of this working group take place at the end of each session, the most recent meeting of the group being held during 23–28 July, 2001.

In pursuance of Article 18 of the Convention State parties undertake to submit reports of legislative, judicial, administrative and other measures adopted to give effect to the provisions of the Convention within one year as an initial report, and every four years thereafter. Article 21 provides for the reporting procedures. CEDAW reports annually to the General Assembly through ECOSOC. Its reports may be transmitted by the Secretary-General to the Commission on the Status of Women for information. Individuals and NGOs are not authorised to address the Committee directly; on the other hand, specialised agencies can be present at the time when reports are being submitted and considered by the Committee.

The present reporting procedure as provided in the Convention, in common with other reporting procedures, remains less than satisfactory. Reports are often delayed, outdated and inadequate with most State parties emphasising the legislative mechanisms relating to gender equality. We have already noted CEDAW's concern at the lack of information or data on issues related to women's rights. There is also the general complaint of reports being ineffective in their exposition of steps undertaken to eliminate de facto discrimination against women. To deal with the subject of outdated reports, in its sixteenth session in 1997, the Committee took a formal decision to encourage the submission of up to two consolidated reports.[82] In order to assist State parties in reporting, CEDAW has adopted guidelines for the preparation of initial and subsequent reports.[83] In the

[80] See below Chapter 15.
[81] See above Chapter 4.
[82] Report of CEDAW, GAOR 52nd Session, Supp. No. 38 (A/52/38/Rev.1), Part 1, Decision 16 (III).
[83] UN Doc. CEDAW/2/7/Rev. 3 (26 July 1996).

initial reports States need to pay particular regard to the criteria set out in paragraphs 4 and 5, as follows:

4. Part II should provide specific information in relation to each provision of the Convention, in particular:

   (a) The constitutional, legislative and administrative provisions or other measures in force;
   (b) The developments that have taken place and the programmes and institutions that have been established since the entry into force of the Convention;
   (c) Any other information on progress made in the fulfilment of each right;
   (d) The de facto position as distinct from the *de jure* position;
   (e) Any restrictions or limitations, even of a temporary nature, imposed by law, practice or tradition, or in any other manner on the enjoyment of each right;
   (f) The situation of non-governmental organizations and other women's associations and their participation in the elaboration and implementation of plans and programmes of the public authorities.

5. It is recommended that the reports not be confined to mere lists of legal instruments adopted in the country concerned in recent years, but should also include information indicating how those legal instruments are reflected in the actual economic, political and social realities and general conditions existing in the country. As far as possible, States parties should make efforts to provide all data disaggregated by sex in all areas covered by the Convention and the general recommendations of the Committee.

For the preparation of second and subsequent reports, the States need particularly to consider the following:

12. As a general rule States parties in their second and subsequent periodic reports should focus on the period between the consideration of their latest report up to the date of preparation of their last one.
13. In their periodic reports States parties should have regard to the previous report and to the proceedings of the Committee in regard to that report, and should include, *inter alia*, the following:

   (a) Legal and other measures adopted since the previous report to implement the Convention;
   (b) Actual progress made to promote and ensure the elimination of discrimination against women;
   (c) Any significant changes in the status and equality of women since the previous report;
   (d) Any remaining obstacle to the participation of women on an equal basis with men in the political, social, economic and cultural life of their country;

(e) Matters raised by the Committee which could not be dealt with at the time when the previous report was considered;
(f) Information on measures taken to implement the Beijing Declaration and Platform for Action.

General recommendations

In addition to considering State reports CEDAW may also make general recommendations and suggestions which are included in the report. CEDAW has made a number of General Recommendations on various significant though controversial issues. General recommendations are similar to the General Comments issued by the Human Rights Committee or those provided by the Committee on ICESCR. They are aimed at States parties and usually consist of the Committee's view of the obligations assumed under the Convention. General Recommendations have been used by CEDAW to expand into areas not covered by the Convention, for example, violence against women and female circumcision. Those General Recommendations adopted during the Committee's first decade of existence were short. They were frequently limited to dealing with issues such as the content of reports and reservations to the Convention and resources.

Since its tenth session the Committee has decided to adopt the practice of issuing General Recommendations on specific provisions of the Convention and on the relationship between the Convention Articles. This is what has been described by CEDAW as 'cross-cutting' themes. From this time onwards, CEDAW has issued a number of comprehensive and detailed General Recommendations offering States parties guidance on the application of the Convention in specific situations. Thus, for example, in its General Recommendation No. 5 (1988) the Committee called upon State parties to make greater use of 'temporary special measures such as positive action, preferential treatment or quota system to advance women's integration in to education, the economy, politics and employment'.[84] Its General Recommendation No. 14 (1990) called for the eradication of female circumcision,[85] General Recommendation No. 19 (1992) considered the issue of violence against women,[86]. General Recommendation No. 23 (1997) related to women in public life[87] and General Recommendation No. 24 (1999) was concerned with women and health.[88] During 2001, the Committee was working on formulating its Recommendation No. 25 which will address

[84] General Recommendation No. 5 (Seventh Session, 1988).
[85] General Recommendation No. 14 (Ninth Session, 1990).
[86] General Recommendation No. 19 (Eleventh Session, 1992)
[87] General Recommendation No. 23 (Sixteenth Session, 1997).
[88] General Recommendation No. 24 (Twentieth Session, 1999).

Article 4(1) of Convention on temporary special measures aimed at accelerating de facto equality between men and women. In addition to General Recommendations, the Committee has also adopted a number of Suggestions. Suggestions, as opposed to General Recommendation are usually aimed at United Nations entities. CEDAW has thus far adopted twenty-four general recommendations.

Procedure

At the end of each session, a decision is made on the States whose reports will be considered at the next session. The listing is published in the Committee report and available from the UN Secretariat. States are made aware of this listing and have until 1 September to withdraw from being considered should they wish to do so. Initial reports do not require the formation of a working group to scrutinise the contents of the reports. Subsequent reports are considered by a working group of CEDAW.[89] Pre-sessional working groups consist of four members, each drawn from a different regional group.

The purpose of the working group is to prepare a list of questions to be put before the State representative during the consideration of the report by CEDAW. In its scrutiny CEDAW is assisted by information from the Secretariat and non-governmental organisations. NGO documentation is made available to members of the working group. Initial reports are considered by up to three meetings. In relation to periodic reports, as already reviewed by a pre-sessional group and with questions already posed, the consideration is quicker (shorter period of up to one and a half meetings).

In common with other procedures, the Committee invites a representative from the State party to introduce the report prior to its consideration. After the presentation of reports, CEDAW members may ask additional questions, seek additional information or clarify certain points. Following the consideration of the report by CEDAW, it then proceeds to its 'Concluding Comments'. These typically include CEDAW's view of the report; an introduction to the comments; positive aspects in the report; factors and difficulties in the implementation of the Convention; and principal areas of concern and recommendations. The Concluding Comments are included in the annual report to ECOSOC, the General Assembly and the Commission on the Status of Women. From 1990, the Committee decided that it would review up to eight initial reports. Following the trend established by other treaty-based bodies, CEDAW has now rescheduled its working group sessions to take place at the end of each session. The intention for such rescheduling is that it will

[89] M. O'Flaherty, *Human Rights and the UN: Practice before the Treaty Bodies* (London: Sweet and Maxwell) 1996, p. 196.

allow the Committee to address issues properly and give States adequate time to respond.

From the seventeenth session (July 1997) the Committee decided that, while all members of the Committee could submit questions to be addressed by the relevant State, a group of three members – including the Country Rapporteur – would be assigned the primary responsibility for the preparation of questions with regard to each report, to assist the pre-sessional working group's consideration. The State party responds to those questions at a meeting several days later in the same session. Committee members may ask follow-up questions.

In common with other reporting procedures, State reports often characterise unsatisfactory coverage of issues. In many cases the reports are prepared by governmental officials who do not fully comprehend the provisions of the Convention. In these circumstances credit needs to be given to CEDAW for going beyond the strict parameters of its mandate. It has on a number of instances raised issues and concerns (for example in relation to abortion on the reports from the Republic of Ireland) upon matters not strictly covered by the Convention.

It is also the case that State reports vary in quality, volume and/or substance. Often there is little information on the implementation of the Convention with reports being excessively self-congratulatory and avoiding controversial areas. An uncompromising and unsympathetic attitude of governmental officials towards NGOs often results in little NGO involvement at crucial stages in compiling the report. To an extent, CEDAW can itself be criticised for having made insufficient use of information from other bodies. Within the Convention, there are no explicit provisions relating to the participation of NGOs. Article 22 of the Convention has thus far invoked limited interest from specialised agencies.

Recent initiatives

In light of the significant violations of women's rights, the international community has undertaken a number of initiatives. Women's rights as a subject has been considered in various contexts and by a number of recent international instruments. We have already considered the adoption of the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women. The Option Protocol forms part of a sustained campaign to ensure equality of treatment for women in all spheres of life, and also to provide impetus for addressing their needs. These campaigns include the Nairobi Forward-looking Strategies for the Advancement of Women (1985)[90] the

[90] See Report of the World Conference to Review and Appraise the Achievements of the United Nations Decade for Women: Equality, Development and Peace, Nairobi, 15–26 July 1985 (United Nations publication, Sales No. E.85.IV.10), chap. I, sect. A.

Vienna Declaration and Programme of Action adopted by the World Conference on Human Rights (1993),[91] the fourth World Conference on Women held in Beijing in September 1995.[92] The objectives of the Beijing Conference included, *inter alia*, reviewing the progress made since the Nairobi Conference and the adoption of a 'Platform for Action'. This 'Platform for Action' is intended to concentrate on key obstacles which are preventing the advancement of women. The document suggests and proposes to various agencies, including governments, NGOs, the private sector and individuals, strategies for the removal of barriers in the path of equality and the further progression of women's rights.

Further developments have taken place since the Beijing Conference. During its fifty-fifth session, the General Assembly adopted a resolution which is a follow-up to the Beijing Conference and was intended to review the progress made in the five years since the Conference.[93] The General Assembly also invited ECOSOC to continue to promote a coordinated follow-up programme for the implementation of the outcomes of the major UN Conferences and to ensure gender mainstreaming as an integral part of the activities of its mandate. At the same time there was a reaffirmation of the need to mobilise resources at all levels for the promotion of an active policy of adopting a United Nations gender perspective.

VIOLENCE AGAINST WOMEN

The Vienna Declaration focuses upon the rights of women as human rights. The Declaration notes:

> the human rights of women and of the girl child are an inalienable, integral and indivisible part of universal human rights. The full and equal participation of women in political, civil, economic, social and cultural life, at the national, regional and international levels, and the eradication of all forms of discrimination on grounds of sex are priority objectives of the international community[94]

One of the recommendations made by the Vienna Declaration was to call upon 'the General Assembly to adopt the draft declaration on violence against women and [to urge] States to combat violence against women in accordance

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[91] World Conference on Human Rights: The Vienna Declaration and Programme of Action, June 1993 (United Nations Department of Public Information, August 1993)

[92] A/CONF.177/20, 1995; 35 I.L.M. (1996) 401. The Beijing Conference as noted above was the fourth world conference on women. Earlier conferences had been held in Mexico City (1975), Copenhagen (1980) and Nairobi (1985) which adopted the Forward-looking Strategies for the Advancement of Women.

[93] GA/Res/55/71.

[94] Ibid. Section I.18, p. 34.

with its provisions'.[95] Much domestic violence goes on behind closed doors; the information that is leaked out to international monitoring bodies presents a horrific and regrettable picture. Reports of forms of domestic violence represent a source of serious concern. A serious criticism of the Women's Convention has been the absence of specific provisions condemning violence against women, an omission which is unacceptable in the light of the everyday instances of violence against women in every region of the world.[96] This criticism is visible in the analyses of such treaty-based bodies as the Human Rights Committee and the Committee against Torture.[97]

In order to overcome these lacunae, the United Nations General Assembly adopted a Declaration on the Elimination of Violence Against Women.[98] The Declaration provides an expansive definition of the term 'violence against women', taking it to mean:

> any act of gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life.

Article 2, in elaboration upon the meaning of violence, provides examples such as physical, sexual and psychological violence occurring in the family, including battering, sexual abuse of female children in the household, dowry-related violence, marital rape, female genital mutilation and other traditional practices harmful to women, non-spousal violence and violence related to exploitation,[99] physical, sexual and psychological violence occurring within the general community, including rape, sexual abuse, sexual harassment and intimidation at work, in educational institutions and elsewhere, trafficking in women and forced prostitution,[100] and physical, sexual and psychological violence perpetrated or condoned by the State, wherever it occurs.[101]

The Declaration calls upon all States to condemn violence against women and not to invoke any custom, tradition or religious consideration to justify the continuation of any such violence.[102] This provision is particularly aimed

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[95] Ibid. Section II.38, p. 54.

[96] Subedi, above n. 9, at p. 595; this point has been established by CEDAW in its consideration of State reports.

[97] See Human Rights Committee, Sixty-fourth session, *Concluding observations of the Human Rights Committee: Libyan Arab Jamahiriya*, 06/11/98. CCPR/C/79/Add.101. (Concluding Observations/Comments), para 17. On the Committee against Torture See A. Byrnes, 'The Committee against Torture' in P. Alston (ed.), above n. 72, 509–546 at p. 519; see below Chapter 15.

[98] GA Res. 48/104 of 20 December 1993.

[99] Article 2(a).

[100] Ibid. 2(b).

[101] Ibid. 2(c).

[102] Ibid. Article 4.

at those societies which continue to justify such policies as female circumcision, sati or dowry as part of divine ordinance or an integral part of their culture and traditions. In addition, the Declaration adopts a much wider approach in condemning psychological violence and marital rape. Marital rape remains a problematic family law issue in many States, including the United Kingdom.[103]

The UN Declaration is a General Assembly Resolution and is not *per se* a legally binding instrument.[104] However, as noted in an earlier chapter, General Assembly Resolutions present evidence of State practice which, alongside the requisite *opinio juris*, can lead to the establishment of customary international law. The fact that the Resolution was adopted without a vote, but by consensus among States has added to its weight and authority; subsequent developments, particularly since the Beijing Conference, may lead the provisions in the Declaration to represent customary law.

Whatever may be the precise legal position of the provisions contained in the Declaration, it is already obvious that the Resolution has had considerable impact in developing the law relating to women's rights and has provided substantial ammunition to CEDAW to scrutinise practices which contravene the provisions of the Declaration. CEDAW in its recent survey of reports has shown concern at the lack of available information on the incidence and types of violence against women, particularly at home.[105] It has expressed grave concern at the incidence of so-called 'honour killings',[106] acid throwing, stoning and dowry death,[107] dowry, sati and the *devadasi* system.[108] In a number of instances it has lamented the inability of governments to take effective action to enforce laws, or to provide immediate relief to women who are victims of such violence. The unfortunate position of women suffering from violence and the threat of violence, has led other courts and tribunals to extend human rights protection. There is, therefore, an increased willingness to recognise gender-based persecution as a ground for granting asylum. In a recent case before the House of Lords, their Lordships held that women suffering from domestic violence could be recognised as a 'particular social group' and thereby be able to rely upon the protection afforded under the Geneva

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[103] See *R* v. *R (A Husband)* (CA (Crim. Div)] Court of Appeal (Criminal Division), 14 March 1991; Concern has been expressed at the subject of marital rape. See e.g. Concluding Observations/Comments by the Human Rights Committee for Uzbekistan. 26/04/2001 CCPR/CO/71/UZB, para. 19; see also Concluding Comments by CEDAW on the report by Egypt para 344, see Egypt's 3rd and Combined 4th and 5th periodic report, CEDAW/CIEGY/3 and CEDAW/C/EGY at its 492nd and 493rd meetings (4–19 January, 2001).

[104] On the value of General Assembly Resolutions see above Chapter 2.

[105] Iraq para 189.

[106] Ibid. para 193.

[107] Bangladesh, above n. 43, para 436.

[108] India, above n. 41, para 68.

Convention Relating to the Status of Refugees 1951 – and allowed their appeal.[109]

Given the widespread nature and growing concern over violence against women, the United Nations Human Rights Commission in 1994 appointed a Special Rapporteur on Violence against Women, for a period of three years. The mandate of the Special Rapporteur was extended in 1997 for a further term of three years. During her term in office the Special Rapporteur has made a number of visits to countries and produced several valuable reports. Violence against women was a subject that was highlighted as a particular source of concern in the Beijing Conference[110] and the follow-up to the Conference.[111]

CONCLUSIONS

The Convention on the Elimination of All Forms of Discrimination against Women has been described as the international bill of rights for women. Its many positive aspects include coverage of a fairly comprehensive range of rights and a useful State reporting mechanism which has more recently been supplemented by an individual complaints procedure. Despite these positive features the Convention still suffers from significant substantive and procedural weaknesses. The language of the Convention 'is considerably closer to that of a political declaration than that of an international treaty'.[112] The Convention fails to address some of the more fundamental issues such as violence against women: it does not makes any references to

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[109] See Article 1A(2) Geneva Convention Relating to the Status of Refugees 1951. *Islam (A.P.)* v. *Secretary of State for the Home Department Regina* v. *Immigration Appeal Tribunal and Another Ex Parte Shah (A.P.) (Conjoined Appeals)* http://www.parliament.the-stationery-office.co.uk/pa/ld199899/ldjudgmt/jd990325/islam, 25 March 1999 (Internet edition: 27 October 2001). See also Wallace, above n. 8, at p. 702.

[110] 'Violence against women both violates and impairs or nullifies the enjoyment by women of human rights and fundamental freedoms. Taking into account the Declaration on the Elimination of Violence against Women and the work of Special Rapporteurs, gender-based violence, such as battering and other domestic violence, sexual abuse, sexual slavery and exploitation, and international trafficking in women and children, forced prostitution and sexual harassment, as well as violence against women, resulting from cultural prejudice, racism and racial discrimination, xenophobia, pornography, ethnic cleansing, armed conflict, foreign occupation, religious and anti-religious extremism and terrorism are incompatible with the dignity and the worth of the human person and must be combated and eliminated. Any harmful aspect of certain traditional, customary or modern practices that violates the rights of women should be prohibited and eliminated. Governments should take urgent action to combat and eliminate all forms of violence against women in private and public life, whether perpetrated or tolerated by the State or private persons' see above n. 92, para 224.

[111] See FWCW 'Platform for Action: Violence against women' Strategic objective D.1–D.3.

[112] L. Reanda, 'The Commission on the Status of Women' in P. Alston (ed.), above n. 72, 265–303 at p. 287.

sexual orientation or lesbian women, and apart from the reference in Article 12 to health, there is no particular recognition of reproductive rights. While some remedial attempts have been made by the United Nations, the absence of specific provisions – for example, prohibiting violence, and recognising sexual orientation and reproductive rights – within the treaty represents a significant omission.

It is also the case that the Convention was a product of years of debate and argumentation. Needless to say that the instrument that finally emerged was a product of political compromises, many of them fundamental to the entire debate relating to women's human rights.[113] A majority of the States would have been unwilling to proceed towards completion of the instrument if it contravened their fundamental precepts.

One lingering reminder of this conciliatory stance is the reservations clause, as provided in the Convention.[114] Out of all the human rights treaties, the Women's Convention has attracted the most number of reservations – some of them so sweeping and overriding in nature, that the issue of good faith and the principle of the integrity of the instrument inevitably comes into question.[115] The factors that have led States to place reservations include religious and cultural relativism and religious intolerance.[116] CEDAW has consistently encouraged States to review and withdraw their reservations. There have been disputes from a number of Islamic States on compatibility of provisions. Unlike the Race Convention, which provides that reservations are to be considered incompatible if at least two-thirds of the State parties object to it, the Women's Convention provides no similar provisions as to whether a reservation is valid except the possibility of reference to the International Court of Justice under Article 29. States which are unhappy with a reservation can enter an objection to the reservation and then raise the matter at meetings of State parties or other bodies such as ECOSOC or the General Assembly. The realisation of the purposes and principles set forth in the Convention through a system of periodic reporting has not been satisfactory. While the adoption of the Optional Protocol to the Convention (which would allow individuals to bring a complaint before CEDAW) is a very

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[113] On definitional aspects see UN Doc E/CN. 6/589–591 (1974); UN Doc E/CN.6/AC.1/L.4. On Reservations see 54 UNESCOR Supp. (No. 5).

[114] B. Clark, 'The Vienna Convention Reservations Regime and the Convention on Discrimination against Women' 85 *AJIL* (1991) 281. Also see R.J. Cook, 'Reservations to the Convention on the Elimination of All forms of Discrimination against Women' 30 *Va.JIL* (1990) 643.

[115] S. Sardar-Ali and S. Mullally, 'Women's Rights and Human Rights in Muslim Countries: A Case Study' in H. Hinds, A. Phoenix and J. Stacey (eds), *Working Out: New Directions for Women's Studies* (London, Falmer Press) 1992, 113–123 at p. 118; Schabas regards the Women's Convention as 'the worst case'. See also W.A. Schabas, 'Reservations to the Convention on the Rights of the Child' 18 *HRQ* (1996) 472 at p. 474.

[116] H. Steiner and P. Alston (eds), above n. 11, at p. 441.

commendable undertaking, it is as yet too early to predict the extent to which this procedure will be relied upon.

There are other defects and weaknesses as well. In comparison to other treaty-based bodies, CEDAW has remained at a disadvantage when acquiring adequate information on violations of the rights set forth in the Convention. There is a need for greater formal and informal participation by NGOs and specialised agencies such as the International Labour Organisation.[117] The overall position of CEDAW (again when compared with other treaty-based bodies) is relatively weak. The Committee has had to adopt a more mundane and conciliatory stance, the reasons for which include a weaker threshold of implementing authority, limited resources in terms of time and finances, and often evident divisions among CEDAW members themselves.

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[117] See O'Flaherty, above n. 89, at pp. 128–129.