Human Rights

A Student Reader

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CHAPTER 1: BASIC CONCEPTS OF HUMAN RIGHTS

1.1 Fundamental human rights concepts

Human rights are universal, indivisible, inalienable and interdependent. They are universal because everyone is born with and possesses the same rights regardless of their background, nationality, place of living or status; indivisible because all rights are equally important and cannot be separated from each other; inalienable because all human rights are non-derogable and cannot be removed by any political order; and interdependent because rights – political, civil, social, cultural and economic – are connected and none can be fully enjoyed without the others.

1.1.1 Universality

The main distinction between most parts of rights and human rights is that while “regular” rights apply subject to place and time, human rights apply at all times to every human being across the globe. This has been affirmed by Article 1 of the Universal Declaration of Human Rights (UDHR), which states that “All human beings are born free and equal in dignity and rights.”¹ The universality of human rights is a principle proclaimed to ensure and reinforce the weight to be placed on these rights.

However, this principle is not uncontested, and one major criticism that has been mooted against this universality factor comes from cultural relativism, which maintains that universal human rights are neo-imperialistic and culturally hegemonic. The UDHR was drafted before the end of the decolonization process, at a time where numerous developing nations transposed the standards set out in the Declaration in their domestic legislation due to western influence. The content of the rights protected as human rights are strongly influenced by the Western point of view and thus, cannot fit in societies where the cultural values are different, such as Asian societies, as some scholars have argued. Nevertheless, after the Second World War, it was often countries particularly from the Global South that came out of a period of

colonialization that called for international human rights which would bind all states and many developing countries were in fact involved in the birth of these rights.

Some parties still argue that cultural diversity challenges the very notion of universality. In its 1991 White Paper, China stated that “owing to tremendous differences in historical background, social system, cultural traditions and economic development, countries differ in their understanding and practice of human rights”. Consequently, cultural relativists state that current human rights principles are the product of the Western liberal tradition and do not encompass notions of wrong and right specific to other cultures, therein making its claim to universality untenable. Indeed, human rights precisely pertain to values that may vary across different cultures. One argument sceptics have presented is how the importance of the community in Asian culture is incompatible with the primacy of the individual, upon which the Western notion of human rights rests.

These arguments however come, more often than not, from governments rather than civil societies and one has to be careful as to their strategic purpose. Individual members of societies or civil-society organizations across the globe often agree with most human rights as it protects them on an individual level. Despite a debate on cultural relativism, it is hard to argue that many of the most basic rights such as the right to not be arbitrarily deprived of your life, the right to a fair trial, the right not to be arbitrarily detained, the right to food and safe water - just to name a few - are not shared globally.

To say that human rights are universal also means that while States have a duty to implement and enforce these rights, States are not the source of human rights. Indeed, human rights are internationally recognized, but the implementation depends on the good will of national authorities who often claim that their traditions and culture conflict with conceptions of human rights. The Asian Values, an ideology developed in the 1990s, are a good illustration of that phenomenon and have been mounted by leaders to oppose what they deem as the Western concept of human rights and to defend their actions. For example, the Foreign Minister of Singapore stated, during the 1993 World Conference on Human Rights, that "universal recognition of the ideal of human rights can be harmful if universalism is used to
deny or mask the reality of diversity.” J. Chan similarly argues that the Bangkok Declaration adopted by Asian governments in April 1993 stakes out a distinctively Asian point of view on issues of human rights by reaffirming the notion of universal human rights and their importance while insisting that “they are interpreted in the context of historical, cultural and religious peculiarities”.  

All that being said, the Vienna Declaration and Programme of Action, adopted by the World Conference on Human Rights in Vienna on 25 June 1993, states that “it is the duty of States, regardless of their political, economic and cultural systems, to promote and protect all human rights.” In addition, in 2001 the UNESCO adopted the Universal Declaration on Cultural Diversity which states that “[n]o one may invoke cultural diversity to infringe upon human rights guaranteed by international law, nor to limit their scope.” Beyond that, scholars have argued that the “Asian challenge” to the idea of universal human rights has been dramatized as a historic confrontation with the West and is a misconceived crude dichotomy. Yet while there seems to be a consensus that acts such as torture, slavery and genocide are unacceptable violations of basic human rights, in other areas, the question remains of who has the authority to decide what political practices should be adopted by societies of different cultures and socioeconomic conditions.

1.1.2 Inalienability

To say that human rights are inalienable means that every human being has human rights, independently of his or her knowledge of it and that it is impossible for an individual to lose his/her human rights for any reason whatsoever. It thus follows that, theoretically, whether an individual possesses human rights does not depend on State recognition of those rights. Thus, what makes human rights inalienable is the fact that nobody should be deprived from his or her human rights and that it does not depend on any domestic authority to recognize them.

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3 Chan, J., “The Asian challenge to universal human rights: A philosophical appraisal”.
Even people who have committed atrocities still have human rights. However, even if this is the case, it is still disputed whether one truly is in possession of human rights if supposed human rights are so often and blatantly violated, or if there is no formal or legal recognition of such rights. The deliberative school of thought around human rights conceives of human rights as “political values that liberal societies choose to adopt, for instance, through agreement to the UDHR and ratification of various international human rights treaties” (Dembour, 2010). It is thus argued that human rights exist insofar as they are agreed upon and codified by international and domestic law.

However, whether human rights are inalienable has been a source of debate. For one, Rathore & Cistelecan (2012) have considered the multiplicity of ways in which one might be considered “unhuman”. Hannah Arendt has also offered her perspective on the inalienability of human rights against the backdrop of the Holocaust. Noting the lack of tangible access to rights experiences by refugees by virtue of their statelessness, she concluded that the only true right was the right to have rights. Given today’s challenges of displacement and statelessness, some have thus argued the importance of going beyond the inalienable principle to acknowledge that rights are ultimately inseparable from citizenship and statehood.

1.1.3 Indivisibility

Human rights are indivisible and represent a coherent and homogeneous whole that is necessary for every human being. It is not for the State to decide which category of rights it decides to guarantee. Human rights reinforce each other – as an illustration, it is hard to imagine an effective right to life without a right to water for example.

It was originally intended that one treaty, rather than two, would give legal force to the 1948 UDHR. However, the global ideological divide between the West and the Soviet Union during the Cold War undermined this indivisibility by allowing for two covenants that divided civil and political rights (CPRs) and economic, social and cultural rights (ESCRs). While Western countries focused exclusively on the former and neglected the latter, the Soviet bloc

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adopted the opposition position. In particular, China and Russia argued that ESCRs have equal status to CPRs. Counties like these have been criticised for breaching CPRs, but have been less inclined to breach ESCRs. The ratification of the International Covenant on Economic, Social and Cultural Rights (ICESCR) was slower than for the International Covenant on Civil and Political Rights (ICCPR) and nowadays, it still happens that some States are only parties to one of the covenants. For example, Myanmar ratified the ICESCR in 2017 but, while the Human Rights Council recommended that it ratify the ICCPR in its Universal Periodic Review in 2015\(^8\), Myanmar is still not a party to one of the main human rights instruments.

However, some have remained sceptical of whether human rights are truly indivisible. For instance, Whelan (2010)\(^9\) argues that the rhetoric of indivisibility has frequently been used to further political ends, but has little to do with promoting the rights of individuals.

### 1.1.4 Equality and non-discrimination

One of the core obligations under human rights law is the principle of non-discrimination which stems from the universal nature of these rights. While no express definition is given of the concept of discrimination in the common Art. 1 of the two covenants of 1966, the Human Rights Committee has stated that discrimination should be understood to imply “any discrimination, exclusion, restriction or preference which is based on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms”.\(^{10}\) The prohibition of such behaviour is repeatedly included in most, if not all, human rights instruments. In addition to the two covenants of 1966 (Art. 2), the Convention on the Rights of the Child as well as the Convention on the Rights of Persons with Disabilities prohibit discrimination as well.

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\(^8\) Human Rights Council (HCR), "Report of the Working Group on the Universal Periodic Review of Myanmar”.


However, it is worth noting that the ICCPR authorises state parties, on certain strictly specified conditions, to derogate from international legal obligations under it (with regards to the principle of non-discrimination). Under Art. 14(1) of the ICCPR, the derogatory measures must not involve “discrimination solely on the ground of race, colour, sex, language, religion or social origin”. Thus, the provision does not include the following grounds contained in Art. 2(1) and 26 of the ICCPR – political or other opinion, national origin, property and birth or other status. With regard to the word “solely”, the UK (which had submitted the draft proposal”) considered that it had a certain importance since “it might easily happen that during an emergency a State would impose restrictions on a certain national group which at the same time happened to be a racial group” and “that word would make it impossible for the group to claim that it had been persecuted solely on racial grounds”.

It is now widely agreed that the sole absence of interference does not allow states to achieve de facto equality, which refers to a state of equal opportunities and objective equality in results. Indeed, discrimination does not only exist when an authority discriminates between two persons but is also related to the society in which one lives. The concept of positive discrimination requires positive action to achieve de facto equality. The notion of non-discrimination went from equality in front of the Law, that requires to stop discriminatory laws to equality in the facts that require to take positive affirmative actions to achieve a real equality of opportunity. Such actions can be public policies in the field of education, employment. Nowadays, electoral quotas are also widely use to assure the representation of a certain group. However, the assumption that such affirmative action achieves de facto equality should be questioned. While many countries allow the practice of positive discrimination, it remains illegal in the UK under the Equality Act 2010, on the grounds that the process does not accord equal treatment to all races. In addition, there are also negative impacts of positive discrimination – critics have argued that affirmative policies that treat different racial groups differently will entrench racial antagonism.

The very notions of equality and non-discrimination have been the topic of numerous discussions between scholars. For example, the feminist international law scholar Hilary Charlesworth argues that in practice a hierarchy between different kind of discrimination have
been developed in International Law as racial discrimination is somehow considered as more severe than discriminations on other grounds such as gender-based discrimination.\textsuperscript{11}

\section*{1.2 Classification of human rights}

\subsection*{1.2.1 Generations of rights}

This classification was introduced by Karel Vasak, who was the First Secretary-General of the International Institute of Human Rights in Strasbourg, in 1979. The three generations are supposed to follow the three principles of the French Revolution "Liberté, Egalité, Fraternité".

The first generation is composed of the civil and political rights, which have been recognized at the end of the 18\textsuperscript{th} century at a time when political regimes compatible with political liberties were emerging in Europe. There are two subcategories of civil-political rights: (i) physical and civil security; and (ii) individual liberties. These rights are "negative" in nature, which means that to implement them, the government simply has to refrain from infringing upon them. Many of the rights in this generation are based on the US Bill of Rights and the French Declaration of Rights of Man and of the Citizen. Additionally, the International Covenant on Civil and Political Rights outlines the global framework for this type of human right.

The second generation combines economic, social and cultural rights, and has been enshrined in the International Covenant for Economic, Social and Cultural Rights. While they were not explicitly recognized in the national declarations in the 18\textsuperscript{th} century, these rights are sometimes necessary for the implementation of the former. Such rights have been included in the Constitution of Mexico in 1917 as an example. Economic social and cultural rights represent a decline in the liberal ideology and are inspired by socialist ideas. It represents a new role for a more interventionist state. Unlike first generation rights, these rights are "positive", and requires institutional support from the state – the state must intervene through legislation to create an institutional system that allows exercise, for instance, of the right to education.

\textsuperscript{11} Charlesworth, H., \textit{Concept of Equality in International Law}, p. 143.
The third generation corresponds to solidarity rights, which are group or collective rights such as the right to peace, development for example. Implementation does not only depend on the relation between the State and the individual, but also the totality of the actors in the society. Consequently, as these rights often do not carry official legal status and are soft law, there is a need for both national governments and the international community to recognize them. There are two subtypes of solidarity rights: (i) self-determination, and (ii) special rights of ethnic and religious minorities. Most recently, these rights may include the right to natural resources and a healthy environment.

In addition, some argue that a fourth generation is now appearing which regroups the rights of the future generations and the rights related to genetic engineering. Indeed, the progress of science and communication technologies has consequences on human rights and some international documents already acknowledge that phenomenon. This is notable the case in Europe with the Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine. In addition, the 2030 Agenda for Sustainable Development reminds us, “the spread of information and communications technology and global interconnectedness has great potential to accelerate human progress.” Studying the human genome, genetic manipulation, in vitro fertilisation, experiences with human embryos, euthanasia and eugenics are activities that can generate complicated legal issues, ethical, moral and even religious reason for which public opinion has led states to deal with the regulation of these issues.

While this categorisation can be seen today, such as in the Charter of Fundamental Rights of the European Union, the UDHR does not follow these categories. Indeed, this classification by generations of rights is not free from flaws. First, from a historical point of view, some of the rights of later generations were recognized at the same time, if not before some of the first categories. Vasak presented no arguments or explicit timeframe to contextualise the generational concept. While he originally used a 30-year span dating back to the 1948 Universal Declaration followed by the two Covenants in 1966, he modified the theory later by

12 Council of Europe (CoE), "Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine”.
13 UNGA, "Transforming our world: the 2030 Agenda for Sustainable Development”, p. 15.
linking the three generations to the French Revolution’s concepts, backdating it another 150 years. Second, it undermines the principle of indivisibility of human rights as it implies that the first generation, the civil and political rights, could exist without the other generations of rights. To this end, it has been stressed that equal emphasis must be placed on all three types of rights to achieve balance and coherency in human rights. Third, the theory’s promotion of the hierarchy of human experience – placing French and American historical experiences as defining features of a transnational story – may be problematic in being overly Western-centric.

1.2.2 Civil and political rights vs economic, social and cultural rights

Most commonly, human rights are distinguished in two main categories: civil and political rights and economic, social and cultural rights. Each of them can be subdivided. This classification is supported by the adoption of two separate covenants in 1966.

Civil and political rights: These rights are said to be “classic”, and are known as “liberty oriented human rights” because they provide, protect and guarantee individual liberty to an individual against the State and its agencies. They include the right to right to life, right to freedom from torture, right to a fair trial, right to freedom of assembly and association, right to liberty and security and right to freedom from discrimination. Civil and political rights are intended to be immediately implemented and precise, to facilitate judges’ interpretation. They reflect a liberal ideology. These rights came to the fore in the 18th and 19th centuries, where the struggle for rights focused on the liberation from authoritarian oppression and the corresponding rights of free speech, association and religion and the right to vote. In particular, civil rights were commonly associated with the 1960s movement in the US to establish equality for people of African descent and with the US Bill of Rights. By the end of the 20th century, their reach and recognition was global, embodying and providing legal support for basic concepts of human dignity and respect for individuals and groups in their diverse cultures and ways. While this category of rights had previously been seen as only necessitating a negative action from the State, according to more modern concepts of political rights, every citizen should have the right and opportunity, without unreasonable restrictions, to take part in the conduct of public affairs. It follows that such rights presume that the
government actively structures its processes so as to provide opportunities for political participation of all eligible citizens.

**Economic, social and cultural rights:** These rights were developed in the aftermath of World War II against the background of growing inequalities and the changed view of the state’s role in an industrialising world. Unlike civil and political rights, economic, social and cultural rights typically require more economic resources and positive actions from the State, and have thus been referred to as “rights-debts”. They are known as “security oriented human rights” because these rights jointly provide and guarantee the essential security in the life of an individual. They include the right to an adequate standard of living, the right to education, the right to a healthy environment and the right to social security One of their particular features is the ‘progressive realisation’. The ICESCR, for example, recognizes that such rights are not all immediately realisable. States have the obligation to take appropriate measures, based on their available resources, towards the full realization of the ECS rights. Economic, social and cultural rights have been criticized as being “vague”, difficult to monitor effectively and thus not judicially enforceable as there is no metric to measure whether a state has fulfilled its obligations. However, most sovereign states have enshrined ESCR in their constitutions, and there are numerous examples of courts applying domestic and international law to protect these rights. Vagueness has also not prevented international development agencies from attempting to develop metrics to “measure” the extent to which states have fulfilled these obligations, for instance, the UNDP’s human development index and gender-related indices, UNICEF’s rate of progress measurements and the World Bank’s World Development Reports.

**Evaluation**

There has been a deep and longstanding disagreement over the status of and relationship between the two sets of rights. From one extreme to the other, the views stretch from ESCRs being superior to civil and political rights to ESCRs not constituting rights at all. Some argue that the implementation and recognition of ESCRs in domestic legislation have a tendency of being neglected of civil and political rights, and this can be attributed to the different nature of the two sets of rights – ESCRs presupposes a proactive state that attends to citizens’ needs whilst civil and political rights revolve around limiting the state’s interference in citizens’ lives.
1.3 Sources and basic principles of public international law

International human rights law is part of the broader public international legal order. Thus, to better grasp its complexities and nuances, it is necessary to first understand the basic principles of the international legal order at large.

1.3.1 State sovereignty

In 1648, the Peace of Westphalia marked the starting point of ‘the modern system of sovereign states’\(^1\), in which states recognized their equal sovereignty. In the aftermath of the two world wars, the United Nations Charter strengthened the existing international system based on the sovereign equality of the states so as to protect states from unwanted violent intervention from antagonistic external forces, and by extension, protect the human rights of citizens (Art. 2).\(^1\) The concept of state sovereignty has both an internal and external element – while it gives individual states complete control over their territory, it also restricts the influence that states have on one another. Theoretically, this means that states would be able to do as they wished within their territory.

However, the international legal order limits this ability by putting some limit on this internal sovereignty. While it is true in any branch of international law, this is especially relevant to the field of human rights. For one, the international security and human rights norm of “Responsibility to Protect” mandates the international community to intervene to prevent and stop genocides, war crimes, ethnic cleansing and crimes against humanity. This global political commitment was endorsed by all member states of the UN at the 2005 World Summit.

In domestic law, signing a contract binds the parties; in international law, ratifying a treaty similarly binds countries. States that have signed and ratified an international treaty should fulfil their obligations under treaties they have signed and ratified pursuant to the principles of *pacta sunt servanda* and good faith, enshrined under the Vienna Convention on the Law of

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\(^1\) UN Charter, Article 2.
Treaties, which states that ‘[e]very treaty in force is binding upon the parties to it and must be performed by them in good faith.’ Consequently, human rights law was developed to protect the individual against the state. Thus, state sovereignty is evolving from an absolute concept of unlimited freedom and independence to a relative concept where freedom and independence of states is limited by international law.

**CASE STUDY**

On the issue of migration, Thompson says that ‘[t]here is a fear that protecting human rights […] undermines state sovereignty’ A particularly relevant example can be seen in the case of border control. In the ICJ’s *Nottebohm* case, Judge Read considered that “[w]hen an alien comes to the frontier, seeking admission, either as a settler or on a visit, the State has an unfettered right to refuse admission”. However, according to the Refugee Convention, it is prohibited to expel an alien ‘where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.’ Thus, the prohibition of *refoulement* is at odds with the state sovereignty which grants the ability for a State to control its border. However, nowadays, some, as Popovski, argue for a change in our way of thinking about state sovereignty which ‘no longer antagonizes but rather incorporates the concept of human rights’. For him, ‘the sovereignty of the State means the sovereignty of people, not of leaders’.

**1.3.2 Sources of international law**

Article 38(1) of the Statute of the International Court of Justice lists the different sources of international law the Court can decide to apply. These are:

- *international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;*

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18 The Nottebohm Case (Liechtenstein v Guatemala), 1955 ICJ 4 (6 Avril 1955), Dissenting Opinion of Judge Read, 46.
20 Popovski, V. “Sovereignty as Duty to Protect Human Rights”, p.17.
b. international custom, as evidence of a general practice accepted as law;

c. the general principles of law recognized by civilized nations;

d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.²¹

The above, however, does not provide for a complete list of sources of international law the ICJ may use, and in effect, has used in its jurisprudence. In addition to the sources listed, other sources exist, such as binding decisions of international organisations and unilateral acts.

1.3.2.1 Treaties

Treaties are the main source of international law. A treaty is ‘an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation’.²² The body of international law governing the formation of and compliance with treaties is contained mainly in the Vienna Convention on the Law of Treaties Between States and International Organizations or Between International Organizations, which was drafted by the International Law Commission. The Law of Treaties sets out the basics rules regarding the capacity to conclude treaties, how treaties should be interpreted, the resolution of disputes pursuant to treaties and other basic principles including the fundamental rule of pacta sunt servanda. According to this adage, agreements rightfully concluded must be honoured. The only limit to pacta sunt servanda are the peremptory norms of general international law, called jus cogens, a fundamental principle of international law accepted by the international community as a norm from which no derogation is permitted.

A state’s decision to sign a treaty emanates from its own free will, thus in doing so, it therein expresses its consent to be bound by its provisions and perform obligations pursuant to said treaty in good faith. However, a particularity of the law of treaties lies in the possibility for states to modify their legal obligations through the mechanism of reservations. According to

²¹ International Court of Justice, “Statute of the International Court of Justice”, Article 38(1).
the Vienna Convention, a reservation is ‘a unilateral statement, however phrased or named, made by a State, when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State.’ 23 When making a reservation, a state can limit the scope of application of some provisions under the treaty. Nevertheless, some limits to this mechanism exist and a reservation can only be made if compatible with the objects and purposes of the treaty. 24 Should the treaty in question create a body, this determination would be made by the latter. The reason for this exception to the binding nature of a treaty is purely realistic. The drafting process of a treaty implicates a multitude of actors and disagreements are common; however, to be bound by a treaty, a state needs to express its full consent. As a result of constraints within their domestic law, states often accept obligation in terms of a treaty only insofar as their municipal law allows them to do so. International law thus allows for such reservations in order to enhance the total numbers of signatories and to broaden the geographical scope of application of a treaty. However, this reservation mechanism has provoked questions on whether efforts to promote respect for and observance of human rights have, to a certain extent, been frustrated by the widespread practice amongst individual states of signing and ratifying international instruments dealing with the protection of human rights while at the same time entering reservations excluding the applicability of specific provisions to their own situations. To this end, critics have argued that this practice considerably undermines the effectiveness and impact of a treaty.

In the field of human rights particularly, some treaties establish a derogation system to suspend their obligations under exceptional circumstances and for a limited period of time. Similar to reservations, this mechanism allows states to calibrate their overall level of international commitment. In authorising states to temporarily deviate from treaty rules if exigent situations arise, escape clauses, ceteris paribus, encourage more states to ratify a treaty than would do so without such clauses. However, escape provisions can also weaken international agreements by authorising deviant behaviour precisely when treaty compliance is needed most.

At the same time, it should be noted that treaties can also bind non-signatories. Treaties that have been signed by a large majority of states may be viewed of as having such importance as to be universal in effect, so that the minority of non-signatory states are bound. More often, the treaty is universalized by more indirect means. For example, the "objective effect" doctrine singles out certain treaties as being valid *erga omnes*. It never seems to be made clear exactly which quality produces this effect, nor which organ decides whether that quality is present; but the effect is clearly to presume the consent of states (Bodansky & Watson, 1992).  

1.3.2.2 Custom

Defined in the Statute of the ICJ as being ‘a general practice accepted as law’, customary international law is recognized as a source of international law and as such, produces binding obligations on states. While treaty law only applies to those that expressly manifested their consent through ratifying a document, customary international law is binding upon all states. The development of customary international law reflects the characteristics of the international community understood as a legal community. It has the advantage that all states may share in the formulation of new rules and that customary international law can be modified, changed or amended through this international community more easily than is possible for treaty law (Wolfrum, 2011).

There are two main components that cumulatively constitute customary international law. There must be a widespread practice amongst many and the most relevant states, and states must adhere to them not merely because they find it convenient, but because they believe that the rule is a binding legal norm. These are called *usus* and *opinion juris*.

- *Usus* (State practice): There must be a consistent behaviour of states manifested through their actions and statements. This is an objective criteria.
- *Opinion Juris* (Belief in the legal nature of the practice): States must believe that their actions have a legal basis by opposition to a policy. This is a subjective criteria.

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While there is no hierarchy between treaty law and customary international law, some norms, which can be the result of either of these sources, are recognized a higher status. Those are known as peremptory norms of general international law or *jus cogens*. The only international treaty to recognize it is the Vienna Convention on the Law of Treaties which defines it as ‘a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character’. The principle has not only been acknowledged in the VCLT, but the ICJ as well – the court implied its existence when it referred to obligations *erga omnes* in the 1970 *Barcelona Traction Case*. The ICJ spoke of “obligations of a State towards the international community as whole’ which were ‘the concern of all States’ and for whose protection all States could be held to have a ‘legal interest’ ([32]). Since 1970, the ICJ has also implicitly recognized the existence of jus cogens in several cases. It has stated that the question of whether a norm is part of the jus cogens relates to the legal character of the norm (*Legality of the Threat or Use of Nuclear Weapons* [Advisory Opinion] [258]; *Gabčíkovo-Nagymaros Project* (Hungary/Slovakia) [38–9]).

Two main issues arise from that notion of *jus cogens*. First, who exactly is authorised recognize a norm as being peremptory and how; and second, what legal consequences arise from recognising such status. On the former question, it took a while before the International Court of Justice recognized the peremptory nature of norms in international law and even to date only a few have been acknowledged as being *jus cogens* as it is the case for the prohibition of torture. The International Law Commission’s Draft Articles on the Law of the Treaties provides greater guidance in this respect. The commentary on Art. 50 mentions as examples a treaty contemplating the use of force contrary to the principles of the UN Charter, a treaty contemplating the performance of any other act criminal under international law, and a treaty contemplating or conniving at the commission of acts such as trade in slaves, piracy, or genocide, in the suppression of which every State is called upon to co-operate. These prohibitions have similarly been listed in the Draft Articles on State Responsibility (2001), in addition to prohibition against discrimination and apartheid. Once a norm is recognized as having such status, the question of the legal consequences from breaching said norm arises. To date, the only clear and agreed upon obligation for a state is to not conclude any treaty

against such norm.\textsuperscript{28} According to Art. 53 of the VCLT, a treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law.

1.3.2.3 Soft law

Lord McNair coined the term “soft law” to describe “instruments with extra-legal binding effect”. More generally, soft law is used in legal literature to describe principles, rules and standards governing international relations that are not considered to stem from one of the sources of international law enumerated in Art. 38(1) of the ICJ Statute. These extra- or paralegal norms are of particular importance in international relations especially as international law does not recognise a common superior legislature or central, compulsory jurisdiction, thus international actors often resort to using norms that underpin the legal principles and rules constituting the core of international order without being law themselves (Thurer, 2009)\textsuperscript{29}. There are two major categories of soft law: resolutions (i.e. recommendations or decisions) of international organisations and non-binding inter-state agreements.

However, the soft law phenomenon has faced certain fundamental challenges. For one, it seems to suggest that in international relations, no precise distinction can be drawn between norms of a legal and non-legal character. This questions the established dichotomy between law and non-law and could lead to the denial of the very existence of international law as a set of rules in international relations. Furthermore, soft law has been criticised for its non-binding character, which does not have as much force as treaties and customary international law does in obliging states to perform certain obligations. However, soft law has also been welcomed precisely because of its non-binding character. The UDHR, for instance, was drafted by the UN General Assembly as a recommendation, and its adoption would not have taken place if it had been in the form of a legally binding treaty given the multiple the objections and abstentions it faced.

\textsuperscript{28} UN, "Vienna Convention on the Law of Treaties", Article 53.
\textsuperscript{29} Thurer, D., "Soft Law", Max Planck Encyclopaedia of Public International Law, 2009.
1.3.2.4 General principles of law

Although often very general and abstract, the general principles of international law remain necessary to maintain and restore international peace and security, as well as to fill gaps present in the sources of international law when necessary. As for *jus cogens*, the general principles of law have long been, and are still, the object of doctrinal debates. Most scholars consider that such principles derivate from domestic legal systems and consist of shared principles at the national level. Most fundamentally, the principle of *jus cogens* recognises that the goal of preserving peace and protecting individuals presupposes the existence of some basic values.

1.3.2.5 Judicial decisions and teachings of international law

As a general matter, judicial decisions by the ICJ are not binding on states that are not party to the dispute (Art. 59 of the Statute of the International Court of Justice). However, they are particularly useful in interpreting treaty law and customary international law, establishing the evidence of a state practice and gaining insights on principles recognised by the court. While the decisions of the ICJ are only binding between the parties (and not to the entire community of states), the Court often refers to its own case law and it is common for international jurisdictions to refer to the decisions of others to support a particular case to ensure “consistency of jurisprudence” (*Legality of Use of Force (Serbia and Montenegro v Portugal)* (Preliminary Objections, Judgement) [2004] ICJ Rep 1160, 1208).

Teachings of the most highly qualified publicists of the various nations (Art. 38(1)(d) of the ICJ Statute): the work of prominent jurists is not *per se* a source of international law, and the Court may use the teachings of publicists only “as a subsidiary means for the determination of rules of law”. However, it does have an essential role in the development of the rules, though the influence of scholars is more conceptual than factual. It is common for international courts, arbitration tribunals and other bodies engaged in resolving disputes to cite scholars in their deliberation, especially at the International Court of Justice. This was acknowledged by Sir Huphrey Waldock, a Judge of the ICJ, who stated that “[t]he way in which individual judges quite often make use of them in their separate opinions indicates that they have played a part in the internal deliberations of the Court and in shaping opinion”
1.4. Discussion Points and Further Reading

1.4.1 Discussion points

- What are advantages and disadvantages of the UN Charter compared to national laws?
- Should the UN Charter overrule the State’s laws?
- What impact does the progress of science and communication have on human rights?
- What are the challenges of customary international law?
- What role as a source of International law play judicial decisions and teachings?
- Is there any practical way to achieve a compromise between human rights and state sovereignty?

1.4.2 Further reading


CHAPTER 2: THE UNITED NATIONS SYSTEM OF PROTECTION OF HUMAN RIGHTS

2.1 Core international Human Rights instruments
2.1.1 The International Bill of Human Rights

During the drafting of the UN Charter at the San Francisco conference in 1945, the idea of including a "Declaration on the Essential Rights of Man" to the Charter was put aside, mostly due to the lack of time to examine the proposition with deep consideration. In early 1946, the newly formed Economic and Social Council (ECOSOC) established the Commission on Human Rights (UNCHR) to fulfil its mandate of promotion of human rights as required by the Article 68 of the UN Charter. The commission established a drafting committee for an International Bill of Rights composed of China, France, Lebanon, the United States, Chile, Australia, the Soviet Union, and the United-Kingdom. The group of representatives first decided to prepare two distinct documents, one declaration and one convention, the former setting forth general principles or standards of human rights and the later defining specific rights and their limits as members of the Commission could not agree on the legal status to be given to the instrument. However, during its third session the Commission on Human Rights lacked time to review the covenant and the question of the implementation of the provisions.
The Declaration was adopted at the General Assembly by its resolution 217 A (III) of 10 December 1948, being the first of the planned instruments to be adopted.\textsuperscript{30}

The Commission on Human Rights started its work on the covenant shortly after the adoption of the UDHR (Universal Declaration of Human Rights). In 1948 it reviewed the covenant drafted by the Committee and following a Resolution of the AG according to which "the enjoyment of civic and political freedoms and of economic, social and cultural rights are interconnected and interdependent" it added 14 Articles on ECOSOC Rights. However, the context of the Cold War pushed the States to argue for two separate covenants, one on civil and political rights, important to western countries to emphasize their commitment to liberal democracy, and one on economic, social and cultural rights to which the Soviet bloc gave priority. By 1954 the two covenants were drafted but the UNGA (United Nations General Assembly) recommended a discussion article by article which started in 1955. It was only in 1966 that the work was completed, and the two covenants were adopted through the GA resolution 2200 A (XXI) of 16 December 1966. In addition, the first protocol to the ICCPR (International Covenant on Civil and Political Rights) was adopted by the same Resolution, creating a right to individual petitions for individuals claiming to be victims of a violation of their rights enshrined in the ICCPR. Viljoen argues that with the adoption of two distinct instruments the initial idea of transforming the Universal Declaration into a single binding instrument was not accomplished, mainly due to a lack of agreement about the justiciability of socio-economic rights. As a result, individual complaints could be lodged, alleging violations by certain States of ICCPR, but not so with ICESCR (International Covenant on Economic, Social and Cultural Rights).\textsuperscript{31}

\textbf{2.1.1.1 Universal Declaration of Human Rights}

The Universal Declaration of Human Rights is not a treaty and, thus, states are not legally bound by its provisions. However, this document is highly symbolic as the first universal instrument on human rights. In addition, many scholars believe that it at least partially became customary international law. "\textit{Although the affirmations of the Declaration are not binding}

\textsuperscript{30} Council Secretariat, "The commission on human rights", p. 252-257.

qua international convention [...] they can bind States on the basis of custom [...] whether because they constituted a codification of customary law [...] or because they have acquired the force of custom through a general practice accepted as law”. 32

The Preamble of the UDHR clearly established that the document was mainly a product of the atrocities of the Second World War. Indeed, the second paragraph refers to “barbarous acts which have outraged the conscience of mankind”. 33 The text first recognizes civil and political rights (Articles 1 to 21) before focusing on economic, social and cultural rights (Articles 22 to 29). It is the most translated human rights document with translations in over 370 languages and dialects.

33 UNGA, "Universal Declaration of Human Rights”, Preamble.
30 Articles of the UDHR:

Article 1 Everyone is born equal
Article 2 Freedom from discrimination
Article 3 Right to life, liberty, personal security
Article 4 Freedom from slavery
Article 5 Freedom from torture and degrading treatment
Article 6 Right to recognition as a person before the law
Article 7 Right to equality before the law
Article 8 Right to remedy by competent tribunal
Article 9 Freedom from arbitrary arrest, detention and exile
Article 10 Right to a fair public hearing
Article 11 Right to be considered innocent until proven guilty
Article 12 Freedom from interference with privacy, or reputation
Article 13 Right to free movement
Article 14 Right to asylum
Article 15 Right to a nationality and the freedom to change it
Article 16 Right to marriage and family
Article 17 Right to own property
Article 18 Freedom of belief and religion
Article 19 Freedom of expression and information
Article 20 Right of peaceful assembly and association
Article 21 Right to participate in government and in free elections
Article 22 Right to social security
Article 23 Right to work and to join trade unions
Article 24 Right to rest and leisure
Article 25 Right to adequate living standards, including healthcare, food, housing.
Article 26 Right to education
Article 27 Right to participate in the cultural life of a community
Article 28 Right to a world where human rights are protected
Article 29 Community duties essential to free and full development
Article 30 Duty not to use rights to interfere with others
2.1.1.2 International Covenant on Civil and Political Rights and its two additional protocols

2.1.1.2.1 Rights guaranteed in the Covenant

2.1.1.2.1.1 Right to self-determination

The first Article of the ICCPR guarantees the right to self-determination of people. Far from being the first treaty mentioning this right in an international document, the Articles 1 (2) and 55 of the Charter of the United Nations recognize the self-determination of people as one of the United Nations’ purposes without giving any definition. The Declaration on Friendly Relations defines it as the right for all peoples to "freely to determine, without external interference, their political status and to pursue their economic, social and cultural development, and every State has the duty to respect this right in accordance with the provisions of the Charter". Article 1 (1) common to both the ICCPR and the ICESCR states that “[a]ll peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development”. In practice, this means that people have the right to choose the form of government under which they wish to live. This right was highly symbolic in the context of decolonisation in which the covenants were adopted and is still relevant today, for instance considering the annexation of Crimea by the Federation of Russia in 2014.

The principle of self-determination can be divided into two categories:

- **External self-determination**: As summarized by Senese, it is the “recognition that each people has the right to constitute itself a nation-state or to integrate into, or federate with, an existing state. According to certain interpretations, it is a question of the right of peoples to self-determination in the context of a stage preceding state-formation.” External self-determination in practice is mainly relevant to situation of decolonisation.

- **Internal self-determination**: It is the right of people to "freely determine their political status". Contrary to external self-determination, this aspect concerns

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34 UN Charter, Article 1(2) and 55.
35 UNGA, “Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in Accordance with the Charter of the United nations”.
36 ICCPR, Article 1.
situations in which the state is already formed. For Senese, “the right to internal self-determination means only that other states should not, through appeals or pressure, seek to prevent a people from freely selecting its own political, economic, and social system.”

2.1.1.2.1.2 Right to life

The right to life is protected by Article 6 of the ICCPR and as stated by the Human Rights Committee its “effective protection is the prerequisite for the enjoyment of all other human rights and whose content can be informed by other human rights”. While one may think that the interpretation of the scope of such right should not be too problematic, several issues arise. Topics such as the death penalty, abortion and euthanasia are directly related to the culture and moral values of a society, which renders it nearly impossible for the international community to agree upon a common position. Regarding the death penalty, while the Covenant itself does not prohibit it, it does limit the situations in which capital punishment can be imposed: for the most serious crimes committed by a person over the age of eighteen. In addition, Article 6 requires that “anyone sentenced to death shall have the right to seek pardon or commutation of the sentence.” While regional organizations such as the Council of Europe made the prohibition of death penalty a condition for accession, the low ratification of the Second Optional Protocol to the International Covenant on Civil and Political Rights adopted in 1989 and aiming at the abolition of the death penalty shows the lack of consensus on the topic. Indeed, while 172 countries are now parties to the ICCPR, only 86 have ratified the Second additional protocol.

2.1.1.2.1.3 Rights related to criminal proceedings

Several rights in the Covenant are related to the right to a fair arrest, trial and detention. Those are legal guarantees in criminal proceedings that protect individuals from the power of the state. These rights can be divided into three categories:

- Rights upon arrest: Article 9 of the ICCPR prohibits arbitrary arrest, everyone has a right to know the reason of his/her arrest. The deprivation of liberty must be done according to established legal procedures, and each individual arrested has a

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38 Ibid.
39 UN Human Rights Committee (HRC), “CCPR General comment No. 36”, para. 2.
40 ICCPR, Article 6(4).
right to access a court. In case of an unlawful arrest, the person has a right to compensation.

- **Right to a fair trial:** Article 14 is the longest of the Covenant and guarantees the right to a fair trial. These provisions are of a particular importance and, as the Human Right Committee highlighted in its General Comment no. 32: “[d]eviating from fundamental principles of fair trial, including the presumption of innocence, is prohibited at all times.”[^41] The principle of equality before the courts “ensures that the parties to the proceedings in question are treated without any discrimination.”[^42] Judges must be competent and free from biases. The Covenant only allows for a restricted list of reasons under which the hearings might not be public. Indeed, the publicity of hearings is “an important safeguard for the interest of the individual and of society at large.”[^43] The accused should be able to understand the charges against them and everyone is entitled to an interpreter. In addition, to guarantee the principle of equal access and equality of arms, everyone is entitled to a lawyer of their own choice and to have adequate time to prepare their defence. This implies, for example, the lawyer-client privilege, under which the communications between a lawyer and their client are confidential. The general principle of non bis in idem prohibits to try or punish a person twice for the same facts.^[44] While the facts must constitute a criminal offense at the time of the commission or omission, the second paragraph of Article 15 allows for an exception to the principle of Nulla poena sine lege, and only if it amounts to the "general principles of law recognized by the community of nations".

- **Rights once imprisoned:** Detention needs to be justified and the imprisonment for contractual debts is strictly prohibited.^[45] Once deprived of their liberty, the imprisoned persons need to be treated with humanity and dignity, the penitentiary system must aim at "their reformation and social rehabilitation".[^46]

[^41]: HRC, “General comment no. 32”, para. 6.
[^42]: Ibid., para. 8.
[^43]: HRC, “General comment no. 32”, para. 28.
[^44]: ICCPR, Article 14(7).
[^45]: ICCPR, Article 11.
[^46]: ICCPR, Article 10.
2.1.1.2.1.4 Freedom of movement

Freedom of movement not only allows an individual to move freely within their country of residence but also includes the right to leave one’s country, including the country of nationality.

2.1.1.2.1.5 Freedom of thought, conscience and religion

Article 18 of the Covenant protects the freedom of thought, conscience and religion. The Human Rights Committee has qualified these provisions as being "far-reaching and profound".47 These three freedoms are protected equally and "it encompasses freedom of thought on all matters, personal conviction and the commitment to religion or belief, whether manifested individually or in community with others."48

2.1.1.2.1.6 Freedom of expression

Under Article 19, every Human being has a right “to seek, receive and impart information and ideas of all kinds,”49. While “Freedom of opinion and freedom of expression are indispensable conditions for the full development of the person” and “constitute the foundation stone for every free and democratic society”50, it can still be limited to protect the rights of others or to protect national security, public order, or public health or moral.

2.1.1.2.2 Limits to the rights

The first limitation of the rights guaranteed in the ICCPR is the respect of the rights of others. This is a consequence of the principle of equality. As every human being should have the same rights, one cannot use his/her rights to destroy the rights of another person.51 In addition, the covenant allows for additional restrictions in specific circumstances.

First, most part of the articles organize their own restrictions. As an example, while one may think that the right to life is of the most absolute nature, Article 6 does not prohibit the death penalty. In addition, national security or public safety, public order, the protection of public

47 HRC, “General Comment No. 22”, para.1.
48 Ibid.
49 ICCPR, Article 19(2).
50 HRC, “General comment no. 34”, para. 2.
51 ICCPR, Article 5.
health or morals can justify limitation of freedom of expression, of movement, thought, conscience and religion as well as of freedom of assembly and association. However, even though the terms were also used in the UDHR, no definition is given in the Covenant and the interpretation brought long debates between scholars and practitioners regarding the scope of possible limitations. The term “public order”, for example, does not have the exact same meaning in common law countries and civil law countries. The Siracusa Principles, adopted following an international conference composed of human rights experts in 1984, defines the limitations and derogations to the ICCPR and provides for guidelines regarding the scope of applications of such limitations. Consequendy, limitations made by acts of the government must be authorized by law, necessary to ensure human rights and must be done for a specific reason.

In addition, Article 4 provides that states are authorized to derogate from their obligations under the Covenant in times of emergency. However, these derogations are limited. First, some rights cannot be restricted even in time of emergency such as freedom from torture and slavery, the right to religion, non-discrimination, and the right to be recognized as a person before the law. Moreover, ”[n]ot every disturbance or catastrophe qualifies as a public emergency which threatens the life of the nation,” and the state must inform the Secretary-General of the provisions concerned and the reason it needed to derogate from it. Once the reason ceases, the derogations have to stop, and the rights need to be fully implemented again.

53 HRC, “CCPR General Comment No. 29”, para. 3.
ICCPR

Article 1 - Self-determination

Article 2 – Prohibition of discrimination

Article 3 - Ensure equal enjoyment of treaty rights between men and women.

Article 4 - Derogation of rights to be limited to specific circumstances

Article 5 - Covenant may not be interpreted in a way that destroys rights ensured in the covenant.

Article 6 - Right to life, which shall be protected in law.

Article 7 - Right to be free from inhuman or degrading treatment or punishment.

Article 8 - Freedom from slavery and servitude.

Article 9 - Right to liberty and freedom from arbitrary arrest or detention.

Article 10 - People deprived of their liberty shall be treated with humanity.

Article 11 - Freedom from being imprisoned over a debt.

Article 12 - Right to liberty and freedom of movement

Article 13 – Prohibition of arbitrary expulsion of aliens

Article 14 - Right to equality before the law; the right to be presumed innocent until proven guilty and to have a fair and public hearing.

Article 15 - Nulla poena sine lege

Article 16 - Right to be recognised as a person before the law.

Article 17 - Right privacy and its protection by the law.

Article 18 - Freedom of thought, conscience and religion.

Article 19 - Freedom of opinion and expression.

Article 20 - Prohibition on propaganda advocating war or national, racial or religious hatred.

Article 21 - The right to peaceful assembly.

Article 22 - The right to freedom of association and to join a trade union.

Article 23 - The right to marry and found a family and equal rights between men and women within the marriage at its dissolution.

Article 24 – Rights of the Child

Article 25 - The right to participate in public affairs, to vote and to be elected and access to public service.

Article 26 - Everyone is equal before the law and has a right to legal protection “of the law” without discrimination.

Article 27 - The right, for members of religious, ethnic or linguistic minorities, to enjoy their culture, practice their religion and use their language.
2.1.1.3 International Covenant on Social, Economic and Cultural Rights

While adopted at the same time as the ICCPR, the International Covenant on Social, Economic and Cultural Rights, was at first ratified by fewer countries than its counterpart. Africa is a good illustration of that phenomenon. Only seven African States had ratified the covenant in 1976 and it was not until the 1990s that 90% of the continent was bound by its provisions.\(^54\) Many western scholars doubted the possibility to effectively implement such rights. Indeed, it was said that while civil and political rights only necessitate an absence of interference by the State, economic, social and cultural rights require positive action as well as substantial human and financial resources. However, it is now widely accepted that all human rights are interrelated. As an example, it is difficult to imagine a right to life without a right to health, or how an individual would be able to freely participate in political life if the right to education is not implemented. Moreover, civil and political rights also require positive actions from the state and the cost of their implementation does not appear to be necessarily less than the one of economic, social and cultural rights. Under the ICCPR, states have the obligation to ensure the effective implementation of the rights, the ICESCR adds a provision regarding the “available resources” and the aim is “to achieving progressively the full realization of the rights”\(^55\). However, some of the provisions need to be implemented immediately. The first step toward the realization of the rights “must be taken within a reasonably short time after the Covenant’s entry into force for the states concerned.”\(^56\) In addition, some rights do not require much financial resources to be implemented, such as the right to form and join trade unions and thus, states have to take immediate measures for the fulfilment of these provisions. Moreover, the UN Committee on Economic, Social and cultural Rights stated that “[i]n order for a State party to be able to attribute its failure to meet at least its minimum core obligations to a lack of available resources it must demonstrate that every effort has been made to use all resources that are at its disposition in an effort to satisfy, as a matter of priority, those minimum obligations.”\(^57\)


\(^{55}\) ICESCR, Article 2(1).

\(^{56}\) CESCR, “General Comment No. 3”, para. 2.

\(^{57}\) CESCR, “General Comment No. 3”, para. 10.
**ICESCR**

**Article 1** - Right to self-determination

**Article 2** - Progressive realization and non-discrimination

**Article 3** - Equal rights of men and women

**Article 4 & 5** - Limitations to the rights

**Article 6** - Right to work

**Article 7** - Right to good work conditions

**Article 8** - Right to trade unions

**Article 9** - Right to social security

**Article 10** - Family protection, especially for mothers and children

**Article 11** - Livelihood rights, including food, clothing and housing

**Article 12** - Right to physical and mental health

**Article 13** - Right to education

**Article 14** - Right to compulsory and free primary education

**Article 15** - Right to culture

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**2.1.1.3.1 Economic rights**

Economic rights are guaranteed in Articles 6 to 9 of the covenants. They cover the right to work, which allows an individual to ‘gain his living by work which he freely chooses or accepts’ but also the conditions of the work that have to protect the individual from forced labor and allow for decent conditions at the work place. In addition, “*the right to social security is of central importance in guaranteeing human dignity for all persons when they are faced with circumstances that deprive them of their capacity to fully realize their Covenant*”

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58 ICESCR, Article 6.
rights”⁵⁹, including in case of unemployment. The right to form and join trade unions, guaranteed in the Article 8, allows the individuals to organize between them “to introduce, maintain and defend just and favourable conditions of work.”⁶⁰

In addition to the economic rights guaranteed in the ICESCR, the International Labour Organization (ILO) set up standards to promote the realization of these rights and numerous conventions have been adopted under its auspices on specific issues related to the conditions of work.

### 2.1.1.3.2 Social rights

Social rights are mainly related to housing, food, health, water and education. Several organizations work toward the realization of these rights. As an example, UNESCO (United Nations Educational, Scientific and Cultural Organization) and UNICEF (United Nations International Children’s Emergency Fund) both work in areas related to the right to education and the World Health Organization’s (WHO) mandate is intertwined with the right to health.

While Article 11 explicitly refers to food, clothing and housing as part of the livelihood rights, it does not constitute an explicit list, and the right to water is not mentioned. The Committee on Economic, Social and Cultural Rights (CESCR), in its general comment no.15, clarified by stating “[t]he use of the word “including” indicates that this catalogue of rights was not intended to be exhaustive. The right to water clearly falls within the category of guarantees essential for securing an adequate standard of living, particularly since it is one of the most fundamental conditions for survival.”⁶¹

In its general comments, the CESCR established several factors to determine whether or not a livelihood right is fulfilled or not. Regarding the right to adequate housing, “availability”, “affordability”, “accessibility” and “cultural adequacy”⁶² were among these factors. The Committee also cited “availability”, “sustainability” and “accessibility” and “adequate” as part of the requirement for the realization of the right to food.⁶³ Finally, it considered that the

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⁵⁹ CESCR, “General Comment No. 19”, para. 1.
⁶⁰ CESCR, “General Comment No. 23”, para.1.
⁶¹ CESCR, “General Comment No. 15”, para. 3.
⁶² CESCR, “General Comment No. 4”, para. 8.
⁶³ CESCR, “General Comment No. 12”, para. 7.
“availability”, the “acceptability”, the “accessibility” and the “adaptability” of education were indicators of the fulfillment of the right to education.64

2.1.1.3.3 Cultural rights

As the CESCR stated, “[t]he full promotion of and respect for cultural rights is essential for the maintenance of human dignity and positive social interaction between individuals and communities in a diverse and multicultural world.”65 Cultural rights can be defined as aiming at the free access to the culture of one’s choice and to ensure it is done so in every aspects of that culture in respect with the principles of equality, human dignity, and non-discrimination. Cultural rights are interrelated with various other human rights such as the right to education and the right to self-determination. These rights are related to the notion of culture, which “is a broad, inclusive concept encompassing all manifestations of human existence.”66 Culture is here interpreted as encompassing also “the benefits of scientific progress and its applications”67. This broad interpretation allows the Committee to consider it as “a living process, historical, dynamic and evolving, with a past, a present and a future.”68 To be implemented, the state must abstain to interfere “with the exercise of cultural practices and with access to cultural goods and services’ and must ensure the preconditions for participation, facilitation and promotion of cultural life, and access to and preservation of cultural goods.”69 Among these cultural rights, the right to take part in cultural life “entails at least the obligation to create and promote an environment within which a person individually, or in association with others, or within a community or group, can participate in the culture of their choice”70. The Committee is of the opinion that states “should go beyond the material aspects of culture” and adopt “proactive measures”.71 The relation to the right to education is particularly relevant in that aspect. The access of people to a proper education is a prerequisite for the conservation and enjoyment of “language, knowledge and traditions”72.

64 CESCR, “General Comment No. 13”, para. 6.
65 CESCR, “General Comment no. 21”, para. 1.
66 CESCR, “General Comment no. 21”, para. 11.
67 ICESR, Article 15.1(b).
68 CESCR, “General Comment no. 21”, para. 11.
69 CESCR, “General Comment no. 21”, para. 6.
70 CESCR, “General Comment no. 21”, para. 55.
71 CESCR, “General Comment no. 21”, para. 70.
72 Ibid.
2.1.2 Thematic instruments

Besides the International Bill of Human rights, a whole treaty-based system focusing on particular topics of Human rights has been adopted under the auspices of the UN. In addition to the two International Covenants adopted in 1966, there are seven core Human rights instruments that have created their own treaty bodies to monitor their implementations: the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), the Convention on the Rights of the Child (CRC), the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICRMW), the International Convention for the Protection of All Persons from Enforced Disappearance (CED) and the Convention on the Rights of Persons with Disabilities (CRPD). The following exemplifies the instruments based on the first four: ICERD, CEDAW, CRC and CAT.

2.1.2.1 The International Convention on the Elimination of All Forms of Racial Discrimination (ICERD)

The first international treaty on human rights to be adopted, even before the two covenants of 1966, is the International Convention for the Elimination of All form of Racial Discrimination adopted in 1965. Its adoption was mainly a reaction to colonialism and policies of apartheid and segregation. In its preamble, the state parties are said to be “[a]larmed by manifestations of racial discrimination still in evidence in some areas of the world and by governmental policies based on racial superiority or hatred, such as policies of apartheid, segregation or separation”73. It defines racial discrimination as:

"any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.”74

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73 ICERD, Preamble.
74 ICERD, Article 1.
Most of the UN’s member States are now parties to ICERD with 169 having ratified the convention out of the 193 States members of the UN. Nevertheless, the Convention still makes headlines, notably recently with the protests that erupted in Malaysia in 2018. While the country was due to sign various human rights conventions in early 2019, massive protests in December 2018 gathering thousands of people around the country, forced the government to change its plan and back off. The demonstrators were fearing, among other things, that the implementation of the Convention would undermine the privileges of the Malay-Muslim majority. Indeed, Article 153 of the Constitution of Malaysia protects the “special position of the Malays and natives of any of the States of Sabah and Sarawak”76, also known as ‘Bumiputeras’.

Article 8 of the Convention creates a treaty body, the Committee on the Elimination of Racial Discrimination. The mandate and composition of that institution are defined in Articles 8 to 15. As many treaty bodies, the Committee reviews biannual reports from State parties on the implementation of the Convention. One of the particularities of the ICERD is the procedure regarding interstate complaints. If a State party is of the opinion that another is not fulfilling its obligations under the Convention, it can refer the matter to the Committee. The latter has to collect the necessary information, and then has to establish an ad hoc Conciliation Commission which will publish a report with recommendations for the disputing States. Under Article 14 of the Convention, the Committee can also hear petition from individuals if the State party made the relevant declaration. However, less than 60 States have done so as of early 2019.77 One of the main obstacles to the work of the Committee has been financial. Until the mid-90s for example, while the committee was supposed to hold two sessions a year, the Committee often met only once.78 Nevertheless, more recently, the committee has resumed a better rhythm of activity.

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76 Malaysia, Federal Constitution (31 August 1957), Article 1.
2.1.2.2 The Convention for the Elimination of All Forms of Discrimination Against Women (CEDAW)

The first explicit international call for a convention for the Human rights of women materialized at the First World Conference on Women in Mexico City in 1975. While the principle of non-discrimination on the basis of sex was already recognized in the UDHR and then in the two covenants in 1966, no properly binding instrument was addressing women’s rights issues in the international framework at the time even if a Declaration on the Elimination of Discrimination against Women was adopted by the General Assembly on 7 November 1967.

One of the main features of this convention lies in the “temporary special measures” of Article 4 to attain “de facto equality between men and women.”79 Thus, the Convention “goes beyond traditional liberal conceptions of direct non-discrimination”80. Despite an apparently strong commitment to achieve gender equality, numerous states were in practice reluctant to be legally bound by strong provisions which resulted in some provisions having weak language. Indeed, in Accordance with the CEDAW adopted in 1979, the “States shall take appropriate measures” for the realization of the goal of the conventions without further explanation of what “appropriate measures” consist of. Nevertheless, it allows for policies of positive discrimination such as gender quotas in electoral processes or in education.

For Charlesworth and Chinkin, using a different language in women’s human rights than for other main human rights instruments can be seen as evidence of “the general consensus at the state level that oppression on the basis of race is considerably more serious than oppression on the basis of gender”81. Similarly, while gender-based violence is one of the core issues affecting the status of women, the word “violence” does not appear at any time in the final text of the convention. To date, the only international instrument directly addressing this issue of Gender-Based Violence (GBV) is the Declaration on the Elimination of Violence against Women adopted in 1993.82 Yet, as a Declaration it does not constitute a binding document and only constitutes soft-law. While CEDAW projected feminist claims in international law a

79 CEDAW, Article 4.
82 UNGA, “Declaration on the Elimination of Violence against Women”.

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large number of human rights’ violations faced by women are still not explicitly condemned by a binding international instrument. For Nussbaum, CEDAW is “already a form of improvement in itself”\(^{83}\). Yet, other feminist scholars consider that the creation of a separate body created a "women’s ghetto"\(^{84}\).

These criticisms pushed the international community to adopt a policy of mainstreaming women’s issues. It did so notably at the Fourth World Conference on Women in Beijing in 1995 and the Beijing Declaration and Platform for Action. Mainstreaming implies taking care of women's rights through 'normal' institutions rather than letting marginalized and specialised institutions deal with it.\(^{85}\) Following the definition of the Economic and Social Council (ECOSOC), “it is a strategy for making women's as well as men's concerns and experiences an integral dimension of the design, implementation, monitoring and evaluation of policies and programmes in all political, economic and societal spheres so that women and men benefit equally and inequality is not perpetuated. The ultimate goal is to achieve gender equality”\(^{86}\). All UN’s institutions now have to implement it. Even the Security Council, one of the most political entities of the UN system, has incorporated a gender perspective into peacekeeping missions, as can be seen in its Resolution 1325 in 2000.\(^{87}\) Instead of being taken as an additional tool, this policy “served to justify the reduction of resources for specialized women’s units within U.N. agencies”\(^{88}\).

Originally, the Committee could only monitor the implementation through the mechanism of States’ reports and instruments and it was not before the optional protocol in 2000 that these gaps had been corrected by introducing a complaint procedure\(^{89}\) and an inquiry procedure\(^{90}\). However, a quick comparison between the number of ratifications for the Convention and for the Optional Protocol suffices to understand the limit of the Committee’s jurisdiction. Indeed,

\(^{83}\) Nussbaum, M., “Women’s Progress and Women’s Human Rights”, p. 597-598.
\(^{84}\) Charlesworth, H. and Chinkin, C., The boundaries of international law: A Feminist Analysis, p. 219.
\(^{87}\) United Nations Security Council (UNSC), “Landmark resolution on Women, Peace and Stability”.
\(^{90}\) Ibid, Article 8.
there is 189 States parties to the Convention\textsuperscript{91} but only 111 ratified the Optional Protocol\textsuperscript{92}, although this number has been increasing in recent years.

2.1.2.3 The Convention on the Rights of the Child (CRC)

2.1.2.3.1 The Convention

In 1959, the UN adopted the Declaration on the Rights of the Child. It was not until 1978 that a draft text for a binding instrument was proposed, and it then took ten years of negotiations for the working group to revise the draft and agree on a final text. On November 20, 1989, the Convention on the Rights of the Child was adopted. It only entered into force in 1990 when a total of 20 States signed the convention. It is now the most widely ratified human rights treaty.

Three additional protocols complete the convention. The two adopted in 2000 concern the sale of children, child prostitution and child pornography (OPSC)\textsuperscript{93} and the involvement of children in armed-conflict (OPAC)\textsuperscript{94}. In 2011 a third one created a mechanism of individual petition to the Committee on the Rights of the Child. The United Nations Children’s Fund’s (UNICEF) fundamental mission is to protect the rights of every child. The organization plays an important role in advocating to protect children’s rights notably at the domestic level through its field offices. Moreover, it is the only organization to be cited in the Convention to provide expert assistance and advice.\textsuperscript{95}

The Convention sets four core principles: non-discrimination; devotion to the best interests of the child; the right to life, survival and development; and respect for the views of the child.

- Devotion to the best interests of the child: While prior to its adoption, children were considered somehow as the property of their legal guardians or as

\textsuperscript{91} United Nations, ”Status of Treaties: Convention on the Elimination of All Forms of Discrimination against Women”.
\textsuperscript{92} United Nations, ”Status of Treaties: Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women”.
\textsuperscript{93} UNGA, “Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflicts”.
\textsuperscript{95} CRC, Article 45.
objects of charity, the Convention operated a shift in this conception by allowing children to be viewed as human beings benefiting of an additional set of rights. Article 3 of the Convention is particularly relevant in that respect. Indeed, it obliges to take into consideration the best interests of the child in every decision concerning him/her. For the Committee it is a threefold concept. It is not only a directly applicable substantive right to have one’s interests assessed and taken into consideration but also a “fundamental, interpretative legal principle” and “a rule of procedure”.⁹⁶ A legal principle as when several interpretation to a same disposition can be given, the one that serves the child’s best interest must be chosen and a rule of procedure as the decision making process, when concerning a child, “must include an evaluation of the possible impact (positive or negative) of the decision on the child or children concerned.”⁹⁷ Doing so requires procedural guarantees and States Parties have to “explain how the right has been respected in the decision, that is, what has been considered to be in the child’s best interests; what criteria it is based on; and how the child’s interests have been weighed against other considerations”⁹⁸.

- **Non-discrimination**: Article 2 of the Convention provides that its provisions have to be implemented “without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.”⁹⁹

- **The right to life**: When applied to children, the right to life does not only mean the right to stay alive but also obliges states to “ensure to the maximum extent possible the survival and development of the child.”¹⁰⁰ This wide conception of the right to life strongly depends of the fulfilment of the economic, social and cultural rights of the child.

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⁹⁷ Ibid.
⁹⁸ Ibid.
⁹⁹ CRC, Article 2.
¹⁰⁰ CRC, Article 6(2).
- **Respect for the views of the child**: This principle is directly related to the first one related to the best interests of the child. Indeed, in order to understand properly what is best for a child it is still better to listen to the child itself. Article 12 requires ensuring that children can express their views “freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.”

In addition to the rights guaranteed in the Convention, several additional protocols reinforce the legal guarantees on certain issues.

### 2.1.2.3.2 Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography

While most part of the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography (OPSC) concerns criminal proceeding and mutual assistance, Article 1 “prohibits the sale of children, child prostitution and child pornography” and Article 2 defines these terms as following:

- **Sale of Children**: “any act or transaction whereby a child is transferred by any person or group of persons to another for remuneration or any other consideration”.
- **Child Prostitution**: “the use of a child in sexual activities for remuneration or any other form of consideration”.
- **Child Pornography**: “any representation, by whatever means, of a child engaged in real or simulated explicit sexual activities or any representation of the sexual parts of a child for primarily sexual purposes.”

In practice, these crimes often have a transnational component which explains the necessity to promote cross-border cooperation and mutual assistance to properly implement the optional

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101 CRC, Article 12(1).
102 OPSC, Article 1.
103 OPSC, Article 2(a).
104 OPSC, Article 2(b).
105 OPSC, Article 2(c).
protocol. Many institutions work in area directly related to the provision of the OPSC, for example the ILO in its efforts to end child labor and forced labor.

2.1.2.3.3 Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflicts

Adopted by the General Assembly in the same Resolution as the OPSC, the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflicts (OPAC) aims to reinforce the legal protection of children from recruitment and use in armed conflicts. This protocol highlights the close ties between international human rights law and international humanitarian law as efforts to limit the effects of armed conflicts on children that were already materialized with the additional protocols to the Geneva Conventions. The issue of child soldiers is of particular concern. Indeed, while in a way these children commit war crimes and other atrocities, they cannot be held responsible for their actions as they have been forced to do so and require special protection. The point of the Convention is to criminalize the instrumentalization of children in armed-conflicts in order to consider children as victims rather than perpetrators. The International Committee of the Red Cross (ICRC) plays a fundamental role in the realization of this goal through its general mandate as the protector of International Humanitarian Law.

Regarding the binding obligations, the Additional Protocol prohibits the recruitment of children under the age of 18 whether it is done by states or non-state actors. The conscription of soldiers under 18 is equally prohibited and states must take measures to prevent and criminalize the recruitment and use of children under 18. Where prevention has failed, states must demobilize all child soldiers and offer them ‘all appropriate assistance for their physical and psychological recovery and their social reintegration.’ To facilitate the implementation states also have an obligation of cooperation "through technical cooperation and financial assistance".

106 ICRC, “Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I)” Article 77.
107 OPAC, Article 1.
108 OPAC, Article 4(1).
109 OPAC, Article 2.
110 OPAC, Article 4(2).
111 OPAC, Article 6(3).
112 OPAC, Article 7.
2.1.2.4 The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT)

While the prohibition of torture was recognized in the UDHR and in the ICCPR and a Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment was adopted by the GA in 1975, it was not until 1984 that a complete and comprehensive binding instrument was adopted to support the global fight against torture and ill-treatment. The main debates during the drafting process were concerning a more precise definition of torture and states eventually agreeing on the principle of universal jurisdiction as per Article 5, paragraph 2. It is now recognized that the prohibition of torture has the status of a peremptory norm of international law or *jus cogens* which allows for absolutely no derogations whatsoever.

As mentioned above, while the convention mainly relates to proceedings and jurisdiction, the definition of torture was highly problematic during the negotiations and the final version remains vague. The first article of the Convention defines torture as “any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him, or a third person, information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in, or incidental to, lawful sanctions.” The wording “inherent in, or incidental to” is relatively broad and allows for a wide margin of appreciation to the States. Moreover, many States still have to recognize the competence of the Committee to receive individual petitions by making a declaration under Article 22 of the Convention. Once again, the ICRC’s actions are interrelated with the promotion and monitoring of the prohibition of torture as it plays an important role in the documentation of torture. Because of its core principles of impartiality and neutrality, it has access to many prisons and thus, can collect evidences directly on the field. Article 3 prohibits

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113 CAT.
115 CAT, Article 1.
the refoulement of aliens “a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture”\textsuperscript{116} which directly relates to the mandate of the UN High Commissioner for Refugee (UNHCR) in the protection of refugees.

Once again, the creation of specialized institutions does not limit the necessity of inter-agencies coordination in monitoring Human rights. Nevertheless, the current widespread use of torture by most States is an open secret. As just one of many examples, statistics from the Basque Government draw up a list of 2625 cases of alleged torture by Spanish security forces between 1979 and 2013.\textsuperscript{117} These violations are often the result of anti-terrorism measures or criminal procedures.

\section*{2.2 The Human Rights Council (HRC)}

\subsection*{2.2.1 Quick History: From the Commission on Human Rights to the Human Rights Council}

The current Human Rights Council was established in 2006 by the General Assembly to replace the former Commission on Human Rights that was created in 1946 by the Economic and Social Council in 1946 under Article 68 of the UN Charter. The Commission’s main role, through its procedures and mechanisms, was to examine, monitor and publicly report on human rights. However, funding problems as well as institutional and political issues provoked a real dysfunction of the institution. The then Secretary-General of the UN Kofi Annan reacted in his report “In larger freedom” by alarming the international community to the fact that “States have sought membership of the Commission not to strengthen human rights but to protect themselves against criticism or to criticize others. As a result, a credibility deficit has developed, which casts a shadow on the reputation of the United Nations system as a whole.”\textsuperscript{118}

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\textsuperscript{116} CAT, Article 3.
\textsuperscript{117} Basque Government, Proyecto de investigación de la tortura en el País Vasco (1960-2013) – Memoria Resumen de la actividad realizada, 27 June 2016, para. 5.1, para. 5.1.2 and para. 5.2.
\textsuperscript{118} UNGA, “In larger freedom: towards development, security and human rights for all: Report of the Secretary-General”, para. 182.
\end{flushleft}
While the Commission did fulfill its mandate regarding the creation of an international bill of rights and of international declarations or conventions “on civil liberties, the status of women, freedom of information and similar matters”.\textsuperscript{119} with the successive resolutions of ECOSOC enlarging its mandate, the Commission rapidly found itself overloaded. Resolution 1325\textsuperscript{120} allowed the Commission to “built up a system of Special Procedures” which in practice consist with independent experts with a country mandate, ”to report on human rights violations in specific countries”, or with a thematic mandate, ”on the situation of specific rights or groups of victims”\textsuperscript{121}. To extend its activities to individual complaints, the Commission created a procedure known as Procedure 1503, due to the resolution on which it is based on\textsuperscript{122}. It gave the Commission the ability to deal with individual complaints and determine if they constitute “consistent pattern of gross and reliably attested violations of human rights”\textsuperscript{123}. The Council was created in 2006 to make up for the weakness of its ancestor.\textsuperscript{124} In the resolution of the General Assembly, the Council has received a somehow higher status than the Commission did which, “along with the greater frequency of its meetings as compared with the Commission, are key differences distinguishing it from its predecessor.”\textsuperscript{125} The main introduction was the procedure of Universal Periodic Review (UPR)\textsuperscript{126} as the ”complaint procedure”\textsuperscript{127} which is in fact similar to the former confidential communication system. In addition, it retains the special procedures of the Resolution 1325 which consist of human rights experts or a group of experts who report and give recommendations on some issues such as Special Rapporteurs and Independent Experts mandated by the Council.

2.2.2 Complaint procedure

In its resolution 60/251, the General Assembly provided the same ”mandates, mechanisms, functions and responsibilities” as those previously assumed by the Commission in order to

\textsuperscript{119} ECOSOC, “Resolution on the establishment of a Commission on Human Rights with a Sub-Commission on the Status of Women”.
\textsuperscript{120} ECOSOC, Resolution 1325 (XLI), UN Doc. E/4393 (1967).
\textsuperscript{122} ECOSOC,”Procedure for Dealing with Communications Relating to Violations of Human Rights and Fundamental Freedoms”.
\textsuperscript{123} ECOSOC, “Economic and Social Council Resolution”, para. 1.
\textsuperscript{124} UNGA, “Human Rights Council”.
\textsuperscript{125} Boyle, K., New Institutions for Human Rights Protection, p. 3.
\textsuperscript{126} UNGA, “Human Rights Council”, para. 5(e).
maintain a certain form of continuity. This encompasses the complaint procedure which was properly established on June 18 2007, when the Human Rights Council adopted its resolution 5/1. The new procedure inherited many of its predecessor’s main features as the ECOSOC Resolution 1503 “served as a working basis”. Controversially, the confidentiality of the procedure, which was already a recurrent criticism of the Commission, remains and thus, the individual or group who submitted the complaint will not be informed of the process. The council does not investigate individual complaint as such. However, communications can indicate “consistent patterns of gross and reliably attested violations of all human rights and all fundamental freedoms occurring in any part of the world and under any circumstances.” To examine the communications and to alert the Council on consistent patterns of gross and reliably attested violations of human rights and fundamental freedoms, two working groups have been established:

2.2.2.1 The Working Group on Communications

The Working Group on Communications is the one responsible for determining the admissibility of a communication based on criteria contained in paragraphs 85 to 88. The Chairperson of the Working group, assisted by the secretariat, has to screen out manifestly ill-founded or anonymous communications before sending the others to the concerned States, which will be given the opportunity to give its views on the allegations. It is then the responsibility of every member of the Working Group to assess the admissibility of the communications and to give recommendations. The Working group also has to determine whether a situation has “consistent pattern of gross and reliably attested violations of human rights and fundamental freedoms.” Its work will be contained in a file to be transmitted to the Working Group on Situations and all decisions in that document must be justified. The admissibility criteria listed under paragraph 87 are as follows:

- Absence of political motive
- Includes a factual description of the alleged violations

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131 Ibid., para. 85.
132 Ibid., para. 94.
133 Ibid., para. 95.
134 Ibid., para. 87(a).
- Non-abusive language. Nevertheless, a communication can still be admissible if the other criteria are met even though sections with the abusive language are not taken into consideration.136
- The person or group of persons filing the complaint must have ‘direct and reliable’ knowledge of the alleged violations and second-hand knowledge will any be admissible if completed by clear evidence.137
- Not exclusively based on reports disseminated by mass media138
- The case it refers to has not being ‘dealt with by a special procedure, a treaty body or other United Nations or similar regional complaints procedure in the field of human rights’139
- Exhaustion of domestic remedies140

The Working Group on Communications can take three kinds of decisions. It can choose to either dismiss a communication or on the contrary, transmit it to the Working Group on Situations. In addition, it can keep a communication under review until its next session and request further details from the concerned State.141

2.2.2.2 The Working Group on Situations:

The working Group on Situations uses the information provided by the Working Group on Communications to produce a report for the Human Rights Council "on consistent patterns of gross and reliably attested violations of human rights and fundamental freedoms and to make recommendations to the Council on the course of action to take, normally in the form of a draft resolution or decision with respect to the situations referred to it."142

However, the powers of the Council appear severely limited when it comes to the measures and remedies and only five possibilities are given:

135 Ibid., para. 87(b).
136 Ibid., para. 87(c).
137 Ibid., para. 8(d).
138 Ibid., para. 87(e).
139 Ibid., para. 87(f).
140 Ibid., para. 87(g).
141 Ibid., para. 95.
142 Ibid., para. 98.
- Dismiss the case, when the situation does not justify further consideration or action;\textsuperscript{143}
- Keep the situation under review and require the State to clarify the situation by providing more detailed information;\textsuperscript{144}
- Keep the situation under review while an independent expert monitors the situation and report it back to the Council;\textsuperscript{145}
- Dismiss the case under the confidential procedure to allow for a public debate;\textsuperscript{146}
- To recommend to OHCHR to provide technical cooperation, capacity-building assistance or advisory services to the State concerned.\textsuperscript{147}

\textbf{2.2.3 Universal Periodic Review}

The Universal Periodic Review (UPR) is one of the main innovations in the reform from the Commission to the Council. The first international mechanism to periodically examine the situation of all human rights in every UN member State aims at complementing rather than duplicating other human rights mechanisms.\textsuperscript{148} Under the UPR, the Council will regularly review a report prepared by the State together with information provided by the Office of the High Commissioner for Human Rights (OHCHR) and “credible and reliable information provided by other relevant stakeholders” which will then be summarized by the OHCHR before being submitted to the HRC.\textsuperscript{149}

The UPR working group is composed of the 47 member states of the Council.\textsuperscript{150} Each review is facilitated by three rapporteurs from the Council’s members states, this group is also known as \textit{Troika}. The Working Group allows for an “[i]nteractive dialogue between the country under review and the Council”\textsuperscript{151} and, as any UN member State can raise questions or make

\textsuperscript{143} Ibid., para. 109(a).
\textsuperscript{144} Ibid., para. 109(b).
\textsuperscript{145} Ibid., para. 109(c).
\textsuperscript{146} Ibid., para. 109(d).
\textsuperscript{147} Ibid., para. 109(e).
\textsuperscript{148} Ibid., para. 3(f).
\textsuperscript{149} Ibid., para. 15.
\textsuperscript{150} Ibid., para. 18(a).
\textsuperscript{151} Ibid., para. 21.
suggestions, the role of the Troika is notably to collate issues or questions to be transmitted to the State under review to facilitate its preparation and focus the interactive dialogue."\(^{152}\)

Non-Governmental Organization are involved in the process under the label of "other relevant stakeholders". Thus, they can submit information that they consider necessary to be invoked and can attend the review in the Working Group. The Troika has to draft a report following the review by the Working Group which will be adopted by the plenary Council once the State concerned has been offered "the opportunity to present replies to questions or issues that were not sufficiently addressed during the interactive dialogue."\(^{153}\) The outcome report mostly consists of an assessment of the situation of Human rights in the country, “including positive developments and the challenges faced by the country”\(^{154}\) together with questions, comments and recommendation and whether the State accepted or noted them. Before the adoption by the Council, States and civil society organizations are once again given the opportunity to influence the process by making general comments.\(^{155}\)

However, the UPR does not confer binding power on the recommendations made by the Council and thus, limited options exist in case the state concerned does not implement the conclusions of the outcome report. Indeed, it is provided that as one of the means to follow-up on the review, “the international community will assist in implementing the recommendations and conclusions regarding capacity-building and technical assistance, in consultation with, and with the consent of, the country concerned.”, but the vague vocabulary used undermines the potential binding effects of that provision. Moreover, in case cooperation with the State has failed “the Council will address, as appropriate, cases of persistent non-cooperation with the mechanism.”\(^{156}\) Yet, no means or procedure is established, leaving a wide margin of appreciation on a case-by-case basis.

While providing for an innovative universal mechanism, the Universal Periodic Review still lacks enforcement powers which undermines its impact. On the other hand, it is because of

\(^{152}\) Ibid., para. 21.
\(^{153}\) Ibid., para. 29.
\(^{154}\) Ibid., para. 27(a).
\(^{155}\) Ibid., para. 31.
\(^{156}\) Ibid., para. 38.
that very method regarding the implementation of recommendations that states are willing to participate.

2.2.4 Special procedures

The Human Rights Council’s special procedures are highly similar to the ones of the Commission. The mandate given to an expert or group of experts can be either thematic or country-specific. Mandate holders have a broad range of tools at their disposal going from undertaking country visit to engaging in advocacy. Special Procedures also often provide advice regarding technical cooperation and can send communication to States. The OHCHR is supporting the Procedures in their functioning. The reform engendered by the Secretary-General’s report in 2005 aims at ensuring the effectiveness of the Human rights system. In this view, it provided for a normative framework of the review, rationalization, and improvement of mandates.157 In the interest of transparency, the procedure and standards regarding the selection and appointment of mandate holders are equally clarified.158 To date, there are 44 Special Procedures with a thematic mandate159 and 11 with a country-specific mandate160.

While the Human Rights Council, due to structural barriers, was mainly producing soft-law and non-binding recommendations, it seems to have now adopted a more pro-active role. Indeed, the Council, mostly through its mandate of prompt response to human rights emergencies, established 28 Commissions of Inquiry, Fact-Finding Missions and other bodies since 2006. While the HRC is not the only entity to create such investigations - the Security Council, the Secretary-General and the High Commissioner for Human Rights do so too- it now has a broader mandate and power. This reflects a rising interest in transitional justice as a way to prevent mass atrocities and the necessity to collect and protect evidence for potential future proceedings.

157 Ibid., para. 54-64.
158 Ibid., para. 39-53.
159 OHCHR, “Special Procedures: Thematic Mandates”.
160 OHCHR, “Special Procedures: Country Mandates”.
2.3 The Office of the High Commissioner for Human Rights (OHCHR)

2.3.1 Short history of the creation of the High Commissioner

The idea of a representative for Human rights within the UN system goes back as far as 1947 with the proposition made by René Cassin. The French Professor wanted to create a right for individuals whose rights have been violated to petition the Human Rights Commission with the assistance of an Attorney-General for Human Rights. However, despite many propositions and drafts, new conventions on Human Rights created their own monitoring systems: The implementation of the two Covenants of 1966 was supervised by the Human Rights Committee and the Committee on Economic, Social and Cultural Rights. In addition, many other bodies of experts were created to monitor the instruments specific to certain rights, leading to a wide range of mechanisms established to deal with Human Rights violations.\(^\text{161}\)

However, in 1992 the Secretary-General admitted in his reports on the work of the Organization that “if standards and procedures exist for normal situations, the United Nations has not been able to act effectively to bring to an end massive human rights violations. Faced with the barbaric conduct which fills the news media today, the United Nations cannot stand idle or indifferent. The long-term credibility of our Organization as a whole will depend upon the success of our response to this challenge”\(^\text{162}\). At the World Conference on Human Rights in 1993, during which the Vienna Declaration and Programme of Action was adopted, the international community “called for better coordination, a system-wide approach to human rights”\(^\text{163}\) and included in the text of the Vienna Declaration a paragraph stating that “[t]he World Conference on Human Rights recommends to the General Assembly that when examining the report of the Conference at its forty-eighth session, it begin, as a matter of priority, consideration of the question of the establishment of a High Commissioner for Human Rights for the promotion and protection of all human rights.” \(^\text{164}\) The resolution creating the High Commissioner was finally adopted on 20 December 1993\(^\text{165}\) and “for the

\(^{164}\) UNGA, “Vienna Declaration and Programme of Action”, para. 18.
\(^{165}\) UNGA, "High Commissioner for the promotion and protection of all human rights".
first time, the UN now has a human rights official who can take up human rights concerns with governments without waiting for a mandate from a political body.”

2.3.2 Mandate

According to its website: “[t]he mandate of the Office of the High Commissioner for Human Rights (OHCHR) is to ensure universal enjoyment of all human rights, to remove obstacles to their effective implementation, and to enhance coordination and cooperation of human rights-related activities throughout the United Nations system.”

The mandate of the High Commissioner is defined in the fourth paragraph of the General Assembly Resolution 48/141 creating the position of High Commissioner. According to the General Assembly Resolution 48/141:

- To promote and protect the effective enjoyment by all of all rights;
- To assist the competent bodies of the UN system with the aim of improving the promotion;
- To promote and protect the realization of the right to development by intensifying its support when relevant in this matter;
- When requested, to assist States and regional human rights organization with advisory services as well as technical and financial assistance;
- To lead and coordinate programmes of education and public information on human rights;
- To address obstacles to the full realization of human rights and to prevent continuation of violations;
- To exchange with Governments for the realization of his/her mandate;
- To strengthen international cooperation in the field of human rights;
- To coordinate activities related to human rights in the UN system;
- To improve the efficiency and effectiveness of the UN human rights system;
- To supervise the Centre for Human Rights.

The High Commissioner holds a central position in the UN human rights system. She/he has the responsibility to coordinate the activities in the field of human rights between the various

167 OHCHR, “The role of the OHCHR”.
168 UNGA, “High Commissioner for the promotion and protection of all human rights”, para.4.
institutions and other stakeholders. Moreover, the High Commissioner plays an important role in assisting the numerous bodies of the UN.

A major budget crisis undermining the work of the OHCHR pushed the international community to formally agree at the World Summit in 2005 to strengthen the institution by doubling its regular budget over the following five years, by reinforcing the cooperation with other UN institutions and supporting "further mainstreaming of human rights".\textsuperscript{169} While the regular budget may not always be sufficient despite improvements, the year 2017 also saw the highest amount of voluntary contributions received by the office.\textsuperscript{170}

\textsuperscript{169} UNGA, “2005 World Summit Outcome”, para.124 and 126.
2.3.3 Structure and leadership

2.3.3.1 The High Commissioner

The High Commissioner is the highest individual in the hierarchy of the OHCHR. He or she supervises the overall functioning of this institution but, most importantly, plays a crucial role in advocating for institutional changes and additional funding. In practice, the position is rather political. In 2018, Michelle Bachelet, former President of Chile, took office at the head of the UN human rights machinery. Her predecessor, the Prince Zeid Ra’ad Al Hussein refused to seek a second mandate fearing to lessen the independence and integrity of [his] voice.\textsuperscript{171}

2.3.3.2 Substantive divisions

The action of the OHCHR is divided in three substantive divisions. Each corresponds to an area of work of the Office, which is supposed to enhance coordination and implementation of the OHCHR’s mandates.

2.3.3.2.1 Thematic Engagement, Special Procedures and Right to Development Division (TESPRDD)

This regroups the branches related to economic and social issues and well as on rule of law and non-discrimination. The branch related to the Human rights council special procedure branch is supporting the various special procedures while the treaty body branch is in charge of assisting in the work of the various quasi-judicial body established by treaties.

2.3.3.2.2 Human Rights Council and Treaty Mechanisms Division (CTMD)

This division aims at supporting the Human Rights Council including the UPR mechanism but also the various treaty bodies.

\textsuperscript{171} Baynes, C., “UN human rights chief quits after Trump Jerusalem decision, saying he will not ’bend a knee in supplication”.”
2.3.3.2.3 Field Operations and Technical Cooperation Division (FOTCD)

This division is responsible for the coordination and implementation of the office’s work in the field. It comprises regional branches, a section on mission support and rapid response as well as a National Institutions and Mechanisms section.

2.4 Treaty bodies

Frans Viljoen states that “[t]he treaty-based system developed even more rapidly than the Charter-based system.”172 and in theory, provides for many advantages. Human rights are monitored closer as each treaty body is only concerned with the provisions of the international instrument that created it. For governments, it provides clearer obligations through the interpretation of the provisions, and victims supposedly have access to remedies when an individual complaint system exists.

There are 9 core instruments completed by additional protocols that created treaty bodies to monitor their implementation as stated above in this chapter. Each requires regular reports by State parties on the concerned area which creates a complicated agenda for States and results in a delay in every procedure of the treaty bodies. The victims are rarely aware of the mechanisms available to them and the felt distance with the organization undermines their participation. The lack of funding and staff is also often emphasized to justify the poor in ensuring the effective protection and promotion of human rights.

Human rights treaty bodies are composed of independent experts whose competencies in human rights have been recognized. They are nominated and elected for four years and their mandate is renewable.173 States have to provide each of the nine bodies with regular reports on their implementation of the provisions entailed in the treaty concerned.174 These reports will then serve as a basis for the treaty-body’s concluding observations expressing the concerns and recommendations of the Committee. Treaty bodies also have the power of issuing general comments to interpret the convention and establish guidance for the

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173 As an example, CEDAW, Article 17(5).

174 As an example, CRC, Article 44.
implementation. One of the main success of the consideration of State’s report is the possibility for other stakeholders, including NGO and civil society organization, to submit what are known as “shadow reports”, and by doing so, to raise domestic issue to the international level. Moreover, when appearing on the international stage, governments are often keen to spin stories and embellish reality. Submission of information by various sources mitigate that effect and statements made in this context by states can be interpreted in a more informed manner. This requires enhanced cooperation between international NGOs, local civil society organization, state officials and court lawyers.

Three procedures allow for complaints of violations to a treaty body:

2.4.1 Inter-state complaints

The nine core international treaties on Human rights organize the procedure for a state to complain about the lack of implementation by another state, although several options have been chosen.

- The CAT\textsuperscript{175}, the Committee on Migrant Workers (CMW)\textsuperscript{176}, the Committee on Enforced Disappearances (CED)\textsuperscript{177}, the CESCR\textsuperscript{178} and the Committee on the Right of the Child (CRC)\textsuperscript{179} are all competent bodies to hear from a complaint from one State to another when the States have accepted that competence.

- Procedures of the CERD and the CCPR differ as the relevant texts provide for the creation of an Ad Hoc Conciliation Commission to resolve inter-States disputes. In the case of the CERD, once negotiations have failed, the Committee collects all necessary information and sets up a Commission, whose members are appointed with the consent of the state parties to the dispute, to find an ‘amicable

\textsuperscript{175} CAT, Article 21.
\textsuperscript{176} International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (ICRMW), Article 74.
\textsuperscript{177} International Convention for the Protection of All Persons from Enforced Disappearance (ICPPED), Article 32.
\textsuperscript{178} Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (OPICESCR), Article 10.
\textsuperscript{179} Optional Protocol to the Convention on the Rights of the Child on a communications procedure (OPCP), Article 12.
solution’. The Commission then prepare a report including its findings and recommendations.180

- It is also common for a treaty to involve the International Court of Justice when it comes to States disputes when negotiation and arbitration have failed. This is notably the case with the ICERD, CEDAW181, CAT182, ICMW183, and ICED184. These procedures can be added together to form several steps to the inter-states’ complaints procedure. The ICERD provides that disputes between States that were not resolve through the procedures of the Convention can be referred to the ICJ if the parties request so.185

2.4.2 Individual complaints or communications from individuals

When a state has ratified the relevant additional protocol or has made the necessary declaration, individuals can complain about violations of their rights directly to the treaty body. However, the CMW does not yet have this competence as not enough declarations under Article 77 have been made so far to meet the threshold of 10 States accepting the individual complaint procedure. States can accept the competence of the CEDAW, the CRPD, the CRC, the CCPR and the CESCR by ratifying the relevant additional protocol. To recognize the right to individual petitions to the CAT186, the CERD187, the CED188, States must make a proper declaration of acceptance under the relevant Article providing for such right. Several criteria have to be met for an individual communication to be admissible:

- The state concerned must be a party to the relevant convention and have expressly accepted the competence of the body to deal with individual complaints

180 ICERD, Articles 11-13.
181 CEDAW, Article 29.
182 CAT, Article 30.
183 ICMW, Article 92.
184 ICED, Article 32.
185 ICERD, Article 22.
186 CAT, Article 22.
187 ICERD, Article 14.
188 ICED, Article 31.
- The complainant must be the alleged victim of the violation of rights guaranteed in the relevant instrument and to which the States did not make any reservations.
- The complaint should include the name of the alleged victim and in situations where a person brings a complaint on the behalf of another, proof of the consent should be provided. In addition, a substantive description of the facts in often required.
- In cases where a long period of time passes before the submission, some instruments consider the complaint inadmissible. This is for example the case for ICERD which gives six months to an alleged victim to file a complaint after exhausting domestic remedies.\(^{189}\) Similarly, the Optional Protocol to the ICESCR provides for a year after the exhaustion of domestic remedies to submit a communication.\(^{190}\)
- Domestic remedies must be exhausted
- The matter has not been referred to another international or regional body

The individual files a complaint which is registered before being transmitted to the state concerned. The state is given the opportunity to clarify the situation and its position through comments on which the alleged victims will make observations.

Procedures vary from one treaty body to another, but a common framework renders their functioning similar. Most commonly, the Committee then decides about the case’s admissibility and merits. The decision of the Committee can include separate and dissident opinions from members if the Committee could not reach unanimity on the matter. When the Committee has decided whether or not the State has fulfilled its obligations, its conclusions and recommendation are transmitted to the parties. In the case of the CESCR, the State has six months to provide a written response.

Following the same example, in case a communication “does not reveal that the author has suffered a clear disadvantage, unless the Committee considers that the communication raises

\(^{189}\) ICERD, Article 14.
\(^{190}\) OP-ICESCR, Article 3(2).
a serious issue of general importance”, the CESCR can decide to decline the complaint.\textsuperscript{191} The Committee also has the competence to “invite the State Party to submit further information about any measures the State Party has taken in response to its views or recommendations”\textsuperscript{192} when it decides the case consists a violation of the State’s obligation.

One major flaw of the treaty-based system is the lack of binding force of the Committees’ decision which engenders weak compliance with the recommendations made by the treaty bodies.

### 2.4.3 Inquiries

Out of the nine core human rights treaty-bodies, six are competent to initiate inquiries when having “reliable information indicating grave or systematic violations”\textsuperscript{193}: the CAT\textsuperscript{194}, the CEDAW\textsuperscript{195}, the CRPD\textsuperscript{196}, the CED\textsuperscript{197}, the CRC\textsuperscript{198} and the CESCR\textsuperscript{199}. At the exception of the CED\textsuperscript{198}, States have to declare their acceptance of the competence to conduct inquiries to be subjected to such investigation.\textsuperscript{200} An inquiry procedure is based on the cooperation between the Committee and the State. As for individual complaints, the State concerned is invited to submit a response after the Committee released its findings and recommendations. In every case, the nature of an inquiry procedure is confidential.\textsuperscript{201}

While those inquiries have an important function, i.e. to collect and protect evidence of mass violations of human rights, it is once again the absence of enforcement powers that weakens the mechanism.

\textsuperscript{191} OP-ICESCR, Article 4.
\textsuperscript{192} OP-ICESCR, Article 9.
\textsuperscript{193} OP-ICESCR, Article 11.
\textsuperscript{194} CAT, Article 20.
\textsuperscript{195} OP-CEDAW, Article 8.
\textsuperscript{196} OP-CRPD, Article 6.
\textsuperscript{197} ICED, Article 33.
\textsuperscript{198} OP-CRC "Communications procedure", Article 13.
\textsuperscript{199} OP-ICESCR, Article 11.
\textsuperscript{200} ICED, Article 33.
\textsuperscript{201} OP-ICESCR, Article 11(4); OP-CRC "Communications procedure", Article 13(3).
2.5 The Security Council and human rights

During the Cold War, human rights were a highly sensitive issue and the Security Council, a political organ *par excellence*, was reluctant to refer to human rights’ violations. It did so only in a few resolutions, notably regarding the Soviet invasion of Hungary. In the 1960s, the Security Council allowed itself some reference to the UDHR on matters related to decolonisation. Prior to the 1990s, the strongest references to human rights were made regarding the South African apartheid regime.

Nowadays, the Security Council’s actions are more interrelated with human rights, which shows the wide scope of the states’ human rights obligations under international law. A shift occurred in 1991 when the Security Council qualified the political repression in Iraq as a threat to international peace and security. The following year, the “*first summit-level meeting on the topic of the responsibility of the Security Council in the maintenance of international peace and security*” was held. On that occasion, opposition to humanitarian intervention were already formulated, especially by the President of China who was “*opposed to interference in the internal affairs of other countries using the human rights issue as an excuse*”. Most of the states’ representatives were in favour of addressing human rights, which were described by the American President as “*the building blocks of peace and freedom*”.

The fundamental principles of non-discrimination and gender-equality were also incorporated into the Security Council’s actions, notably through the adoption of an agenda for Women, Peace and Security (WPS) with its Resolutions 1325. While the WPS agenda served as a normative basis to adopt gender-sensitive policies in conflict settings, the slow improvement of the situation in that matter raised several criticisms. The Resolution 1325 pushed for more political participation of women in peace processes. Yet, the vocabulary of that same

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202 UNSC, Resolution 120.
203 UNSC, Resolution 473, Resolution 417, Resolution 392.
204 UNSC, Resolution 688.
208 UNSC, Resolution 1325.
Resolution often confined women to a status of victims rather than actors of the process. Moreover, the focus on women tends to dissimulate the fact that men are also victims of conflict-related gender-based violence and sexual violence.  

Since 2003, the Security Council developed a normative framework to apply and respect human rights in counterterrorism measures. Resolution 1456 obliges States to comply with their human rights obligations in every one of the counterterrorism policies.  

2.6 The U.N.’s accountability for human rights violations in its missions  

As Verdirame rightly noted, “[u]ntil not so long ago the proposition that the UN can violate human rights would have been dismissed as merely academic”. However, for over two decades now, allegations of human rights violation by UN personnel keep arising. The first article of the UN charter states that one of the main purposes of the organization is “[t]o achieve international co-operation 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 race, sex, language, or religion”. Thus, protecting human rights is part of the mandate of the organization.  

While according to the Charter “the paramount consideration in the employment of the staff and in the determination of the conditions of service shall be the necessity of securing the highest standard of efficiency, competence, and integrity”, its Article 105, which grants privileges and immunities to the Organization and its personnel, has long been interpreted as providing for impunity rather than immunity. The United Nations has personnel abroad responsible for highly sensitive missions and some of these have been making negative headlines over the past few years. These included the management of refugee camps during the Cholera epidemic in 2010 and UN peacekeepers' involvement in the scandal of sexual

209 Carpenter, C., "Recognizing Gender-Based Violence Against Civilian Men and Boys in Conflict Situations", p. 83–103.  
210 UNSC, Resolution 1456.  
211 Verdirame, G., The UN and Human Rights – Who Guards the Guardians?, p. 3.  
212 UN Charter, Article 1(3).  
213 UN Charter, Article 101.  
214 UN Charter, Article 105.
exploitation and abuse by French troops surrounding the operation Sangaris under a Security Council mandate in the Central African Republic.

2.6.1 Cholera epidemic in Haiti

The UN Stabilization Mission in Haiti (MINUSTAH), established in 2004 by the Security Council, deployed 1,075 troops in Haiti in October 2010 following the deadly earthquake of January. The troops’ military bases were based at proximity of the Meille River, which then joins the Artibonite, Haiti’s main river. Due to defective sanitation, human waste contaminated by disease leaked into the waterway and a disastrous cholera epidemic followed, killing over 10,000 people.

In May 2011, an independent panel of experts mandated by the United Nations published its report of the cholera epidemic. It established that "the evidence overwhelmingly supports the conclusion that the source of the Haiti cholera outbreak was due to the contamination of the Meye Tributary of the Artibonite River with a pathogenic strain of current South Asian type Vibrio cholerae as a result of human activity” and that “[t]he introduction of this cholera strain as a result of environmental contamination with feces could not have been the source of such an outbreak without simultaneous water and sanitation and health care system deficiencies.” However, the UN chose to highlight “that the Haiti cholera outbreak was caused by the confluence of circumstances as described in the report, and was not the fault of deliberate action of a group or individual person.”

It was not until 2016 that UN Secretary-General Ban Ki Moon recognized officially the responsibility of the organization in front of the General Assembly during the event for the launch of his report on the new approach to cholera in Haiti. Despite the US$400 million plan which was then deployed to control the epidemic and assist victims, many human rights activists and victims consider that the victims have been deprived of the right to an effective

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215 UNSC, Resolution 1542.
217 United Nations, "Daily Press Briefing by the Office of the Spokesperson for the Secretary-General".
218 UN Secretary-General, "Remarks to the General Assembly on a New Approach to Address Cholera in Haiti".
remedy. In an open-letter from July 2018, sixty rights organization urged the Secretary-General to concretely implement the promises made in 2016.219

This case particularly highlights the role of civil society in advocating for the recognition of responsibility and reparations in case of violation of human rights by the United Nations. With the help of rights organizations, victims are able to continuously push for assistance and reparations.

GEORGES v. UNITED NATIONS220

Oct. 2013: The collective of human rights groups composed of the Bureau des Avocats Internationaux (BAI), the Institute for Justice and Democracy in Haiti (IJDH), and the civil rights law firm Kurzban, Kurzban, Weinger, Tetzell & Pratt (KKWT) filed a class lawsuit in New York against the United Nations on behalf of the victims of the cholera epidemic. They sought injunctive, compensatory and punitive damages and provision for adequate sanitation.

Jan 2015: The judge from NY Federal Court dismissed the case.221

Feb 2015: Notice of Appeal filed by the claimants

Aug. 2016: The Second Circuit Court of Appeals upheld the UN’s immunity from claims.222

Dec. 2016: UN Secretary-General Ban Ki-moon to the General Assembly:
“The United Nations deeply regrets the loss of life and suffering caused by the cholera outbreak in Haiti. On behalf of the United Nations, I want to say very clearly: we apologise to the Haitian people. We simply did not do enough with regard to the cholera outbreak and its spread in Haiti.”223

2.6.2 Sexual exploitation and abuses

Media have widely reported on the various scandals of sexual abuses by UN peacekeeping forces and their existence is now an open secret. However, the recognition of the organization’s responsibility and reparations to the victims are proceeding slowly.

219 IJDH, "Human Rights Organizations Call on UN Secretary General to Engage Victims as Partners in the New Approach Plan”.
222 Georges v. United Nations, 834 F.3d 88 (2d Cir. 2016).
223 UN Secretary-General, ”Remarks to the General Assembly on a New Approach to Address Cholera in Haiti”.
Around the world, the Democratic Republic of Congo is the country with the most alleged victims of sexual exploitation and abuse by UN peacekeepers. For the period between May and September 2004, a total of 72 allegations of sexual exploitation and abuse have been reported to the United Nations Organization Mission in the Democratic Republic of the Congo (MONUC).\(^\text{224}\) In 2004, the media unveiled large scale allegations of Sexual Exploitation and Abuse (SEA) pushing the Secretary-General to name Zeid Ra’ad Al Hussein Advisor to the Secretary-General on Sexual Exploitation and Abuse. Zeid then published a report of his finding in 2005, which is the first official document from the UN providing a framework for the fight against the impunity of such crimes.\(^\text{225}\)

The report criticizes the way the UN conducted its investigation and highlighted that one of the main issues for the prosecution of the perpetrators is the UN’s lack of criminal jurisdiction over its peacekeepers. Indeed, while the UN has been recognized a partial international legal personality, it is not a sovereign body. It is up to the member States to take actions against their troops serving as part of the UN peacekeeping missions around the world. In his report Zeid give two main recommendations:

- **Regarding the accountability of military personnel:** ‘that troop-contributing countries conduct on-site courts martial and that countries whose legislation does not permit them consider reforming their legislation.’\(^\text{226}\)

- **Regarding the accountability of civilian personnel:** “*[i]t may be possible to develop an international convention that would subject United Nations personnel to the jurisdiction of States parties for specified crimes committed by such personnel (the Convention on the Safety of United Nations and Associated Personnel does this for specified crimes against United Nations personnel).*”\(^\text{227}\)

However, more than a decade later, no comprehensive efforts have been made by members states to adopt the recommended measures. While forty-four military personnel serving under

\(^{224}\) UNGA, “Investigation by the OIOS into allegations of sexual exploitation and abuse in the UN Mission in the DR Congo”.

\(^{225}\) UN Secretary-General, “A Comprehensive Strategy to Eliminate Future Sexual Exploitation and Abuse in United Nations Peacekeeping Operations, prepared by Prince Zeid Ra’ad Zeid Al-Hussein”.


\(^{227}\) *Ibid*, para. 89.
UN peacekeeping mandates have been sentenced to jail for SEA by their home countries since 2010, no imprisonment sentence by a national court for the actions of a civilian peacekeeper while working for the UN abroad has been reported on the UN’s website dedicated to the conduct in UN Field Missions.\textsuperscript{228} The only case against civilian personnel jailed for SEA while working for the UN abroad that has been widely reported in the media concerns Didier Bourguet, a French citizen. He was arrested by the Congolese Police in 2004 and was later charged by the French authorities for the rape of at least 20 young girls in the Central African Republic and Democratic Republic of Congo as well as for possession of pornography materials involving minors. However, Bourguet was only convicted for two of the alleged rapes and sentenced to nine years of imprisonment.\textsuperscript{229} His case emphasizes the difficulties for national prosecutors to collect evidences and conduct properly the investigation, mostly because the type of crimes involved often take place on the other side of the world and thus, a proper investigation requires sufficient financial and human resources.

In 2015, an Independent Review on Sexual Exploitation and Abuse by International Peacekeeping Forces in the Central African Republic concluded that the lack of coordination between the different policies leave most victims vulnerable and that “\textit{[i]n the absence of concrete action to address wrongdoing by the very persons sent to protect vulnerable populations, the credibility of the UN and the future of peacekeeping operations are in jeopardy.}”\textsuperscript{230}

In 2016, Anthony Banburi resigned from his position of Assistant Secretary-General for Field Support considering that the United Nations had failed its mandate, including because of the lack of accountability and the inclusion of soldiers from the Democratic Republic of Congo in the peacekeeping mission to Central African Republic despite multiple reports of gross human rights violations by these forces.\textsuperscript{231}

\textsuperscript{228}United Nations, "Sexual Exploitation and abuse – actions".
\textsuperscript{230}United Nations, "Taking Action on Sexual Exploitation and Abuse by Peacekeepers".
\textsuperscript{231} Banburi, A., "I Love the U.N., but It Is Failing (opinion)". \url{https://www.nytimes.com/2016/03/20/opinion/sunday/i-love-the-un-but-it-is-failing.html}, (accessed 2 March 2019).
In 2017, Antonio Guterres took office as the new UN Secretary-General and, at the occasion of a visit to the Central African Republic in December, he made clear sexual exploitation and abuse is a priority for him when he stated that “[w]e are determined to ensure that the voices of victims are heard – I will myself be ready to meet with victims and their families – in and beyond the Central African Republic. Victims must be at the center of our response if we want our zero-tolerance policy to be successful”. In his report ‘Special measures for protection from sexual exploitation and abuse: a new approach’ in 2017, the Secretary-General vowed to put “the rights and dignity of victims first”.

2.6.3 What has been done so far?

In 2011, the Secretary-General instituted a due diligence policy which requires the United Nations entities to ensure their consistency with the purposes and principles of the UN Charter when supporting non-United Nations security forces. The policy includes the necessity of conducting an assessment of the risks to determine if the risks of grave violations of human rights, humanitarian law or refugee law are higher in providing or not providing support. It also requires transparency regarding the legal obligations of the organizations and governing the support. In addition, the policy calls for an effective implementation framework which should include monitoring procedures and procedures to end grave violations of Human rights. However, the Secretary-General does not have the power to produce binding provisions, even for internal use within the Organization, thus the policy is not legally binding but serves as a guidance to the UN entities.

In 2016, the Security Council adopted its Resolution 2272 giving to the Secretary-General the power of sending peacekeeping forces home in case of “credible evidence of widespread or

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233 Secretary-General, "Special measures for protection from sexual exploitation and abuse: a new approach”.
234 Secretary-General, "Human rights due diligence policy on United Nations support to non-United Nations security forces", Annex, para.1.
235 Ibid., para.2(a).
236 Ibid., para.2(b).
237 Ibid., para.2(c).
systemic sexual exploitation and abuse by that unit”\textsuperscript{238}. In addition, the Resolution also requires the Secretary-General to “gather and preserve evidence ahead of investigations of sexual exploitation and abuse in United Nations peace operations”\textsuperscript{239} and urges member states to investigate SEA and to hold accountable their perpetrators when such crimes are allegedly committed by their national personnel.\textsuperscript{240} Contrary to the policy adopted by the Secretary-General, the Security Council Resolutions are binding, and this represents a step forward for the accountability of UN peacekeeping forces. However, the resolution only encompasses sexual abuses and other kinds of grave violations of human rights, such as the cholera epidemic in Haiti, are not covered.

In 2016, the Secretary-General established a Trust Fund in Support of Victims of Sexual Exploitation and Abuse to strengthen medical, psychosocial and legal assistance to victims. However, states contribute to the fund on a voluntary basis and, once again, victims of other forms of violations of human rights are not entitled to receive support through this fund (see the image below). In addition, the General Assembly agreed to transfer the money withheld from UN personnel in cases of sexual exploitation and abuse to the fund.\textsuperscript{241}

\textsuperscript{238} UNSC, Resolution 2272, para.1.
\textsuperscript{239} Ibid., para.4.
\textsuperscript{240} Ibid., para.11.
\textsuperscript{241} UNGA, “Resolution 70/286”.
In 2017, the Secretary-General created the role of the Victims Rights’ Advocate (VRA) and appointed Jane Connors to that position to ensure the victims receive the assistance they need. The VRA also have a role of coordination between the different entities of the UN as well as with civil society. To that aim, the VRA conducts various field visits. In order to strengthen the support on the community level, field victims’ rights advocates are present in four countries where UN peacekeeping forces are present, the Central African Republic, the Democratic Republic of Congo, Haiti and South Sudan. In a first annual Report, the VRA acknowledged that the victims “lack appropriate and adequate legal assistance – a key gap which needs urgently to be addressed.”

A Security Council Resolution from September 2018 “[r]equests the Secretary-General to provide detailed reporting on the findings and implementation plans of Special Investigations to the Security Council and relevant Member States, as appropriate, to include recommendations to address all factors contributing to any identified failures, as well as accountability measures, as appropriate, for uniformed and civilian components,”243 and requires the Secretary-General to include a section regarding the “zero-tolerance policy” in all his reporting to the Security Council. In December 2018, the Security Council also called on the contributing States “to meet the UN performance standards”244.

In conclusion, despite many improvements in terms of transparency and investigations, violations of human rights taking place during the various UN’s activities are still a major issue and no clear, complete and binding provisions have been adopted so far to ensure the accountability of the perpetrators. While massive scandals of sexual exploitation and abuse revealed in the media have pushed high ranking UN officials to strive for ensuring accountability and reparations for the victims, the lack of political will from the States undermines their efforts. Moreover, the strong focus put on SEA excludes other forms of human rights violations by the UN from the nascent accountability framework.

Internal policies and reforms are made sparingly which leave the bigger picture of the violations of Human rights by the UN unaddressed, mostly because of the difficulty to coordinate different measures. The draft articles on the responsibility of international organizations under international law adopted by the International Law Commission in 2011245, still has to be agreed upon by States to become binding but provide relevant guidance for States.

The complexity of the United Nations system and the variety of stakeholders render it nearly impossible that, under the current binding legal provisions, all perpetrators of human rights violations working for the UN can and will be held accountable.

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243 UNSC, Resolution 2436, para.11.
244 UNSC, Resolution 2447, para.3.
245 International Law Commission (ILC), "Draft Articles on the responsibility of international organizations".
2.7 Discussion Points and Further Reading

2.7.1 Discussion Points

- How valuable is the Universal Declaration of Human Rights, The Office of the High Commissioner, and the Human Rights Council when it all remains non-binding?
- Considering how limited these Conventions have been in putting an end to the issues they respectively address, are the Conventions doomed to simply be a ‘piece of paper’?
- How valuable are these Conventions in helping small states pressure larger states to uphold the Universal Declaration of Human Rights?
- Where does the power of the United Nations Human Rights Council lie when they have to rely on the contributions of member states to have any funds and ground forces?
- Should the United Nations Human Rights Council be allowed to intervene in abuses made by peacekeeping forces in order to allow for greater accountability?
- Where do human rights gain their power from, if they are not upheld by non-binding constitutions?

2.7.2 Further Reading


CHAPTER 3: REGIONAL SYSTEMS OF PROTECTION OF HUMAN RIGHTS

3.1 The European System of Protection of Human Rights

3.1.1 The Council of Europe

3.1.1.1 History

The Council of Europe (CoE) is an International Organization founded on 5 May 1949 by ten Western European states as the first European organization. The founding states followed the conviction that they had a common heritage of political traditions and ideals, such as respect for freedom and the rule of law. In order to restore peace, democracy, and stability in Europe after World War II and to promote economic and social progress, they aimed the reinforcement of the ties between the European states.

The seat of the Council of Europe is Strasbourg (Art. 11 of the Statute of the CoE). It must be noted that the CoE is not an Institution of the European Union (EU), so it must not be confused with the EU’s European Council or the Council of the European Union. However, the symbols of the Council of Europe, its flag and anthem, have also been used by the European Union (EU).

The membership to the CoE is limited to states that accept the principles of democracy, the rule of law, of human rights, and fundamental freedoms (cf. Article 3 of the Statute of the CoE). Currently, the CoE comprises 47 member states, including all of the 28 member states of the European Union as well as, e.g., Russia and Turkey. Non-European countries have the opportunity to co-operate with the CoE and become so-called „Observer States“ by

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246 Belgium, Denmark, France, Ireland, Italy, Luxembourg, Netherlands, Norway, Sweden, and the UK.
accepting the guiding principles. As a consequence, they are entitled to appoint permanent observers to the Council of Europe.  

The Statute of the Council of Europe provides for both withdrawal (cf. Art. 7) and suspension of membership rights (cf. Art. 8 and 9). In 1997, for instance, the special guest status of Belarus was suspended due to human rights violations. One of the biggest obstacles for its membership to the CoE is the continuing imposition of capital punishment. While all the other states in the region have abolished it, Belarus remains the only state that still executes death penalties with no change in sight. The CoE has made abolition of the death penalty a precondition for accession.

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3.1.1.2 Structure

Article 10 of the Statute of the Council of Europe provides for two organs: The Committee of Ministers (Art. 13 ff.) and the Parliamentary Assembly (Art. 22 ff.).

The Committee of Ministers is the executive and decision-making body. It is composed of the Foreign Ministers and Permanent Diplomatic Representatives of the member states. It serves for political exchange and decides on the admission of new members as well as the suspension of membership rights. It also supervises the execution of judgments of the
European Court of Human Rights. The Committee meets at ministerial level once to twice a year; the ministers’ deputies meet once a week. The chairmanship of the Committee is rotated on a six-monthly basis. The Parliamentary Assembly (formerly: “Consultative Assembly”) brings together representatives of the national parliaments. It has a solely advisory function, i.e., it gives recommendations (Art. 22 of the Statute), expresses opinions, and monitors state compliance. Its resolutions are not legally binding and do not create any obligations. The member states of the Council of Europe are therefore free to take note of the resolutions of the Assembly. Additionally, the Parliamentary Assembly has the power to elect the European Commissioner for Human Rights, the Secretary General of the CoE, as well as the Judges to the European Court of Human Rights. It meets four times a year.

The European Commissioner for Human Rights collaborates with national and international human rights institutions in order to promote education and awareness of human rights in member states, and can receive individual complaints. However, the Commissioner can neither adjudicate them nor present them before any national or international court. His competence is limited to the submission of written comments to the European Court of Human Rights and to take part in Chamber hearings. Further key institutions of the CoE are the Congress of Regional and Local Authorities, which advises the organs of local and regional issues, and the Conference of International Non-governmental Organizations, which brings together representatives of participating NGO’s with status, aiming to strengthen the participation of the civil society.

### 3.1.1.3 Obligations and Monitoring

By acceding to the Council of Europe, each country accepts to submit to its basic principles in order to verify respect for human rights and democratic practices on its territory. In addition, the member states have made further commitments by ratifying specific conventions. The ECHR is generally considered to be the most important convention and will be presented below. Other key conventions are, inter alia, the European Social Charter and the European

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255 See below.
258 Greer, S., “Europe”, p. 458.
Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (ECPT).\textsuperscript{260}

The states’ compliance with their obligations is to be ensured by various monitoring mechanisms. For example, the institution supervising the observance of the ECPT is the Committee for the Prevention of Torture of the Council of Europe (CPT). According to Article 1 of the ECPT, committee members carry out random and unannounced visits to the detention centers of the member states (i.e., prisons, police stations, and detention centers for foreigners) to verify the treatment of persons deprived of their liberty. Following the visit, the Committee sends a report with recommendations, if applicable, to the respective government. Based on Article 10 of the ECPT the Committee may decide to make a public statement if the State “fails to cooperate or refuses to improve the situation in the light of the Committee’s recommendations.”\textsuperscript{261} Public statements for example have been made between 1992 and 1996, against Turkey; from 2001 and 2007, three public statements were made against the Russian Federation, and in 2011, one public statement was made against Greece.\textsuperscript{262}

\subsection*{3.1.1.4 The European Convention on Human Rights (ECHR) and additional Protocols}

All member states of the CoE have signed up to the Convention for the Protection of Human Rights and Fundamental Freedoms, better known as the European Convention on Human Rights (ECHR), a treaty designed to protect international fundamental rights and freedoms, democracy, and the rule of law.\textsuperscript{263} Based on the Universal Declaration of Human Rights of the United Nations (1948) the European Convention on Human Rights guarantees, for example, the right to life and physical integrity (Art. 2), the right to liberty and security (Art. 5), freedom of conscience and religion (Art. 9), and freedom of expression (Art. 10), and it prohibits torture and degrading punishment (Art. 3), forced labour (Art. 4), punishment without law (Art. 7), and discrimination (Art. 14).\textsuperscript{264} Furthermore, it codifies procedural rights, such as the right to an effective remedy (Art. 13) and the right to a fair trial (Art. 6).

\begin{footnotesize}
\begin{enumerate}
\item Greer, S., “Europe”, p. 459.
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In contrast to the UN Universal Declaration of Human Rights, the European Convention on Human Rights goes beyond a mere declaration of intent. It enshrines instruments for legal action and the protection of rights, and establishes the European Court of Human Rights in order to oversee the implementation of the Convention in its states parties. The ECHR entered into force in 1953. Sixteen additional Protocols amended and supplemented ECHR over the years. For example, the Additional Protocol No. 11, which entered into force in 1998, strengthened the competences of the European Court of Human Rights by making it a permanent, full-time judiciary and the only body responsible for monitoring complaints. The most recent additional protocols provide for procedural reforms in order to accelerate the Court’s proceedings.

3.1.1.5 The European Court of Human Rights

3.1.1.5.1 Structure and Procedure

The European Court of Human Rights (ECtHR), seated in Strasbourg, was founded in 1959 and reformed in 1998. It is not to be confused with the highest court of the European Union, the European Court of Justice (CJEU) in Luxembourg. The ECtHR is composed of a number of judges equal to that of the contracting states (Art. 20 ECHR). The judges are delegated by the member states and must be elected by the Parliamentary Assembly of the Council of Europe (Art. 22 ECHR). However, since the judges are independent and do not represent their states, there is no restriction on the number of judges of the same nationality.

The ECtHR has jurisdiction to interpret and enforce the provisions of the ECHR (Art. 32 ECHR). It may be appealed to, when fundamental rights and human rights listed in the Convention have been violated by one of its member states. It does not act ex officio. Thus, its jurisdiction refers to complaints filed either by states parties against other treaty states

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267 Previously, a European Commission for Human Rights and the Committee of Ministers of the Council of Europe had also been competent monitoring bodies, cf. Walter, C., “The Notion of European Fundamental Rights and Freedoms, p. 4 marginal no. 11.
(state complaints, Art. 33 ECHR) or by individuals as well as non-governmental organizations (individual complaints, Art. 34 ECHR) against states parties, claiming to be a victim of infringements by an act of the state, including the acts of all state organs, such as public authorities or courts. In the case of individual complaints, however, it is required that the national legal process is exhausted.271

Despite this prerequisite, the workload of ECtHR is enormous. At the beginning of 2019, more than 57,000 proceedings were pending.272 In 2018, 43,100 new applications were received. On the other hand, 42,761 decisions were made (of which only a fraction, 2738, was admissible).273 In view of these statistics, it goes without saying that incoming applications will only be decided after a certain time and that complainants will have to prepare themselves for lengthy proceedings.

Since the ECHR is not regarded as a fixed set of rules, but as a “living dynamic instrument which [...] must be interpreted in the light of present-day conditions,”274 the Court’s interpretations are crucial. The judgment of the ECtHR, whether a state has violated the rights of the ECHR, and if so it has to pay damages to the person concerned, is legally binding for the state that is brought before the court (Art. 46 para. 1 ECHR). The ECtHR is not an appellate court and national judgments are not immediately set aside or amended. Hence, the sentenced state has to implement the obligations resulting from the judgment actively in order to avoid further violations against other persons. The Committee of Ministers of the Council of Europe monitors the execution of the judgments (Art. 46 para. 2-5 ECHR).275 The ECtHR workload problems are mirrored in the enforcement process. Only a small percentage of cases can actually be processed. There is also the problem that the ECHR does not provide for effective sanction mechanisms. If a member state refuses to implement the ECtHR’s ruling,

the only coercive measures that could be considered are the suspension of voting rights in the Committee of Ministers or exclusion from the CoE. Both means, however, would be counterproductive, as they would lead to further alienation between the state concerned and the CoE.276

Member states that are not subject to the particular litigation are not directly obliged to abide by the judgments. Nevertheless, if the national courts and authorities of a state do not take the case law of the ECtHR into account and deviate from its legal interpretation, the preliminary effect of the decisions of the ECtHR makes it probable that this state will be sentenced in similar cases. Accordingly, the judgements of the ECtHR are of an indicative nature, as they often lead to changes in national legislation.277 However, due to different cultural and moral understandings in the states of Europe the ECtHR generally concedes every member state a wide margin of appreciation on the implementation of its judgments, as long as the standard of fundamental freedoms set by the ECtHR is not reduced or limited.278

The ECtHR for instance, sees differences between the contracting states of the ECHR regarding their view in terms of the beginning of life under criminal law, the admissibility of abortion, assisted suicide, the access of homosexual couples to marriage and adoption, and the affixing of religious symbols in classrooms.279

3.1.1.5.2 Judgements

The most violated ECHR provision is Art. 6 (right to fair trial), especially since it guarantees a right to a judicial decision within a „reasonable time.“280 According to ECtHR case law, the length of the “reasonable” period always depends on the individual case and is determined by various criteria, such as the complexity of the case, the conduct of the applicant and the

276 Greer, S., “Europe”, p. 472 f.
competent authorities, the personal consequences of the decision for the applicant, etc.\textsuperscript{281} The ECtHR has often found that the time period to be determined according to these criteria has been exceeded in domestic court proceedings. The fact that the ECtHR is repeatedly passing judgement against the same states in similar situations shows that, in practice, judgments are not always implemented by the member states in accordance with their obligations.

Some of the ECtHR landmark cases are:

3.1.1.5.2.1 Opuz v. Turkey (Judgement of 9 June 2009):

The ECtHR found a violation of the prohibition of discrimination against women, the right to life, and the prohibition of torture and degrading treatment. The Court ruled that the Turkish authorities had failed to take appropriate measures within the scope of their powers to protect the applicant and her mother against domestic violence used by her father. The Court states a “general and discriminatory judicial passivity in Turkey [that] created a climate that was conducive to domestic violence.”\textsuperscript{282}

3.1.1.5.2.2 Soering v. United Kingdom (Judgement of 7 July 1989):

The ECtHR hold that a violation of the prohibition of torture and degrading treatment is to be seen in the extradition of the applicant to a state where he is threatened with the death penalty, because of the conditions of detention on death row. The applicant is a German national who was to be extradited to the State of Virginia, USA, where he was charged with murdering his girlfriend’s parents. The case is crucial because the Court included the behavior of a state that is not subject to the ECHR in its decision.\textsuperscript{283}


\textsuperscript{282} ECtHR, text of the judgement \url{http://hudoc.echr.coe.int/eng?i=001-92945} (accessed 14 March 2019).

\textsuperscript{283} ECtHR, text of the judgement \url{http://hudoc.echr.coe.int/eng?i=001-57619} (accessed 14 March 2019).
3.1.1.5.2.3 Bayatyan v. Armenia (7 July 2011):

The Court ruled a violation of the freedom of thought, conscience, and religion concerning the imprisonment of a conscientious objector – a Jehovah’s Witness – for his refusal to perform military service. 284

3.1.1.5.2.4 Burdov v. Russia (7 May 2002, 4 May 2009):

In its Judgement in 2002 the ECHR found violations of the right to a fair trial and the protection of property, because the decisions of domestic courts granting the applicant various social benefits were not carried out fully or on time. After years of apparent lack of decisive improvements, the ECHR again decided in favor of the complainant in a follow-up case in 2009 stating: “The Court notes at the outset that non-enforcement or delayed enforcement of domestic judgments constitutes a recurrent problem in Russia that has led to numerous violations of the Convention.”

3.1.1.5.2.5 Schwabe and M.G. v. Germany (1 December 2011):

The applicants had been arrested and kept in prison for five days in order to prevent their participation in demonstrations related to the Group of Eight Summit of Heads of State and Government held in Germany in 2007. One day before, there had been heavy riots during which violent demonstrators had attacked police officers with stones and baseball bats and injured 400 officials. The police assumed without sufficient indication that the complainants could participate in further riots. Since the ECHR provides for preventive detention only for the purpose of arraignment or for the prevention of a crime which is specifically and precisely defined, the Court found a violation of the right to liberty and security and the freedom of assembly and association.

3.1.1.5.2.6 Nagla v. Latvia (16 July 2013):

The ECHR ruled a violation of the freedom of expression after the police had searched the home of a journalist and confiscated data storage devices. The Court held that the right of

journalists not to disclose their sources is not dependent on the lawfulness of their sources, but an essential element of the right to information.\(^{288}\)

3.1.1.5.2.7 D.H. et al. v. Czech Republic (13 November 2007):

The ECtHR hold that children of Roma descent (ethnic minority in Europe) face systematic discrimination in the Czech Republic and sees the prohibition of discrimination and the right to education to be violated. The applicants were placed into “special schools” for children with mental disabilities as of over half of Roma children in der town.\(^{289}\)

3.1.2 Human Rights in the European Union

3.1.2.1 European Union

As of early 2019, the European Union is a supranational economic and political union of 28 European countries.\(^{290}\) The predecessor of the EU, die European Economic Community (EEC), was created in the aftermath of the Second World War as a result of the 1957 Treaty of Rome in order to foster economic cooperation between the six founding states Belgium, West-Germany, France, Italy, Luxembourg, and the Netherlands. In the following decades, more and more European states joined the single market.\(^{291}\)

In 1992, the Treaty of Maastricht gave more powers in non-economic policy areas and renamed the EEC into the European Union (EU). The Treaty of Maastricht also created a reference to human rights, stating that: “The Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to the Member States, as general principles of Community law” (Art. F para. 2).\(^{292}\)

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\(^{289}\) ECtHR, text of the judgement http://hudoc.echr.coe.int/eng?i=001-83256 (accessed 14 March 2019).

\(^{290}\) See map above.


To become a member of the European Union, a candidate country must comply with a number of conditions. In addition to the so-called political criterion – which conforms to the Council of Europe's membership requirement – the state must fulfill economic criteria and be able to take on the obligations of membership and the objectives of political, economic, and monetary union (adoption of the so-called “acquis communautaire.”)\(^{293}\)

Several reform treaties, most recently the Treaty of Lisbon (2007), amended the original treaties of Rome and Maastricht and extended the supranational competences of the EU.\(^{294}\) These treaties form together the central legal source of European law, so-called primary law of the EU.\(^{295}\)

3.1.2.2 The European Charter of Fundamental Rights of the European Union

The Charter of Fundamental Rights of the European Union (CFR) comprises 54 Articles divided into seven chapters. The first chapter (Dignity) covers the right to life and integrity to the person, and it prohibits torture and slavery. The second chapter (Freedoms) guarantees, for example, liberty and security, privacy, the freedom of expression and information, and the freedom of assembly and association. Furthermore, it codifies the right to property, the freedom to choose an occupation and to conduct business, and the right to asylum. The third title (Equality) covers equality before the law and prohibits all forms of discrimination. The fourth title (Solidarity) refers to single aspects of social rights, such as family and working conditions. Furthermore, it lays down social security and assistance as well as health care. The fifth chapter (Citizen’s Rights) enshrines, e.g., the right to vote and the freedom of movement and residence. The sixth chapter (Justice) guarantees the right to an effective remedy, a fair trial, the presumption of innocence, etc. Last but not least, the seventh title contains general provisions on the interpretation and application of the Charter.\(^{296}\) The Charter is based on the


ECHRI, the European Social Charter, the case law of the European Court of Justice and European Union law.\(^{297}\)

The CFR was proclaimed in 2000. Until the Treaty of Lisbon, the legal status of the CFR was, however, undetermined.\(^{298}\) Coming into force on 1 December 2009, the Treaty of Lisbon determined the Charter as primary source for human rights in the law of the European Union, stating that: "The Union recognizes the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union [...] which shall have the same legal value as the Treaties."\(^ {299}\) Accordingly, the CFR is part of the EU’s primary law and is thus to be found at the top of the hierarchy of norms within the EU. Pursuant to Art. 51 CFR, the Charter, on the one hand, is binding for the EU and its institutions. All the EU’s action must be benchmarked against the Charter, in particular European legislation (regulations and directives) and European administration. On the other hand, every EU member state is obliged by the Charter if and when it carries out EU law, for example, by integrating European directives into national law or by implementing European regulations through national administrations. The Charter does not apply to purely national situations without a European dimension. The national fundamental rights of the member states are the sole yardstick for this assessment. However, the Charter always serves as an aid to interpretation not only for EU law but also for national law.\(^ {300}\)

3.1.2.3 The Court of Justice of the European Union

The Court of Justice of the European Union (CJEU) has jurisdiction to interpret EU law, such as the Charter.\(^ {301}\) In contrast, the CJEU can neither interpret national norms, nor can it apply them against EU law.\(^ {302}\) Violations of fundamental rights can be litigated before the CJEU by EU institutions against each other, by member states against each other, and by the


Commission\textsuperscript{303} or Individuals against member states or EU institutions.\textsuperscript{304} However, the access to the CJEU for individuals is limited. In pursuance of Art. 263 Treaty on the Functioning of the European Union (which is an updated form of the Treaty of Rome) individuals can only call the CJEU if they are direct addressees of or directly affected by EU acts. Since addressees of EU acts are usually the member states themselves, the scope of Art. 263 is essentially limited to the examination of, for example, measures of EU competition law. Mostly, the CJEU gets involved via preliminary reference procedure, Art. 267 Treaty on the Functioning of the European Union. This procedure allows (and obliges) national courts to make a reference application to the CJEU in matters relating to European law as part of the domestic procedure.

Subsequently, the CJEU states its opinion on the matter, giving a general interpretation of the EU law concerned, and sends it back to the national court. As a result, not only the court that has made the reference application has to follow the CJEU’s interpretation, but every other court on EU territory has to take this into account when it decides in similar cases. In this way, jurisprudence in the EU will be harmonized.\textsuperscript{305}

3.1.2.4 Relationship of the EU Human Rights Protection and the ECHR

Although planned for a long time, the EU as such has not joined the European Convention on Human Rights. Consequently, the EU is not directly bound by the ECHR and EU law is not subject to any direct control by the European Court of Justice as to its compatibility with the ECHR.

In its Opinion 2/94\textsuperscript{306}, the European Court of Justice (CJEU) stated that the European Union lacks the competence to accede to the ECHR. The 2007 Treaty of Lisbon therefore expressly provides for a legal basis and declares the EU’s accession to the European Convention of Human rights as binding legal aim (cf. Art. 6 para 2 Treaty on European Union). Accordingly, the EU and the CoE negotiated an agreement that the EU and its institutions, including the

\textsuperscript{303} The Commission is the EU institution responsible to promote the general interest of the Union and take appropriate initiatives to that end (Art. 17(1) Treaty on European Commission).
\textsuperscript{304} Greer, S., “Europe”, p. 475.
CJEU, would be subject to the external control mechanisms of the ECHR and in particular to
the decisions and judgments of the ECtHR. Although the Commission was sure that the
agreement was compatible with the EU Treaties, it asked the CJEU for its opinion on the
matter for reasons of principle. On 18 December 2014 the CJEU stated that it considers the
accession agreement to be incompatible with EU law. It sees the special characteristics of the
Union and Union law as affected by the failure to ensure consistency between the provisions
of the ECHR and the CFR. As the opinion of the CJEU is negative, the accession of the EU
has moved into the distant future. However, this does not relieve the EU member states,
which are altogether subject to the ECHR, of their responsibility to ensure that the rights of
the Convention are respected. The accession of the EU to the ECHR is therefore of limited
practical significance.

Art. 6 para. 3 of the Treaty on European Union codifies: “Fundamental rights, as guaranteed
by the European Convention for the Protection of Human Rights and Fundamental Freedoms
and as they result from the constitutional traditions common to the Member states, shall
constitute general principles of the Union's law.” Thus, the ECHR remains a formal source of
EU human rights law, guaranteeing a minimum standard of human rights. The CFR is more
comprehensive than the ECHR but they overlap in many ways. Art. 52 para 3 of the CFR
states: “In so far as this Charter contains rights which correspond to rights guaranteed by the
Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and
scope of those rights shall be the same as those laid down by the said Convention. This
provision shall not prevent Union law providing more extensive protection.”

This clarifies that the ECHR and its interpretation by the ECtHR is a source of legal
knowledge for the acquisition of general legal principles of EU law. Accordingly, the case
law of the ECtHR is of great importance, also for the jurisdiction of the CJEU.

The ECHR and CFR do not constitute competing legal orders on EU territory, but a multi-
layered human rights protection system.

307 Obwexer, W., “Der Beitritt der EU zur EMRK: Rechtsgrundlagen, Rechtsfragen und
Rechtsfolgen”, p. 116 ff.
fundamental-rights-in-the-eu (accessed 20 March 2019); Obwexer, W., “Der Beitritt der EU zur
EMRK: Rechtsgrundlagen, Rechtsfragen und Rechtsfolgen”, p. 148.
309 European Commission, https://ec.europa.eu/info/aid-development-cooperation-fundamental-
rights/your-rights-eu/eu-charter-fundamental-rights/why-do-we-need-
charter_en#conventiononhumanrights (accessed 18 March 2019).
Legal Process in Case of Human Rights Violations by Member States of the Coe/EU:

3.1.3 Organization for Security and Co-operation in Europe

A third pan-European organization with a focus on human rights to be mentioned briefly, is the Organization for Security and Co-operation in Europe (OSCE). It was originally created to establish politico-military security in Europe.\(^{311}\) Nowadays, the OSCE also monitors the human rights situation in its 57 participating states\(^ {312}\) and denounces grievances.\(^ {313}\)

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311 Greer, S., “Europe”, p. 455.
OSCE Office for Democratic Institutions and Human Rights (ODIHR) provides for advice and assistance for individuals and civil society.\(^{314}\) In contrast to the CoE the OSCE focuses more on political than on hard legal obligations.\(^{315}\)

### 3.2 The Inter-American system of human rights protection

The Inter-American system of human rights protection is a ‘dual model’. The Inter-American Commission, an independent organ of the Organization of American States (OAS) reviews cases before” the case may proceed to the Inter-American Court of Human Rights.” While the Commission is in charge of monitoring with on-site visits, the mandate of the Court is more related to the interpretation of Inter-American instruments. This system is similar to what was existing in Europe prior to the Additional Protocol 11. As for the European system, the implicit aim of the organization was originally to curb the propagation of communism in a global context of the cold war.

#### 3.2.1 The Organization of American States (OAS)

After a series of regional conference, the Charter of the OAS was adopted at the Ninth International Conference of American States in 1948 in Bogota, and states that the OAS was established to achieve “an order of peace and justice, to promote their solidarity, to strengthen their collaboration, and to defend their sovereignty, their territorial integrity, and their independence”\(^{316}\). The organization groups 35 member states and has its headquarters in Washington DC. Article 2 of its Charter defines eight essential purposes:

1. To strengthen the peace and security of the continent.
2. To promote and consolidate representative democracy, with due respect for the principle of non-intervention.
3. To prevent possible causes of difficulties and to ensure the pacific settlement of disputes that may arise among the member states.
4. To provide for common action on the part of those states in the event of aggression.
5. To seek the solution of political, judicial, and economic problems that may arise among them.

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\(^{316}\) Charter of the Organisation of American States (OAS Charter), Article 1.
6) To promote, by cooperative action, their economic, social, and cultural development.
7) To eradicate extreme poverty, which constitutes an obstacle to the full democratic development of the peoples of the hemisphere.
8) To achieve an effective limitation of conventional weapons that will make it possible to devote the largest amount of resources to the economic and social development of the member states.317

For its functioning, the OAS is divided between the General Secretariat, the Permanent Council, the Inter-American Council for Integral Development, and numerous committees. The General Assembly, composed of representatives from each member state, is the leading decision-making institution of the organization.

Adopted at the same conference shortly after the Charter, the American Declaration of the Rights and Duties of Man was the first general international human rights instrument, even before the UDHR.318 As a Declaration, this document is not binding as such. However, it served at a basis for the Inter-American normative framework relating to human rights as we know it today.

3.2.2 The American Convention on Human Rights

Adopted in 1969 Costa Rica, the American Convention on Human Rights (ACHR), also known as the Pact of San Jose, entered into force in 1978. To date only 25 States are parties to the Convention.319 The original document has been complement by two Additional Protocols. The first one adopted in 1988 on economic, social and cultural rights320 and the second opened for signature in 1990 and concerns the abolition of death penalty321.

317 OAS Charter, Article 2.
318 American Declaration of the Rights and Duties of Man.
321 Protocol to the American Convention on Human Rights to Abolish the Death Penalty, OAS TS no.73 (8 June 1990).
3.2.2.1 Rights guaranteed

The rights guaranteed in the text on the Convention are divided into two chapters. While Chapter II deals with civil and political rights, Chapter III is dedicated to the protection of economic, social, cultural rights. This represents one of the main differences with the text of the European Convention which mainly focuses on civil and political rights. Indeed “[t]he American Convention contains rights similar to those in the European Convention but goes further by providing for a minimum of ‘socio-economic’ rights.” In addition, Article 32 highlights the ”relationship duties and rights” present in the 1948 HR Declaration.

3.2.2.1.1 Civil and political Rights

Civil and political rights are guaranteed under Chapter II of the Convention. The provisions protect mostly the same rights as in other regional agreements such as the right to life, the prohibition of torture and other inhuman treatments, the prohibition of slavery, the right to a fair trial, the freedoms of religion, expression and of association. Article 23 enumerates the rights stemming from the general right to participate in government.

3.2.2.1.2 Economic, social and cultural rights

The unique Article of the Convention’s third Chapter enshrines the principle of ‘progressive development’ of economic, social and cultural rights. While the Convention does not list or defines these rights, Article 26 refers to” the rights implicit in the economic, social, educational, scientific, and cultural standards set forth in the Charter of the Organization of American States as amended by the Protocol of Buenos Aires.”

322 ACHR, Article 4.
323 ACHR, Article 5.
324 ACHR, Article 6.
325 ACHR, Article 8.
326 ACHR, Article 12.
327 ACHR, Article 13.
328 ACHR, Article 16.
329 ACHR, Article 26.
3.2.2.1.3 Suspensions of the Rights

As many human rights instrument, the ACHR allows for the suspension of its provisions "[i]n time of war, public danger, or other emergency that threatens the independence or security of a State Party". The concerned State has to inform the Secretary General of the OAS of the suspension. Such communication should include "the provisions the application of which it has suspended, the reasons that gave rise to the suspension, and the date set for the termination of such suspension."

Nevertheless, the right of suspension is limited in several ways. Firstly, certain rights are considered as non-derogable (meaning they cannot be suspended) and thus, benefit from a higher protection. These are: the rights guaranteed in “Article 4 (right to life), Article 5 (right to humane treatment), Article 6 (freedom from slavery), Article 9 (freedom from ex post facto laws), Article 12 (freedom of conscience and religion), Article 17 (right to family), Article 18 (right to the name), Article 19 (rights of the child), Article 20 (right to nationality), or Article 23 (right to participate in government)”.

3.2.2.2 Means of Protection

Article 33 gives mandate to the Commission and the Court regarding the implementation and monitoring of the Convention’s obligations. The provisions relative to the Commission can be find in Article 34 to 51 under Chapter VII of the Convention and those concerning the Court are contained in Chapter VIII from Article 52 to 69.

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331 ACHR, Article 27(1).

332 ACHR, Article 27(3).

333 ACHR, Article 27(2).

334 Ibid.

335 Ibid.
3.2.3 The Inter-American Commission on Human Rights (IACHR)

Created in 1959, through the Resolution VII, the Inter-American Commission, together with the Inter-American Court on Human Rights, is one of the bodies of the American regional system of human rights protection. It is an independent organ but its mandate is based on the OAS and the American Convention on human rights. Its functioning and powers have been reformed several times. The relevant provisions of the Convention are laid out in Article 34 to 51.

3.2.3.1 Composition

The Commission is currently composed of seven ‘persons of high moral character and recognized competence in the field of human rights’ The judges are elected for four years in their personal capacity and there cannot be more than one judge of the same nationality.

3.2.3.2 Mandate

In 1960, during its first session, “Commission broadly interpreted its authority under its statute as permitting it to make general recommendations to each, as well as to all member states concerning the adoption of progressive human rights measures within the framework of their domestic legislation.” Nevertheless, it denied having jurisdiction over individual complaints could only be used as way of information for investigations.

Article 41 of the ACHR, provides:

”The main function of the Commission shall be to promote respect for and defense of human rights. In the exercise of its mandate, it shall have the following functions and powers:

a. to develop an awareness of human rights among the peoples of America;

b. to make recommendations to the governments of the member states, when it considers such action advisable, for the adoption of progressive measures in favor of human rights within the framework of their domestic law and constitutional

References:

336 OAS, “Fifth Meeting of the Consultation of Ministers of Foreign Affairs, Final Act”.
337 ACHR, Article 34.
338 ACHR, Articles 36 and 37.
provisions as well as appropriate measures to further the observance of those rights;

c. to prepare such studies or reports as it considers advisable in the performance of its duties;

d. to request the governments of the member states to supply it with information on the measures adopted by them in matters of human rights;

e. to respond, through the General Secretariat of the Organization of American States, to inquiries made by the member states on matters related to human rights and, within the limits of its possibilities, to provide those states with the advisory services they request;

f. to take action on petitions and other communications pursuant to its authority under the provisions of Articles 44 through 51 of this Convention; and

g. to submit an annual report to the General Assembly of the Organization of American States.\(^{340}\)

The role of the Commission goes way further than the sole responsibility to hear individual petitions and included a broad range of powers to fulfil its monitoring mission. Indeed, the Commission can conduct on-site visits, to hear and investigate individual petitions, monitor the general situation of human rights through its annual report to the General Assembly. The Commission also has an important position regarding spreading awareness around human rights issues and can make recommendations to member states for the implementation of human rights. Nevertheless, the right to petition remains one of the most important aspect of its mandate.

3.2.3.3 Capacity to file a complaint

Article 44 of the ACHR allows “[a]ny person or group of persons, or any non-governmental entity legally recognized in one or more member states of the Organization' to 'lodge petitions with the Commission containing denunciations or complaints of violation of this Convention by a State Party.”\(^{341}\)

3.2.3.4 Criteria of Admissibility

Several criteria must be met for a complaint to be admissible:

\(^{340}\) ACHR, Article 41.
\(^{341}\) ACHR, Article 44.
3.2.3.4.1 Exhaustion of Domestic Remedies

Under Article 46 of the ACHR and 31 of the Rules of Procedure of the Commission, to be admissible the domestic remedies must have been exhausted which means that no more possibility exists in the domestic legal order to offer remedies for the violation of one of the rights of the American system. However, Article 46 (2) provides that this criterion does not apply when domestic are not available.

3.2.3.4.2 Time constraint

To be admissible a complaint must be filed "within a period of six months from the date on which the party alleging violation of his rights was notified of the final judgment". It means that an individual, group of individuals or NGOs have 6 months after the exhaustion of the domestic remedies if they want the Commission to hear their complaint.

3.2.3.4.3 Absence of other international procedures on the same issue

In order to avoid a duplication of procedures due to the multitude of mechanisms existing in international law, a complaint is inadmissible if the Commission or ‘another international organization’ already heard, or is currently hearing, the same petition.

3.2.3.4.4 Elements to be contained in the petition

In addition to the previous criteria, the Convention requires the petition to contain ‘the name, nationality, profession, domicile, and signature of the person or persons or of the legal representative of the entity lodging the petition.’

343 ACHR, Article 46(2).
344 ACHR, Article 46(1)(b).
345 ACHR, Article 46(1)(c) and Article 47.
346 ACHR, Article 46(1)(d).
3.2.3.5 Procedure

Once a petition has been declared admissible, the Commission has to investigate the allegations. To that effect, it can "carry out an investigation, for the effective conduct of which it shall request, and the states concerned shall furnish to it, all necessary facilities" and can request further information from the States are any parties concerned.

States have the possibility to reach Friendly Settlements with the help of the Commission. If such settlement is reached, the Commission then asks the petitioner and the states parties to report on the facts and solutions agreed upon. The report will be then published. In other cases, the Commission has to file a report under Article 50 on the merits stating the facts of the case and its conclusion. The Commission can make recommendations to the states regarding its conclusions.

In case no settlement has been reached and none of the states concerned has submitted the issue to the Court, the Commission can decide to publish the report or to refer the issue to the Court.

Regarding the procedure of the complaint mechanism, the Commission acts in practice as a filter before acceding to the Court.

3.2.4 Inter-American Court of Human Rights (IACtHR)

The Inter-American Court of Human Rights (IACtHR) is the second organ in charge of the Convention’s enforcement and interpretation and was established in 1978 when the Convention entered into force. The Court is based in San Jose, Costa Rica. Only 20 of the 35 member states of the OAS have so far accepted the Court’s jurisdiction over “all cases concerning the interpretation and application of the provisions of this Convention that are submitted to it”.

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347 ACHR, Article 48(1)(d)
348 ACHR, Article 48(1)(e).
349 ACHR, Article 48(1)(f).
350 ACHR, Article 49.
351 ACHR, Article 50.
352 ACHR, Article 51(2).
353 ACHR, Article 62.
It is important to remember that the Court decides of the responsibility of States for breaching the Convention and not of individuals.

3.2.4.1 Composition and Mandate

The Court is composed of seven judges elected ‘among jurists of the highest moral authority and of recognized competence in the field of human rights, who possess the qualifications required for the exercise of the highest judicial functions’ and having the nationality of one of the member states of the Organization, even though it is not possible to have two judges of the same nationality.\(^3\) The requirement of ‘highest moral authority’ has often be criticized for its broadness and the variations in the required qualifications from a state to another. Their mandate is of six years and is only renewable once.\(^4\) In case a judge is from the nationality of a state party to a case, he/she” shall retain his right to hear the case.”\(^5\) However, as judges are elected in their personal capacity, they do not represent their state.\(^6\)

3.2.4.1.1 Judiciary function:

While the Court has jurisdiction over “all cases concerning the interpretation and application of the provisions of this Convention that are submitted to it,”\(^7\) it has only mandate to deal with cases brought by the Commission or member States and cannot directly hear individual complaints.\(^8\) The court started its activities in 1979, but it is only in 1986 that it issued its first judgement on merits in a contentious case.\(^9\)

The rulings of the Court are binding for the state parties to the case and while the convention does not expressly tasks one of the political organs with the supervision of the enforcement of the judgements, the annual report of the Court to the General Assembly has to include “in

\(^3\) ACHR, Article 52.
\(^4\) ACHR, Article 54.
\(^5\) ACHR, Article 55(1) .
\(^6\) ACHR, Article 52.
\(^7\) ACHR, Article 62.
\(^8\) ACHR, Article 61.
\(^9\) Inter-American Court of Human Rights (IACtHR), Velásquez-Rodríguez v. Honduras (Merits), Series C, No. 4 (July 29, 1988).
particular, the cases in which a state has not complied with its judgments, making any pertinent recommendations."\(^{361}\)

Article 63 of the Convention states:

"If the Court finds that there has been a violation of a right or freedom protected by this Convention, the Court shall rule that the injured party be ensured the enjoyment of his right or freedom that was violated. It shall also rule, if appropriate, that the consequences of the measure or situation that constituted the breach of such right or freedom be remedied and that fair compensation be paid to the injured party."\(^{362}\)

In the Velasquez-Rodriguez case, the Court ruled that the reparations under Article 63(1) are compensatory and not punitive.\(^{363}\)

In addition, Article 63 allows the Court to adopt provisional measure "in cases of extreme gravity and urgency, and when necessary to avoid irreparable damage to persons"\(^{364}\).

3.2.4.1.2 Advisory function:

Article 64 of the Convention invests the Court with an advisory function. This power includes advisory opinions on the interpretation of the "Convention or of other treaties concerning the protection of human rights in the American states"\(^{365}\) as well as regarding the compatibility of a domestic legislation with the Convention\(^{366}\). Such advisory opinion can be made at the request of a member state of the OAS. In addition, organs of the OAS are offered a right to consultation concerning the interpretation of the inter-American human rights instruments in issues related to their mandate.\(^{367}\)

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\(^{361}\) ACHR, Article 65.

\(^{362}\) ACHR, Article 63(1).

\(^{363}\) IACrHR, Velásquez-Rodríguez v. Honduras, para. 37-38.

\(^{364}\) ACHR, Article 63(2).

\(^{365}\) ACHR, Article 64(1).

\(^{366}\) ACHR, Article 64(2).

\(^{367}\) ACHR, Article 64(1).
3.2.4.2 The Inter-American Court and the notion of restorative justice

Restorative Justice has been defined as "a process where all the stakeholders affected by an injustice have an opportunity to discuss how they have been affected by the injustice and to decide what should be done to repair the harm." It operates a shift in the conception of a crime which is seen as affecting individuals and the community as a whole and not solely as a breach of a legal norm. Restorative justice aims at the inclusion of all parties, victims and perpetrators included, in the process to let the parties decide of the way to repair the harm caused by the human rights violation. Here, the focus is put on the general interest more than on the needs of individuals, “[r]estorative justice practices are intended to heal at the individual and communal levels.” The idea is to restore the victims to the situation they were before the violations of their rights happened by addressing the roots of the problem.

This is particularly relevant to the reparations granted by the Court as “[a] substantial part of the reparations may be described as ‘measures of general interest’ rather than as individual reparations seeking to restore the wronged party’s rights.” While the ECHR mainly recourse to monetary remedies, the IACHR displays great creativity when octroying non-monetary remedies that can target individuals, particular communities or even the society as a whole.

Antkowiak enumerates four kinds of non-monetary remedies directed at individuals:

- Restitution and cessation remedies: As an example, the Court ordered to find and return missing corpses as a cessation remedy in cases of enforced disappearances. Similarly, the Court requested State to erase the criminal records of individuals whose right to due process had been violated.
- Rehabilitation remedies: Remedies aiming at the rehabilitation include a broad range of measures such as physical and psychological assistance, education programs. However, ‘State compliance with rehabilitation measures, such as medical and psychological treatment, scholarships, and vocational assistance, has

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been poor.\textsuperscript{373} In the case of \textit{Juvenile Reeducation Institute v. Paraguay}, the Court ordered the State to provide the victims and the victims’ relative with free medical and psychological treatment.\textsuperscript{374}

- Recognition of Responsibility and Apologies: The Court did not recourse to such remedies until 2001 when it requested public apologies from the State of Peru.\textsuperscript{375} This kind of remedies is reminiscent of the idea of restorative justice to make amends for the harms caused.

- Memorials and Commemorations: Measures for the commemorations target both the individuals. It serves to remember the atrocity lived by a community and acknowledge the victims’ status of the individuals. As this kind of measures often does not require too much involvement from the States, Governments are often keener to comply with it than with other remedies.

The Inter-American Court also frequently grants remedies targeted at entire communities especially in cases of mass violations of the rights of indigenous and tribal communities.

As an example, in the case of \textit{Ituango Massacres v. Colombia}, the Court ordered the State to guarantee the security of victims in case of voluntary return to their village where paramilitary groups committed several massacres.\textsuperscript{376}

A more surprising type of remedies is those directed at the society as a whole and which can take the form of legal reform.

In the case of \textit{Bámaca-Velásquez v. Guatemala}, the Court went up to ordering Guatemala to “adopt the legislative and any other measures required to adapt the Guatemalan legal system to international human rights norms and humanitarian law, and to make them domestically effective”\textsuperscript{377}.

\begin{itemize}
\item \textsuperscript{373} Ibid, 295.
\end{itemize}
In conclusion, the Inter-American system of human rights protection is now well established. In comparison with the European System, it offers a better balance between civil and political rights and economic, social and cultural rights. One of the major features of that regional system is the attribution of non-monetary remedies in the spirit of restorative justice. However, it lacks the sufficient enforcement mechanisms necessary to obtain compliance of the member States with the rulings and reparations ordered by the Court.

### 3.3 The African system of human rights protection

#### 3.3.1 A system of protection based on the continent's culture

The protection and the promotion of Human Rights in Africa have been mostly developed by the African Union, and its predecessor, the Organisation of African Unity (1963-2002). Today, the Union is composed of 55 States and represents almost the whole continent, which means around 15% of the world’s population.

If the first aim of this entity was the emancipation of the African countries. It has been quickly criticized by media, churches, inter-governmental and non-governmental organisations for not condemning some of the abuses perpetrated by its members, while it did condemn the abuses by the apartheid system in South Africa. Indeed, despite the endorsement of the principles of the Universal Declaration on Human Rights of 1948 in the preamble of the organisation’s charter, Human Rights protection was not a priority for the union in the first years of its existence.

Only in 1979, 16 years after the creation of the OAU, the Assembly of Heads of State and Government adopted a resolution creating a group of experts that had the task to establish a charter of human rights and some mechanisms of protection. Although the African Charter on Human and Peoples’ Rights was unanimously adopted by the organisation at a 1981 meeting in Nairobi, Kenya, the OAU had to wait 5 more years before the Charter entered into force.

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and the Commission was created – this was because of the Article 63, paragraph 3 of the Charter that required the ratification of the Charter by at least half of the Member States.

Since October 21, 1986, the African continent had its own system of Human Rights Protection, following Europe and the Americas\(^{380}\). However, unlike the Council of Europe which established a judicial body already with the adoption of the European Convention on Human Rights\(^{381}\), it took several additional years for the African organization to create the African Court of Human and Peoples’ Rights. This may be explained in part by the presence of a culture of alternative dispute resolution in the continent and a kind of mistrust of the tribunals\(^{382}\).

Nonetheless, in 1994, the OAU decided to plan several meetings of government experts in order to think about how “to enhance the efficiency of the African Commission and to consider in particular the establishment of an African Court on Human and Peoples’ Rights”\(^{383}\). Again, despite the adoption of the Protocol to the Charter on Human and Peoples’ Rights on the Establishment of an African Court on Human and Peoples’ Rights in June 1998, it only entered into force on January 25, 2004, exactly 30 days after a 15\(^{th}\) State ratified it.

Today, the African Union has developed a complex system of Human Rights protection. Indeed, in addition to the Charter on Human and Peoples’ Rights, the organisation has adopted several legal instruments, either binding (such as the Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa or the African Charter on Democracy, Elections and Governance) or non-binding (such as the Guidelines on Combating Sexual Violence and its Consequences in Africa or the Pretoria Declaration on Economic, Social and Cultural Rights in Africa).


\(^{381}\) Section II of the European Convention on Human Rights, 1950.

\(^{382}\) Uwazie, E., “Alternative Dispute Resolution in Africa: Preventing Conflict and Enhancing Stability”.

Today we count 7 binding instruments and 23 that are not binding, but the commission and the court are not limited to the application of only these instruments since the Court and the Commission shall apply any instruments related to Human and Peoples Rights that have been ratified by the African countries. Moreover, the Commission shall take into consideration the non-written norms that are applicable in African countries (such as customs and general principles).

Despite this large inventory of applicable rules, the African Charter on Human and Peoples Rights remains the main source applied by the Court and the Commission. It is interesting to note that, unlike the American Convention on Human Rights and the European Convention on Human Rights, the African Charter grants special importance to collective rights. Indeed, Articles 20 to 24 are related to the Peoples’ Rights. This specificity is understandable according to the first aim of the African Union which is the emancipation of the African peoples. The charter is also distinguished by the recognition of individual duties in its Chapter II specifically called “Duties” (Articles 27 to 29) which is a list of the persons’ obligations “towards his family and society, the State and other legally recognized communities and the international community”. Moreover, the wish of the Charter-drafters should be noted to elaborate a proper African Charter endorsing the international standards while preserving the continent’s identity.

This particularity is explicitly expressed in several parts of the charter which mention the “traditional” or the “African” values, but it is also seen in Article 18 which recognizes the family as the “natural unit and basis of society”.

In addition to the court and the commission, the African system of Human Rights Protection is unique among the regional systems because it is the only one which established a mechanism that specifically deals with children’s rights. Based on the African Charter on the

384 All these documents can be found on the African Commission on Human and Peoples Rights Website: [http://www.achpr.org/instruments/](http://www.achpr.org/instruments/), (Accessed 2 March 2019).
Rights and Welfare of the Child, adopted in 1990 and entered into force in 1999\(^{389}\), the African Committee of Experts on the Rights and Welfare of the Child shall promote and protect the rights enshrined in the Charter, monitor the implementation and ensure protection of the rights enshrined in the Charter and interpret the provisions of the Charter\(^{390}\).

As of January 2017, only 7 States have not yet ratified the African Charter on the Rights and of the Child\(^{391}\). The committee, composed of 11 members from 11 different African States\(^{392}\) has to deal with various matters such as education\(^ {393}\), cultural activities\(^ {394}\) or health services\(^ {395}\), but also with more sensitive ones such as the sexual exploitation\(^ {396}\) or refugee children\(^ {397}\).

3.3.2 An ambitious project limited in practice

The court and the commission are both composed of 11 members from 11 different States, elected by the African Union Assembly\(^ {398}\). In both institutions the members are elected for 6 years (the judges may be re-elected only once)\(^ {399}\) and they elect a Chairman and a Vice-Chairman for two years\(^ {400}\).


\(^{392}\) ACRWC, Article 33, “Composition”, (1990).


The functions of the Commission are written in Article 30 of the Charter as “to promote human and peoples' rights and ensure their protection in Africa” and then are further developed in Article 45. These functions mean that the Commission has the duty to raise the abuses committed on the African continent or by a Member State but also to inform the members and the African Union about everything that matters the Human and Peoples’ Rights, to advise them, to comment on the different practices and legislations and to interpret the Charter and other relevant legal instruments.

In order to achieve its task, power of investigation is granted to the Commission and the States have the obligation to provide all information required by the Commission. The Charter explicitly provides for the possibility of referring abuses committed by an African country to the Commission only for the Member States. In theory, therefore, only state entities have the power to make a request to the commission to investigate abuses in an African country. However, by providing that the commission must “perform any other tasks which may be entrusted to it by the Assembly of Heads of State and Government,” the Charter broadens the possibility of denouncing abuses and thus tries to avoid diplomatic blockages. Since the Commission is only a quasi-judicial body, its decisions are not binding for the States but by providing reports and recommendations to the African Union, the commission has the possibility to influence the decisions taken by the Union.

<table>
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<tr>
<th>Name</th>
<th>Nationality</th>
<th>Year of election</th>
<th>Name</th>
<th>Nationality</th>
<th>Year of election</th>
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</thead>
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<tr>
<td>Sylvain Oré (p)</td>
<td>Ivory Coast</td>
<td>2010 (re-elected)</td>
<td>Soyata Maiga (c)</td>
<td>Mali</td>
<td>2007 (re-elected)</td>
</tr>
<tr>
<td>Ben Kioko (v-p)</td>
<td>Kenya</td>
<td>2012 (re-elected)</td>
<td>Yeung Kam John Yeung Sik Yuen</td>
<td>Mauritius</td>
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<td>Rafal Ben Achour</td>
<td>Tunisia</td>
<td>2014</td>
<td>Zainabo Sybie Kaytesi</td>
<td>Rwanda</td>
<td>2007 (re-elected)</td>
</tr>
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<td>Angelo Vasco Matusse</td>
<td>Mozambique</td>
<td>2014</td>
<td>Lucy Asunghor</td>
<td>Cameroon</td>
<td>2010 (re-elected)</td>
</tr>
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<td>2016</td>
<td>Saha Ali Fadel</td>
<td>Algeria</td>
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<td>2016</td>
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<td>Solomon Ayek Dersso</td>
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<td>2015</td>
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<td>Chafia Bensaoula</td>
<td>Algeria</td>
<td>2017</td>
<td>Jamesina Essi L. King</td>
<td>Sierra Leone</td>
<td>2015</td>
</tr>
<tr>
<td>Blaise Tchikaya</td>
<td>Republic of Congo</td>
<td>2018</td>
<td>Hatem Essaiem</td>
<td>Tunisia</td>
<td>2017</td>
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<tr>
<td>Stella Ishiako Amona</td>
<td>Nigeria</td>
<td>2018</td>
<td>Maria Teresa Manuela</td>
<td>Angola</td>
<td>2017</td>
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<td>Tanzania</td>
<td>2018</td>
<td>Rémy Ngoy Lambu</td>
<td>Democratic Republic of Congo</td>
<td>2017</td>
</tr>
</tbody>
</table>

The court on the other hand is a judicial body and the States must comply with its decisions. It also has the means to take provisional measures “in cases of extreme gravity and urgency.” It must be noted that the final decisions of the court are not subject to appeal. A ruling can be reviewed only in the light of new evidence or it can be interpreted.

Once again, the drafters of the protocol establishing the court looked to adapt the mechanism to African culture. Indeed, the court shall try to find an amicable settlement to every dispute in priority.

The Court has also a pedagogic task that can be seen in its possibility to provide an advisory opinion at the request of the States, the African Union or its organs, on any legal matter relating to the Human and Peoples’ Rights. Unfortunately, this possibility remains widely unused among the African countries and as of October 2018, the court had received only 13 requests for an advisory opinion.

Individuals and NGOs can access this right only if the State concerned by the request has previously made a specific declaration allowing such application, provided for at Article 34 (6).

This declaration is one of the major controversies of the African system of Human Rights protection. Indeed, despite Article 34 (6) stating that “the State shall make a declaration”, only 9 of the 55 States have made it by March 2019. More generally, the reluctance of the States to submit to the institutions and instruments of the African Union in the field of human rights has become an obstacle to the proper functioning of the African system. While all of the

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412 African Court on Human and Peoples’ Rights, press release, “The Gambia becomes the ninth country to allow NGOs and Individuals to access the African Court directly”, (23 November 2018).
member States have ratified the Constitutive Act of the Union and the African Charter on Human and Peoples’ Rights, subsequent documents were less successful. Despite the international support for the creation of the court, only 30 States have ratified the Protocol by March 2019 and the African Union Convention for the Protection and Assistance of internally displaced persons in Africa (Kampala Convention, adopted in 2009) has been ratified by 27 countries, which means less than half of the Member States.

Moreover, it should be noticed that even when the States did ratify the legal instruments, the African institutions have trouble making them comply with their obligation. One of the most flagrant examples of that concerns the obligation for States to produce a report every two years about the implementation of the Human and Peoples’ Rights principle in their country. In reality, these reports are produced on a random basis. For example, the first reports from Angola covered 20 years, the first one between 1990 and 1998 and the second one between 1999 and 2010, the Beninese’s last report was given in 2000, while the Chadian and the Comorian government have yet to produce any report at all.

The problem is similar with the implementation of the Court’s decision. Of the 15 judgments studied in the 2016 activity report of the African Court on Human and Peoples’ Rights (including final decisions and provisional measures), only one was partially implemented and another one was ongoing (it should be noted that 12 of the decisions concerned one single country).

In addition to these practical obstacles, the African system of Human Rights protection is currently facing a questioning of its conception regarding the possibility to prosecute individuals. Currently, the Court can only prosecute member States, like the other regional courts from Europe and America. However, with mistrust against the International Criminal Court rising in Africa, the African Union is considering extending the jurisdiction of the Court

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413 African Court on Human and Peoples’ Rights, press release, “Chad becomes the 30th AU member State to ratify the protocol on the establishment of the African Court on Human and Peoples’ Rights”, (11 February 2016).
415 African Charter on Human and Peoples’ Rights, Article 62.
to include criminal matters related to international crimes but also to enable the Court to try new crimes such as unconstitutional change or prolongation of government\textsuperscript{417}.

3.3.3 Landmark Cases

3.3.3.1 Democratic Republic of Congo v. Burundi, Rwanda, Uganda, AHRLR 19, The African Commission on Human and Peoples’ Rights:

In this case, the Democratic Republic of Congo alleged human rights abuses against rebels on its territory perpetrated by the armed forces of Burundi, Rwanda, and Uganda. The Democratic Republic of Congo claimed breaches of several legal instruments such as the Charter of the United Nations, the Charter of the OAU or the International Covenant on Civil and Political Rights.

The Commission found the respondent States guilty and recommended that they pay adequate compensation.

What matters in this case is that it is the only communication filed by a State against other States using Article 49 of the Charter.

3.3.3.2 Social and Economic Rights Action Center (SERAC) and Center for Economic and Social Rights (CESR) v. Nigeria, AHRLR 60, The African Commission on Human and Peoples’ Rights:

The complaint was a video sent by the applicants accusing the government of Nigeria of having caused environmental degradation and health problems due to the contamination of the environment made by the State oil company. The government of Nigeria was found guilty of breaching several Articles of the African Charter.

What matters in this case is that the condition of exhaustion of local remedies required in Article 56 (5) of the Charter on Human and Peoples’ Rights for the admissibility was not met. However, since the respondent was not able to prove that its legislation was protecting these

rights and so, that the domestic courts were effective remedies, the Commission ruled that there was an exception to Article 56 (5).

3.3.3.3 Femi Falana v. The African Commission on Human and Peoples’ Rights, Application n° 019/2015, The African Court on Human and Peoples’ Rights:

This is the first hearing heard by the court. The applicant was a well-known lawyer and Human Rights Activist who requested the Commission to file a communication to the court regarding the alleged Human Rights violation perpetrated by the government of Burundi against peaceful protesters, journalists and Human Rights activists. The applicant could not seize the court by himself since Burundi did not produce the declaration provided for at the Article 34 (6) of the Protocol establishing the court allowing individuals to file a communication to the court.

The question then was to know if an individual could file a communication against an organization which did not produce the said declaration since it is not a State entity. This solution could open the possibility for individuals to overcome the obstacle of Article 34 (6). The court’s ruling is unclear on whether the application is not admissible because the respondent is not a State Party to the Charter or if it is because it did not file the declaration pursuant to Article 34 (6) but the Court rejected the application and said it was not able to force the commission to bring a case to the Court.

3.3.3.4 The African Commission on Human and Peoples’ Rights v. The Republic of Kenya, Application 006/2012, The African Court on Human and Peoples Rights:

This communication was filed by the Commission against a measure taken by the Kenyan authorities to evict the communities living in the Mau Forest on the grounds that the forest constituted a reserved water catchment zone. According to the applicant, this decision could have devastating effects on the survival of the Ogiek ethnic group which is an indigenous people living in that forest.

After having taken provisional measures in 2013 the Court issued a judgment in 2017 based on the African Charter on Human and Peoples’ Rights but also on the UN Declaration of the Rights of Indigenous Peoples. The Court first recognized the Ogiek as a distinct tribe, which the Kenyan authority failed to do. According to this status, the indigenous people was
protected by the collective rights provided for in the Charter, including the right to culture and the right to use and dispose of wealth and resources.

3.4 The Southeast-Asian system of human rights protection

Since the Association of Southeast Asian Nations’ (ASEAN) inception in 1967, human rights protection has only slowly made it up higher on the agenda. Even today, with a regional, intergovernmental commission firmly in place and abundant references to upholding and protecting human rights in Southeast Asia in official documents, human rights protection is porous at best. What one is to make of the mechanisms and progress to protect human rights in Southeast Asia depends heavily on one’s own expectations, standards and theoretical approach. It is however objectively observable that ASEAN’s rhetorical commitments stand in stark contrast to the region’s reality in this respect.

3.4.1 ASEAN Documents, ASEAN Rhetoric – The Legalisation of Human Rights Protection

As early as 1993, at the United Nations World Conference on Human Rights in Vienna, the ASEAN member states – six at the time: the five founding members and Brunei - were part of a group of nations that produced and endorsed the Vienna Declaration and Programme of Action. The “Vienna Declaration“ holds that all states who endorsed it accept the universality of human rights as well as a number of more specific provisions pertaining to the protection of minorities or the individual rights to seek asylum from prosecution.418

Not a month later, at the 26th ASEAN Ministerial Meeting in Singapore, human rights protection had also found its way into the official documents of ASEAN, stating that the ASEAN Foreign Ministers are

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“in support of the Vienna Declaration and Programme of Action of 25 June 1993, [and that] they agreed that ASEAN should also consider the establishment of an appropriate regional mechanism on human rights.”419

While there was no great amount of progress or indeed discussion on human rights and the protection thereof in the following 10 years or so, it continued to play a role in civil society discussions and a Working Group for an ASEAN Human Rights Mechanism was established by the civil society and later officially recognised by ASEAN.420 In addition to the efforts of this working group and numerous mentions of human rights and its protection in ASEAN documents and discourse especially since 2004, the adoption of the ASEAN Charter in 2007 was a real and tangible step forward in ASEAN’s evolution towards meaningful human rights protection.

ASEAN’s main legal body clearly references the need and intention to protect human rights in Southeast Asia. It references this, in fact, even in the preamble of the document where it states adherence to “respect for and protection of human rights and fundamental freedoms”.421 Further, Article 14 demands that a human rights body is to be created “in conformity with the purposes and principles of the ASEAN charter relating to the promotion and protection of human rights and fundamental freedoms”.422

Other relevant ASEAN documents are no less shy when it comes to human rights protection commitments. The ASEAN Political-Security Community (APSC) Blueprint 2009 as well as the current APSC Blueprint 2025 and the ASEAN Community Vision 2025 for example, all contain clear statements with regards to the protection of human rights, going as far as encouraging ASEAN member states to engage with the relevant human rights mechanisms to which they are party.423

In addition to these documents and numerous commitments there, ASEAN also adopted the ASEAN Human Rights Declaration (AHRD) in 2012, after the document was drafted by the ASEAN Intergovernmental Commission on Human Rights (AICHR). The ASEAN Human Rights Declaration generally adopts many of the standards of the Universal Declaration of Human Rights (UDHR). Articles 10 and 26 state that all ASEAN member states affirm all of the civil, political, economic, social and cultural rights in the UDHR. Conversely, it differs from the basic assumptions of a number of UDHR provisions, for instance referring repeatedly to exercising rights in accordance with national law.

3.4.1.1 Relative Universality

Perhaps a great oxymoron within the declaration, and within the human rights discourse in ASEAN in general, is the question of universality of human rights. The declaration states in Article 7 that

“All human rights are universal, indivisible, interdependent and interrelated. All human rights and fundamental freedoms in this declaration must be treated in a fair and equal manner, on the same footing and with the same emphasis. At the same time, the realisation of human rights must be considered in the regional and national context bearing in mind different political, economic, legal, social, cultural, historical and religious backgrounds.”

While ASEAN documents above cited the universality of human rights in the way it was previously embraced by the Vienna Declaration, the consideration of the regional and national context and bearing in mind different political, economic, legal, social, cultural, historical and religious backgrounds, introduces a degree of relativism. The ADHR enshrines this different view on universalism throughout the document, such as in Article 16, stating that “every person has the right to seek and receive asylum in another State”, but again tellingly adding that this must be “in accordance with the laws of such State”.

425 Ibid, Art. 7, emphasis added.
426 Ibid, Art. 16.
ASEAN documents, declarations and its main legal body, the ASEAN charter are strong on their commitment to the protection of human rights, setting aside the relativism claims around universality. However, the attempt to reconcile all efforts of human rights protection with core ASEAN principles such as the ASEAN way and non-interference, relativizes the overall applicability, and therefore the implementation of human rights protection in the spirit of the Vienna Declaration and the UDHR. Perhaps unsurprisingly, the core principles of ASEAN reign supreme in the field of human rights as they do in ASEAN’s general modus operandi. To be sure, the ADHR ends on the following, unambiguous Article:

“[n]othing in this Declaration may be interpreted as implying for any State, group or person any right to perform any act aimed at undermining the purposes and principles of ASEAN”.\(^{427}\)

3.4.2 The ASEAN Intergovernmental Commission on Human Rights (AICHR)

The ASEAN Intergovernmental Commission on Human Rights (AICHR) was the answer to the ASEAN charter’s Article 14 demand to create a human rights body. After the charter’s adoption in 2007, it took two years to establish it. Its terms of reference (ToR) were agreed to by the member states of ASEAN in 2009 and generally speaking, AICHR echoes the theme laid out above: rhetorical commitment with little to no protective impact.

3.4.2.1 Composition and Mandate

AICHR is composed of ten representatives that serve for three years, with the possibility to renew an appointment once. The representatives can come from different backgrounds, such as academia, civil society, foreign service and other government officials. ASEAN member states can freely choose, and indeed have done so in the past, whether they want to send a seasoned human rights expert from a civil-society background, or an official who may even concurrently hold a government position. Regardless of who is sent, it is crucial to note that

\(^{427}\) Ibid., Art. 40.
each appointee is “accountable to the appointing government”. At the same time, in line with ASEAN’s basic principles of decision-making, all decisions have to be made in consensus, effectively rendering each member, and therefore government, full veto power in every decision. AICHR is, as the name suggests, strictly intergovernmental and virtually nothing in the ToR transcends this set-up. The fact that a government can send a person as a representative that is part of the government and may or may not have any human rights background or indeed interest, speaks volumes.

AICHR functions furthermore as a “consultative body”. Bound by the strict ToR, it has zero independent agency quality with no powers to independently monitor. It has no independent, permanent bureaucratic structure, no non-compliance mechanisms and most importantly, as mentioned above, cannot take any decisions, make remarks or even recommendations with regards to any human rights violation if there is no unanimity. In fact, it does not have the mandate to even receive human rights complaints. But even if a complaint were to make it to the commission, the principle of unanimity means that a potential government that would be implicated in a possible human rights violation would have to join a statement or action by AICHR against itself. This is unlikely however, not least since the representative is hand-picked by the respective government and as stated above, may even be part of that government.

3.4.2.2 Promotion, not Protection

Based on the ToR, AICHR has not much to offer in terms of protecting human rights and can only focus on promotion thereof, despite the fact that its very purpose is stated to be both. AICHR is specifically tasked to “enhance public awareness of human rights through education, research, thematic studies and dissemination of information”, for which it has a slightly stronger mandate than for the protection of human rights.

429 Ibid., Art. 3.
430 Ibid., Art. 1.1.
431 Ibid., Art. 4.3, 4.11.
Lastly, again reigning in on its independence and the ability to actively protect human rights, AICHR is subordinate to the ASEAN Foreign Ministers. It reports to the ministers at the ASEAN Foreign Ministers Meeting and it is them who must approve the workplan and proposed budget of the commission. Therefore, ASEAN governments, via their Foreign Ministers, have yet another means of great and direct influence on the commission’s scope and work, not least by controlling the budget. The commission’s initial funding in 2009 for instance, as announced by then Thai Prime Minister Abhisit Vejjajiva, comprised of a meagre USD200.000, or USD20.000 per member state.\(^\text{432}\) By comparison, the budget of the Inter-American Commission on Human Rights in the same year was close to USD 4.000.000.\(^\text{433}\)

Overall, it should therefore come as no surprise that AICHR has not yet taken any public action or protective measures on a human rights violation that has occurred within ASEAN since its inception in 2009. Southeast Asia exemplifies a region where promoting human rights and having set up a human rights mechanism has not yet led to effective human rights protection.

While the ToR are strict and preclude AICHR from exercising much or indeed any meaningful protection of human rights, promotion and continued discourse have merits and AICHR focuses on such promotional human rights activities, including trainings, workshops, debates and seminars. Furthermore, despite the fact that the ToR do not foresee for the commission to receive, review, let alone act upon human rights complaints, they do state that AICHR is to “\textit{obtain information from ASEAN Member States on the promotion and protection of human rights}”\(^\text{434}\). So far, AICHR’s interpretation of this has been timid, but it may not always remain so. In conclusion, for the time being, AICHR is a promotional rather than protective human rights body.


3.5. Discussion Points and Further Reading

3.5.1 Discussion Points

- What are advantages and disadvantages of regional human rights protection mechanisms?
- What are some of the main similarities and differences between the different regions and mechanisms mentioned?
- How would you begin to qualify the different mechanisms?
- Is there a „one size fits all“ solution? If not, what are factors that need to be considered for each region?
- Are any of the international human rights treaty body systems an effective set of mechanisms for holding states to account for their practices affecting human rights?
- Have we made any progress in reducing human rights violations with the help of regional mechanism?
- Does talk about human rights protection matter when the reality does not reflect the “statements” that have been made? Is a promotional human rights institution of any worth?
- Can ASEAN reconcile effective human rights protection with its core principles, such as non-interference and unanimity?
- Can human rights exist without a strong claim to universalism?
- Are there realistic ways to strengthen the mandate of AICHR or is it doomed to remain a “toothless” commission? How does it compare to other commissions?
- Is it better to have a weak human rights commission than to have none? Are critics of AICHR too harsh and do not account for political realities and the very diverse views on human rights within ASEAN?

3.5.2 Further Reading

3.5.2.1 Council of Europe and European Union


**3.5.2.2 Inter-American System of Human Rights Protection**


**3.5.2.3 African System of Human Rights Protection**


Viljoen, F. (2012). International human rights law in Africa. *Oxford University Press on Demand*


### 3.5.2.4 The Southeast-Asian system of Human Rights Protection


CHAPTER 4: DEALING WITH THE AFTERMATH OF HUMAN RIGHTS MASS VIOLATIONS

4.1 International Criminal Law

4.1.1 The Emergence of International Criminal Law

The intention of international criminal law is to protect human rights by preventing impunity. Thereby “the existence of the International Criminal Court is the result of a 50-year journey, during which the international community struggled to find an effective way to end impunity for international crimes.”

4.1.1.1 The Nuremberg Tribunals and the International Military Tribunal for the Far East

The International Military Tribunals after the Second World War were role models for the International Criminal Court (ICC). They were based on the Nuremberg Charter, codifying international criminal law standards regarding individual crimes by men and not abstract entities in a period of time when the protection of human rights on the international level was insufficient and no general human rights monitoring body existed. The Nuremberg trials initiated a movement for the prompt establishment of a permanent international criminal court, leading to the adoption of the Rome Statute of the ICC.

In 1943, the Allied forces agreed on the Moscow Declaration to prosecute those high-ranking members of the German Nazi regime that were the most responsible for the commission of war crimes. After the war, the UN Commission of the Investigation of War Crimes, composed of the representatives of most of the Allies was established to set the stage for the post-war prosecution and to prepare a “Draft Convention for the Establishment of a United Nations War Crimes Court”. But it was the London conference consisting of the four victorious powers that laid the basis for the trial in Nuremberg by determining the Agreement for the

436 Zappala, S., Human rights in international criminal proceedings, p. 8.
437 Schabas, W., An Introduction to the International Criminal Court, p. 5.
Prosecution and Punishment of Major War Crimes of the European Axis and Establishing the Charter of the International Military Tribunal, known as “Nuremberg Charter” or “London Charter”, which was formally adopted on 8 August 1945.

A problem, however, was that the Charter of the International Military Tribunal was established after the crimes had been committed. Therefore, the Tribunal was criticized for violating the fundamental principle “nulla poena sine lege” by creating an ex post facto criminalization. Moreover, the Nuremberg Charter did not provide for a right of appeal or revision. Instead, it provided in Article 26 of the Charter that the judgment would be final.

The principles of law of the Nuremberg Charter were used again in the Tribunal for the Far East, where war crimes committed by Japanese armed forces were tried. The provisions were similar to those used in the Nuremberg Tribunal.

The Nuremberg Charter was the basis for the Control Council Law No. 10 which was enacted in December 1945 and provided the legal basis for post war trials on crimes against humanity, war crimes and crimes against peace.

Subsequently, in December 1946, the UN General Assembly affirmed in Resolution 95 (I) “the principles of international law recognised by the Charter of the Nurnberg Tribunal and the Judgement of the Tribunal”.

In November 1947, the General Assembly established the International Law Commission and adopted Resolution 177 (II) directing the Commission to “(a) formulate the principles of the international law recognized in the Charter of the Nuremberg Tribunal and in the judgement of the Tribunal and (b) prepare a draft code of offences against the peace and security of mankind, indicating clearly the place to be accorded to the principles mentioned in subparagraph (a) above”.

439 Zappala, S., Human rights in international criminal proceedings, p. 1566.
441 UNGA, Resolution 177 (II).
4.1.1.2 Ad hoc tribunals

4.1.1.2.1 The International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR)

While the International Law Commission considered the draft statute of an international criminal court, a commission of experts established by the Security Council identified war crimes and crimes against humanity being committed in the former Yugoslavia during the Balkan Conflict.

In reaction, the Security Council adopted Resolution 827 of 8 May 1993 to establish the International Criminal Tribunal for the former Yugoslavia (ICTY), an ad-hoc tribunal to prosecute “persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991”.

The establishment of ad hoc tribunals is generally based on chapter VII of the UN-Charter by resolutions of the UN Security Council.\(^\text{442}\) The structure and organization as well as the personal, temporal and subject matter jurisdiction of these tribunals is set out by their statutes. The statutes also provide for applicable general principles and procedural issues. They are binding for all member states by virtue of Art. 25 of the UN Charter.

The ICTY started functioning in 1995 and consisted of three trial chambers and an appeals chamber. The mandate lasted from 1993 until 2017. The ICTY has charged over 160 persons including heads of states, prime ministers and army chiefs based on their individual responsibility. The last proceeding was finished on 29 November 2017 and the ICTY officially ceased its operation on 31 December 2017.

In November 1994, the Security Council created a second ad-hoc tribunal on request of Rwanda. The International Criminal Tribunal for Rwanda (ICTR) was charged with the prosecution of genocide and serious violations of humanitarian law in Rwanda and neighbouring countries. The tribunal’s statute was identical with the ICTY’s Statute except for the fact that the war crimes provisions also reflected that the genocide took place in a purely internal armed conflict.

\(^{442}\) Security Council, Resolution 827 and 955.
The ICTY and the ICTR shared several institutions, such as the prosecutor’s office and the composition of the Appeal Chamber to secure uniformity of prosecutorial policy and appellate jurisprudence. The mandate of the ICTR lasted until 31 December 2015.

In 2015, the responsibilities of both Tribunals had jointly been taken over by the International Residual Mechanism for Criminal Tribunals (IRMTC). The Mechanism was created on 22 December 2010 by the Security Council and started operating on 1 July 2010. During the first years it operated parallel with the ICTY and the ICTR and continued operating after the tribunals closure.

Among the historic achievement of the ICTR was that it was the first tribunal to deliver verdicts against persons responsible for genocide. It also recognised rape as a means of perpetrating genocide.

The first major judgement of the Appeals Chamber made it clear that crimes against humanity could be committed in peacetime and not just in wartime, which had been the situation in the cases dealt with by the Nuremberg Tribunals. The ICTR Appeals Chamber also held that also war crimes committed in internal armed conflicts are punishable under international criminal law. These judgements where later incorporated in Article 7 and 8 of the Rome Statute of the ICC. Also, the ad-hoc tribunals provided a role model of how an international criminal court could look like.

4.1.1.2 Ad-hoc “hybrid” tribunals in Southeast Asia

Ad-hoc tribunals – besides the ICTY and the ICTR, one can also mention the Special Court for Sierra Leone (SCSL) and the Special Tribunal for Lebanon (STL) – have all been set up by the international community in order to achieve justice with regard to particular situations. The same holds true for the two tribunals that have been established in Southeast Asia.

The Special Panels for Serious Crimes (SPSC) in Timor-Leste were set up in 2000 to deal with crimes allegedly committed by Indonesian-backed militia groups and military forces

following the 1999 referendum that resulted in the independence of the Democratic Republic of Timor-Leste. The Special Panels were part of the District Court in Dili and they were each composed of two international judges and one East-Timorese judge (a so-called “hybrid” court). They had the mandate to exercise jurisdiction with respect to genocide, war crimes, crimes against humanity, murder, sexual offences, and torture. In 2005, the SPSC completed their mandate after having handed down 84 convictions and three acquittals. However, most of the convicted perpetrators were low-level militia soldiers as opposed to those high-rank army and militia members who are considered the most responsible for the crimes.

The other “hybrid” tribunal on Asian soil can be found in the Extraordinary Chambers in the Courts of Cambodia (ECCC) dealing with crimes committed between 1975 and 1979 by the Khmer Rouge, which resulted in the death of an estimated 1.7 million people, accounting for about 20 percent of the Cambodian population at the time. The ECCC was put into operation in 2006 pursuant to an agreement between the United Nations and the Royal Government of Cambodia. The trial chambers are each composed of three Cambodian judges and two international judges. The subject-matter jurisdiction of the ECCC is confined to the crimes of genocide, crimes against humanity, and grave breaches of the 1949 Geneva Conventions.

In 2010, the ECCC handed down a judgment holding Kaing Guek Eav, the former head of the S-21 prison, guilty of crimes against humanity and grave breaches of the Geneva Conventions of 1949. Another famous judgment was made in the case against Khieu Samphan who was appointed Democratic Kampuchea's Head of State and succeeded Pol Pot as leader of the Khmer Rouge in 1987. In 2014, he received life sentences for crimes against humanity, and in 2018, the tribunal found him also guilty of the crime of genocide against the Vietnamese people. Due to governmental interference and disputes between the Cambodian and the international judges, even resulting in the resignation of judges as well as defense lawyers, the ECCC has been confronted with major obstacles in its work. The outcome of the ECCC has already been criticized as unsatisfactory. However, the potential of “hybrid” international


446 UNGA, Resolution 57/228.
tribunals to make a positive contribution to ongoing reform processes in the domestic justice sector of the respective country is still being emphasized.\(^{447}\)

### 4.1.2 The Rome Statute and the International Criminal Court (ICC)

#### 4.1.2.1 The Crimes

The ICC has jurisdiction over the crimes named in Article 5 of the Rome Statute. These are genocide, crimes against humanity, war crimes and, since 17 July 2018, the crime of aggression.

#### 4.1.2.1.1 Genocide

The term genocide covers actions that are carried out with the intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such (Article 6). The UN General Assembly adopted the Genocide Convention in 1948 which sets out a careful definition of the crime and prohibits Genocide regardless whether it is perpetrated in war or peacetime.

The different classes of actions constituting “genocide” were spelled out in different judgements of the ICTR. The ICTR decided that “killing” must be interpreted as “murder”, i.e. voluntary or intentional killing.\(^{448}\)

According to the ICTR, “serious bodily or mental harm do not necessarily mean that the harm is permanent and irremediable.\(^{449}\) The ICTY ruled that inhuman treatment, torture, rape, sexual abuse and deportation are acts that can cause serious bodily or mental injury.\(^ {450}\)

The ICTR Trial Chamber held that subjecting a group of people to a subsistence diet, systematic expulsion from homes and reduction of essential medical service below minimum requirements or the deliberate deprivation of resources indispensable for survival, such as food or medical services, fulfils the condition of deliberately inflicting on the group

\(^{447}\) Sperfeldt, C., “From the Margins of Internationalized Criminal Justice: Lessons Learned at the Extraordinary Chambers of Cambodia”, p. 1136; see also Linton, S., “Putting Cambodia’s Extraordinary Chambers into Context”, p. 256 (“Disturbingly substandard as it is, this form of court was the best that could be agreed upon.”).


\(^{449}\) Akayesu, (ICTR 96-4-T, TC), 17 June 2004, § 291.

\(^{450}\) Krstic, (ICTY IT-98-33-T, TC), 2 August 2001, § 513.
conditions of life calculated to bring about its physical destruction. The Trial Chamber also held that “also included is the creating of circumstances that would lead to a slow death, such as lack of proper housing, clothing and hygiene or excessive work or physical exertion.”

The Chamber further held that “imposing measures intended to prevent births within the group” could mean “sexual mutilation, the practice of sterilization, forced birth control and separation of sexes and prohibition of marriages” even if the measures are only mental. Moreover, “forcibly transferring children of the group to another group” covers also threats or intimidation leading to the forcible transfer.

In the ICTR’s Akayesu case, the Trial Chamber decided that a person can be convicted of genocide even if a relevant action with the required intent is committed against only one member of a group.

The four protected groups under Article 6 have, so far, not been clearly defined. The ICTR Chamber noted that different concepts must be assessed in the light of a particular political, social and cultural context and that membership of a group is attributed rather subjectively than objectively.

Contrary to various commentators, the ICTY Appeals Chamber held that “existence of a plan or policy is not a legal ingredient of the crime.”

The mental requirement for genocide is the intent to destroy, in whole or in part, a national, ethnical, racial or religious group. Genocide is therefore considered as a crime which depersonalizes the victim in a way that individual qualities or characteristics are not required but rather the membership of a group.

The ICTR held that the commission of genocide requires a dolus specialis or special intent. Special intent is qualified by the ICTR as “the special intention, required as a constitutive element of crime which demands that the perpetrator clearly seeks to produce the act

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451 Akayesu, TJ, §§ 505-506
452 Brdanin, (ICTY IT-99-36-T, TC), 1 September 2004, § 691.
453 Akayesu, TJ, § 507
454 Ibid, § 508
455 Akayesu, TJ, § 509.
456 Akayesu, TJ, § 521.
457 Rutaganda, TJ, § 56.
The ICTR also held that the special intent can be inferred “from all acts or utterances of the accused, or from the general context in which other culpable acts were perpetrated systematically against the same group, regardless of whether such other acts were committed by the same perpetrator or even by other perpetrators.”

4.1.2.1.2 Crimes against Humanity

Article 7 of the Rome Statute stipulates international criminal liability for crimes against humanity. Any of the enumerated acts can be considered as crimes against humanity only if they have been committed as part of a widespread or systematic attack directed against any civilian population. Article 7(2)(a) further provides that this refers to a course of conduct involving the multiple commission of acts referred to Article 7(1) against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack. The ICC held that, even if carried out over a large geographical area or directed against a large number of victims, such attacks must still be thoroughly organized and follow a regular pattern.

The ICC Pre Trial Chamber II held, that “such a policy may be made by groups of persons who govern a specific territory or by any organisation with the capability to commit a widespread or systematic attack against a civilian population. The policy needs to be formalized” The Chamber also ruled that “an attack which is planned, directed or organized – as opposed to spontaneous or isolated acts of violence – will satisfy this criterion”. The Pre-Trial Chamber I pointed out, that the attack must be conducted “in furtherance of a common policy involving public or private resources. Such a policy may be made either by groups of persons who govern a specific territory or by any organization with the capability to commit a widespread or systematic attack against a civilian population”.

Consequently, if an individual is unaware of the fact that his actions are part of a widespread or systematic attack on a civilian population, he cannot be guilty of crimes against humanity.

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460 Akayesu, TJ, § 498.
461 Ibid., § 523.
463 Bema, (ICC-01/05-01/08), 21 March 2016, p. 81.
464 Ibid.
465 Katanga et al. (ICC-01/04 – 01/07), p. 398.
but, rather, of murder or war crimes.\textsuperscript{466} Nonetheless, the definition of crimes against humanity does not require any motive for the commission of such crimes.\textsuperscript{467}

**Southeast Asian Case Study: “Drug War” in the Philippines**

At the beginning of 2018, the Prosecutor of the International Criminal Court announced a preliminary examination (see below 4.1.2.3.2) of the situation in the Philippines. Since then, the Prosecutor has analysed crimes allegedly committed since at least 1 July 2016 in the context of the "war on drugs" campaign launched by the Government of the Philippines under President Rodrigo Duterte. Specifically, it has been alleged that since 1 July 2016, thousands of persons have been killed for reasons related to their alleged involvement in illegal drug use or dealing. While some of such killings have reportedly occurred in the context of clashes between or within gangs, it is alleged that many of the reported incidents involved extrajudicial killings in the course of police anti-drug operations. The Prosecutor needs to decide whether some of the acts committed amount to a widespread or systematic attack against the civilian population.

Shortly after the Prosecutor’s announcement, Philippine President Rodrigo Duterte decided that the Philippines will withdraw from the ICC. In his withdrawal announcement, Duterte complained, in particular, about a lack of respect for the principles of complementarity, due process and the presumption of innocence. The Philippines’ withdrawal became effective in March 2019. However, according to Article 127(2) of the Rome Statute, all actions committed before the withdrawal becomes effective remain subject to the ICC’s jurisdiction. Nonetheless, the Philippines’ withdrawal exemplifies the Court’s fragile foothold across Southeast Asia. To date, Cambodia and Timor-Leste are the only remaining ICC member states.

**4.1.2.1.3 War Crimes**

The term war crimes refers to serious breaches of international humanitarian law during an international or domestic armed conflict.\textsuperscript{468} According to Article 8 of the Rome Statute, this

\textsuperscript{466} Schabas, W., *International Criminal Court*, p. 114.
\textsuperscript{467} Ibid.
includes certain enumerated grave breaches of the Geneva Conventions of 12 August 1949, including their common Article 3 referring to internal conflicts, and other enumerated serious violations of the laws and customs applicable in international and non-international armed conflict.

4.1.2.1.4 Aggression

When the Rome Statute entered into force on 1 July 2002, the ICC’s jurisdiction over the crime of aggression was suspended until a suitable definition would be found. ICC member states then decided upon the definition of the crime at a review conference in Kampala in 2010. At the end of the year 2017, the ICC member states finally moved to activate the Court’s jurisdiction over the crime of aggression, effective from 17 July 2018. According to Article 8 bis, the crime of aggression means "the planning, preparation, initiation or execution, by a person in a position effectively to exercise control over or to direct the political or military action of a State, of an act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations." The act of aggression means "the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations." These acts can include, among others, invasion, military occupation, and annexation by the use of force, blockade by the ports or coasts.

4.1.2.2 Jurisdiction of the ICC

The ICC does not have universal jurisdiction. To be persecuted at the ICC as an individual, either territorial or personal jurisdiction must exist:

- Territorial jurisdiction: Crimes committed on the territory of States Parties, regardless of the nationality of the offender (Article 12(2)(a) of the Statute) or crimes committed on the territory of States that accepts the ICC’s jurisdiction on

469 The newly defined crime of aggression was inserted into the ICC Statue as Article 8 bis by resolution RC/Res.6 of 11 June 2010.
an ad hoc basis (Article 12(3)) or, in accordance with Article 13(b), where jurisdiction is conferred by the United Nations Security Council.470

- **Personal jurisdiction:** Natural persons that are nationals of a State party of the Rome Statute, regardless where they are located (Article 12 (2) (b)), or nationals of non-Party States that accept the jurisdiction of the ICC by filing a declaration with the Court.471

- **Temporal jurisdiction:** Crimes committed after the entry into force of the Statute on 1 July 2002 (Article 11 (1)) or, if a State has become a member at a later date, crimes committed after the date of entry into force for that State. Article 24 also prohibits retroactive jurisdiction.

**Principle of Complementarity:** The Principle of Complementarity is set out in Article 1. It regulates the relationship between the ICC and domestic criminal jurisdiction. The ICC is not supposed to replace domestic jurisdiction but to provide an additional forum when domestic jurisdiction fails to bring justice in cases of alleged genocide, crimes against humanity, war crimes or aggression. According to Article 17(1)(a), a case is inadmissible before the ICC where the case is being prosecuted or investigated by a state that has jurisdiction over it, unless the state is unable or unwilling genuinely to carry out an investigation or prosecution. The ICC held that the investigation or prosecution has to “encompass both the person and the conduct which is the subject of the case before the Court”.472

**Case study: The Rohingya Crisis and ICC territorial jurisdiction**

In 2016 and 2017, Myanmar military forces attacked Rohingya people in the country's north-west Rakhine state. The atrocities included attacks on people and locations, looting and burning down villages, mass killing of Rohingya civilians, gang rapes, and other sexual violence. According to UN reports, as of September 2018, over 700,000

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471 Ibid., p. 76.
Rohingya people had fled or had been driven out of Rakhine state who then took shelter in the neighbouring Bangladesh as refugees.

In September 2018, following a request submitted by the ICC Prosecutor, the Pre-Trial Chamber I decided by majority that the Court may exercise jurisdiction over the alleged deportation of the Rohingya people from Myanmar occurred on the territory of Myanmar (which is a State not party to the Statute) to Bangladesh (which is a State party to the Statute). Thus, the ICC stated that it has jurisdiction over acts which have taken place mainly in the territory of Myanmar, however with the consequence of a mass exodus to the ICC member state Bangladesh. Territorial jurisdiction could therefore be established.

Consequently, the Prosecutor announced the opening of a preliminary examination (see below 4.1.2.3.2) concerning the alleged deportation of the Rohingya people from Myanmar to Bangladesh as well as potentially other crimes under Article 7 of the Rome Statute (Crimes against Humanity).

### 4.1.2.3 Legal Process

#### 4.1.2.3.1 Trigger Mechanism

To trigger proceedings at the ICC, there are three mechanisms laid down in Article 13 of the Statute. These are as follows:

a) According to Article 13 (a), the Court may exercise its jurisdiction after a situation has been referred to the prosecutor by a state party. A reciprocity or special interest in the matter is not required. The first three cases of the ICC have been self-referrals by the member states Uganda, the Democratic Republic of Congo and the Central African Republic.

b) The second mechanism to trigger proceedings at the ICC is, according to Article 13 (b), the referral of a situation by the United Nations Security Council acting under Chapter VII of the UN Charter. The Security Council can even refer a situation to the ICC if the
concerned state is not a member state. The Security Council first used this mechanism when it referred the situation of Darfur, Sudan, to the ICC in resolution 1593 in the year 2005. 473

However, according to Article 16, the Security Council has the power to defer an investigation or prosecution for a renewable period of 12 months in a resolution under Chapter VII of the UN Charter in a situation where international peace and security might be better achieved without a criminal investigation or prosecution.

c) The third trigger mechanism is the *proprio motu* power of the ICC Prosecutor based on Article 13(c) and 15 of the Statute. According to Article 15, the Prosecutor may initiate investigations on the basis of information of crimes within the jurisdiction of the Court. However, in order to actually start an investigation, the Prosecutor needs the authorization of the Pre-Trial Chamber. The Pre-Trial Chamber will consider whether there is a reasonable basis to proceed and whether the Court has jurisdiction (Article 15 (3), (4)). This control mechanism shall prevent a too powerful Prosecutor to be able to engage politically motivated investigations. 474

For the first time in ICC history, a request by the Prosecutor has been authorised by the Pre-Trial Chamber in the majority decision of 31 March 2010 regarding the pre-electoral violence in Kenya 2007.

**Focus on Southeast Asia: States’ opinions toward *proprio motu* investigations**

Southeast Asian countries have been particularly hesitant to join the ICC. To date, after the withdrawal of the Philippines, only Cambodia and Timor-Leste are ICC members. Revisiting Southeast Asian countries’ statements at the Rome Conference in 1998, it becomes apparent that the power of the Prosecutor to conduct investigations *proprio motu* has been particularly contentious.

With respect to the fundamental principle of national sovereignty, the delegation of Indonesia submitted: “In drafting the Statute, the Conference must uphold the principle of respect for national sovereignty and join the emerging consensus that the Court’s jurisdiction should be

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473 Ibid.
474 Ibid.
complementary to that of national courts and based on the consent of the States concerned. ... However, that principle [of complementarity] still had to be defined unambiguously.”

With regard to the Prosecutor’s power to initiate investigations *proprio motu*, there is a divisive line separating those countries in favour of a powerful Prosecutor and those countries that oppose this concept. According to Indonesia’s position, “[t]he Prosecutor should not be able to initiate investigations *proprio motu*. “ The delegation of Malaysia concurred “in view of the principle of complementarity and the danger of adverse effects on the integrity and credibility of the office and possible accusations of bias.” Finally, “[t]o give the Prosecutor power to initiate proceedings *proprio motu* was unacceptable” for Vietnam, too.

The Philippines, however, submitted that “[t]he Prosecutor should be independent and be entitled to investigate complaints *proprio motu*, subject to the safeguards provided by a supervisory pre-trial chamber.” Equally, Thailand “could agree to the Prosecutor initiating investigations *ex officio* on the basis of information obtained from any source, including non-governmental organizations. [...] It [...] endorsed the role of the Pre-Trial Chamber in considering the basis on which the Prosecutor should be allowed to proceed further with an investigation.”

4.1.2.3.2 Preliminary examinations

The Prosecutor carries out preliminary examinations to find out whether there is a reasonable basis to proceed under the Rome Statute. The Prosecutor considers the factors listed in Article 53(1)(a)-(c), namely whether the information available provides a reasonable basis to believe that a crime within the jurisdiction of the Court has been or is being committed; whether the case would be admissible, and whether, taking into account the gravity of the crime and the

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476 Ibid., p. 200 (statement of Arizal Effendi, Deputy Head of the Indonesia delegation).
477 Ibid., p. 109 (statement of R. Vengadesan, Head of the Malaysia delegation).
478 Ibid., p. 308 (statement of Nguyen Ba Son, Head of the Vietnam delegation).
479 Ibid., p. 82 (statement of Lauro L. Baja, Jr., Head of the Philippines delegation).
480 Ibid., p. 199 (statement of Piyawat Niyomrerks, Deputy Director-General, Dep’t of Treaties and Legal Affairs, Thai Ministry of Foreign Affairs).
interest of victims, there are nonetheless substantial reasons to believe that an investigation would not serve the interest of justice.

If the Prosecutor decides that there is no reasonable basis to proceed, he or she will have to inform the Pre-Trial Chamber. The Pre-Trial Chamber may review this decision on the basis of Article 53(3) of the Statute.

4.1.2.3.3 Investigations

Once he or she started an investigation, the Prosecutor has to conduct the investigation to cover all facts and evidence relevant to an assessment of whether there is criminal responsibility under the Statute and, in doing so, investigate incriminating and exonerating circumstances equally (Article 54 (1) (a)). During investigations, the Prosecutor is obliged to respect the rights of victims and witnesses and to keep confidentiality. 481

The Pre-Trial Chamber can issue a warrant of arrest against a person on the request of the Prosecutor (Article 58(1)). According to Article 59(2) of the Statute, the person shall be promptly brought before the competent judicial authority in the custodial state to control the correct application of the warrant with a right to apply for interim release (Article 59 (2) (3)).

The States Parties are under the general obligation to cooperate with the Court in its investigation and prosecution of crimes (Article 86). According to Article 88, they must ensure that there are procedures available under the national law to provide cooperation. Difficulties may arise, especially in Non-Party States, because the prosecutor must conduct investigations on the territory of sovereign states. The success of investigations therefore depends on the receptivity of the domestic legal system to initiatives from the Prosecutor’s office. 482 He or she may also seek help from intergovernmental organisations or states (Article 54 (3) (c)) and enter into agreements as may be necessary to facilitate the investigation on the basis of Article 54(3)(d). The Prosecutor can agree to not disclose confidential information at any state of procedure (Article 54(3)(e)). The Appeals Chamber in

481 Ibid.
the *Lubanga* proceedings decided that the agreement of the Prosecutor has to be respected, and that a Chamber could not order disclosure if confidentiality has been promised.⁴⁸³

In case a State Party refuses to cooperate, Article 87(7) states that the Court may take a finding of non-compliance and then refer the matter to the Assembly of States Parties or, where the Security Council referred the matter to the Court, to the Security Council.

### 4.1.2.3.4 Pre-Trial Stage

After a suspect or other person has been surrendered to the ICC, the Pre-Trial Chamber has to satisfy itself that the person has been informed of the crimes which he or she is alleged to have committed and of his or her rights under the Statute (Article 60(1)). The Pre-Trial Chamber also has to decide initially and periodically afterwards on the request of detention or interim release (Article 60(2)-(4)).

According to Article 61, the Pre-Trial Chamber hast to hold a hearing to confirm the charges on which the Prosecutor intends to seek trial. On the basis of the hearing, the Pre-Trial Chamber shall determine whether there is sufficient evidence to establish substantial grounds to believe that the person charged committed the crimes (Article 61(7)).

### 4.1.2.3.5 Trial Stage

Unless otherwise decided, the place of the trial shall be the seat of the Court (Article 62). The trial has to be held in public (Article 64(7)).

During the trial, the accused has to be present at the Court in all parts of the proceedings (Article 63). According to Article 66, the accused is presumed innocent. Thus, the burden of proof is with the Prosecutor and the Court. Article 65 provides different procedural rules in cases of an admission of guilt.

According to Article 64(2), the Trial Chamber hast to ensure that the trial is fair and expeditious and is conducted with full respect for the rights of the accused and with regard for the protection of witnesses and victims. Therefore, Article 68 stipulates several rules for the

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⁴⁸³ *Lubanga* (ICC-01/04-01/06 OA 13).
protection of witnesses and victims. Article 67 states several basic rights of the accused, such as the right of information, the right of defence, the right to an interpreter and the right to remain silent.

Every party has the right to provide evidence, but also the court can require evidence to become part of the record and summon its own witness (Article 64(6) (d)). Unlike in common law systems, the Statute contains no complex and technical rules of evidence. Rather it allows the admission of all relevant and necessary evidence (Article 69 (3)).\textsuperscript{484} Moreover, there is no general rule excluding indirect evidence or hearsay.\textsuperscript{485}

The accused has the same rights like the prosecution to examine a witness (Article 67(1)(e)) and, in addition, he or she has the right to be the last to examine a witness.\textsuperscript{486} At the end of the trial, the defence has the right to make the closing arguments.\textsuperscript{487}

The Court has to determine the sentence in accordance with the rules of Procedure and Evidence by taking into account the gravity of the crime and the individual circumstances of the convicted person (Article 79(1)). According to Article 74(2), the judges’ decision shall be based only on evidence submitted and discussed before it at the trial. The Chamber has to issue one decision. If there is no unanimity, the decision shall contain the opinion of majority and minority (Article 74(5)).

\textbf{4.1.2.3.6 Appeals stage}

The Prosecutor and the convicted can make an appeal on the grounds of procedural error, error of facts or error of law. Also, a sentence can be appealed on the grounds of disproportion between sentence and crime (Article 81).

Either party may appeal against interlocutory decisions of the Pre-Trial Chamber or Trial Chamber including decisions about jurisdiction or admissibility, release of persons being investigated or prosecuted, measures to provide evidence and investigative steps (Article 82).

\textsuperscript{484} Schabas, W., \textit{International Criminal Court}, p. 311.
\textsuperscript{485} Ibid.
\textsuperscript{486} International Criminal Court (ICC), “Rules of Procedure and Evidence”, Rule 140(2).
\textsuperscript{487} ICC, “Rules of Procedure and Evidence”, Rule 141.
As regards the proceedings of an appeal, the Appeals Chamber has all powers of the Trial Chamber (Article 83). The Appeals Chamber may reverse or amend the decision or order a different trial before a different Trial Chamber. If the Appeal Chamber finds that the sentence is disproportional to the crime, it may adjust the sentence.

The judgement of the Appeals Chamber shall be rendered by majority decision. Unlike the Trial Chamber, the Appeals Chamber may deliver its judgement in absence of the person convicted. If only the person convicted or the prosecutor on that person's behalf appealed, the decision cannot be amended to his or her detriment (Article 83).

The convicted, or after his death other specified persons, may also apply to the Appeals Chamber to revise the final judgement on the grounds that new evidence has been discovered that was not available at the time of the trial and is sufficiently important that, had it been proved in trial, it would have been likely to have resulted in a different verdict, but also on the grounds that evidence on which the conviction depends was false, forgotten or falsified.

4.1.2.3.7 Enforcement of the sentence

The ICC relies on States to enforce the sentences.

According to Article 103 of the Statute, a sentence of imprisonment shall be served in a State designated by the Court from a list of States which have indicated to the Court their willingness to accept sentenced persons. Nonetheless, the ICC alone has the right to decide about any application for appeal and revision. The state of enforcement shall not impede the making of any such application by a sentenced person (Article 105(2)).

The Court shall supervise the enforcement of a sentence of imprisonment and make sure that the enforcement is consistent with widely accepted international treaty standards regarding the treatment of prisoners (Article 106).

Austria was the first state that signed an agreement with the ICC to accept sentenced persons in 2005.
4.1.3 Conclusion

There are still many important challenges regarding the future of the ICC.

The ICC has yet to turn into a fully operational and functioning judicial institution. The only way this aim can be reached is to turn the ICC into a fully accepted institution within the international community. This aim is not reached yet, and major states like the United States, Israel or Russia have not ratified the Statute. Others, including China and India have neither signed or agreed on the Rome Statute.

Another major limitation of the ICC is that crimes are often committed in unstable and unsafe regions, which makes it very difficult to carry our investigations or collect evidence. Geographical distance of the ICC to the regions where the crimes are committed can also cause serious problems of logistics and organisation.

4.2 Transitional Justice

4.2.1 A new form of justice

Gross violations of human rights are often so traumatic for victims and societies that they cannot be settled by the traditional justice systems alone. The end of the second millennium saw the birth of a new type of justice, specially created to deal with these unspeakable crimes: transitional justice.

While wars were traditionally ended through political settlements, the historical failures before and after the First World War as well as the atrocities committed throughout the Second World War pushed states to imagine a judicial mechanism to deal with the worst crimes on earth. Thus, rather than repeating the previous mistakes, the winners of the Second World War established the Nuremberg and the Tokyo tribunals to judge individuals, not countries. Over the years, this judicial approach has developed to create a unique and new concept of justice in cases of gross violations of human rights (see above 4.1). However, judicial proceedings against individuals have not always proven beneficial for the
achievement of lasting peace and reconciliation. Therefore, broader transitional justice concepts and principles have been developed.

Paradoxically, the first experience of a proper transitional justice mechanism was made amid one of the most violent dictatorships of the second part of the 20th century. Idi Amin, by some also referred to as the “Butcher of Uganda”, established a Commission of Inquiry into the Disappearances of People in Uganda (1974), in order to appease the tension due to the numerous disappearances since 1971488.

Despite several shortcomings – a report was never published, the recommendations were not implemented, the members of the commissions had to face reprisals from the government489 – this experiment established the first pillar of transitional justice: truth-seeking.

The experience was repeated in several South-American countries during the wave of democratization, which inspired Nelson Mandela and the Post-Apartheid South-African government to create their own transitional justice process which became well known all around the world.

Nowadays, each continent of the world has seen at least one truth commission and the transitional justice processes go further than solely establishing truth commissions. The United Nations have supported these processes for a long time, either financially or politically, more or less directly, like in El Salvador, Guatemala or Rwanda490. The enshrinement of transitional justice by the United Nations was achieved through the adoption of the Joint principles in 1997491 and the creation in 2011 of a Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence492. The work of the United Nations since the end of the 20th century in addition to the work of several NGOs, and particularly the International Center for Transitional Justice (ICTJ), enabled to create a fully-

492 UNGA, Resolution 18/7.
fledged discipline that is based on 4 pillars: truth-seeking, reparations, justice, and guarantees of non-recurrence\(^{493}\).

However, it has to be kept in mind that, since transitional justice deals with the trauma of a full society, each process is unique and specially designed for each case. There is no “one size fits all” transitional justice process, so transitional justice ought to be understood as a set of concepts and principles, not a set of rules and well-established mechanisms.

In fact, transitional justice is highly inspired by the restorative justice movement since it shares the same goal: the transformation of people, relationships and communities\(^{494}\). The main difference between the two movements is the “transitional” element. While the idea of “transition” originally refers to the period of time between a political regime and another\(^{495}\), it is more broadly understood nowadays. It is pointed out that in case of an important change in a society (from war to peace or from dictatorship to democracy for example), there is a need for a period of time which is neither in the former state nor in the new one. This interval is made to close the past and prepare for the future. In that sense, transitional justice is the kind of justice that must turn the page of the past abuses and establish the basis for a peaceful democratic society.

Transitional justice processes consist of judicial and non-judicial mechanisms. Therefore, justice must be understood in a broader sense. The transitional justice movement intended to combine peace and justice which may seem contradictory at times. It also created a new conception of what reparation is or could be.

### 4.2.2 The peace/justice dilemma

There is often a debate on whether justice or peace should be the priority after gross violations of human rights, but the transitional justice movement considers that one cannot be achieved

\(^{493}\) UN Secretary General, “Guidance Note, United Nations Approach to Transitional Justice”, p. 3.
\(^{495}\) O’Donnell, G. and Schmitter, P., Transitions from Authoritarian Rule: Comparative perspective.
without the other. Thus, criminal proceedings and non-judicial mechanisms must be complementary, and the possibility of amnesty should not be an obstacle to justice.

4.2.2.1 The complementarity between criminal proceedings and transitional justice mechanisms

The supporters of transitional justice are working hard to mitigate the peace/justice dilemma. According to Kofi Annan, the former UN Secretary General, “This debate of justice and peace, which sometimes becomes so acrimonious, is a false debate in the sense that you need both. Justice reinforces the long-term peace that one is looking for”

496. In a more formal way, the United Nations also consecrated the end of this dilemma in a resolution adopted by the Human Rights Council which said that “Justice, peace, democracy and development are mutually reinforcing imperatives”

497. In fact, justice, understood here as the judicial process that recognizes liability and sentences individuals, is one of the four pillars of the transitional justice movement. The need for accountability has always been emphasized in transitional justice processes. Indeed, the 2004 Secretary-General’s report about “The rule of law and transitional justice in conflict and post-conflict societies” devoted three chapters to the effectivity of criminal justice while the other elements of transitional justice each covered only one

498. Moreover, if the Joinet principles (named after UN Special Rapporteur Louis Joinet) concede the existence of restrictions to the possibility to prosecute, those are immediately limited

499. Since transitional justice is an exceptional process dealing with exceptional crimes, the criminal proceedings may also be uncommon. For instance, Rwanda divided the criminal prosecution into three different systems according to the level of involvement of the accused persons. While the persons that had more responsibility in the genocide were tried by the International Criminal Tribunal for Rwanda, the persons accused with smaller charges were

497 HRC, Resolution 9/10, para. 4.
498 UN Secretary General, “Report on The rule of law and transitional justice in conflict and post-conflict societies”, S/2004/616, Chapters XI to XIII.
prosecuted by the national courts, and finally the less active in the genocide had to face a mechanism inspired by a customary dispute resolution system in Rwanda: the Gacaca. It is further conceivable that, for diverse reasons, the state cannot organize the criminal proceedings by itself so that the international community may intervene by creating a tribunal as was the case for Rwanda or the former Yugoslavia, by establishing a hybrid court like for Sierra Leone or Cambodia, or today with the role of the International Criminal Court.

No matter the form of criminal proceedings, they remain an important part of transitional justice processes since they aim to deal with past abuses. Nonetheless, one also needs to think about future consequences, and this is the point when the peace element gains relevance. Indeed, the Rome Statute mentions the possibility where “a prosecution is not in the interests of justice”. Since Peace and Justice are conceived of as a whole, an infringement on one would necessarily harm the interests of the other.

In practice, courts often work closely with Truth and Reconciliation Commissions, the other main body of a transitional justice process. Indeed, these commissions usually have a power of investigation and can get relevant information that may help the judges. Moreover, the approach of the truth commission is often to encourage people to talk about the abuses and collect a large number of testimonies. It also provides recommendations that can help to overcome the peace/justice dilemma. In some cases, such as in South Africa, the commission has the power to grant amnesties, but this power remains rare and sensitive.

4.2.2.2 The amnesty option

The question of amnesty is the perfect representation of the peace/justice dilemma. On the one hand, one would consider that peace starts with a pardon or at least by a reduction of violence, but on the other hand, granting an amnesty could be understood as denying justice. It must be kept in mind that transitional justice processes are fighting impunity while trying to achieve reconciliation at the same time.

The idea of the South African government to give the power of granting amnesties to the Truth Commission can be understood in the sense that this commission was supposed to be closer to the people and understand them better because it involved them in the process. In other words, the commission would be able to grant amnesties only if there is no risk to cause a feeling of impunity or injustice. This was the way chosen by Nelson Mandela and his government to achieve both peace and justice. In the end, only a few amnesties have been granted (only 849 have been granted while 5392 have been refused)\(^{503}\).

Granting an amnesty should not prevent the recognition of the liability or the recognition of a victim’s status. Thus, in any case, the United Nations rejects the use of “blanket amnesties” \(^{504}\) because they could shield some people from being prosecuted despite being found guilty by a court.

After Argentina successfully conducted a truth commission, it also showed an example for the misuse of amnesties. In order to close chapters of the past, two laws were adopted: the *Punto Final* or “full stop” law (1986) and the *Obediencia Debida* or “due obedience” law (1987). These two laws granted immunity from prosecution to almost all members of the military until they were struck down by the Supreme Court in 2005. Unfortunately, such laws are still enforced in some countries like in Spain where a judge was prosecuted until 2011 for investigating Francoist crimes, disregarding a 1977 amnesty that remains valid until today\(^{505}\). Moreover, the granting of an amnesty should not prevent the victims from their right to truth and to reparations\(^{506}\).

Summing up, the transitional justice movement does not deny the need for justice. Quite the opposite, it is included as one of the four pillars and so, it is one of the most important elements of transitional justice processes. Most of the documents about transitional justice


\(^{504}\) HRC, Resolution 12/11, para. 11.


expressly mention the need to fight impunity. The search for peace mainly questions the need for traditional punishment and the consequences that it can have for the future of the society, not the recognition of liability. Nonetheless, finding the right balance remains a challenge for every transitional justice process.

4.2.3 New forms of reparations

The “reparations” pillar must be understood in a broader sense than traditional financial compensation. It can also include part of the “truth-seeking” pillar, but it is open to every possibility that helps to turn the page of the past.

4.2.3.1 The truth as a form of reparation

The right to truth may be considered as the first element of transitional justice in the sense that it appeared even before the idea of transitional justice. Indeed, as mentioned, General Idi Amin established a commission of inquiry in 1974 to address the issues of disappearances by "granting the truth" to the population. Despite the failure of this first experience, the idea that victims deserve the truth remains the main element of every transitional justice process. It received this importance because, in the beginning, transitional justice processes focused mostly on cases of disappearance. The first four commissions were created to work exclusively on these matters (Uganda 1974, Bolivia 1982-1984, Argentina 1983-1984 and Uruguay 1985). Since no traditional reparation would have been paid, it appeared that seeking, providing and recognizing the truth was indeed the best compensation.

More than just a mere tool to ease the tensions, truth became a fully-fledged right for the victims of gross violations of human rights and international humanitarian law. While the right to truth is specifically addressed by the International Convention for the Protection of All Persons From Enforced Disappearance (Article 24), the Joint principles extended it to every “heinous crime”, considering that it is an inalienable right for the victims of these crimes. The United Nations pointed out that “the right to the truth may be characterized differently in some legal systems as the right to know or the right to be informed or freedom of

information”. This right gives the possibility for every victim to know about the circumstances of the crimes, the reasons that led to the perpetration of these crimes but also, in case of death or disappearance, the victim’s fate.\textsuperscript{508}

Because of the importance given to the truth, the Truth and Reconciliation Commission became the central body and the symbol of the transitional justice process. While the very first experiences created mere commissions of inquiry, Chile changed the vision of this mechanism by adding a new dimension: “reconciliation.”\textsuperscript{509} More than a mere body of investigation, the Truth Commissions received the task to heal the wounds of the past and prepare a peaceful future.

Their process is usually divided into three steps. The first one is the investigation. The members of the commission are interviewing people from every side. They go into the field in order to get as many pieces of evidence as they can and to investigate as many cases as possible. The most famous part of the processes are then the public hearings. People from both sides (victims and accused) can come in front of the commission to publicly reveal their story and their point of view. Moreover, perpetrators are often confronted with their victims directly. These hearings are regarded as one of the most powerful ways to reassert victims’ dignity\textsuperscript{510} but at the same time, it has also been strongly criticized for using the victims’ distress as a show element. Sandrine Lefranc, a French Doctor of Political Sciences, even called the South African commission “the Tribunal of Tears” (“Le Tribunal des Larmes” in French).\textsuperscript{511}


\textsuperscript{509} Hayner, P., “Fifteen Truth Commissions - 1974 to 1994: A Comparative Study”, p. 621. The President Patricio Aylwin established a Commission that was called the “National Commission for Truth and Reconciliation”.


The final task of these commissions is to produce a report. This is made to create an “official history”, to acknowledge the suffering of the people but also to make diverse recommendations.

Establishing the truth can be regarded as a form of reparation for two reasons. First of all, in many cases providing the truth means revealing information that has been kept secret or unknown before. Especially in cases of disappearances, the truth is often the best compensation that can be given to a family. Moreover, the right to truth also means officially acknowledging history. The official recognition of the suffering and the facts can be a much more powerful compensation than any financial grant.
Examples of the use of truth as reparation:

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<td>The last volume of the Truth Commission’s report is entirely dedicated to the victims’ memory. It reports the stories of numerous victims and ends with a list of the names of all the people that have been recognized as victims.(^{512})</td>
<td>The Truth Commission was established after the disclosure of the Stasi Secret Police’s scope of clandestine operations which caused a scandal in Germany. The main aim of the Commission was to better explain the victims’ stories and the impact that the regime had on people’s lives. Providing more information on history was supposed to help people to better understand and ease the tensions(^{513}).</td>
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<td>The Truth Commission was established to investigate the consequences of slavery and endured labor during the colonial period(^{514}). While the report also provides recommendations for the future and includes a “reconciliation” part(^{515}), the most important aspect of this process is, by far, the establishment of the truth.</td>
<td>The Chadian Commission had the task to “preserve in their present condition the torture chambers and the equipment utilized”(^{516}).</td>
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### 4.2.3.2 Other non-financial reparations

Transitional justice deals with both individuals and entities. They may either be victims (persons and communities) or accused (individual perpetrators, former regimes or armed groups). Thus, the reparations granted in cases of transitional justice vary widely. There is no pre-established type of reparations, no scale of fees. It is part of the task of transitional justice mechanisms to determine the most appropriate reparations.

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\(^{516}\) Decree No. 014 /P.CE/CJ/90 of the Chad Republic, “Decree Creating the Commission of Inquiry into the crimes and misappropriations committed by the ex-president Habre, his accomplices and/or accessories”, (29 December 1990).
The United Nations encourage states to provide reparations through programs that have been designed with the involvement of victims and civil society organizations\textsuperscript{517}. This participation is intended to better determine the needs of the victims either for individuals and for groups. Indeed, it is recommended, especially by the United Nations and the International Centre for Transitional Justice, to grant particular consideration to women, children and minority groups that may be affected, sometimes less obviously, by the abuses\textsuperscript{518}.

As the right to reparations is autonomous, the reparations programs do not have to be related to other mechanisms such as trials. Thus, on the contrary to traditional criminal mechanisms, victims must be indemnified, without consideration of the recognition of the fault from an individual or the capacity of the perpetrator to grant reparations.

That is why the reparations programs must be implemented by the states, with or without the help of the international community. Moreover, the International Criminal Court has also established a Trust Fund for Victims which, in addition to implementing the reparation measures ordered by the court, provides “physical and psychosocial rehabilitation or material support to victims of crimes that fall within the jurisdiction of the Court”\textsuperscript{519}.

The Jointet principles also point out that these reparation programs must be publicized and disseminated as much as possible, in the country and abroad, by public and private means. This aims to enable as many victims as possible to exercise their right to reparations\textsuperscript{520}.

In summary, the four pillars of transitional justice must not be understood separately but as a whole. In that sense, the pillar that guarantees “non-repetition” may also be partly included in the reparation process. In addition to institutional reforms such as the drafting of a new constitution, other measures can be included in the reparation programs and may play a role to guarantee non-repetition. Most of them concern educational reforms or the access to specific

\textsuperscript{517} United Nations’ Economic and Social Council, Commission on Human Rights, Set of Principles for the protection and promotion of Human Rights through action to combat impunity, E/CN.4/2005/102/Add.1 (February 8, 2005), Principle 32.

\textsuperscript{518} Ibid.


employments. They may also involve land reallocation or the construction of a symbolic monument.

Examples of reparations:

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<td>In 2012, the Canadian Truth and Reconciliation Commission submitted a document named: “Calls to Action” which lists 94 actions that are needed. Among them, some are rather unusual like the promotion of Aboriginal athletes or the assessment of museum policies’ compliance with the United Nations Declaration on the Rights of Indigenous Peoples.521</td>
<td>The Year One Program, implemented by the National Commission for Social Action (a governmental organization), planned to carry out a program of emergency medical care and to provide educational support to child victims (such as the reimbursement of school fees, books and uniforms).522 Moreover, the President of Sierra Leone addressed formal apologies to the women victims of the conflict.523</td>
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<td>One of the most important types of measures launched during the transitional justice process concerned the reallocation of lands because large parts were owned by white people524. This process is still ongoing nowadays.</td>
<td>There was a very sensitive debate in 2018 on whether all victims of Sri Lanka’s civil war should benefit from reparations, including the families of former LTTE cadres. The Office of Reparations Bill was finally passed without differentiating the victims.525</td>
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4.3 Discussion Points and Further Reading

4.3.1 Discussion Points

- Some defendants in the Nuremberg trials argued that their acts where legal at the time of commission. Please discuss the validity of this argument.
- What are the advantages and disadvantages of a permanent international criminal court compared to ad-hoc or hybrid tribunals?

• Crimes against humanity are punishable only if they occur as part of a widespread "or" systematic attack against a civilian population. What is the difference between "widespread" and "systematic"?

• What could be reasons why it took so long to define the crime of aggression?

• The ICC Prosecutor has the power to conduct investigations without referral by a member state or the United Nations Security Council. Why has this been criticized?

• What makes transitional justice a new form of justice? What are its advantages and disadvantages?

• One element of transitional justice processes is to establish the truth. Isn't this also possible in traditional criminal trials?

• Would you agree that transitional justice has a higher potential to achieve long-lasting peace?

• To what extent can moral and emotional reparation replace financial reparation?

• Should elements of transitional justice also be incorporated into traditional criminal proceedings? If yes, which elements?

4.3.2 Further Reading


CHAPTER 5: ARMED FORCE AND HUMAN RIGHTS

5.1 Brief introduction to the law of armed conflict

International Law regarding the conduct and use of armed force is divided into two main branches:

- The Jus ad Bellum which governs the legality of the recourse to armed force

In principle the use of force is prohibited but the Charter of the United Nations provides for two exceptions which are self-defense in case of an armed attack\(^5\) and the authorization of the Security Council.\(^6\)

- The Jus in Bello otherwise known as International Humanitarian Law

It regulates the way the hostilities can be conducted and whether or not the jus ad bellum was respected or not.

While "[t]he orthodox history of international humanitarian law tells the following story: Laws of war have always existed to limit the destruction of war"\(^7\), modern International Humanitarian Law as we know it is relatively recent. Traditions regulating the conduct of warfare can be traced back far in history, not only in Europe but also in Asia and the Islamic world.\(^8\) Nevertheless, international lawyers agree to consider "the Battle of Solferino in 1859 as the crucial moment in the history of modern humanitarian law."\(^9\) Henry Dunant, who witnessed the battle of Solferino and was horrified by the atrocities wrote *A Memory of Solferino*\(^10\) and formed a group of five including himself and Gustave Moynier, and which formed what was going to become the current International Committee of the Red Cross

\(^5\) UN Charter, Article 51.
\(^6\) UN Charter, Chapter VII.
\(^7\) Alexander, A., ‘A Short History of International Humanitarian Law’, p. 111.
\(^10\) Dunant, H., *Un souvenir de Solférino*. 

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(ICRC) which pushed for the adoption of first Convention for the Amelioration of the Condition of the Wounded in Armies in the Field. It was signed in August 1864.532

The first ten Articles notably provide for the human treatment of the wounded and sick533 and gives the ICRC a role of coordination and relief534. The first convention was completed by the Hague Convention in 1907535, the Geneva Conventions in 1949536 as well as their Additional Protocols adopted in 1977537 plus the third protocol of 2005538. While the “Law of Geneva” and the “Law of the Hague” were previously considerate separately, "[t]heses two branches of the law applicable in armed conflict have become so closely interrelated that they are considered to have gradually formed one single system, known today as international humanitarian law."539

533 Convention for the Amelioration of the Condition of the Wounded in Armies in the Field (ICRC), Article 12.
534 Ibid., Article 9.
With the emergence of the two bodies of law, the term International Humanitarian Law came to replace the “law of war” and “[t]he change in terminology is an important one, because it not only represents the unification of Hague Law and Geneva Law, but also – and most importantly – the profound influence of human rights.”

5.1.1 Scope of application

The body of law composed of the converging law of the Hague (concerning the conduct of hostilities) and of Geneva (regarding protected persons) is applicable in situations of armed conflict. However, no precise definition is given in the Conventions or the Protocol.

The common Article 2 of the Geneva Conventions states that ‘the present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them. The Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance.’

The International Tribunal for the former Yugoslavia clarified that there is an armed conflict ‘whenever there is a resort to armed force between States or proacted armed violence between governmental authorities and organized armed groups or between such groups within a

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540 Meron, T., The Making of International Criminal Justice, p. 43.
541 Geneva Conventions, Article 2.
Tradiitionally, IHL distinguishes between international armed-conflicts (IAC) and Non-International Armed Conflicts (NIAC). Only certain provisions apply to the former. For Stewart, ‘[t]his distinction was based on the premise that internal armed violence raises questions of sovereign governance and not international regulation.’ The principle difference being that only the common Article 3 to the Conventions and the second additional protocol are applicable to NIAC while the 4 Conventions and the first Additional Protocol apply to International armed conflicts.

There are two requirements for a conflict to be qualified as a non-international armed conflict. The violence must reach a certain threshold and the non-states actors involved in the conflict must be organized with a chain of command and the military capacity to conduct operations. In addition, the Additional Protocol II introduced a criterion of territorial control in case of armed conflict between the States and armed groups. In case of NIAC involving only non-state actors as parties to the conflict, this provision does not apply, leaving individuals under the sole protection of the common Article 3.

Regarding NIAC, violence must reach a certain threshold to be qualified as armed conflict. Thus, "situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature" do not amount to armed conflicts.

While at first glance the distinction can appear clear, in practice the delimitation line is blurry. Indeed, cases of non-state armed group, fighting against a State and supported by a third State for political reasons are not rare. In Nicaragua, in the 1980’s, the Contras were non-state armed groups fighting the socialist Junta and as part of its fight against communism, and the US funded these groups. While there was no direct conflict between Nicaragua and the US, the ICJ ruled that: "[t]he conflict between the contras' forces and those of the Government of Nicaragua is an armed conflict which is 'not of an international character'. The acts of the contras towards the Nicaraguan Government are therefore governed by the law applicable to conflicts of that character; whereas the actions of the United States in and against Nicaragua...

542 ICTY (Appeals Chamber), The Prosecutor v Tadic, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Case No IT-94-1 (1995), para.70.
543 Stewart, J., "Towards a single definition of armed conflict in international humanitarian law: A Critique of Internationalized Armed Conflict”.
545 Additional Protocol II, Article 1(2).
fall under the legal rules relating to international conflicts. Because the minimum rules applicable to international and to non-international conflicts are identical, there is no need to address the question whether those actions must be looked at in the context of the rules which operate for the one or for the other category of conflict. The relevant principles are to be looked for in the provisions of Article 3 of each of the four Conventions of 12 August 1949, the text of which, identical in each Convention, expressly refers to conflicts not having an international character.”

Thus, an armed conflict can be of a hybrid nature with international and internal components but “because the minimum rules applicable to international and to non-international conflicts are identical, there is no need to address the question whether those actions must be looked at in the context of the rules which operate for the one or for the other category of conflict.”

The Common Article 3 protects the “persons taking no active part in the hostilities”, included those who did but are not any more, from “violence to life and person”, being taken as hostages and “outrages upon personal dignity” but also protects their right to a fair trial. These minimum standards of protections that apply in both IAC and NIAC are not without reminding us the right to life, the prohibition of torture and other inhuman treatments, the right to dignity and the right to a fair trial enshrined in International Human Rights Law.

5.1.2 Main features of International humanitarian Law

As summarized by Solis “[w]hether it is called the law of war, IHL, or LOAC, the goal is to confine fighting as closely as possible to combatants and to spare noncombatants; to target those things having a military need for destruction and sparing property not necessary to achieve the military ends of the conflict. These aspirations are lofty, but they are goals worthy of civilized and caring peoples”.

547 Ibid.
548 Geneva Conventions 1949, Article 3(1).
549 Solis, G., Law of Armed Conflict: International Humanitarian Law In War, p. 31.
While International Humanitarian Law sets up a body of norms, to prevent assumption that anything not explicitly prohibited by relevant treaties is permitted the Martens Clause was introduced in the preamble of the second Hague Convention in 1899 which stated:

"Until a more complete code of the laws of war is issued, the High Contracting Parties think it right to declare that in cases not included in the Regulations adopted by them, populations and belligerents remain under the protection and empire of the principles of international law, as they result from the usages established between civilized nations, from the laws of humanity and the requirements of the public conscience."

In 1977, the clause was inserted in the first additional protocol to the Geneva Conventions regarding international armed conflicts. The wording evolved between the two documents and the latest provides that: "In cases not covered by this Protocol or by other international agreements, civilians and combatants remain under the protection and authority of the principles of international law derived from established custom, from the principles of humanity and from the dictates of public conscience."

The key principles of IHL are the following:

- The distinction between civilians and combatants
- The prohibition to attack those hors de combat
- The prohibition to inflict unnecessary suffering
- The principle of military necessity
- The principle of proportionality

5.1.2.1 The distinction between civilians and combatants

The aim of international humanitarian law is to govern the conduct of hostilities in order to protect those who are not taking part in the hostilities from the violence of armed conflicts. Under Article 48 of the first Protocol to the Conventions, "the Parties to the conflict shall at

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551 Additional Protocol I, Article 1(2).
all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives.” This provision enshrines the obligation of distinction between civilians and combatants. Thus, the fundamental distinction in IHL is the one between civilian and combatant.

Civilians are defined negatively in Article 50 of the first Additional Protocol as being anybody who is not a combatant. It provides that “[i]n case of doubt whether a person is a civilian, that person shall be considered to be a civilian.”

The Additional Protocol refers to its own Article 43 and the third Geneva Convention to define who is not a civilian. The provisions of the Article 4A of the third Geneva Convention mentioned read as follows:

(1) Members of the armed forces of a Party to the conflict, as well as members of militias or volunteer corps;

(2) Members of other militias and members of other volunteer corps, including those of organized resistance movements, belonging to a Party;

(3) Members of regular armed forces who profess allegiance to a government or an authority not recognized by the Detaining Power;

(6) Inhabitants of a non-occupied territory, who on the approach of the enemy spontaneously take up arms to resist the invading forces, without having had time to form themselves into regular armed units, provided they carry arms openly and respect the laws and customs of war.

Following Article 43 of the first Protocol: "[m]embers of the armed forces of a Party to a conflict (other than medical personnel and chaplains covered by Article 33 of the Third Convention) are combatants, that is to say, they have the right to participate directly in hostilities.”

552 Additional Protocol I, Article 48.
553 Additional Protocol I to the Geneva Conventions, Article 50(1).
555 Additional Protocol I to the Geneva Convention, Article 43(2).
Article 50 goes even further in providing that "[t]he presence within the civilian population of individuals who do not come within the definition of civilians does not deprive the population of its civilian character."\(^{556}\)

While the Additional Protocol II does not give any definition of what a civilian is in a non-international armed conflict, most scholars agree to apply the same definition no matter of the status of a conflict. In 2000, the ICTY defined civilians as "persons who are not, or no longer, members of the armed forces"\(^{557}\), reinforcing that idea.

In NIAC the protection of civilians from attack is also applicable as the principle is enshrined in Article 13 of the Additional Protocol II.\(^{558}\) However, the ambiguity remains regarding their right to a combatant or a Prisoners of War (PoW) status. In addition, violation of that provision is considered as a war crime in International Criminal Law.\(^{559}\)

Under Article 48 of the first Protocol to the Conventions, "the Parties to the conflict shall at all times Distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives."\(^{560}\) These provisions enshrine the obligation of distinction between civilians and combatants.

Not solely civilians are protected but their objects are too. Civilians objects are defined negatively in the first Additional Protocol as being not military objectives.\(^{561}\) As for the civilian population, object normally with a civilian purpose are to be considered as civilian objects in case of doubt on whether they are used for military objectives.\(^{562}\) An additional protection is granted for the "objects indispensable to the survival of the civilian population, such as foodstuffs, agricultural areas for the production of foodstuffs, crops, livestock, drinking water installations and supplies and irrigation works"\(^ {563}\) with the aim to avoid to

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\(^{556}\) *Ibid*, Article 50(3).

\(^{557}\) ICTY (Trial Chamber 1), *The Prosecutor v. Tihomir Blaškić* (Blaskic case), Judgement, Case No IT-95-14-T (2000), para. 751

\(^{558}\) Additional Protocol II, Article 13(2).

\(^{559}\) ICC Statute, Article 8(2)(e)(i).

\(^{560}\) Additional Protocol I, Article 48.

\(^{561}\) Additional Protocol I, Article 48.

\(^{562}\) Additional Protocol I, Article 52.

\(^{563}\) Additional Protocol I, Article 52(3).

\(^{563}\) Additional Protocol I, Article 54.
"leave the civilian population with such inadequate food or water as to cause its starvation or force its movement."\textsuperscript{564}

Furthermore, it is prohibited to attack "historic monuments, works of art or places of worship which constitute the cultural or spiritual heritage of peoples" or to use it for military purpose.\textsuperscript{565} Under the Convention for the Protection of Cultural Property in the Event of Armed Conflict, States Parties have to ensure "the safeguarding of cultural property situated within their own territory against the foreseeable effects of an armed conflict, by taking such measures as they consider appropriate."\textsuperscript{566}

In situations of NIAC, the Additional Protocol II protects ‘works and installations containing dangerous forces’\textsuperscript{567}, “cultural objects and places of worship,”\textsuperscript{568} as well as ‘objects indispensable to the survival of the civilian population’\textsuperscript{569}. Yet, no provision provides for the general protection of civilian objects as in the first Protocol.

However, it is important to note that while civilians and civilians’ objects cannot be the subject of an attack, it is lawful under international humanitarian law to cause harm and suffering to civilian populations when the target is a military objective as long as the military advantage is proportional to the damage. These principles of military necessity and proportionality will be approached later.

In addition, no matter of the nature of the conflict, as long as the threshold of armed-conflict is reached, people who do not take direct part in the hostilities are protected against "violence to life and person", “taking of hostages”, “outrage upon personal dignity” and “the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as

\textsuperscript{564} Ibid.
\textsuperscript{565} Additional Protocol I, Article 53.
\textsuperscript{567} Additional Protocol II, Article 15.
\textsuperscript{568} Ibid., Article 16.
\textsuperscript{569} Ibid., Article 14.
"indispensable by civilized peoples." These minimum requirements have to be applied humanely without any discrimination and it extend to those *hors de combat*.

### 5.1.2.2 The prohibition to attack those *hors de combat*

Civilians are not the only one to be protected under IHL. Indeed, those classed as *hors du combat* are also prohibited target of attacks. This is guaranteed in Article 41 (1) of the first Protocol and Article 85 considers that a violation of that provision is a grave breach of the Protocol.

For the ICRC, a “*person hors de combat* is:

(a) anyone who is in the power of an adverse party;

(b) anyone who is defenseless because of unconsciousness, shipwreck, wounds or sickness; or (c) anyone who clearly expresses an intention to surrender; provided he or she abstains from any hostile act and does not attempt to escape.”

This protection also applies in situations of NIAC. Even though the Additional Protocol II does not use the term *Hors de Combat*, it protects the person, his/her honor and convictions and religious practices of those “who have ceased to take part in hostilities”.

According to the European Court of Human Rights “*for this protection to apply, a person had to be wounded, disabled or unable for another reason to defend him/herself (including not carrying arms), but a person was not required to have a particular legal status, and a formal surrender was not required.*” In addition, the protection offered by the Common Article 3 of the Convention extends to those *Hors de Combat* and provides that “*[t]he wounded and sick shall be collected and cared for.*”

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570 Geneva Conventions, Common Article 3.
571 Additional Protocol I, Article 41(1).
572 *Ibid.*, Article 85.3(e).
574 Additional Protocol II, Article 4.
576 Geneva Conventions, Common Article 3.
5.1.2.3 The principle of military necessity

When conducting an attack, the parties to a conflict have to restrain their means and actions to what is necessary for their military objective. As stated above, civilians, civilian objects, and those hors de combat cannot be targeted. The first Additional Protocol limits military objectives “to those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage.”

In its handbook, the ICRC teaches that military objects are ‘a) the armed forces except medical service and religious personnel and objects; b) the establishments, buildings and positions where armed forces or their materiel are located (e.g. positions, barracks, stores).’

It has further been ruled that “the concept of military necessity is incompatible with a requirement that the perpetrator intended the appropriation for private or personal use.”

In conclusion, two cumulative criteria have to be met for an object to be considered as military objective. It has to by its ”nature, location, purpose or use make an effective contribution to military action’ and its ‘destruction, capture or neutralization […] offers a definite military advantage.” To be lawful, an attack, among other thing, must distinguish between civilian and combatants.

Article 51 of the first Protocol prohibits indiscriminate attacks, which are defined as:


\[\text{‘(a) those which are not directed at a specific military objective;}
\]

\[\text{(b) those which employ a method or means of combat which cannot be directed at a specific military objective; or}
\]

\[\text{(c) those which employ a method or means of combat the effects of which cannot be limited as required by this Protocol; and consequently, in each such case, are of a}
\]

577 Additional Protocol I, Article 52(2).
579 International Criminal Court (ICC), Trial Chamber III, Prosecutor v. Jean-Pierre Bemba Gombo (Judgement), No.: ICC-01/05-01/08,(21 March 2016);, para. 124
580 Additional Protocol I, Article 52.
nature to strike military objectives and civilians or civilian objects without distinction."\textsuperscript{581}

5.1.2.4 The principle of proportionality

The principle of proportionality requires that the military advantage obtained by an operation must outweigh the damage caused to civilians and civilian objects. Article 51 of the first Protocol which prohibits indiscriminate attacks specifically proscribes "an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated."\textsuperscript{582}

It implements that parties to a conflict have to take precautions to avoid incidental damages to civilians and thus shall "refrain from deciding to launch any attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated".\textsuperscript{583} Not only precautions have to be taken in attack but also against the effects of attacks. Article 58(c) of the first Additional Protocol requires the parties to a conflict to ‘take the other necessary precautions to protect the civilian population, individual civilians and civilian objects under their control against the dangers resulting from military operations."\textsuperscript{584} In addition, as Jean Pictet famously stated "if there are two means to achieve the same military advantage, we must choose the one which causes the lesser evil"\textsuperscript{585}. This principle is now enshrined in the Additional Protocol I which requires to choose the possibility "on which may be expected to cause the least danger to civilian lives and to civilian objects."\textsuperscript{586}

While the Additional Protocol II does not explicitly refer to the principle of proportionality, the Protocol II to the Convention on Certain Conventional Weapons applicable to both

\textsuperscript{581} Additional Protocol I, Article 51.4(1).
\textsuperscript{582} Additional Protocol I, Article 51.5.
\textsuperscript{583} Additional Protocol I, Article 57.2(iii).
\textsuperscript{584} Additional Protocol I, Article 58(c).
\textsuperscript{585} Pictet, J., Development and Principles of International Humanitarian Law, p.75.
\textsuperscript{586} Additional Protocol I, Article 57.3.
international and non-international armed-conflicts enshrines the principle.\(^{587}\) In addition, the obligation to take all feasible precautions to spare civilian lives and objects does not apply. Nevertheless, Article 13(1) of the Additional Protocol II provides a ‘general protection against the dangers arising from military operations’ to the civilians.\(^{588}\)

To conclude, it follows from that principle that an attack can be prohibited, even though directed at a military objective, if the expected incidental consequences on civilians are deemed excessive in comparison with the military advantages. In addition, all measures should be taken as precaution to limits these consequences.

### 5.1.2.5 The prohibition to inflict unnecessary suffering

Included in various international instruments including the 1907 Hague Convention, the probation to use “arms, projectiles, or material calculated to cause unnecessary suffering”\(^{589}\) has been considered as one of the ‘cardinal principles’ of IHL by the ICJ.\(^{590}\)

While contained in Article 35 of Additional Protocol I\(^{591}\), this provision was not incorporated in the final text of the Additional Protocol II to the Geneva Convention. However, the Amended Protocol II to the Convention on Certain Conventional Weapons, applicable in situations of NIAC proscribes "the use of any mine, booby-trap or other device designed or of a nature to cause superfluous injury or unnecessary suffering"\(^{592}\).

In addition, the Rome Statutes defines the act of "[e]mploying weapons, projectiles and material and methods of warfare which are of a nature to cause superfluous injury or unnecessary suffering"\(^{593}\) as being a war crime. Moreover, on this matter, the ICTY considered that "[w]hat is inhumane, and consequently proscribed, in international wars, cannot but be inhumane and inadmissible in civil strife."\(^{594}\)


\(^{588}\) Additional Protocol II, Article 13(1).

\(^{589}\) Hague Convention IV, Article 23(e).

\(^{590}\) Nuclear Weapons Advisory Opinion, para. 78.

\(^{591}\) Additional Protocol I, Article 35.

\(^{592}\) Amended Protocol II to the Convention on Certain Conventional Weapons, Article 3(3).

\(^{593}\) ICC Statute, Article 8(b)(xx).

\(^{594}\) ICTY, *Prosecutor v Tadic*, para. 119.
The prohibition of unnecessary suffering directly concerns combatants and their weapons, it serves as a basis to proscribe certain weapons. Yet, the notion of “unnecessary suffering” is not defined in the various international agreement. The ICJ considers it as being “a harm greater than that unavoidable to achieve legitimate military objectives.”

Basing its ruling on the prohibition on unnecessary suffering, the ICJ in its advisory opinion ruled that “the threat or use of nuclear weapons would generally be contrary to the rules of international law applicable in armed conflict, and in particular the principles and rules of humanitarian law.” However, the Court fell short of considering unlawful nuclear weapons.

IHL prohibits the use of weapons, but also of methods of warfare causing unnecessary sufferings but does not give example of such proscribed methods and weapons although many separate instruments do deal with particular type of weapons. This principle led notably to the prohibition of expanding bullets, also known as “dum-dum,” bullets by the Hague Declaration concerning Expanding Bullets in 1899. Similarly, the Chemical Weapons Convention proscribes uses of such weapons in “any circumstances.”

5.2 Relationship between the law of armed conflict and human rights

5.2.1 International Humanitarian Law and human rights

International Human Rights Law and International Humanitarian Law are two bodies of law intrinsically related, however with fundamental differences. While most part of human rights relates to the right to life, making of it a central element of IHRL, in situation of armed-conflict “[a]s long as rules of the games are observed, it is permissible [in armed conflict] to cause suffering, deprivation of freedom, and death.” Similarly, while International Human Rights Law allows for the suspension of certain rights in certain times, the provisions of International Humanitarian Law cannot be suspended. Consequently, “[a]nyone who has

595 Nuclear Weapons Advisory Opinion, para.78.
596 Nuclear Weapons Advisory Opinion, para.105(2)E.
been involved in teaching IHL to human rights professionals or speaking of human rights law with military personnel is aware of the acute difficulties that at times make it seem like speaking Dutch to the Chinese or vice versa.”

International Humanitarian Law intervenes as a *lex specialis* in situation of armed-conflict to protect the life, health and dignity of individuals while International Human Rights Law is the body applying in general. The ICJ notably considered that “[t]he protection of the International Covenant of (sic) Civil and Political Rights does not cease in times of war”

However, in such situation “[t]he test of what is an arbitrary deprivation of life’ will be determined by the law of armed conflicts.” The Court reaffirmed that it ‘considers that the protection offered by human rights conventions does not cease in case of armed conflict”.

Similarly, the Common Article 3 protects the “persons taking no active part in the hostilities”, included those who did but are not any more, from ”violence to life and person”, being taken as hostages and ‘outrages upon personal dignity’ but also protects their right to a fair trial.

These minimum standards of protections that apply in both IAC and NIAC are not without reminding us the right to life, the prohibition of torture and other inhuman treatments, the right to dignity and the right to a fair trial enshrined in International Human Rights Law.

Most scholars now agree that “there is today no question that human rights law comes to complement humanitarian situations of armed conflict.”

**5.2.2 Human rights and the recourse to armed force: Responsibility to Protect and humanitarian intervention**

Human rights and state sovereignty in particularly enter in contradiction in situations of mass human rights violation. Indeed, in cases of large-scale violation of human rights, such as genocide, as Antonio Cassese questioned: “[s]hould one remain silent and inactive only

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601 Nuclear Weapons Advisory Opinion, para. 25.
602 Ibid.
604 Geneva Conventions 1949, Article 3 (1).
because the existing body of international law rules proves incapable of remedying such a situation? Or, rather, should respect for the Rule of Law be sacrificed on the altar of human compassion?"\textsuperscript{606}

Criticisms of the restrictions imposed by the principle of non-intervention in case of mass violations of human rights started amplifying with the inaction of the international community during the 1994 Genocide in Rwanda and then, the 1995 Srebrenica massacre. The intervention in Kosovo by the NATO forces raised debates over the legality of the recourse to armed force.

In 1999, to end the violence and repression against the Albanian ethnic population of Kosovo, the armed forces of NATO launched bombing despite Russia and China opposing their veto at the Security Council against any draft resolution aiming at resolving the crisis. Yugoslavia later initiated proceedings at the ICJ against 10 of NATO’s member States for their alleged breach of the prohibition of the use of force. While the Court ruled it had no jurisdiction over the matter, it said to be "deeply concerned with the human tragedy, the loss of life, and the enormous suffering in Kosovo"\textsuperscript{607} which "raises very serious issues of international law"\textsuperscript{608}.

Humanitarian intervention can be defined as the recourse to armed force in order to stop the human rights violations. However, as implied in Cassese’s interrogation, to be lawful, a humanitarian intervention must be in conformity with the framework of the Charter. It has to be either authorized by the Security Council or at the invitation of the concerned State. Beyond the legality of the recourse to armed force, "humanitarian intervention carries with it the perils of commission - either that it is used as a cover for other motives, or that the intervention is well-intentioned but results in more harm than good."\textsuperscript{609}

In 2000, the Secretary General Kofi Annan urged the international community to review its interpretation of sovereignty by asking "if humanitarian intervention is, indeed, an unacceptable assault on sovereignty, how should we respond to a Rwanda, a Srebrenica – to

\textsuperscript{606} Cassese, A., "Ex injuria ius oritur: are we moving towards international legitimation of forcible countermeasures in the world community?", p. 25.


gross and systematic violations of human rights that affect every precept of our common humanity.”

To palliate the flaws of the notion of humanitarian intervention, the government of Canada set up the International Commission on Intervention and State Sovereignty (ICISS) in 2000 which published an influential report on the Responsibility to Protect a year later. While humanitarian intervention corresponds to the use of ‘coercive action, in particular coercive military action, against another state in order to protect people at risk in that other state’, the concept of R2P is broader. Indeed, it represents “the idea that sovereign states have a responsibility to protect their own citizens from avoidable catastrophe [...] but that when they are unwilling or unable to do so, that responsibility must be borne by the broader community of states.” The Secretary-General endorsed the R2P in his report "In larger Freedom” in 2005, and the General Assembly followed with the adoption of the 2005 World Summit Outcome document. While the concept of humanitarian intervention is limited to the recourse to armed force, the R2P is divided between three pillars articulated in the Secretary-General’s report on implementing the Responsibility to Protect:

- Pillar I: Sovereignty as responsibility for the State to protect its own population;
- Pillar II: International cooperation and assistance;
- Pillar III: ‘timely and decisive’ action.

The R2P operates a shift in the understanding of the notion of sovereignty which becomes a responsibility for the state. It is first to the State to protect its population from mass violations of human rights. It is only when this responsibility is not fulfilled, when the state is ”unwilling or unable to do so,” that the international community can intervene. Its role becomes then ”to

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613 ICISS, The Responsibility to Protect, viii.
615 UNGA, Resolution 60/1, para. 138-139.
prevent, to react and to rebuild”\textsuperscript{617}. In addition, it is only when peaceful means have been proved inadequate that collective action can be taken.\textsuperscript{618} The ICISS originally envisaged a broader scope of application for the Responsibility to Protect as it included “natural or environmental catastrophes”\textsuperscript{619} while the World Summit Outcome only refers to “genocide, war crimes, ethnic cleansing and crimes against humanity.”\textsuperscript{620}

The Commission is of the opinion that, for a military operation under the third pillar of the R2P to be lawful, 6 criteria have to be met, “right authority, just cause, right intention, last resort, proportional means and reasonable prospects.”\textsuperscript{621}

- **Right authority**: Under the relevant nascent normative framework relating to R2P, the Security Council is the institution in charge of the authority to decide of the relevance of an armed intervention when the five other criteria are met. Indeed, the ICISS considers that “[t]here is no better or more appropriate body than the United Nations Security Council to authorize military intervention for human protection purposes”\textsuperscript{622} and the 2005 World Summit Outcome requires action to be taken “through the Security Council”\textsuperscript{623}.

- **Just cause**: For a military intervention based on R2P to take place „there must be serious and irreparable harm occurring to human beings, or imminently likely to occur.”\textsuperscript{624} Two types of situations reach that threshold:
  
  o “large scale loss of life, actual or apprehended, with genocidal intent or not, which is the product either of deliberate state action, or state neglect or inability to act, or a failed state situation; or
  
  o large scale “ethnic cleansing,” actual or apprehended, whether carried out by killing, forced expulsion, acts of terror or rape.”\textsuperscript{625}

- **Right intention**: The purpose of the military intervention must be to stop the commission of atrocities. For the ICISS, “[o]ne way of helping ensure that the

\textsuperscript{617} ICISS, The Responsibility to Protect, para. 8.28

\textsuperscript{618} UNGA, Resolution 60/1, para.139.

\textsuperscript{619} ICISS, The Responsibility to Protect, para. 4.20.

\textsuperscript{620} UNGA, Resolution 60/1, para.139.

\textsuperscript{621} ICISS, The Responsibility to Protect, para. 4.16.

\textsuperscript{622} ICISS, The Responsibility to Protect, xii.

\textsuperscript{623} UNGA, Resolution 60/1, para. 139.

\textsuperscript{624} ICISS, The Responsibility to Protect, para. 4.18.

\textsuperscript{625} ICISS, The Responsibility to Protect, para. 4.19.
“right intention” criterion is satisfied is to have military intervention always take place on a collective or multilateral rather than single country basis.”626

- **Last resort:** The recourse to armed force must always be made as a last resort, “The responsibility to react – with military coercion – can only be justified when the responsibility to prevent has been fully discharged.”627 Every peaceful means of crisis resolution must have been tried before setting up a military operation.

- **Proportional means:** The means of the military operation must be strictly proportional to the aim, “The scale, duration and intensity of the planned military intervention should be the minimum necessary to secure the humanitarian objective in question.”628 In addition, the ICISS suggests that “even higher standards should apply” in case of intervention under the R2P than in other kind of armed-conflict.629

- **Reasonable prospects:** A military intervention should only take place when the aim it follows is attainable. The idea here is to avoid a larger conflict to erupt from the intervention, causing more harm than good. For practical reasons, the ICISS advices to restrain from using R2P against the major powers.630 Indeed, the use of force under the R2P against one of the major powers would likely lead to a global conflict.

Despite a better definition of the concept of R2P compared to the notion of humanitarian intervention, criticisms remain. For Jean Bricmont, "the supposed need to defend human rights by military means is indeed the ideological Trojan horse of Western interventionism within the very movements opposed to it in principle."631

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626 ICISS, *The Responsibility to Protect*, para. 4.34.
627 ICISS, *The Responsibility to Protect*, para. 4.37.
628 ICISS, *The Responsibility to Protect*, para. 4.39.
629 ICISS, *The Responsibility to Protect*, para. 4.40.
630 ICISS, *The Responsibility to Protect*, para. 4.42.
The normative framework might be more developed than for the humanitarian intervention, however, is important to keep in mind that the documents issued by the ICISS and the Assembly General are not binding in international law and the practice is yet to be established with more consistency.

Indeed, in its Resolution 1674 and following on the Protection of Civilian in Armed Conflict, the Security Council does refer to the R2P, but it does not expressly mention its third pillar.632

The Resolution 1973 authorizing the use of force “to protect civilians and civilian populated areas under threat of attack in the Libyan Arab Jamahiriya”633 is a milestone as it allows a military operation based on the R2P. However, it seems that, in practice, it undermined support for the concept mostly because the developing states refused to support the implementation of the R2P that they consider as interventionist.634

Indeed, “human rights-based arguments have been used many times by hegemonic states to justify their interventions, in the form of the doctrine of humanitarian intervention”635. If, as recommended by the ICISS, the major powers cannot be targeted by an intervention based on R2P, one could easily consider that it creates a hierarchy dividing between the major powers and the rest of the States. This led Mahmood Mamdani to consider that "the new global regime of R2P bifurcates the international system between sovereign states whose citizens have political rights, and de facto trusteeship territories whose populations are seen as wards in need of external protection.”636

5.3 Sexual Violence in Armed-conflict

Among the issues arising in situations of armed-conflicts, sexual violence is particularly sensitive. First, in time of war as in time of peace, victims rarely report the facts due to social

632 United Nations Security Council (UNSC), Resolution 1674.
633 UNSC, Resolution 1973, para.4.
635 Rajagopal, B., "Invoking the Rule of Law in Post-Conflict Rebuilding: A Critical Examination”, p. 1369.
636 Mamdani, M., “Responsibility to Protect or Right to Punish?”, p. 53.
stigma. Second, there is a general assumption that only female individuals are concerned by Conflict-Related Sexual Violence (CRSV). This is reinforced by some domestic legal provisions ruling out sexual violence against men of the definition of rape as in Uganda.637

The relatively rising number of research on the topic proved that in Sierra Leone “[m]en were victims of sexual slavery” as "a substantial proportion of males reported sexual abuse, especially the group aged 65 and above.”638 In reality, as stated in the International Protocol on the Documentation and Investigation of Sexual Violence in Conflict of the UK foreign and Commonwealth Office, “CRSV can be committed by anyone, to anyone, and in many different ways, and there is no one ‘typical’ example.”639 It further adds that “recent findings indicate that there is less of a disparity between male victims and female victims than has historically been acknowledged.”640

Rape and CRSV at large were long considered as incidental to armed-conflict, as inevitable. CRSV have a multitude of effects and consequences for victims in particular legal, social, psychological and psychiatric as well as socio-economic impacts.

637 Uganda, The Penal Code Act (Cap. 120), 15 June 1950, Article 123.
640 Ibid., p. 21.
The effects of CRSV vary depending on the gender of the victims as men and women are not affected the same way. In every case, such violence increases gender inequalities. The fear of social stigma and isolation is one of the reasons for the lack of reporting. CRSV can lead to a loss of access to education as well as of a loss of livelihood. Thus, if CRSV are not addressed and the perpetrators rendered accountable for such crimes can lead to the deprivation of multiple human rights such as the right to education and the right to remedies. The right to health is also at strike for victims of CRSV who need psychological and physical medical assistance but are often denied access to such help. In addition, domestic legislations regarding adultery and same-sex relations can sometimes provide for the arrest and punishment of the victims.641

Already prohibited in the Lieber Code642, sexual violence is now considered as a war crime under the Rome Statute in both IAC and NIAC.643 In IAC, the fourth Geneva Convention

642 Instructions for the Government of Armies of the United States in the Field (Lieber Code), 24 April 1863, Article 44.
643 ICC Statute, Article 8(2)(b)(xxii) and (e)(vi).
proscribes "rape, enforced prostitution, or any form of indecent assault" and in NIAC, the Additional Protocol II makes the same express reference.

The definitions of rape and sexual violence are particularly problematic. Indeed, while the International Criminal Tribunal for the former Yugoslavia first described it as the use of "coercion or force or threat of force against the victim or a third person", it then widened the definition considering that "the Furundžija definition does not refer to other factors which would render an act of sexual penetration non-consensual or non-voluntary on the part of the victim". The Appeal Chamber added that "[a] narrow focus on force or threat of force could permit perpetrators to evade liability for sexual activity to which the other party had not consented by taking advantage of coercive circumstances without relying on physical force."

The term of conflict-related sexual violence covers a broader range of facts, it "refers to rape, sexual slavery, forced prostitution, forced pregnancy, forced abortion, enforced sterilization, forced marriage and any other form of sexual violence of comparable gravity perpetrated against women, men, girls or boys that is directly or indirectly linked to a conflict."

Sexual violence such as rape can also constitute other crimes. The ECHR and the ICTY, for example, considered that rape can amount to torture and the ICTR ruled that it can constitute an element of the crime of Genocide when the specific conditions are reunited. In addition, the Statutes of the ICTY and the ICTR qualify rape of a crime against humanity.

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644 Geneva Convention IV, Article 27.  
646 ICTY (Trial Chamber), Prosecutor v. Anto Furundzija (Furundzija case), Judgement, Case No. IT-95-17/1-T, (1998): para. 185.  
652 ICTR Statute, Article 3(g) ; ICTY Statute, Article 5(g).
The Rome Statute goes further in recognizing ‘any other form of sexual violence of comparable gravity’ as such.\textsuperscript{653}

The Security Council has discussed the matter several times and since 2000 directly addresses the issue of CRSV through its Resolutions (ex. Res 1325). The Secretary-General, in 2018 reports on conflict-related Sexual violence emphasized that "[t]he chronic underrepresentation of women in the justice and security sector impedes reporting and response efforts."\textsuperscript{654}

\textbf{5.4 Discussion Points and Further Reading}

\textbf{5.4.1 Discussion Points}

- What are the ways in which human rights and humanitarian law conflict and complement each other?
- What are some potential issues in the application of International Humanitarian Law in armed conflicts?
- How can humanitarian law adapt to new developments in war and conflict, such as cyber and nuclear warfare?
- Is proportionality really a good justification for causing harm and suffering to civilian populations?
- Is humanitarian intervention still justified, given that it can be used as a cover for other motives, or that it can result in more harm than good?
- Given the support and criticisms of R2P, what is your position on R2P? Why?
- Since R2P is not binding in international law, what can motivate greater compliance with R2P?
- What might you add or subtract from the six criteria of R2P? Why?
- In situations of mass human rights violations in need of humanitarian intervention, how shall we resolve the contradiction between human rights and state sovereignty?
- How can we better acknowledge and address male victims of Conflict-Related Sexual Violence (CRSV)?

\textsuperscript{653} ICC Statute, Article 7(1)(g).

5.4.2 Further Reading


6.1 The importance of terminology and categories of non-citizen

Debate over terminology is not a question of political correctness, as it is sometimes characterized, and has real implications for vulnerable people. From the outset, human rights, citizenship, migration and refugee studies have been fraught with terminological difficulties; particularly as such terms are the very foundation of human rights discourse and policy implementation. It is thus important to define these terms in the context of human rights. Unlike rights conferred to citizens of formally recognized nation-states by virtue of citizenship, human rights are conferred upon all humans irrespective of their nationality and can also be claimed by stateless people or dispossessed refugees as human rights legislation has been accepted across the world. In contrast, one typically cannot acquire citizenship if he or she is not simultaneously members of a political community.

Citizenship controls access to the resources of a society, and this allocative function has been the cause of profound conflict in modern societies over criteria for citizenship. The processes of and conditions for naturalization and de-naturalization reveal the character of democracy in society as these processes relate fundamentally to the basic values of inclusion and exclusion. 2005 saw the creation of the Guiding Principles on Internal Displacement, the first statement dictating the rights of internally displaced persons (IDPs) and obligations of governments towards these populations. Most notably, the Principles restate the right not to be discriminated against on the basis of their displacement and reaffirm that national authorities have the primary responsibility to ensure that IDPs’ basic rights to food, water, shelter, dignity and safety are met. In guaranteeing the protection of IDPs, the Guiding Principles on Internal Displacement reflect and are consistent with international human rights and humanitarian law. Although not a binding legal instrument, the Principles have gained considerable authority by drawing from international human rights, humanitarian and refugee

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laws, such as the United Nations Declaration of Human Rights (UDHR), and consolidating the legal standards relevant to IDPs. It addresses all phases of displacement by providing protection against arbitrary displacement, offering a framework for humanitarian assistance and protection during displacement and setting forth guarantees for safe return, resettlement and reintegration. Significantly, this restatement on existing terminology and norms has been recognized by the UN General Assembly addressed gaps caused by the lack of a universal international treaty applying specifically to IDPs.\textsuperscript{658} The revisit of remaining terminology has also led to a surge in refugee studies decades after the Refugee Convention, focusing on its definition, institutional context and impact on policies, which has been proven to be one of its key weaknesses.\textsuperscript{659}

The use of terminology on migration has been rife with complications for some time. While many people have adopted a binary categorization of migrants as either legal or illegal, Paola Pace and Kristi Severance have pointed out that people cannot be illegal, only acts can. To this end, the Council of Europe clarified that the term “illegal” refers to a status or process, whereas the term “irregular” is preferred when referring to a person. More specifically, “illegal” refers to a lack of valid status and is often used to describe migrants who enter a territory secretly. The UN Special Rapporteur on the rights of migrants has stressed that irregular entry into a territory should only be an administrative, and not a criminal, offence. The International Organisation for Migration (IOM) and other international organizations have long promoted the use of the term “irregular” instead of “illegal”, following the recommendation made by the UN General Assembly in 1975.\textsuperscript{660} This is because the latter term is associated with criminality, which is a wrong connotation – being in a country without required papers is not a criminal offence, but rather, an administrative infringement.

To better grasp the potential political and humanitarian consequences of applying inaccurate terminology, one needs to bear in mind the traumatic experiences of the thousands of people


\textsuperscript{659} Malkii, L., “Refugees and Exile: From ‘Refugee Studies’ to the National Order of Things” p. 495.

who flee danger areas around the world every year, and how these experiences shape internationally accepted norms.

**6.2 The categories of rights of non-citizens**

Non-citizens are those who have not been recognized as having a connection to the state they live in, and include immigrants, non-immigrants, refugees, asylum seekers, stateless people and trafficked people. Since the September 11 attacks, official hostility has grown increasingly flagrant as governments detain non-citizens due to widespread fears of terrorism. International legal instruments have also been cautious of imposing responsibility on states that they may perceive to threaten their sovereign ability to control who enters their borders.

It is pertinent to protect the rights of non-citizens especially because they are vulnerable to mistreatment, exploitation, and other threats which they often lack the means to challenge effectively or seek remedies for. These problems are exacerbated by the difficulties they face in accessing basic services such as education and health as a result of xenophobia, language barriers, unfamiliar customs and a lack of political representation. These hostile social and practical realities may be so harsh that they overshadow the protection offered to non-citizens by legal guarantees of equal treatment. Non-nationals also tend to have special needs such as family reunification, unlike citizens. There are four categories of rights that non-citizens are entitled to: the general principle of equality; universal rights and freedoms; civil and political rights; and economic, social and cultural rights.

**6.2.1 The general principle of equality for non-citizens**

The principle of equality ostensibly guarantees that all humans are entitled to human rights without discrimination. Thus, non-nationals should receive the same treatment as nationals of the country in which they reside. This right is codified in Article 2 of the Universal Declaration of Human Rights (UDHR), which states that

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Everyone is entitled to all the rights and freedoms set forth in this Declaration, without
distinction of any kind, such as race, color, sex, language, religion, political or other
opinion, national or social origin, property, birth or other status.

The principle of equality for non-citizens is also embodied in the International Covenant on
Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and
Cultural Rights (ICESCR). Cumulatively, these pieces of legislation attest to the primacy of
the principle of equality. Accordingly, states that have ratified these treaties are required to
implement measures to prevent unreasonable differentiation between citizens and non-
citizens.

Interestingly, however, there are several exceptions to this general principle, such as when the
discrimination between citizens and non-citizens serve a legitimate state objective and are
proportional to the achievement of that objective. Also, the ICCPR permits states to draw
distinctions between citizens and non-citizens with respect to two categories of rights:
political rights explicitly guaranteed to citizens (Art. 25) and freedom of movement (Art.
12(1)). The Committee on the Elimination of Racial Discrimination, yet another document
that codifies the general principle of equality, further indicates that states may draw
distinctions between citizens and non-citizens only if such distinctions do not have the effect
of limiting the enjoyment by non-citizens of the rights enshrined in other instruments.

6.2.2 Universal Rights and Freedom

6.2.2.1 Right to life and liberty; arbitrary detention and security of the person

All humans, including non-citizens, have an inherent right to life which they cannot be
arbitrarily deprived of. This right is embodied in Art. 3 of the UDHR, which states that
“everyone has the right to life, liberty and security of person”. Art. 6 of the ICCPR reaffirms
that this right is “inherent to human beings and [should] be protected by law”. Although the
state can detain non-nationals who enter its territory without appropriate immigration status,
the state must respect the fundamental rights of non-national detainees and offer them the
legal protection they are entitled to.\textsuperscript{664} For instance, states have the obligation to notify

detainees of their rights, which includes a right to communicate with consular officials.\textsuperscript{665} All humans, including non-nationals must be protected from arbitrary detention, must not be subject to torture or cruel, inhuman or degrading treatment or punishment, and may not be held in slavery or servitude.\textsuperscript{666} While states border on violating this right recently due to increasing concerns to protect against terrorism, the Office of the UN High Commissioner for Human Rights has stated that states and international organizations must ensure that measures taken in the struggle against terrorism do not discriminate in purpose or effect on grounds of race, national or ethnic origin.

\subsection*{6.2.2.2 Protection from refoulement and arbitrary expulsion}

Although states have the authority to control the admission and removal of non-nationals, states cannot arbitrarily expel non-citizens under international law, which protects non-citizens from arbitrary expulsion and refoulement. Their collective expulsion has been prohibited by the UN Declaration on the Rights of Individuals who are not Nationals of the Country in which They Live and Protocol No. 4 to the European Convention on Human Rights.\textsuperscript{667} Expulsions of non-citizens should not be carried out without taking into account possible risks to their lives and physical integrity in the countries of destination.\textsuperscript{668} For instance, pursuant to Article 3 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, states cannot expel persons to another State “where there are substantial grounds for believing that he would be in danger of being subjected to torture”. This risk of torture must be assessed on grounds that go beyond mere theory or suspicion but does not have to meet the test of being highly probable. A person subject to an expulsion order is required to establish that he or she would be in danger of being tortured, and that such danger is personal and present. States may only expel non-citizens if to do so would be proportional to achieving a legitimate state objective, or would protect public interest.\textsuperscript{669}

\textsuperscript{666} UNHCR, \textit{The rights of non-citizens}, p. 5.
\textsuperscript{667} UNHCR, \textit{The rights of non-citizens}, p. 18.
\textsuperscript{669} UNHCR, \textit{The rights of non-citizens}, p. 16.
6.2.3 Liberty of movement and the right to enter one’s own country

Generally, people do not have the right to enter or stay in countries of which they are not citizens. However, non-citizens who are lawfully within the territory of the country have the right to liberty of movement and free choice of residence.670 Non-citizens are entitled to move freely within the territory of the state as well as to leave and return to the country. Under Art. 12(4) of the Covenant on Civil and Political Rights, “[n]o one shall be arbitrarily deprived of the right to enter his country”, and the Human Rights Committee has broadly interpreted this provision to give rights to stateless persons who are resident in a particular state and others with a long-term relationship with the country, but who are not citizens.

6.2.4 Freedom of thought and conscience; peaceful assembly and freedom of association; no arbitrary interference with privacy

Non-citizens have the right to express their opinions and to freedom of thought. Furthermore, they are also entitled to the right of freedom of association and peaceful assembly.671 For example, membership in political parties should be open to citizens. Moreover, non-citizens should not be subjected to arbitrary or unlawful interference with their privacy, family, home or correspondence, and this right is enshrined in Art. 8 of the European Convention on Human Rights.

6.2.3 Civil and political rights

6.2.3.1 Right to recognition and equal protection before the law

Art. 7 of the UDHR provides that “[a]ll are equal before the law and are entitled without any discrimination to equal protection of the law”. Accordingly, non-nations are entitled to equality before the courts, which entails a fair and public hearing by a competent, independent and impartial tribunal established by law in the determination of any criminal charge or of rights and obligations in a lawsuit.672

671 UNHCR, The rights of non-citizens, p. 5.
6.2.3.2 Right to acquire, maintain and transmit citizenship

Non-citizens have the right to acquire citizenship without discrimination. For instance, states have to ensure that they do not discriminate against ethnic minorities with regard to naturalization or the registration of births. Moreover, national legislation discriminating between men and women over acquiring and transmitting nationality should be eliminated, pursuant to Article 9 of the Convention on the Elimination of All Forms of Discrimination against Women.673

6.2.3.3 Protection from discrimination on the basis of gender

States should eliminate national legislations that discriminate between men and women with respect to the acquisition and transmission of nationality.674 For instance, in keeping with Art. 5 of the International Convention on the Elimination of All Forms of Racial Discrimination, non-citizen spouses of citizens should be able to acquire citizenship in the same way regardless of sex.

6.2.4 Economic, social and cultural rights

6.2.4.1 Rights of non-citizens as members of minorities

While non-national minorities have different races, languages and religions from citizens, they are entitled to enjoy their culture, use their language and practice their religion under Art. 27 of the ICCPR. Pursuant to Art. 15 of the ICESCR, states are obliged to take steps that promote and ensure that non-citizens are able to exercise their economic, social and cultural rights.675 The Rome Statute of the International Criminal Court further confers the court the power to protect non-citizens from persecution and abuses committed with intent to cause annihilation of their national group.

6.2.4.2 Right to health, education, housing, a minimum standard of living and social security

States have to ensure that both citizens and non-citizens receive equal standards of treatment with regards to social services, healthcare, education and social security. In particular, states should take effective measures to ensure that housing agencies refrain from engaging in discriminatory practices, that social services provide a minimum standard of living for non-citizens, and that educational institutions are accessible to non-citizens without discrimination. Non-citizens should also receive the same quality of education as citizens.\textsuperscript{676}

6.3 The Refugee Convention and the UNHCR

6.3.1 Historical Background of the Convention

Following World War I (1914-1918), millions of people fled violence and persecution in their motherlands to seek shelter, causing receiving countries to be overwhelmed by the task of meeting the needs of the disorganized masses of refugees flooding in, in addition to already facing serious reconstruction problems, political unrest and economic crisis. As a result, after the end of World War I, in 1921, the League of Nations was established to provide legal protection for refugees by helping them attain official travel documents. Then, the status of the refugees was examined according to the instructions and definitions from the League of Nations – the determining features being the need for protection and threat on the applicant’s life or wellbeing. However, the League of Nations carried out this task of protecting refugees with two dominant considerations: (1) it would take no responsibility for the organisation or financing of relief, and (2) its work was temporary.\textsuperscript{677} In the aftermath of World War II, massive numbers of people were, again, forcibly displaced, deported and resettled, resulting in the creation of the modern international regime. In 1951, the Convention Relating to the Status of Refugees (1951 Convention) was adopted during a diplomatic conference in Geneva, and was later amended by the 1967 Protocol Relating to the Status of Refugees (1967 Protocol).

\textsuperscript{676} UNHCR, \textit{The rights of non-citizens}, p. 10.
Initially, as a post-World War II instrument, the 1951 Convention was limited in scope to persons fleeing events occurring before 1 January 1951 and within Europe. Subsequently, the 1967 Protocol extended the scope by removing temporal and geographical limitations, thus giving the Convention universal coverage.

Both the 1951 Convention and the 1967 Protocol contain 3 types of provisions: (i) provisions giving the basic definition of who is (and who is not) a refugee and who, having been a refugee, has ceased to be one; (ii) provisions that define the legal status of refugees and their rights and duties in their country of refuge; and (iii) other provisions dealing with the implementation of the instruments from the administrative and diplomatic standpoint (Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees). In particular, as the cornerstone of refugee protection, the 1951 Convention differs from earlier international refugee instruments, which applied to specific groups of refugees, by endorsing a single definition of the term “refugee” in Art. 1 which therein sets out the requirements of claiming refugee status. Moreover, it lists the legal protection, assistance and social rights that refugees are entitled to, such as access to the courts and to work, as well as the host state’s obligations towards refugees.

The Supreme Court of Canada has described the rationale for the international regime in the case of Canada v. Ward (1993):

> International refugee law was formulated to serve as a back-up to the protection one expects from the State of which an individual is a national. It was meant to come into play only when that protection is unavailable, and then only in certain situations.678

### 6.3.2 Definition of a Refugee

Refugee Status Determination (RSD) is the legal process by which governments or the UNHCR determines whether a person seeking international protection is considered a refugee under international, regional or national law. States have the primary responsibility to conduct RSD, however, UNHCR may conduct RSD under its mandate when a state is not a party to

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the 1951 Refugee Convention and/or does not have a fair and efficient asylum procedure in place. RSD is often a vital process in helping refugees realize their rights under international law.

According to Article 1(A) of the 1951 Convention, a refugee is a person who:

owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country.

A person will be considered a refugee when he or she satisfies all requirements of the definition laid out in the 1951 Refugee Convention, which are as follows:

6.3.2.1 Outside the country of origin

A person who wants to claim refugee status is required to be outside his or her country of origin. This is because an applicant has to be seeking protection from another state. International protection will not be available to a person within his or her home country.679

6.3.2.2 Well-founded fear of being persecuted based on five grounds

6.3.2.2.1 Well-founded fear of being persecuted

The applicant has the burden of proving that they have left their country due to a well-founded fear. The term “well-founded fear” consists of a subjective and objective element. In other words, the determination of the status of refugee based on whether a “well-founded fear” exists requires the consideration of both subjective and objective elements.

Fear is, by definition, a state of mind and hence a subjective condition. As individuals may not react or interpret his or her circumstances the same way as others, the term fear is largely dependent on his or her profile, family background, individual experiences and membership

of religious, social or political groups.\textsuperscript{680} However, as a baseline subjective fear must have a basis in reality.

The term “well-founded” entails an objective determination, and may require an investigation to prove that the applicant faces a real risk of persecution. The prevailing circumstances in the applicant’s country of origin will be assessed to evaluate the credibility of the applicant and therein, ascertain whether this element has been satisfied.\textsuperscript{681}

A person can be considered a refugee if he or she faces serious harm which may amount to a risk of being persecuted.\textsuperscript{682} While the 1951 Convention contains no precise and universally accepted definition of the term “persecution”, the “Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status” (hereinafter referred to as "UNHCR Handbook") defines “Persecution” as

any threat to life or physical freedom as a consequence of race, religion, nationality, political opinion or membership of a particular social group.\textsuperscript{683}

Whether the threats will amount to persecution has to be ascertained objectively and subjectively, and the result will depend on individual situations in each case. The concept of “persecution” covers not merely a single violation of fundamental rights, but also cumulative violations of such rights. For instance, cases of discrimination that affect their socioeconomic status, if combined with other adverse factors like an atmosphere of insecurity, can produce a justifiable claim to a well-founded fear of persecution. Moreover, many scholars agree that there is a link between persecution and the absence of state protection. In other words, a person facing serious harm and who does not have any protection from the state could fulfil the definition of “a well-founded fear of persecution”.

An example of acts that constitute persecution, and that the UDHR protects persons against, include serious violations of non-derogable rights such as the right to life, the right to freedom

\begin{itemize}
\item \textsuperscript{680} UNHCR, \textit{Handbook on procedures and criteria for determining refugee status under the 1951 Convention and the 1967 Protocol relating to the status of refugees.}
\item \textsuperscript{681} UNHCR, \textit{Handbook on procedures and criteria for determining refugee status under the 1951 Convention and the 1967 Protocol relating to the status of refugees.}
\item \textsuperscript{682} Hathaway, J., “Refugees and asylum”, p. 183.
\item \textsuperscript{683} UNHCR, \textit{Handbook on procedures and criteria for determining refugee status under the 1951 Convention and the 1967 Protocol relating to the status of refugees.}
\end{itemize}
from torture or cruel, inhuman or degrading treatment or punishment, and the right to freedom of thought and religion. Similarly, the systemic or repetitive violation of other human rights may amount to persecution.\textsuperscript{684} For instance, while individual acts of discrimination may not satisfy the threshold to find persecution, a persistent pattern of such prejudicial treatment may fall within the ambit of this concept. Moreover, other prejudicial actions or threats may amount to persecution, such as economic restrictions so severe as to deprive a person of all means of earning a livelihood and punishment for a breach of law which is out of proportion with the offence committed.

The Syrian civil war is an example of an act constituting persecution. Since the war began in 2011, the nation has suffered a brutal conflict that has killed hundreds of thousands of people, creating the largest refugee and displacement crisis of this age. There are currently 6.7 million Syrian refugees, with another 6.2 million people displaced within Syria. It has been estimated that nearly 12 million people in the country need humanitarian assistance.\textsuperscript{685}

\textbf{6.3.2.2.2 Five Grounds}

A person will be considered as a refugee when they are able to show “well-founded fear of persecution” based on one or more of the five grounds specified in the Convention: race; religion; nationality; membership of a particular social group; or political opinion.

\textbf{6.3.2.2.2.1 Race}

Fear of persecution on grounds of race is more commonly faced by minority groups, and can be caused by a refusal of citizenship. A closely related concept is “racial discrimination”, defined by the Convention on the Elimination of All Forms of Racial Discrimination as “any distinction, exclusion, restriction or preference based on race, color, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.” In countries such as


Burma, Bhutan, Sri Lanka, and former Yugoslavia, millions have been forced to flee their homes as a result of ethnic violence, racism, racial discrimination and intolerance.

6.3.2.2.2 Religion

Individuals have a right to freedom of religion, whether they choose to have one or not. The right to freedom of thought, conscience and religion has been proclaimed by the UDHR and the ICCPR. Persecution on the basis of religion takes many different forms. For example, one may be persecuted for having different religious beliefs, or for not having religious beliefs, as in the case of atheists and agnostics. The UNHCR handbook (2011) highlights that if severe enough, prohibitions on worship, forced compliance with religious practice and serious discrimination as a consequence of religious practice can constitute religious persecution.686

6.3.2.2.3 Nationality

The UNHCR handbook (2011) points out that the term “nationality” is wider than citizenship and includes members of ethnic, religious, cultural and linguistic groups.687

6.3.2.2.4 Membership of a particular social group (PSG)

The UNHCR handbook (2011) clarifies that PSG refers to a group of persons sharing a common characteristic crucial to their identities.688 This could include groups of people who are former members of the military who have become targets for assassination, or women of a tribe forced to undergo marriage or female genital mutilation. The case of Ourbih was significant in showing that transsexuals may also constitute a particular social group, as the court held was the case for transsexuals in Algeria because a common characteristic set them apart and exposed them to persecution that was tolerated by Algerian authorities.689 The importance of social factors is recognized under the 1951 Convention, Art. 2 of the UDHR and the ICCPR and ICESCR. A claim to a fear of persecution under this heading often

687 UNHCR, Handbook on procedures and criteria for determining refugee status under the 1951 Convention and the 1967 Protocol relating to the status of refugees, p. 16.
overlaps with a claim to fear of persecution on other grounds such as race, religion or nationality.

The UNHCR (2005) has suggested that typically, the group will demonstrate one or more of the following characteristics:690

- Innate – such as linguistic background, or sexual orientation.
- Unchangeable – such as a common history, as in the case of former military soldiers.
- Fundamental to identity, conscience or the exercise of one’s human rights.

6.3.2.2.2.5 Political opinions

The recognition of this ground in Art. 19 of the UDHR and Art. 19 of the ICCPR aims to protect those who are persecuted for their political opinions. According to the UNHCR Handbook (2011), individuals should be able to express political opinions without fearing persecution.691 However, not every political opinion warrants protection for a fear of being persecuted. For instance, the mere fact of holding political opinions different from those of the Government is not in itself a ground for claiming refugee status. To satisfy the requirement of having a well-founded fear of persecution, a person claiming refugee status has to have political opinions that are not tolerated by the authorities. A “well-founded fear of persecution” will be found where a person is “unable or, owing to such fear, unwilling to avail himself of the protection of that country”, and the person cannot or is unwilling to seek protection within his or her country. For instance, a country may fail to provide protection to its citizens because it is at civil war or experiencing grave disturbances.692 Political activists who fear they will get arrested by the government due to their political opinions will also likely refuse to seek protection within their states.

691 UNHCR, Handbook on procedures and criteria for determining refugee status under the 1951 Convention and the 1967 Protocol relating to the status of refugees, p. 17.
6.3.3 The United Nations Office of the High Commissioner for Refugees (UNHCR)

The Office of the United Nations High Commissioner for Refugees (UNHCR) was established on December 14, 1950, by the United Nations General Assembly in the aftermath of World War II. The UNHCR is crucial in ensuring the protection of refugees worldwide and finding solutions that enable them to live their lives in dignity and peace. These solutions include: integration with the local community where they claim refugee status (local integration); resettlement in a third country (resettlement); and a choice to return to their own country after the risk of persecution has ceased (repatriation).

The UNHCR was initially established as a temporary and short-term organization responsible only for addressing the displacement in Europe in the aftermath of WWII. Today, however, the responsibilities of the UNHCR extend far beyond European refugees to cover refugees, such as those fleeing communism and government suppression, globally. This goal of protecting refugees is ultimately the re-establishment of a normal life, though efforts are also being made to ensure that refugees are also able to realize other opportunities for which they may be eligible, such as to family reunification.

Betts, Milner and Loescher (2012) explain that the UNHCR’s mandate is based on the global refugee regime. The UNHCR is of particular importance as it supervises the application of the 1951 Convention and 1967 Protocol by monitoring the procedures and criteria applied. The decisions reached are of direct relevance not only to the application itself, but also in determining the form of assistance provided by the UNHCR.

States have the primary responsibility of protecting refugees, while the UNHCR’s role is to assist and supervise states regardless of whether states fulfil their obligations towards refugees. While states have the mandate to cooperate and work with the UNHCR to fulfil these responsibilities, in reality, however, states are likely to be unwilling to do so. Instead, receiving countries often adopt measures that make it more difficult for refugees and asylum seekers to enter their territories, such as through implementing restrictive asylum and immigration policies. These challenges have, in turn, inhibited the ability of the UNHCR to protect refugees especially because within the limits of international law, states have the

693 Betts, A./Milner, J./Loescher, G., UNHCR, p. 7.
694 Betts, A./Milner, J./Loescher, G., UNHCR, p. 8.
sovereign right to choose whom to admit, exclude and expel from their territory as they have a legitimate interest in controlling unauthorized entry to their territory and combating crime.

To adapt to countries’ changing attitudes towards refugees and facilitate the implementation of sustainable solutions for their protection, the UNHCR has taken actions that it had not initially expected to when first created. For example, as states limit refugees and asylum seekers’ freedom of movement and right to work in response to political, economic and security concerns, the UNHCR plays a role in refugee camp management and camp coordination (CCCM). Where there is no effective or formal system to manage asylum seeking processes in states, the UNHCR steps in to fulfil this responsibility. In addition, in response to increasingly restrictive migration policies, the UNHCR has to be more engaged in monitoring the entry systems of states to ensure that states will not forcibly return refugees to a country where they may face persecution. Overall, the UNHCR has varying supervisory roles across different regions and countries, depending on the form and extent of supervision the state requires.

6.3.4 Ongoing Debate

6.3.4.1 Is the 1951 Refugee Convention still relevant to today’s needs?

As mentioned in section on historical background, there was a massive population movement in Europe due to World War II, and over 60 million people fled their home countries for fear of violence and persecution. To resolve the legal status of this group of displaced refugees, the 1951 Convention was drafted. In other words, it was drafted with the precise purpose of dealing with a specific group of people at a particular time.

In recent years, the world has been facing a global refugee crisis. According to the global trends of forced displacement in 2017, an unprecedented 68.5 million people around the world have been displaced, from which 25.4 million are refugees. 57% of refugees worldwide came from three countries – Syria (6.3 million), Afghanistan (2.6 million) and South Sudan (2.4 million). Interestingly, the report displayed a steep increase of 4.4 million in newly displaced

695 Betts, A./Milner, J./Loescher, G., UNHCR, p. 16.
696 Simeon, J., The UNHCR and the supervision of international refugee law, p. 17.
Given that conflict, violence and fear of persecution remain causes of displacement, the 1951 Convention continues to be relevant today to protect people facing the danger of such persecution. To this end, even 50 years after the creation of the 1951 Convention, in 2001, state parties declared that they recognized the “enduring importance” of the Convention and reaffirmed their commitment to it.

However, many analysts have argued that the 1951 Convention has been ineffective in protecting refugees. Cathryn Costello (2016), for one, finds the narrow definition of refugee problematic especially as the applicant is required to have a well-founded fear of persecution on very specific grounds, which includes race, religion and political opinion. She points out that there are many who do not fall within the definition of refugee in the Convention, such as those facing indiscriminate abuse. Professor Philip Cole (2016) further notes that the definition is very “target-based”, in the sense that one has to be deliberately targeted by persecution to claim refugee status, and thus poses a problem for those who are not the target of that violence, but are “simply trying to escape”. In addition, he adds that this definition of refugee is likely to be challenged by the phenomenon of climate change as the number of people being displaced by natural disasters resulting from global warming is likely to increase in the near future. However, the definition of refugee in the 1951 Convention, as it stands, does not include those displaced due to climate change. Professor Cole (2016) also highlights that since one criterion for claiming refugee status is that the applicant must be outside his or her country, the 1951 Convention will apply only where he or she is under the jurisdiction of the receiving state. However, many facing violence and persecution are unable to cross the border due to internal violence, and as a result, are not eligible to claim refugee status. At the moment, there are 40 million internally displaced persons, from countries like Syria, Nigeria and Iraq who cannot acquire protection as refugees precisely because they are trapped within their own countries. Worsening the problems caused by the narrow scope of “refugee” is

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697 UNHCR, Global Trends: Forced Displacement in 2017, p. 3.
703 UNHCR, Global Trends: Forced Displacement in 2017, p. 3.
the unsatisfactory definition of “persecution”, which is very broad and thus difficult to be implemented, and is contained in a non-legally binding document.

Critics have further questioned the ability of the 1951 Convention to address challenges posed by the global refugee crisis in the 21st century especially as some of the 43 non-parties to it host important refugee populations, such as the United States. Today, since asylum seekers can process their application for asylum upon reaching the border of another state, many nation-states have deliberately prevented an increasing number of asylum seekers from reaching their territory by adopting restrictive policies such as imposing visa restrictions, strengthening immigration control and heightening the burden of proof necessary before a refugee claim is accepted.\textsuperscript{704} The UNHCR has acknowledged this problem in the 1951 Convention and has reaffirmed its commitment to dealing with it, as seen in its Strategic Directions 2017-2021. Another example of how states curb the arrival of asylum seekers is the carrier liability legislation. In the UK, Europe and North America, this law imposes financial penalties on carriers who bring passengers without a valid visa or proper document into their territory.\textsuperscript{705} As a result, the task of screening passengers’ documents is put into the hands of private agents who are neither mandated nor trained to identify asylum seekers and refugees. Maritime interception further poses a problem for migrants when they attempt to cross the border of another state. When migrants try to enter the state’s territory by boats, maritime patrol tends to intercept the boats while they are still in international waters and force the migrants to turn back before they reach the state’s territory. While the UNHCR Background Note on the Protection of Asylum Seekers and Refugees Rescued at Sea sets out the roles and responsibilities of international agencies and the international community as a whole, it is non-binding and thus largely ineffective. Worryingly, during such interception, there is a lack of procedures able to distinguish between genuine refugees who need protection and traffickers and smugglers who do not.\textsuperscript{706} As a result, states may unknowingly turn refugees who resort to such means away before they reach their borders. These examples demonstrate how state parties have disregarded their international legal obligations under the

1951 Convention by directly and/or indirectly limiting the scope of human rights protection to refugees. However, the Convention fails to address

An example here is that the US government has imposed new security vetting procedures on refugees before they can be admitted into the country, which has greatly lengthened waiting times and left many refugees in dangerous situations for prolonged periods. After a surge in migrants fleeing violence and poor economic conditions in Guatemala, Honduras and El Salvador in 2019, US President Trump implemented the “safe third country”, a policy where asylum seekers would need to wait outside the US or be sent back to whichever country they crossed first when fleeing their homes. However, regular reports of murder, kidnapping, rape and extortion of migrants in Mexico undermine the claim that Mexico is a safe country for asylum seekers.

Despite limits to its scope of protection, the 1951 Convention remains fundamental as the only consolidated international treaty that safeguards the rights of refugees by setting out the state’s obligations. Moreover, the Convention plays an important role in the regulation of the refugee protection regime. Absent the 1951 Convention, the lack of regulation could trigger large-scale migration, which would have repercussions for both developed and developing countries.\textsuperscript{707} Volker Turk (2016) confirms this, stating that “departures from the fundamental principles of international refugee protection have neither reduced nor stalled refugee movements”.\textsuperscript{708} He states that, instead, they have resulted in “ineffective management of large-scale influxes, the diversion of refugee movements and the creation of tensions between states as burdens and costs are shifted from some onto others”.

\textbf{6.3.4.2 Limitations of the Convention and the Protocol}

The 1951 Convention was part of the international community’s response to the plight of the Holocaust victims and others who had been displaced from Central and Eastern Europe following WWII. It complements and supports other human rights treaties recognized by the international community. However, while the Convention legalized the status of those who had been displaced due to the war, it simultaneously shut the door for others in future by giving governments control over their newcomers, therein transferring power back to

\textsuperscript{707} McAdam, J., “The Enduring Relevance of the 1951 Refugee Convention” p. 6.
\textsuperscript{708} Türk, V., “Prospects for Responsibility Sharing in the Refugee Context” p. 47.
individual states after considerable inter-state cooperation in the pre-war years.\textsuperscript{709} The restrictions present in the 1951 Convention, including the provision outlining that the right was exclusive to those displaced within Europe prior to 1951, led to the creation of the 1967 Protocol, which removed these temporal and geographical restrictions.

The Convention provides protection for those facing persecution, which necessarily implies that how “risk of persecution” is construed is central to the definition of a refugee. However, the Convention fails to explicitly define the requirement to find persecution other than categorically stating the five grounds, which considerably limits its scope. Rather, it is merely defined in the non-binding Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees. Although the threat of death, torture or inhumane or degrading treatment or punishment is included under Art. 31 and 33, Goodwin-Gill (2008) argues that a more comprehensive definition necessitates the consideration of broad international human rights developments that were not specifically included so that the refugee definition will not be as vulnerable to restrictive interpretations.\textsuperscript{710} However, such a comprehensive definition may not be desirable given the advantage to indeterminacy of the concept of persecution, which provides the refugee definition with an indispensable element of flexibility. This advantage has materialized in applications of the Convention— the concept of “persecution” has expanded to include forms of harm that were not present to the Convention’s drafters, such as domestic abuse. Thus, indeterminacy has allowed the concept to evolve in response to both the “changing nature of persecution” and the changing sensibilities of society.

Changes in the modern world, such as climate change, endemic food insecurity, overpopulation, terrorism and technological advances that facilitate greater cross-border communication and movement, have created increasingly large numbers of refugees and asylum seekers, therein forcing changes in policies and practices to deal with this influx. These issues have exacerbated the problems posed by these inherent limitations of the Convention. It has been suggested that the system is fragmented, based on outdated concepts of forced migration, with elaborate makeshift processes for those crossing international

\textsuperscript{709} Glynn, I., "The genesis and development of Article 1 of the 1951 Refugee Convention", p. 141.
\textsuperscript{710} Goodwin-Gill, G., “The politics of Refugee Protection”, p. 8-23.
borders and ad hoc institutional responses for other displaced persons. In response, regional instruments such as in Africa, the Americas and Europe have sought to address the shortcomings of the Convention and keep it relevant. For instance, owing to the increasing numbers of refugees coming from dictatorial regimes, the Latin American states expanded the definition of refugee via the 1984 Cartagena Declaration on Refugees. These treaties have contributed to important changes in the law of many countries and have been extensively interpreted with regard to the administration of justice and treatment of persons deprived of their liberty.

6.3.4.2.1 Internally Displaced People

The exclusion of IDPs remains a big gap in the current definition of a refugee. According to the Convention, a person must be outside of his or her own country in order to make a claim as a refugee. However, sometimes IDPs may be unable to leave their country, perhaps because the borders are too far, or because armed conflict and mines make the journey too dangerous. There are some 28 million IDPs around the world, forming more than half of the world’s forcibly displaced population. Concern with the vulnerability of IDPs led to the formulation of the Guiding Principles on Internal Displacement. While not legally binding upon states, many of the rights to which it refers to are defined in other international human rights instruments that are of a legally binding character. The Principles were not intended to provide a strict legal framework for the protection of IDPs, rather, they draw upon elements of existing international human rights law which are of particular relevance to the protection of IDPs and apply those elements to the specific situations experienced by IDPs.

Critically, neither the Convention nor the UNHCR specifically protects IDPs, even though they would otherwise be considered refugees if they crossed an international border.

While from the 1970s onwards the UNHCR began coordinating assistance to IDPs via the “cluster approach”, under which it organized nine critical areas of the humanitarian response into “clusters” composed of a broad range of actors, these processes lacked consistency. Thereafter, growing interest in internal displacement followed the realization that IDPs are a devastating burden on countries unable or unwilling to provide the support required for its own citizens, but whose citizens are unable or unwilling to cross international borders. This was matched with UNHCR’s changing policies, such as UNHCR’s Role in Support of an Enhanced Humanitarian Response to Situations of Internal Displacement, which outlined the mobilization of resources to protect IDPs. The current preoccupation with limiting refugee flows and avoiding long-term settlement has further resulted in a policy shift in favor of internal displacement, with greater efforts geared towards keeping displaced persons within their own country.716 The flight of refugees from former Yugoslavia to Western Europe in the early 1990s was a key turning point. Governments responded to the mass influx of refugees by (i) forcing them to take up temporary protection visas, which often did not meet basic international legal standards.717 and (ii) forcing a “right to remain” claim for would-be refugees to monitor and administer the needs of “at-risk involuntary migrants”, effectively encouraging and even forcing persons to remain in their own country and thus fail to qualify for refugee status.718

6.3.4.2.2 Accountability and authority

A fundamental flaw in the United Nations Refugee Convention is that it is an opt-in, opt-out agreement. The only authority that the UN has to hold signatories accountable to the Convention is when countries themselves give the UN that power by ratifying the Convention. While the UN may assist in enforcement through UN peacekeepers, it is up to states themselves to be present at UN meetings and comply with UN regulations and conventions. Furthermore, the ability of states to resist trade and investment sanctions as well as threats of removal from international councils and bodies rests on their relative willpower to stand up to pressures exerted by the international community.719 Governments conform to

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716 Bennet, J., “Forced migration within national boarders: The IDP Agenda”, p.4-6.
international norms either because they believe in them, because it is in their best interests to do so, or due to their fear of shame, ostracism and/or punishment that a violation of such norms would incur. The refugee crisis primarily involves two different types of states: developed states, who hold more power, tend to be receiving states and favor a narrow interpretation of the Convention, and developing states, who have little international power, tend to be sending states and favors broader definitions and policies. The duty to provide protection for refugees should be shared by all sovereign nation states if the very notion of sovereignty of nation states is to continue with some moral basis. If one state fails to uphold its responsibilities, this encourages other states to evade their duties as well. Unfortunately, such non-compliance with international treaty obligations for refugees is becoming a “global norm”. However, this does not detract from the relevance and usefulness of the Convention, and only signals that implementation requires strong, collective political will.

6.3.4.2.3 Border protection

Another issue of increasing concern is the tension between the right to seek asylum and state border protection policies. In principle, the Convention provides protection for refugees who enter member states, regardless of the legality of their entry, however, this is in conflict with most states whose key policies are aimed at discouraging and preventing undocumented and illegal entry due to priorities of national security amidst fears of terrorism. These competing interests often result in differential treatment towards asylum seekers based on their reasons for fleeing, their mode of arrival and the country in which they first seek asylum. Two assumptions are at play when countries enact such policies – first, that migration flows constitute a pool of individuals particularly prone to radicalization and recruitment and second, that terrorists have used migration flows as a backdoor to enter the country. To this end, the Convention specifically excludes the protection of refugees believed to have committed war crimes, serious non-political offences and acts contrary to the principles of the United Nations. Thus, Goodwin-Gill (2008) argues that the Convention has been, from the very outset, adequate in ensuring that terrorists and criminals do not benefit from international

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However, this provision in the Convention is distinct from countries’ concerns that they might unknowingly accept refugees who turn out to be terrorists or have links with criminal organizations.

6.3.4.2.4 State policies and processes

Although states must uphold certain international standards in protecting refugees, the implementation of these measures at a domestic level is largely in the hands of individual states. In both Africa and Central America, there has been a growing recognition that the Convention has failed to sufficiently address the problems caused by the increasing flows of refugees into these regions, resulting in the development of regional protocols. These include the Cartagena Declaration of 1984, a non-binding Latin American instrument which covers refugees fleeing their home countries due to gross violations of human rights, forced aggression, internal conflicts or other circumstances that threaten their lives, security or liberty, and the 1969 Organization for African Unity Convention in Africa, which covers persons who flee due to “seriously disturbed public order”. While these regional restatements have not replaced the Convention, they have contributed to its constantly evolving interpretation and implementation, especially as it assists national governments with the implementation of their human rights obligations and recommendations of treaty bodies.

On the other hand, some states treat refugees as a special type of migrant, and have sought reforms designed primarily to meet state-based migration management goals. This includes states that have sought to artificially designate so-called “countries of first arrival” as the sole place in which refugees may lawfully seek protection, a proposition that finds no basis in the Convention itself. Governments tend to enact restrictive policies that reflect hostility towards refugees due to concerns over national security, resource limitations, ethnic and political enmities, regional alliances as well as, typically for military governments, an innate aversion to protecting refugees. In addition, many states have begun to penalize refugees that arrive without any authorization despite Art. 31 of the 1951 Convention explicitly

726 Goodwin-Gill, G. and McAdam, J., The Refugee in international law.
forbidding countries from penalizing refugees based on their mode of arrival. Examples of such penalties include denying them access to basic social services, mandatory detention and extra-territorial “processing” of refugees.\textsuperscript{728} Countries have been taken to task for these violations in the past – in the case of \textit{The Haitian Centre for Human Rights et al. v United States}, the Inter-American Commission on Human Rights found that the US had breached several rights the Haitian Refugees were entitled to, such as the right to security of the person and to life and liberty and ordered it to provide adequate compensation to the victims. While not necessarily an effort to deny protection to refugees, these methods nevertheless represent concentrated efforts towards constraining options available to refugees and effectively “de-refugee” refugees.\textsuperscript{729}

6.3.4.3 Is it possible to change the Convention?

Notably, those calling for a change in the definition of refugees are politicians in asylum states who often play up xenophobia; on the other hand, refugees themselves do not challenge the relevance of the Convention in offering protection to them.\textsuperscript{730} Thus, while internationally coordinated efforts to modify the Convention could bring about a positive reconfiguration of the asylum system, it is far more likely to “be a time when hard-fought gains protecting the rights and dignity of asylum seekers are lost in the name of national security and border protection”.\textsuperscript{731} Furthermore, the issues with the current global refugee situation stem not so much from the Convention itself and its definition of a refugee, but rather from the application and implementation, which varies according to country. What is lacking is an international agreement on how the burden of accepting refugees should be shared, how long they should be in processing camps and centers, and what should happen to them both during and after they asylum claims are assessed. Art. 35 does not go far enough to force state compliance, and should be amended to ensure equal protection for all refugees regardless of where they seek asylum. However, this does not detract from the meaningfulness of the definition of a refugee. On the contrary, efforts must be made to ensure compliance through state and international legal systems in order to protect the rights of refugees, which form a

\textsuperscript{728} Hathaway, J., “Forced Migration Studies: Could We Agree Just to ‘Date’, p. 355.
part of a greater commitment to human rights protection. The Convention and, in particular, the adoption of an appropriate definition of a refugee, remain vital for international refugee policy and cooperation between states. Indeed, a Ministerial Meeting of State Parties marking the fiftieth anniversary of the Convention specifically acknowledged “the continuing relevance and resilience of this international regime of rights and principles”.

Clearly, while there are many factors to consider when developing ways to more efficiently respond to the current refugee crisis, the definition of a refugee as provided for in Art. 1 in the Convention and the Protocol continues to be an excellent guide and basis for future actions. At the same time, it is acknowledged that no one document can hope to fully address the issues involved, as each state, and indeed, each refugee faces unique circumstances that require careful consideration rather than a uniform response. Crucially, what is required is states’ political and social will to ratify and implement existing frameworks and develop more coherent policies. In addition, new institutional frameworks are required to better deal with complex situations, better distribute the burden between developing and developed countries, and to address the gaps in the definition of a refugee that result in a lack of protection of certain groups such as IDPs. Nevertheless, the Convention, coupled with strong collective will, forms a strong foundation upon which a more just system can be developed to provide equal opportunity for all refugees to live freely without fear of persecution.

### 6.4 Statelessness

#### 6.4.1 Definition

Stateless Persons

The 1954 Convention Relating to the Status of Stateless Persons defines stateless people as a person who is not considered as a national by any state under the operation of its law. An individual’s citizenship status is determined based on the national laws of the country in which he or she was born, or where his or her parents were born. However, an individual can be deprived of citizenship and nationality for a variety of reasons. For instance, individuals

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may lose their nationality or citizenship as a result of the extinction of the state, or the acquisition of said state by another state. 733

6.4.2 Protection in international law: The Conventions

They key conventions and legal frameworks for the protection of stateless people are the 1954 Convention Relating to the Status of Stateless Persons, the 1961 Convention on the Reduction of Statelessness (CRS) and the Convention on the Rights of the Child (CRC). While the former two Conventions were adopted more than 50 years ago, both remain widely relevant as indicated by the 49 accessions to both Conventions between 2011 and 2015.

6.4.2.1 The 1954 Convention Relating to the Status of Stateless Persons

The 1954 Convention signifies the first international effort to address the rights of stateless persons. It was adopted following the displacement of millions of people during WWII, which created an urgent need to establish legal protection for those people. The 1951 Refugee Convention acted as a legal framework protecting people who feared persecution and resided outside the country of their habitual residence. However, many stateless people did not fall within the definition of “refugee” under the 1951 Refugee Convention either because they were unable to cross the borders, or the mistreatment they faced did not satisfy the threshold to find persecution. Unlike the 1951 Refugee Convention, the 1954 Convention was adopted precisely to address this gap by requiring states to provide stateless persons with identity papers and travel documents as well as facilitate their assimilation and naturalization. It provides important standards of treatment for stateless persons, stating that they are to enjoy the same rights as citizens with respect to freedom of religion and education of their children, and at minimum, the same treatment as other non-nationals with regards to other rights.

6.4.2.2 The 1961 Convention on Reduction of Statelessness (CRS)

The 1961 Convention guides states on the conferral and non-withdrawal of citizenship in order to minimize instances of statelessness and its subsequent implications. State parties are restricted from withdrawing their citizen’s nationality if such removal will result in

statelessness. Art. 1 of the 1961 Convention provides that member states are obliged to reduce statelessness by granting nationality:

a. To persons born in its territory who would otherwise be stateless
b. At birth, by operation of law, or on application as prescribed by national law

In light of states’ concerns surrounding their sovereign right to govern such an issue of national interest, the Convention has sought to balance the rights of individuals as underlined in Art. 15 of the UDHR with the interest of States by setting out general rules for the prevention of statelessness and simultaneously allowing some exceptions to those rules.

6.4.2.3 The Convention on the Rights of the Child (CRC)

The Convention on the Rights of the Child was adopted to protect and promote every child’s right to survive and thrive, learn and grow, have their voices heard and reach their full potential. The CRC has been ratified by 194 out of 196 countries, signalling their commitment to respect and protect the civil, political, economic, social and cultural rights of children. One principle underlying the CRC is the prevention of childhood statelessness. According to Art. 7 of the CRC, every child is entitled to birth registration and having a nationality. There is an intimate link between birth registration and statelessness – children with access to birth registration are given a document as evidence that they were born in the country where they may later claim nationality or citizenship.

6.5 Migrant Workers

6.5.1 Migrant workers’ Human Rights violations

The growing global economy has created a large number of migrant workers. In developing countries, many workers who receive little pay and suffer from poverty try to seek job opportunities overseas. At the same time, there is shortage of unskilled labor in developed countries. Evidently, migrant workers feature prominently in economic flow, labor market and productivity challenges in today’s globalized economy. Crucially, international labor migration is projected to increase over the next forty years, especially as developed countries increase their demand for international labor owing to demographic changes like ageing populations and low birth rates.
Not only do migrant workers contribute to the economy of their host countries, they also improve the economies of their country of origin by sending remittances to their family. In 2018, remittances to low- and middle-income countries reached a record high, reaching about USD529 billion, with India, which was the largest country of origin of international migrants, being the top remittance recipient. However, migrant workers are not well-protected by international and domestic law. This is evident in the case of undocumented migrants and domestic workers, who are particularly vulnerable to discrimination and exploitation. For instance, migrant workers may be trafficked for different purposes such as forced labor or sexual exploitation, resulting in them suffering physically and mentally. In the case of foreign domestic workers, they often live in slave-like conditions, are forbidden from having days off, are forced to work extremely long hours (100 hours per week) and receive little pay. Some may even experience physical or sexual abuse by the employers. These domestic workers typically come from Asia, for example Nepal, where many women migrate to work in Gulf States such as the United Arab Emirates, Kuwait, Qatar and Saudi Arabia.

6.5.2 The International Convention on the Protection of the Rights of all Migrant Workers and Members of their Families (ICRMW)

The ICRMW does not expand the range of human rights recognized, but rather, offers a more precise interpretation of existing rights of migrant workers, such as non-discrimination and non-refoulement. It presents two tiers of rights: those available to all workers (including undocumented workers); and those available exclusively to documented workers. All workers are entitled to basic rights such as the freedom from slavery and servitude (Art. 11), freedom of thought, conscience and religion (Art. 12) and the right to liberty and security of person (Art. 16). Beyond these rights, documented workers are also entitled to form associations and trade unions (Art. 40) and receive equal treatment with relation to education and housing (Art. 43).

However, the ICRMW has not received sufficient global support. The majority of the 54 state parties and 39 signatory states are sending states such as Mexico, Morocco and the Philippines. In contrast to similar UN conventions such as the Convention on the Elimination of

734 Murphy, C., “The Enduring Vulnerability of Migrant Domestic Workers in Europe”, p. 600.
of All Forms of Discrimination against Women (CEDAW), CRC, International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) and ICCPR, the number of states party to the ICRMW is extremely low. Notably, the seven European countries that took part in drafting did not even ratify the Convention. According to the report of the Global Commission on International Migration, countries were unwilling to ratify the 1990 Convention because it provides migrants (especially those who undertook irregular migration paths) with rights not found in other treaties. Furthermore, as it disallows differentiation between irregular and non-irregular migrants, states worry that ratification would entail the obligation to grant too many rights to migrants who do not have a legal status in the country. As a result, only a limited percentage of the global migrant worker population is protected by the Convention. While the UN Special Rapporteur for Human Rights of Migrants launched the Global campaign for ratification, it did not draw wide attention.

6.5.3 International human rights standard

Existing safeguards for human rights and humanitarian responses fail to address the many complexities underlying the multiple refugee crises across the globe. The massive scale of human mobility has resulted in a tremendous increase in the needs of migrants and refugees, as well as demands on host countries. While current human rights instruments set out obligations of providing food and non-food assistance, this is vastly insufficient to reach the standard of self-reliance set in the Operational Guidance on Refugee Protection and Solutions in Urban Areas. For instance, protracted displacement necessarily results in a lack of access to education, healthcare and job opportunities. Urban displacement and the concern to address undercurrents in the host community have further exacerbated these challenges and severely inhibit the ability of refugees to gain a legal status, and thereafter, access jobs and social services in the host country.735 The Refugee Convention highlights the rights of refugees and obligations of states, but does not mandate international cooperation. On a similar note, the 1951 Convention fails to provide a systematic model to better share the burden that host countries have shouldered for decades. A sustainable response to the refugee crises would require the integration of systematic global compacts on refugee and migration into national systems in order to protect the rights of migrants and refugees.

The New York Declaration on Refugees and Migrants, adopted by the United Nations General Assembly on September 19, 2016, triggered the creation of two Compacts: the Global Compact for Refugees (GCR) and the Global Compact for Safe, Orderly and Regular Migration (GCM). These non-binding Global Compacts were formulated at a time when the US has abandoned its traditional leadership role in relation to the refugee issue. The Trump administration has already announced a major reduction in the number of refugee resettlement places that it provides, and has threatened to make cuts in the contributions that the US makes to refugee assistance programmes in the developing world.736

6.5.3.1 The Global Compact for Refugees

On the 17th of December 2018, the United Nations General Assembly accepted the GCR in consultation with state representatives and other stakeholders, based on the comprehensive refugee response framework set out in the New York Declaration (Annex I). The GCR strengthens the international response to large-scale movements of refugees and protracted refugee situations and seeks to set out principles on state cooperation to share responsibilities, forming a basis from which international law and standards can be set, such as the 1951 Refugee Convention and human rights treaties. The GCR encompasses four parts: (i) an introduction setting out the background, guiding principles and objectives of the global compact; (ii) the Comprehensive Refugee Response Framework (CRRF), as agreed to by member states in Annex I of the New York Declaration; (iii) a Programme of Action which sets out concrete measures to help meet the aims of the compact, including arrangements to share burdens and responsibilities through a Global Refugee Forum, national and regional arrangements for specific situations and tools for funding, partnerships and data gathering and sharing; and (iv) areas in need of support from reception and admission to meeting needs and supporting communities to find solutions. The GCR aims to ease pressures on the host country, enhance refugees’ capacity for self-reliance, expand access to third-country solutions and support conditions in countries of origin to ensure refugees can return safely.

However, what is significant, and troubling, about the Refugee Compact is that the non-binding commitment in the Compact for additional funding does not come with conditions that host states guarantee rights to refugees (e.g. right to work and freedom of movement).

736 Crisp, J., “The Global Compact on Refugees: what can we expect?”. 
Furthermore, the call for more resources for host states, which is a general theme in the Refugee Compact to promote “national ownership” of the refugee response, may be problematic particularly if national accountability structures for how states spend new refugee dollars are not robust.

6.5.3.2 The Global Compact for Safe, Orderly and Regular Migration

The Global Compact for Safe, Orderly and Regular Migration document, published by the International Organisation for Migration (IOM), is regarded as the first inter-governmentally negotiated agreement. It was prepared under the auspices of the United Nations and covers all phases of international migration in an inclusive manner. It is a non-binding document that while respecting states’ sovereign right to regulate who enters and stays in their territory, reaffirms commitment to international cooperation on issues pertaining to migration. Every objective of the GCM is laid out in view of state practices and human rights obligations. It presents an overview of drivers of migration and the structural factors that influence human mobility.

The GCM has several aims: to support international cooperation on the governance of international migration; to provide states with policy options targeted at addressing some of the most challenging matters around international migration; and to give states the space and flexibility to proceed with implementation based on their own realities and capacities. The GCM is also consistent with target 10.7 of the 2030 Agenda for Sustainable Development, under which member states have committed to collaborate to facilitate safe, orderly and regular migration (Annex II of the New York Declaration). In particular, the GCM aims to: address all aspects of international migration, including protecting the basic rights of migrants and ensuring sustainable, humanitarian and gender-responsive solutions; contribute to global governance by enhancing coordination in issues of international migration; and construct an action plan among its member states for implementation, which includes a framework for follow-up and review amongst member states. Beyond these goals, the GCM is to be directed by the 2030 Agenda for Sustainable Development and the Addis Ababa Action Agenda, and is to be advised by the Declaration of the 2013 High-Level Dialogue on International Migration and development.

737 Guild, E. and Basaran, T., “The UN’s Global Compact for Safe, Orderly and Regular Migration: Analysis of the final draft, Objective by Objective”.
However, the GCM is not without challenges, especially as many relevant countries such as Australia and a group of Eastern European countries have opted out of it. At the end of 2017, the Trump administration withdrew from this agreement, declaring that it would “undermine the sovereign right of the US to enforce [their] immigration laws and secure [their] borders”.

6.5.3.3 Obstacles to the ICRMW

First and foremost, misunderstanding over the content of the ICRMW inhibits its reach. Civil society, institutions and actors in the field of migration tend to either be unaware or have little knowledge of the Convention. For instance, states perceive that the Convention provides more extensive rights than it does in actuality, such as in relation to admission policies and states’ obligations to grant family reunification to migrants. However, Art. 79 of the Convention explicitly clarifies that the Convention does not undermine states’ sovereignty by interfering in state-level policies on admitting migrants. For instance, the Convention merely encourages states to allow workers to reunite with their family without setting out obligations in order to respect the discretionary power of states. This may be a shortfall of the Convention – as host states increasingly recognize that they can better protect their own interests by doubling down on deterrence measures than by joining a plan for responsible distribution of the world’s displaced.

Secondly, states’ lack of capacity to handle migration management hinders the effectiveness of the Convention even after states ratify it. The complexities underlying the Convention is evident in its imposition of state responsibilities in a multitude of areas such as health services (Art. 28), education (Art. 30) and judicial proceedings (Art. 16). Ratifying the Convention means that the state would need to incorporate the standard set out in the Convention into national policies. However, some countries may lack coherent migration policies, and others may fundamentally be unable or lack the experience to coordinate migration efforts at a state-level. Not only will ratification result in an additional workload to countries, it will also be a

challenge to address migration problems in countries where the political direction changes frequently because ratification requires a long-term political commitment.\textsuperscript{739}

Thirdly, individual states’ migration dynamics and political obstacles complicate the implementation of the Convention. The Convention was finalized and open to ratification in 1990. Especially with the fast-changing economic flows, which shapes labor migration trends, the Convention may be perceived as outdated and less relevant in meeting current needs. Moreover, in Europe, countries are dealing with the integration of second-generation migrants, while there are no provisions relating to this in the Convention.

Lastly, there is resistance against committing to protecting migrants’ rights and widespread negative public perceptions in receiving states. Migration is considered a “threat” to social cohesion, employment opportunities, and cultural and religious homogeneity. For instance, people may be led to believe that the absence of welfare systems is an indication of political failings. States fear that ratifying the Convention will encourage large-scale labor migration into the country, especially irregular migrants. It is worth noting that most state parties to the Convention are sending states such as Mexico, Morocco and the Philippines as these states look towards the Convention as a form of protection for their emigrants. For instance, Mexico has been the leading country in promoting the Convention as it relies on the Convention to protect its citizens who work in the United States. In the contrary, no major receiving state have ratified the Convention as they perceive the obligations pursuant to it as more detrimental to them, resulting in a low ratification of the ICRMW.\textsuperscript{740}

6.6 Conclusion

The refugee crisis has reached critical mass today, with communities, governments and international organizations alike all trying to keep abreast of providing necessary support to people fleeing war and persecution. While there are international conventions protecting the rights of refugees and intranational organizations such as the UNHCR being mandated to lead and


coordinate international action for the resolution of refugee problems, the implementation of recommendations and incorporation of treaty provisions into domestic policies are largely in the control of individual countries. The former UN Secretary General Ban Ki-moon has echoed these sentiments, stating that “the needs and potential of displaced populations must be reflected in national development plans”. However, at its most basic level, protection of refugees and other displaced persons is challenged by the interests of others – of states, host communities, other refugees and non-state entities. While in some cases, these interests reflect reasonable concerns, such as national security of the state, certain measures have also been deemed controversial and, to a more severe extent, a violation of the rights of the migrants, and have elicited negative reactions from the international community.

The current refugee regime is widely distinct from that of migration patterns after WWII, despite both being part of the complex phenomena of migration. The distinction between “refugees” and “migrants” arose from the international political equilibrium following the conflict between the US and the International Labour Organisation (ILO) after WWII over the issue of dealing with the massive displacement of people from Europe. Scholars have found that one of the most problematic aspects of the definition of “refugee” is that it requires a determination of the extent to which this category can be distinguished from other types of migrants in order to ascertain if their causes of departure were voluntary and thus precludes them from claiming refugee status. This distinction between forced migration (e.g. refugees and trafficked persons) and voluntary migration is crucial as it underpins the current policy framework addressing human mobility. Consequently, current international frameworks for the protection of refugees is based on the differing treatment that refugees and other types of migrants receive. Asylum and migration are, at present, dealt with as separate policy areas, as reflected in the separation of institutions responsible for refugees and those for migrants. This division corresponds to the way people’s movements are categorized today in international law. This has resulted in a wide gap in the international protection to which migrants and refugees are entitled. Today, while there is a more coherent international regime to protect refugees, based on the 1951 Geneva Convention and a designated UN Agency mandated to protect their rights, there is no such coordinated regime for other categories of migrants, nor is there any universal consensus amongst the international community on state responsibility for responding to migration issues. Instead, the focus of governments has been centered on controlling and restricting the movement of migrants, rather than on defining and protecting
their rights. The recently-created Global Compacts, GCR and GCM, highlight the political significance of states reaching an agreement on refugee and migration, and signal the possibility for a coordinated international response to the global refugee crisis.

6.7 Discussion Points and Further Reading

6.7.1 Discussion Points

- Many people, in particular those advocating “open borders” appear to assume that migration to wealthy countries make immigrants themselves better off. On its face, this assumption seems uncontroversial: if unwarranted, why would millions continue to try to gain entry to other states in the face of considerable resistance, sometimes to the extent of risking significant injury or death? However, there may be some weaknesses in the foundations of this assumption. On closer analysis, the assumption that migration generally makes immigrants better off seems to be more an expression of faith than an established empirical proposition, a likely consequence of reducing “better off” to its narrowest economic connotation. Do you agree?

- Speakers in the Security Council have long called for the United Nations to strike a balance between the fundamental principle of state sovereignty and the need to protect human rights. To this end, the “Responsibility to Protect” doctrine, in advocating for an enhanced role for the international community in relation to states who are unwilling or unable to protect their citizens, represents a re-working of the traditional sacrosanct international relations concept of absolute sovereignty. The debate about whether states should be taken to task for failing to guarantee the rights of migrants thus arguably hinges on the question of whether a state’s right to be secure and free from external influence should be conditional on its fulfilment of certain responsibilities to non-citizens. Has the United Nations, and the UNHCR in particular, been successful in striking a balance between respecting the principle of non-interference in states’ domestic affairs while strengthening refugee and IDP protection?

- As mentioned above, the definition of “refugee” has been widely debated amongst international agencies, government officials and scholars. On one hand, some argue...
that the ambit of who can be considered a “refugee” should be broadened to include, among others, those who experience natural disasters or suffer from the effects of climate change. On the other hand, some states, especially receiving countries, have posited that the definition of “refugee” is too broad given the hundreds of millions of people currently living in a conflict zone, which would heavily burden their country’s resources. How can, or even, should the definition of “refugee” be adapted to reflect current trends and meet present needs?

- While there are several conventions aimed at protecting the rights of refugees and other migrants, the effectiveness of these conventions is often inhibited by the lack of enforcement mechanisms to ensure that states fulfil their obligations under the treaties they have ratified. For one, if one state seeks to force another to comply with its obligations under the 1951 Refugee Convention, it would not be able to bring a case under the International Court of Justice if the other country did not consent to its jurisdiction. Moreover, a key weakness in the UN human rights bodies is that, while they are set up for dialogue and engagement, they lack a mechanism to effectively protect rights where a state is not willing to cooperate. What mechanisms are in place to enforce international human rights law in relation to migrants’ rights, and to what extent have they been effective in ensuring that states adhere to the conventions?

- How does the UNHCR seek to protect refugees?

- What are some of the main criticisms made regarding the 1951 Refugee Convention and the 1967 Protocol?

- Can internally displaced people be classed as refugees?

6.7.2 Further Reading


CHAPTER 7: BUSINESS AND HUMAN RIGHTS

7.1 Human Rights with Reference to Business

7.1.1 Labour Rights: Sources of Law

Labour rights in working life had been laid down in the “Universal Declaration of Human Rights” (UDHR) proclaimed by the General Assembly of the United Nations (UNGA) on December 10, 1948. The UN International Covenants on Human Rights of 1966, consisting of the “International Covenant on Civil and Political Rights” (ICCPR) and the “International Covenant on Economic, Social, and Cultural Rights” (ICESCR) further specialized them and made them legally binding. While the ICCPR formulates classical liberty rights (so-called human rights of the “first generation”), the ICESCR contains economic, social, and cultural human rights (so-called human rights of the “second generation”). The human rights of the first generation include, amongst others, the general prohibition of discrimination (Art. 2 (1)), the equality of men and women (Art. 3), the prohibition of slavery (Art. 8 (1)), the prohibition of forced labour (Art. 8 (3)), and the freedom of association (Art. 22). The ICESCR takes up some of these aspects, but goes even further by formulating a right to social security (Art. 9), education (Art. 13) and an appropriate standard of living (Art. 11), and by dealing with child labor (Art. 10 No. 3). In addition, there is a large number of UN Conventions relating to individual aspects of human rights protection in working life, such as the rights of the child and the elimination of discrimination against women as well as racial discrimination.

741 See Art. 22-25 UDHR. The abolition of child labour is not codified here yet.
744 Non-discrimination rules: Art. 2 (2), Art. 3 (1), Art. 7 (c) ICESCR; freedom of association: Art. 7 (1) ICESCR.
Founded in 1919, the International Labour Organization (ILO) aims to develop standards of decent work worldwide and to create social justice. The ILO has been a specialized agency of the UN since 1946 and has established itself internationally as the body responsible for the elaboration and application of minimum social standards in labour and social law. Currently it has 187 member states.

The ILO's body of rules consists of numerous conventions. It is based on the following four basic principles laid down in eight fundamental conventions:

- Freedom of association and protection of the right to collective bargaining
- Elimination of forced labour
- Abolition of child labour
- Prohibition of discrimination in employment and occupation

Since the greatest challenges for social and labour rights across the board are different cultural precepts in the heterogeneous world of states, these standards are progressive and contain flexible elements.

7.1.2 Legal Status of Fundamental Labour Rights

To date, 144 of the 187 ILO member states have ratified all of the eight core labour conventions, which makes them for these states binding as international treaty law (Art. 38 (1) (a) ICJ Statute).

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749 Convention No. 87 concerning Freedom of Association and Protection of the Right to Organise, Convention No. 98 concerning the Application of the Principles of the Right to Organise and to Bargain Collectively
750 Convention No. 29 concerning Forced or Compulsory Labour and Protocol, Convention No. 105 concerning the Abolition of Forced Labour.
751 Convention No. 138 concerning Minimum Age for Admission to Employment, Convention No. 182 concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour.
752 Convention No. 100 concerning Equal Remuneration, Convention No. 111 concerning Discrimination in Respect of Employment and Occupation.
753 Matthais Herdegen, *Völkerrecht*, chap. I § 4 marginal no. 15.
However, it is arguable if one can consider core labour standards as customary international law for ILO member states that have not ratified the conventions yet. As customary law, the legal validity of the first generation human rights of the ICCPR is assumed. These lag behind the ILO’s core social rights though, especially with regard to the prohibition of child labour. Due to the lack of legislative power, declarations by International Organizations such as the ILO have no legally binding character. As an expression of normative patterns of behavior, they are regarded as so-called “soft law”.

Nevertheless, the acceptance of a declaration by a state can serve as evidence of the emergence of legally binding customary law. International customary law arises through uniform state practice based on a so-called opinio iuris. This is the case if the state's actions are subjectively based on the conviction that it is legally obliged to act.

At the 86th session of the “International Labour Conference” – the supreme organ of the ILO (Art. 1 et seq. of the ILO-Constitution) – in 1998, the “Declaration on Fundamental Principles and Rights at Work” was adopted without dissent. This Declaration includes the commitment that core labour standards are so essential to decent work that they must be upheld by all ILO member states in good faith and in accordance with the ILO Constitution, whether or not the relevant convention has been ratified. For those states that have adopted the Declaration, even if they have not ratified the core labour conventions, customary international law can be assumed. However, it is questionable whether this also applies to the nineteen ILO member states that have abstained from voting on the Declaration. With the Declaration, a follow-up mechanism was established which goes beyond the original reporting obligation of the

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757 Knut Ipsen, § 20 marginal no. 20; Wolfgang Graf Vitzthum in Wolfgang Graf Vitzthum/Alexander Proelβ, Sect. 1, I marginal no. 14, III marginal no. 152.

758 Wolfgang Graf Vitzthum in Wolfgang Graf Vitzthum/Alexander Proelβ, sect. 1, III marginal no. 131.

member states under Art. 22, 19 (5) of the ILO Constitution. While the reporting procedure under the ILO Constitution only requires reporting on the application of conventions ratified by member states, the new procedure should answer the question of why states have not ratified the conventions yet. As a result, even states that have not ratified the standards will be obliged to report, and be subject to concrete monitoring of their legislation and practice. Even states that have not expressly adopted the Declaration participate in this reporting procedure, thus an *opinio iuris* is presumed for these states.

In view of the fact that a large part of the states of the world have thus adopted core labour rights as customary law, the question arises whether they can be assigned to *ius cogens*. *Ius cogens* are mandatory and indispensable legal principles (see Art. 53, 64 Vienna Convention on the Law of Treaties) that claim a general validity and impose obligations *erga omnes* (i.e., towards all). Prevailing opinion indicates that “elementary human rights” are *ius cogens*. However, consensus on their concrete content cannot be reached. The significance of workers' rights always depends on the economic conditions of a country and the respective socio-cultural and religious contexts. Since slavery and slave trade are uniformly regarded as violations of *ius cogens*, it is more likely to assume that the prohibition of forced labour

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761 ILO-Declaration 1998, annex (follow up) no. II.
763 See Christine Kaufmann and Simone Henri, 6; Kofi Addo, *Core Labour Standards and International Trade – Lessons from the Regional Context* (Heidelberg/New York: Springer, 2015): no. 4.2.3; declining: Christoph Herrmann in Christoph Herrmann/Wolfgang Weiß/Christoph Ohler, § 24 marginal no. 1100, according to whom the customary legal validity of social standards requires a universally valid social principle, which is not given.
is attributed to *ius cogens* rather than the prohibition of child labour. Nevertheless, core social rights are not regarded as *ius cogens* by a majority.\(^{768}\)

As a result, it can be stated that while core social rights cannot be attributed to *ius cogens* and have no *erga omnes* effect, they are binding under international law for the member states of the ILO.

### 7.2 Implementation of Labour Rights

#### 7.2.1 Challenges

The division of labour, supported by the dismantling of trade barriers and the intensification of state foreign investment subsidies since the mid-1990s, characterizes the ongoing process of globalization.\(^{769}\) Due to modern technologies in production and logistics, companies have the ability to relocate their production facilities to low-wage countries and outsource single production steps or even entire production process to local suppliers. On one hand, companies are the driving forces behind globalization.\(^{770}\) On the other hand, enterprises are driven in the fight for market shares because of a rising competitive pressure.\(^{771}\) While certain labour standards are taken for granted in the home countries of large corporations,\(^{772}\) working conditions in producing countries can be eminently devastating.\(^{773}\)

To the extent that states have bound themselves to labour rights under international law, they have the obligation to transform these rights into domestic law which binds private

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\(^{768}\) Julia Ruth-Maria Wetzel, *Human Rights in Transnational Business – Translating Human Rights Obligations into Compliance Procedures* (Cham: Springer, 2016): 1; Kofi Addo, No. 4.4.2; Christoph Herrmann in Christoph Herrmann/Wolfgang Weiß/Christoph Ohler, § 24 marginal no. 1109; Christine Kaufmann and SimoneHeri, 6, leave that open.

\(^{769}\) Werner Heinecke, 15.

\(^{770}\) Cf. Knut Ipsen, § 19 marginal no. 16.

\(^{771}\) Werner Heinecke, 16.


individuals. They must also enforce the law and provide effective legal protection. Despite ratification in many countries, the transposition of labour rights into national law has been a particular problem. The necessary state supervision often fails, which can be attributed to a lack of financial or human resources as well as the ignorance of corrupt statesmen. That this generally applies more frequently to developing countries follows from the fact that the way the laws are enforced tends to be characterized by arbitrariness and bribery. These countries in particular are also dependent on tax revenues or on private-public partnerships with companies, leading to the suspicion that they deliberately suspend core social rights in order not to drive companies out of the country. However, the possibilities of the home country of a corporation to influencing entrepreneurial activities abroad, such as those of foreign supplier companies, are limited. The principle of state sovereignty (Art. 2 No. 1 UN Charter) grants states the freedom from interference by other states in their territories. Thus, only the state whose law a contract is subject to has influence on the rights exercised in contractual relationship between employees and employers. The home state of a company would therefore violate a foreign sovereign sphere if it attempts to regulate the actions of a supplier company domiciled in the host state.

In addition, it is not uncommon for states to be directly involved in the violation of human and employee rights. The ILO estimates that at least 20.9 million people in all regions of the

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777 Rainer Hofmann in Marc Bungenberg/Jörn Griebel/Stephan Hobe/August Reinisch, chap. 2 III C 1 b.


779 Thomas Koenen, 41.
world, including in countries that have ratified the conventions, are victims of forced labour, around 10% of them in the public sector.\footnote{ILO, “ILO global estimate of forced labour: Results and methodology” (Genf 2012), pp. 13 ff., \url{www.un-act.org/wp-content/uploads/2014/08/ILO-global-estimate-of-forced-labour1.pdf} (accessed 4. March 2019).}

### 7.2.2 State Monitoring Procedures under International Law

Many of the international treaties on the protection of human rights provide state reporting procedures and state complaint procedures.\footnote{Marcel Kau in Wolfgang Graf Vitzthum/Alexander Proelß, sec. 3, III marginal no. 230.} Some possibilities for influencing other member states can be found, for example, in the ICCPR and ICESCR,\footnote{The ICCPR provides for a reporting system (Art. 40 ff.) and a state complaints procedure, which has never been used for political reasons; the ICESCR contains a reporting system (Art. 16 ff.); cf. Thomas Koenen, 138.} but also in the ILO Constitution.

The ILO has a comparatively sophisticated monitoring system. According to Art. 22, 19 (5) of the ILO Constitution, all of the ILO Member States are obliged to report on their measures for the implementation of ratified conventions as well as the relevant obstacles. If it appears necessary after the reports have been examined, recommendations will be made to encourage the affected government to improve the situation through political means.\footnote{Deutscher Gewerkschaftsbund (German federation of trade union), \url{www.dgb.de/themen/++co++cc64bd60c-8acb-11e0-5636-00188b4dc422} (accessed 4. March2019).} Member states (Art. 21 (1) of the ILO Constitution) as well as the Administrative Council of the ILO (Art. 26 (4) of the ILO Constitution) – which is the executive body of the ILO, Art. 7 ILO Constitution – are entitled to bring an action before the International Labour Office – which is the supreme body of the ILO, Art. 1 ff. ILO Constitution – against an ILO member for violating a ratified convention. Thereafter, the Administrative Council contacts the relevant government (Art. 26 (2), Art. 24 ILO Constitution) and a Committee of Inquiry may be entrusted with the matter (Art. 26 (3) of the ILO Constitution). Its final report, Art. 28 of the ILO Constitution, contains recommendations and is generally regarded as binding on the government unless the latter submits the dispute to the International Court of Justice (ICJ). In that case, the ICJ makes a decision under Art. 31 f. of the ILO Constitution. If the member state concerned does not comply with the recommendations of the Committee of Inquiry within the set period or does not comply with the decision of the ICJ, the Administrative Council is authorized to propose measures to the members of the International Labour Conference (Art. 33 ILO Constitution).
If a state fails to comply with its obligations, the last resort would be suspending its membership rights or even terminating its membership. However, this would only result in an alienation of the state concerned, and not be beneficial to the matter as a whole. Therefore, legal proceedings are rarely used in practice.

The only time sanctions have been imposed in the history of the ILO was the suspension of Myanmar's membership rights in 1999 due to forced labour, and the request to other members to freeze their political and economic relations with Myanmar in the following year.

The ILO's monitoring mechanisms offer a differentiated system for negotiation and dispute settlement. They contribute decisively to the promotion of intergovernmental cooperation and common values. However, the effectiveness of reporting and complaint procedures depends on whether arrangements have been made for the enforcement of decisions and recommendations. If there is no provision for sanctions of infringements, every decision would merely have a political and moral impact. As the ILO has no direct sanction possibilities, the procedure lacks enforceability.

### 7.2.3 Enforcement towards Companies

#### 7.2.3.1 Companies as Duty Bearers

In principle, the implementation of core social rights in companies could be regulated through social clauses in contracts between states – respectively state institutions – and business enterprises. Agreements between states and companies already exist in many different forms, for example, concession agreements concerning the extraction of mineral resources as well as investment agreements for the financing of infrastructure projects involving the privatization of public goods and services in the fields of energy, telecommunications, water supply, and

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784 Knut Ipsen, § 6 marginal no. 34.
785 Christian Tomuschat, “Menschenrechtsschutz und innere Angelegenheiten”, 16.
787 Franz Pappi/Eibe Riedel/Paul Thurner/Roland Vaubel, 150.
transport. However, emerging and developing nations in particular are dependent on corporate investments to drive employment and economic growth in their country. While industrialized countries already regulate core social rights by law, some poorer countries have no interest in jeopardizing their opportunities in the world market by imposing conditions on companies, so it is usually the company that dictates the investment conditions. Regulations that deal with the implementation of corporate social responsibility are therefore typically not part of such contracts.

Although, from a traditional point of view, only nation states have the ability to be holders of rights and obligations under international law, it has recently come to attention whether, at least, the most powerful enterprises, so-called transnational or multinational companies (TNCs), are obliged under international law to implement core social rights. TNCs are companies that generate a large proportion of their sales abroad. They have at least one branch in a foreign country or invest in an independent foreign company as part of direct investments. They often completely buy up suppliers in order to secure control through vertical integration. The intensified international interdependencies lead to a concentration of market shares, which is why the financial strength of TNCs has steadily increased since the beginning of globalization. The annual turnover of some large corporations has now even

789 Wolfgang Graf Vitzthum in Wolfgang Graf Vitzthum/Alexander Proelß, sect. 1, I marginal no. 19; Johannes Reidel, 2.5.2; Constantin Köster, 36; Burkhard Schöbener/Jochen Herbst/Markus Perkams, § 16 marginal no. 81, 83; Georg Dahm/Jost Delbrück/Rüdiger Wolfrum, Völkerrecht Vol. I/2 (2nd ed., Berlin: De Gruyter, 2002), 251.
790 Georg Dahm/Jost Delbrück/Rüdiger Wolfrum, 250; Stephan Hobe, Einführung in das Völkerrecht (10th ed., Tübingen: A. Francke, 2014): no. 3.4.2; Constantin Köster, 37.
791 A uniform term has not yet been established, but the terms are generally used synonymously. See, for example, "transnational companies": Knut Ipsen, § 9 marginal no. 16; Stephan Hobe, no. 3.4.2; Marcel Kau in Wolfgang Graf Vitzthum/Alexander Proelß, sect. 3, I marginal no. 42; Johannes Reidel, no. 2.5.2; Thomas Koenen, 43; „multinational companies“: Rudolf Dolzer/Charlotte Kreuter-Kirchhof in Wolfgang Graf Vitzthum/Alexander Proelß, sect. 6, I marginal no. 53; Burkhard Schöbener/Jochen Herbst/Markus Perkams, § 5 marginal no. 195; Alexander Theer, Die Rolle internationaler Förderkonzepte für das Engagement multinationaler Unternehmen in Entwicklungsländern – dargestellt am asiatisch-pazifischen Raum (Malaysia, Indonesien) (Munich: Herbert Utz Verlag, 1995): no. 1.4.2.; Peter Muchlinski, ”Research Notes – Social and human rights implications of TNC activities in the extractive industries”, in Transnational Corporations 18 (1)/2009, 125-136 (126 ff.)
792 Direct investments are capital investments that usually serve the purpose of gaining influence on the business activities of an existing company or a company to be founded or of expanding the capital base of an already controlled company, see Alexander Theer, no. 1.4.3.
exceeded the gross domestic product of smaller states. In addition, TNCs are to a large extent active in the private sector in developing and emerging economies. On the one hand, this has positive consequences for economic development and the standard of living of the people in the relevant countries, such as the creation of new jobs and infrastructure, the transfer of technology and know-how. On the other hand, TNCs damage the environment, promote corruption among local authorities, and affect human rights.

In a UN survey on the so-called “Fortune Global 500”, the 500 top-selling companies in the world, 45.9% of all companies stated that they had encountered significant human rights violations.

Indirectly, involvements in human rights violations are already to be seen when companies profit from repressive policies and weak power structures, and when they tolerate state practices that violate human rights. Thus, it cannot be ruled out that the refusal of corrupt governments to enforce core social rights is precisely intended to keep TNCs as employers and taxpayers in the country.

Well-known examples include the use of forced labour in the construction of the Yadana Pipeline in Myanmar by state security forces and the murder of trade union workers in Colombia by paramilitaries.

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794 UNCTAD World Investment Report 2002, 90; Stephan Hobe, no. 3.4.2; Dürmeier, p. 57; Georg Dahm/Jost Delbrück/Rüdiger Wolfrum, 249; BT-Drs. 18/2746.
795 Georg Dahm/Jost Delbrück/Rüdiger Wolfrum, 249.
796 Thomas Koenen, 25; Werner Heinecke, 20; Georg Dahm/Jost Delbrück/Rüdiger Wolfrum, 250.
801 Cf. Doe v. Unocal (2002), US Court of Appeals, 395 F.3d 932; Peter Muchlinski, Transnational Corporations 2009, 125-136 (126); Rajeshree Sisodia and Andrew Buncombe, Burmese villagers “forced to work on Total Pipeline” in The Independent (14 August 2009), www.independent.co.uk/news/world/asia/burmese-villagers-forced-to-work-on-total-pipeline-
Because of their economic power and threat potential, TNCs are gaining more and more influence in politics and society. They also elude effective national control. This proves that the classical subjects of international law have lost their importance in relation to TNCs, and that a structural difference has emerged between the private and public sectors.

However, this is due to the process of globalization initiated by economic policy. States are kept from intervening in the sphere of power of companies by international law, as they are, for example, by the principle of sovereignty with regard to other states. After all, it is not the failure of an economic enterprise but the failure of the community of states, if human rights are inadequately enforced. Although a good argument can be made for subjecting TNCs to international legal rulings, it is still the prevailing opinion that customary international law does not oblige such companies to implement core social rights.

International treaties on the protection of core social rights do not create obligations for companies that could be enforced by states at the level of international law. Hence, there is no direct liability for the infringement of individual rights under international law. Companies can only be liable for infringements of international law if the competent state has created a substantive legal basis for liability and legal recourse.
7.2.3.2 Regulatory Approaches

In the 1960s and ‘70s, the international community became aware of the (potential) influence of large companies on national economies and international economic relations. It was a big scandal for instance, when attempts by the US TNC “ITT” to influence Chilean domestic politics and US secret service activities became known in 1973.

A main demand is the creation of a “level playing field” that, on the one hand, avoids competitive disadvantages for companies that have committed themselves to high social standards on their own initiative, and, on the other hand, avoids a deterioration of the conditions (“race to the bottom”) provoked by competition from other companies.

In 2003 the “UN Sub-Commission on the Promotion and Protection of Human Rights” attempted to involve transnational corporations in the protection of international human rights by drafting the “Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights.” These so-called “Draft Norms” refer to core social standards in the section on social rights, but go beyond them, for example, by standardizing the right to reasonable working hours and wages. In addition, the “Draft Norms” strive for the establishment of obligations for companies with regard to their

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814 UN Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with regard to Human Rights, UN Doc. E/CN.4/Sub.2/2003/38/Rev.2, no. 1 (non-discrimination rule), no. 3, 5 (prohibition of forced labour), no. 6 (prohibition of child labour), no. 9 (freedom of association and the right to collective bargaining), see also the references to the ILO standards in the commentaries.
subcontractors and suppliers by making the inclusion of social clauses and legal consequences of violations (e.g., the termination of business relationships) in contracts legally binding. They aim to maintain the primary obligations of states to protect human rights, while simultaneously create a “shared responsibility” within the respective sphere of activity and influence of states and companies. However, due to the lack of a legal basis for obliging companies, the “Draft Norms” were not adopted by the UN Commission on Human Rights.

Subsequently, since there was no international framework agreement for the creation of international judicial institutions for the protection against human rights violating activities of private enterprises to be expected, the UN “Guiding Principles on Business and Human Rights” were developed under the leadership of the UN Special Representative for Human Rights and Transnational Corporations, Prof. John Ruggie. As an overall concept for the enforcement of core social rights in states and companies, they link international law and political aspects with voluntary corporate action. They were unanimously adopted by the Human Rights Council of the United Nations in June 2011 (UN Resolution 17/4) and contain 31 principles divided into three pillars: the state duty to protect (7.2.3.2.1), corporate responsibility to respect (7.2.3.2.2), and access to remedy (7.2.3.2.3). Although the Guiding Principles do not aim to bind those involved in a normative way under international law, they are designed to develop and substantiate customary law through voluntary commitments by companies and states and through mutual references in international documents and trade agreements.

7.2.3.2.1 State Duty to Protect

Since States are primarily responsible for the protection of human rights, a central element of the “Guiding Principles on Business and Human Rights“ is the further development of states’ obligations to protect human rights. States should take concrete measures to regulate companies and monitor the business activities of transnational companies within the scope

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815 no. 7, 8, 15; cf. Kristina Koeltz, 183,191.
816 Kristina Koeltz, 189f.
820 Guiding Principles no. 1, 4; Thomas Koenen, 34.
821 Guiding Principles no. 2, 3, 7.
of their sovereign influence and business relationships. As members of multilateral trade and financial institutions, they should work on adhering to human rights and, especially when entering into Bilateral Investment Treaties, maintain sufficient political leeway to implement their human rights obligations under international law.

7.2.3.2.2 Corporate Responsibility to Respect

In the absence of universally binding provisions that regulate transnational corporate activities and thus can serve as the basis for “Corporate Accountability”\(^\text{824}\), the activities of companies to shape the value chain in a socially responsible manner are voluntary. To date, a large number of non-binding “Codes of Conduct” exist,\(^\text{825}\) the concrete form of which has been initiated and shaped by a variety of actors and serves as a yardstick for “Corporate Social Responsibility.”\(^\text{826}\) Examples for Codes of Conduct initiated by International Organizations are the ILO’s “Tripartite declaration of principles concerning multinational enterprises and social policy,”\(^\text{827}\) the “Guidelines for Multinational Enterprises,” of the Organisation for Economic Co-operation and Development (OECD)\(^\text{828}\) and the UN Global Compact. The latter contains a declaration of self-commitment for participating companies.\(^\text{829}\) What all these instruments have in common is that they refer to the contents of the ILO core labour conventions. Codes of Conduct that companies have given themselves in a company,\(^\text{830}\) sector-\(^\text{831}\), or country-specific\(^\text{832}\) manner are also widespread nowadays. While some refer to the international instruments described above,\(^\text{833}\) their scope varies considerably.

\(^{822}\) Guiding Principles no. 2, 5, 6.
\(^{823}\) Guiding Principles no. 9, 10.
\(^{824}\) According to Johannes Reidel, no. 2.5.3, from the point of view of the company corporate accountability aims at external commitment. Accordingly, companies must subordinate themselves to legally effective standards and expect corresponding consequences for illegal actions.
\(^{825}\) Marcel Kau in Wolfgang Graf Vitzthum/Alexander Proell, sect. 3, I marginal no. 42a.
\(^{826}\) According to Johannes Reidel, no. 2.5.3, aims at voluntary self-commitment from the point of view of companies.
\(^{829}\) Participation has been offered since 31. January1999, and 9,997 companies worldwide have participated to date, see UN, www.globalcompact.org (accessed 4. March2018).
7.2.3.2.1 Deficits of voluntary regulations

In a market-oriented economic and social order, companies are not democratically structured communities, but strive for profits and act out of self-interest.\textsuperscript{834} Higher sales can be achieved for corporations in the short term if production costs are kept as low as possible through non-compliance with social and ecological standards. Otherwise, rising wage costs, taxes, and social security contributions are to be expected.\textsuperscript{835} Environmental and social concerns can therefore only take precedence over economic interests when legal regulations require as such.\textsuperscript{836} Against this background, it does not seem realistic to assume an ethically motivated activity orientation.\textsuperscript{837}

The “soft law” instruments of International Organizations do not result in directly effective obligations for transnational companies.\textsuperscript{838} Their observance does not create any customary international law either, since the preconditions – state practice and willingness to enforce it – are not given.\textsuperscript{839} Even though society is more sensitive nowadays to social concerns than in the past, consumers generally have no insight into actual business practices, but are dependent on the educational work of NGOs. The first company codes were only formulated because NGOs uncovered abuses that led to a loss of reputation.

However, since companies usually rely on self-regulation within the framework of their self-imposed standards of conduct,\textsuperscript{840} and mechanisms that go beyond an exclusively internal

\textsuperscript{832} e.g., the CSR mission statement of the Austrian employers’ associations, cf. Bernhard Mark-Ungericht, \textit{zfwr} 2005, 324-342 (327ff.).
\textsuperscript{833} John Gerard Ruggie, \textit{Questionnaire surveys of Governments and Fortune Global 500 firms, Summary II}: „25 percent of respondents skipped the question asking whether or not they refer to international instruments for guidance. Of the 75 percent that did respond, ILO declarations and conventions were referenced most, then the UDHR.“
\textsuperscript{834} Werner Heinecke, 11; Julia Ruth-Maria Wetzel, 4.
\textsuperscript{835} Potential savings from lower social standards are particularly beneficial for labour-intensive sectors where production requires low skills, Stefanie Hiß. 45; Werner Heinecke, 11, 27.
\textsuperscript{837} Stefanie Hiß, 16.
\textsuperscript{838} Marcel Kau in Wolfgang Graf Vitzthum/Alexander Proelß, sect. 3, I marginal no. 42a; Herdegen, Völkerrecht, chapt. II § 13 marginal no. 3; cf. also (declaratory) OECD-Guidelines for multinational Enterprise, preface, p. 3.
\textsuperscript{839} Burkhard Schöbener/jochen Herbst/Markus Perkams, § 5 marginal no. 233; Karsten Nowrot, 201 ff.
company audit are usually not provided, there is a danger that the reference to “Corporate Social Responsibility” will only be misused for marketing purposes. In allusion to the UN's blue color and with regard to the UN Global Compact, the term “blue washing” has already established itself among critics. In addition, there are no sanctions for violations of voluntary self-commitments; at best there is a threat of competition law or civil law proceedings if these are provided for under national law.

The enforcement of social standards in companies is thus reserved to the consumer, who has the power to adapt his consumption behavior and boycott products manufactured in violation of core labour rights. It is said that the consumption behavior of certain consumer groups is changed by “eco-trends.” However, there is a clear discrepancy between the statements and the behavior of the majority of consumers. Ultimately, it must be assumed that only very few people independently inform themselves on whether the products were produced under fair working conditions before buying. The influence of NGOs is therefore limited, and their effect is selective. Media coverage is something few consumers are able to avoid. However, this presupposes that it is a well-known company that is suspected of being involved in labour law violations. Infringements by smaller companies are often not published at all, so they do not have to be afraid of being pilloried to the same extent through so called “name-and-shame” campaigns.

7.2.3.2.2 Opportunities for voluntary regulations

A positive image is becoming more important for corporations, especially since producing countries are increasingly serving as sales markets for their goods. Public pressure thus has

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843 Eva Kocher, GRUR 2005, 647-652 (651).
845 Johannes Reidel, no. 4.4.1, 4.4.2.
848 Johannes Reidel, no. 4.4; Werner Heinecke, 39f.
the potential to cause companies to make corrections. The call by the public for regulation of corporations is especially suitable to strengthen their self-control mechanisms in order to counteract external regulation and thus give companies the opportunity to shape their corporate environment.

It is precisely the increasing abundance of soft law instruments that can serve as an indication of a possible development in legal policy. The fact that numerous Guidelines of International Organizations are addressed directly to companies (in addition to states) also illustrates the expectation of the community of international law that companies will orient themselves on social standards even if they are not being legally binding. In this way, companies' self-imposed obligations are exposed to the public eye and generate social expectations. The more civil society actors are involved, the greater the pressure to live up to these expectations. Ultimately, this can only be achieved by actually taking appropriate measures.

“Corporate Social Responsibility” campaigns gain credibility in public if they are not used solely to increase the company’s reputation or prevent a loss of reputation, but also if they demonstrably create advantages for companies that fit into the “business-logic” of profit maximization. Ultimately, it is also the company that benefits from an improvement of the social framework conditions, a better infrastructure and legal security in the country of production.

Based on the consideration that sustainability measures can benefit corporate value creation by creating long-term value for investors, it can be observed that banks and rating agencies are increasingly taking measures to ensure compliance with social and ecological standards as

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850 Knut Ipsen, § 6 marginal no. 56.
851 Karsten Nowrot, 203.
852 Stefanie Hiß, 307.
853 Werner Heinecke, 40f.
a basis for the assessment of companies’ stock market value.\textsuperscript{854} In order to provide financial analysts with assessable information and demonstrate their social commitment to stakeholders (i.e., everyone who has a legitimate interest in the company, such as investors, trade unions, consumers, public authorities, and NGOs), the majority of companies\textsuperscript{855} are already submitting sustainability reports or corporate social responsibility reports in addition to their annual reports.\textsuperscript{856} It further raises the credibility of these reports, when critical points, e.g. activities relevant to human rights, are broached.\textsuperscript{857} The depth of information and critical self-analysis are not yet particularly pronounced.\textsuperscript{858} However, standards are being developed with increasing precision in order to improve measurability, clarity, and comparability.\textsuperscript{859}

It is also demanded that companies take responsibility within their entire sphere of influence for the business practices of legally independent supplier companies. A feature of TNCs is the splitting up of individual value-added stages, which enables them to optimally adapt production to the regional framework conditions.\textsuperscript{860} The resulting global supply chains create a lack of transparency and complicate the monitoring of the impact of management decisions and actions. However, companies also have the power to contractually influence compliance with core social rights by suppliers and other subcontractors.\textsuperscript{861} In doing so, they create binding (contract) laws and establish internationally binding standards of worker protection.\textsuperscript{862}

Adidas for example, refers in its contract with its 800 subcontractors to its “Standards of Engagement,” a code introduced in 1998 as a response to allegations of the NGO “Clean Clothes Campaign” of child labour and exploitation in production sites. In addition, the company has established a “Social and Environmental Affairs Department” to monitor and train suppliers in developing countries on compliance with minimum working conditions.\textsuperscript{863} If a subcontractor

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{854} Werner Heinecke, p. 14; Robert Gutsche/Michael Gratwohl/Daniel Fauser, IRZ 2015, 455-458 (455 ff.); Sebastian Podwojewski, 40f.
\item \textsuperscript{856} Werner Heinecke, 14/80; Robert Gutsche/Michael Gratwohl/Daniel Fauser, IRZ 2015, 455-458 (455); Podwojewski, pp. 56f.
\item \textsuperscript{857} Sebastian Podwojewski, 57.
\item \textsuperscript{858} Robert Gutsche/Michael Gratwohl/Daniel Fauser, IRZ 2015, 455-458 (456ff.); Thomas Koenen, 215.
\item \textsuperscript{859} Werner Heinecke, 86.
\item \textsuperscript{860} Johannes Reidel, no. 2.5.2.
\item \textsuperscript{861} Peetr Muchinski, Transnational Corporations 2009, 125-136 (129).
\item \textsuperscript{862} Marcel Kau in Wolfgang Graf Vitzthum/Alexander Proefel, sect. 3, I Rn. 42a.
\item \textsuperscript{863} Eva Kocher, GRUR 2005, 647-652 (647).
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breaches a corresponding contractual obligation, a so-called “Corrective Action Plans” is provided; in extreme cases resulting in the termination of the contractual relationship.\footnote{Eva Kocher, GRUR 2005, 647-652 (648).}

Even if voluntary self-regulation is seen as a strategy to avoid obligatory regulations, core social rights can therefore be enforced through self-imposed obligations by companies.\footnote{Bernhard Mark-Ungericht, zfwu 2005, 324-342 (330), Johannes Reidel, no. 2.5.3.2.}

### 7.2.3.2.2.3 Suggestions of the Guiding Principles

The “Guiding Principles on Business and Human Rights” demand that business enterprises respect core social rights,\footnote{Guiding Principles no. 11, 12, with regard to the ILO Declaration 1998.} and urge them to investigate, document, and eliminate negative consequences of their foreign business – also on the basis of its business relationships with third parties – as part of a “human rights due diligence”.\footnote{Guiding Principles no. 13-21, 23-24.} This requires the introduction of a company-specific human rights strategy, its regular impact assessment, and integration into corporate culture and management.\footnote{John Gerard Ruggie, \textit{Just Business}, 113.} Periodic progress reports at company level should be part of this strategy.\footnote{Guiding Principles no. 21.}

In addition to the company's own actions, the behavior of third parties with whom the company has direct business relationships should be recorded. Especially in large companies with complex structures, audit mechanisms – also with regard to the behavior of business partners – are considered necessary and reasonable. Eventually, companies have a self-interest in gaining an insight into and influence on the business activities of their supplier companies for the purpose of quality management and investment protection.\footnote{Robert Grabosch, “Rechtsschutz vor deutschen Zivilgerichten gegen Beeinträchtigungen von Menschenrechten durch Unternehmen,” in Ralph Nikol/Thomas Bernhard/Nina Schniederjahn (eds.) \textit{Transnationale Unternehmen und Nichtregierungsorganisationen im Völkerrecht}, (Baden-Baden: Nomos, 2013): 96.} The stricter the assessment of due diligence obligations to be established, the higher the risk of legal infringements is in the country in which the entrepreneurial activity is carried out.\footnote{See in particular Guiding Principles no. 13 b, 14; Robert Grabosch in Ralph Nikol/Thomas Bernhard/Nina Schniederjahn, 90; Miriam Saage-Maaß, \textit{Arbeitsbedingungen in der globalen Zuliefererkette – Wie weit reicht die Verantwortung deutscher Unternehmen?} (Bonn: Friedrich-Ebert-Stiftung, 2011): 17f.} In
addition, business enterprises should provide compensation for violations or at least cooperate. 872

This does not create any original protection obligations for companies,873 but it does impose an obligation on them, as "secondary addressees" of human rights, to respect core labour rights. 874 The formulated "obligation to respect" goes beyond the existing self-obligations through corporate social responsibility concepts by setting concrete requirements for an effective risk analysis and reporting. The formulation of "due diligence" serves to clarify that measures to identify and minimize risks should not end at national borders, but should be implemented throughout the entire global corporate structure and business relationships. 875

NGOs also have an important role to play in the dissemination and implementation of the Guiding Principles, as they point out human rights issues in corporate management and, if necessary, also open up public discussion.876 Although this process does not necessarily lead to legally binding results, it is promising in terms of addressing all stakeholders, as both companies and consumers become accustomed to applying standards and norms that have been developed without state involvement.877

7.2.3.2.3 Access to Remedy

The “Guiding Principles on Business and Human Rights” demand that states create effective judicial and non-judicial complaint mechanisms as part of their duty to protect in order to persuade companies to comply with core social rights 878 These mechanisms should follow the principles of the rule of law, be accessible to those affected simply and under fair conditions, and enable a foreseeable and transparent procedure. This refers not only to the territory of the state in which a violation of rights is committed. Also, the judicial assertion and the prosecution of violations in the country in which a parent company has its headquarters can be conducive to public debate, because in addition to the decision-makers of the parent company,
there is also the majority of the stakeholders, who can at least indirectly influence the company's actions. As a source of continuous advancement of remedial mechanisms, states should promote the commitment and dialogue of the stakeholders involved. In addition, complaint mechanisms should be implemented at the company level.

7.3 Conclusion

In theory, there are numerous ways and means for states to implement core social rights towards powerful business enterprises, whether within the framework of their intergovernmental relations, their own business relations, or domestic legislation, enforcement, and application. Furthermore, there are numerous agreements based on international law that overlap in terms of content and that apply for almost the entire community of states. This proves that there is a fundamental consensus on the necessity of ensuring the enforcement of rights. The official rhetoric of these agreements, however, stands in striking contradiction to their real observance. The crucial obstacle to effective enforcement is the absence of binding legal bases and sanctions at universal level.

National implementation fails because states fear the disadvantages for their economic location if they burden companies. Enterprises fear cost increases and legal disputes if they are subject to binding sanction-reinforced rules. Consumers often orient their preferences towards the cheapest offer even if they are informed by the media. The continuing self-imposed obligations of companies do not create a direct liability basis. By intensive public work, however, larger pressure is exerted on enterprises. Particularly since globalization guarantees a larger offer of similar goods, the image of a brand is important to the consumer in addition to quality and price. This can lead to a gradual improvement in living conditions in the producing countries and to new sales markets in these countries. At the same time, rising wages may lead to the discovery and development of new production countries.

The more companies improve their reputation through voluntary self-commitments, therein making social standards an advertising topic, the more attention this topic receives in the public, thus advancing the development of legal policy in the direction of binding legal bases. The reference to "Corporate Responsibility" in the Guidelines of International Organizations cannot yet generate any direct legal effects because of its emphasized non-binding character.

879 Miriam Saage-Maaß, 4, 6.
880 Guiding Principles, no. 29.
However, even if it is not binding "soft law", a tight regulatory network can promote the development of binding legal norms through corresponding state practice or as a basis for the interpretation of international jurisprudence.

Under these circumstances, the approach adopted by the UN “Guiding Principles on Business and Human Rights” is pragmatic. It develops Guidelines for the protection of human rights from various sources that are capable of consensus. By referencing other "soft law" instruments, the Guiding Principles will permeate a large number of other contractual relationships and are therefore capable of influencing international economic and political action.

7.4 Discussion points and Further Reading

7.4.1 Discussion Points

- In a hierarchical system where chances of agency slippage increase as you go up the chain, how can we realistically ensure that everyone in the chain abides by humanitarian law?
- Considering how all procedures in the United Nations Human Rights Council and its subsidiary bodies lack enforceability, what value does it contribute to the global order nonetheless?
- As the global realm becomes more proliferated with increasing numbers of non-state actors (i.e. TNCs, MNCs and NGOs) and state actors, how does the United Nations Human Rights Council ensure the compliance of all such actors according to its statutes?
- How is the significance of workers’ rights influenced by a country’s economic, socio-cultural and religious contexts?
- What are some potential issues that might surface when states transform labour rights into domestic law?
- Besides their dependence on tax revenues and private-public partnerships with companies, what other obstacles do developing countries face in compliance with labour rights? What further support can be provided to these countries?
- Why do states violate labour rights despite ratifying labour conventions? Is there any value, then, in a state’s ratification of labour conventions?
- Besides suspension or termination of membership rights, what else do you think can motivate state compliance with labour rights obligations?
• Given that consumers can pressurize companies to comply with social standards, how can consumers be further empowered to do so?
• What are the strengths and limitations of international organizations and NGOs in promoting compliance with labour rights?

7.4.2 Further Reading


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### II. Important Abbreviations

<table>
<thead>
<tr>
<th>Abbreviation</th>
<th>Full Name</th>
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<tbody>
<tr>
<td>ACHPR</td>
<td>African Commission on Human and Peoples Rights</td>
</tr>
<tr>
<td>ACHR</td>
<td>American Convention on Human Rights</td>
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<tr>
<td>ACRWC</td>
<td>African Charter on the Rights and Welfare of the Child</td>
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<tr>
<td>ACERWC</td>
<td>African Committee of Experts on the Rights and Welfare of the Child</td>
</tr>
<tr>
<td>AICHR</td>
<td>ASEAN Intergovernmental Commission on Human Rights</td>
</tr>
<tr>
<td>CAT</td>
<td>Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment</td>
</tr>
<tr>
<td>CEDAW</td>
<td>Convention on the Elimination of All Forms of Discrimination against Women/Committee on the Elimination of Discrimination against Women</td>
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<tr>
<td>CESCR</td>
<td>Committee on Economic, Social and Cultural Rights</td>
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<tr>
<td>COE</td>
<td>Council of Europe</td>
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<tr>
<td>CRC</td>
<td>Convention on the Rights of the Child/Committee on the Rights of the Child</td>
</tr>
<tr>
<td>EC</td>
<td>European Commission</td>
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<tr>
<td>ECOSOC</td>
<td>United Nations Economic and Social Council</td>
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<tr>
<td>ECtHR</td>
<td>European Court of Human Rights</td>
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<tr>
<td>HRC</td>
<td>Human Rights Council</td>
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<tr>
<td>IACtHR</td>
<td>Inter-American Court of Human Rights</td>
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<tr>
<td>ICC</td>
<td>International Criminal Court</td>
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<tr>
<td>ICCIS</td>
<td>International Commission on Intervention and State Sovereignty</td>
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<td>ICPPED</td>
<td>International Convention for the Protection of All Persons from Enforced Disappearance</td>
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<tr>
<td>ICCPR</td>
<td>International Covenant on Civil and Political Rights</td>
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<tr>
<td>ICERD</td>
<td>International Convention on the Elimination of All Forms of Racial Discrimination</td>
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<tr>
<td>ICESCR</td>
<td>International Covenant on Economic, Social and Cultural Rights</td>
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<td>ICJ</td>
<td>International Court of Justice</td>
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<tr>
<td>ICMW</td>
<td>International Convention on the Protection on the Rights of All Migrant Workers and Members of Their Families</td>
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<tr>
<td>ICRC</td>
<td>Convention for the Amelioration of the Condition of the Wounded in Armies in the Field</td>
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<tr>
<td>ICRC</td>
<td>International Committee of the Red Cross</td>
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<tr>
<td>ICRMW</td>
<td>International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families</td>
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<tr>
<td>ICTY</td>
<td>International Criminal Tribunal for the former Yugoslavia</td>
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<td>IJDH</td>
<td>Institute for Justice and Democracy in Haiti</td>
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<tr>
<td>ILO</td>
<td>International Labour Organization</td>
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<tr>
<td>Acronym</td>
<td>Description</td>
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<tr>
<td>OAU</td>
<td>Organization of the African Unity</td>
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<tr>
<td>OHCHR</td>
<td>Office of the United Nations High Commissioner for Human Rights</td>
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<td>OPAC</td>
<td>Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict</td>
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<td>OPCP</td>
<td>Optional Protocol of the Convention on the Rights of the Child on a communications procedure</td>
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<tr>
<td>OSCE</td>
<td>Organization for Security and Co-operation in Europe</td>
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<td>UNCTAD</td>
<td>United Nations Conference on Trade and Development</td>
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<tr>
<td>UNESCO</td>
<td>United Nations Educational, Scientific and Cultural Organization</td>
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<tr>
<td>UNGA</td>
<td>General Assembly of the United Nations</td>
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<tr>
<td>UNHCR</td>
<td>United Nations High Commissioner for Refugees</td>
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<tr>
<td>UNSC</td>
<td>United Nations Security Council</td>
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<tr>
<td>VCLT</td>
<td>Vienna Convention on the Law of Treaties</td>
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