
Human Rights and Refugee Protection

Self-study Module 5, Vol. I



UNHCR

United Nations High Commissioner for Refugees
Haut Commissariat des Nations Unies pour les réfugiés

15 December 2006

Note

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SELF-STUDY MODULE 5: HUMAN RIGHTS AND REFUGEE PROTECTION

Overview

This document, which focuses on international human rights law, is one of a series of self-study modules developed by UNHCR's Division of International Protection Services in 2006. UNHCR first published a *Human Rights and Refugee Protection* training module in October 1995 (Volume I) and October 1996 (Volume II). That earlier module helped to create a greater awareness and understanding of human rights issues in the context of refugee protection. However, human rights law is constantly evolving, and advances in the field over the past decade have been enormous.

The case-law of the human rights courts, including the European Court and the Inter-American Court, has undergone extensive development while United Nations human rights supervisory bodies (e.g., the treaty bodies) and regional bodies, such as the African Commission and Inter-American Commission on Human Rights, have developed the content and expanded the scope of human rights protection. Increasingly, these standards are being applied to the protection of refugees and other persons of concern to UNHCR – that is, to asylum seekers, returnees, stateless persons, and internally displaced persons. In fact, it is now acknowledged that international refugee law, international human rights law, and international humanitarian law should be applied in concert to best protect refugees and other persons of concern to UNHCR.

Purpose

This self-study module is intended to be used by the UNHCR staff and implementing partners who provide protection and assistance to refugees and other persons of concern to UNHCR. It is designed to

- Familiarize UNHCR staff and partners with the principles, provisions and major mechanisms of international human rights law;
- Be used as a reference tool for protection officers in the field; and
- Assist UNHCR staff and partners in the field in designing and conducting their own training sessions.

Contents

The training module consists of two books:

❖ Volume I – General Issues

This volume includes a basic review of international public law and international human rights law, a review of the universal and regional human rights systems, and self-study exercises.

❖ Volume II – Substantive Issues

Volume II includes an examination of specific protections needs and the human rights principles that are most relevant, a detailed discussion of the human rights principles that apply to all refugees and other persons of concern to UNHCR, and self-study exercises.

Those readers who are already familiar with international law and the universal and regional systems charged with protecting human rights might wish to focus on Volume II, which provides more detailed information.

The shaded boxes that appear throughout both Volumes contain in-depth discussions of particular terms or issues. Wherever appropriate, readers are also directed to additional sources for information on specific topics.

This module focuses on the use of the human rights regime to enhance the protection of refugees and asylum-seekers. However, other persons of concern to UNHCR, such as returnees, stateless persons, and internally displaced persons, can equally benefit from the application of the outlined human rights principles and mechanisms. It is recommended that readers also consult the *Guiding Principles on Internal Displacement* and the *UNHCR/Inter-Parliamentary Union Handbook on Nationality and Statelessness*.

Volume I – General Issues

This volume is divided into three Parts: Part A contains an overview of basic concepts of international public law and human rights law (Chapters 1 to 4); Part B contains an overview of universal and regional human rights systems for the promotion and protection of human rights (Chapters 5 to 8); and Part C includes questionnaires for self-study, suggestions for further reading, and answers to the exercises. Each Part includes a set of key learning objectives.

The main objective of Volume I is to familiarize the reader with the basic concepts of international public law and human rights law. For an examination of more specific refugee-related topics, and for a list of relevant case-law and relevant Concluding Observations of the UN treaty bodies, please refer to Volume II.

PART A

OVERVIEW OF BASIC CONCEPTS OF INTERNATIONAL PUBLIC LAW AND HUMAN RIGHTS LAW

Learning Objectives:

- Familiarize the reader with basic concepts of public international law
- Give the reader a working knowledge of how refugee protection can be enhanced through different branches of international law
- Make the reader aware of the important role of international human rights law in the protection of refugees and asylum-seekers at the national level
- Ensure that the reader acquires a basic knowledge of the origin and scope of international human rights law



Chapter 1

Basic Concepts of Public International Law

1.1 The protection of individuals under international law

International human rights law constitutes part of public international law. In order to properly understand the nature and functioning of international human rights law some basic concepts of international law must be recalled. Traditionally, international law, or the Law of Nations, is the binding body of rules and principles that govern a State's relations with other States and with international organizations. According to this definition, the State is the main actor or "subject" of international law.

Initially, international law was concerned solely with the relations between nation-States. This meant that only States were subjects of and had legal rights under international law. Individual human beings were not deemed to have international legal rights, as such, and were said to be objects, rather than subjects, of international law.

Under traditional international law, when an individual outside of his/her country of nationality was subjected, by a foreign government, to treatment that violated international law, only the State of his/her nationality was considered under international law to have cause for action against the offending State and could exercise diplomatic protection in favour of its national. It was considered that the injury to an alien abroad was an injury to the alien's State of nationality. In other words, the obligation to treat a foreign national in a manner that conformed to certain minimum standards of civilization was deemed to be an obligation to the State whose nationality the individual possessed. This approach left stateless persons and refugees without any effective protection under international law. Stateless persons lacked protection as they had no State of nationality that could offer diplomatic protection. Refugees were left without diplomatic protection because although they may have kept the citizenship of the country of origin (*de jure* refugees), they were not able or willing to avail themselves of that protection.

Likewise, it was accepted that relations between individuals and the States of which they were nationals were governed only by the national laws of those States. There were, however, some exceptions to this rule, including cases involving slavery, the protection of minorities, and humanitarian law.

Today, as a result of the development of international human rights law, it is widely accepted that the fundamental rights of the individual are a matter of international law. An individual can seek remedies through international bodies if human rights standards are not respected by the State of his/her nationality or by any other State that has jurisdiction over him/her.

1.2 Sources of international law

There is no supreme authority that makes international law; international law is primarily developed and endorsed by States, though civil society and international organizations increasingly take initiatives and contribute to the drafting processes. The formally accepted and internationally recognized sources of international law are enumerated in Article 38 of the *Statute of the International Court of Justice* (see Vol. I, Chapter 5). These are:

- **International conventions;**
- **International custom**, as evidence of general practice accepted as law; and
- **General principles of law** recognized by the community of nations.
- These principal sources are complemented by **judicial decisions** and **teachings of the most highly qualified publicists**, which serve as “subsidiary means for the determination of rules of law.”

1.2.1 International treaties

International treaties are contracts among States. They have many different names, such as “covenant”, “charter”, “convention”, “pact,” and “protocol”. They are legally binding only on States that are parties to them (see below).

According to Article 2 of the *Vienna Convention on the Law of Treaties* (VCLT 1969), 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.”

The basic principle underpinning international treaty law is the principle of *pacta sunt servanda*, which means that agreements are binding upon the parties to them and must be performed by them in good faith (Article 26 VCLT). This implies that a State cannot invoke the provisions of its domestic laws to avoid its international legal obligations. Moreover, in international human rights law, the rules of State responsibility are very strict, and States are held responsible for violations of their treaty obligations *even if they were not intentional* (see Vol. I, Chapter 3).

States can become parties to treaties with another State (bilateral) or to treaties involving more than two States (multilateral).

In concluding a multilateral treaty, States generally follow the following procedures:

Adoption

Treaties that are negotiated within an international organization are usually adopted through a resolution made by the representative organ of that organization. For example, treaties negotiated under the auspices of the United Nations, or any of its bodies, are adopted through a resolution of the General Assembly of the United Nations. Human rights treaties were regularly drafted in the framework of the Commission on Human Rights and its subsidiary organs. Following adoption by the Commission and now the newly established Council (which have a limited number of members), draft conventions are to be forwarded to the General Assembly for adoption by the UN Member States. Although adoption does not make a treaty binding, adoption may indicate a common “*opinio juris*” that serves as one requirement for establishing customary international law (see below). Upon adoption, the treaty becomes “open for signature.”

Signing

By signing a treaty a State indicates that it will take steps to express its consent to be bound by the treaty at a later date. While signing does not, in itself, bind the State to the terms of the treaty, it creates some obligations for the State in the period between signing and ratification, acceptance or approval. Indeed, by signing a treaty, a State assumes an obligation of good faith to refrain from acts that would defeat the object and purpose of that treaty (Article 18 VCLT).

A treaty only binds those States that have consented to be bound by it. In multilateral treaties, the most common ways to express consent to be bound by the treaty are by ratification, acceptance or approval, and accession.

The act by which a State expresses its consent to be bound by a treaty is distinct from the treaty's entry into force. Consent to be bound is the act through which a State demonstrates its willingness to undertake the legal rights and obligations under a treaty by signing the treaty or by depositing an instrument of ratification, acceptance, approval or accession. The entry into force of a treaty is the moment the treaty becomes legally binding for that State. Each treaty contains provisions dealing with both aspects.

Ratification

Most multilateral treaties expressly provide for States to express their consent to be bound by signing, subject to ratification. This gives States the opportunity to seek domestic approval for the treaty (as generally provided for under States' Constitutions) and to enact any legislation necessary to implement the treaty internally, prior to undertaking the treaty's international legal obligations. Once a State has ratified a treaty

at the international level, it is responsible for fulfilling the obligations contained therein and it must give effect to the treaty domestically. This is the responsibility of the State. Generally, there is no time limit within which a State is requested to ratify a treaty that it has signed. Upon ratification, the State becomes legally bound under the treaty.

Acceptance or approval

Acceptance or approval of a treaty following its signing has the same legal effect as ratification, and the same rules apply, unless the treaty provides otherwise (Article 14(2) VCLT). If the treaty provides for acceptance or approval without prior signing, such acceptance or approval is treated as an accession, and the rules relating to accession would apply.

Accession

“Accession”, “adherence” or “adhesion” is the act through which a State that has not signed a treaty expresses its consent to become a party to that treaty by depositing an “instrument of accession.” Accession has the same legal effect as ratification. However, unlike ratification, which must be preceded by signing to create binding legal obligations under international law, accession requires only one step: the deposit of an instrument of accession. Accession may occur before or after a treaty has entered into force.

State succession in respect of treaties

The issue of State succession arises when there is a definitive replacement of one State by another concerning sovereignty over a given territory. This may happen when a State absorbs all of a predecessor State, a State takes over part of the territory of another State, a State becomes independent of another State of which it had been a part, or when a predecessor State has separated into a number of States. State succession is an area of great uncertainty and controversy, and the applicable rules are equivocal.

When treaties have been involved in State succession, some predecessor and successor States have made agreements concerning the “devolution” of rights and obligations under treaties, while a number of newly independent States have made unilateral declarations of a general character regarding the continuation of treaties of their predecessor States.

The Vienna Convention on the Succession of States in Respect of Treaties (1978) regulates this issue. Although this Convention entered into force in 1996, very few States are party to it.

A multilateral treaty enters into force internationally only after the minimum number of States (as spelled out in the treaty) has expressed consent to be bound by it. For instance, the *Convention relating to the Status of Refugees* (hereafter: 1951 Convention or CSR) was adopted by the United Nations Conference of Plenipotentiaries in July 1951 and entered into force on 22 April 1954 after the 90th day following the day the sixth instrument of ratification or accession was deposited (Article 43). Under international law, States may, however, declare that norms

contained in an international treaty (in their entirety or in part) are applicable in national law before the respective convention enters into force internationally. This was the case, for example, when Germany declared the norms of the 1951 Convention applicable under national law one year before entering into force at the international level.

1.2.2 Customary international law

The *Statute of the International Court of Justice* refers to “general practice accepted as law.” In order to become international customary law, there must be evidence of:

- Acts amounting to “settled practice” of States; and
- A “belief that this practice is rendered obligatory by the existence of a rule of law requiring it” (*opinio juris*).

Customary law is binding on all States, except those that may have objected to it during its formation, whether or not they have ratified any relevant treaty. Evidence of custom can be found, for example, in resolutions of the UN General Assembly (see Vol. I, Chapter 5), diplomatic correspondence, the opinion of State legal advisers, press releases of States or Inter-governmental bodies, the conclusions of international conferences, bilateral treaties, and voting patterns on resolutions. The value of these sources varies and depends on the circumstances.

To prevent GA Resolutions from being considered to express customary international law, States may resort to expressing explicit objections to such understanding. For example, to prevent that the Declaration on the Rights of Indigenous Peoples adopted by the Human Rights Council would contribute to the development of customary international law principles, Canada declared the following:

*“Regretfully, however, Canada must vote no to the text which has been put before us. For clarity, we also underline our understanding that this Declaration has no legal effect in Canada and does not represent customary international law.”*¹

Similarly the U.S. communicated the following:

*“With respect to the Draft Declaration on the Rights of Indigenous Peoples, the United States reserves its position as to the entire declaration. We will provide our interpretations and concerns regarding the declaration at the General Assembly this fall or at another appropriate time.”*²

Many scholars argue that some standards set down in the Universal Declaration of Human Rights (which is a resolution of the UN General Assembly and, as such, is technically not legally binding), have become

¹ Declaration by the representative of Canada, 29 June 2006.

² Written communication by the U.S., 29 June 2006.

part of customary international law as a result of subsequent practice and are therefore binding upon all States.

It is generally accepted that the prohibition of *refoulement* is part of customary international law (see textbox below). This means that it must be respected even by States that are not party to the 1951 Convention or other human rights instruments that prohibit it. For a comprehensive analysis of the scope and content of this principle under international refugee law and human rights law, see Vol. II, Chapter 10.

As a principle of customary international law, *non-refoulement* prohibits the return of a refugee, in any manner whatsoever, to the frontiers of territories where his/her life or freedom would be threatened on account of race, religion, nationality, membership of a particular social group or political opinion. It also encompasses the principle of non-rejection at the frontier. See Article 33 of the 1951 Convention & ExCom Conclusions Nos. 6, 22, and 30.

The best evidence for a customary rule of international law is to be found in what States say they think the rule is (*opinion juris*), and what they say they are doing (or not doing) regarding that rule. Singular incidents of *refoulement*, as such, do not question the customary international law character of the *non-refoulement* principle. Where there are disputes between UNHCR and the State on whether the principle of *non-refoulement* is violated, the fact that a State argues that the individual concerned is not a refugee (having no well-founded fear of persecution on one of the Convention grounds or should be excluded) or that Article 33, para. 2, of the 1951 Convention applies, does actually constitute a legal practice which confirms the State's acceptance of being in principle bound by *non-refoulement* obligations.

Jus cogens, or “peremptory norms of general international law”, is a class of customary international law consisting of norms accepted and recognized by the international community of States from which no derogation is permitted. Under the *Vienna Convention on the Law of Treaties* (VCLT), any treaty obligation that conflicts with a peremptory norm is void (Article 53).

Commonly mentioned examples of *jus cogens* include the prohibition of slavery, genocide, torture, racial discrimination, the use of force by States (when not in self-defence or authorized by the UN Security Council), and gross violations of the right of peoples to self-determination.

It is also possible to argue the *jus cogens* character of the prohibition of *refoulement* in cases involving the risk of torture. This position is now supported by the fact that the Commission on Human Rights strengthened the reference to *non-refoulement* by moving it by consensus from a preambular paragraph to an operational one in its 2005 Resolution on Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (2005/39). The Commission urges States

“not to expel, return (refouler), extradite or in any other way transfer a person to another State where there are substantial grounds for believing that the person would be in danger of being subjected to torture.”

1.2.3 General principles of law

This is the third source of international law explicitly referred to in the *Statute of the International Court of Justice* and there is little agreement about the meaning of the phrase. According to some scholars, it refers to the general principles of international law, such as for example the principle of consent, reciprocity, equality of States, and good faith (see below). To others, it means general principles of national law, that is, principles that are common to all or most national systems of law, such as the right to a fair hearing and justice.

The fundamental principle of good faith

UNHCR submitted an amicus brief to the House of Lords (UK) concerning a case that ultimately was only partially successful involving the European Roma Rights Center (the brief is available at <http://www.unhcr.org/cgi-bin/texis/vtx/home/opendoc.pdf?tbl=RSDLEGAL&id=41c1aa654>). The case centred on pre-clearance procedures introduced in Prague that expressly intended to stem the movement of Czech citizens of Roma ethnic origin who might claim asylum in the United Kingdom. In its brief, UNHCR noted:

“The different aspects to ‘good faith’ as a *general* principle of international law must be distinguished. These include the obligations of States (1) to settle disputes in good faith; (2) to negotiate in good faith; (3) having signed a treaty, not to frustrate the achievement of its object and purpose prior to ratification: Article 18, 1969 Vienna Convention on the Law of Treaties (VCLT69); (4) having ratified a treaty, to apply and perform it in good faith and not to frustrate the achievement of its object and purpose: Article 26 VCLT69; (5) to interpret treaties in good faith, in accordance with their ordinary meaning considered in context and in the light of their object and purpose (the principle *pacta sunt servanda*): Article 31 VCLT69; (6) to fulfil in good faith obligations arising from other sources of international law: Article 2(2), UN Charter; and (7) to exercise rights in good faith.”

Applying this principle, UNHCR argued that “the options available to a State wishing to obstruct the movement of those who seek asylum are thus limited by specific rules of international law and by the State’s obligation to fulfil its international commitments in good faith ...”

1.2.4 Subsidiary means for the determination of rules of law

According to Article 38 of the *Statute of the International Court of Justice* (see Vol. I, Chapter 5), judicial decisions and the teachings of the most qualified publicists are “subsidiary means for the determination of rules of law.” Therefore, they are not formal sources, but they are regarded as evidence of the state of the law.

Article 38 of the *Statute of the International Court* is not confined to international decisions, such as those of the International Court of Justice, the Inter-American Court of Human Rights, the European Court of Human Rights, or *ad hoc* international tribunals; decisions of national tribunals are also evidence of the law. However, the value of these decisions varies considerably. Nonetheless, neither the

International Court of Justice nor the international human rights monitoring organs are obliged to follow previous judicial decisions, including their own.

An example of a treaty body departing from previous jurisprudence (*Kindler v. Canada*) in light of the developing understanding of the scope of a human rights obligation is the Human Rights Committee's decision in the case of *Roger Judge v. Canada* (Communication No. 829/1998, UN Doc. CCPR/C/78/D/829/1998 (2003)). Balancing between the understood need for coherence and consistency of case law and the progressive dynamic of human rights law, the Committee elaborated in a case relating to the abolition of the death penalty:

“10.3 While recognizing that the Committee should ensure both consistency and coherence of its jurisprudence, it notes that there may be exceptional situations in which a review of the scope of application of the rights protected in the Covenant is required, such as where an alleged violation involves that most fundamental of rights - the right to life - and in particular if there have been notable factual and legal developments and changes in international opinion in respect of the issue raised. The Committee is mindful of the fact that the abovementioned jurisprudence was established some 10 years ago, and that since that time there has been a broadening international consensus in favour of abolition of the death penalty, and in states which have retained the death penalty, a broadening consensus not to carry it out. ...”

The writings of publicists (*“la doctrine”*) contribute to the development and analysis of international law. Compared to the formal standard-setting of international organs, the impact of such writings is indirect. Nonetheless, scholars and experts have made significant contributions, and their writings may not only be evidence of customary law but may also help to develop new rules of law.

1.3 “Soft law”

Some instruments, resolutions, conclusions or decisions adopted or taken by political organs of international organizations and human rights supervisory bodies are not binding on States parties, *per se*, but they carry considerable legal weight nonetheless.

Many international organs make decisions concerning human rights and thereby strengthen the body of international human rights standards. Such non-binding human rights instruments are called “soft law”, and may shape the practice of States as well as establish and reflect agreement among States and experts on the interpretation of certain standards. Examples of “soft-law” include:

- **General Assembly Resolutions:** Every year, the UN General Assembly adopts hundreds of resolutions and decisions covering a

range of topics including refugee law and human rights. Some of these resolutions, sometimes called declarations, adopt specific standards on specific human rights that complement or provide guidance on existing treaty standards. Notable examples include the *Declaration on the Human Rights of Individuals Who Are Not Nationals of the Country in Which They Live*, adopted by the General Assembly in 1985 (Resolution 40/144, 13 December 1985) and the *Declaration on Territorial Asylum*, adopted by the General Assembly (Resolution 2312 (XXII) on 14 December 1967). Numerous declarations adopted by the General Assembly have led to negotiations that set treaty standards.

- **Resolutions of the UN Commission on Human Rights and the new Human Rights Council replacing it:** Such resolutions can, in certain circumstances, be regarded as having legal value, although they are not legally binding, *per se*. One example is the *Guiding Principles on Internal Displacement*, adopted by the Commission on Human Rights in 1999 (Doc. E/CN.4/1998/53/Add.2), which to a large extent sums up relevant applicable legal standards based in already existing international law. Such resolutions, particularly if they are adopted by consensus, may serve to indicate the existence of a common “*opinio juris*”, or lack thereof, which is one element for the establishment of customary international law (see above). For example, the dispute between the US and the EU over the scope of *non-refoulement* obligations in relation to the risk of torture and other cruel, inhuman, and degrading treatment or punishment that became evident when negotiating the text of the Commission on Human Rights 2005 Resolution on Torture (2005/39) strongly indicated that there is not yet a global *opinio juris* on this issue as far as it relates to *non-refoulement* obligations in case of return leading to “*cruel, inhuman and degrading treatment or punishment*”.
- **General Comments and Recommendations made by UN treaty bodies:** The supervisory bodies created by UN human rights treaties (e.g., the Human Rights Committee or Committee on the Rights of the Child; see Vol. I, Chapter 5) often prepare so-called General Comments or Recommendations that elaborate on the various articles and provisions of their respective human rights instruments. The purpose of these general comments or recommendations is to assist States Parties in fulfilling their obligations. These general comments/recommendations reflect developments in interpreting specific provisions and aim to provide authoritative guidance to States Parties. They also set standards for the evaluation of a State’s legislation and practice and, as such, they have a significant influence on the behaviour of State Parties and carry significant legal weight (see Vol. I, Chapter 5 for the most relevant General Comments and

Recommendations of the UN treaty bodies). UNHCR cooperates closely with the treaty bodies in their efforts to draft new General Comments, with the aim of addressing displacement issues and guaranteeing that these comments are consistent with international refugee law and doctrine.

- **ExCom Conclusions on international protection:** From a refugee law perspective, the conclusions of the Executive Committee of the High Commissioner's Programme (ExCom) make up a key body of "soft law" (see textbox). The Conclusions cover a wide range of protection issues, including matters not addressed in any depth in international law, such as voluntary repatriation, responses to massive refugee crises, and maintaining the civilian and humanitarian character of asylum. Given that ExCom Conclusions (traditionally adopted by consensus) represent the views of more than 60 States, including some that are not Party to the 1951 Convention/1967 Protocol, they form an integral part of the international protection framework, guiding national policy as well as UNHCR's operations. They are the standards against which UNHCR evaluates States' practices when exercising its international protection mandate, particularly its monitoring functions under Article 35 of the 1951 Convention. ExCom Conclusions, while advisory rather than binding, still carry considerable authority. They reflect international expertise in refugee matters, and the opinions expressed in them are broadly representative of the views of the international community, particularly since participation in meetings of the Executive Committee is not limited to, and typically exceeds, its membership. The specialist knowledge of the Committee and the fact that its decisions are taken by consensus add further weight to its Conclusions. ExCom Conclusions, while constituting "soft law" for States, are internally binding for UNHCR; they have to be respected in all of UNHCR's activities, and must also be applied as standards when UNHCR is reviewing and commenting on States' asylum legislation and practice.

UNHCR's Executive Committee (ExCom) was created by ECOSOC in 1958 following a request from the UN General Assembly. In 2006, ExCom consisted of 70 UN Member States. Its main tasks are to approve the High Commissioner's assistance programmes, advise the High Commissioner in the exercise of his/her statutory functions, notably international protection, and scrutinize all financial and administrative aspects of the organization. Members of ExCom are elected by ECOSOC (see Vol. I, Chapter 5). Although the main Committee meets only once a year, its Standing Committee meets twice before the main ExCom meeting to prepare for that meeting.



Chapter 2 **The Protection of Refugees and Other Persons of Concern under International Law**

Three areas of international law are particularly relevant for the protection of refugees and other persons of concern: international refugee law (IRL), international human rights law (IHRL), and international humanitarian law (IHL).

While this manual focuses on the links between international refugee law and human rights law, provisions in international humanitarian law can also apply to refugees. Indeed, effective, comprehensive protection of refugees, asylum-seekers, and other persons of concern to UNHCR can only be achieved by applying, in concert, the standards set in these three complementary branches of international law.

2.1 International refugee law (IRL)

A number of global and regional international instruments establish and define basic standards for the treatment of refugees. The most important are the 1951 United Nations Convention relating to the Status of Refugees and its 1967 Protocol relating to the Status of Refugees. UNHCR is the UN agency mandated to provide international protection for refugees and to supervise the 1951 Convention, the 1967 Protocol, and other international refugee instruments. UNHCR's core mandate is defined in its Statute, but has been developed further by General Assembly Resolutions and ExCom Conclusions as well as decisions taken by the Secretary General.

The *Statute of the Office of the United Nations High Commissioner for Refugees* was annexed to General Assembly Resolution 428 (V) of 14 December 1950. The mandate was subsequently broadened by resolutions adopted by the General Assembly and its Economic and Social Council (ECOSOC). According to the Statute, the essential function of UNHCR is to provide international protection to refugees and to seek durable solutions to their problems by facilitating either their voluntary repatriation or their integration into new national communities in safety and with dignity. As set out in Chapter 1, para. 2 of the Statute, the work of UNHCR is “of an entirely non-political character ... humanitarian and social.”

The *Convention relating to the Status of Refugees (1951)* (hereafter: 1951 Convention) is the key legal document that defines who is a refugee, what his/her rights are, and the relevant legal obligations of States. Article 1 asserts that a refugee is any person “...owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable, or owing to such fear, is unwilling, to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it”.

The Convention establishes the juridical status of refugees and sets the minimum standards of treatment of refugees, including an enumeration of the basic rights to which they are entitled. These include the rights to gainful employment and welfare, identity papers and travel documents, applicability of fiscal charges, and the right of refugees to transfer their assets to another country where they have been admitted for the purposes of resettlement. The Convention provides for the facilitation of naturalization and assimilation of refugees, access to courts, education, social security, housing, and freedom of movement. It also prohibits the expulsion or forcible return of refugees, unless exceptional and clearly defined circumstances warrant such measures.

The aim of the *Protocol relating to the Status of Refugee (1967)* (hereafter: 1967 Protocol) was to acknowledge the applicability of the 1951 Convention to contemporary refugee population movements. The Protocol is an independent instrument to which States may accede without becoming Parties to the 1951 Convention, though this rarely happens. States Parties to the Protocol agree to apply the Convention's definition of a refugee, but without the Convention's time and geographical limitations.

Regional instruments

The *OAU Convention Governing the Specific Aspects of Refugee Problems in Africa* was adopted in 1969 by Member States of the Organization of African Unity (OAU, now the African Union). It complements the 1951 Convention in that it contains a broader definition of a refugee (Article I), an obligation to make the best efforts to grant asylum (Article II), provisions for durable solutions (Article V), and provisions on prohibiting subversive activities by refugees (Article III). According to this Convention, the term *refugee* "shall also apply to every person who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country of origin or nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality".

The *Cartagena Declaration on Refugees* was adopted in 1984 by government representatives, distinguished academics, and lawyers from the Latin America region. The Declaration established the legal foundations for the treatment refugees in the region, including the principle of *non-refoulement*, the importance of integrating refugees, and the need to eradicate the causes of mass population movements. The definition of a refugee in the declaration is similar to that found in the OAU Convention. The Cartagena Declaration considers as refugees those "persons who have fled their country because their lives, safety or freedom have been threatened by generalized violence, foreign

aggression, internal conflicts, massive violation of human rights or other circumstances which have seriously disturbed public order.”

The Cartagena Declaration is not binding on States. It is, however, applied in practice by a number of Latin American States and, in some cases, has been incorporated into domestic legislation. On the twentieth anniversary of the Cartagena Declaration, 18 Latin American States adopted the *Mexico Declaration and Plan of Action to Strengthen the International Protection of Refugees in Latin America*.

The *Bangkok Principles on the Status and Treatment of Refugees* were adopted by certain Asian, Middle Eastern, and African States in 1966. These principles, which were updated in 2001, are significant in that they reflect the views of many States that have had extensive experience in providing asylum, including some States that are not Parties to the 1951 Convention or its 1967 Protocol. As do the OAU Convention and the Cartagena Declaration, the Principles include a refugee definition that is broader than that found in the 1951 Convention.

Since UNHCR is the UN agency tasked with helping to reduce the incidence of statelessness and assisting those individuals who are stateless in securing an effective nationality, it is important to be familiar with the body of law relating to the acquisition, loss, or denial of citizenship and the protection of stateless persons:

The *Convention relating to the Status of Stateless Persons (1954)* defines a stateless person as “a person who is not considered as a national by any State under the operation of its law.” The Convention prescribes the standards of treatment to be accorded to stateless persons in terms similar to those established for refugees under the 1951 Convention. The Statelessness Convention addresses issues of documentation, property rights, access to courts, public relief, employment, and public education. It aims to improve the quality of life for those who are stateless by giving them a degree of legal stability.

The *Convention on the Reduction of Statelessness (1961)* seeks to reduce the number of stateless individuals. Under the Convention, a State Party agrees to grant nationality to individuals who would otherwise be stateless if they have a significant link with that country - such as if they were born in the country or are descended from a citizen of that country. The Convention specifies that a person or group of persons shall not be deprived of their nationality on racial, ethnic, religious, or political grounds.

2.2 International human rights law (IHRL)

Under human rights instruments, rights are generally granted to all individuals, not only to nationals of States Parties. Therefore, non-nationals usually also benefit from the rights guaranteed in human rights instruments – with limited exceptions, such as rights pertaining to political participation. Given the universality of these rights, asylum-seekers, refugees, and stateless persons must be granted all the rights and freedoms envisaged in human rights treaties without discrimination of any kind. (For a detailed examination of this issue, see Vol. II).

While the 1951 Convention, which sets minimum standards for the treatment of persons who qualify for refugee status, predates the major international human rights mechanisms by over a decade, it is generally accepted that the provisions found in those human rights instruments complement the Convention and so offer greater protection to all persons of concern to UNHCR.

Human rights norms are particularly relevant to refugee protection because:

- Some human rights instruments have been *ratified by more countries* than the 1951 Convention and its Protocol. For example, the Convention on the Rights of the Child (CRC) has been ratified by 192 States. Therefore, in countries that are not States Parties to the 1951 Convention, Article 22 of the CRC, which addresses refugee children, may be used to provide protection to children who are refugees (see Vol. II, Chapter 3).
- Human rights instruments envisage a *broader range of rights* than that found in international refugee law instruments. Moreover, even when certain rights are protected under two branches of international law, those rights protected under human rights instruments are generally more widely applicable.
- Human rights instruments usually provide for the *same treatment for nationals and non-nationals*, including refugees, asylum-seekers, and stateless persons. While the 1951 Convention contains different criteria for entitlement and, in most cases, the rights are accorded on the basis of the most favourable treatment accorded to aliens, under human rights instruments, asylum-seekers and refugees are entitled to the same enjoyment of rights as nationals. (See Vol. II, Chapter 7 for exceptions to this principle.)
- The *principle of non-discrimination* contained in human rights treaties is wider than the non-discrimination clause in the 1951 Convention and its Protocol. While the 1951 Convention limits the prohibition of discrimination against refugees to the grounds of “race, religion, and country of origin” (Article 3), the corresponding

provisions under human rights treaties enumerate more grounds for discrimination that are prohibited; and those lists are not exhaustive. (See Vol. II , Chapter 10.)

- The **supervisory mechanisms** are different. Article 35 of the 1951 Convention includes a provision requiring “[t]he Contracting States undertake to co-operate with the Office of the United Nations High Commissioner for Refugees, or any other agency of the United Nations which may succeed it, in the exercise of its functions, and shall in particular facilitate its duty of supervising the application of the provisions of this Convention.” In addition, States are obliged “to provide them in the appropriate form with information and statistical data requested concerning: (a) the condition of refugees, (b) the implementation of this Convention, and (c) laws, regulations and decrees which are, or may hereafter be, in force relating to refugees.”
- Contrary to many international and regional human rights instruments, the Convention does not specifically provide for other mechanisms, such as State reports or individual complaints. Human rights instruments establish a variety of supervisory mechanisms ranging from reporting obligations through on-site missions to quasi-judicial supervisory bodies (e.g., the Human Rights Committee) to the possibility of submitting a claim to an international human rights court (e.g., the European Court, the Inter-American Court, and the African Court) to adjudicate claims. The decisions of those Courts are binding on States Parties. In addition, under human rights instruments, States are obliged to submit reports on the domestic implementation of the treaties to which they are Parties (see Vol. I , Chapters 5 and 6).
- Human rights norms provide **protection to everyone under the jurisdiction of a State Party**. Therefore, they are particularly relevant to those individuals, including refugees, who have not yet gained access to asylum procedures or who have not otherwise regularized their stay and so might not yet meet the requirements of “lawfully staying in their territory” – which is a precondition for many of the provisions of the 1951 Convention.

2.3 International humanitarian law (IHL)

This branch of international law, which predates both human rights and refugee law, consists of rules that apply during armed conflict. These rules restrict the actions of the parties to a conflict by providing for the protection and humane treatment of persons who do not take part in the hostilities (civilians, medics, aid workers) and those who can no longer take part in the hostilities (wounded, sick, and shipwrecked troops, prisoners of war). IHL also regulates the means and methods of warfare (commonly referred to as *ius in bello*). It does not, however,

address the question of the legality of the armed conflict as such (commonly referred to as *ius in bellum*, i.e. whether the use of force is consistent with the provisions of Chapter VII of the UN Charter, including its Article 51 concerning the right to self-defence).

The “guardian” of IHL is the *International Committee of the Red Cross (ICRC)*. Founded in 1863, the ICRC exercises its supervisory mandate by establishing a relationship of trust with the belligerents in a conflict.

The main instruments of international humanitarian law that are also relevant to international refugee protection are the four *Geneva Conventions* of 1949 and their two *Additional Protocols*, adopted in 1977.

Protection under IHL covers:

(a) *International Armed Conflicts*, that is, conflicts between two or more States (the four Geneva Conventions and Additional Protocol I are applicable); and

(b) *Non-International Armed Conflicts*, that is, conflicts between a State and non-State armed forces, or between two or more non-State armed groups within the territory of one State (in situations of internal strife, Article 3, common to the four Geneva Conventions, and Additional Protocol II are applicable).

In principle, refugees caught up in an international armed conflict fall within the category of “protected persons,” which means that they are covered by all the provisions of the Fourth Geneva Convention and Additional Protocol I. During non-international armed conflicts, refugees are automatically protected since they are, by definition, “civilians not taking an active part in the hostilities.” Refugees benefit in particular from the following provisions:

- Article 3, which is common to the four Geneva Conventions, spells out the minimum protection that must be accorded to persons who are not, or are no longer, taking part in the hostilities in a non-international armed conflict. This includes protection against acts of violence, particularly murder, mutilation, torture, and cruel, humiliating, and degrading treatment, a prohibition against hostage-taking, and a fair trial before any punishment is imposed.
- The *Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War* covers the protection of civilians against certain consequences of war. It prohibits the use of civilians as human shields, the collective punishment of civilians, measures aimed at intimidating or terrorizing the civilian population, pillage, and reprisals against civilians. It also provides for the establishment of neutralized zones, which could be used as refugee settlements, and for the reuniting of dispersed families. The Convention also

prohibits treating refugees as enemy aliens solely because they have the same nationality as the enemy (see Articles 44, 45, 49, and 70).

- Additional Protocol I stipulates that wars of national liberation must be treated as conflicts of an international character and reinforces the rule that belligerents must distinguish between military objectives and civilians/civilian objectives. It strengthens protection under the Geneva Convention by asserting that civilians shall not be the intentional target of military actions or indiscriminate attacks, and that civilians should be provided with impartial assistance by humanitarian agencies, subject to the agreement of the Parties concerned (see, in particular, Article 85).
- Additional Protocol II extends to non-international armed conflicts the principal rules of Protocol I relating to the protection of civilians. It expands protection beyond that provided by common Article 3. Displacement of civilian populations may only be ordered if the security of the civilians involved or imperative military reasons so demand. Under those circumstances, measures must be taken to ensure that the population is settled in safe conditions (see, in particular, Article 17).

IHL protects refugees only in situations of international or internal armed conflict. If a refugee flees armed conflict, but finds asylum in a country that is not involved in international or internal armed conflict, IHL no longer applies to that refugee. ICRC also plays an important role in protecting internally displaced persons who have been forced to flee their homes because of international and internal armed conflicts.

International human rights law is applicable at all times, so it applies during times of armed conflict, whether internal or international. This means that international human rights law and international humanitarian law are applicable *simultaneously during times of armed conflict*.

The accepted view is that during an armed conflict, IHL is the *lex specialis* and the general norms of international law are held in abeyance (see, for example, *the ICJ Advisory Opinion on Nuclear Weapons*). Thus, the scope of the right to life during armed conflicts is determined by IHL.

For further information on IHL and how it contributes to the protection of refugees, see *The Cross-Fertilization of International Humanitarian Law and International Refugee Law*, by S. Jaquemet, International Review of the Red Cross, Vol. 843, 2001.

UNHCR documents relevant to this topic:

EXCOM Conclusions No. 94 (2002); No. 27 (1982), No. 32 (1983), No. 45 (1986) & No. 48 (1987)

UNHCR, Note on the Protection of Refugees in Armed Conflict Situations (1982)

UNHCR, Note on Military and Armed Attacks on Refugee Camps and Settlements (1987)

Comparative Chart	International Human Rights Law	International Refugee Law	International Humanitarian Law
<i>When each body of law applies</i>	Always, but some human rights instruments allow for derogation of some of their provisions in times of public emergency (e.g., ICCPR, Art. 4[1]; ECHR, Art. 15). However, there are also non-derogable rights (see, for example, ICCPR, Art. 4[2], ACHR, Art. 27[2]).	Always, but States can withhold rights from refugees in "time of war or other grave and exceptional circumstances" (1951 Convention, Art. 9).	<ul style="list-style-type: none"> ▪ International armed conflict; occupation ▪ Non-international armed conflict (Common Article 3 and Protocol II)
<i>Who is protected</i>	All persons on the territory or under jurisdiction of the State (e.g., under effective control of the State)	Asylum-seekers and refugees, if not excluded from refugee protection (1951 Convention, Art. 1F)	Persons who do not take part or are no longer taking part in hostilities (e.g., civilians, humanitarian workers, and combatants who have been wounded, captured or have surrendered)

2.4 International criminal law (ICL)

Some developments in international criminal law are also relevant to the protection of refugees and other persons of concern to UNHCR. The *Rome Statute of the International Criminal Court (ICC)* established a permanent international criminal court to adjudicate the cases of persons charged with some of the most serious crimes of international concern. The ICC Statute was adopted on 17 July 1998 by a UN Diplomatic Conference and entered into force on 1 July 2002.

The jurisdiction of the ICC complements national criminal jurisdictions. The material jurisdiction of the Court is over four categories of crimes:

- Genocide,
- War crimes,
- Crimes against humanity, and
- Crimes against the administration of justice of the ICC.

The Rome Statute informs the interpretation of the refugee definition under the 1951 Convention. It helps to determine which acts attain the threshold of persecution and guides the delineation of excludable

criminal acts under Article 1 F (see text box). For example, in the context of gender-based persecution, the Statute explicitly includes “rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity” (Articles 7[1][g] and 8[2][b][xxii]) in the definitions of crimes against humanity and war crimes. (For further details, see Volume II, Chapter 2).

Similarly, judgements made by the international tribunals for the former Yugoslavia and Rwanda have confirmed enslavement, rape, torture, and genocide as crimes against humanity. (For further information about these tribunals, see Vol. II, Chapter 2). The identification of these acts as violations of international criminal law can assist decision-makers in determining the persecutory nature of a particular act that affects women and girls. Such violations should be considered in the context of excludable crimes under Article 1F of the 1951 Convention.

The Rome Statute defines the deportation or forcible transfer of a population as a crime against humanity. It also characterizes the unlawful deportation or transfer of a civilian population and the order to displace a civilian population as war crimes (see below).

Another significant development related to both criminal law and refugees has been international action to combat human trafficking and smuggling. Increasing numbers of refugees are forced to rely on smugglers in their attempts to reach safety. In doing so, not only do they put their lives at risk, but they often also jeopardize the outcome of their claims for asylum in the destination State. The *United Nations Protocol against Smuggling of Migrants by Land, Sea, and Air* (2000), in force since January 2004, and the *United Nations Protocol to Prevent, Suppress, and Punish the Trafficking of Persons* (2000), in force since December 2003, focus on the traffickers and smugglers, thus making it clear that the victims of trafficking and smuggling should not be punished solely for having been subject to these crimes. Both Protocols stipulate that nothing in their provisions affects the rights of individuals and the obligations of States under the 1951 Convention/1967 Protocol or the principle of *non-refoulement*. These Protocols supplement the *United Nations Convention against Transnational Organized Crime* (2000) and provide for greater cooperation among governments in tackling cross-border criminal activity (see Vol. II, Chapter 2).

GUIDELINES ON INTERNATIONAL PROTECTION:

Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees (HCR/GIP/03/05)

(...)

II. SUBSTANTIVE ANALYSIS

A. Article 1F(a): Crimes against peace, war crimes, and crimes against humanity

10. Among the various international instruments that offer guidance on the scope of these international crimes are the 1948 Convention on the Prevention and Punishment of the Crime of Genocide, the four 1949 Geneva Conventions for the Protection of Victims of War, the two 1977 Additional Protocols, the Statutes of the International Criminal Tribunals for the former Yugoslavia and Rwanda, the 1945 Charter of the International Military Tribunal (the London Charter), and, most recently, the 1998 Statute of the International Criminal Court, which entered into force on 1 July 2002.

11. According to the London Charter, a **crime against peace** involves the “planning, preparation, initiation, or waging of a war of aggression, or a war in violation of international treaties, agreements, or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing.” Given the nature of this crime, it can only be committed by those in a position of authority representing a State or a State-like entity. In practice, this provision has rarely been invoked.

12. Certain breaches of international humanitarian law constitute **war crimes**. Although such crimes can be committed in both international and non-international armed conflicts, the content of the crimes depends on the nature of the conflict. War crimes cover such acts as wilful killing and torture of civilians, launching indiscriminate attacks on civilians, and wilfully depriving a civilian or a prisoner of war of the rights of fair and regular trial.

13. The distinguishing feature of **crimes against humanity**, which cover acts such as genocide, murder, rape, and torture, is that they must be carried out as part of a widespread or systematic attack directed against the civilian population. An isolated act can, however, constitute a crime against humanity if it is part of a coherent system or a series of systematic and repeated acts. Since such crimes can take place in peacetime as well as during armed conflict, this is the broadest category under Article 1F(a).



Chapter 3

Basic Outline of International Human Rights Law

3.1 Concept and development of international human rights law

Human rights are commonly understood as those rights to which a person is inherently entitled merely for being human. Human rights may not be renounced or forfeited. While some national constitutions stipulate that certain basic human and political rights may be forfeited under particularly grave circumstances, provided that certain procedures are followed, and while the 1951 Convention establishes in its exclusion clauses (Article 1F) that certain individuals are not deserving of international protection as a refugees, the idea that basic human rights may be forfeited is alien to existing international human rights law. Because of the inalienable nature of human rights, an individual is unable to waive any human right; but he/she may waive the exercise of a particular right in a certain situation. For example, when applying for funds to support his/her return under a stranded migrant programme, a rejected asylum-seeker may sign a waiver indicating his desire not to appeal the refugee status determination decision. At the same time, however, he/she may not waive his/her right to be protected against *refoulement*, which derives from international refugee and human rights law.

3.1.1 Historical antecedents

The origins of human rights may be found both in Greek philosophy and the various world religions. Later, several charters that codified human rights and freedoms, particularly the *Magna Carta Libertatum* (1215) and the English *Bill of Rights* (1689), made significant steps toward establishing a singular body of norms. While these documents specified rights, they did not contain an all-embracing philosophical concept of individual liberty. Freedoms were often seen as rights conferred upon individuals or groups by virtue of their rank or status.

It was during the Age of Enlightenment, in the 18th century, when the concept of human rights emerged as a specific category. The ideas of Hugo Grotius (1583-1645), Samuel von Pufendorf (1632-1694), John Locke (1632-1704), and Jean-Jacques Rousseau (1712-1778), among others, helped to develop the philosophical underpinnings of the modern idea of human rights.

The philosophical developments made prior to the 18th century led to the adoption of ground-breaking declarations of rights that included fundamental rights inherent to all human beings, regardless of their social or economic status. Thus, the *American Declaration of Independence* (1776) was based on the assumption that all human beings are equal, and referred to certain inalienable rights, such as the right to life, liberty, and the pursuit of happiness. These ideas were also reflected in the United States' Bill of Rights, which was promulgated by the State

of Virginia in the same year. The term *human rights* appeared for the first time in the French *Déclaration des Droits de l'Homme et du Citoyen* (1789). Both the American and the French Declarations were intended to be systematic enumerations of these rights.

The first international measures to protect human rights were established during the 19th century with the conclusion of treaties to ban the slave trade, the evolution of humanitarian law, resulting from the work of Swiss philanthropist Henry Dunant (see Vol. I, Chapter 2), and the adoption of international agreements to protect minorities.

3.1.2 The Charter of the United Nations and subsequent international human rights instruments

The treaty that established the League of Nations in 1920 – the organization that preceded the United Nations - contained no general provisions dealing with human rights. It was the Charter of the United Nations, adopted after the atrocities of the Second World War, that took the decisive step toward international protection of human rights. (For a detailed analysis on the United Nations, see Chapter 5).

The Preamble of the Charter of the United Nations (1945) affirms “faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women, and of nations large and small”. It also speaks of the determination “to promote social progress and better standards of life in larger freedom.” According to Article 1(3) of the Charter, one of the purposes of the UN is to promote and encourage “respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion.”

Articles 13(1)(b), 55(c), 62(2), 68, and 76(c) of the Charter also contain references to human rights. According to Articles 56 and 55(c), read in conjunction, United Nations Member States have a legal obligation “to take joint and separate action in co-operation with the Organization for the achievement of ... universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.”

The idea of promulgating an “International Bill of Rights” was developed immediately after the adoption of the UN Charter and led to the adoption of the Universal Declaration of Human Rights (UDHR) in 1948. Although not a treaty – it was adopted by a resolution of the UN General Assembly – the UDHR is the earliest comprehensive human rights instrument adopted by the international community.

On the same day that it adopted the UDHR, the General Assembly asked the UN Commission on Human Rights to prepare, as a matter of priority, a legally binding human rights convention. Because of the divisive climate of the Cold War at the time, there was no agreement

among States on adopting a single binding human rights instrument that encompassed all human rights: civil, political, economic, social, and cultural; so eighteen years later, in 1966, two distinct instruments were adopted: the *International Covenant on Economic, Social and Cultural Rights (ICESCR)* and the *International Covenant on Civil and Political Rights (ICCPR)*. A *First Optional Protocol to the ICCPR*, which established an individual complaints procedure, was also adopted. It took a full decade before both Covenants and the Optional Protocol finally entered into force in 1976. A *Second Optional Protocol to the ICCPR on the abolition of the death penalty* was adopted in 1989 and entered into force two years later. The UDHR, the two Covenants, and the two Optional Protocols are collectively referred to as the “*International Bill of Human Rights*”.

Since 1948, a series of other human rights treaties addressing specific human rights issues have been adopted at the United Nations level. Organizations in Europe, the Americas, and Africa have also elaborated on and expanded the human rights legal framework at the regional level (see Vol. I, Chapters 6, 7, and 8).

While it is commonly understood and has been explicitly expressed by the UN High Commissioner on Human Rights, Ms. Louise Arbour, that the efforts of UN human rights machinery should refocus from standard-setting to implementation of human rights, standard-setting processes have not come to a conclusion. It is the ever-changing realities and the technical progress which require the on-going development of norms, both at the national and international level, and in the sphere of human rights law. A recent example is the *International Convention for the Protection of All Persons from Enforced Disappearances* adopted in the 2006 Session of the Human Rights Council, which was initiated in reaction to the dramatic experiences in a number of Latin-American countries. Other examples of ongoing normative efforts are the work on the draft *International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities* as well as on an *Optional Protocol to the International Covenant on Economic, Social and Cultural Rights*.

3.2 Reservations to human rights treaties

A reservation is a statement made by a State through which it purports to exclude or alter the legal effect of certain provisions of a treaty as they apply to that State. In assessing the exact extent of a State’s legal obligations under a human rights treaty, it is necessary to ascertain whether the State made a reservation when it ratified or acceded to the treaty and whether the State has subsequently maintained the reservation.

The major human rights treaties allow for reservations to be made, although they have somewhat different ways of regulating the subject. According to Article 19 of the Vienna Convention on the Law of Treaties, when signing, ratifying, accepting, approving or acceding to a treaty, States may formulate a reservation unless the reservation is prohibited by the treaty or the reservation is incompatible with the object and purpose of the treaty. (See Vol. I, Chapter 1).

The *Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)* expressly includes a provision stating “a reservation incompatible with the object and purpose of the Convention shall not be permitted” (Article 28[2]). The Human Rights Committee, set up to supervise the implementation of the *International Covenant on Civil and Political Rights (ICCPR)* addressed the issue of reservations in its General Comment No. 24. Sometimes, reservations “of a general character” are prohibited by human rights instruments (e.g., Article 57[1] of the European Convention for the Protection of Human Rights and Fundamental Freedoms [ECHR]). However, the effects of invalid reservations to human rights treaties and of objections to reservations are subject to continuing debate in international law.

The **1951 Convention** and **1967 Protocol** allow contracting States to make reservations to certain provisions. However, in accordance with Article 42, reservations may not be made to Articles 1, 3, 4, 16 (1), 33, and 36-46 (inclusive) of the Convention.

3.3 Restrictions or limitations on human rights

Various international human rights instruments contain explicit provisions allowing for restrictions or limitations on the exercise of certain rights, such as the right to freedom of expression, the right to assembly, the right to freedom of movement, and the right to respect for one’s private and family life. These limitations can be imposed, for instance, in order to protect the rights and freedoms of others, for national security, and to protect public health or morals. Even when no explicit limitations are formulated, the competition among different rights and different rights-holders must be considered and carefully balanced.

In order to be lawful, acts limiting the exercise of human rights must comply with certain minimum *requirements*. They must be:

- Defined by *law*;
- Imposed for one or more specific *legitimate purposes*, i.e. objectives which are consistent with the letter and spirit of the international human rights framework and should be justified by the protection of a strictly limited set of well-defined *public interests*, which usually includes one or more of the following grounds: national security,

public safety, public order (*ordre public*), the protection of health or morals, and the protection of the rights and freedoms of others;

- ***Suitable and necessary***, i.e. there must be a rational connection between the measure taken and the objective pursued. The measure must be capable to achieve the set objective, and there must be a pressing social need to take such measure to be assessed on a case-by-case basis;
- ***The least intrusive measure*** to effectively achieve the legitimate purpose;
- ***Proportional***, i.e. the public interest or the rights of others to be protected by the intrusive measure must outweigh the harm to the individual affected by the measure;
- ***Interpreted strictly*** in the light and context of the particular right, without jeopardizing the essence of the right concerned.

The burden falls upon States to prove that a limitation imposed upon the enjoyment of the rights is legitimate. This is, of course, a heavy burden of proof, but it is consistent with the object and purpose of human rights treaties, which is to protect the individual. There are a few rights, however, which cannot be limited, such as freedom from torture and slavery. (For the limitation provisions of some relevant human rights, see Vol. II.)

3.4 Derogations from international legal obligations

Many national constitutions allow for the temporary suspension of certain constitutionally-guaranteed rights and the imposition of martial law or emergency rule in certain circumstances, such as war. Similarly, some human rights instruments allow States to derogate, temporarily, from some of their obligations.

Derogating measures must be of an exceptional and temporary nature. There are derogation clauses in, among other instruments, the ICCPR (Article 4), the European Convention for the Protection of Human Rights and Fundamental Freedoms (Article 15), and the American Convention on Human Rights (Article 27). Some human rights instruments, such as the Convention on the Right of the Child (CRC), the ICESCR, and the African Charter on Human and Peoples' Rights (ACHPR), do not contain any derogation clause.

Derogations from human rights obligations

	ECHR	ICCPR	ACHR
<i>Provision</i>	Article 15	Article 4	Article 27
<i>Justification</i>	"In time of war or other public emergency threatening the life of the nation"	"In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed"	"In time of war, public danger, or other emergency that threatens the independence or security of a State Party"
<i>Substantive Requirements</i>	i) To be taken only "... to the extent strictly required by the exigencies of the situation"; ii) Must be consistent with "other obligations under international law"; iii) Secretary General of Council of Europe to be kept informed of derogating measures and reasons for them.	i) To be taken only "... to the extent strictly required by the exigencies of the situation"; ii) Must be consistent with "other obligations under international law"; iii) Must not involve discrimination on grounds of race, colour, sex, language, religion or social origin; iv) Other States parties to be immediately informed through UN Secretary General of provisions which have been derogated from and why.	i) To be taken only "... to the extent and for the period of time strictly required by the exigencies of the situation"; ii) Must be consistent with "other obligations under international law"; iii) Must not involve discrimination on grounds of race, colour, sex, language, religion or social origin; iv) Other States parties to be immediately informed through OAS Secretary General of which provisions suspended, why, and when suspension will be terminated.

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

When derogation measures are allowed, they are subject to strict formal and substantive requirements, such as:

- There must be a ***war or general state of public emergency*** which threatens the life of the nation" (See Article 4[1]1 of the ICCPR, Art. 27[1] of the ACHR, and Article 15 of the ECHR).
- The state of emergency must be ***officially proclaimed***. For example, Article 4(3) of the ICCPR requires that any State availing itself of the right of derogation must "immediately inform the other States Parties to the present Covenant, through the intermediary of the Secretary-General of the United Nations, of the provisions from which it has derogated and of the reasons by which it was actuated. A further communication shall be made, through the same intermediary, on the date on which it terminates such derogation;

- Measures must comply with the *principle of proportionality*, they may not go beyond what is strictly required by the situation;
- Measures may *not be inconsistent with other obligations* under international law; and
- Measures *must not be discriminatory*.

A State availing itself of the right of derogation must immediately provide justification for its decision to proclaim a state of emergency, and also for any specific measure based on such a proclamation. For derogations under the 1951 Convention, see Article 9.

3.5 Non-derogable rights

Several human rights instruments establish a list of “non-derogable” rights, that is rights from which a State may not in any circumstances derogate. These include the ICCPR (Article 4[2]), the ECHR (Article 15[2]), and the ACHR (Article 27[2]).

The list of non-derogable rights generally includes, at a minimum, the right to life, freedom from slavery, torture, and imprisonment for debt, the principle of legality in the field of criminal law, freedom of thought, conscience, and religion, and the right to juridical personality. The lists of non-derogable rights found in human rights treaties are not exhaustive. That means that one cannot argue, *a contrario*, that, because a right is not expressly listed as non-derogable, States Parties can proceed to extraordinary limitations on its enjoyment.

The Human Rights Committee, in its General Comment 29 (2001) sets out in detail the conditions that must be met in order to derogate from the rights contained in the ICCPR and refers at length to those rights which are non-derogable. The Committee established that the rights contained in Article 4(2) of the ICCPR are not the only non-derogable rights; there are elements of other rights not listed in Article 4(2) that cannot be subject to lawful derogation.

In its Advisory Opinion on Habeas Corpus in Emergency Situations, the Inter-American Court of Human Rights noted that the rights protected by the ACHR cannot, *per se*, be suspended even in emergency situations, because they are “inherent to man.” Thus it noted that “what may only be suspended or limited” under the Convention is the “full and effective exercise” of the rights contained therein (see the Advisory Opinion OC-8/87 of January 30, 1987.)

In general, under human rights instruments, the prohibition of torture and other forms of ill-treatment are non-derogable rights. In case of torture, this entails related *non-refoulement* obligations when there is a real risk of torture. There is currently no global consensus on the question of obligations to *non-refoulement* in cases of risk of cruel,

inhuman or degrading treatment or punishment, that is, when the treatment feared falls below the threshold of torture. In European contexts, however, such an obligation is accepted.

Examples of non-derogable rights (see Article 15 of the ECHR, Article 4 of the ICCPR and Article 27 of the ACHR)

- The right to life
- The right not to be held in slavery
- The recognition as a person before the law
- The right not to be subject to torture or cruel, inhuman or degrading treatment or punishment
- The right to freedom of thought, conscience, and religion
- The right not to be taken hostage, abducted or subject to *incommunicado* detention

3.6 Denunciation

Denunciation is the withdrawal from a treaty by a State Party. Generally, this may take place in accordance with a specific provision of the treaty. The 1951 Convention Relating to the Status of Refugees, for example, foresees in its Article 44 that “[a]ny Contracting State may denounce this Convention at any time by a notification addressed to the Secretary-General of the United Nations.” It also clarifies the consequences by stipulating that “[s]uch denunciation shall take effect for the Contracting State concerned one year from the date upon which it is received by the Secretary-General of the United Nations.”

Some human rights instruments, including the ICCPR, the ICESCR, and CEDAW, do not permit denunciation by a State Party. Other human rights treaties, such as the CRC, Convention against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment (CAT), and the Convention on the Elimination of Racial Discrimination (CERD), allow for denunciation.

3.7 Savings clauses and interpretation provisions

According to human rights and refugee law, in the event of a disparity between two or more standards, the more generous provision is to be applied (see, for example, Article 5 of the ICCPR, Article 5 of the ICESCR, Article 29 of the ACHR, and Article 41 of the CRC).

Article 5(2) of the ICCPR states: “There shall be no restriction upon or derogation from any of the fundamental human rights recognized or existing in any State Party to the present Covenant pursuant to law, conventions, regulations or custom on the pretext that the present Covenant does not recognize such rights or that it recognizes them to a lesser extent.” Likewise, according to Article 5 of the 1951 Convention, “Nothing in this Convention shall be deemed to impair any rights and

benefits granted by a Contracting State to refugees apart from this Convention.” Thus, when States are parties to the 1951 Convention and its Protocol and to human rights instruments, the rights most favourable to individuals must prevail.

In explaining the meaning of the provisions of a human rights treaty, it is essential for authorities and UNHCR to adopt a *teleological and systematic approach* by searching for an interpretation that respects the rights and interests of the individual and is also logical in the context of the treaty as a whole.

3.8 Types of State duties imposed by international human rights norms

The States’ duties imposed by human rights norms are commonly referred to as a “tripartite typology” (or three-fold classification) of obligations: to *respect, protect and fulfil*. Each human right generally imposes all three types of obligation. A State will be held responsible for not complying with any of these obligations established in a treaty binding on the State or in any other source of law.

3.8.1 Obligation to Respect

This level of obligation requires the State, including all its organs and agents, to refrain from any measure that may interfere with or impair an individual’s enjoyment of his/her rights or the ability to satisfy those rights by their own efforts. It entails “negative” obligations, such as the prohibition to return or extradite an individual when there are substantial grounds for believing that he/she would be in danger of being subject to torture (see Article 3 of the CAT and Article 7 of the ICCPR). (For further analysis, see Vol. II.)

3.8.2 Obligation to Protect

This level of obligation requires the State, including all its organs and agents, to take all necessary measures to ensure that individuals under its jurisdiction are protected from infringements of their rights by third parties. The obligation to protect is normally taken to be a central function of States, which have to prevent irreparable harm from being inflicted upon members of society. This requires that States: prevent violations of rights by any individual or non-State actor; avoid and eliminate incentives to violate rights by third parties; and provide access to legal remedies when violations have occurred, in order to prevent further violations. In practice, this level of obligation requires the State to take measures to prevent human rights violations, such as, for example, regularly monitoring prisons, providing education and training, and assessing the competence of government officials who serve in rights-sensitive areas, such as law enforcement or health services.

Thus, a State may be responsible for not having taken reasonable action to prevent private individuals or groups from carrying out acts that violate human rights or to provide adequate protection against such violations under domestic law. For example, if a girl has undergone female genital mutilation (see Vol. II, Chapter 2), a boy has been recruited into a guerrilla group (see Vol. II, Chapter 3), or a woman has suffered from domestic violence (see Vol. II, Chapter 2) and the State is aware or should have been aware of these events and is unable or unwilling to provide protection against such harm, the State may be held responsible for violating its duty to protect these individuals.

3.8.3 Obligation to Fulfil

This level of obligation requires the State, including all its organs and agents, to take all positive measures to ensure that individuals under its jurisdiction enjoy the rights recognized in human rights instruments. Although this is the key State obligation in relation to economic, social, and cultural rights, the duty to fulfil also arises with respect to civil and political rights. Enforcing the prohibition of torture (which requires, for example, police training and preventive measures), the right to a fair trial (which requires investments in courts and judges), the right of free and fair elections, or the right to legal assistance, entails considerable cost.

This level of obligation implies that when an individual cannot secure his/her economic, social, and cultural rights (such as the right to adequate food or the right to adequate housing), through his/her own efforts, a State Party to the major human rights treaties, such as the ICESCR or the CRC, must provide material assistance. This would apply to cases involving, for example, unaccompanied children or asylum-seekers in detention centres.

A State will only be held responsible for a human rights violation in the international arena if it has failed to provide the alleged victim with an adequate and effective remedy through its own courts or administrative authorities. The international protection of human rights is “subsidiary” to the available national or domestic mechanisms.

3.9 State responsibility for human rights violations

A State is considered to have perpetrated an internationally wrongful act when its conduct consists of an action or omission that is attributable to the State under international law, and that constitutes a breach of the State’s international obligations (Article 2). According to the International Law Commission’s 2001 Draft Articles on State Responsibility, a State is responsible, in the international arena, for every internationally wrongful act it perpetrates (Article 1).

All branches of the State (executive, legislative, and judicial), at the national, regional or local level, are responsible for meeting the

obligations of the treaties to which the State is a party. Historically, States have assumed responsibility for human rights violations only when State agents or officials were the perpetrators. However, it is now accepted that States are responsible for some acts perpetrated by private persons or entities when they, for example, act at the instigation or with the consent or acquiescence of the State (Article 1 of the CAT) or when the State fails to take appropriate measures or to exercise due diligence to prevent, investigate, punish or redress the harm caused by such acts, such as when domestic violence is condoned. (For more details, see the Human Rights Committee General Comment No. 31, paragraph 8).

States must comply with their human rights obligations in regard to all individuals on their territories or under their jurisdiction, regardless of nationality, including asylum-seekers, refugees, stateless persons, migrant workers, and other persons who may find themselves in the territory or otherwise subject to the jurisdiction of the State concerned.

The concept of “jurisdiction” is not restricted to the national territory of the State. It includes all territories over which the State exercises control, even *de facto* control. This means that a State Party must respect and ensure the rights enumerated in the human rights treaties to which it is party to anyone within the power or effective control of that State, even if that individual is not situated within the territory of the State Party. According to the Human Rights Committee General Comment No. 31, this principle also applies to those within the power or effective control of the forces of a State Party acting outside its territory, regardless of the circumstances in which such power or effective control was obtained. This would include forces constituting a State’s contingent assigned to an international peace-keeping or peace-enforcement operation.

In addition, States can be held accountable for human rights violations that its agents commit on the territory of another State, either with or without the acquiescence of the government of that State (see, for example, the Human Rights Committee’s *Lopez Burgos v. Uruguay* and the European Court of Human Rights’ *Cyprus v. Turkey*). States are also responsible for the actions committed by their diplomatic representatives abroad (see, for example, the Human Rights Committee’s *Pereira Montero v. Uruguay*).

These norms of State responsibility should be referred to when considering transportation carrier liability, interceptions, and related issues. For a practical application of these norms to refugee protection, see UNHCR’s amicus submission in the ERRC case before the UK House of Lords, available on UNHCR’s web page (see above).

While human rights instruments stress the obligations of States towards individuals as rights-holders, every State has a legal interest in every other State’s adherence to its human rights obligations. As stated in

General Comment 31 of the Human Rights Committee, this follows from the fact that the “rules concerning the basic rights of the human person” are *erga omnes* obligations, and there is a UN Charter obligation to promote universal respect for, and observance of, human rights and fundamental freedoms.

The responsibility to protect

The origins of the concept of a “responsibility to protect” are found in the debate about humanitarian intervention that took place during the 1990s. At that time, the Security Council showed itself willing, in some circumstances at least, to characterize egregious human rights abuses as a threat to international peace and security, thus opening up the possibility of enforcement action under Chapter VII of the UN Charter. Problems arose because of the gap between theory and practice. The genocidal acts in Rwanda and Bosnia demonstrated the grave consequences of that inconsistency. In addition, humanitarian intervention was, and remains, a politically charged and divisive concept.

In his March 2005 report, “In larger freedom”, UN Secretary-General Kofi Annan urged all to “embrace the responsibility to protect and, when necessary (...), act on it.” This was further endorsed in the Outcomes of the September 2005 UN Summit, convened by the Secretary-General to review progress on implementation of the UN Millennium Goals.

There has thus been an important shift in the focus from a “right of humanitarian intervention” to a potentially much broader “responsibility to protect.” It is recognized that this responsibility rests first and foremost with each individual State; however, when the State is unable or unwilling to act, the international community shares a collective responsibility to do so, through, for example, humanitarian operations, monitoring missions, diplomatic pressure, and, as a last resort, force. As noted by the Director of International Protection, the “responsibility to protect” “is also a most useful frame, we believe, within which to promote a more flexible and less discretionary approach to addressing the many protection gaps which still confront delivery of protection to persons of our concern.” (Presentation by E. Feller, “Moving On: Forced migration and human rights” conference, Sydney, Australia, November 2005.) For further information see the Report of the International Commission on Intervention and State Sovereignty, available at: <http://www.iciss.ca/report-en.asp>



Chapter 4 **Implementation of International Human Rights Law at the National Level**

While it is important to develop international standards of human rights that protect refugees and asylum-seekers, these rights must also be upheld through domestic legal systems. Therefore, international human rights standards (see Vol. II) should be incorporated into national Constitutions and legislation.

Parliamentarians, judges, prosecutors, and lawyers, among others, have a crucial role to play in ensuring that human rights are effectively implemented at the national level. They should therefore familiarize themselves with both national and international human rights law. UNHCR staff and civil society partners can help to promote the incorporation of international standards into domestic legislation as far as relating to refugees, stateless and other persons of concern. To this end, UNHCR protection staff and partners should be familiar with both international human rights standards and with key national human rights norms in the country concerned, including the fundamental rights in the Constitution or Bill of Rights, the main legislative provisions, the regional and universal human rights treaties ratified by the State, and relevant rules of customary international law.

4.1 Incorporating international human rights standards into the domestic legal system

Most States have included provisions in their domestic legislation that are related to the protection of human rights, often in their constitutions or bills of rights. Such norms may be applied when arguing for the protection of refugees, asylum-seekers and other persons of concern to UNHCR, particularly when those rights extend not only to citizens, but to “everybody.” Under certain conditions, international human rights norms can be directly applied and referred to in national contexts.

Generally, international treaties do not stipulate how States should implement human rights standards at the national level, allowing each State to decide how its obligations will be met. There is a great variety of domestic methods for implementing international human rights instruments. Scholars have classified these methods into *adoption*, *incorporation*, *transformation*, *passive transformation*, and *reference*. States may apply more than one of these methods. In very broad terms, two systems can be identified: monism and dualism. In some States, treaty provisions are automatically incorporated into domestic law once they have been ratified and published in the official gazette. France, Mexico, and the Netherlands, for example, work this way. Other States, including the United Kingdom, other Commonwealth countries, and Scandinavian countries, require the express legislative enactment of treaty provisions before they become domestic law.

Since domestic legal systems differ considerably in this respect, each staff member should inform himself/herself about the way the State

concerned incorporates its international legal obligations into national law. Regardless of the method that the State has chosen, however, "[A] party may not invoke the provisions of its internal law as justification for its failure to perform a treaty" (Article 27 of the Vienna Convention on the Law of Treaties). In other words, States should modify their domestic legal order as necessary in order to give effect to their treaty obligations. If there is any conflict in the legislation, predominance should always be given to the obligations arising from a human rights treaty.

The adoption of national refugee legislation that is based on international standards is thus crucial for strengthening asylum, making protection more effective, and providing a basis for seeking solutions to the plight of refugees. In some countries, there may be an absence of national legislation that specifically protects the human rights of refugees and asylum-seekers. In these cases, UNHCR staff and counterparts should investigate the availability of any domestic, including constitutional norms which may serve the protection of persons of concern and should promote the adoption of legislation for protecting refugees that takes into account international standards.

Incorporating international human rights law into national legislation is particularly important in areas on which the 1951 Convention is silent, such as procedures for determining refugee status, and in areas in which human rights instruments provide broader protection, such as the right to education or the absolute prohibition of *refoulement* (see Vol. II, Chapters 9 and 19).

4.2 The protection of international human rights standards by the judiciary

The effect of applying international human rights standards cannot be assessed in the abstract, only on the basis of the constitution and legislation of a given country. What is crucial is whether or not and how domestic courts and other legal operators apply human rights norms in their decisions and day-to-day work.

If international standards are incorporated into national legislation, it is easier for domestic courts and legal operators to apply them. When international human rights treaties have not been formally incorporated into domestic law, national courts can and should use international human rights standards as guidance in interpreting national law, and thereby achieve a human rights-conform application of the domestic norms. In other words, national courts and legal operators may refer to international and regional human rights norms when interpreting and developing national law, and they may also use international human rights law as the minimum standard of protection that national law should attain. Thus, judges play an important role in refugee protection,

although they sometimes may not be sufficiently familiar with international standards.

4.3 Promoting human rights standards at the domestic level

The domestic implementation of human rights norms requires a joint and coordinated effort by all branches of the government (judiciary, legislative, and executive). Training and education in human rights is therefore vital for the effective implementation of human rights at the domestic level. Thus, providing training activities on human rights standards for judges, law-enforcement officials, and immigration officials can have a positive impact on protecting individuals from being returned to countries where they may be at risk of torture.

Training efforts alone will, however, hardly be sufficiently effective if conducted in isolation. Their success depends on the underlying political will, on the ability to explain how human rights translate into concrete action (or abstention from action) within the functions of the specific target group (judges, police, government officials, military, security forces, etc.), and on the translation of human rights standards into administrative instructions, codes of conduct or rules of engagement, as well as their enforcement. In an environment of total impunity the impact of human rights training will be limited, but such training can, together with other forms of technical assistance, contribute to the change of such a climate of impunity.

UNHCR can play an important role in providing technical and legal advice on how to improve the protection of refugees and people of concern to UNHCR at the national level.

UNHCR staff can:

With governments (executive and parliamentary) counterparts:

- Encourage accession to the 1951 Convention and its 1967 Protocol and to international and regional human rights instruments relevant to refugee protection, if they have not yet done so.
- Promote the review of reservations and restrictive interpretations to relevant international treaties.
- Assist in designing and adopting a national legal framework for protecting refugees that conforms to international law and standards, or provide comments on proposed legislation.
- Assist in reviewing national legislation on immigration and refugee protection when existing law does not comply with international standards.
- Provide information on international standards, including Conclusions adopted by UNHCR's Executive Committee and guidelines produced by UNHCR.
- Encourage governments to address the causes of refugee flows.
- Assist in the design of training strategies, programmes and manuals of national actors involved in the protection of refugees, IDPs or other persons of concern, such as asylum migration authorities, police, military, etc., and contribute to the implementation of such programmes.
- Refer explicitly, and elaborately, when necessary, to human rights norms when intervening with the government on cases where human rights of refugees, IDPs or other persons of concern have been violated, or where measures must be taken to prevent violations.

With the judiciary:

- Assist judges and lawyers in becoming familiar with international standards for the protection of refugees by offering training sessions and workshops in refugee law and human rights, *inter alia* by promoting the inclusion of human rights and refugee law courses into the regular curricula of law schools and assisting government and independent actors to offer refresher and advanced courses, in particular to secure swift awareness on and implementation of legislative and regulatory changes.
- Provide amicus briefs to courts, in certain circumstances.

With national human rights institutions:

- Strengthen local capacity to protect the human rights of refugees.
- Provide assistance and training in refugee and human rights law.
- Cooperate in creating awareness of human rights problems facing refugees and other persons of concern.
- Encourage hearing individual cases regarding refugees and asylum-seekers.

PART B

OVERVIEW OF UNIVERSAL AND REGIONAL HUMAN RIGHTS SYSTEMS FOR THE PROMOTION AND PROTECTION OF HUMAN RIGHTS

Learning Objectives:

- Familiarize the reader with major human rights systems for the promotion and protection of human rights
- Ensure that the reader acquires a basic knowledge of how universal and regional human rights instruments are relevant for refugees

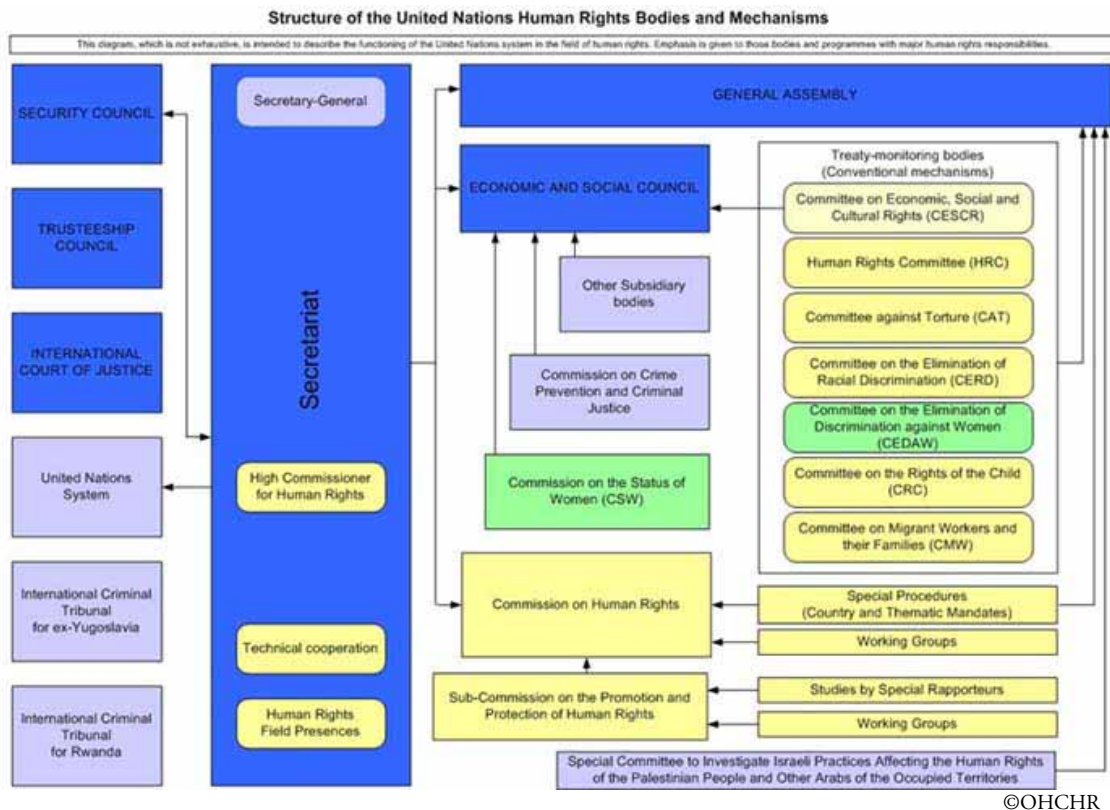
Part B will examine the universal human rights system, that is, the system under the United Nations, and regional systems. Only a brief reference to the three most developed regional systems for the protection of human rights – in Africa, the Americas, and Europe – is included here. A review of the substantive rights protected by the regional systems can be found in Volume II.

There are other regional arrangements for the protection of human rights besides those discussed in the following chapters. For example, within the framework of the League of Arab States, which was founded in 1945, there is a Permanent Arab Commission on Human Rights that adopted an Arab Charter on Human Rights in 1994. When that charter comes into force, it will provide the member States of the League of Arab States with an arrangement comparable to those examined here. While there is no regional human rights protection regime in Asia, the Asian-African Legal Consultative Organization (AALCO) has adopted some relevant instruments, including the Bangkok Principles on the Status and Treatment of Refugees (see above), even though it is not a human rights organization, *per se*. Established in 1956 as the Asian Legal Consultative Committee, the AALCO now comprises 47 countries from Asia and Africa.



Chapter 5 **The United Nations System**

Generally, the United Nations (UN) system for the protection of human rights is called the “universal system.” The UN was created in 1945 when the United Nations Charter was adopted, making international concern for human rights an established part of international law.



Note that the Commission on Human Rights was replaced by the Human Rights Council, and that its subsidiary organs, including the Sub-Commission are presently under review and may be replaced by other bodies. Further note that the chart does not yet reflect the Sub-Committee on the Prevention of Torture created by the Optional Protocol as well as the future Committee on Enforced Disappearances.

5.1 Main human rights bodies relevant for human rights protection

5.1.1 General Assembly (UNGA)

The UN General Assembly (UNGA) is the main deliberative body of the United Nations. It is composed of representatives of all Member States, each of which has one vote. Decisions on important questions, such as those on peace and security, admission of new members, and budgetary matters, require a two-thirds majority. Decisions on other questions are by simple majority.

The Office of the United Nations High Commissioner for Refugees (UNHCR) was established on 14 December 1950 by the UNGA as a subsidiary body. Recently, by the adoption of GA Resolution 60/251 dated 3 April 2006, the General Assembly established the new Human Rights Council which replaced the Commission on Human Rights.

Several meetings of the Annual General Assembly Session are devoted to human rights.

5.1.2 The International Court of Justice (ICJ)

The International Court of Justice (ICJ) is the principal judicial organ of the United Nations. Seated at the “Peace Palace” in The Hague, the Netherlands, the ICJ began work in 1946. Its Statute forms an integral part of the Charter of the United Nations.

The Court has a dual role: to settle, in accordance with international law, the legal disputes submitted to it by States (individuals cannot bring cases before the Court), and to give advisory opinions on legal questions referred to it by duly authorized international organs and agencies.

The ICJ has ruled on several cases relevant to human rights and refugee protection, including *Haya de la Torre* (13 June 1951; asylum), *Nottebohm* (6 April 1955; nationality), *Barcelona Traction Light and Power Company* (5 February 1970; human rights as obligations *erga omnes*), and the case on the *Orders on Requests for the Indication of Provisional Measures in the Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia v. Serbia and Montenegro)* (8 April and 13 September 1993; genocide). The Court has also addressed human rights issues in its advisory opinions, for example, on genocide, apartheid, and the immunity of UN human rights special rapporteurs, and elaborated on the relationship between international humanitarian and international human rights law in its advisory opinion of 8 July 1996 on the Legality of the Threat or Use of Nuclear Weapons.

5.1.3 The Security Council (SC)

The UN Security Council has 15 members: five permanent members with the power of veto (China, France, the Russian Federation, the United Kingdom, and the United States), and 10 members elected by the General Assembly for two-year terms. The UNGA is currently debating a proposal to change the composition of the Council.

In accordance with Article 24 of the UN Charter, the Security Council bears primary responsibility for maintaining international peace and security. With the UN’s gradual shift in focus to human security, many of the Security Council’s decisions have a direct impact on human rights.

The Security Council, acting under Chapter VII of the Charter of the United Nations, is also the institution that sets up *ad hoc* tribunals, such as those for the former Yugoslavia and for Rwanda. These tribunals should not be confused with the International Court of Justice, which is the principal judicial organ of the United Nations (see above).

5.1.3.1 The International Criminal Tribunal for the former Yugoslavia (ICTY)

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

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

The ICTY has concurrent jurisdiction with national courts over serious violations of international humanitarian law committed in the former Yugoslavia. In cases where it proves to be in the interests of international justice, the ICTY may claim primacy over national courts and take over national investigations and proceedings at any stage. The Tribunal has its seat in The Hague, The Netherlands.

5.1.3.2 International Criminal Tribunal for Rwanda (ICTR)

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

The purpose of the Tribunal is, among other things, to contribute to the process of national reconciliation in Rwanda and to help maintain peace in the region. The judges of the Tribunal are elected by the UNGA and are generally of different nationalities. The Tribunal has its seat in Arusha, United Republic of Tanzania.

5.1.3.3 The International Criminal Court and Other International Criminal tribunals

The ICTY and ICTR should be differentiated from the **International Criminal Court (ICC)**, which was established by the Rome Statute. The ICC is a permanent international criminal court with its seat in The

Hague, The Netherlands (see Vol. I, Chapter 2). Differences between the ICC and the ICTY/ICTR include:

- While the ICTY and the ICTR are subsidiary organs of the Security Council and, as such, are embedded in the United Nations, the ICC was created by a separate international treaty, the Rome Statute. Therefore, it is usually the Assembly of the States Parties to the ICC that supervises the work of the ICC, not the Security Council, which supervises the work of the ICTY and ICTR.
- Unlike the ICTY and ICTR, the ICC is a permanent judicial body, the jurisdiction of which is not limited by any time limit, save for the principle of non-retroactivity. It also has, at least potentially, universal reach (though some key international actors, such as the U.S., did not become party to the Rome Statute and are therefore not bound by its provisions).
- Although the jurisdiction of the two *ad hoc* tribunals is not exclusive, but concurrent with that of national courts, both have primacy over national courts. At any stage of the procedure, they may formally request national courts to defer competence. Conversely, the judicial activity of the ICC is intended only to complement that of national courts. It will exercise its jurisdiction only when national courts are unwilling or unable genuinely to carry out the investigation or prosecution of a person accused of the crimes defined in the Rome Statute. According to Article 13 of the Rome Statute, on the exercise of jurisdiction, the ICC “*may exercise its jurisdiction with respect to a crime referred to in article 5 in accordance with the provisions of this Statute if: (a) A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by a State Party in accordance with article 14; (b) A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations; or (c) The Prosecutor has initiated an investigation in respect of such a crime in accordance with article 15.*”

These tribunals are also fundamentally different from the **Special Court for Sierra Leone**, which was established per an agreement between the United Nations and the Government of Sierra Leone that was adopted on 16 January 2002. The Special Court is an international body that is independent of any government or organization. Its mandate is to try those who bear the greatest responsibility for serious violations of international humanitarian law and Sierra Leonean law committed on the territory of Sierra Leone since 30 November 1996, “*including those leaders who, in committing such crimes, have threatened the establishment of and implementation of the peace process in Sierra Leone.*”

5.1.4 Economic and Social Council (ECOSOC)

The Economic and Social Council (ECOSOC) consists of 54 Member States elected by the UNGA for overlapping three-year terms. ECOSOC serves as the central forum for discussing international economic and social issues, and for formulating policy recommendations addressed to Member States and the United Nations system. It takes decisions on the most important organizational matters, but frequently refers policy matters to the UNGA. In carrying out its mandate, ECOSOC consults with academics, representatives of the business sector, and non-governmental organizations.

ECOSOC has established a number of important commissions in the sphere of human rights, including the UN Commission on Human Rights, which, in turn, set up the Sub-Commission on the Promotion and Protection of Human Rights; the Commission on the Status of Women; the Commission for Social Development; and the Commission on Crime Prevention and Criminal Justice. The new Human Rights Council will, however, not report to ECOSOC, but directly to the General Assembly.

5.1.5 Human Rights Council

The General Assembly decided at its sixtieth session on 3 April 2006 to establish the Human Rights Council, based in Geneva, as one of its subsidiary organs. The Council succeeds the Commission on Human Rights which during recent years had become the subject of criticism, including allegations of politicisation and an imbalanced approach. The Council was created following a proposal made by the Secretary-General with the aim of creating a stronger and more effective human rights body.

Key innovations as compared to the previous Charter-based human rights protection system introduced by General Assembly Resolution 60/251 are the following:

- upgrading of the body from a Commission, reporting to ECOSOC, to a Council, which directly reports to the General Assembly;
- creating a permanent body which meets for at least three sessions per year, including a main session, for a total duration of no less than 10 weeks;
- reducing the number to 47 members (proportionally representing different regions, to be elected by absolute majority of the General Assembly, and not eligible to serve more than two terms in a row) with a view to enhanced efficiency;
- the possibility for the General Assembly to suspend, by a two-thirds majority vote, the membership of a member “that commits gross and systematic violations of human rights”;

- introduction of a universal periodic review of the fulfillment by each State of its human rights obligations and commitments.

Key Functions of the Human Rights Council

According to GA Resolution 60/251, the General Assembly decided that the Council shall, *inter alia*,

“(a) Promote human rights education and learning as well as advisory services, technical assistance and capacity-building, to be provided in consultation with and with the consent of Member States concerned;

(b) Serve as a forum for dialogue on thematic issues on all human rights;

(c) Make recommendations to the General Assembly for the further development of international law in the field of human rights;

(d) Promote the full implementation of human rights obligations undertaken by States and follow-up to the goals and commitments related to the promotion and protection of human rights emanating from United Nations conferences and summits;

(e) Undertake a universal periodic review, based on objective and reliable information, of the fulfilment by each State of its human rights obligations and commitments in a manner which ensures universality of coverage and equal treatment with respect to all States; the review shall be a cooperative mechanism, based on an interactive dialogue, with the full involvement of the country concerned and with consideration given to its capacity-building needs; such a mechanism shall complement and not duplicate the work of treaty bodies; the Council shall develop the modalities and necessary time allocation for the universal periodic review mechanism within one year after the holding of its first session;

(f) Contribute, through dialogue and cooperation, towards the prevention of human rights violations and respond promptly to human rights emergencies;

(g) Assume the role and responsibilities of the Commission on Human Rights relating to the work of the Office of the United Nations High Commissioner for Human Rights, as decided by the General Assembly in its resolution 48/141 of 20 December 1993;

(h) Work in close cooperation in the field of human rights with Governments, regional organizations, national human rights institutions and civil society;

(i) Make recommendations with regard to the promotion and protection of human rights;

(j) Submit an annual report to the General Assembly;”

As was the case with the Commission, UNHCR will closely follow the sessions of the Council and contribute to the discussion of issues relevant to the Office’s mandate. The main objectives of UNHCR’s participation are to:

- supply the Council with relevant information on UNHCR’s activities and positions;
- promote the development of standards that enhance the protection of refugees, IDPs, stateless persons and others of concern;
- strive to ensure that the standards set by these bodies or their efforts do not contradict international refugee law or interfere with UNHCR’s international protection mandate;
- make maximum use of the findings and conclusions of the Council, including valuable country of origin information which may assist UNHCR and States in identifying refugee protection needs.

5.1.6 The Sub-Commission on the Promotion and Protection of Human Rights

The Sub-Commission was the main subsidiary body of the UN Commission on Human Rights. It is now subject to review. Its future is uncertain and it may be replaced by another body offering expert advice to newly established Council.

Originally called the “Sub-Commission on Prevention of Discrimination and Protection of Minorities”, it was established in 1947 with 12 members. It was renamed in 1999 and is now composed of 26 experts in the field of human rights who are elected by the Commission on Human Rights with due regard given to equitable geographical distribution. The experts work in their personal capacities.

The Sub-Commission met each year for three weeks. The sessions of the Sub-Commission are attended by its members and/or their alternates, observers from UN Member States, and representatives of the UN Specialized Agencies, inter-governmental organizations, NGOs that hold consultative status with ECOSOC, and national liberation movements, if there is an item on the agenda that concerns them. The Sub-Commission adopts resolutions and submits draft resolutions and draft decisions to the Commission and/or ECOSOC, and reports to the Commission after each session. Some of the studies prepared by the Sub-Commission, irrespective of its future, continue to be of particular importance for the protection of refugees and asylum-seekers, such as the report on the rights of non-citizens (E/CN.4/Sub.2/2003/23 [2003]) and the principles on housing and property restitution for refugees and displaced persons (E/CN.4/Sub.2/2005/17 [2005]).

When a study requested of a Sub-Commission member is of direct relevance to refugees, asylum-seekers or other persons of concern, UNHCR, as did NGOs and other advocates, can and are encouraged to submit information to the experts to ensure that the study comprehensively reflects issues of concern. UNHCR participates in the Sub-Commission sessions, provides information and frequently assisted in the formulation of recommendations and resolutions related to its mandate.

5.1.7 The High Commissioner for Human Rights and the Office of the United Nations High Commissioner for Human Rights (OHCHR)

The High Commissioner for Human Rights, whose post was created in 1993 by the UNGA (Resolution 48/141), is the principal UN official responsible for human rights. The High Commissioner has the rank of Under-Secretary-General and reports directly to the Secretary-General.

The High Commissioner has a special role in coordinating UN activities in the field of human rights while also cooperating with governments to

strengthen national human rights protection. The High Commissioner aims to lead the international human rights movement by acting as a moral authority and a voice for victims. The High Commissioner makes frequent public statements and appeals on human rights crises.

The Office of the High Commissioner for Human Rights (OHCHR), based in Geneva at the Palais Wilson, is the main body within the UN Secretariat that deals with human rights. It is mandated to promote and protect the enjoyment and full realization, by all people, of all rights established in the Charter of the United Nations and in international human rights law and treaties. Its mandate includes preventing human rights violations, securing respect for all human rights, promoting international cooperation to protect human rights, coordinating related activities throughout the United Nations, and strengthening and streamlining the UN system in the field of human rights. In addition to its mandated responsibilities, the Office leads efforts to integrate a human rights approach within all work carried out by UN agencies. OHCHR is increasingly engaged in preparing reports on the human rights situation in a particular country that may serve as valuable country-of-origin information to help identify international protection needs.

The newly established Human Rights Council assumes *“the role and responsibilities of the Commission on Human Rights relating to the work of the Office of the United Nations High Commissioner for Human Rights, as decided by the General Assembly in its resolution 48/141 of 20 December 1993”*, thereby taking over the role of a governing body of State representatives for the OHCHR.

The Office assists various UN organs, subsidiary organs, and working groups, and serves as a secretariat for charter-based human rights mechanisms and for all treaty-monitoring bodies except the CEDAW Committee, which is served by the Division for the Advancement of Women.

A number of OHCHR field offices have been established with the aim of ensuring that international human rights standards are implemented and realized at the national level, both in law and in practice. Increased field presence of OHCHR enhances the scope for practical inter-agency co-operation between OHCHR and UNHCR, particularly in return and IDP operations.

In 2005, the High Commissioner for Human Rights submitted a plan of action that is included in the UN Secretary-General’s report entitled, *“In Larger Freedom: Towards Development, Security, and Human Rights for All”* (A/59/2005). The plan envisages an expansion of field presences, thus increasing the potential for cooperation between UNHCR and OHCHR in the field.

United Nations Reform

In 2005, the Secretary-General of the United Nations submitted a proposal for reforming the organization in his report, "In Larger Freedom: Towards Development, Security, and Human Rights for All". The proposal foresees the reform of some of the above-mentioned bodies, including the Security Council, ECOSOC, and the Commission on Human Rights. One year later, only few of the proposed reforms have been completed. Notably, the Commission on Human Rights was replaced in 2006 by a smaller **Human Rights Council**. Its members are elected directly by the General Assembly by a two-thirds majority of members present and voting.

Other priority reform proposals include giving the **humanitarian response system** more effective stand-by arrangements, and ensuring better protection of **internally displaced people** (see A/59/2005/Add.3).

5.2 Supervisory mechanisms under the UN system

At the UN level, there are two distinctive types of supervisory procedures: Charter-based mechanisms, and treaty-based mechanisms. The first procedure is undertaken by bodies created under the UN Charter, including the Human Rights Council and its predecessor the Commission on Human Rights. The second refers to supervision conducted by the bodies created under the international human rights treaties.

5.2.1 Charter-based procedures for the protection of human rights

The Charter-based procedures were established by two ECOSOC resolutions: Resolution 1235 (XLII) of 6 June 1967 and Resolution 1503 (XLVIII) of 27 May 1970. In its First Session in June 2006, the Council decided to "*extend exceptionally for one year, subject to the review to be undertaken by the Council in conformity with General Assembly resolution 60/251 [...] the procedure established in accordance with Economic and Social Council resolution 1503.*" and requested "*the 1503 procedure to continue with the implementation of [its] mandate[s] and the Office of the United Nations High Commissioner for Human Rights to continue to provide the necessary support [...]*". The future of the 1503 Procedure is not yet known, though the GA has given strong guidance when it decided that "*the Council shall assume, review and, where necessary, improve and rationalize all mandates, mechanisms, functions and responsibilities of the Commission on Human Rights in order to maintain a system of Special Procedures, expert advice and a complaint procedure.*"

Some of the advantages of the established Charter-based mechanisms are that:

- They allow action regardless of whether a State is party to an international human rights treaty or not, as they are based on the general human rights obligations of all UN Member States;
- They generally do not require the exhaustion of domestic remedies; and

- Because of the strong political pressure attached to the mechanisms, they may be very persuasive.

5.2.1.1 ECOSOC Resolution 1235 (XLII)

This resolution authorized the UN Commission on Human Rights and the Sub-Commission on the Promotion and Protection of Human Rights to study consistent patterns of human rights violations and to investigate gross violations of human rights. In practice, the “1235 procedure” has evolved into an annual public debate on human rights violations anywhere in the world.

On the basis of the “1235 procedure”, the Commission on Human Rights appoints Special Rapporteurs, special representatives, experts, working groups, and other envoys competent to study human rights violations in specific countries (“country procedures”) or competent to study particular human rights violations around the world (“thematic procedures”). In carrying out their mandates, and based on “standing” or specific invitations by States, Special Rapporteurs and other mandate-holders routinely undertake fact-finding missions at the invitation of the country concerned. UNHCR frequently assists in the preparation and conduct of such missions, sharing information and suggesting interlocutors and sites to be visited by the Rapporteurs whose mandates are related to UNHCR's work. The Special Rapporteurs and working groups reported annually to the Commission on Human Rights, and will now present their reports and recommendations to the newly established Human Rights Council. Their reports are authoritative sources of country-of-origin information. Under some of these procedures, urgent appeals on individual cases can be made on a strictly humanitarian basis.

5.2.1.1.1 “Special procedures” most relevant to the work of UNHCR, including procedures offering urgent appeal procedures

Special Procedures, whether in the form of Special Rapporteurs, special representatives, experts or working groups, are mechanisms designed to address different aspects of human rights. They may respond to concerns related to refugees, asylum-seekers, internally displaced persons, and stateless persons ranging from human rights violations as a root cause of displacement to preventing those who are already displaced from being subjected to imminent human rights abuses. They may also respond to allegations of such abuses.

While all special procedures are under review, the system of special procedures as such shall be maintained. Traditionally, the following special procedures are of particular relevance to UNHCR:

- **Representative of the Secretary-General on the human rights of internally displaced persons.** This mandate, created in 2004

replacing the former mandate of the RSG on IDPs which led to the creation of the so-called Deng-principles, has been given a particular human rights focus. The RSG is mandated to engage in dialogue and advocacy with Governments and other actors concerning the rights of IDPs, strengthen the international response to internal displacement, and mainstream human rights throughout the UN system. He has become a key partner for UNHCR in advancing IDP protection, and co-operation between the RSG and UNHCR has been institutionalized by way of a Memorandum of Understanding (MoU). According to this MoU, in relation to UNHCR, the activities of the RSG or his staff will include:

- “upon request of UNHCR, either in its individual capacity or in its capacity as cluster lead, the sharing of his expertise in the area of international law and norms related to IDPs in support of the development or revision of training or other materials;
 - the participation in training sessions run by UNHCR, particularly as regards IDPs and the Guiding Principles on Internal Displacement.”
- **Special Rapporteur on the Question of Torture.** The SR can take action in cases in which there is an imminent risk of *refoulement* or when the conditions of detention are considered to amount to torture or ill-treatment (See Vol. II, Chapter 9).
 - **Working Group on Arbitrary Detention.** The WG can examine arbitrary detentions of asylum-seekers, such as when the State has not complied with international standards of due process, when there is unduly prolonged administrative detention, or when detention is administered without any legal basis (See Vol. II, Chapter 11).
 - **Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions.** The SR can take action in cases where there is a risk of imminent expulsion, *refoulement* or return of an individual to a country where his/her life is at risk, when asylum-seekers or refugees suffer death threats or are at imminent risk of extra-judicial execution or of death in custody, or when they are subject to life-threatening conditions in detention (See Vol. II, Chapters 9 and 11). The SR can take action when the death has occurred or when there is a significant risk that it may occur.
 - **Special Rapporteur on Violence against Women, its Causes and Consequences.** The SR examines violence or threats of violence against women perpetrated solely because of their gender. The SR can take action with regard to gender-based violence that may amount to persecution, which, in turn, may force them to leave their countries. The SR can also take action against the risk of violence that women suffer as asylum-seekers or refugees (See Vol. II, Chapter 3).

Making use of and contributing to the “special procedures”

- Provide information under the relevant procedures on the situation of refugees, asylum-seekers, and other persons of concern to UNHCR, such as information about their enjoyment of the right to education or health, the conditions of women and children, their access to courts and legal assistance.
- Assist in the design of mission schedules and in logistics to make sure that the human rights situation of displaced persons receives appropriate attention.
- Thoroughly reflect on recommendations by special procedures as they may directly or indirectly relate to UNHCR's operations and adjust programme design and activities accordingly where recommendations are relevant and convincing; in case of divergent positions a constructive dialogue should be sought.
- Suggest in coordination with UNHCR Headquarters transmission of an urgent appeal to relevant thematic procedure(s) when an individual or group is about to be sent back to a country where they are believed to be at risk of serious human rights violations, such as torture and summary execution. In some of these cases, it is possible to request that the decision to expel the person be reconsidered, that the person be deported to a third country where there is no risk, or to seek assurances from the country of origin that, if returned, the person will not be subject to human rights violations. Such information may be provided confidentially.
- Follow up on requests for information or urgent appeals issued under the special procedures.
- Use the reports of the Special Rapporteurs and Working Groups as country-of-origin information. Promote, where appropriate, inclusion of recommendations relating to refugee-protection and humanitarian access into country-specific reports.

5.2.1.2 ECOSOC Resolution 1503 (XLVIII)

ECOSOC Resolution 1503 created a confidential procedure to handle communications on violations of human rights. Only communications indicating “a consistent pattern of serious and reliably documented violations of human rights” qualify for consideration under the 1503 procedure. The 1503 procedure is not primarily intended to provide redress to individual complainants, but rather to take action in respect of systematic violations of human rights designated as a “situation”.

In 2000, the 1503 confidential communications procedure was reformed (ECOSOC Resolution 2000/3 of 16 June 2000). Since then, the procedure works as follows: a Working Group on Communications of the Sub-Commission on the Promotion and Protection of Human Rights meets annually to examine communications (complaints) received from individuals and groups alleging human rights violations, and any government responses to those communications. When the Working Group identifies reasonable evidence of a consistent pattern of gross violations of human rights, the matter is referred to the Working Group on Situations of the Commission to examine the particular situations forwarded to it by the Working Group on Communications, and to decide whether or not to refer any of these situations to the plenary of the Commission. The Commission then takes a decision concerning each situation brought to its attention in this manner.

5.2.1.3 Relevance for the protection of asylum-seekers and refugees

Unlike treaty-bodies, Charter-based country and thematic mechanisms have no formal complaints procedures. Nonetheless, sometimes communications addressed to these extra-conventional mechanisms contain information to the effect that a serious human rights violation is about to be committed, such as imminent *refoulement* or fear that an asylum-seeker may be subjected to torture. In such cases, the Special Rapporteur or chairperson of a working group may address a message to the authorities of the State concerned by fax or telegram, requesting clarifications regarding the case and appealing to the government to take the necessary measures to guarantee the rights of the alleged victim. Such appeals, though not strictly binding, are primarily of a preventive nature and are resorted to on a regular basis by certain thematic mechanisms, particularly the Special Rapporteurs on extrajudicial, summary or arbitrary executions, and on torture, and the Working Groups on Enforced or Involuntary Disappearances and on Arbitrary Detention. While the reply-rate of States to some of the special procedures is evidently in decline, communications by Special Rapporteurs had effectively contributed to the prevention of *refoulement* on a number of occasions. However, other thematic and country mechanisms occasionally follow a similar procedure. In some instances, when the circumstances of the case justify such an approach, an appeal may be addressed by several Special Rapporteurs and/or working groups jointly. The criteria for urgent interventions vary from one mandate to another and are described in the methods of work of the respective mechanisms (available at: <http://www.ohchr.org/english/bodies/chr/special/complaints.htm>).

Despite all the inherent limitations that result from the fact that the 1503 procedure is confidential, it may nonetheless be useful to asylum-seekers and refugees when there has been such egregious abuse of their rights that it can be considered a situation of gross violations of human rights.

5.2.2 Treaty-based procedures

The supervisory mechanisms established under UN human rights treaties can be divided into four main groups:

- Reporting procedures
- Inter-State complaints procedures
- Individual complaints procedures
- Inquiry procedures and on-site visits

	ICESCR	ICCPR	CEDAW	CERD	CRC	CAT	CMW
<i>Reporting system</i>	●	●	●	●	●	●	●
<i>Inter-state complaints</i>	X	●	X	●	X	●	●
<i>Individual complaints</i>	X	●	●	●	X	●	●
<i>Inquiry procedure</i>	X	X	●	X	X	●	X

The treaty body system, as established over the years, faces a number of problems and challenges and is presently under review. The experienced shortcomings include:

- a large backlog and significant delay in the review of country reports;
- limitations in addressing acute human rights crises;
- inconsistencies in the approaches of different committees which may result in confusion over the precise scope of human rights obligations of States, and which would ultimately be detrimental to the interests of the individuals to be protected;
- heavy reporting requirements of States which are party to most, or all of the Treaties, requiring significant resources;
- enormous time and extra efforts treaty body members have to invest without any form of remuneration.

Among the many suggestions which have been made to address these challenges is the proposal tabled by the UN High Commissioner for Human Rights, Ms. Louise Arbour, to replace the present treaty body system by a single treaty body, to be equipped with more resources and, in particular, professional (fulltime) and expert staff. (for details refer to the Concept Paper on the High Commissioner's Proposal for a Unified Standing Treaty Body (HRI/MC/2006/2). The debate on the reform will be a lengthy process and major features of the treaty body system, such as the review of reports and individual complaints procedures, will be retained. The following elaboration therefore remains relevant.

5.2.2.1 Reporting procedures

All UN human rights treaties include a system of periodic reporting. States Parties are obliged to report periodically to a supervisory body on the domestic implementation of the treaty in question. UNHCR, as other agencies, contributes to the review process. Unfortunately, the treaty bodies still apply a very different set of norms, rules of procedures and working methods governing co-operation with agencies and the role they may play in the review of country reports. This complicates co-operation. In general, the reporting mechanism at the UN level is made up of the following stages:

The submission of the State's Report: Each State Party to a UN human rights instrument must prepare its national report following the respective guidelines and must submit it for examination within a given timeframe. In addition to the State Report, the treaty bodies receive information provided by NGOs and agencies of the United Nations. UNHCR may provide confidential information to the relevant treaty body on the situation of refugees and persons of concern.

Most but not all treaty bodies have a *pre-sessional working group/task force*, which also meets with NGOs and agencies to collect and further explain written information submitted to the treaty body.

"List of issues": Prior to each Committee session, a few members of the Committee meet to identify in advance the questions that will constitute the principal focus of discussion with State representatives during the constructive dialogue. This "pre-sessional working group" prepares a list of issues to be taken into consideration when examining the State Party Report, which is transmitted to the permanent delegation of the State concerned. The intent is to provide the State with the opportunity to prepare answers in advance and thereby to facilitate dialogue with the Committee.

The Constructive Dialogue: States are encouraged to be present at the meeting when their reports are examined. The discussion between government representatives and Committee members is called the "constructive dialogue".

The Concluding Observations: The final phase of the examination of a State Report is the drafting and adoption of the Committee's "Concluding Observations". These observations are an important source of country-of-origin information and may include recommendations which assist UNHCR in the promotion of the protection of persons of concern. Different treaty bodies apply a different approach to the scope and level of detail of recommendations, which impacts on their value for UNHCR.

5.2.2.2 Inter-State complaints procedures

Some human rights instruments allow States Parties to initiate a procedure against another State Party that is considered not to be fulfilling its obligations under human rights instruments. In most cases, such a complaint may only be submitted if both the claimant and the defendant States have recognized the competence of the supervisory body to receive this type of complaint. The only Inter-State complaint procedures that have been used are at the regional level, under the European Convention for the Protection of Human Rights and Fundamental Freedoms and under the African Charter on Human and Peoples' Rights. The former has been used several times, most recently

in 2001 in the case *Cyprus v. Turkey*. The latter has been used only once, in 2004.

5.2.2.3 Individual complaints procedures

This mechanism is included in some human rights treaties or their optional protocols and allows individuals under the jurisdiction of the State to bring a complaint to the supervisory body claiming that their rights under the relevant treaty have been violated.

Advocates seeking to file a complaint under the above-mentioned treaties must determine whether the State has ratified the treaty in question, and if the supervisory body can receive individual complaints, and then ascertain whether the State has attached a reservation to the right in question. If the State has done so, refugees or asylum-seekers who have suffered a violation of one the human rights envisaged in the treaty may seek redress by submitting a complaint to the respective treaty body, provided that admissibility requirements are fulfilled.

While there are some procedural variations, in general, the system works as follows:

The complaint: The alleged violating State must have ratified the treaty invoked by the individual and/or the optional protocol which established the mechanism. The rights allegedly violated must be covered by the treaty concerned. The complaint must not be currently under examination nor has it been examined under another international mechanism. Proceedings before the relevant body may only be initiated after all domestic remedies have been exhausted.

Thus, for example, asylum-seekers wishing to submit a petition to the Human Rights Committee or CAT Committee will have to avail themselves of every effective remedy in the country of asylum, except when such procedures are unreasonably prolonged, plainly ineffective, or otherwise unavailable to them, such as when they are denied legal aid.

Procedure: Once a complaint is submitted and it is found to comply with the formal requirements of admissibility, the case is registered and transmitted to the State Party concerned to give the State an opportunity to respond. The State is asked to submit its observations within a set timeframe, which varies among the procedures. The two major stages in any case are known as the “admissibility” stage and the “merits” stage. The “admissibility” of a case refers to the formal requirements that the complaint must satisfy before the relevant supervisory body can consider its substance. The “merits” of the case are the substance on the basis of which the supervisory body decides whether or not the rights under a treaty have been violated.

Interim measures: If the violation of the rights is extremely grave and urgent and immediate action is required in order to avoid irreparable

damage to persons, it is possible to ask the supervisory body to adopt “interim” or “provisional” measures to avoid irreparable damage to the victim of the alleged violation (Human Rights Committee’s Rules of Procedure No. 86, CAT Committee’s Rules of Procedure No. 108, CERD Committee’s Rules of Procedure No. 94(3), and Article 5 CEDAW-OP). Interim measures are particularly relevant for asylum-seekers as they can be invoked, for example, to prevent an imminent expulsion by a State Party to the relevant conventions. In numerous cases, the CAT Committee has asked a State Party to refrain from removing from its territory a person who is the subject of a complaint. Although a number of States deny a legal obligation to comply with a request of interim measures, most States do so.

Remedies: Upon examining the communication the supervisory body announces its “views” or judgement. The treaty bodies’ “views” are not legally binding as are the “judgements” of the human rights courts, such as the Inter-American and European Court of Human Rights. Nonetheless, they carry significant legal weight.

5.2.2.4 Inquiry procedures and on-site visits

Some UN human rights treaties that have been negotiated relatively recently allow the supervisory body to investigate situations that appear to constitute a consistent pattern of gross and systematic violation of human rights. These investigations can be prompted on the basis of reliable information received or on the supervisory body’s own initiative. Such procedures are found in Article 20 of the CAT and Article 8 of the CEDAW-OP. However, under both instruments, States may refuse to accept, or “opt out”, of the procedure.

The procedure is as follows:

According to Article 20 of the CAT: If the Committee receives reliable information that appears to contain well-founded indications that torture is being systematically practised in a State that is a party to the Convention, the Committee may invite that State to cooperate in the examination of the information. Considering the observations received, the Committee may appoint one or more of its members to undertake a confidential investigation and it may even visit the country in question with the consent of its government. After the examination, the findings are sent to the government together with any comments or suggestions. The Committee’s work during the investigation stage is confidential. However, on completion of an investigation, the Committee may decide to include a brief report of the results of its work in its annual report. This sanction may give greater weight to the Committee’s position in its dealings with the government concerned.

According to Article 8 of the CEDAW Optional Protocol: The Committee is allowed to initiate a confidential investigation by one or

more of its members when it has received reliable information that a State Party is gravely or systematically violating the rights established in the Convention. In this case, also with the consent of the State Party, the Committee may visit the territory of the State Party. Any findings, comments or recommendations are transmitted to the State Party concerned and published.

5.2.2.5 Relevance for the protection of asylum-seekers and refugees

ExCom notes “the complementary nature of international refugee and human rights law as well as the possible role of the United Nations human rights mechanisms in this area and therefore *encourages* States, as appropriate, to address the situation of the forcibly displaced in their reports to the United Nations Treaty Monitoring Bodies, and suggests that these bodies may, in turn, wish to reflect, within their mandates, on the human rights dimensions of forced displacement”. (Conclusion No. 95, 2003)

Reporting system:

The examination of State reports by the treaty bodies frequently provides a comprehensive analysis of the human rights situation in a given country and thereby valuable country-of-origin information which can assist UNHCR and States to assess international protection needs of asylum seekers. Reports offer helpful reference and arguments when arguing with States for such protection being granted. Furthermore, the examination of State reports offers an opportunity to discuss the enjoyment of their rights under the respective treaty by asylum seekers and refugees and other persons of concern to UNHCR. Although the reporting system is a less adversarial procedure than an individual complaint (see below), it publicizes situations in which asylum-seekers and refugees have seen their rights violated. The whole reporting process provides several opportunities for advocates to enter into dialogue with the State about the situation of asylum-seekers and refugees.

Indeed, advocates can engage State authorities

- When the authorities are **in the process of drafting** their report;
- **During the examination** of the report by the Committee, by giving information to the members and suggesting issues and questions to be raised; and by
- Promoting or **following-up** on the recommendations of the Committees.
- In addition, the “concluding observations” provide recommendations on the measures that States should take for improving and redressing the situation.

Inter-State complaints:

In practice, inter-state complaint mechanisms at the UN level have never been used, so their relevance for the protection of asylum-seekers and refugee is very limited.

Individual complaints:

This is the most important type of mechanism to protect individual asylum-seekers, refugees, stateless persons or IDPs, as well as other persons of concerns when a State has failed to protect their rights. Although litigation of human rights violations at the international level does not guarantee protection of asylum-seekers and refugees, landmark cases may have an enormous impact domestically. A case decided by an international human rights body may clarify the treaty body's view on the correct interpretation and scope of the human rights obligation and thereby help to strengthen the legal protection of refugees and asylum-seekers at the national level and deter future violations.

Asylum-seekers and refugees face particular logistical hardships associated with the conditions of displacement that make it difficult for them to submit complaints. Even though some supervisory bodies make exceptions to the principle of exhaustion of domestic remedies, such as when those remedies are unavailable or ineffective (which is one of the main limitations to the submission of international complaints), other factors, such as language barriers, ignorance of the judicial system of the host State, and the temporary status of asylum-seekers and refugees, make it even more difficult for these persons of concern to use these mechanisms. In addition, these procedures are often lengthy, and asylum-seekers usually do not have the time to wait. Some of this inconvenience can be reduced, however, if proper legal counselling services are established with the help of *inter alia* lawyer networks, legal clinics, NGOs, and are operated where necessary with the support of UNHCR.

Inquiry procedure and on-site visits:

The inquiry procedures allow advocates to submit cases or other information to the Committee, such as the CAT and CEDAW, in order to alert them to general situations or patterns of human rights violations, including those suffered by asylum-seekers, refugees and IDPs. This information may prompt the Committee to initiate an inquiry into the situation and it may also prompt a visit to the State concerned to examine the situation of asylum-seekers on the ground.

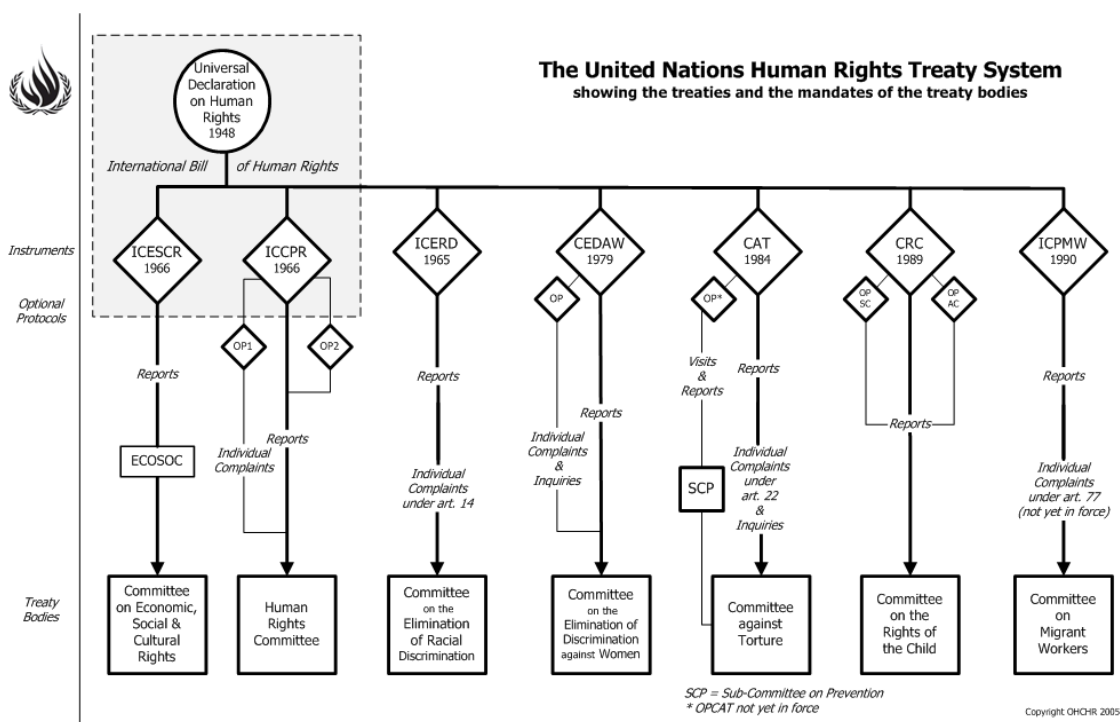
5.3 UN human rights instruments

This section describes briefly the main features of the UN human rights treaties, their supervisory bodies and mechanisms, some procedural requirements to submit complaints, when relevant, and the most

relevant general comment or recommendation adopted by each treaty-body. Each of these treaties contains a number of substantive rights that are relevant to refugees and asylum-seekers. The analysis of the substantive rights can be found in Volume II.

There are seven human rights treaties and corresponding **treaty bodies**. All treaty bodies but one: the Committee on Economic, Social and Cultural Rights which is established by ECOSOC, were created by the respective treaty. The treaty bodies are committees made up of experts serving in their personal capacities who are elected by States Parties to the treaty (except for the Committee on Economic, Social and Cultural Rights, whose constituent experts are selected by ECOSOC members). The respective mandates of these committees only cover States that are parties to the relevant treaty.

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5.3.1 International Covenant on Economic, Social and Cultural Rights (ICESCR)

The ICESCR was adopted by UNGA Resolution 2200 A (XXI) of 16 December 1966. It entered into force on 3 January 1976.

Main features: The Covenant rights apply to everyone “within” the jurisdiction of the State, including not only refugees, asylum-seekers, and stateless persons but also “illegal” migrants. It recognizes several rights which are of utmost importance to asylum-seekers and refugees, such as the principle of non-discrimination (Articles 2 and 3), the right to work (Article 6), the right to just and favourable conditions of work (Article 7), the right to an adequate standard of living for oneself and

one's family, including adequate food, clothing, and housing, and to the continuous improvement of living conditions (Article 11), the right to the highest attainable standard of physical and mental health (Article 12), and the right to education (Article 13). Although each State Party undertakes to "take steps...to the maximum of its available resources, with a view to achieving progressively the full realisation of the rights recognized", the Covenant also imposes several immediate obligations (see volume II).

Supervisory body: *The Committee on Economic, Social and Cultural Rights* is composed of 18 independent experts elected for a period of four years.

Supervisory mechanism:

- *Reporting mechanism* (Articles 16 and 17): States Parties are required to submit reports every five years. This instrument has no individual petitions mechanism as yet.

Relevant General Comments: No. 3, on the nature of States Parties' obligations (Article 2, paragraph 1) [1990]; No. 4, on the right to adequate housing (Article 11, paragraph 1) [1991]; No. 5, on persons with disabilities [1994]; No. 6, on the economic, social and cultural rights of older persons [1995]; No. 7, on forced evictions and the right to adequate housing (Article 11, paragraph 1) [1997]; No. 12, on the right to adequate food (Article 11) [1999]; No. 13, on the right to education (Article 13) [1999]; No. 14, on the right to the highest attainable standard of health (Article 12) [2000]; No. 16, on the equal right of men and women to the enjoyment of all economic, social and cultural rights [2005]; and No.18, on the right to work [2005].

5.3.2 International Covenant on Civil and Political Rights (ICCPR)

The ICCPR was adopted by UNGA Resolution 2200 A (XXI) of 16 December 1966. It entered into force on 23 March 1976.

Main features: Under the ICCPR, States undertake "to respect and ensure" the rights enshrined therein of all individuals within the territory or the jurisdiction of the State. Most of the rights contained in the Covenant are relevant to asylum-seekers, refugees, IDPs and other persons of concern, including the principle of non-discrimination (Article 2), the right to life (Article 6), the right not to be subjected to torture or cruel, inhuman or degrading treatment or punishment (Article 7), the right to liberty and security of the person (Article 9), and the right to equality before the law (Article 26). The Human Rights Committee acknowledges an extra-territorial dimension of obligations under the ICCPR (*See General Comment, nr. 32, para. 12*).

Supervisory body: The Human Rights Committee (which should not be confused with the UN Commission on Human Rights) is composed of 18 independent experts who are elected for a period of four years.

Supervisory mechanisms:

- *Reporting mechanism* (Article 40): States Parties must submit a report every five years.
- *Inter-state complaints procedure* (Articles 41 to 43): The procedure is optional. No party to the Covenant has made use of the procedure so far (see section 5.2.2 above).
- *Individual complaints mechanism* (First Optional Protocol to the ICCPR): The Committee's findings are called "views". The views are published in a form that has many of the characteristics of a Court judgement and may be regarded as the Committee's case-law. In 1990, the Committee created the function of Special Rapporteur for the Follow-up of Views.

Who may file a complaint to the Human Rights Committee?

Under Article 1 First Optional Protocol to the ICCPR, complaints may be filed by individuals subject to the jurisdiction of a State Party to the Optional Protocol "who claim to be victims of a violation by that State Party of any of the rights set forth in the Covenant. No communications shall be received by the Committee if it concerns a State Party to the Covenant which is not a party to the present Protocol." Exceptionally, a communication submitted on behalf of an alleged victim may be accepted when it appears that the individual in question is unable to submit the communication personally (Rules of Procedure, Rule No. 90).

Relevant General Comments: No. 4, on equality of rights between men and women (Article 3) [1981]; No. 6, on the right to life (Article 6) [1982]; No. 8, on the right to liberty and security of the person (Article 9) [1982]; No. 10, on freedom of opinion (Article 19) [1983]; No. 13, on equality before the law (Article 14) [1984]; No. 15, on the position of aliens [1986]; No. 16, on the right to privacy (Article 17) [1988]; No. 17, on the rights of the child (Article 24) [1989]; No. 18, on non-discrimination [1989]; No. 19, on the protection of the family (Article 23) [1990]; No. 20, on the prohibition of torture or cruel, inhuman or degrading treatment or punishment (Article 7) [1992]; No. 21, on the treatment of persons deprived of their liberty (Article 10) [1992]; No. 22, on the freedom of thought, conscience, and religion (Article 18) [1993]; No. 23, on the right of minorities to enjoy, profess, and practice their own culture (Article 27) [1994]; No. 27, on freedom of movement (Article 12) [1999]. No. 28, on the equality of rights between men and women (Article 3) [2000]. Particular attention should be paid to General Comment No. 31, on the nature of the general obligations imposed on States Parties [2004], which *inter alia* emphasizes that "States Parties are required by article 2, paragraph 1, to respect and to ensure the Covenant rights to all persons who may be within their territory

and to all persons subject to their jurisdiction", further clarifies that "the enjoyment of Covenant rights is not limited to citizens of States Parties but must also be available to all individuals, regardless of nationality or statelessness, such as asylum seekers, refugees, migrant workers and other persons, who may find themselves in the territory or subject to the jurisdiction of the State Party" . Particularly important for the work of UNHCR is the Human Rights Committee's understanding of the extraterritorial dimension of human rights, emphasizing that the article 2 obligation requires "that States Parties respect and ensure the Covenant rights for all persons in their territory and all persons under their control entails an obligation not to extradite, deport, expel or otherwise remove a person from their territory, where there are substantial grounds for believing that there is a real risk of irreparable harm, such as that contemplated by articles 6 and 7 of the Covenant, either in the country to which removal is to be effected or in any country to which the person may subsequently be removed ."

5.3.3 International Convention on the Elimination of All Forms of Racial Discrimination (CERD)

The CERD was adopted by UNGA Resolution 2106 A (XX) of 21 December 1965. It entered into force on 4 January 1969.

Main features: CERD contains a number of detailed prohibitions and obligations to prevent discrimination on the grounds of race, colour, origin, and national or ethnic background. The Convention bans discrimination in relation to a range of rights, including the right to equal treatment before tribunals, security of person, freedom of movement and residence, the right to nationality, and the right to public health, medical care, social security and social services. States Parties shall ensure effective protection and remedies against acts of racial discrimination (Article 6), and States pledge to combat prejudices that lead to racial discrimination (Article 7). Given the racial and ethnic discrimination that refugees and asylum-seekers often face in the asylum country, and the various civil, political, economic, social, and cultural rights covered in this Convention, CERD may have a significant impact on the lives of refugees and asylum-seekers.

Supervisory body: The Committee on the Elimination of Racial Discrimination is composed of 18 independent experts elected for a period of four years.

Supervisory mechanisms:

- *Reporting mechanism* (Article 9): States are required to submit a report every four years.
- *Inter-state complaints mechanism* (Article 11).
- *Individual complaints mechanism* (Article 14).

Who may file a complaint to the CERD Committee?

Complaints may be filed by individuals or groups of individuals subject to the jurisdiction of a State Party to the Convention. According to CERD Rules of Procedure, in exceptional circumstances a third person may file the complaint on behalf of the victim(s) if they are unable to file it themselves and the author of the communication justifies their acting on the victim's behalf.

Relevant General Recommendations: No. 7, on measures to eradicate incitement to or acts of discrimination (Article 4) [1985]; No. 11, on non-citizens [1993]; No. 14, on the definition of racial discrimination (Article 1, paragraph 1) [1993]; No. 15, on measures to eradicate incitement to or acts of discrimination (Article 4) [1993]; No. 19, on the prevention, prohibition, and eradication of racial segregation and apartheid (Article 3) [1995]; No. 22, on refugees and displaced persons (Article 5) [1996]; No. 25, on gender-related dimensions of racial discrimination [2000]; No. 27, on discrimination against Roma [2000]; and No. 30, on non-citizens [2004].

5.3.4 Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)

The CEDAW was adopted by UNGA Resolution 34/180 of 18 December 1979. It entered into force on 3 September 1981.

Main features: This Convention sets out a series of obligations for States with the aim of guaranteeing that women enjoy rights as on equal footing with men. The CEDAW states that “affirmative action” and measures aimed at accelerating *de facto* equality between men and women will not be considered discriminatory (Article 4); that States shall take all appropriate measures to modify cultural patterns that perpetuate discrimination (Article 5); that States undertake to suppress trafficking, exploitation, and prostitution of women (Article 6); and recognizes women's right to change and retain their own and their children's nationality (Article 9). Part III of the Convention stipulates that States must take appropriate measures to eliminate discrimination with regard to certain social and economic issues, such as education (Article 10), employment (Article 11), and health (Article 12). In addition, Article 14 provides several rights for rural women that are relevant to many refugee women. Part IV provides for the right to equality before the law (Article 15) and stipulates that States must undertake measures to eliminate discrimination regarding to marriage and family relations (Article 16).

Supervisory body: The **Committee for the Elimination of Discrimination against Women** is composed of 23 independent experts elected for a period of four years by the States Parties to the Convention. This Convention is served by the Division of the Advancement of Women and is therefore the only treaty body whose secretariat functions

are not integrated in OHCHR. This arrangement is presently under discussion.

Supervisory mechanisms:

- *Reporting system* (Article 18): Under the Convention the only supervisory mechanism established is the reporting system. States Parties are required to submit a report every four years.

In 1999, the UNGA adopted an Optional Protocol to the Convention on the Elimination of all Forms of Discrimination against Women (CEDAW-OP). The Optional Protocol, which entered into force on 22 December 2000, provides a forum for women asylum-seekers and refugees seeking redress for human rights violations based on sex discrimination.

The Optional Protocol contains two additional supervisory mechanisms:

- *Inquiry procedure* (Article 8): The Protocol sets out a unique inquiry procedure that enables the Committee to initiate inquiries into situations of grave or systematic violation of women's rights and that allows for country visits. The Protocol includes an "opt-out clause" which allows States, upon ratification or accession, to declare that they do not accept the inquiry procedure.
- *Individual complaints mechanism* (Article 2): This procedure allows individual women, or groups of women, to submit claims of violations of the rights protected under the Convention.

Who may file a complaint to the CEDAW Committee?

Complaints may be filed by or on behalf of individuals or groups of individuals subject to the jurisdiction of the State Party to the Convention who claim to be victims of a violation of a Convention right. The CEDAW-OP specifies that if a complaint ("communication") is submitted "on behalf of alleged victims," it must be with their consent unless the author can justify acting on their behalf without such consent.

Relevant General Recommendations: No. 5, on temporary special measures [1988]; No. 12, on violence against women [1989]; No. 14, on female circumcision [1990]; No. 18, on disabled women [1991]; No. 19, on violence against women [1992]; and No. 24, on women and health (Article 12) [1999].

5.3.5 Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT)

The CAT was adopted by UNGA Resolution 39/46 of 10 December 1984. It entered into force on 26 June 1987.

Main features: From a UNHCR perspective, the prohibition of *refoulement* is the most important feature in this instrument and offers a valuable protection tool, notably where States are not party to 1951

Convention or where refugee status under the Convention has been denied. This provision is broader than the *non-refoulement* obligation under Article 33 of the 1951 Convention in as it does not require any link to one of the five Convention grounds, nor does it foresee any exceptional clause equivalent to Article 33(2) of the 1951 Convention. It is, however, narrower as it only refers to “*substantial grounds for believing*” that an individual would be in danger of being subjected to torture, and torture is only one of many possible manifestations of persecution. The CAT contains a definition of torture (Article 1) that is narrower than that of the ICCPR or ECHR. States Parties are obliged to take effective legislative, administrative or other measures to prevent acts of torture and establish that no exceptional circumstances whatsoever may be invoked as a justification of torture (Article 2). Expulsion or *refoulement* is prohibited when there are grounds to believe that an individual will be subject to torture (Article 3). States must ensure remedy, redress, and reparation to victims of torture (Articles 13 and 14).

The definition of torture under the CAT (Article 1)

“...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 her] or a third person information or a confession, punishing him [or her] for an act he [or she] or a third person has committed or is suspected of having committed, or intimidating or coercing him [or her] 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.”

Supervisory body: The **Committee against Torture** is composed of ten independent experts elected to four-year terms.

Supervisory mechanisms:

- *Reporting mechanism* (Article 19): States must submit reports every four years. The governments concerned may respond to the comments with their own observations (Article 19[3]). The Committee may, at its discretion, decide to include any comments or suggestions it makes in accordance with paragraph 3, together with the observations thereon received from the State Party concerned, in its annual report made in accordance with article 24. If so requested by the State Party concerned, the Committee may also include a copy of the report submitted. (Article 19[4]).
- *Inter-state complaints mechanism* (Article 21): An optional procedure that may only be used if both States concerned have made a declaration recognizing the competence of the Committee.
- *Inquiry procedure* (Article 20): If the Committee receives reliable information that contains well-founded indications that torture is being systematically practiced in the territory of a State Party it may

appoint one or more of its members to undertake a confidential investigation. It may visit the country in question with the consent of its government. Such visits have, for example, been organized to Sri Lanka.

- *Individual complaints procedure* (Article 22): The procedures have the same features as those of the ICCPR and its First Optional Protocol.

Who may file a complaint to the CAT Committee?

According to Article 22 of the CAT, complaints may be filed by or on behalf of individuals subject to the jurisdiction of a State Party who claim to be victims of a violation of a provision of the Convention. No communication may be received by the Committee if it concerns a State Party to the Covenant that has not made a declaration recognizing the competence of the Committee to receive and consider communications.

Relevant General Comment: No. 1, on Communications concerning the return of a person to a State where there may be grounds to believe he/she would be subjected to torture (Article 3 in the context of Article 22) [1996].

5.3.6 Convention on the Rights of the Child (CRC)

The CRC was adopted by UNGA Resolution 44/25 on 20 November 1989. It entered into force on 20 September 1990.

Main features: According to this treaty, a child is any person below the age of 18, unless under applicable laws majority is attained earlier (Article 1). The CRC sets out four guiding principles: the best interest of the child shall be a primary consideration (Article 3); there shall be no discrimination on grounds of race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status (Article 2); each child has a fundamental right to life, survival, and development to the maximum extent possible (Article 6); and children should be assured the right to express their views freely and that they should be heard and their views be given “due weight” in accordance with the age and maturity of the child (Article 12). In addition to these four guiding principles, the CRC provides for a number of fundamental rights crucial for the protection of refugees and asylum-seekers, including prevention and reduction of statelessness and birth registration of children (Article 7) and economic, social and cultural rights (Articles 27, 28 and 31). It also focuses on the role of the family in providing care to the child (Articles 20, 21, 22, and 23) and establishes the only explicit refugee protection provision in a universal human rights instrument (Article 22). This provision of an instrument, which – having been ratified by 192 States Parties – is globally the most widely accepted human rights instrument, provides a particularly important legal tool for UNHCR with regard to those States that are not parties to the 1951 Convention. Article 22 of the CRC requires States to “take appropriate measures to ensure that a child who is seeking

refugee status or who is considered a refugee in accordance with applicable international or domestic law and procedures shall, whether unaccompanied or accompanied by his or her parents or by any other person, receive appropriate protection and humanitarian assistance in the enjoyment of applicable rights set forth in the present Convention and in other international human rights or humanitarian instruments to which the said States are Parties.” It also provides a strong legal argument for the States’ obligation to co-operate with UNHCR as Article 22(2) further stipulates:

“For this purpose, States Parties shall provide, as they consider appropriate, co-operation in any efforts by the United Nations and other competent intergovernmental organizations or non-governmental organizations co-operating with the United Nations to protect and assist such a child and to trace the parents or other members of the family of any refugee child in order to obtain information necessary for reunification with his or her family. In cases where no parents or other members of the family can be found, the child shall be accorded the same protection as any other child permanently or temporarily deprived of his or her family environment for any reason, as set forth in the present Convention.”

With 192 States Parties, the CRC is, therefore, particularly important.

Supervisory body: The Committee on the Rights of the Child was originally composed of ten independent experts, but currently consists of 18 independent experts elected for a four-year term.

Examples of the principle of the best interests of the child under the CRC

Article 3 establishes the general principle that “In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, *the best interest of the child shall be a primary consideration.*”

Article 9 enshrines the principle that “a child shall not be separated from his or her parents against their will, except when competent authorities ... determine ... *that such separation is necessary for the best interests of the child.*” And ... “the right of the child who is separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the *child’s best interests.*”

Article 20 provides that a “child temporarily or permanently deprived of his or her family environment, or in whose own *best interests* cannot be allowed to remain in that environment, shall be entitled to special protection and assistance provided by the State.”

Article 37 (c) requires States to ensure that “... every child deprived of liberty shall be separated from adults *unless it is considered in the child’s best interest* not to do so and shall have the right to maintain contact with his or her family through correspondence and visits, save in exceptional circumstances”.

Supervisory mechanism:

- *Reporting system* (Article 44): The only supervisory mechanism established by the CRC. States are required to submit a report every five years.

On 25 May 2000, two additional Optional Protocols to the Convention on the Rights of the Child were adopted, one on the involvement of children in armed conflict and the other on the sale of children, child prostitution, and child pornography.

The *Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict* entered into force on 12 February 2002. The Protocol prohibits States and other non-State groups from recruiting people under the age of 18 to the armed forces. It requires that countries raise the minimum recruiting age above the age set by the CRC and that they do everything possible to keep people under the age of 18 from taking direct part in hostilities and take precautions against the voluntary recruitment of people under the age of 18. States must report to the Committee on their compliance with the provisions of the Convention and the Protocol.

The *Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography* entered into force on 18 January 2002. It supplements the CRC with detailed requirements for criminalizing violations of children's rights in relation to the sale of children, child prostitution, and child pornography. The Protocol defines the offences "sale of children", "child prostitution", and "child pornography." It sets standards for treating violations under domestic law, not just as they relate to offenders, but also as they relate to prevention efforts and the protection of victims. The Optional Protocol also provides a framework for greater international cooperation in these areas, particularly for prosecuting offenders.

Relevant General Comment: No. 3, on HIV/AIDS and the rights of the child [2003] and No. 6, on the treatment of unaccompanied and separated children outside their country of origin [2005], the latter of which, to a significant extent drafted by UNHCR, also serves as a good example of co-operation between treaty bodies and UNHCR in the preparation of general comments.

5.3.7 International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (CMW)

Treaty	Supervisory Body	Supervisory Mechanisms
<i>ICESCR</i>	Committee on Economic, Social and Cultural Rights. Composed of 18 experts.	❖ State reports every 5 years (Article 16 [1])
<i>ICCPR</i>	Human Rights Committee. Composed of 18 experts (Article 28).	❖ State reports every 5 years (Article 40) ❖ Inter-state complaints (Article 41) ❖ Individual complaints (ICCPR-OP)
<i>CEDAW</i>	Committee on the Elimination of Discrimination against Women. Composed of 23 experts (Article 17).	❖ State reports every 4 years (Article 18) ❖ Individual complaints (CEDAW-OP) ❖ Inquiry procedure (CEDAW-OP)
<i>CERD</i>	Committee on the Elimination of Racial Discrimination. Composed of 18 experts (Article 8).	❖ State reports every 2 years (Article 9) ❖ Individual complaints procedure (Article 14) ❖ Inter-state complaints (Article 11)
<i>CRC</i>	Committee on the Rights of the Child. Composed of 18 experts (Article 43).	❖ State reports every 5 years (Article 44)
<i>CAT</i>	Committee against Torture. Composed of 10 experts (Article 17).	❖ State reports every 4 years (Article 19) ❖ Inquiry procedure (Article 20) ❖ Inter-state complaints (Article 21) ❖ Individual complaints (Article 22)
<i>CMW</i>	Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families. Composed at present of 10 experts (Article 72).	❖ State reports every 5 years (Article 73) ❖ Inter-state complaints (Article 76) ❖ Individual complaints (Article 77)

The CMW was adopted by UNGA Resolution 45/158 of 18 December 1990. It entered into force on 1 July 2003.

Main features: The Convention seeks to prevent and eliminate the exploitation of migrant workers throughout the entire migration process by providing a set of binding international standards to address the treatment, welfare, and human rights of both documented and undocumented migrants. It also sets out the obligations and responsibilities on the part of sending and receiving States. According to Article 3, this Convention shall not apply to “refugees and stateless persons, unless such application is provided for in the relevant national legislation of, or international instruments in force for, the State Party concerned.”

Supervisory body: The **Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families** is composed of ten independent experts. They first met in 2004.

Supervisory mechanisms:

- *Reporting mechanism* (Article 72): States are required to submit a report every five years.
- *Inter-state complaints mechanism* (Article 77): This procedure requires ten declarations by States Parties before it enters into force.
- *Individual complaints procedure* (Article 77): This procedure requires ten declarations by States Parties before it enters into force.



Chapter 6 **The African System**

The African human rights system is established under the framework of the *African Union* (AU), founded in July 2002. The AU is the regional inter-governmental organization that replaced the Organization of African Unity (OAU). This section describes the main human rights treaties and the two principal human rights bodies.

6.1. Main Human Rights Treaties

6.1.1 African Charter on Human and Peoples' Rights (ACHPR)

The African Charter was adopted by the OAU on 26 June 1981. It entered into force on 21 October 1986.

Main features: The ACHPR is a binding treaty that covers four main categories of rights and duties: individual rights, the rights of peoples; the duties of States; and the duties of individuals. Because of the unique needs and values of African cultures, as well as colonial experience, the ACHPR contains some features that are distinct from other regional conventions. For example, the Charter confers rights upon peoples, not only individuals. It is also unique in emphasizing the duties of the individual *vis-à-vis* the community and the State. Duties only apply to individuals and not to peoples. Unlike other international human rights conventions, the ACHPR does not contain a general derogation clause that allows States Parties to suspend the enjoyment of certain rights during national emergencies (see Vol. I, Chapter 3). However, it contains a number of provisions, referred to as “claw-back clauses”, that limit the reach of these rights (see, for example, Article 9[2]).

Supervisory bodies:

- African Commission on Human and Peoples' Rights
- African Court on Human and Peoples' Rights (about to be put in operation, see below)

Supervisory mechanisms:

- *Reporting system:* States are required to submit reports to the African Commission every two years.
- *Individual complaints procedure:* See above
- *Inter-State complaints:* See above

6.1.2 The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa

The Protocol was adopted by the AU on 11 July 2003 and entered into force on 25 November 2005.

Main features: The Protocol addresses a variety of civil, political, economic, cultural, and social rights. Its entry into force is critical because it will commit governments to: integrating a gender perspective

in their policy decisions, legislation, development plans, and activities, and ensuring the overall well-being of women; incorporating into their national constitutions and other legislative instruments the fundamental principles of the Protocol, and ensuring their effective implementation; eliminating all forms of violence and discrimination against women and promoting equality between men and women; and ensuring that women enjoy a wide variety of health and reproductive rights, including the right to medical abortion in cases of sexual assault, rape, incest, and when the continued pregnancy endangers the mental and physical health of the mother or the life of the mother or the foetus. This is the first time that an international standard explicitly provides for the right of a woman to have an abortion under certain circumstances. It is also unique in that it unequivocally denounces and declares illegal female genital mutilation and related harmful traditional practices.

In addition, the Protocol specifically addresses the special needs of women in times of armed conflict (Article 11). It requires States to protect asylum-seeking women, refugees, returnees, and internally displaced persons from acts of sexual violence that take place within the context of armed conflict, to ensure that such acts are considered as war crimes, genocide, and/or crimes against humanity, and to prosecute them accordingly.

Supervisory body:

African Commission on Human and Peoples' Rights

Supervisory mechanism:

- *Reporting system:* States are required to submit periodic reports to the African Commission on legislative and other measures they have undertaken to ensure the full realization of rights recognized under the Protocol.

6.1.3 The African Charter on the Rights and Welfare of the Child

The African Charter was adopted in July 1990 by the OAU Assembly. It entered into force on 29 November 1999.

Main features: The Charter defines a child as: "... every human being below the age of 18 years"; no exceptions are mentioned. It declares that no child may take part in armed conflict, thereby using the straight-18 rule, prohibits harmful social and cultural practices affecting the welfare, dignity, normal growth, and development of the child, and includes a detailed provision on the right to education. Under the Charter, States are obliged to take special measures to protect children during armed conflicts, including internal armed conflicts, tension, and strife (Article 22). States are obliged to protect child asylum-seekers, refugee children, and internally displaced children whether they are displaced because of natural disaster, internal armed conflict, civil strife, or breakdown of

economic and social order (Article 23). States must provide appropriate protection and humanitarian assistance to these children so they may enjoy the rights set out in the Convention and in “other international human rights and humanitarian instruments to which the States are parties” (Article 23). States also commit to cooperating with existing international organizations that protect and assist refugees and to tracing the parents or other close relatives of an unaccompanied refugee child in order to obtain information necessary for family reunification. The Charter has a specific article on the responsibilities of the child subject to his/her age and ability.

Supervisory body:

The African Committee of Experts on the Rights and Welfare of the Child (see below) is composed of 11 members elected by the Assembly of Heads of State and Government from a list of persons nominated by the States Parties to the Charter.

Supervisory mechanisms:

- *Reporting mechanism:* States are required to submit a report to the Committee every three years
- *Individual complaints mechanism:* The Committee can receive communications from persons, groups or NGOs regarding violations of the Charter.
- *Inquiry procedure:* The Committee has been granted broad powers of investigation. It may resort to any appropriate method of investigating any matter falling within the jurisdiction of the Charter, including measures a State Party has taken to implement the Charter. It may also request from the States Parties any information relevant to the implementation of the Charter. Formally, however, the Committee’s principle means of enforcement is publicity, as the AU bears ultimate responsibility for enforcement.

6.2 Main human rights bodies

6.2.1 The African Commission on Human and People’s Rights

The African Commission on Human and Peoples’ Rights (hereafter: African Commission) is a quasi-judicial body established by the African Charter on Human and Peoples’ Rights (ACHPR). The African Commission was incorporated into the AU framework at the Durban Summit held in July 2002. The Commission is based in Banjul, The Gambia.

Composition

The Commission is composed of 11 members (Article 31 of the ACHPR) “chosen from among African personalities of the highest

reputation, known for their high morality, integrity, impartiality, and competence in matters of human and peoples' rights; particular consideration being given to persons having legal experience." The members of the Commission serve in their personal capacities.

Supervisory mechanisms

- *Reporting system* (Article 62 of the ACHPR): The African Commission is allowed to review the reports that States are obliged to submit every two years on legislative and other measures they adopt in order to give effect to the provisions of the ACHPR.
- *Inter-State complaints* (Article 47 of the ACHPR): The African Commission is allowed to examine complaints submitted by one State against another State alleging violations of human rights.
- *Individual complaints* (Article 55 of the ACHPR): The African Commission is entitled to consider communications from individuals and organizations, including NGOs, alleging violations of the rights enshrined in the ACHPR. After examining the communications, the Commission makes recommendations to the Assembly of the African Union and to the State Party concerned. All the recommendations are included in the annual reports of the African Commission, which are made public once the AU Assembly has approved them.

In addition to examining State reports and receiving, examining, and investigating communications, the African Commission can interpret any provision in the ACHPR if asked to do so by AU Member States, organs of the AU or African organizations. The African Commission is also entitled to appoint members of the Commission as Special Rapporteurs to gather information about human rights violations. So far, the Commission has appointed Special Rapporteurs on the thematic issues of extrajudicial executions, prison conditions, women's rights, and refugees, asylum-seekers, and internally displaced persons.

Who may file a complaint to the African Commission?

Article 55 of the ACHPR does not place any restrictions on who can submit cases to the Commission. This provision simply notes: "Before each session, the Secretary of the Commission shall make a list of the communications other than those of States Parties to the present Charter." The Commission has interpreted this provision as giving *locus standi* to the victims themselves and to the victims' families as well as to NGOs and others acting on their behalf.

Admissibility

Exhaustion of domestic remedies: The Commission can only handle communications if they "are sent after exhausting local remedies, if any, unless it is obvious that this procedure is unduly prolonged" (Article 56[5] of the ACHPR).

Time period: The communications must be “submitted within a reasonable period from the time local remedies are exhausted or from the date the Commission is seized of the matter” (Article 56[6] of the ACHPR).

Duplication of procedures at the international level: The Commission does “not deal with cases which have been settled by the States involved in accordance with the principles of the Charter of the United Nations or the Charter of the Organization of African Unity or the provisions of the present Charter” (Article 56[7] of the ACHPR).

Interim measures: The Commission has developed a mechanism for adopting provisional measures in its Rules of Procedure (Rule 111): “1. Before making its final views known to the Assembly on the communication, the Commission may inform the State Party concerned of its views on the appropriateness of taking provisional measures to avoid irreparable damage being caused to the victim of the alleged violation. [...] . 2. The Commission may [...] indicate to the parties any interim measure, the adoption of which seems desirable in the interest of the parties or the proper conduct of the proceedings before it.”

6.2.2 The African Court of Human and People’s Rights

The ACHPR did not provide for the institution of a Court of Human Rights. In June 1998, the OAU adopted the *Protocol to the African Charter on Human and Peoples’ Rights on the Establishment of an African Court of Human and Peoples’ Rights*, which came into force on 25 January 2004.

In July 2004, when the Assembly of the African Union was expected to make decisions on matters relating to the African Court of Human Rights in its Third Ordinary Session in Addis Ababa, Ethiopia, it decided to integrate the African Court and the Court of Justice into one Court. The Court of Justice of the AU was established under the Constitutive Act of the Union and its statute, composition, and functions are defined in the Protocol of the Court of Justice of the AU.

While the AU Court of Justice has jurisdiction to resolve disputes among member States that have ratified the Court’s Protocol, the African Court is empowered to hear cases challenging violations of the civil, political, economic, social, and cultural rights guaranteed under the ACHPR and other relevant human rights instruments. The Draft Protocol on the merger of the African Human Rights Court and the Court of Justice of the AU has been forwarded to the AU Executive Council for consideration and for subsequent approval by the AU Assembly.

All 11 judges to the Court were elected by the African Union Executive Council of Ministers in Khartoum, Sudan on 21 January 2006. On 2

July 2006, they were sworn in at the 7th African Union Summit in Banjul, Gambia. Tanzania was confirmed as the seat of the new Court, at the current site of the International Criminal Tribunal for Rwanda in Arusha.

According to the Protocol, the Court will exercise both contentious and advisory jurisdictions:

Advisory Jurisdiction

Under its advisory jurisdiction, the Court is entitled to give advisory opinions on “any legal matter relating to the Charter or any other relevant human rights instruments.” Advisory opinions may be requested not only by a Member State of the AU, but also by any organ of the AU or an African NGO recognized by the African Union.

Contentious jurisdiction

The African Commission, States Parties and African intergovernmental organizations can bring a case to the African Court once a State ratifies the Protocol. Individuals and NGOs, however, do not have “automatic” access to the Court. The Court cannot receive an individual petition unless the State Party involved has made a declaration accepting the competence of the Court to receive such cases directly from victims and NGOs.

The Court is formally independent of the African Commission although it may request the Commission’s opinion with respect to the admissibility of a case brought by an individual or an NGO. The Court may also consider cases or transfer them to the African Commission when it feels that the matter requires an amicable settlement, not adversarial adjudication.

The Court’s judgements are final and without appeal, and they are binding on States. In its annual report to the AU, the Court shall specifically list States that have not complied with its judgements. The AU Executive Council is required to monitor the execution of the judgements on behalf of the AU Assembly.

Who may file a complaint to the African Court?

Article 5(1) of the Protocol states that: “The following are entitled to submit cases to the Court: (a) The Commission; (b) The State Party which has lodged a complaint to the Commission; (c) The State Party against which the complaint has been lodged at the Commission; (d) The State party whose citizen is a victim of human rights violation; (e) African Intergovernmental Organizations.” The striking omission in this provision is the lack of *locus standi* for victims of human rights violations. However, Articles 5(3) and 34(6) allow States Parties, through a separate declaration, to recognize the standing of individuals and NGOs before the Court.

Admissibility: Article 6 of the Protocol states that: “1. The Court, when deciding on the admissibility of a case instituted under Article 5 (3) of this Protocol, may request the opinion of the Commission which shall

give it as soon as possible. 2. The Court shall rule on the admissibility of cases taking into account the provisions of Article 56 of the Charter.” In other words, the admissibility requirements for the Court are the same as those for the Commission (Article 56 of the Charter). The novelty here is the possibility for the Court to “request the opinion of the Commission” on admissibility (Article 6[1] of the Protocol).

Inquiry procedures: Article 26(1) of the Protocol allows the Court to conduct inquiries.

Friendly settlements: Article 9 of the Protocol states: “The Court may try to reach an amicable settlement in a case pending before it in accordance with the provisions of the Charter.”

Provisional measures: Article 27(2) of the Protocol states: “In cases of extreme gravity and urgency, and when necessary to avoid irreparable harm to persons, the Court shall adopt such provisional measures as it deems necessary.”

6.2.3 African Committee of Experts on the Rights and Welfare of the Child

The Committee was established in 1999 under the African Charter on the Rights and Welfare of the Child.

Composition: Eleven members are elected by the Assembly of Heads of State and Government in a secret ballot from a list of persons nominated by the States Parties to the Charter.

The mandate of the Committee includes promoting and protecting the rights and welfare of the child, collecting and documenting relevant information, assessing problems relating to children, formulating and drafting rules to protect children, and monitoring and implementing the rights enshrined in the Charter. As part of the monitoring activities, a reporting procedure requires States to submit a report to the Committee every three years.



Chapter 7 The Inter-American System

The system for the protection of human rights is established under the framework of the Organization of American States (OAS), which was created in 1948.

7.1 Main human rights treaties

7.1.1 American Declaration of the Rights and Duties of Man

The American Declaration of the Rights and Duties of Man was adopted on 2 May 1948. Although it was adopted as a non-binding instrument, its character has gradually changed. It is now considered to be the authoritative interpretation of “the fundamental rights of the individual”, which Article 3(l) of the OAS Charter proclaims as one of the Organization’s key principles. The Inter-American Commission thus applies the Declaration as though it were a binding treaty, which is particularly important for guaranteeing the protection of persons of concern to UNHCR in those countries of the region that are not party to the American Convention on Human Rights (ACHR).

Main features: The Declaration contains civil, political, economic, social, and cultural rights. It expressly provides that every person has the right to “seek and receive asylum in foreign territories, in accordance with the laws of each country and with international agreements” (Article XXVII).

Supervisory body: Inter-American Commission on Human Rights (IACmHR)

Supervisory mechanisms:

- *Individual complaints:* The IACmHR may receive individual complaints alleging violations of the Declaration with respect to OAS Member States that are not parties to the ACHR, such as the United States of America.
- *Country reports:* The IACmHR publishes special reports on the general human rights situation in Member States and studies on specific human rights issues. The Inter-American system’s means of addressing refugee protection challenges is the publication of reports (see, for example, its Report on Canada, published in 2001).
- *On-site visits:* The IACmHR carries out on-site visits to observe the general human rights situation in a country and to investigate specific cases.

7.1.2 The American Convention on Human Rights, “Pact of San Jose” (ACHR)

The ACHR was adopted on 20 November 1969 and entered into force on 18 July 1978.

Main features: Although the ACHR contains primarily civil and political rights, Article 26 expresses the general commitment of States Parties to adopt measures with the aims of progressively achieving the full realization of economic, social, and cultural rights. It provides that every person has the right to “seek and to be granted asylum in foreign territory, in accordance with the legislation of the State and international conventions, in the event he is being pursued for political offences or related common crimes” (Article 22[7]). It also envisages a prohibition to deport or return an individual if his “life or personal freedom is in danger of being violated because of his race, nationality, religion, social status, or political opinions” (Article 22[8]) and a prohibition against collective expulsion of aliens (Article 22[9]).

Supervisory bodies:

- Inter-American Commission on Human Rights (IACmHR)
- Inter-American Court of Human Rights (IACtHR)

Supervisory mechanisms:

- *Inter-state complaints*
- *Individual complaints procedure*

As noted above, the Commission has a series of mechanism at its disposal, but apart from the two mentioned here none are specifically provided for in the Convention.

7.1.3 Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights: “Protocol of San Salvador”

The Protocol of San Salvador was adopted on 17 November 1988 and entered into force on 16 November 1999.

Main features: The States Parties to the Protocol undertake to adopt the necessary measures, both nationally and through international cooperation, especially economic and technical cooperation, to attain the full observance of the rights recognized in the Protocol. While the Protocol takes into account the differing degrees of States’ development and restrictions on available resources, progressive implementation is, nonetheless, an obligation. The Protocol of San Salvador contains mostly the same rights as the ICESCR; however, the Protocol improves the text of the ICESCR by recognizing a number of rights that are not included in the Covenant, such as the right to a healthy environment (Article 11), the right to the formation and the protection of the family (Article 15), the rights of children (Article 16), the protection of the elderly (Article 17), and the protection of the handicapped (Article 18).

Supervisory bodies:

- Inter-American Commission on Human Rights (IACmHR)
- Inter-American Court of Human Rights (IACtHR)

Supervisory mechanisms:

- *Reporting mechanism*
- *Individual complaints procedure:* The Protocol provides for individual complaints only in regard to alleged violations of the right to organize and join unions, national federations of unions or international trade union organizations (Article 8[1][a]) and to violations of the right to education (Article 13).

7.1.4 The Inter-American Convention to Prevent and Punish Torture

The Convention was adopted on 9 December 1985 and entered into force on 28 February 1987.

Main features: The Convention expands upon the provisions of Article 5 of the ACHR, which prohibits torture and cruel, inhuman or degrading punishment or treatment. It contains a definition of torture (Article 2) that is broader than that contained in Article 1 of the CAT, potentially encompassing more acts of coercion. It expressly prohibits that the Convention be interpreted as limiting the right of asylum (Article 15).

Supervisory body: Inter-American Commission on Human Rights (IACmHR)

Supervisory mechanism:

- *Reporting mechanism* (Article 17): States undertake to submit reports on any legislative, judicial, administrative or other measures they adopt in application of the Convention to the Inter-American Commission (Article 17).

7.1.5 The Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women (Convention of Belem do Para)

The Convention was adopted on 9 December 1985 and entered into force on 2 March 1995.

Main features: In the Convention, the State parties condemn any forms of violence against women and agree to pursue, by all appropriate means and without delay, policies to prevent, punish and eradicate such violence. Violence against women is understood as any act or conduct “based on gender which causes death or psychological harm or suffering to women, whether in the public or the private sphere.” This definition of violence under the Convention includes domestic violence in the

widest sense – that is, within any inter-personal relationship and whether or not the perpetrator resides with the victim. It also includes violence occurring in the community, or perpetrated or condoned by the State or its agents, wherever it occurs. States Parties have specific duties under the Convention to adopt the required legislative measures to prevent and punish all forms of violence against women. The Convention may be of particular importance to UNHCR for two additional reasons: it specifically indicates that States must “take special account of the vulnerability of women to violence by reasons of, among others, their race or ethnic background or their status as migrants, refugees or displaced persons (Article 9). Also, the obligation to take measures to prevent violence against women should be seen as prohibiting return to a place where a woman is at risk of rape, battery or sexual abuse in the domestic sphere, that is, at the hands of a spouse or other family member, or at risk of sexual abuse, torture, trafficking in persons, forced prostitution, or kidnapping in any other place (Articles 2, 4 and 7 read in conjunction with each other).

Supervisory bodies:

- Inter-American Commission of Women
- Inter-American Commission on Human Rights (IACmHR)
- Inter-American Court of Human Rights (IACtHR)

Supervisory mechanisms:

- *Reporting mechanism:* States are required to submit reports to the Inter-American Commission of Women (Article 10), a specialized organization of the OAS, which aims to promote and protect the rights of women in the Americas.
- *Individual complaints procedure:* Any person, group of persons or legally recognized NGO can lodge petitions with the Inter-American Commission on Human Rights. The Commission considers such claims in accordance with the norms and procedures established by the ACHR.

7.2 Main human rights bodies

7.2.1 The Inter-American Commission on Human Rights (IACmHR)

The IACmHR is a quasi-judicial, quasi-political body established by the OAS Charter and the American Convention on Human Rights (ACHR). Its function is to promote “the observance and the defence of human rights” in the Americas. The Commission’s activities include: receiving, examining and investigating individual complaints or petitions that allege violations of the rights guaranteed under the American Declaration or the ACHR; referring cases to the Inter-American Court of Human Rights under the ACHR and appearing

before the Court (when it appears before the Court, the Commission, acting as guardian of the Convention and of the Inter-American system for the protection of human rights, presents its own case while the alleged victim has independent legal counsel presenting his/her case); requesting advisory opinions from the Court regarding questions of interpretation of the ACHR; conducting on-site visits to observe the general human rights situation in a country or to investigate specific cases; publishing special reports on the general human rights situation of member countries when it considers it appropriate; and undertaking research and publishing documents.

The IACmHR is composed of seven members elected in their personal capacities. It meets in Washington, D.C.

Who may file a complaint to the Inter-American Commission on Human Rights?

Article 44 of the ACHR states that: “Any person or group of persons, or any non-governmental entity legally recognized in one or more Member States of the Organization, may lodge petitions with the Commission containing denunciations or complaints of violation of this Convention by a State Party.”

When the respondent State has not ratified any relevant treaties other than the OAS Charter, petitions filed with the Commission must allege a violation of the American Declaration of the Rights and Duties of Man.

Admissibility

Exhaustion of domestic remedies: The Commission may agree to consider a petition or communication only after “the remedies under domestic law have been pursued and exhausted in accordance with generally recognized principles of international law.” According to Article 46(2), this rule is not applicable when: “(a) the domestic legislation of the State concerned does not afford due process of law for the protection of the right or rights that have allegedly been violated; (b) the party alleging violation of his [her] rights has been denied access to the remedies under domestic law or has been prevented from exhausting them; or (c) there has been unwarranted delay in rendering a final judgment under the aforementioned remedies” (Article 46 of the ACHR and Article 31 of the Rules of Procedure of the IACmHR).

Time period: The petition or communication must be lodged “within a period of six months from the date on which the party alleging violation of his rights was notified of the final judgment” (Article 46 of the ACHR).

Duplication of procedures at the international level: The IACmHR may admit a petition or communication only when “the subject of the petition or communication is not pending in another international proceeding for settlement.” According to Article 47, the Commission shall consider any petition or communication inadmissible if “the petition or communication is substantially the same as one previously

studied by the Commission or by another international organization” (Article 46 of the ACHR).

Precautionary measures: In serious and urgent cases, and whenever necessary according to the information available, the Commission may, on its own initiative or at the request of a party, request that the State concerned adopt precautionary measures to prevent irreparable harm to persons (Article 25 of the Rules of Procedure). Some of these measures have been requested to protect refugees and asylum-seekers (see, for example, *Case 11.661 against the State of Canada on behalf of Mr. Manickavasgam Suresh*).

7.2.2 The Inter-American Court of Human Rights (IACtHR)

The Court is the supreme judicial organ established by the ACHR. The Court, a part-time body with its seat in San José, Costa Rica, is composed of seven judges elected in their individual capacities to six-year terms. Judges may be re-elected once.

The Court exercises both contentious and advisory jurisdictions.

Advisory Jurisdiction

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

Contentious jurisdiction

States’ acceptance of contentious jurisdiction of the Court is optional and may be made at the time of ratification or accession to the ACHR or at any subsequent time (Article 62[1] of the ACHR).

Only States Parties to the Convention and the Commission have the right to submit a case to the Court (Article 61[1] of the ACHR). Individuals cannot bring a case to the Court; they must file a complaint with the Commission. The Court can only handle a case that has been considered and referred to it by the Commission. The proceedings before the Court in contentious cases terminate with a judgement, which is final and not subject to appeal. The Court may be requested to interpret the meaning or scope of any judgement at the request of any party to the case (Article 67 of the ACHR and Article 46 of the Rules of Procedure).

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

If the Court finds that there has been a violation of the Convention, it rules that the injured party must be accorded the enjoyment of the right or freedom that was violated and, if appropriate, rules that the consequences of the measures or situation that constituted the violation must be remedied and the injured party be awarded compensation. When reparations are awarded, the Court has generally reserved for itself the faculty of supervising compliance with the judgement.

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

Who may file a complaint to the Inter-American Court?

Article 61(1) of the ACHR stipulates that only a State Party to the ACHR and the IACmHR has the right to submit a case to the Court. Individuals may, however, submit cases to the IACmHR (see below). In cases before the Court, alleged victims are allowed to participate by submitting their pleadings, motions, and evidence autonomously throughout the proceedings. The Court may also request the adoption of provisional measures (Articles 23 and 25 of the Rules of Procedure).

Admissibility

Exhaustion of domestic remedies: The Commission may admit a complaint only after “the remedies under domestic law have been pursued and exhausted in accordance with generally recognized principles of international law.” This rule shall not be applicable when “(a) the domestic legislation of the State concerned does not afford due process of law for the protection of the right or rights that have allegedly been violated; (b) the party alleging violation of his rights has been denied access to remedies under domestic law or has been prevented from exhausting them; or (c) there has been unwarranted delay in rendering a final judgement under the aforementioned remedies” (Articles 46 and 47 of the ACHR).

Time period once domestic remedies have been exhausted: The Commission may admit a complaint when “the petition or communication is lodged within a period of six months from the date on which the party alleging violation of his rights was notified of the final judgment” (Article 46 of the ACHR).

Duplication of procedures at the international level: The Commission may admit a complaint when “the subject of the petition or

communication is not pending in another international proceeding for settlement” (Article 46 of the ACHR).

Interim measures: “In cases of extreme gravity and urgency, and when necessary to avoid irreparable damage to persons, the Court shall adopt such provisional measures as it deems pertinent in matters it has under consideration. With respect to a case not yet submitted to the Court, it may act at the request of the Commission” (Article 63[2] of the ACHR). The Court has adopted some interim measures for the protection of non-nationals and internally displaced persons (see, for example, *Provisional Measures in the case of Haitian and Haitian-origin Dominican persons in the Dominican Republic* and *Provisional Measures in the case of the Communities of the Jiguamiandó and the Curbaradó [Colombia]*).

Judgements: “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 [her] 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” (Article 63[1] of the ACHR).

Binding force: Article 68 of the ACHR states that: “1. The States Parties to the Convention undertake to comply with the judgement of the Court in any case to which they are parties. 2. That part of a judgement that stipulates compensatory damages may be executed in the country concerned in accordance with domestic procedure governing the execution of judgements against the State.”

Execution of judgements: The Convention does not establish any institutional role for the political organs of the Organization of American States to supervise enforcement of the Court’s rulings. There is no counterpart, for example, to the Committee of Ministers of the Council of Europe. In the ACHR, only one article refers to the enforcement of judgements. According to Article 65, the Court is obliged to submit an Annual Report to each regular session of the General Assembly of the OAS for its consideration. In this report, the Court “shall specify, in particular, the cases in which a State has not complied with its judgements, making any pertinent recommendations.”

Amicus curiae briefs: The Court receives *amicus curiae* briefs regularly, although there is no specific provision regulating their submission. UNHCR has submitted briefs in the past.



Chapter 8 **The European System**

The European system comprises the all-European human rights protection system, established by the Council of Europe, as well as the more specific regime developed within the European Union (EU).

Founded in 1949, the Council of Europe is the continent's oldest political organization still existing. It consists of 46 countries, including 21 countries from Central and Eastern Europe. The Council was set up in the aftermath of the Second World War with the purpose to defend human rights, parliamentary democracy and the rule of law; to develop continent-wide agreements to standardize member countries' social and legal practices; and to promote awareness of a European identity based on shared values and cutting across different cultures. Today, the Council mainly focuses on human rights protection, particularly in the Eastern-European and Central-Asian States undergoing transition. Its major institution is the European Court of Human Rights, based in Strasbourg.

The EU, which consists of 25 countries, is a unique organization, of which Member States have set up common institutions to which they delegate some of their sovereignty so that decisions on specified matters of joint interest can be made either by unanimity or by qualified majority vote at the supra-national level. This pooling of sovereignty, called “European integration”, provides an important forum in which standards on human rights and asylum are developed. For instance, member States have adopted a non-binding Charter of Fundamental Rights. This instrument and its role must be clearly distinguished from the European Convention for the Protection of Human Rights and Fundamental Freedoms. In addition, the EU has adopted several regulations and directives specifically dealing with asylum issues. Apart from a brief discussion of the Charter of Fundamental Rights, this manual does not however examine EU policy and instruments on asylum.

8.1 Main human rights treaties under the Council of Europe

8.1.1 European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR)

The European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) was adopted on 4 November 1950 and entered into force on 3 September 1953.

Over the years, some 14 Protocols to the ECHR have been adopted. Some amended the original text of the Convention or Convention procedures; others extended the catalogue of human rights contained in the Convention.

Main features: As is generally the case with all human rights instruments, the ECHR applies to all persons under the jurisdiction of the Contracting States. Thus the Convention protects not only the nationals and citizens of the State, but all persons affected by measures taken by the State's authorities. The Convention contains primarily civil and political rights although it also includes the right to education and the protection of property (Protocol No. 1). The ECHR has proved to be an effective tool for the protection of the human rights of asylum-seekers and refugees. On numerous occasions, persons of concern to UNHCR have successfully resorted to the European Court of Human Rights to prevent their return to territories where they fear torture, inhuman or degrading treatment or punishment and to secure additional rights, such as family reunification or procedural guarantees in situations of detention (see Volume II). The Court has delivered a number of important judgements on these issues, demonstrating the links between international human rights and international refugee law.

Supervisory bodies:

- European Court of Human Rights
- Committee of Ministers, which supervises the execution of the Court's judgements.

Supervisory mechanisms:

- *Inter-state complaints* (Article 33 of the ECHR)
- *Individual complaints* (Article 38 of the ECHR)

8.1.1.1 Relevant Protocols to the ECHR

As of May 2005, 14 Protocols to the ECHR have been adopted. Some add specific rights to the Convention, others amended the supervisory mechanisms.

The First Protocol (1952) deals, *inter alia*, with the protection of property (Article 1) and the right to education (Article 2) (ETS No. 9).

The Fourth Protocol (1963) deals, *inter alia*, with freedom of movement (Article 2), the prohibition against expulsion of nationals (Article 3), and the prohibition against the collective expulsion of aliens (Article 4) (ETS No.46).

The Twelfth Protocol (2000) provides a general non-discrimination clause. While the Convention contains an article prohibiting discrimination only with regard to rights and freedoms set forth in the Convention, Protocol No. 12 does not require claims of discrimination to be linked to substantive provisions of the Convention (ETS No. 177).

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

8.1.2 European Social Charter (ESC)

The European Social Charter (ESC) was adopted on 18 October 1961 and entered into force in February 1965.

Main features: The rights of this Charter are guaranteed only to nationals of Contracting States and for foreigners “only insofar as they are nationals of other Contracting Parties lawfully resident or working regularly within the territory of the Contracting Party concerned.” The European Social Charter was revised in 1996. Over the years, several Protocols have been annexed to the Charter. The ESC is a so-called “à la carte” convention: States Parties do not have to accept all articles; they can choose the articles by which they consent to be bound.

Supervisory bodies:

- *The Committee of Independent Experts* is composed of nine experts who are appointed for six years. Its main function is to review the national reports of States Parties to assess whether their national laws and practices conform to the European Social Charter. After assessing the reports, the Committee adopts conclusions and submits them to the Governmental Committee.
- *The Governmental Committee* is composed of representatives of the States Parties and of international employers’ and employees’ organizations. Its main role is to advise the Committee of Ministers about non-compliance with the European Social Charter, which would then form the subject of recommendations to individual States Parties.

Supervisory mechanisms:

- *Reporting mechanism*
- *A Collective complaints procedure* was established by an Additional Protocol to the ESC in 1995. This protocol provides for the right of international and national NGOs, organizations of employers, and trade unions to submit complaints alleging the unsatisfactory application of the Social Charter.

8.1.3 European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment

The European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (ECPT) was adopted on 26 November 1987 (ETS No. 126).

Main features: The ECPT does not contain any substantive provisions concerning torture and inhuman or degrading treatment or punishment,

nor does it include a definition of torture. It leaves these issues, and the consideration of individual complaints, to the ECHR and the European Court. The aim of the Convention is to strengthen the protection of persons who are deprived of their liberty by establishing non-judicial machinery to prevent torture. The Convention thus creates only a supervisory mechanism.

Supervisory body:

The European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT): The Committee examines the treatment of persons deprived of their liberty. It is thus entitled to visit any place where people are being detained by a public authority. The Committee may then formulate recommendations to strengthen protection against torture and inhuman or degrading treatment or punishment. In principle, these visits occur periodically but, if the Committee deems it necessary, *ad hoc* visits may be organized on very short notice (Article 7[1]). All the procedures are confidential but if the State expressly requests it, the report is made public. With a two-thirds majority, the Committee can also decide to make a public statement on a situation if the State concerned is not willing to cooperate (Article 10[2]). Some standards related to the conditions of detention adopted by the CPT are relevant for asylum-seekers (see, for example, CPT/Inf/E [2002] 1-Rev. 2003).

Supervisory mechanism: The Committee cannot decide on individual complaints or award compensation. This is the task of the European Court, which handles cases concerning torture and inhuman or degrading treatment or punishment under Article 3 of the ECHR.

8.1.4 Framework Convention for the Protection of National Minorities

The Framework Convention for the Protection of National Minorities was adopted on 1 February 1995 and entered into force on 1 February 1998. It is the first legally binding multilateral instrument on the protection of national minorities.

Main features: The Framework Convention establishes the principles to which States should adhere to protect their national minorities. As its name implies, the Convention is mostly programmatic and discretionary in nature. The obligations cited in the Convention are State obligations, not individual or collective rights. Thus States are given some discretion in how they implement the principles.

Supervisory bodies:

- Committee of Ministers of the Council of Europe (CoE)
- Advisory Committee of Independent Experts

Supervisory mechanism:

- *Reporting mechanism:* States are obliged to submit the first report within one year after Convention enters into force and periodically thereafter, or whenever the Committee of Ministers requests it.

8.2 Main human rights bodies under the Council of Europe

8.2.1 European Court of Human Rights (ECtHR)

The European Court of Human Rights (ECtHR), which replaced an earlier dualist system consisting of the Commission and a part-time Court, is a judicial body established by the European Convention on Human Rights and Fundamental Freedoms (ECHR). The ECtHR, which is based in Strasbourg, France, is a full-time, permanent body that replaced an earlier, part-time Court when Protocol No. 11 entered into force in 1998. The ECtHR has proved to be key in protecting asylum-seekers and refugees in Europe.

The ECtHR is composed of 45 judges – one for each State Party to the ECHR (Article 20 of the ECHR).

The ECtHR exercises both contentious and advisory jurisdiction:

Advisory Jurisdiction

Under its advisory jurisdiction, the ECtHR may, at the request of the Committee of Ministers, give its opinions on legal questions concerning the interpretation of the ECHR and its protocols (Articles 47, 48, and 49).

Contentious Jurisdiction

Under its contentious jurisdiction, the ECtHR hears both individual and inter-state complaints. The individual complaint procedure allows the ECtHR to “receive applications from any person, non-governmental organization or group of individuals claiming to be the victim by one of the High Contracting Parties of the rights set forth in the Convention or the protocols thereto” (Article 34 of the ECHR). The European Court can also accept cases brought by States Parties against other States Parties that are alleged to be violating provisions in the ECHR (Article 33). In contrast with the IACtHR, the ECtHR can arrange for legal representation, and legal aid is available (Chapter X of the Rules of the Court).

Who may file a complaint with the European Court of Human Rights?

Article 34 The Court may receive applications from any person, non-governmental organization or group of individuals claiming to be the victim of a violation by one of the States Parties of the rights set forth in the Convention or the protocols.

Admissibility

Exhaustion of domestic remedies: “The Court may only deal with the matter after all domestic remedies have been exhausted, according to the generally recognized rules of international law [...]”(Article 35 of the ECHR).

Time period once domestic remedies have been exhausted: The ECtHR may only deal with the matter if it is submitted to the Court within six months after domestic remedies have been exhausted (Article 35 of the ECHR).

Duplication of procedures: The ECtHR shall not deal with any application that “is substantially the same as a matter that has already been examined by the Court or has already been submitted to another procedure of international investigation or settlement and contains no relevant new information” (Article 35 of the ECHR).

Inadmissible: The ECtHR shall declare inadmissible any application submitted under Article 34 that is “anonymous” or “which it considers incompatible with the provisions of the Convention or the protocols thereto, manifestly ill-founded, or an abuse of the right of application” (Article 35 of the ECHR).

Interim measures: The Rules of the Court state that: “1. The Chamber or, where appropriate, its President may, at the request of a party or of any other person concerned, or of its own motion, indicate to the parties any interim measure which it considers should be adopted in the interests of the parties or of the proper conduct of the proceedings before it” (Rule 39). Interim measures are generally granted in expulsion or extradition cases when a breach of Article 3 of the ECHR is alleged. The interim measures are binding on all parties. Until recently the ECtHR held that interim measures had no binding effect (see, for example, *Cruz Varas and others v. Sweden*), however it has reversed its position. In the case of *Mamatkulov and Askarov v. Turkey* (2005), the Court found that the State’s failure to comply with the interim measures hindered the applicant’s ability to exercise his/her right of individual application guaranteed by Article 34 of the Convention.

Amicus curiae briefs: It is possible to submit *amicus curiae* briefs under Article 36 of the ECHR, and UNHCR has occasionally made use of this possibility.

Friendly settlements: If the ECtHR declares an application admissible, it places itself at the disposal of the parties to secure a friendly settlement (Article 38[1][b] of the ECHR and Rule 62 of the Rules of the Court).

Judgements: Under Article 41 of the ECHR, if the Court finds a violation of the ECHR it may require States to pay compensation and cost. The compensation awarded by the Court is always monetary. The

final judgements of the Court are binding upon States Parties (Article 46[1] of the ECHR).

8.2.2 The Committee of Ministers of the CoE

The Committee is composed of the Foreign Ministers of every Council of Europe (CoE) Member State. The Committee, which is the CoE's executive body, meets twice a year in Strasbourg. In accordance with Article 46, the Committee supervises the execution of the Court's judgements by asking the respondent State to take the measures necessary to implement the Court's decision.

8.2.3 The Parliamentary Assembly of the CoE

The Parliamentary Assembly is comprised of some 300 members who are elected from national parliaments of CoE Member States. It meets four times a year. The Assembly and the Committee of Ministers are the two statutory organs of the CoE. The Assembly debates international affairs and prepares reports that focus on European issues. Although it has no legislative power, the Assembly may make recommendations to the 45 governments, via the Committee of Ministers, on any aspect of the Council's work. The Assembly's **Committee on Migration, Refugees and Population** considers issues related to the protection of asylum-seekers and refugees in Europe.

8.2.4 The Commissioner for Human Rights

The post of Commissioner for Human Rights was established in 1999 as a non-judicial institution. The Commissioner's role is to promote the effective observance and full enjoyment of human rights, to identify possible shortcomings in the law and practice of CoE Member States, and to assist them, with their agreement, in their efforts to remedy such shortcomings. The Commissioner does not consider individual complaints. It does, however, regularly visit Member States and focuses on the situation of vulnerable persons, such as women in prisons, mentally ill children, refugees, and members of the Roma community. The Commissioner organizes seminars and conferences with the aim of promoting education in and awareness of human rights, and maintaining relationships with other human rights structures and organizations. Seminars and visits organized by the Commissioner may result in Recommendations addressed to all those Member States affected by a specific problem. One Recommendation of particular relevance for UNHCR is the *Recommendation on the rights of aliens wishing to enter a Council of Europe Member State and the enforcement of expulsion orders*, which was adopted on 7 May 1999. The Commissioner may also give opinions, whether at the request of national bodies or on his own initiative, relating to draft laws or specific practices. These

opinions are usually more technical in nature than the recommendations.

The Commissioner publishes an annual report as well as a report after each official visit to a CoE Member State. These reports are submitted to the Committee of Ministers and the Parliamentary Assembly and made public.

8.3 Main relevant instruments under the European Union

8.3.1 The Charter of Fundamental Rights of the European Union

The Charter of Fundamental Rights of the European Union was signed and proclaimed by the Presidents of the European Parliament, the Council, and the Commission at the European Council meeting in Nice on 7 December 2000. It describes, in a single text, the whole range of civil, political, economic, social, and cultural rights of European citizens and all persons resident in the EU. The Charter is not, however, a legally binding treaty.

Main features: The Charter includes the rights protected by the ECHR while adding some other rights. Of particular relevance for the protection of refugees and asylum-seekers are the right to asylum (Article 18), the prohibition of collective expulsions and protection in case of removal, expulsion or extradition. Article 19(2) explicitly stipulates that “[n]o one may be removed, expelled or extradited to a State where there is a serious risk that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment.” Article 5 prohibits trafficking in human beings. The Charter also includes a number of economic, social, and cultural rights that do not appear in the ECHR, such as the right to education, which includes the possibility of receiving a “free compulsory education” (Article 14), and a number of rights related to work.

8.4. Main bodies under the European Union serving the protection of human rights

8.4.1 The European Court of Justice

The European Court of Justice supervises Member States’ compliance with the EC/EU Treaties. It is seated in Luxembourg and is composed of up to 25 independent judges and eight advocates-general, all appointed by the Member States for six-year terms. EU Member States, institutions, and individuals can bring a matter pertaining to European law before the Court. National courts may also refer questions on the interpretation of European law to the European Court of Justice.

8.4.2 The European Parliament

Since 1979, the citizens of Member States choose members of the European Parliament (EP) directly through universal suffrage. After ten new States entered the EU on 1 May 2004, there are now 732 Members of Parliament. The Parliament, which holds its plenary sessions alternately in Strasbourg and Brussels, may debate and reach conclusions independently of both the Council of Ministers and the Commission.

PART C

SELF-STUDY EXERCISES

QUESTIONS

This section includes some review questions for self-study. The answers sheet is included at the end.

1. The 1951 Convention and international refugee law, in general, are the only sources of protection afforded to asylum-seekers.

True *False*
2. What are the sources of international law?
3. When is a reservation to a human rights treaty not permitted?
4. Enumerate four requirements for legitimate limitations or restrictions to the exercise of human rights.
5. Enumerate three non-derogable rights.
6. Which of the following answers is correct? If there is a conflict between a human rights provision in a regional and a universal treaty, which provision should be applicable:
 - a. The more generous provision
 - b. The more specific provision
 - c. It is necessary to make a proper balance between the two provisions
 - d. The regional provision
 - e. The most recent provision
7. What are the three levels of State duties? Please explain each of them.
8. International human rights law does not apply during armed conflicts.

True *False*
9. A State Party to a human rights treaty may invoke the provisions of its national law as justification for its failure to comply with the treaty.

True *False*
10. Economic, social, and cultural rights are not enforceable rights. They are goals that the State should strive for.

True *False*
11. What is the main advantage of bringing a complaint under a regional system (Europe or Inter- American systems) as opposed to one of the UN mechanisms?
12. The UN Charter states that promoting respect for human rights is one of the fundamental purposes of the UN.

True *False*

13. The UN has recognized that civil and political rights are the most important human rights.

True *False*

14. Examine the following statement: “The Special Rapporteur on Torture has been established under the Convention against Torture, and can deal only with cases of alleged torture in countries that have ratified the Convention against Torture.”

True *False*

15. The newly created Human Rights Council reports to:

- a) ECOSOC
- b) The Security Council
- c) The General Assembly

16. The Sub-Commission on the Promotion and Protection of Human Rights is composed of government representatives.

True *False*

17. The Human Rights Council is the treaty body that supervises compliance with the International Covenant on Civil and Political Rights (ICCPR).

True *False*

18. In time of a public emergency, the State can, in compliance with some formal requirements, derogate all human rights.

True *False*

19. List five UN treaty bodies dealing with human rights.

20. What are the main differences between a “mechanism” to protect human rights established by the Commission on Human Rights and the treaty bodies set up by human rights treaties?

21. Complete the following sentence with the most correct phrase chosen from the list provided: Refugees are foreigners in the asylum country...

- a. so the government is not obliged to respect their human rights.
- b. but nevertheless, in general, under international human rights law they enjoy the same rights and freedoms as nationals.
- c. and by leaving their own country have forfeited most of their human rights.

22. Complete the following sentence with the most correct phrase chosen from the list provided: The prohibitions against slavery, extrajudicial killing, torture, and genocide in international law...
- are unnecessary since such violations rarely occur.
 - are not absolute and are subject to limitations.
 - are part of customary international law, and therefore binding on all States.
23. Complete the following sentence with the most correct phrase chosen from the list provided: A State may derogate from its human rights obligations...
- Whenever the authorities feel it is necessary.
 - Only when there is a public emergency threatening the life of the nation, and certain other conditions are met.
 - Only if the Security Council allows the State to do so.
24. Complete the following sentence with the most correct phrase chosen from the list provided: General Comments or General Recommendations of UN treaty bodies are “soft-law” so...
- they are not legally binding on States Parties and States do not need to consider them.
 - they are not legally binding on States Parties but generally they are considered to be authoritative statements of the law and a source of the specific scope and content of the rights.
 - They are legally binding and generally States comply with them.
 - They are legally binding, but if States do not comply with them there is no mechanism for their enforcement.
25. List three Special Procedures of the Human Rights Council particularly relevant to the work of UNHCR.
26. What are the two main advantages of trying to secure protection of human rights at the regional level?
27. The human rights treaties and bodies established at the regional level in Africa, the Americas, and Europe all provide for a right for individuals to submit complaints alleging violations of treaty obligations.
- True* *False*
28. Since the adoption of the ACHR (“Pact of San José”), the older American Declaration of the Rights and Duties of Man is no longer of importance.

True *False*

29. After Protocol No. 11 to the ECHR entered into force in 1998, the supervisory mechanism was simplified and the European Commission on Human Rights was abolished.

True *False*

FURTHER READING

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- Steiner, H. and Alston, P., *International Human Rights in Context*, Oxford University Press, second edition, 2000.

ANSWER SHEET

1. False
2. The sources of international law are international conventions; international custom; general principles of law; and judicial decisions and the teaching of publicists as subsidiary means.
3. When the treaty does not allow for reservations; and if a reservation is permitted under the treaty, the reservation made is incompatible with the object and purpose of the treaty.
4. In order to be permitted, restrictions or limitations in the enjoyment of human rights must comply with the following requirements: restrictions must be based on a law; restrictions must be necessary; restrictions must comply with the principle of proportionality; and restrictions must be justified by the protection of a strictly limited set of well-defined public interests, such as national security, public order, the protection of health or morals, and the protection of the rights and freedoms of others.
5. Examples of non-derogable rights are: the right to life; the right not to be subject to torture and other forms of ill-treatment; the right to freedom of thought, conscience, and religion; the right not to be held in slavery; and the right not to be taken hostage, abducted or subjected to *incommunicado* detention.
6. (a) (the more generous provision)
7. The three levels are: 1. Obligation to respect: This level requires the State to refrain from any measure that may deprive individuals of the enjoyment of their rights or of the ability to satisfy those rights by their own efforts. 2. Obligation to protect: This level requires the State to prevent violations of human rights by third parties. 3. Obligation to fulfil: this level requires the State to ensure that persons within its jurisdiction can satisfy their basic needs, as recognized in human rights instruments, which cannot be secured by personal efforts.
8. False
9. False. See Article 27 of the VCLT.
10. False
11. The decisions of the regional Court are formally binding on the States Parties to the relevant treaties.
12. True
13. False. All rights are equally important. They are interdependent and interrelated as set out in the Vienna Declaration and Plan of Action.
14. False. The Special Rapporteur on Torture is a charter-based mechanism.
15. c) See General Assembly. GA Resolution 60/251, OP 5(j).
16. False. The Sub-Commission is composed of independent experts.

17. False. The Human Rights Council is a Charter-based body. The body that supervises compliance with the International Covenant on Civil and Political Rights (ICCPR) is the Human Rights Committee.
18. False
19. Five UN treaty bodies dealing with human rights are: the Human Rights Committee, the Committee against Torture, the Committee on Economic, Social and Cultural Rights, the Committee on the Rights of the Child, the Committee for the Elimination of Discrimination against Women, and the Committee for the Elimination of Racial Discrimination.
20. The main differences are that: Treaty bodies can only deal with States Parties to the treaty while the mechanisms can deal with issues within their mandates in any UN Member State; generally, mechanisms do not require the exhaustion of domestic remedies as do treaty-based complaints procedures; and mechanisms are generally not designed to provide remedies for individual cases, but rather to monitor respect for human rights throughout the world and report on it.
21. (b) Nevertheless, under international human rights law they enjoy the same rights and freedoms as nationals.
22. (c) They are part of customary international law and therefore binding on all States.
23. (b) Only when there is a public emergency threatening the life of the nation, and certain other conditions are met.
24. (b) They are not legally binding on States Parties, but they are generally considered to be authoritative statements of the law and a source of the specific scope and content of the rights.
25. *See* Sub-Section 5.2.1.1.1 “Special procedures” most relevant to the work of UNHCR, including procedures offering urgent appeal procedures.
26. The two main advantages of trying to secure protection of human rights at the regional level are: 1. It may be easier for States to agree on detailed provisions because of a common approach to certain issues; and 2. States might be more willing to grant effective investigation and adjudication powers to regional bodies.
27. True
28. False
29. True

