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Inter-Parliamentary Union

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# Human Rights

**Handbook for Parliamentarians N° 26**

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The principle of universality of human rights is the cornerstone of international human rights law. International human rights law lays down obligations of governments to act in certain ways or to refrain from certain acts in order to promote and protect human rights and fundamental freedoms of all individuals or groups. © Anadolu Agency/Serap Aydin

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<sup>1</sup> The policy of OHCHR is not to attribute authorship of publications to individuals.

# Foreword

Human rights are the bedrock principles which underpin all societies where there is rule of law and democracy. Since the end of World War II, the core importance of human rights has been universally acknowledged. Today, against a backdrop of multiple conflicts, humanitarian emergencies and severe violations of international law, it is all the more essential that policy responses be firmly grounded in human rights, and that States comply with the binding obligations they have contracted when ratifying international human rights treaties. From the fight against violent extremism to the struggle to eliminate poverty and our approach to managing migration, international human rights law provides an essential framework and guidance to responsible and sustainable policy-making.

Parliamentarians have a deep connection to people's concerns. At a time when our societies are increasingly divided, parliaments can promote the essential values of respect, dialogue and compromise. There can be no place for discriminatory and xenophobic rhetoric, which scars societies and pushes communities to grow further apart. Parliaments that truly represent the full diversity of their society, adopt effective legislation, and hold their governments to account can powerfully shape a positive and inclusive future for their countries.

The Human Rights Handbook for Parliamentarians is based on the conviction that parliaments and their members can play a key role in delivering concretely on human rights. It is a joint initiative of the Inter-Parliamentary Union and the Office of the United Nations High Commissioner for Human Rights. With brief presentations of the international human rights legal framework and international mechanisms which oversee its implementation at the national level, the Handbook looks at how parliaments can contribute to greater human rights protection.

The first edition of this Handbook was issued more than ten years ago. This long-awaited update includes references to new human rights instruments and mechanisms, and to new challenges, opportunities and threats.

The United Nations and its human rights mechanisms, in particular the Human Rights Council and the Committee on the Elimination of All Forms of Discrimination against Women are increasingly reaching out to members of parliament, recognising that their support is essential to ensuring real and meaningful change for people's lives across the globe. It is the hope of both our organizations that the women and men of every national parliament will use this Handbook to guide their work to deliver that change.



Martin Chungong  
Secretary General  
Inter-Parliamentary Union



Zeid Ra'ad Al Hussein  
United Nations  
High Commissioner for Human Rights

# Abbreviations

ACHPR	African Commission on Human and Peoples' Rights
ACHR	American Convention on Human Rights
AHRD	ASEAN Human Rights Declaration
AICHR	ASEAN Intergovernmental Commission on Human Rights
APF	Asia Pacific Forum of National Human Rights Institutions
APIC	Agreement on the Privileges and Immunities of the Court (International Criminal Court)
ASEAN	Association of Southeast Asian Nations
AU	African Union
CAT	Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
CAT-Committee	Committee against Torture
CED	International Convention for the Protection of All Persons from Enforced Disappearance
CED-Committee	Committee on Enforced Disappearances
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women
CEDAW-Committee	Committee on the Elimination of Discrimination against Women
CERD	International Convention on the Elimination of All Forms of Racial Discrimination
CERD-Committee	Committee on the Elimination of Racial Discrimination
CESCR-Committee	Committee on Economic, Social and Cultural Rights
CMW-Committee	Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families
COHRE	Centre on Housing Rights and Evictions
CPT	European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment
CRC	Convention on the Rights of the Child

CRC-Committee	Committee on the Rights of the Child
CRPD	Convention on the Rights of Persons with Disabilities
CRPD-Committee	Committee on the Rights of Persons with Disabilities
ECCC	Extraordinary Chambers in the Courts of Cambodia
ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms
ECOSOC	United Nations Economic and Social Council
ECOWAS	Economic Community of West African States
ECRI	European Commission against Racism and Intolerance
ECtHR	European Court of Human Rights
ESCR	Economic, social and cultural rights
EU	European Union
FAO	UN Food and Agriculture Organization
HLPF	High-level Political Forum on Sustainable Development
HRC	Human Rights Council
HRCtee	Human Rights Committee (UN body in charge of monitoring implementation of the ICCPR)
IACHR	Inter-American Commission on Human Rights
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICERD	International Convention on the Elimination of All Forms of Racial Discrimination
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICJ	International Court of Justice
ICPPED	International Convention for the Protection of All Persons from Enforced Disappearance
ICRMW	International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (known as the Migrant Workers Convention)
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
ILO	International Labour Organization

IMF	International Monetary Fund
IPHRC	Independent Permanent Human Rights Commission
LAS	League of Arab States
MDGs	Millennium Development Goals
NGO	Non-governmental organization
NHRIls	National human rights institutions
OAS	Organization of American States
OHCHR	Office of the United Nations High Commissioner for Human Rights
OIC	Organization of Islamic Cooperation
OPCAT	Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
OP-CEDAW	Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women
OP-CRPD	Optional Protocol to the Convention on the Rights of Persons with Disabilities
OP-ICESCR	Optional Protocol to the International Covenant on Economic, Social and Cultural Rights
OSCE	Organization for Security and Cooperation in Europe
OP-ICCPR	Optional Protocol to the International Covenant on Civil and Political Rights
PRSPs	Poverty reduction strategy papers
R2P	Responsibility to Protect
SAARC	South Asian Association for Regional Cooperation
SADC	Southern African Development Community
SCA	Subcommittee on Accreditation
SCSL	Special Court for Sierra Leone
SDGs	Sustainable Development Goals
SPT	Subcommittee on Prevention of Torture and other Cruel, Inhuman or Degrading Treatment or Punishment
STL	Special Tribunal for Lebanon
STP	Socialist Party of Turkey
TRIPS	Trade-related Aspects of Intellectual Property Rights
UDHR	Universal Declaration of Human Rights

UN	United Nations
UNDP	United Nations Development Programme
UNESCO	United Nations Educational, Scientific and Cultural Organization
UNFPA	United Nations Population Fund
UN-Habitat	United Nations Human Settlements Programme
UNICEF	United Nations Children's Fund
UPR	Universal Periodic Review
WIPO	World Intellectual Property Organization
WTO	World Trade Organization

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tal serà obligatòria. L'ensenyament tècnic i professional es posarà a l'abast de tothom, i l'accés al senyament superior serà igual per a tots en funció dels mèrits respectius. 2 L'educació tendirà al desenvolupament de la personalitat humana i a l'enfortiment del respecte als drets humans i les llibertats fonamentals, promourà la comprensió, la tolerància i l'amistat entre totes les nacions i els ètnics o religiosos, i fomentarà les activitats de les Nacions Unides per al manteniment de la pau i la mare tenen dret preferent d'escollar la mena d'educació que serà donada als seus fills. Article 27 Everyone has the right freely to participate in the cultural life of the community, to enjoy arts and to share in scientific advancement and its benefits. 2 Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author. Article 28 Toda persona tiene derecho a que se establezca un orden social acional en el que los derechos y libertades proclamados en esta Declaración se hagan efectivos. Article 29 Toda persona té deures envers la comunitat, ja que només en aquesta es posible el lliure i ple desenvolupament de la seva personalitat. 2 En l'exercici dels drets i les llibertats, tothom estarà sotmès a les limitacions estableties per la llei i únicament amb finalitat d'assegurar el reconeixement i respecte deguts als drets i llibertats dels altres i de cumplir les exigències de la moral, l'ordre públic i del benestar general en una societat democràtica. Article 30 Nothing in this Declaration may be interpreted as implying for any State any right to engage in any activity or to perform any act aimed at the destruction of any rights and freedoms set forth herein. © United Nations Photo. Getty Images. Doctoral Union of Social Democratic Party. The University College of Human Rights

## Chapter 1

# What are human rights?

An illuminated panel bearing the words of the Universal Declaration of Human Rights at the Barcelona International Convention Centre.  
© AFP/Adrian Dennis

### Definition

**Human rights are rights that every human being has by virtue of his or her human dignity**

Human rights are rights inherent to all human beings. They define relationships between individuals and power structures, especially the State. Human rights delimit State power and, at the same time, require States to take positive measures ensuring an environment that enables all people to enjoy their human rights. History in the past 250 years has been shaped by the struggle to create such an environment. Starting with the French and American revolutions in the late eighteenth century, the idea of human rights has driven many revolutionary movements for empowerment and for control over the wielders of power, governments in particular.

**Human rights are the sum of individual and collective rights laid down in State constitutions and international law**

Governments and other duty bearers are under an obligation to respect, protect and fulfil human rights, which form the basis for legal entitlements and remedies in case of non-

fulfilment (see Chapter 2). In fact, the possibility to press claims and demand redress differentiates human rights from the precepts of ethical or religious value systems. From a legal standpoint, human rights can be defined as the sum of individual and collective rights recognized by sovereign States and enshrined in national legislation and in international human rights norms. Since the Second World War, the United Nations has played a leading role in defining and advancing human rights, which until then had developed mainly within the nation State. As a result, human rights have been codified in various international and regional treaties and instruments that have been ratified by most countries. Today they represent the only universally recognized value system.

## **Human rights are manifold**

Human rights pertain to all aspects of life. Their exercise enables all individuals to shape and determine their own lives in liberty, equality and respect for human dignity. Human rights encompass civil, political, economic, social, and cultural rights, as well as the collective rights of peoples (see Box 1).

### **Box 1 Examples of human rights**

#### **In the area of civil and political rights**

- Right to life
- Freedom from torture and cruel, inhuman or degrading treatment or punishment
- Freedom from slavery, servitude and forced labour
- Right to liberty and security of person
- Right of detained persons to be treated with humanity
- Freedom of movement
- Right to a fair trial
- Prohibition of retroactive criminal laws
- Right to recognition as a person before the law
- Right to privacy
- Freedom of thought, conscience and religion
- Freedom of opinion and expression
- Prohibition of propaganda for war and of incitement to national, racial or religious hatred
- Freedom of assembly
- Freedom of association
- Right to marry and found a family
- Right to take part in the conduct of public affairs, vote, be elected and have access to public office

### **In the area of economic, social and cultural rights**

- Right to work
- Right to just and favourable conditions of work
- Right to form and join trade unions
- Right to social security
- Protection of the family
- Right to an adequate standard of living, including adequate food, clothing and housing
- Right to health
- Right to education

### **In the area of collective rights**

- Right of peoples to:
  - Self-determination
  - Development
  - Free use of their wealth and natural resources
  - Peace
  - A healthy environment
- Other collective rights:
  - Rights of national, ethnic, religious and linguistic minorities
  - Rights of indigenous peoples

## **Basic human rights principles**

### **Human rights are universal**

**“Human rights are foreign to no culture and native to all nations; they are universal.”**

*Kofi A. Annan, former Secretary-General of the United Nations, Address at the University of Tehran on Human Rights Day, 10 December 1997.*

Human rights are universal because they are based on every human being's dignity, irrespective of race, colour, sex, ethnic or social origin, religion, language, nationality, age, sexual orientation, disability or any other distinguishing characteristic. Since they are accepted by all States and peoples, they apply equally and indiscriminately to every person and are the same for everyone everywhere.

## **Box 2 Human rights: a Western concept?**

The universality of human rights has sometimes been challenged on the grounds that they are a Western notion, part of a neocolonial attitude that is propagated worldwide. A study published by the United Nations Educational, Scientific and Cultural Organization (UNESCO) in 1968<sup>1</sup> clearly showed that the profound aspirations underlying human rights correspond to concepts – the concepts of justice, an individual's integrity and dignity, freedom from oppression and persecution, and individual participation in collective endeavours – that are encountered in all civilizations and periods. Nevertheless, assertions that human rights are not universal still appear in a variety of contexts. For example, States have often questioned the universality of human rights in justifying violations of women's human rights in the name of culture. These practices are often based on harmful stereotypes regarding women's role in society, and the obligation to eliminate such stereotypes and prejudices is clear under international human rights law. A human rights perspective recognizes that culture changes over time, and also interrogates whether women exercise influence in decision-making processes which define the culture of any given community. Today, the universality of human rights is borne out by the fact that the majority of nations, covering the full spectrum of cultural, religious and political traditions, have adopted and ratified the main international human rights instruments.

### **Human rights are inalienable**

Human rights are inalienable insofar as no person may be divested of his or her human rights, save under clearly defined legal circumstances. For instance, a person's right to liberty may be restricted if he or she is found guilty of a crime by a court of law at the closure of a fair trial.

### **Human rights are indivisible and interdependent**

Human rights are indivisible and interdependent. Because each human right entails and depends on other human rights, violating one such right affects the exercise of other human rights. For example, the right to life presupposes respect for the right to food and to an adequate standard of living. Denial of the right to basic education may affect a person's access to justice and participation in public life. The promotion and protection of economic and social rights presupposes freedom of expression, of peaceful assembly and of association. Accordingly, civil, cultural, economic, political and social rights are complementary and equally essential to the dignity and integrity of every person. Moreover, respect for all rights is a prerequisite to sustainable peace and development.

The international community affirmed the holistic concept of human rights at the World Conference on Human Rights, held in Vienna in 1993.

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<sup>1</sup> *Le Droit d'être un homme*, anthology of texts prepared under the direction of Jeanne Hersch, UNESCO and Robert Laffont, 1968.

**"All human rights are universal, indivisible and interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis. While the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind, it is the duty of States, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms."**

*World Conference on Human Rights, Vienna, 1993,  
Vienna Declaration and Programme of Action,  
paragraph 5.*

### **Box 3 Civil, cultural, economic, political and social rights are universal, indivisible and interrelated**

Amartya Sen, Nobel Laureate in economics, has provided empirical proof that all human rights are indivisible and interdependent. In his research on famines, for instance, he found that there is a clear and unequivocal link between famine, governance and respect for all human rights, among rich and poor countries alike. When governments respect civil and political rights, people are able to voice their concerns and the media can raise awareness of the risk of famine. Consequently, leaders are aware of the dangers of ignoring such risks and are more likely to be held accountable for their policies, including those affecting economic, social and cultural rights.<sup>2</sup>

### **The right to equality and the prohibition of discrimination**

Some of the worst human rights violations have resulted from discrimination against specific groups. The right to equality and the prohibition of discrimination, explicitly set out in international and regional human rights treaties, are therefore central to the protection of all human rights. The right to equality obliges States to ensure observance of human rights without discrimination on any grounds, including sex, race, colour, language, religion, political or other opinion, national, ethnic or social origin, membership of a national minority, property, birth, age, disability, sexual orientation and social or other status. Moreover, it is important to note that discrimination is constituted not simply by an unjustifiable "distinction, exclusion or restriction" but also by an unjustifiable "preference" in respect of certain groups. The fight against discrimination remains a struggle for many people around the globe today.

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<sup>2</sup> Amartya Sen, *Poverty and Famines: An Essay on Entitlements and Deprivation*, Oxford, Clarendon Press, 1982.

#### **Box 4 Right to equality and prohibition of discrimination**

- Non-discrimination is a pillar of human rights.
- Differentiation in law must be based on difference in facts.
- Distinctions require reasonable and objective justification.
- The principle of proportionality must be observed.
- Characteristics that have been – and still are – used as grounds for discrimination include sex, race, colour, language, religion, political or other opinion, national, ethnic or social origin, membership of a national minority, property, birth, age, disability, sexual orientation and social or other status.

#### *Difference in fact may justify difference in law*

Not every differentiation constitutes discrimination. Factual or legal distinctions based on **reasonable and objective criteria** may be justifiable. The burden of proof falls on governments: they must show that any distinctions that are applied are actually reasonable and objective.

#### **Box 5 Justified differentiation with regard to employment**

Two European Union directives on racial equality and equality in employment<sup>3</sup> allow governments to authorize differentiated treatment in certain circumstances. Differentiation is thus allowed in a small number of cases involving jobs whose performance actually requires distinction on such grounds as racial or ethnic origin, religion or belief, disability, age or sexual orientation. Examples include acting and modelling jobs, where authenticity or realism may require performers to be of a particular origin or age, and some positions in church or similar organizations which involve contact with the public and (unlike other jobs in the same bodies, such as office work or catering) should be staffed with persons of a given confession or belief.

#### *Specific instruments for certain groups*

The principles of equality, universality and non-discrimination do not preclude recognizing that members of specific groups may need particular protection. Specific human rights instruments and mechanisms have been designed to protect the rights of women as well as certain groups, such as aliens, stateless persons, refugees, displaced persons, minorities, indigenous peoples, children, persons with disabilities, lesbian, gay, bisexual and transgender persons, persons with albinism, migrant workers and detainees.

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<sup>3</sup> Council directives 2000/43/EC of 29 June 2000, implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, and 2000/78/EC of 27 November 2000, establishing a general framework for equal treatment in employment and occupation.

## **Box 6 Rights of indigenous peoples**

According to Article 32 of the United Nations Declaration on the Rights of Indigenous Peoples (A/RES/61/295 September 2007), States must obtain the free and informed consent of indigenous peoples prior to the approval of any project affecting their lands and territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources.

## **Box 7 Rights of persons with disabilities**

In the United Kingdom, the Equality Act of 2010 obliges employers and service providers to make “reasonable adjustments” to work organization and premises to accommodate disabled workers. The Act contains a detailed list of the types of measures required.

In Costa Rica, the Law on Equality of Opportunities for Persons with Disabilities of 1996 established the obligation of priority training for persons with disabilities over 18 years old, who, as a consequence of their disability, would not have had access to education.

In Ecuador, the Organic Law on Disabilities of 2012 established that the State shall adopt affirmative measures and actions in the design and implementation of public policies to guarantee the full exercise of the rights of persons with disabilities.

### *Temporary special measures*

To redress the long-term effects of past discrimination, temporary special measures may be necessary. The Committee on the Elimination of Racial Discrimination<sup>4</sup> states that “[t]he concept of special measures is based on the principle that laws, policies and practices adopted and implemented in order to fulfil obligations under the Convention [on the Elimination of all Forms of Racial Discrimination] require supplementing, when circumstances warrant, by the adoption of temporary special measures designed to secure to disadvantaged groups the full and equal enjoyment of human rights and fundamental freedoms.”<sup>5</sup>

The Committee on the Elimination of Discrimination Against Women (CEDAW-Committee)<sup>6</sup> defines such measures as “a wide variety of legislative, executive, administrative and other regulatory instruments, policies and practices, such as

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<sup>4</sup> The bodies that monitor the implementation of international human rights instruments elaborate on the various rights and corresponding State obligations in “general recommendations” and “general comments”. For further details see Chapter 5.

<sup>5</sup> General recommendation No. 32 on the meaning and scope of special measures in the International Convention on the Elimination of All Forms of Racial Discrimination (2009).

<sup>6</sup> For further information on the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) and parliaments, see *The Convention on the Elimination of All Forms of Discrimination against Women and its Optional Protocol: a Handbook for Parliamentarians*, Geneva, IPU, 2003.

outreach or support programmes; allocation and/or reallocation of resources; preferential treatment; targeted recruitment, hiring and promotion; numerical goals connected with time frames; and quota systems".<sup>7</sup>

For instance, temporary quota systems designed to give women preferential treatment regarding access to specific jobs, political decision-making bodies or university education can be considered as affirmative action aimed at accelerating the attainment of actual gender equality in areas where women have traditionally been underrepresented and have suffered from discrimination. Under article 4 of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), these temporary measures are encouraged and shall, therefore, not be considered as discrimination against men. However, as soon as the objectives of equality of opportunity and treatment have been achieved, these measures must be discontinued; otherwise, they would constitute unjustified privileges for women and, consequently, discrimination against men.

According to general recommendation No. 25 of the CEDAW-Committee, no proof of past discrimination is necessary for such measures to be taken: "While the application of temporary special measures often remedies the effects of past discrimination against women, the obligation of States Parties under the Convention to improve the position of women to one of de facto or substantive equality with men exists irrespective of any proof of past discrimination".<sup>8</sup>

#### **Box 8    Temporary special measures: an example**

It should be stressed that discrimination based on gender is not limited to women. For instance, in Norway, the Gender Equality Ombudsman focused on men in the context of gender equality. As a result, the maternity leave legislation has been amended to extend rights to them. One change has been that four weeks of the leave period are now reserved for the father. If he fails to use that entitlement, known as the "father's quota", the family loses its entitlement to that part of the leave. The "father's quota" was introduced in 1993, and in the next two years the percentage of new fathers taking paternity leave increased from 45 to 70 per cent. The Ombudsman further proposed positive action in favour of men in a limited number of care-related occupations in order to activate men's potential in that area and thereby counteract strict gender segregation in that labour market segment, and to provide children with a less stereotyped concept of gender roles.

<sup>7</sup> General recommendation No. 25 on Article 4, paragraph 1, of the Convention on the Elimination of All Forms of Discrimination against Women, on temporary special measures (2004).

<sup>8</sup> Ibid.

# Human rights and State sovereignty

**"The promotion and protection of all human rights and fundamental freedoms must be considered as a priority objective of the United Nations in accordance with its purposes and principles, in particular the purpose of international cooperation. In the framework of these purposes and principles, the promotion and protection of all human rights is a legitimate concern of the international community."**

*World Conference on Human Rights, Vienna, 1993,  
Vienna Declaration and Programme of Action,  
paragraph 4.*

In the past, when human rights were still regarded as a country's internal affair, other States and the international community were prevented from interfering, even in the most serious cases of human rights violations, such as genocide. That approach, based on national sovereignty, was challenged in the twentieth century, especially as a consequence of the actions of Nazi Germany and the atrocities committed during the Second World War – and subsequently by the international community's failure to prevent mass atrocities in Cambodia, Rwanda and Bosnia and Herzegovina. Today, the concept of sovereignty as prohibiting foreign interference has been largely replaced by one of responsibility, making States accountable for the welfare of their people.

## The Responsibility to Protect

On 16 September 2005, the heads of States and government gathered at the 2005 World Summit held in the framework of the General Assembly unanimously approved the principles forming the Responsibility to Protect (R2P). Paragraph 138 of the 2005 World Summit Outcome Document (A/RES/60/1), adopted without a vote, emphasizes that each individual State has the responsibility to protect its population from genocide, war crimes, ethnic cleansing and crimes against humanity. This means preventing such crimes, or their incitement, through appropriate and necessary means. The Outcome Document also stresses that the international community should encourage and help States to exercise this responsibility. In paragraph 139, world leaders recognized the international community's responsibility to use appropriate diplomatic, humanitarian and other peaceful means, through the United Nations, in accordance with Chapters VI and VIII of the Charter, to help protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity. According to the same paragraph, if such peaceful means prove inadequate, and national authorities still manifestly fail to protect their populations from such crimes, the international community is committed to taking "collective action" through the Security Council, "in a timely and decisive manner" – on a case-by-case basis and in cooperation with relevant regional organizations, as appropriate – in accordance with the Charter,

including Chapter VII. Such action can involve coercive measures, including sanctions and, as a last resort, military force.

The Secretary-General (see A/63/677) summarized the World Summit's commitments as representing three non-sequential and equally important pillars: "protection responsibilities of the State" (Pillar 1), "international assistance and capacity-building" (Pillar 2), and "timely and decisive response" (Pillar 3).

The United Nations Security Council reaffirmed the principles of the responsibility to protect, as set out in the 2005 World Summit Outcome Document, in its Resolution 1674 (2006) on the protection of civilians. In 2011, it invoked R2P in Resolutions 1970 and 1973, on the situation in Libya; Resolution 1975, on the situation in Côte d'Ivoire; Resolution 1996, on the situation in South Sudan; and Resolution 2014, on the situation in Yemen. Resolution 1973 in particular authorized "all necessary measures ... to protect civilians and civilian populated areas under threat."

The first instances in which the United Nations Human Rights Council called on a State to meet "its responsibility to protect its population" were in resolutions adopted during special sessions on Libya (see A/HRC/RES/S-15/1) and Syria (A/HRC/RES/S-18/1). Three Human Rights Council resolutions – A/HRC/RES/19/22, A/HRC/RES/20/22 and A/HRC/RES/21/26 – go a step further, indicating that "the Syrian authorities have manifestly failed in their responsibility to protect the Syrian population." The Human Rights Council also issued resolutions condemning the violations perpetrated in these situations, set up commissions of inquiry and, in the case of Syria, dispatched an OHCHR fact-finding mission.

R2P breaks new conceptual ground by establishing a set of principles that provide guidance on how to effectively respond, while upholding the UN Charter, when human rights are most at risk. Rather than establishing a discretionary right for individual states to intervene (as intended by the "right to humanitarian intervention"), R2P makes the international community as a whole responsible for using all the means prescribed – and circumscribed – by the UN Charter to prevent and respond to the most egregious violations. R2P rests on an undisputed obligation under international law: that of preventing genocide under the Convention on the Prevention and Suppression of the Crime of Genocide, which also reflects customary international law.

From a parliamentary perspective, the Assembly of the Inter-Parliamentary Union recognized that parliaments around the world should consider ways and means to apply and implement R2P in a timely, consistent and effective manner in order to avoid a situation where the international community is deadlocked over whether and how to act to prevent or stop the massacre of civilians.<sup>9</sup>

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<sup>9</sup> Resolution: Enforcing the responsibility to protect: the role of parliament in safeguarding civilians' lives, adopted by the 128th IPU Assembly, Quito, 27 March 2013.

# Democracy, human rights and parliaments

**"As an ideal, democracy aims essentially to preserve and promote the dignity and fundamental rights of the individual, to achieve social justice, foster the economic and social development of the community, strengthen the cohesion of society and enhance national tranquillity, as well as to create a climate that is favourable for international peace. As a form of government, democracy is the best way of achieving these objectives; it is also the only political system that has the capacity for self-correction."**

*Inter-Parliamentary Union, Universal Declaration on Democracy, Cairo, September 1997, paragraph 3.*

In the past decade, the interrelationship between democracy and human rights was studied extensively. Democracy is no longer considered as a mere set of procedural rules for the exercise of political power, but also, along with human rights, as a way of preserving and promoting the dignity of the person. In 1995, the Inter-Parliamentary Union embarked on the process of drafting a Universal Declaration on Democracy to advance international standards and to contribute to ongoing democratization worldwide. In the Declaration, adopted in 1997, democracy and human rights are inseparably linked.

While the expression of democracy can differ according to specific contexts, its core values are universal. They are enshrined in the Universal Declaration of Human Rights (UDHR) and the International Covenant on Civil and Political Rights (ICCPR). Both the Declaration and the Covenant provide for rights that any democracy should promote and protect, and on which all democracies should be based. These include in particular the rights to freedom of expression, association and peaceful assembly; the right to participate in political life and decision-making processes; and the rights to access to justice, fair trial and remedies for human rights violations.

In addition, strong and accountable institutions, and transparent and inclusive decision-making processes, constitute prerequisites for a legitimate and effective system of democratic governance that is respectful of human rights. Parliaments – sovereign bodies constituted through regular elections to ensure government of the people, for the people and by the people – are a key institution in a democracy. As the body competent to legislate and to keep the policies and actions of the executive branch under constant scrutiny, parliament also plays a key role in the promotion and protection of human rights. Furthermore, parliaments establish the legal framework that

guarantees the rule of law, a cornerstone of democracy and human rights protection.<sup>10</sup> For all these reasons, parliaments are crucial to democracy and human rights.

#### Further reading

- Handbook for Parliamentarians on the Convention on the Rights of Persons with Disabilities (2007), <http://www.ipu.org/PDF/publications/disabilities-e.pdf>
- Implementing the UN Declaration on the Rights of Indigenous Peoples, Handbook for Parliamentarians No. 23 (2014), <http://www.ipu.org/PDF/publications/indigenous-en.pdf>

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<sup>10</sup> "For the United Nations system, the rule of law is a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency"; Guidance Note of the Secretary-General on the UN Approach to Rule of Law Assistance.



## Chapter 2

### Which State obligations arise from human rights?

As international law currently stands, *States are the primary duty-bearers of human rights obligations*. In principle, however, human rights can be violated by any person or group, and in fact, human rights abuses committed by non-State actors (such as business enterprises, organized criminal groups, terrorists, guerrilla and paramilitary forces and intergovernmental organizations) are on the increase.

International human rights treaties and customary law impose three obligations on States: the duty to respect; the duty to protect; and the duty to fulfil. While the balance between these obligations may vary according to the rights involved, they apply to all civil, political, economic, social and cultural rights. Moreover, States have a duty to provide a remedy at the domestic level for human rights violations.

Article 19 of The Universal Declaration of Human Rights states that "Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers".  
© Nur Photo/Chris Jung

## What does the “obligation to respect” mean?

The “obligation to respect” means that States are obliged to refrain from interfering in the enjoyment of rights by individuals and groups. It prohibits State actions that may undermine the enjoyment of rights. For example, with regard to the right to education, it means that governments must respect the liberty of parents to establish private schools and to ensure the religious and moral education of their children in accordance with their own convictions.

## What does the “obligation to protect” mean?

The “obligation to protect” requires States to protect individuals against abuses by non-State actors, foreign State agents, or State agents acting outside of their official capacity. The obligation entails both a preventative and remedial dimension. A State is thus obliged to enact legislation protecting human rights; to take action to protect individuals when it is aware (or could have been aware) of threats to their human rights; and also to ensure access to impartial legal remedies when human rights violations are alleged (see below). Once again, the right to education can serve as an example. The right of children to education must be protected by the State from interference and indoctrination by third parties, including parents and the family, teachers and the school, religions, sects, clans and business firms.

States enjoy a margin of discretion with respect to the obligation to protect. For instance, the right to personal integrity and security obliges States to combat the widespread phenomenon of domestic violence against women and children. States have a responsibility to take positive measures – in the form of pertinent criminal, civil, family or administrative laws, police and judiciary training or general awareness raising – to reduce the incidence of domestic violence.

The obligation of the State to protect against violations committed by non-State actors is particularly pertinent in the area of women’s rights. For many years, rampant violence against women was not considered a human rights violation if committed by private actors within the “private sphere” of the home, in the form of domestic violence – even where the nature of the violence might be tantamount to torture – or, if occurring in the public sphere, even though its scale might rise to the level of a public emergency. This early neglect of women’s experience reflected a male bias in the development of human rights law and contributed to impunity for such human rights violations against women. Since then, over the past 20 years, the State’s obligation to protect women’s human rights has been well established. This includes the duty to protect women from violations committed by third parties – in the public or private sphere – and to take positive steps to fulfil their human rights.

# What does the “obligation to fulfil” mean?

According to the “obligation to fulfil”, States are required to take positive action to ensure that human rights can be realized. The extent of the obligation to fulfil varies according to the right concerned and the State’s available resources. Generally speaking, however, States should create “the legal, institutional and procedural conditions that rights holders need in order to realize and enjoy their rights in full.”<sup>1</sup> In respect of the right to education, for instance, States must provide ways and means for free and compulsory primary education for all, free secondary education, higher education, vocational training, adult education, and the elimination of illiteracy (including such steps as setting up enough public schools or hiring and remunerating an adequate number of teachers).

## **Box 9 The State’s obligation to respect, protect and fulfil: examples**

### **Right to life**

- Respect The police shall not intentionally take the life of a suspect to prevent his or her escape.
- Protect Life-threatening attacks by an individual against other persons (attempted homicide) shall be crimes carrying appropriate penalties under domestic criminal law. The police shall duly investigate such crimes in order to bring the perpetrators to justice.
- Fulfil The authorities shall take legislative and administrative measures to progressively reduce child mortality and other types of mortality whose underlying causes can be combated.

### **Prohibition of torture or cruel, inhuman or degrading treatment or punishment**

- Respect The police shall not use torture in questioning detainees.
- Protect The authorities shall take legislative and other measures against domestic violence.
- Fulfil The authorities shall train police officers in acceptable methods of questioning.

### **Right to vote**

- Respect The authorities shall not interfere with the voting procedure and shall respect the election results.
- Protect The authorities shall organize voting by secret ballot to preclude threats by persons in power (such as politicians, heads of clan or family or employers).

<sup>1</sup> Walter Kalin and Jorg Kunzli, *The Law of International Human Rights Protection*, Oxford, Oxford University Press, 2009, 112.

Fulfil The authorities shall organize free and fair elections and ensure that as many citizens as possible can vote.

### **Right to education**

Respect The authorities shall respect the liberty of parents to choose schools for their children.

Protect The authorities shall ensure that third parties, including parents, do not prevent girls from going to school.

Fulfil The authorities shall take positive measures to ensure that education is culturally appropriate for minorities and indigenous peoples, and of good quality for all.

### **Right to health**

Respect The authorities shall not restrict the right to health (inter alia through forced sterilization or medical experimentation).

Protect Female genital mutilation shall be prohibited and eradicated.

Fulfil An adequate number of hospitals and other public health-care facilities shall provide services equally accessible to all.

### **Right to food**

Respect The authorities shall refrain from any measures that would prevent access to adequate food (for instance, arbitrary eviction from land).

Protect The authorities shall adopt laws or take other measures to prevent powerful people or organizations from violating the right to food (such as a company polluting the water supply or a landowner evicting peasants).

Fulfil The authorities shall implement policies – such as agrarian reform – to ensure the population's access to adequate food and the capacity of vulnerable groups to feed themselves.

## **The principle of progressive realization**

The principle of progressive realization applies to the positive State obligations to fulfil and to protect human rights, in particular economic, social and cultural rights. The human right to health, for example, does not guarantee the right of everyone to be healthy. However, it does oblige States, in accordance with their respective economic capabilities, social and cultural traditions as well as international minimum standards, to establish and maintain a public health system that can in principle guarantee access to certain basic health services for all. Progressive realization means that States should, for example, establish targets and benchmarks in order to progressively reduce the infant mortality rate, increase the number of doctors per 1000 inhabitants, raise the percentage of the population that has been vaccinated against certain

infectious and epidemic diseases, or improve basic health facilities. The health standard in poor countries may be lower than in rich countries without any violation of a State's obligations to fulfil the right to health. The total absence of positive measures to improve the public health system, retrogressive measures or the deliberate exclusion of certain groups (such as women and religious or ethnic minorities) from access to health services can, however, amount to a violation of the right to health.

## The right to an effective remedy

The very notion of rights entails, in addition to a substantive claim, the availability of recourse to a national judicial or administrative authority – including courts and national human rights institutions (NHRIs) – in the event that a right is violated. Every person who claims that his or her rights have not been respected, protected or fulfilled must be able to seek an effective remedy before a competent and independent domestic body vested with the power to order reparations and to have its decisions enforced.

According to the Human Rights Committee (the UN body in charge of monitoring implementation of the ICCPR; see Chapter 5) Article 2(3)(a) of the ICCPR obliges States to take effective steps to investigate violations of human rights "promptly, thoroughly and effectively through independent and impartial bodies."<sup>2</sup> Failure to do so may in and of itself amount to a violation of the ICCPR.<sup>3</sup> Further, the Human Rights Committee has held that States are obliged to "bring to justice" perpetrators of certain violations, including torture, cruel, inhuman or degrading treatment, summary and arbitrary killing and enforced disappearance.<sup>4</sup>

Furthermore, the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law<sup>5</sup> specify that States have an obligation to investigate alleged violations and take further action where appropriate; take appropriate legislative and administrative measures to prevent violations; and provide victims with effective remedies and equal and effective access to justice.<sup>6</sup> Amnesties that prevent prosecution of individuals for international crimes or gross violations of human rights would interfere with the right to an effective remedy, including reparations.<sup>7</sup>

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<sup>2</sup> Human Rights Committee, general comment No. 31 (26 May 2004), paragraph 15.

<sup>3</sup> Ibid.

<sup>4</sup> Ibid, paragraph 18.

<sup>5</sup> UN Doc. A/RES/60/147 (16 December 2005).

<sup>6</sup> Ibid, principle 3.

<sup>7</sup> OHCHR, *Rule-of-Law Tools for Post-Conflict States: Amnesties*, New York and Geneva, United Nations, 2009, at p. 11.

#### **Box 10 The right to obtain remedy under international and regional human rights treaties: examples**

According to Article 2 (3) of the ICCPR, States Parties undertake “to ensure that (a) ... any person whose rights or freedoms ... are violated shall have an effective remedy” and that (b) persons claiming such a remedy shall have their “right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State”; and “to develop the possibilities of judicial remedy”.

Article 13 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (EHCR) stipulates that: “Everyone whose rights and freedoms as set forth in the Convention are violated shall have an effective remedy before a national authority ...”

Article 25 (1) of the American Convention on Human Rights (also known as the Pact of San José, Costa Rica) establishes this remedy as a separate human right: “Everyone has the right to simple and prompt recourse, or any other effective recourse, to a competent court or tribunal for protection against acts that violate his fundamental rights recognized by the constitution or laws of the State concerned or by this Convention ...”

Article 23 of the Arab Charter on Human Rights states that: “Each State Party to the present Charter undertakes to ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity.”

### **The right to recourse to an international or regional human rights mechanism**

The right to have recourse to an international or regional human rights court, once all avenues of seeking redress at the domestic level are exhausted, has been accepted only partially. Under the EHCR, individuals may appeal to the permanent European Court of Human Rights, whose judgments are legally binding. The American Convention on Human Rights, the African Charter on Human and People’s Rights-Optional Protocol and the Economic Community of West African States (ECOWAS) Treaty also provide for an individual complaints mechanism, subject to specific rules in each case (for details see Chapter 8).

In addition, individuals can submit complaints to the treaty body responsible for monitoring compliance with each core international human rights treaty (for details see Chapter 5). However, there is currently no international human rights court *per se*.

# The right to reparation for harm suffered

As mentioned above, the right to reparation is an essential element of the right to an effective remedy. Where the State is responsible for a human rights violation through its acts or omissions, it is under an obligation to provide adequate, effective and prompt reparation to the victim(s). Indeed, where reparation is not provided, "the obligation to provide an effective remedy ... is not discharged."<sup>8</sup> The basic principles and guidelines on the right to remedy and reparation for victims of gross violations of international human rights law and serious violations of international humanitarian law provide for the following forms of reparation (see box 11).

## Box 11 Right of victims to reparation after gross human rights violations<sup>9</sup>

In accordance with domestic and international law, and taking account of individual circumstances, victims of gross violations of international human rights law and serious violations of international humanitarian law should, as appropriate and proportional to the gravity of the violation and the circumstances of each case, be provided with full and effective reparation, which includes the following forms:

**Restitution** entails, where appropriate and desirable, restoring the victim to the situation existing before the occurrence of the human rights violation concerned. Restitution may include restoration of liberty, return to one's place of residence, restoration of employment and return of property.

**Rehabilitation** includes legal, medical, psychological and social measures to help victims recover (for instance, setting up rehabilitation centres for torture victims).

**Compensation** refers to indemnification for financial or non-financial damages, including physical or mental harm; lost opportunities (such as employment, education or social benefits); material damages; loss of earnings or earning potential; and moral damage.

**Satisfaction** refers to public apologies; acceptance of responsibility; victim commemorations and tributes; verification of facts with full and public disclosure of the truth where possible and appropriate; an official declaration or judicial decision; judicial and administrative sanctions against the perpetrators of gross human rights violations; search for disappeared persons; identification and reburial of bodies in accordance with victim and family wishes; and inclusion of an accurate account of gross human rights violations in educational material at all levels.

**Guarantee of non-recurrence** entails measures to help prevent future human rights violations. These may include legislative and institutional reforms (such as to strengthen the independence of the judiciary); programmes to vet the integrity

<sup>8</sup> Human Rights Committee, general comment No. 31, paragraph 16.

<sup>9</sup> UN Doc. A/RES/60/147 (16 December 2005), principles 19–23.

and suitability of individuals for public employment; and efforts to improve the observance of codes of conduct by public servants.

## Remedies for violations of economic, social and cultural rights

The provisions for the right to a remedy cited above (see Box 11) refer primarily to civil and political rights, whereas most treaties relating to economic, social and cultural rights – such as the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the European Social Charter – contain no similar provisions. Despite this, violations of economic, social and cultural rights are increasingly adjudicated before domestic and regional courts, as well as United Nations treaty bodies. Indeed, arguments that economic, social and cultural rights are too vague to be adjudicated, or involve policy decisions better left to political authorities than to the courts, are not convincing. All human rights that entail a positive obligation to fulfil necessarily require policy decisions by State officials. For example, the capacity of a justice system to fulfil the right to a fair trial within a reasonable time depends on policy decisions, including the allocation of necessary resources.

In the same way that violations of civil and political rights can be adjudicated by courts, so too can the violations of many economic, social and cultural rights. For example, courts can decide whether States have fulfilled their positive obligations to ensure access to essential primary medical care in accordance with the core content of the right to the enjoyment of the highest attainable standard of physical and mental health. Courts can also adjudicate whether States have complied with their duties to respect economic, social and cultural rights and other immediate duties arising therefrom, including the prohibition of discrimination in guaranteeing the rights enshrined in the ICESCR.

At a domestic level, economic, social and cultural rights are not always entrenched in national constitutions or laws. However, as demonstrated by the South African and Indian constitutional courts in particular, national courts are increasingly adjudicating the rights to health, education, water and adequate housing (for details with regard to South Africa see Chapter 13). Another important example is the Human Rights Chamber for Bosnia and Herzegovina, which, pursuant to Annex 6 to the Dayton Peace Agreement of 1995,<sup>10</sup> handed down many decisions relating to alleged or apparent discrimination in the enjoyment of various economic, social and cultural rights.<sup>11</sup>

At the regional level, the European Committee of Social Rights can consider collective complaints for alleged violations of the European Social Charter, and has developed significant jurisprudence in this regard. Additionally, the Inter-American Court of

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<sup>10</sup> *Dayton Peace Agreement*, Annex Six: Agreement on Human Rights, article XIV (14 December 1995).

<sup>11</sup> Committee on Economic, Social and Cultural Rights, Concluding Observations of the Committee on Economic, Social and Cultural Rights, E/C.12/BIH/CO/1 (24 January 2006) paragraph 5.

Human Rights, the ECOWAS Court of Justice and the African Court and Commission of Human and Peoples' Rights have jurisdiction to hear complaints regarding violations of economic, social and cultural rights. While the ECOWAS Court and the African Court and Commission are able to hear complaints relating to all rights in the African Charter, the Inter-American Court of Human Rights, by virtue of article 19 (6) of the 1988 Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights, is only authorized to decide on individual petitions relating to the right to education and the right to organize trade unions.

At the international level, complaints can now be submitted to the Committee on Economic, Social and Cultural Rights (CESCR-Committee), following the entry into force in May 2013 of the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (OP-ICESCR). The Committee is a quasi-judicial body whose views, while not legally binding, carry important interpretive weight. They will help to clarify the scope of State obligations in specific cases and the types of remedies that need to be adopted to bring redress to victims. A number of other international human rights treaties also include provisions on economic, social and cultural rights. The respective treaty bodies for the Convention on the Rights of the Child (CRC), CEDAW, the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (ICRMW) and the Convention on the Rights of Persons with Disabilities (CRPD), are competent to consider individual complaints regarding economic, social and cultural rights as defined under these treaties (for details see Chapter 5). In the same sense, as some economic, social and cultural rights and civil and political rights are interdependent, aspects of economic, social and cultural rights can also be considered under the complaints mechanisms provided by the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) and the Optional Protocol to the International Covenant on Civil and Political Rights (OP-ICCPR). For example, denial of food or health care to persons deprived of liberty can amount to torture or inhumane and degrading treatment. Forced evictions can also affect the right to private and family life, or violate due process of law.

Although challenges remain in ensuring the right to an effective remedy for economic, social and cultural rights, recent trends such as the entry into force of the OP-ICESCR indicate progress in reversing the outdated assumption that economic, social and cultural rights are not justiciable.

#### **Box 12 Legislation and the competence of domestic courts in the area of economic, social and cultural rights: two examples**

In some countries, legislation empowers domestic courts to rule on economic, social and cultural rights. In South Africa, where economic, social and cultural rights are enshrined in the Constitution, the right to food, access to health care and housing and other rights may be enforced by the courts. In the Grootboom case (*Government of the Republic of South Africa v. Irene Grootboom and others*, CCT 11/00), the country's Constitutional Court set an international precedent in adjudicating economic, social and cultural rights.

The case involved an application on behalf of 900 people who had occupied vacant land while waiting for low-cost State housing to become available but had been evicted and their homes destroyed. The applicants first submitted a petition to the High Court and then appealed to the Constitutional Court, claiming that their right to adequate housing had been violated. The Constitutional Court upheld the applicants' claim. It found that the State was under a negative obligation not to prevent or impair access to housing and a positive obligation to create an enabling environment for the fulfilment of this right. By failing to implement a coherent and coordinated housing plan for those most in need, the State had failed to take reasonable measures to progressively realize the right to housing. The Court ordered the State to "devise, fund, implement and supervise measures to provide relief to those in desperate need."

In 2003, the Scottish parliament passed the landmark Homelessness etc. (Scotland) Act 2003, which created a fully justiciable right to housing. While at first applicable only to persons who had a "priority need", the priority needs test was gradually replaced over a ten-year cycle and finally abolished in December 2012. Thus, all unintentionally homeless persons in Scotland have a legally enforceable right to housing. In its 2009 review of the United Kingdom's (UK's) compliance with its obligations under the ICESCR, the Committee on Economic, Social and Cultural Rights singled out the Homelessness Act as "best practice", implying that it should be extended to the rest of the UK "especially its provision relating to the right to housing as an enforceable right".

*More examples of national courts adjudicating social and economic rights can be found in Chapter 13.*

#### Further reading

- *Basic principles and guidelines on the right to remedy and reparation for victims of gross violations of international human rights law and serious violations of international humanitarian law*. UN Doc. A/RES/60/147 (16 December 2005)
- *Updated set of principles for the protection and promotion of human rights through action to combat impunity*: E/CN.4/2005/102/Add.1 (8 February 2005)
- *Rule-of-Law Tools for Post-Conflict States: Amnesties*, New York and Geneva, OHCHR, United Nations, 2009. Available at <https://shop.un.org> and <http://www.un-ilibrary.org>
- *Rule-of-Law Tools for Post-Conflict States: Reparations Programmes*, New York and Geneva, OHCHR, United Nations, 2008. Available at <https://shop.un.org> and <http://www.un-ilibrary.org>
- *Frequently Asked Questions on Economic, Social and Cultural Rights, Fact Sheet No. 33*, New York and Geneva, OHCHR, United Nations, 2008. Available at <http://www.ohchr.org/Documents/Publications/FactSheet33en.pdf>



## Chapter 3

### International human rights instruments

#### The emergence of international human rights law

International human rights law emerged following the Second World War with the creation of the United Nations and the adoption and ratification of the core human rights treaties. Prior to this, however, several precursors laid the foundation for the international human rights legal framework as it stands today. In particular, human rights were legally protected in some domestic legal systems, including in France under the 1789 *Declaration des droits de l'homme et du citoyen* (Declaration of the Rights of Man and of the Citizen) and in the United States of America, under the 1776 Virginia Declaration of Rights and the Declaration of Independence of the United States. In addition, the doctrine of diplomatic protection under international law permitted States to intervene on behalf of nationals abroad, to ensure that they were treated in accordance with international minimum standards of treatment of aliens. Later, the influence of the Red Cross Movement and the establishment in 1919 of the International Labour Organization (ILO) led to

The United Nations Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, one of the core human rights treaties, was adopted in 1984 by the United Nations General Assembly. It requires states to take effective measures to prevent torture in any territory under their jurisdiction. © UN Photo/Tobin Jones

the conclusion of, respectively, the Geneva Conventions<sup>1</sup> and the first international conventions designed to protect industrial workers from gross exploitation and to improve their working conditions.

Finally, the minority treaties concluded after the First World War sought to protect the rights of ethnic and linguistic minorities and are therefore sometimes seen as precursors of modern international human rights instruments. In addition, the Slavery Convention, adopted in 1926, and the Supplementary Convention on the Abolition of Slavery, adopted in 1956, committed parties to the suppression of the slave trade and the abolition of slavery. Strictly speaking, however, these treaties did not establish individual human rights guarantees, only State obligations.

## The International Bill of Human Rights

With the establishment in 1945 of the United Nations, “*promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion*”<sup>2</sup> became one of the fundamental goals pursued by the international community. The Universal Declaration of Human Rights (1948) provides the first authoritative elaboration of the term “human rights”, as used in the UN Charter. Although it was not drafted or voted upon as a legally binding instrument, the Declaration can now – close to 70 years later – be considered as a general standard on human rights.

**“The Declaration is a timeless and powerful document that captures the profound aspirations of humankind to live in dignity, equality and security. It provides minimum standards and has helped turn moral issues into a legally binding framework ...”**

*Sergio Vieira de Mello, former United Nations High Commissioner for Human Rights, message delivered on Human Rights Day, 10 December 2002.*

### Box 13 The Universal Declaration of Human Rights

Under the leadership of such eminent personalities as Eleanor Roosevelt, René Cassin and Charles Malik, the United Nations Commission on Human Rights succeeded in drafting the Universal Declaration of Human Rights in two years. It was adopted by the General Assembly on 10 December 1948. The Declaration sets out civil, political, economic, social and cultural rights and the right of everyone “to a social and international order in which the rights and freedoms set forth in [the] Declaration can be fully realized”. Although it is

1 For further information on the Geneva Conventions and humanitarian law, see *Respect for International Humanitarian Law: a Handbook for Parliamentarians*, Geneva, IPU, 1999.

2 *Charter of the United Nations*, Chapter I, Article 1, paragraph 3.

not a binding instrument, and the Socialist States and South Africa abstained when it was adopted, the Declaration has risen, morally and politically, to the status of an immensely authoritative instrument, expressing the United Nations understanding of human rights. Today, it serves as the substantive foundation of the charter-based system of human rights protection (see Chapter 6).

While the Universal Declaration of Human Rights was adopted in two years, it took almost 20 years to agree on the text of the ICCPR and the ICESCR. After six years of drafting, the two Covenants were finalized in the United Nations Commission on Human Rights (see Chapter 6) in 1954. The General Assembly took 12 more years to adopt the Covenants, and it took a further 10 years until the required 35 instruments of ratification were deposited. The Covenants finally entered into force in 1976. The Universal Declaration of Human Rights and the two Covenants – also referred to as the International Bill of Human Rights – are the only general human rights instruments of the United Nations.

## Core international human rights treaties

The International Bill of Human Rights has been supplemented with a number of more specific binding instruments, which include both substantive human rights norms as implementing provisions for complaints, reporting and inquiry procedures and other matters. With the two Covenants, these treaties form what are usually referred to as the “core human rights treaties” (see Chapter 5), comprising the following instruments:

- International Covenant on Civil and Political Rights (ICCPR; adoption in 1966; entry into force in 1976);
- Optional Protocol to the ICCPR (OP-ICCPR; adoption in 1966; entry into force in 1976); Second Optional Protocol to the ICCPR aiming at the abolition of the death penalty (adoption in 1989);
- International Covenant on Economic, Social and Cultural Rights (ICESCR; adoption in 1966; entry into force in 1976);
- Optional Protocol to the ICESCR (OP-ICESCR; adoption in 2008; entry into force in 2013);
- International Convention on the Elimination of All Forms of Racial Discrimination (CERD; adoption in 1965; entry into force in 1969);
- Convention on the Elimination of All Forms of Discrimination against Women (CEDAW; adoption in 1979; entry into force in 1981);
- Optional Protocol to CEDAW (adoption in 1999; entry into force in 2000);
- Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT; adoption in 1984; entry into force in 1987);
- Optional Protocol to CAT (OPCAT; adoption in 2002; entry into force in 2006);

- Convention on the Rights of the Child (CRC; adoption in 1989; entry into force in 1990);
- Optional Protocols to CRC on the involvement of children in armed conflict and on the sale of children, child prostitution and child pornography (adoption in 2000; entry into force in 2002);
- Optional Protocol to CRC on a communications procedure (adoption in 2011; entry into force in 2014);
- International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (known as the Migrant Workers Convention; ICRMW; adoption in 1990; entry into force in 2003);
- Convention on the Rights of Persons with Disabilities (CRPD; adoption in 2006; entry into force in 2008);
- Optional Protocol to CRPD (adoption in 2006; entry into force 2008);
- International Convention for the Protection of All Persons from Enforced Disappearance (CED; adoption in 2006; entry into force in 2010)

## Other human rights instruments of the United Nations

The United Nations and its specialized agencies have adopted many other non-binding human rights instruments devoted to women and specific groups, including refugees, aliens and stateless persons, minorities and indigenous peoples, persons deprived of their liberty, persons with disabilities, children, and victims of crime. Further universal instruments deal with specific human rights issues, such as slavery, torture, enforced disappearance, genocide, forced labour and religious intolerance, or focus on other specific human rights issues, including in the areas of education, employment, development, administration of justice, marriage, and the freedoms of association and of information.

Links to human rights treaties and non-binding instruments are provided in the Annex.

### **Box 14 Drafting and adopting international human rights treaties and related instruments**

All international human rights treaties and major declarations are adopted by the United Nations General Assembly, the only body where all – currently 193 – Member States are represented, with one vote each. The drafting process often begins with the adoption of a non-binding declaration, providing a common definition, and continues in the form of the more difficult task of developing legally binding norms.

Until 2006, the text of human rights instruments was generally first drafted by the United Nations Commission on Human Rights, which usually delegated the initial round of drafting to its standing Sub-Commission on the Promotion and

Protection of Human Rights or to an inter-sessional working group set up by the Commission for that purpose. The drafting process in the Commission and its subsidiary bodies generally took at least several years, and for the two Covenants even spanned two decades.

With the replacement in 2006 of the Commission on Human rights by the Human Rights Council, and of the Sub-Commission by an Advisory Council (see Chapter 6), it is now the Council that prepares the text of new instruments. The draft must then be formally adopted by the General Assembly following discussion, in particular by its Third Committee on Social, Humanitarian and Cultural Affairs.

Once a treaty is adopted by the General Assembly, usually by consensus, it is opened for signature and ratification by Member States. It enters into force after a specific number of instruments of ratification or accession have been deposited by Member States.

### **Box 15 Human rights jurisprudence**

Human rights treaties and conventions are living instruments, constantly developed through the jurisprudence of courts and expert bodies responsible for monitoring the implementation of international and regional human rights instruments (see Chapter 5 on treaty bodies and Chapter 8 on regional human rights treaties and monitoring). These bodies have given international human rights norms dynamic interpretations, adapting their provisions to current circumstances. For instance, the prohibition of inhuman and degrading treatment and punishment under Article 3 of the EHCR (1950) was not initially meant to apply to minor forms of corporal punishment (such as those practised in British schools); however, in the course of adaptation of the Convention as a living instrument, the European Court of Human Rights has found that no form of corporal punishment is permitted under article 3. The Inter-American Court of Human Rights, the United Nations Human Rights Committee (see Chapter 5) and other UN treaty monitoring bodies arrived at the same conclusion. Similarly, the Human Rights Committee has found that the right to security of the person, guaranteed in article 9 of International Covenant on Civil and Political Rights (ICCPR) along with the right to liberty, was not intended to be narrowed down to mere formal loss of liberty: in a landmark decision (case of *Delgado Páez v. Colombia*, 195/1985), the Committee ruled that States may not ignore threats to the personal security of non-detained persons within their jurisdictions and are obliged to take reasonable and appropriate measures to protect them.

#### Further reading

- Database of jurisprudence emanating from the United Nations Treaty Bodies, <http://juris.ohchr.org>





## Chapter 4

### May States restrict human rights?

A cartoon by Lebanese artist Stavro Jabra, as part of an exhibition entitled "Sketching Human Rights" in the Main Gallery of the Visitors' Lobby, at the United Nations Headquarters in New York. © AFP/Stan Honda

Some human rights, such as the prohibition of torture and slavery, are absolute. The application of interrogation techniques amounting to torture as defined under Article 1 of the CAT – for instance electric shocks and other methods causing severe physical pain or mental suffering – is not justified on any grounds whatsoever, including to implement counter-terrorism measures or to prevent imminent terrorist attacks.

However, most human rights are not absolute and are therefore subject to certain restrictions, including through reservations, derogations and limitations. Further, the principle of progressive realization of rights means that the particular circumstances and capacity of each State must be taken into account in assessing whether that State has violated its human rights obligations. As such, while the core content of human rights is universal and some obligations have immediate effect, States enjoy a margin of discretion in implementing their obligations to respect, protect and fulfil human rights.

## Limitation clauses

Many obligations to respect human rights are subject to so-called limitation clauses. For instance, the exercise of political freedoms, such as freedom of expression, assembly and association, carries with it duties and responsibilities and may, therefore, be subject to certain formalities, conditions, restrictions and penalties in the interests of national security, territorial integrity or public safety, the prevention of disorder or crime, the protection of public health or morals, or the protection of the reputation or rights and freedoms of others. If people misuse their freedom of speech and freedom to participate in a demonstration, to incite racial or religious hatred, to promote war propaganda or to encourage others to commit crimes, governments have an obligation to interfere with the exercise of these freedoms in order to protect the human rights of others. Any interference, restriction or penalty must, however, be carried out in accordance with domestic law and must be necessary for achieving the respective aims and national interests in a democratic society. States must in any case demonstrate the necessity of applying such limitations, and take only those measures which are proportionate to the pursuance of the legitimate aims.<sup>1</sup>

### Box 16 Limitation clauses: examples of jurisprudence

It is the task of international human rights bodies to assess on a case-by-case basis whether a particular form of interference serves a *legitimate purpose*, is based on a valid and foreseeable *domestic law*, and is *proportionate to the legitimate purpose*. The European Court of Human Rights, for instance, has interpreted the relevant limitation clauses in the ECHR in a way that on the one hand provides governments with a fairly broad margin of appreciation<sup>2</sup>, while on the other hand requiring them to show a *pressing social need* in order to justify restrictions. For instance, the Court did not accept the argument given by the Irish Government that the general prohibition of homosexuality under Irish criminal law was necessary in a democratic society for the protection of public morals. In the absence of any comparable legislation in other European societies, the Court found that there was no pressing social need for such a far-reaching restriction of the right to privacy.

## Derogation during a state of emergency

In exceptional circumstances, including armed conflict, rioting, natural disasters or other public emergencies that threaten the life of a nation, governments may take measures derogating from their human rights obligations, provided that the following conditions are met.<sup>3</sup>

1 See, for example, Article 19 of ICCPR.

2 The concept of margin of appreciation is most frequently applied by the European Court of Human Rights; however, other bodies including the Human Rights Committee, have also referred to similar concepts, including a “margin of discretion”.

3 See Article 4 of ICCPR.

- A state of emergency, which threatens the life of the nation, must be officially declared.
- The specific measures derogating from an international treaty must be officially notified to the competent international organizations and other States Parties.
- Derogation is permissible only to the extent strictly required by the situation.
- The derogation must be lifted as soon as the situation permits.
- The rights subject to derogation must not be among those that admit no derogation<sup>4</sup> (see Box 17 and Chapter 9).

**Box 17 Rights, freedoms and prohibitions that are not subject to derogation even in times of public emergency which threatens the life of the nation**

**Under Article 4 of the ICCPR**

- Right to life
- Prohibition of torture, or cruel, inhuman or degrading treatment or punishment
- Prohibition of slavery and servitude
- Prohibition of detention for debt
- Prohibition of retroactive criminal laws
- Right to recognition as a person before the law
- Freedom of thought, conscience, religion and belief

**Under Article 15 of the ECHR**

- Right to life, except in respect of deaths resulting from lawful acts of war
- Prohibition of torture, or inhuman or degrading treatment or punishment
- Prohibition of slavery and servitude
- Prohibition of retroactive criminal laws

**Under Article 27 of the American Convention on Human Rights**

- Right to legal personality
- Right to life
- Right to humane treatment
- Prohibition of slavery and servitude
- Prohibition of retroactive criminal laws
- Freedom of conscience and religion

<sup>4</sup> See also CAT, Article 2(2) and CED, Article 1(2).

- Right to nationality
- Right to participate in government
- Right to a name
- Rights of the family
- Rights of the child
- Right to the judicial guarantees required to protect the aforementioned rights

### **Under the African Charter on Human and Peoples' Rights**

- The Charter does not contain a derogation provision; however, States Parties may derogate from certain rights in times of emergency.<sup>5</sup>

### **Under Article 4 of the Arab Charter on Human Rights**

- Right to life
- Prohibition of torture, or cruel, degrading, humiliating or inhuman treatment
- Prohibition of medical or scientific experimentation, or trafficking of human organs
- Prohibition of slavery, servitude and trafficking in human beings
- Right to fair trial before a competent, independent and impartial court, including legal aid for persons without the requisite financial resources
- Right of persons deprived of liberty to have the legality of detention determined by a competent court (habeas corpus)
- Prohibition of retroactive crimes and penalties
- Prohibition of imprisonment for failing to pay a contractual debt
- Prohibition of criminal prosecution twice for the same offence
- Right of persons deprived of their liberty to be treated with humanity
- Right to be recognized before the law
- Prohibition of unlawfully preventing persons from leaving or residing in any country
- Right to seek political asylum
- Right to nationality
- Right to freedom of thought, conscience and religion, subject to limitations as prescribed by law
- Right to the judicial guarantees required for the protection of the aforementioned rights

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<sup>5</sup> Max Planck Encyclopedia of Public International Law, African Charter on Human and Peoples' Rights (1981).

### **Box 18 General comment No. 29 (2001) of the Human Rights Committee on derogations during a state of emergency**

The Human Rights Committee, as the supervisory body of ICCPR, may issue general comments to assist States Parties in the interpretation of ICCPR provisions. In its general comment No. 29 on states of emergency, the Human Rights Committee stressed that the list of non-derogable rights contained in article 4(2) of the ICCPR is not necessarily exhaustive. Certain rights or elements of rights not listed in article 4(2) of the ICCPR, such as the right of all persons deprived of their liberty to be treated with humanity and respect for the inherent dignity of the human person, or the prohibition of propaganda for war and advocacy of hatred, cannot be made subject to lawful derogation. The Human Rights Committee also took the view that procedural safeguards, including judicial guarantees, may never be made subject to measures that would circumvent the protection of non-derogable rights. Moreover, it held that "the principles of legality and the rule of law require that fundamental requirements of fair trial must be respected during a state of emergency".

### **Box 19 Excerpts from a report by the UN Special Rapporteur on Human rights and states of exception, Mr L. Despouy, to the IPU Symposium on Parliament, Guardian of Human Rights, Budapest, 1993**

**"Experience shows that it is highly desirable for the provisions governing states of emergency to have the rank of constitutional measures. Most legislations explicitly provide for this, although others set it out in an indirect manner by laying down that 'no authority may assume the legislative functions on the grounds of the existence of a state of emergency'."**

## **Reservations**

In certain cases, States may issue unilateral statements upon signature, ratification, acceptance, approval of, or accession to a treaty with the purpose of excluding or modifying the legal effect of certain provisions of the treaty for the State making the statement. Such statements may be entitled "reservation", "declaration", "understanding", "interpretative declaration" or "interpretative statement".

Article 19 of the 1969 Vienna Convention on the Law of Treaties specifies that a State may, when signing, ratifying, accepting, approving or acceding to a treaty, make a reservation, unless:

- the reservation is prohibited by the treaty;

- the treaty provides that only specified reservations, which do not include the reservation in question, may be made; or
- in cases not falling under the above two categories, the reservation is incompatible with the object and purpose of the treaty.

Where a treaty is silent on reservations and a reservation is formulated and subsequently circulated, the States concerned have 12 months to object to the reservation, beginning on the date of the depositary notification or the date on which the State expressed its consent to be bound by the treaty, whichever is later (see Article 20(5) of the Vienna Convention on the Law of Treaties 1969).

A State may, unless the treaty stipulates otherwise, withdraw its reservation or objection to a reservation, either completely or partially, at any time. A reservation that is found by a treaty monitoring body to be incompatible with the object and purpose of the relevant treaty is invalid. Consequently, the treaty shall be applied by the State concerned without such reservation (see Human Rights Committee, general comment No. 24, CCPR/C/21/Rev.1/Add.6, paragraph 18) (see also Chapter 10).

#### Further reading

- Human Rights Committee, general comment No. 29 on states of emergency (CCPR/C/21/Rev.1/Add.11)
- Human Rights Committee, general comment No. 24 on issues relating to reservations made upon ratification or accession to the Covenant or the Optional Protocols thereto, or in relation to declarations under Article 41 of the Covenant
- Siracusa Principles on the limitation and derogation of provisions in the International Covenant on Civil and Political Rights (E/CN.4/1985/4, annex)



## Chapter 5

# United Nations human rights treaty monitoring bodies

Compliance of States Parties with their respective obligations under the nine United Nations core human rights treaties and their optional protocols (see Chapter 3) is monitored by expert organs, which are known as treaty-monitoring bodies or treaty bodies:<sup>1</sup>

- Human Rights Committee;
- Committee on Economic, Social and Cultural Rights (CESCR-Committee);
- Committee on the Elimination of Racial Discrimination (CERD-Committee);
- Committee on the Elimination of Discrimination against Women (CEDAW-Committee);
- Committee against Torture (CAT-Committee);

The United Nations Convention on the Rights of the Child is the most widely ratified international human rights treaty. The Convention also establishes a Committee of 18 independent experts to monitor its implementation by States Parties. © AFP/Rizwan Tabassum

<sup>1</sup> The UN human rights system generally distinguishes between charter-based and treaty-based bodies. Treaty-based bodies derive from specific human rights treaties, as explained in this chapter. Charter-based bodies are established according to provisions contained in the UN Charter. They include the Human Rights Council, which replaced the former Commission on Human Rights, and Special Procedures (see Chapter 6).

- Subcommittee on the Prevention of Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (SPT);
- Committee on the Rights of the Child (CRC-Committee);
- Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families (CMW-Committee);
- Committee on the Rights of Persons with Disabilities (CRPD-Committee);
- Committee on Enforced Disappearances (CED-Committee).

With the exception of the CESCR-Committee, which was created by a resolution of the Economic and Social Council in 1985, the above bodies were established by their respective instruments, and were set up as soon as the respective treaties had entered into force.

## **Membership and functioning**

The Human Rights Committee, CESCR-Committee, CERD-Committee, CRC-Committee and CRPD-Committee each has 18 members; the CED-Committee and CAT-Committee has 10 each; the CMW-Committee has 14; the CEDAW-Committee, 23 and the SPT, 25. Their members are elected by the States Parties to the respective treaties (with the exception of the CESCR-Committee, which is elected by the Economic and Social Council), with due regard for equitable geographic distribution. The Human Rights Committee, CESCR-Committee, CERD-Committee, CEDAW-Committee, CAT-Committee and CRC-Committee and the SPT meet three times a year, and the other treaty bodies (CED-Committee, CMW-Committee and CRPD-Committee) twice. OHCHR provides support to all treaty bodies.

## **Reporting procedure**

### **Obligations of States**

The State reporting procedure is the only mandatory procedure common to all nine core human rights treaties. Governments have an obligation to submit to each treaty-monitoring body an initial report, followed by periodic reports and, in some cases, emergency or other reports requested by the treaty-monitoring body. The treaty bodies provide States with guidelines aimed at assisting them in the preparation of the reports.

Generally speaking, the reports are expected to provide the following minimum information:

- all measures adopted by a State to give effect to the rights provided for in the treaty;
- progress made in the enjoyment of those rights;

- relevant empirical information, including statistical data;
- all problems and difficulties affecting the domestic implementation of the treaty.

As a rule, State reports are drafted by the respective governments. However, to ensure completeness and objectivity it is advisable that other State institutions and partners, including parliament, national human rights commissions and ombudsmen, relevant non-governmental organizations (NGOs) and civil society organizations, also assist in preparing State reports.

## Examination of State reports

Treaty bodies analyse State reports and discuss them in public sessions, in the presence of State representatives and members of the public. Although the committees aim at a constructive dialogue with governments, State representatives may be confronted with highly critical questions and remarks formulated by Committee members. At the end of the examination of each State report, the treaty bodies adopt concluding observations and recommendations that are released at the end of the session. States are expected to implement those recommendations and provide information in their next reports on the measures taken to that end. Some Committees occasionally request specific reports, particularly in emergency situations or cases involving serious human rights violations. (For parliamentary action, see also Chapter 11.)

## The role of NGOs, parliaments and other organizations in the treaty-body procedure

International and domestic NGOs closely follow the examination of State reports and provide the experts with relevant information, or even alternative reports. Only the Convention on the Rights of the Child expressly envisages, in its Article 45 (a) a role for NGOs in the work of the treaty body. However, all treaty bodies have developed modalities for interaction with NGOs, inviting them to submit relevant written and oral information. United Nations specialized agencies, such as ILO and UNESCO, and other United Nations entities are invited to assist in monitoring treaty implementation. For instance, the United Nations Children's Fund (UNICEF), in particular, with its worldwide network of country offices, provides the CRC-Committee, the CRPD-Committee and other treaty bodies with active and valuable assistance in the ambitious task of monitoring compliance with treaty obligations relating to children in States Parties.

### **Box 20 Collaboration between IPU and the CEDAW-Committee to promote parliamentary involvement in CEDAW implementation**

IPU has consistently promoted parliament's contribution to advancing the CEDAW in several ways, in close collaboration with the CEDAW-Committee.

First, IPU systematically shares information urging parliamentarians to keep track of whether their countries have ratified CEDAW and its Optional Protocol, and whether their countries have issued any reservations.

Second, IPU co-published a handbook on CEDAW for parliamentarians and holds regular thematic sessions to raise awareness among parliamentarians of the Convention's provisions.

Third, before each Committee session, IPU invites parliaments from the countries whose periodic reports are to be reviewed to fill in a questionnaire on the level of parliamentary involvement in the reporting process and in the follow-up to the Committee's concluding observations. A report summarizing the responses is provided to the CEDAW-Committee during the relevant session. This report also includes information on women's participation in the parliaments concerned.

In addition, during CEDAW-Committee sessions, IPU Gender Partnership Programme and a group of CEDAW-Committee members hold regular meetings to discuss and further enhance their collaboration to promote parliaments' contribution to implementation of the Convention.

In between sessions, CEDAW-Committee members are also regularly invited to address the parliamentary community during discussions on gender equality. They also take part in national parliamentary seminars focusing on the Committee's concluding observations at IPU's invitation.

In turn, the CEDAW-Committee has taken a strong stance on the role of parliaments in implementing the Convention. In 2008, the Committee decided to include a standard paragraph on the role of parliaments in its concluding observations for countries under review in order to draw their attention to the importance of involving parliaments in the implementation of the Convention. At its 45th session (January–February 2010), the Committee issued a statement to clarify and strengthen the role of national parliaments vis-à-vis the Convention and to clarify the relationship between the Committee and IPU.

## General comments issued by treaty-monitoring bodies

Treaty bodies adopt and publish general comments or general recommendations concerning the provisions and obligations contained in their respective treaties. These documents reflect the committees' experience in the reporting procedure and constitute an authoritative source of interpretation of human rights instruments.

For a complete list of general comments and general recommendations by treaty bodies, please visit <http://www.ohchr.org/EN/HRBodies/Pages/TBGeneralComments.aspx>.

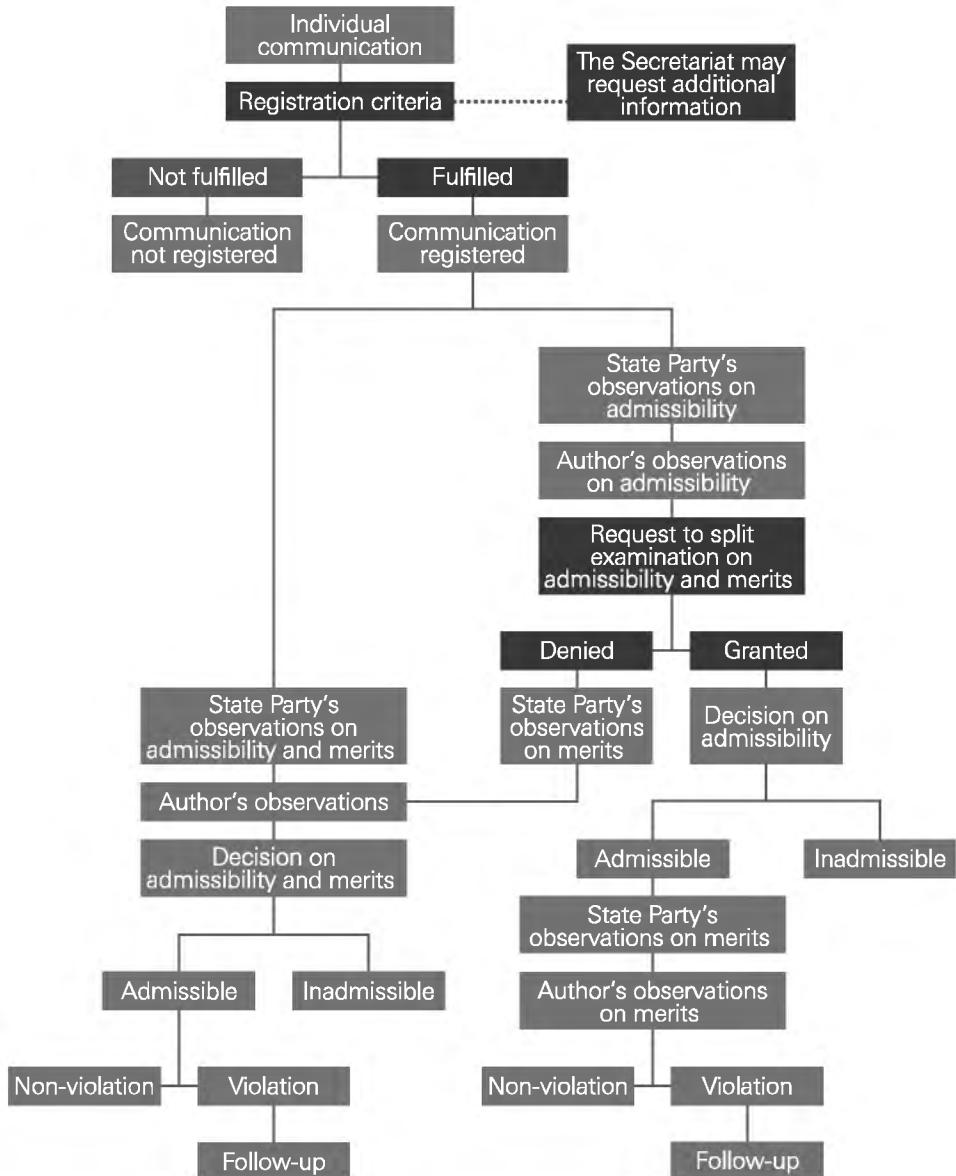
## Individual complaints procedure

The Optional Protocols to ICCPR, CEDAW, CRPD, ICESCR and CRC, and specific articles in CERD, CAT, International Convention for the Protection of All Persons from Enforced Disappearance (ICPPED) and ICRMW, provide for optional individual complaints (called “communications”) procedures for consideration by the relevant treaty bodies.

Under those provisions, which are accepted by an ever greater number of States Parties, any individual subject to the jurisdiction of a State Party who (a) claims to be a victim of a human rights violation and (b) has exhausted all available domestic remedies, is entitled to file a complaint with the competent treaty-monitoring body (see Box 21). The committees examine such complaints under a quasi-judicial, confidential procedure culminating in a final, non-binding decision (called “final views”, “suggestions” or “recommendations”) that declares the complaint either inadmissible (if formal requirements are not met) or admissible, and – in the latter case – issues an opinion on the merits (determining whether the complainant’s human rights have been violated). These views are subsequently made public.

Under Article 30 of ICPPED, the CED-Committee is competent to receive and consider requests that a disappeared person should be sought and found as a matter of urgency. Such requests for urgent action are only admissible if the enforced disappearance has occurred in a country that is a State Party to the Convention.

## Case processing flow chart



Source: *Individual Complaint Procedures under the United Nations Human Rights Treaties, Fact Sheet No. 7 Rev. 2*, New York and Geneva, OHCHR, United Nations, 2013. Available at <http://www.ohchr.org/Documents/Publications/FactSheet7Rev.2.pdf>.

## Inter-State complaints procedure

ICCPR, CERD, CAT, CEDAW, CED, CRPD and ICRMW provide for inter-State complaints procedures, under which a State Party is entitled to submit a complaint to the relevant committee, claiming that another State Party is not fulfilling its treaty obligations. The procedure is based on the principle that every State Party to a human rights treaty has a legal interest in the fulfilment of the obligations of every other State Party.

This collective interest is, for instance, reflected in general comment No. 31 of the Human Rights Committee on the nature of the general legal obligation imposed on States Parties to the ICCPR. The Committee commands to States Parties the view that violations of the rights guaranteed under the ICCPR deserve the attention of all States Parties. It points out that “to draw attention to possible breaches of Covenant obligations by other State Parties and to call on them to comply with their Covenant obligations should, far from being regarded as an unfriendly act, be considered as a reflection of legitimate community interest”.

The different procedural arrangements under the respective treaties aim at finding an amicable solution to inter-State complaints. Committees are expected to make available their good offices to the States concerned. International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), ICCPR and CAT provide for the establishment, if necessary, of ad hoc conciliation commissions to investigate and settle inter-State complaints. While most human rights conventions make it optional, ICERD provides for a compulsory inter-State complaints procedure (any of the States Parties to ICERD can file a complaint alleging racial discrimination by any other State Party). For all other treaties, States Parties must accept the inter-State procedure through an additional declaration. To date, no inter-State complaint has been brought before any of the United Nations treaty-monitoring bodies.

## Inquiry procedures

CAT, ICPPED and the Optional Protocols to CRPD, ICESCR, CEDAW and CRC provide for a procedure of *suo moto* inquiry by the respective treaty bodies (also known as “inquiry of its own motion”). This may be initiated by the relevant treaty bodies, if they have received reliable information containing well-founded indications of serious or systematic violations of the conventions in a State Party. A treaty body that launches such an inquiry may carry out a fact-finding mission to the country concerned, subject to approval by its government, whose cooperation it must seek throughout the entire procedure. All proceedings are confidential, but the committees may include a summary account of the results of their inquiries in their annual reports.

### Box 21 A summary of procedures

Treaty	Date of adoption/ entry into force	Body	Membership	Members elected by	State reporting	Inter-State complaints	Individual complaints	Suo moto inquiry
CAT	12 December 1984/ 26 June 1987	Committee against Torture	10	States Parties	Mandatory Article 19	Optional Article 21	Optional Article 22	Articles 20 and 28 (possibility to opt out)
ICCPR	16 December 1966/ 23 March 1976	Human Rights Committee	18	States Parties	Mandatory Article 40	Optional Articles 41 and 42	First Optional Protocol	
CEDAW	18 December 1979/ 3 September 1981	Committee on the Elimination of Discrimination Against Women	23	States Parties	Mandatory Article 18		Optional Protocol	Optional Protocol Articles 8 and 10 (possibility to opt out)
CERD	21 December 1965/ 4 January 1969	Committee on the Elimination of Racial Discrimination	18	States Parties	Mandatory Article 9	Mandatory Articles 11, 12 and 13	Optional Article 14	
ICESCR	16 December 1966/ 3 January 1976	Committee on Economic, Social and Cultural Rights	18	Economic and Social Council (1985)	Mandatory Articles 16 and 17	Optional (Article 10 Optional Protocol)	Optional Protocol (Article 1)	Optional Protocol Article 11
ICRMW	18 December 1989/ 1 July 2003	Committee on Migrant Workers	10	States Parties	Mandatory Article 73	Optional Article 76 (not yet in force)	Article 77 (not yet in force)	
CRC	20 November 1989/ 2 September 1990	Committee on the Rights of the Child	18	States Parties	Mandatory Article 44	Optional Protocol (Article 12)	Optional Protocol (Article 5)	Optional Protocol (Article 13)
CRPD	13 December 2006/ 3 May 2008	Committee on the Rights of Persons with Disabilities	18	States Parties	Mandatory Article 35		Optional Protocol (Article 1)	Optional Protocol (Article 6)

Treaty	Date of adoption/entry into force	Body	Membership	Members elected by	State reporting	Inter-State complaints	Individual complaints	<i>Suo moto</i> inquiry
ICPPED	20 December 2006/ 23 December 2010	Committee on Enforced Disappearances	10 States	Parties	Mandatory Article 29	Optional Article 32	Optional Article 31 Urgent request under Article 30	Mandatory Article 33

## The system of regular visits to detention centres established under the Optional Protocol to CAT

The Optional Protocol to CAT of December 2002, which entered into force in 2006, provides for a system of regular visits to places of detention by an international body, the Subcommittee on the Prevention of Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (SPT), and by national bodies, National Preventive Mechanisms (NPMs). The system is designed to prevent torture and other cruel, inhuman or degrading treatment or punishment. The SPT and the NPMs formulate recommendations and issue them to the governments concerned. While the recommendations of the NPMs may be published in their annual reports, the SPT reports are confidential. However, States are encouraged to publish the reports. The SPT may also request CAT-Committee to make a public statement or to publish the SPT report if a State refuses to cooperate or fails to take steps to improve the situation in light of the SPT's recommendations.

## Follow-up to recommendations

In order to assist States in implementing their recommendations, some treaty bodies have introduced procedures to ensure effective follow-up. Some request, in their concluding observations, that States report back to the country rapporteur or follow-up rapporteur within one year (sometimes two) on the measures taken in response to specific recommendations or "priority concerns" that are rapidly implementable. The rapporteur then reports back to the committee.

Similarly, all treaty bodies with a mandate to consider individual communications request follow-up information, within a specified time frame, from the State Party concerned in all cases in which a breach of the respective treaty is found. For more information on the follow-up procedure, please visit <http://www.ohchr.org/EN/HRBodies/Pages/FollowUpProcedure.aspx>.

## **Box 22 Treaty body strengthening**

Since the first treaty body was established in 1970, the system has expanded significantly. It has doubled in size since 2004 with the establishment of four new treaty bodies, five new procedures for individual complaints and significant increases in the number of members sitting on the committees. But as the treaty body system grew, its functioning was compromised by:

- chronic under-resourcing;
- the accumulation of significant backlogs in State Party reviews and individual communications;
- a more complex system due to the proliferation of different working methods for similar processes.

In addition, many States Parties did not respect their reporting obligations or did not do so in a timely manner.

This situation led in 2009 to a treaty body strengthening process, initiated by the then UN High Commissioner for Human Rights, Navi Pillay. She launched a process of reflection with States, treaty body experts and other partners on how to strengthen the system. The inclusive and participatory consultations culminated in the publication of a landmark report (A/66/860), which was presented to the General Assembly in 2012. In this report, the High Commissioner proposed innovative measures to reinforce the treaty bodies.

In April 2014, after two years of negotiations among Member States, the General Assembly adopted Resolution 68/268 on strengthening the treaty body system, building on many of the High Commissioner's proposals. To enhance the capacity of treaty bodies to protect human rights, the General Assembly:

- increased treaty body meeting time from 75 to 96 weeks per year, thereby allowing treaty bodies to review more countries and individual complaints per year; it also decided to review the amount of meeting time every two years on the basis of objective criteria;
- approved a capacity-building programme to assist countries that need technical assistance in implementing their treaty obligations;
- reaffirmed the independence and impartiality of treaty bodies and their members;
- strongly condemned reprisals against people and organizations cooperating with the treaty bodies;
- rationalized treaty body documentation, thereby also contributing to more environmentally sustainable practices;
- modernized communication by providing videoconferencing equipment;
- encouraged the treaty bodies to align their working methods to make them more efficient and accessible;

- empowered treaty body chairpersons to harmonize procedures across the treaty bodies;
- requested the UN Secretary-General to ensure that the treaty bodies are progressively made accessible for people with disabilities;
- encouraged States to provide voluntary funds to facilitate the engagement of countries without representation in Geneva with the treaty bodies.

#### Further reading

- *The United Nations Human Rights Treaty System: Fact Sheet No. 30 Rev. 1*, New York and Geneva, OHCHR, United Nations, 2012. Available at <http://www.ohchr.org/Documents/Publications/FactSheet30Rev1.pdf>
- *Individual Complaint Procedures under the United Nations Human Rights Treaties: Fact Sheet No. 7 Rev. 2*, New York and Geneva, OHCHR, United Nations, 2013. Available at <http://www.ohchr.org/Documents/Publications/FactSheet7Rev.2.pdf>
- *Handbook for Human Rights Treaty Body Members*, New York and Geneva, OHCHR, United Nations, 2015. Available at [http://www.ohchr.org/Documents/Publications/HR\\_PUB\\_15\\_2\\_TB%20Handbook\\_EN.pdf](http://www.ohchr.org/Documents/Publications/HR_PUB_15_2_TB%20Handbook_EN.pdf)
- All reports, observations and decisions by the treaty bodies can be found on the Treaty bodies web page, available at <http://www.ohchr.org/EN/HRBodies/Pages/TreatyBodies.aspx>





## Chapter 6

# Charter-based system of human rights: the United Nations Human Rights Council and its mechanisms

Meeting of the 32nd session of the Human Rights Council in Geneva, Switzerland in June 2016. "All victims of human rights abuses should be able to look to the Human Rights Council as a forum and a springboard for action," declared United Nations Secretary-General Ban Ki-moon.  
© Nur Photo/Xu Jinquan

**"This Council [the Human Rights Council] has become an important institution within the United Nations, with growing influence and respect ... In its second decade, the Human Rights Council must have important impact on world events – and help to ensure that the frightful human rights violations which we are seeing today are not the prologue to even greater suffering and chaos, tomorrow."**

*Statement of the United Nations High Commissioner for Human Rights, Zeid Ra'ad Al Hussein, 29 February 2016, 31st session of the Human Rights Council in Geneva.*

# From the Commission on Human Rights to the Human Rights Council

## The Commission on Human Rights

Security, development and human rights constitute the three mutually dependent pillars of the United Nations. Matters of international peace and security are discussed and decided in the Security Council, which can impose binding sanctions and authorize the use of military force under Chapter VII of the UN Charter. Matters of development, poverty reduction and similar forms of international cooperation are dealt with in the Economic and Social Council (ECOSOC). But the Charter did not establish such a political body for the third pillar, human rights. It merely authorized ECOSOC, in Article 68, to establish a Commission on Human Rights, similar to other such functional commissions, on the status of women and various development issues. Created in 1946, the Commission on Human Rights served for half a century as the driving force for the UN human rights programme until its replacement by the Human Rights Council (HRC) in 2006 (see below).

Although the Commission was solely composed of States (which numbered 53 in its final years), its six-week, March/April session in Geneva became a huge annual event, with some 3000 participants, including representatives from all States, inter-governmental and non-governmental organizations, individual human rights experts and the media. The Commission and its Sub-Commission on the Promotion and Protection of Human Rights, a think tank composed of 26 independent experts, drafted most of the UN human rights instruments but also addressed factual human rights issues in many countries of the world. Only Member States of the Commission, elected by ECOSOC, had the right to vote, but observer States were equally involved in the process of negotiating decisions and resolutions. International NGOs enjoying consultative status with ECOSOC had the right to speak and distribute written documents, and the Commission developed a fairly effective system of involving and getting advice from independent experts, through special procedures as well as the aforementioned Sub-Commission.

After an initial period governed by the doctrine of “no power to take action” during the 1950s and 1960s, the Commission gradually developed both a public and a confidential procedure based on ECOSOC Resolutions 1235 (XLII) of 6 June 1967 and 1503 (XLVIII) of 27 May 1970 to deal with gross and systematic human rights violations in particular countries. The confidential “1503 procedure” permitted the Commission to examine individual complaints and the public “1235 procedure” allowed for public consideration of country situations.

If a situation was not dealt with under the confidential 1503 procedure, the matter was often considered under the public 1235 procedure. If a majority of the Member States decided that the overall situation in a State was serious enough to merit its attention, it adopted a country-specific resolution and usually entrusted independent experts (working groups, special representatives, rapporteurs, envoys and other experts) to

investigate the situation and report to the Commission with recommendations for further action. The first working groups were established in relation to the situation in Southern Africa and Israel in 1967, and after the military coup d'état by General Pinochet in Chile in 1973. Since the 1980s, usually Special Rapporteurs and other individual experts were established as country-specific special procedures.

In 1980, the Working Group of Enforced or Involuntary Disappearances was created as the first thematic mechanism. Its task was to investigate and clarify cases of enforced disappearances in all countries of the world on the basis of complaints by family members or NGOs with the cooperation of the governments concerned. In the following years, under thematic special procedures, special rapporteurs and other individual experts were appointed to deal with a variety of human rights issues, including summary executions, torture, freedom of religion, arbitrary detention, and rights to education, housing and food.

As a political body composed of States, negotiations in the Commission were always subject to political consideration, in particular during the Cold War. With the increasingly active role of NGOs and individual experts, discussions became more objective, notably during the 1990s. However, at the turn of the millennium, ideological debates tainted by accusations of double standards and finger-pointing led to harsh criticism from many quarters. Finally, the then UN Secretary-General Kofi Annan, in his report on the reform of the United Nations,<sup>1</sup> proposed to replace the Commission by a more permanent Human Rights Council.

## The Human Rights Council

After intense negotiations in the General Assembly, the HRC was established in 2006 by General Assembly Resolution 60/251. Since States could not agree on an amendment of the UN Charter, the Council does not constitute one of the permanent political UN bodies, as the Security Council and ECOSOC do, but it has been elevated from a functional Commission of ECOSOC to a subsidiary body of the General Assembly. With 47 Member States, it is only slightly smaller than the Commission. It meets at least three times a year during its regular sessions in March (four weeks), June (three weeks) and September (three weeks). If one third of the Member States so request, the HRC can decide at any time to hold a special session to address human rights violations and emergencies.

The Sub-Commission has been replaced by an Advisory Committee of 18 independent experts, which provides the HRC with expertise and advice on thematic human rights issues. The HRC has a number of mechanisms, including the Universal Periodic Review, the special procedures and the complaint procedure,<sup>2</sup> which are addressed in further detail below. The HRC has inherited the Commission's working groups and other mechanisms and established new mechanisms for thematic issues, such as the

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<sup>1</sup> In larger freedom: towards development, security and human rights for all. Report of the Secretary-General (A/59/2005); Addendum to the Secretary-General's Report: Explanatory Note on the Human Rights Council (A/59/2005/Add.1).

<sup>2</sup> See also HRC resolution 5/1 of 18 June 2007, entitled "Institution-building of the United Nations Human Rights Council", which guides the HRC's work and sets up its procedures and mechanisms.

right to development, the rights of indigenous peoples, implementation of the Durban Declaration and Programme of Action, regulatory framework of activities of private military and security companies, the right to peace, and the rights of peasants and other people working in rural areas. Other subsidiary bodies of the Council include the Forum on Minority Issues, the Social Forum, the Forum on Business and Human Rights and the Forum on Human Rights, Democracy and the Rule of Law. Moreover, the HRC may establish investigative mechanisms, such as fact-finding missions and commissions of inquiry, to investigate alleged violations of international humanitarian and human rights law.

## The Universal Periodic Review

In order to be non-selective and to ensure equal treatment for every country, a new process called the Universal Periodic Review (UPR) was created in 2006. It involves a review of the human rights record of all 193 UN Member States once every four and a half years. The UPR is a State-driven process, under the auspices of the HRC, in which each State's human rights performance is assessed by other States with the ultimate aim of improving the human rights situation on the ground. At the time of writing, the second cycle of the UPR was about to be completed. All UN Member States will then have been reviewed twice.

While the discussion among States in the framework of the UPR can be very politicized, the review is based on a broad variety of information. Besides the report presented by the State under review, the Office of the United Nations High Commissioner for Human Rights (OHCHR) compiles two reports: one based on information provided by NGOs and other stakeholders, such as NHRIs, and the other based on a compilation of conclusions and recommendations made by treaty monitoring bodies and special procedures, which are all composed of independent experts, and information provided by UN entities.

The functioning of both the Council and the UPR was subjected to a review process, which concluded in 2011 and brought some minor changes to the modalities of the UPR.

### **Box 23 Steps of the UPR process**

- preparation of documents, including a national report which should be based on “a broad consultation process at the national level with all relevant stakeholders”, a summary of NGO reports, and information on engagement and compliance with UN-related human rights commitments which is prepared by the OHCHR;
- assessment of the national report and preparation of recommendations by recommending States;
- review of the State under review by the UPR Working Group, which is composed of all Member States of the HRC; and presentation by the State under review of its report, holding of an interactive dialogue during which States ask questions and make recommendations. Each State review is

assisted by groups of three States, known as “troikas”, which serve as rapporteurs. The troikas may group issues or questions to be shared with the State under review to ensure that the interactive dialogue takes place in a smooth and orderly manner;

- preparation of a document containing recommendations by States and voluntary commitments made by the State under review;
- preliminary adoption of the report;
- final adoption of the document during a plenary session of the HRC.

See also Chapter 10.

## Special procedures

The special procedures system of the HRC is made up of independent human rights experts with mandates to report and advise on human rights from a thematic or country-specific perspective. The system is a central element of the United Nations human rights machinery and covers all human rights: civil, cultural, economic, political and social. The HRC has progressively established new country mandates, of which there were few initially, on the situation of human rights. As of July 2016 there were 41 thematic and 14 country mandates.<sup>3</sup>

Special procedures consist either of an individual (called “Special Rapporteur” or “Independent Expert”) or a five-member working group (one from each of the five United Nations regional groupings). The special rapporteurs, independent experts and working group members are appointed by the Human Rights Council and serve in their personal capacities. They undertake to uphold independence, efficiency, competence and integrity through probity, impartiality, honesty and good faith. They are not United Nations staff members and do not receive financial remuneration. Their independent status is crucial to their ability to fulfil mandates impartially. A mandate-holder’s tenure, whether for a thematic or a country mandate, is limited to a maximum of six years.

### **Box 24 Special procedures of the Human Rights Council**

With the support of the OHCHR (see Chapter 7), special procedure mandate holders carry out a variety of tasks, including to:

- undertake country visits;
- act on individual cases and concerns of a broader, structural nature by sending communications to States and other stakeholders bringing alleged violations or abuses to their attention;

<sup>3</sup> For the full list of Special procedures mandate holders, please see <http://www.ohchr.org/EN/HRBodies/SP/Pages/Welcomepage.aspx>.

- conduct thematic studies and convene expert consultations;
- contribute to the development of international human rights standards;
- engage in advocacy;
- provide advice for technical cooperation.

Special procedure mandate holders report annually to the Human Rights Council; most also report to the General Assembly. Their tasks are defined in the resolutions creating or extending their mandates.

## Human Rights Council complaint procedure

The HRC established a new complaint procedure that largely resembles the old Commission's confidential "1503 procedure" for individual complaints. It also aims to "address consistent patterns of gross and reliably attested violations of all human rights and all fundamental freedoms occurring in any part of the world and under any circumstances".

Two working groups, the Working Group on Communications and the Working Group on Situations, have been established and are responsible, respectively, for examining written communications and bringing consistent patterns of gross and reliably attested violations of human rights and fundamental freedoms to the attention of the HRC. The chairperson of the Working Group on Communications together with the Secretariat undertakes an initial screening of the complaints for admissibility and transmits complaints that meet the admissibility criteria to the concerned States to obtain their views on the allegations of violations contained therein. Then the Working Group on Communications, composed of five experts designated by the Advisory Committee, assesses the admissibility and the merits of a communication. It may keep a case under review and request the State concerned to provide further information within a reasonable time, dismiss a case or recommend the case to the Working Group on Situations. The report of the Working Group on Communications is transmitted to the Working Group on Situations, composed of five members of the HRC serving in their personal capacity. Based on the information and recommendations provided by the Working Group on Communications, the Working Group on Situations is requested to report to the HRC on consistent patterns of gross and reliably attested violations of human rights and fundamental freedoms and to make recommendations on the course of action to take. The Working Group on Situations may also decide to keep the case under review, transmit the case to the HRC for further consideration or dismiss the case. The HRC, based on the report and recommendations, may then decide to:

- discontinue consideration of the situation when further consideration or action is not warranted;
- keep the situation under review and request the State concerned to provide further information within a reasonable period of time;

- keep the situation under review and appoint an independent and highly qualified expert to monitor the situation and report back to the HRC (this course was taken in a situation concerning Liberia under the Commission's 1503 procedure);
- discontinue reviewing the matter under the confidential complaint procedure in order to take up public consideration of the same (as was the case in two instances, concerning Kyrgyzstan in 2006, following its consideration under the 1503 procedure, and Eritrea in 2012);
- recommend to OHCHR to provide technical cooperation, capacity-building assistance or advisory services to the State concerned (as was done, for example, in situations concerning the Democratic Republic of the Congo and Iraq in 2011 and 2012, respectively).

Further reading

- *Institution-building of the United Nations Human Rights Council*, HRC resolution 5/1 of 18 June 2007
- *Directory of Special procedures mandate holders*. Available at <http://www.ohchr.org/EN/HRBodies/SP/Pages/Welcomepage.aspx>





## Chapter 7

# The Office of the United Nations High Commissioner for Human Rights

OHCHR is the leading United Nations entity on human rights. It has a unique mandate from the UN General Assembly to promote and protect all human rights for all people.

An OHCHR staff member, during an information-gathering mission, speaks with local residents about the human rights situation in South Sudan.  
© UN Photo/JC McIlwaine

### History

The UN human rights programme began in the 1940s as a small Division of the UN Secretariat in New York. The Division moved to Geneva and upgraded to the Centre for Human Rights in the 1980s. At the World Conference on Human Rights in 1993, UN Member States decided to establish a more robust human rights institution and, later that year, on 20 December 1993, the General Assembly adopted Resolution 48/141, creating the post of High Commissioner for Human Rights. Twelve years later, at the 2005 UN World Summit, heads of State from around the world committed themselves to an expansion of the UN human rights programme to recognize the central role

and importance of ensuring a human rights approach in all aspects of the United Nations' work.

OHCHR is a part of the United Nations Secretariat and has its headquarters in Geneva. The High Commissioner for Human Rights heads OHCHR and spearheads the United Nations' human rights efforts. The High Commissioner is assisted by a Deputy High Commissioner and an Assistant Secretary-General, who heads OHCHR's New York Office. The New York Office represents the High Commissioner in New York and works for the effective integration of human rights standards into the work of the New York-based UN organs and agencies, policy development processes and public information initiatives.

### **Box 25 General Assembly Resolution 48/141**

General Assembly Resolution 48/141 charges the High Commissioner for Human Rights with "principal responsibility" for human rights in the United Nations with the mandate to:

- promote and protect all human rights for all;
- recommend to bodies of the UN system the improved promotion and protection of all human rights;
- promote and protect the right to development;
- provide technical assistance for human rights activities;
- coordinate UN human rights education and public information programmes;
- work actively to remove obstacles to the realization of human rights;
- work actively to prevent the continuation of human rights violations;
- engage in dialogue with governments with the aim of securing respect for all human rights;
- enhance international cooperation;
- coordinate human rights promotion and protection activities throughout the UN system;
- rationalize, adapt, strengthen and streamline the UN human rights machinery.

## **How OHCHR works**

As the entity in charge of implementing the UN human rights programme, OHCHR aims to make the protection of human rights a reality in the lives of people everywhere. The work of OHCHR generally centres on three broad areas: supporting human rights standard setting; human rights monitoring; and supporting human rights implementation at the country level.

OHCHR cooperates with other UN bodies to integrate human rights norms and standards into the work of the UN system as a whole. It also provides the UN treaty-monitoring bodies and special procedures with quality secretariat support. OHCHR engages in dialogue with governments on human rights issues with a view to building national capacities in the area of human rights and enhancing respect for human rights. It also provides advisory services and technical assistance when so requested, and encourages governments to pursue the development of effective national institutions and procedures for the protection of human rights.

## **Box 26 Technical assistance to States and parliaments**

### **OHCHR technical assistance**

The United Nations Technical Cooperation Programme in the Field of Human Rights assists States, at their request, in building and strengthening national structures that have a direct impact on the observance of human rights and the rule of law.

Components of the programme focus on incorporating international human rights norms and standards in national laws and policies; building or strengthening national institutions capable of promoting and protecting human rights, democracy and the rule of law; formulating national plans of action for the promotion and protection of human rights; providing human rights education and training; and promoting a human rights culture. Such assistance takes the form of expert advisory services, training courses, workshops and seminars, fellowships, grants, the provision of information and documentation, and the assessment of domestic human rights needs.

Under the Technical Cooperation Programme, a number of national parliaments have received direct training and other support designed to assist them in carrying out their important human rights functions. This programme component addresses a variety of crucial issues, including information on national human rights legislation, parliamentary human rights committees, ratifications of and accessions to international human rights instruments, and, in general, the role of parliament in promoting and protecting human rights.

The United Nations regards technical cooperation as a complement to, but never a substitute for, monitoring and investigation under the human rights programme. As emphasized in relevant reports of the Secretary-General, the provision of advisory services and technical assistance does not reduce a government's responsibility to account for the human rights situation in its territory; nor does it exempt it from monitoring under the appropriate United Nations procedures.

### **Examples of OHCHR technical assistance and capacity-building for national parliaments**

OHCHR delivers technical assistance from its headquarters and from its several field presences in different countries and regions.

**Madagascar:** In 2014, OHCHR set-up a working group with the National Assembly which holds weekly meetings and offers a space for information sharing and coordinated responses to human rights violations and threats. Further to such cooperation, the President of the National Assembly committed to creating a Human Rights Committee within the National Assembly and appointed a human rights adviser in his office in 2014. OHCHR also supported the elaboration and adoption of legislation to create an independent national human rights commission (INHRC). In 2015, OHCHR organized information sessions for the National Assembly on INHRC's mandate and the need to appoint an assembly representative to the commission.

**Georgia:** In 2015, in response to a request by the chair of the Parliament's Legal Committee, OHCHR supported research on models of legal capacity for persons with disabilities. Following completion of the research, OHCHR was requested to support and lead the process of finalizing an amendments package for existing legislation on the legal capacity of persons with psychological disabilities. The amendments were passed in 2015.

**Paraguay:** OHCHR provided technical assistance for the creation of an inter-institutional monitoring system for international recommendations on human rights (called "SIMORE"), which includes Members of Parliament and representatives of different ministries. There is currently a focal point, based in the Human Rights Committee of the Chamber of Deputies, to follow up on relevant recommendations.

## OHCHR in the field

By July 2016, OHCHR was operating in or supporting 65 field presences to ensure that international human rights standards are progressively being implemented and realized at the country level, both in law and in practice. This means building national human rights capacity and institutions, for example by training judges and members of the armed forces, police and other national actors. Other activities include helping to draft national laws that are in line with international human rights norms and standards and human rights monitoring efforts, and following up on the recommendations of human rights treaty-monitoring bodies and the mechanisms of the United Nations Human Rights Council. The work of field presences is based on partnerships with national and other counterparts, notably from governments and civil society.

### Box 27 Human rights in action: OHCHR in the field (as of July 2016)\*

#### Country offices/stand-alone offices

Bolivia (Plurinational State of), Burundi, Cambodia, Colombia, field-based structure for the Democratic People's Republic of Korea,<sup>1</sup> Guatemala, Guinea,

<sup>1</sup> Human Rights Council Resolution 25/25.

Honduras, Mauritania, Mexico, State of Palestine,<sup>2</sup> Tunisia, Uganda, Ukraine (Human Rights Monitoring Mission), Yemen

### **OHCHR regional presences**

East Africa (Addis Ababa), South Africa (Pretoria), West Africa (Dakar), Central Africa (Yaoundé), South-East Asia (Bangkok), the Pacific (Suva), the Middle East and North Africa (Beirut), Central Asia (Bishkek), Europe (Brussels), Central America (Panama City), South America (Santiago de Chile)

UN Human Rights Training and Documentation Centre for South West Asia and the Arab Region (Doha)

### **Human rights components of UN peace missions**

Afghanistan, Central African Republic, Côte d'Ivoire,<sup>3</sup> Democratic Republic of the Congo, Guinea-Bissau, Haiti, Iraq, Kosovo,<sup>4</sup> Mali, Liberia, Libya, Somalia, South Sudan, Sudan (Darfur)

### **Human rights advisers in UN country teams and UN Development Group regional teams**

Bangladesh, Chad, Dominican Republic, Jamaica, Kenya, Madagascar, Malawi, Mozambique, Nigeria, Papua New Guinea, Paraguay, Philippines, Russian Federation, Rwanda, Serbia, Sierra Leone, Sri Lanka, the Southern Caucasus (based in Tbilisi and covering Armenia, Azerbaijan and Georgia), Timor-Leste, United Republic of Tanzania, the former Yugoslav Republic of Macedonia

UNDG regional team for Southeast Asia and UN Development Group regional team for Central America

\*Content subject to change. Please check [www.ohchr.org](http://www.ohchr.org) for up-to-date information.

### **Box 28 United Nations High Commissioners for Human Rights**

After a career in the diplomatic service of Ecuador, **José Ayala-Lasso** became the first United Nations High Commissioner for Human Rights in 1994. He was succeeded in 1997 by **Mary Robinson**, a former President of Ireland. On 12 September 2002, **Sergio Vieira de Mello** became the third High Commissioner. In May 2003, he was asked by the Secretary-General to take a four-month leave of absence from OHCHR to serve as Special Representative of the Secretary-General in Iraq, where he was tragically killed on 19 August 2003. Until the appointment of a new High Commissioner, the office was led by Acting High Commissioner **Bertrand Ramcharan**, of Guyana. Between 1 July 2004

2 Reference to Palestine should be understood in compliance with United Nations General Assembly resolution 67/19.

3 By Resolution 2284, unanimously adopted on 28 April 2016, the UN Security Council decided that the mandate of UNOCI will end on 30 June 2017.

4 Reference to Kosovo should be understood in full compliance with the United Nations Security Council Resolution 1244 and without prejudice to the status of Kosovo.

and 1 July 2008, OHCHR was headed by **Louise Arbour**, a former Justice of the Supreme Court of Canada and, from 1996 to 2000, Chief Prosecutor for the International Criminal Tribunals for the former Yugoslavia and for Rwanda. From July 2008 to August 2014, OHCHR was headed by **Navanethem Pillay**, a former judge at the High Court of South Africa, the International Tribunal for Rwanda (1999–2003), and the International Criminal Court (2003–2008). Since September 2014, OHCHR is under the leadership of **Zeid Ra'ad Zeid Al-Hussein** from Jordan. He brings to the position an extensive career in multilateral diplomacy. Knowledgeable in international criminal justice, he played a central role in the establishment of the International Criminal Court, notably as the first president of its governing body. He worked intimately on peacekeeping issues for over 19 years, notably as one of five eminent experts in Secretary-General Ban Ki-moon's Senior Advisory Group on reimbursements to countries contributing troops to peacekeeping. Following allegations of widespread abuse committed by United Nations peacekeepers in 2004, Mr Zeid was appointed by Kofi Annan as Adviser to the Secretary-General on Sexual Exploitation and Abuse. He also served as President of the United Nations Security Council.

#### Further reading

- *Working with the United Nations Human Rights Programme: A Handbook for Civil Society*, New York and Geneva, OHCHR, United Nations, 2008. Available at [http://www.ohchr.org/EN/AboutUs/CivilSociety/Documents/Handbook\\_en.pdf](http://www.ohchr.org/EN/AboutUs/CivilSociety/Documents/Handbook_en.pdf)

## EUROPEAN COURT OF HUMAN RIGHTS COUR EUROPÉENNE DES DROITS DE L'HOMME



## Chapter 8 Regional human rights treaties and monitoring

In addition to the UN charter-based system of human rights protection, which applies to all States, and the UN treaty-based system, which applies only to States

Parties, many States in Africa, the Americas, the Arab region and Europe have also assumed binding human rights obligations at the regional level and have accepted international monitoring of these obligations. A regional human rights treaty and monitoring mechanism has not yet been adopted in the Asian and Pacific region, but a process is under way within the Association of Southeast Asian Nations (ASEAN) to institutionalize a regional approach to human rights.

The European Court of Human Rights, one of the regional human rights courts, monitors respect for the human rights of 800 million Europeans in the 47 Council of Europe member States that have ratified the European Convention on Human Rights. © Anadolu Agency/Mustafa Yalcin

### Africa

In 1981, the Member States of the Organization of African Unity, which has since become the African Union (AU), adopted the African Charter on Human and Peoples' Rights, which entered into force in October 1986. As of March 2016, the Charter had been ratified by all Member States of the African Union, except South Sudan. As its title implies, this regional treaty, in addition to a number of civil, political, economic, social and cultural rights, also provides for collective rights of peoples to equality, self-determination, freedom to dispose of their wealth and natural resources, development, national and international peace and security and "a general satisfactory

environment". In addition to the Charter, the AU has adopted treaties in the areas of refugee protection, women and children's rights.

The African Charter provides for a complaints procedure before the African Commission on Human and Peoples' Rights (ACHPR), headquartered in Banjul, Gambia. Complaints (or "communications") may be submitted by any person or entity. This includes States, which may file inter-State complaints, and any individual or collective entity, such as NGOs, families, clans, communities or other groups. If it appears that one or more communications submitted to the Commission indicate the existence of a series of serious or massive violations of human and peoples' rights, the Commission may notify the Assembly of Heads of State and Government – the highest political body of the AU – which can then request the Commission to undertake an in-depth study on the situation. In addition to this complaints procedure, the Commission also examines State reports under a procedure similar to the one followed by the United Nations treaty bodies. It has several special mechanisms in the form of special rapporteurs, working groups and committees mandated to investigate and report on specific human rights issues.

An Additional Protocol to the African Charter, adopted in 1998 to establish an African Court on Human and Peoples' Rights, entered into force on 25 January 2004. After starting its operations in November 2006 in Addis Ababa (Ethiopia), the Court moved its permanent seat to Arusha (United Republic of Tanzania) in August 2007. The decisions of the Court, unlike those of the Commission, are binding on the parties. The Court can receive complaints regarding violations of the African Charter and other relevant human rights treaties from a number of complainants: the Commission; States Parties against whom a complaint has been lodged with the Commission; States Parties one or more of whose citizens claim to be victims of human rights violations; African intergovernmental organizations; individuals; and NGOs with observer status before the African Commission. However, individual and NGO complaints are admissible only if the respondent State has accepted the jurisdiction of the Court to receive complaints. In addition to its "contentious jurisdiction" (competence to hear cases between two parties), the Court is also competent to render advisory opinions which interpret the African Charter and other relevant human rights instruments binding on Member States and assess the compatibility of domestic laws with those instruments.

The Court was established by virtue of Article 1 of the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights (the Protocol) which was adopted by Member States of the then Organization of African Unity in Ouagadougou, Burkina Faso, in June 1998. The Protocol came into force on 25 January 2004 after it was ratified by more than 15 countries. The Court delivered its first judgment in 2009 following an application dated 11 August 2008 against Senegal. As of January 2016 it had received 74 applications from individuals and NGOs. However, the majority of these applications were dismissed for lack of jurisdiction, either because the State against which the case was brought had not ratified the protocol or because the respondent State had not accepted the Court's jurisdiction to receive cases from NGOs or individuals. As at February 2016, only seven of the States Parties to the Protocol had made the

declaration recognizing the competence of the Court to receive cases from NGOs and individuals.

In July 2008, the African Union merged the African Court on Human and Peoples' Rights and the African Court of Justice to form a new regional court, the African Court of Justice and Human Rights. It also adopted a protocol on the new court's statute, but as of July 2016, only five States (Benin, Burkina Faso, Congo, Libya and Mali) had ratified it (out of the 15 ratifications required for the protocol's entry into force).

The Community Court of Justice of ECOWAS, along with its general mandate to ensure the observance of ECOWAS law and principles, has a particular mandate to protect human rights. Following the adoption of a Supplementary Protocol in 2005, the Court's jurisdiction was extended to hear individual complaints of alleged human rights violations in any ECOWAS Member State. Unlike the African Commission and Court, it does not require that domestic remedies be exhausted before cases are brought before it.

The East African Court of Justice, the judicial arm of the East African Community, became operational in 2001, with jurisdiction over the interpretation and application of the Treaty establishing the East African Community. Members of the Community may decide to adopt a protocol extending the Court's jurisdiction to include human rights issues.

The Southern African Development Community (SADC) also has a judicial body: the SADC Tribunal, established in 1992. While not a human rights court per se, the SADC Tribunal does have jurisdiction over, and has heard several cases involving human rights issues.

## The Americas

The inter-American system for the protection of human rights comprises two distinct processes, one that is based on the Charter of the Organization of American States (OAS), and the other based on the American Convention on Human Rights (also known as the Pact of San José). While the charter-based process is applicable to all OAS Member States, the American Convention on Human Rights is only legally binding on States Parties. The Convention, adopted in 1969 and in force since 1978, focuses on civil and political rights, and is supplemented by an additional protocol (adopted in 1988, entered into force in 1999) addressing economic, social and cultural rights (the San Salvador Protocol). The OAS has also adopted special treaties on enforced disappearances, torture, violence against women, international trafficking in minors and discrimination against persons with disabilities.

The Convention provides for inter-State and individual complaints before the Inter-American Commission on Human Rights (IACHR), a quasi-judicial monitoring body located in Washington, DC, and the Inter-American Court of Human Rights, located in San José (Costa Rica). As of March 2016, 23 of the 35 OAS Member States were parties to the Convention and 19 had recognized the Court's jurisdiction. States that have not ratified the Convention (or that have withdrawn, such as Trinidad and Tobago

and the Bolivarian Republic of Venezuela) are subject only to the charter-based system (before the Inter-American Commission).

The overwhelming majority of the thousands of complaints that are filed under this system are dealt with only by the Inter-American Commission, which either declares them inadmissible, facilitates a friendly settlement or publishes its conclusions on the merits of the cases in a report, including non-binding recommendations. The applicants themselves are not entitled to bring their cases directly before the Inter-American Court of Human Rights; only the States concerned and the Commission may do so. In most cases referred to the Court, the States in question have been found responsible for gross and systematic human rights violations (including torture, arbitrary executions and enforced disappearances) and ordered to ensure reparation beyond monetary compensation, including guarantees of non-repetition, for victims and their families.

Like the African Court, the Inter-American Court is also competent to render advisory opinions, interpreting international human rights treaties (especially the American Convention on Human Rights) and assessing the compatibility of domestic laws with these treaties.

The Caribbean Court of Justice was inaugurated in 2005. It has its headquarters in Port of Spain, Trinidad and Tobago, but also conducts hearings in other contracting parties. The Court has both an original and an appellate jurisdiction and functions as a final court of appeal for members that have recognized its jurisdiction in their internal law. The Court has the competence to consider issues related to the Caribbean Common Market as well as cases that concern broader human rights and environmental questions.

## Arab region

In May 2004, the League of Arab States (LAS) adopted the Arab Charter on Human Rights, which entered into force in March 2008. The revised Charter replaced the previous Arab Human Rights Charter, which was adopted in September 1994 but not ratified by any of the LAS Member States. The process of updating the Charter was supported by the OHCHR, which established a drafting team of Arab human rights experts from among members of United Nations Human Rights Treaty Bodies. The proposal of the Committee of Experts was then amended and adopted by the Human Rights Commission of Arab States – also known as the Arab Standing Committee for Human Rights or the Permanent Arab Commission on Human Rights. The Human Rights Commission of Arab States was established in 1968 as the permanent human rights body of LAS, and is composed of representatives of each of the Member States. Since 2003, civil society organizations have been able to obtain observer status at the Commission. Beyond its decisive role in adopting the original and revised versions of the Arab Charter, the Human Rights Commission of Arab States has been active in denouncing human rights violations in some Arab States, has considered a plan of action for human rights education in the Arab world and has reviewed agreements within the LAS in light of the revised Arab Charter.

The current Arab Charter builds on its predecessor and contains the most comprehensive list of non-derogable rights to be found in any regional human rights instrument. The current Charter is much more advanced than the previous version in respect of states of emergency, fair trial guarantees, slavery, sexual violence, the rights of persons with disabilities and trafficking. The revised Charter also recognizes the right to development,<sup>1</sup> entrenches the principle that all human rights are “universal, indivisible, interdependent and interrelated”,<sup>2</sup> and recognizes a number of children’s rights.<sup>3</sup>

The Arab Charter provides for a human rights committee to monitor State implementation of the Charter, through State reports, and submit recommendations to the LAS Council. The committee is composed of seven human rights experts and operates in a fashion similar to that of the United Nations Human Rights Committee, although it is not competent to receive individual complaints. Article 52 of the Arab Charter provides for the possibility of adopting protocols to the Charter, which may allow for an individual complaints mechanism in the future.

The Organization of Islamic Cooperation (OIC) has an Independent Permanent Human Rights Commission (IPHRC), which held its first meeting in 2012. The IPHRC has its seat in Jeddah, Saudi Arabia, and is composed of 18 independent experts who provide legal advice and information to members while also conducting research and making recommendations to the OIC. The IPHRC does not receive individual complaints but acts in an advisory and coordinating capacity, seeking to promote cooperation on human rights issues among the OIC, its members, civil society and the international human rights mechanisms.

## Asia and the Pacific

While a regional convention on human rights does not exist, Asian and Pacific countries have focused on strengthening regional cooperation, including through OHCHR, to promote respect for human rights. States participating in a series of Asian and Pacific regional workshops over the past 20 years have developed a framework of cooperation.

An important step towards a regional human rights system in Asia was taken by ASEAN. In October 2009, ASEAN established the ASEAN Intergovernmental Commission on Human Rights (AICHR). Its mandate is limited to developing strategies for, enhancing awareness about and promoting the effective implementation of Member States’ human rights obligations. To this effect, the Commission was mandated to develop the ASEAN Human Rights Declaration (AHRD), which was adopted at the 21st ASEAN Summit in Phnom Penh (Cambodia, November 2012). The Declaration has been widely criticized, however, for falling short of international human rights norms and standards and for failing to incorporate meaningful consultation with civil society during the drafting process. Other regional instruments

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<sup>1</sup> Article 37, Arab Charter on Human Rights (adopted on 23 May 2004, entry into force on 15 March 2008).

<sup>2</sup> Ibid, Article 1(4).

<sup>3</sup> Ibid, Articles 17, 33 and 34.

with human rights components have also been adopted, such as the Convention Against Trafficking in Persons, Especially Women and Children, adopted in Kuala Lumpur, Malaysia, in November 2015 but not yet in force (as of March 2016).

The South Asian Association for Regional Cooperation (SAARC) has adopted a number of conventions that deal with human rights issues, including trafficking in women and children, child welfare and the suppression of terrorism.

There is no subregional human rights instrument or body as yet in the Pacific, but the topic has been discussed in recent years. The Asia Pacific Forum of National Human Rights Institutions (APF) is a key regional organization. Its membership consists of NHRIs in the region that comply with international standards set out in the Paris Principles.

## Europe

### Council of Europe

The Council of Europe<sup>4</sup> was established after the Second World War. It is an international organization with 47 Member States. Its primary goals are to promote democracy and protect human rights and the rule of law in Europe. As soon as it was established in 1949, the Council began to draw up the ECHR, which was signed in 1950 and came into force in 1953. The European Convention and its additional protocols constitute a general human rights treaty focused on civil and political rights. Social, economic and cultural rights are enshrined in the European Social Charter (1961–65) and its additional protocols and revisions (the Revised European Social Charter, 1996–99, which is gradually replacing the original Charter). Furthermore, the Council of Europe has adopted special treaties in the areas of, *inter alia*, data protection, migrant workers, minorities, torture prevention, biomedicine, trafficking in human beings and violence against women.

Today, the ECHR provides the most advanced system of human rights monitoring at the regional level. Under Article 34 of the European Convention, any person, NGO or group of individuals claiming to be a victim of a human rights violation under the Convention and its protocols is entitled, once all domestic remedies have been exhausted, to file a petition to the European Court of Human Rights in Strasbourg (France), the only human rights court with full-time professional judges. If a violation is found, the Court may provide satisfaction to the injured party. Its decisions are final and legally binding on the States Parties. Their implementation is monitored by the Committee of Ministers, the highest political body of the Council of Europe. The Court receives approximately 65,000 applications every year and has had increasing difficulties in handling this immense case load. Protocol No. 14, which entered into

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<sup>4</sup> The Council of Europe is distinct from the European Council (a European Union (EU) institution comprising the heads of state or government of the Member States of the EU) and the Council of the European Union (one of the two law-making bodies of the EU, which consists of the ministers of each Member State with responsibility for a given area).

force in June 2010, aims to address this issue and to guarantee the Court's long-term efficiency by optimizing the filtering and processing of applications, providing for simpler cases to be heard by a single judge or a bench of three judges, and for judges' terms to be extended to nine years without the possibility of re-election. Other reforms introduced in Protocols 15 and 16 (2013) expand the role of national courts and enable domestic appellate tribunals to request advisory opinions from the Court on questions of principle relating to the interpretation or application of the rights and freedoms contained in the ECHR.

Under the **Protocol to the European Social Charter** that entered into force in 1998, certain organizations<sup>5</sup> may lodge complaints with the European Committee on Social Rights. Once a complaint has been declared admissible, a procedure is set in motion, leading to a decision on the merits by the Committee. The decision is transmitted to the parties concerned and the Committee of Ministers in a report, which is made public within four months. The Committee of Ministers adopts a resolution, in which it may recommend that the State concerned take specific measures to ensure that the situation is brought into line with the Charter.

The **European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment**, which entered into force in February 1989, established the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT). The CPT is composed of independent experts from each State Party who regularly undertake unannounced and unsupervised visits to all places of detention with a view to preventing torture and other ill-treatment. Since its establishment, the Committee has undertaken more than 400 visits and published over 300 reports.

In 1994, the Council of Europe set up the **European Commission against Racism and Intolerance** (ECRI) as an independent monitoring body to combat racism, xenophobia, anti-Semitism and intolerance.

In 1999, the Council of Europe established the independent institution of a **Commissioner for Human Rights** with the mandate to promote awareness about and respect for human rights in the Council's 47 Member States. In doing so, the Commissioner engages in a permanent dialogue with Member States, undertakes country visits, issues thematic recommendations and promotes the development of national human rights structures.

## European Union

With the adoption of the Treaty on the European Union (Maastricht, 1992), "fundamental rights as guaranteed by the ECHR and as they result from the constitutional traditions common to the Member States" became general principles of

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<sup>5</sup> The organizations authorized to submit complaints are the European Trade Union Confederation, BusinessEurope; and the International Organisation of Employers. In addition, NGOs with participative status with the Council of Europe as well as employers' organizations and trade unions, may also submit complaints. Finally, States can also agree to allow national NGOs to file complaints against them. See Article 1, Additional Protocol to the European Social Charter Providing for a System of Collective Complaints (open for signature on 9 November 1995, entry into force on 1 July 1998).

Community Law. In 1997, the Amsterdam Treaty enshrined human rights as founding principles of the EU. In 2000, EU Member States signed the Charter of Fundamental Rights, which since its inclusion into the Lisbon Treaty (Articles 1 and 7 of the Treaty) has become legally binding, not only for the EU's institutions but also for Member States when applying European Union law. The Charter covers civil and political as well as social, economic and cultural rights, and contains certain specific guarantees, for example concerning bioethics and data protection. According to Article 53 of the Charter, the fundamental rights set out in the ECHR constitute a minimum standard, although Member States can provide further protection beyond what is laid down in the Convention. Moreover, nothing in the Charter is to be interpreted as restricting those rights. All EU institutions are in principle involved in human rights protection according to their specific mandates. The European Fundamental Rights Agency, established in 2007, is mandated to advise the Union's organs and Member States as to respect for human rights in the implementation of Community Law.

## Organization for Security and Cooperation in Europe

The OSCE is the world's largest regional security organization that is also active in promoting and protecting human rights, in particular freedom of movement and religion, minority rights, free and fair elections and the prevention of trafficking in persons. The OSCE monitors and reports on human rights situations in participating States and provides training for their administrations. Its specialized institutions include the Office for Democratic Institutions and Human Rights, the Office of the Special Representative and Coordinator for Trafficking in Human Beings, the Representative on Freedom of the Media and the High Commissioner on National Minorities. The OSCE operates long-term field missions specialized in promoting human rights and democratization in post-conflict countries, such as Bosnia and Herzegovina and Kosovo<sup>6</sup>.

### **Box 29 Regional human rights treaties**

#### **Council of Europe, European Union**

European Convention for the Protection of Human Rights and Fundamental Freedoms (1950–1953)<sup>7</sup> and Additional Protocols

European Social Charter (1961–1965), Additional Protocols and Revised European Social Charter (1996–1999)

European Convention on the Legal Status of Migrant Workers (1977–1983)

European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (1987–1989)

<sup>6</sup> All references to Kosovo in this publication should be understood to be in the context of UN Security Council resolution 1244 (1999).

<sup>7</sup> The first date listed after each treaty refers to the date on which the treaty was adopted; the second date refers to the entry into force of the treaty (after being ratified by the required number of Member States).

European Charter for Regional or Minority Languages (1992–1998)  
Framework Convention for the Protection of National Minorities (1995–1998)  
European Convention on the Exercise of Children’s Rights (1996–2000)  
Convention on Human Rights and Biomedicine (1997–1999)  
European Convention on Nationality (1997–2000)  
Charter of Fundamental Rights of the European Union (2000)  
European Convention on Action against Trafficking in Human Beings (2005–2008)  
Council of Europe Convention on Protection of Children against Sexual Exploitation and Sexual Abuse (Lanzarote Convention) (2007–2010)  
Council of Europe Convention on Combating Violence against Women and Domestic Violence (Istanbul Convention) (2011–2014)

### **Organization of American States**

American Convention on Human Rights (1969–1978) and Additional Protocols (on economic, social and cultural rights and abolition of the death penalty)  
Inter-American Convention to Prevent and Punish Torture (1985–1987)  
Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women (1994–1995)  
Inter-American Convention on the Forced Disappearance of Persons (1994–1996)  
Inter-American Convention on International Traffic in Minors (1994–1997)  
Inter-American Convention on the Elimination of All Forms of Discrimination against Persons with Disabilities (1999–2001)  
Inter-American Convention against Racism, Racial Discrimination and Related Forms of Intolerance (2013–2013)  
Inter-American Convention against All Forms of Discrimination and Intolerance (2013–2013)

### **African Union (formerly Organization of African Unity)**

African Charter on Human and Peoples’ Rights (1981–1986)  
Convention Governing the Specific Aspects of Refugee Problems in Africa (1969–1974)  
Convention on the Rights and Welfare of the African Child (1990–1999)  
Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa (Maputo Protocol) (2003–2005)  
African Youth Charter (2006–2009)  
African Charter on Democracy, Elections and Governance (2007–2012)



## Convention for the Protection and Assistance of Internally Displaced Persons in Africa (Kampala Convention) (2009–2012)

### Further reading

- *The European Union and International Human Rights Law*, OHCHR Regional Office for Europe: [http://www.europe.ohchr.org/Documents/Publications/EU\\_and\\_International\\_Law.pdf](http://www.europe.ohchr.org/Documents/Publications/EU_and_International_Law.pdf)



## **Chapter 9**

# **Basic requirements for an effective parliamentary contribution to human rights**

Members of the IPU Committee on the Human Rights of Parliamentarians engage in discussion during the 135th IPU Assembly in March 2016 in Lusaka, Zambia. © IPU/Bellah Zulu

### **Basic principles**

When it comes to human rights promotion and protection, parliaments and members of parliament are essential actors: parliamentary activity as a whole – legislating, adopting a State's budget and overseeing the executive branch – covers the entire spectrum of political, civil, economic, social and cultural rights and thus has an immediate impact on the enjoyment of these rights by the people. As the State institution which represents the people and through which they participate in the conduct of public affairs, parliament is indeed a guardian of human rights. Parliament must be aware of this role at all times because the country's peace, social harmony and development largely depend on the extent to which human rights permeate all parliamentary activity.

For parliaments to effectively fulfil their role as guardians of human rights, specific criteria must be met and safeguards established.

## Ensuring the representative nature of parliament

Parliament's authority derives to a large extent from its capacity to reflect the will and diversity of all components of society, including men and women, persons holding different political opinions, ethnic groups, minorities and disadvantaged groups. To achieve this, members of parliament must be chosen by the people in genuine and periodic elections by universal, equal and secret suffrage, in accordance with the rights set forth in Article 21 of the Universal Declaration of Human Rights and Article 25 of the ICCPR.

### Box 30 Women's representation in parliament and in IPU

Women make up half the world's population, but this is not reflected in their share of seats in parliaments, which in 2015 stood at 22.6 per cent. Nevertheless, important gains have been made during the past decade: their share came to only 16.2 per cent in 2005.

IPU's annual publication entitled "Women in parliament: the year in review" presents an overview and analysis of progress made and setbacks encountered by women in parliament further to elections and renewals held during the year.

IPU's analysis for 2015 offered several lessons, including the following:

- **Quotas: necessary but not sufficient.** Electoral gender quotas make a huge difference to the election of women to parliament. In 2015, in elections where quotas were legislated, women took almost a quarter of the parliamentary seats available. However, as shown in a number of countries, quotas are only as effective as their implementation regime. Where quota provisions are ignored, and sanctions are not applied or strictly enforced, women are not elected in large numbers. More innovative solutions are also needed to tackle the continuing challenge faced by women of securing adequate financing for their campaigns.
- **Context matters: electoral systems.** Even where gender quotas were not completely respected, electoral systems preserved the number of women elected in both the Nordic region (Denmark and Finland) and Latin America (Argentina and Guyana). Women took 25.8 per cent of seats elected by proportional representation, compared with 22.3 per cent elected through majoritarian systems or allocated by appointment. While proportional representation itself allows political parties to field more women (because more than one candidate may be elected to a constituency), this system is also most compatible with legislated candidate quotas. These quotas are more difficult to implement in majoritarian systems precisely because only one candidate can be elected per constituency.
- **All political parties must field women candidates.** Data on candidates continues to be sporadically collected, making a comprehensive analysis difficult. The available data shows that women's success rates are high when the quota used is in the form of reserved seats (Pakistan and the

United Republic of Tanzania), and where the outcome of the election is more predictable because of the strength of a ruling party (Ethiopia, Singapore and Tajikistan). Women's electoral success in 2015 had a greater impact in relatively small parliaments, particularly in the small island developing states of Marshall Islands, Tuvalu and St Kitts and Nevis. However, this data masks a significant finding: conservative political parties have tended to resist the adoption of targets or voluntary quotas, and have therefore seen fewer women selected as candidates for election.

IPU has set an international example as the only international organization to have internal quotas for women in elected positions and sanctions for delegations that do not include representatives of both sexes.

## Protecting the freedom of expression of parliamentarians

Parliament can fulfil its role only if its members enjoy the right to freedom of expression so that they can speak on behalf of the people they represent. Members of parliament must be free to seek, receive and impart information and ideas without fear of reprisal. They are therefore generally granted a special status, intended to provide them with the requisite independence: they enjoy parliamentary privilege or parliamentary immunities with respect to their freedom of expression during proceedings in parliament.

### **Box 31 Parliamentary immunity in historical context<sup>1</sup>**

In Great Britain, starting with the Magna Carta in 1215, the rights of the individual vis-à-vis those in power offered guarantees against the abuse of royal power, in particular freedom from arbitrary arrest and imprisonment. The Petition of Rights (1628), the Habeas Corpus Act (1679) and finally the Bill of Rights (1689) all referred to the common law tradition of individual rights, which they confirmed or further developed. The Anglo-Saxon concept of immunities is therefore rooted in the progressive development of custom, which applied to everyone, parliamentarians as well as others. Members of the British Parliament therefore did not feel the need to develop special protection, considering the common law sufficient to protect them against arbitrary action by the King or Government.

This was not so in France, where a revolution was necessary to set forth the rights of the individual vis-à-vis state power. The 1789 Declaration of the Rights of Man and of the Citizen was not the result of common agreement on basic political values that had evolved over the years. Special measures were therefore deemed necessary to ensure the independence of National Assembly Members. When, on 25 June 1789, the King ordered the Estates General to leave the building where they were meeting, the National Assembly adopted a

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<sup>1</sup> *Parliamentary Immunity*, background paper prepared by the Inter-Parliamentary Union and UNDP, 2006.

motion declaring the person of each deputy inviolable and further proclaiming that individuals, corporations, tribunals or commissions venturing to prosecute, arrest or attempt to arrest and detain a deputy during or after the session on account of proposals, statements or opinions given at the Estates General “are odious and traitors to the Nation, and are committing a capital crime”. This novel concept of inviolability was analysed as a measure of public order seeking to shelter the legislative power from encroachments by the executive and not as a privilege created for the advantage of a single category of individuals. Its scope and its legal and practical implications developed, and a clear distinction emerged between acts carried out by parliamentarians in their official capacity and private acts. The French model thus came to comprise the privilege of freedom of speech and parliamentary inviolability. It had a considerable impact in Europe and the former French colonies, as of course did the Westminster model in the Commonwealth community of nations.

Parliamentary immunities ensure the autonomy, independence and dignity of the representatives of the nation and of the institutions of parliament itself by protecting them against any threat, intimidation or arbitrary measure by public officials or other persons. The scope of immunities varies. The minimum guarantee, which applies to all parliaments, is *non-accountability*. Under this guarantee, parliamentarians in the exercise of their functions may express themselves freely without the risk of sanctions, other than that of being disavowed by the electorate, which may eventually not renew their mandates. In many countries, members of parliament also enjoy *inviolability*: it is only with the consent of parliament that they may be arrested, detained and subjected to civil or criminal proceedings. Inviolability is not equivalent to impunity. It merely entitles parliament to verify that proceedings brought against its members are legally well founded.

#### **Box 32 Protecting parliamentarians’ human rights: the IPU Committee on the Human Rights of Parliamentarians**

- If parliamentarians are to defend the human rights of the people they represent, they must themselves be able to exercise their human rights, including the right to freedom of expression. Noting that this often is not the case, IPU adopted a procedure for the examination and treatment of alleged violations of the human rights of parliamentarians in 1976.
- IPU entrusted the Committee on the Human Rights of Parliamentarians with the task of examining complaints concerning parliamentarians “who are or who have been subjected to arbitrary actions during the exercise of their mandate, whether parliament is sitting, [is] in recess or has been dissolved as the result of unconstitutional or extraordinary measures”. The procedure applies to members of the national parliament of any country.
- The Committee is composed of ten full members, each elected in an individual capacity for five years, bearing in mind the need for gender balance and geographical representation. It holds three closed meetings per year.

- The Committee seeks to establish the facts of a given case by cross-checking and verifying, with the authorities of the countries concerned and the complainant, the allegations and information forwarded to it. Once it has found that a complaint is admissible, the Committee aims to find a satisfactory settlement of the case in light of national, regional and international human rights law and jurisprudence. In carrying out its mandate, the Committee also applies relevant recommendations from the United Nations as well as official regional and national human rights structures and mechanisms. Satisfactory settlements can take a variety of forms, such as the release of a detained parliamentarian, the dropping of politically motivated charges, the effective investigation of abuses against a parliamentarian and legal action against their perpetrators.
- The Committee holds hearings with the parties and – subject to approval by the State concerned and fulfilment of certain minimum conditions – may carry out country missions and mandate the observation of trial proceedings against parliamentarians when there are concerns about respect for due process.
- The Committee's decisions are public unless it considers that there are overriding reasons for keeping a decision confidential. The Committee can decide to bring a case to the attention of IPU Governing Council, its plenary decision-making body, by presenting a draft decision for adoption by it. In adopting the decision, the Governing Council expresses the concern of the entire IPU membership and invites all Member Parliaments to act, on the basis of the principle of parliamentary solidarity, in support of it.
- Complaints to the Committee may be submitted by the member of parliament concerned or his/her family or lawyers, any other member of parliament, a political party, an authoritative international or national organization competent in the field of human rights (United Nations and its specialized agencies, intergovernmental organizations, inter-parliamentary organizations and NGOs) to the following email address: postbox@ipu.org.

For more information on the Committee and its procedure, including the submission of complaints, please go to IPU website at: [www.ipu.org](http://www.ipu.org).

**“Sadly, in some countries, the human rights of parliamentarians themselves are not respected. Their freedom of expression is denied. They are victimized, imprisoned, or even murdered for speaking out on behalf of their people. IPU plays a crucial role, through the work of its Committee on the Human Rights of Parliamentarians, in bringing an end to these injustices. Using peaceful dialogue and negotiation IPU obtains remarkable results, securing the release of political prisoners and redress for victims of violations.”**

*The IPU at 125: Renewing our commitment to peace and democracy, Chair's summary of the debate, 2014.*

## **Understanding the legal framework, in particular parliamentary procedure**

It is essential that members of parliament are familiar with the constitution and the State's human rights obligations, the functioning of government and public administration and, of course, parliamentary procedure. Certain parliaments, for instance the Parliament of South Africa, organize seminars for newly elected parliamentarians to familiarize them with the legal framework of their work and parliamentary procedure.

To fulfil their functions, members of parliament must also be provided with adequate resources.

Technical assistance can enhance the knowledge of parliamentarians in the area of human rights and help to secure necessary resources (see Box 26).

## **Determining parliament's role in states of emergency**

When a state of emergency is declared, the first victim is often the parliament: its powers may be drastically reduced, or it may even be dissolved. To avoid such an eventuality, the parliament should ensure that:

- states of emergency do not open the door to arbitrary measures;
- responsibility for declaring and lifting a state of emergency in accordance with international human rights law lies with the parliament;
- non-derogable human rights are not subject to derogation (see Chapter 4);
- the dissolution or suspension of parliament in a state of emergency is prohibited by law;
- during states of emergency, the parliament closely monitors the activities of the authorities – particularly law enforcement agencies – invested with special powers;
- states of emergency are defined in constitutions or in laws having constitutional status, so that they are protected against opportunistic reforms.

Considering the evolving nature of human rights, and their growing ramifications for different areas of parliamentary work, it is now more necessary than ever that parliamentary bodies include a human rights committee (see Chapter 11).

### **Further reading**

- *IPU Handbook on Child Participation in Parliament*, Geneva, IPU, 2011
- *IPU Report on Youth Participation in National Parliaments*, Geneva, IPU, 2016



## Chapter 10

### Parliamentary functions to promote and protect human rights

A panel discussion at the United Nations in Geneva, in June 2015, on the contribution of parliaments to the work of the Human Rights Council and its Universal Periodic Review. © UN/OHCHR Photo/ Danielle Tissot Kirby

#### Ratifying human rights treaties

The ratification of human rights treaties is an important means of demonstrating to the international community and domestic stakeholders that the State is committed to human rights. Ratification – an expression of the State’s resolve to implement the obligations laid down in the treaty and to allow international scrutiny of its progress in human rights promotion and protection – has far-reaching consequences for the ratifying State.

Human rights treaties are signed and ratified by a representative of the executive, usually the head of state or government or the minister for foreign affairs. The ultimate decision, however, on whether or not a treaty should be ratified rests in most countries with the parliament, which must approve ratification. Ratification renders the international human rights norms guaranteed in a treaty legally effective in the

ratifying country and obliges it to report to the international community on measures adopted to align its legislation with treaty norms.

### **Box 33 Involvement of parliament in the negotiation and drafting of treaties**

Members of national parliaments are generally not directly involved in drafting international or regional treaties or in the related political decision-making processes. One notable exception is the Parliamentary Assembly of the Council of Europe, a regional parliamentary assembly established in 1949, which plays an important role in human rights monitoring and in the drafting of new instruments. Its Committee on Legal Affairs and Human Rights cooperates closely with the Committee of Ministers (consisting of the ministers for foreign affairs of the Council's Member States) and the Steering Committee for Human Rights when new instruments are drawn up or major human rights problems emerge.

IPU has consistently called for greater involvement of members of parliament in negotiating international human rights instruments, insisting that parliament, since it must eventually enact relevant legislation and ensure its implementation, should intervene long before the ratification stage and participate, along with government representatives, in the drafting of new instruments within international deliberative bodies.

## **What you can do as a parliamentarian**

- Check whether your government has ratified (at a minimum) the nine core international human rights treaties, their optional protocols (see Chapters 3 and 5) and the existing regional treaties on human rights (see Chapter 8).
- If not, ascertain whether your government has the intention of signing those instruments. If not, use parliamentary procedure to determine the reasons for such inaction and to encourage your government to start the signing and ratification process without delay.
- If a signing procedure is under way, check whether your government intends to make reservations to the treaty and, if so, determine whether the reservations are necessary and compatible with the object and purpose of the treaty (see Chapter 4). If you conclude that they are groundless, take action to bring about reversal of your government's position.
- Check whether any reservations made by your country to treaties already in force are still necessary. If you conclude that they are not, take action to bring about their withdrawal.
- Check whether your government has made the necessary declarations or ratified the relevant optional protocols (see Chapter 5) with a view to:

- recognizing the competence of treaty bodies to receive individual complaints (under OP-ICCPR, OP-CEDAW, ICERD, CAT, OP-ICECSR, ICPPED, OP-CRPD, OPIC-CRC and ICRMW);
  - recognizing the competence of treaty-monitoring bodies (under CAT, ICPPED and the optional protocols to CRPD, ICESCR, CEDAW and CRC) to institute an inquiry procedure;
  - ratifying the optional protocol to CAT, which provides for a system of regular visits to detention centres.
- If not, take action to ensure that the declarations are made or the optional protocols signed and ratified.
- Make sure that everyone, including public officials, is aware of ratified human rights treaties and their provisions.
- If your country has not yet signed and ratified the ICC Statute, take action to see that it does, and that it abstains from any agreements reducing the force of the Statute and undermining the Court's authority (see below and Chapter 15).

**"Acknowledging the crucial role that parliaments play, inter alia, in translating international commitments into national policies and laws, and hence in contributing to the fulfilment by each State Member of the United Nations of its human rights obligations and commitments and to the strengthening of the rule of law."**

*UN Human Rights Council Resolution 22/15 (2013), preamble.*

## Ensuring national implementation

### Adopting enabling legislation

If international legal obligations in a treaty are not implemented at the domestic level, the treaty becomes dead letter. Parliaments and parliamentarians have a key role to play when it comes to adopting the necessary implementing legislation (civil, criminal and administrative law) in all areas, including health care, social security and education.

The procedure for translating international treaties into national law is generally laid down in a State's constitution, which determines the extent to which individuals may directly invoke treaty provisions before national courts. There are basically two types of approaches:

- The monist system consists of the automatic incorporation of treaties upon ratification or accession into domestic law, which allows individuals to directly invoke their provisions before national courts or tribunals. In some cases, treaties need to be published in the official gazette, or national legislation needs to be enacted to implement them, before they have the force of national law so that individuals can invoke their provisions before domestic courts.
- Under the dualist system, treaties become part of the national legal system only through explicit enactment. Under this system, an individual may not invoke treaty provisions that are not part of national legislation.

In civil law countries, it is essential that human rights are enshrined in the constitution as the instrument that sets out the norms and serves as the framework for all other national legislation, which must in turn conform with the intent and principles of the constitution.

## What you can do as a parliamentarian

- Ensure that international human rights provisions are incorporated into national law and, if possible, given constitutional status so that they enjoy maximum protection under national law.
- Ensure that bills brought before your parliament and the parliamentary committees on which you sit are consistent with the human rights obligations of your country, and review existing legislation to determine whether it is compatible with those obligations.
- To this end, familiarize yourself with the work of the treaty bodies, with the recommendations formulated by those bodies and other international or regional monitoring mechanisms (see Chapters 5, 6 and 8), and with the work of national or international human rights NGOs and NHRIs. If you find inconsistencies, take action to redress the situation by ensuring that amendments or new bills are drafted or that a petition is filed with the constitutional court or a judicial body with equivalent functions in your country.
- Ensure that government decrees issued under existing legislation do not contradict the spirit of the laws and the human rights guarantees that they are intended to provide.
- Ensure that public officials, particularly law enforcement agencies, are aware of their duties under human rights law and receive appropriate training.
- In view of the importance of public awareness of human rights, ensure that human rights education is part of the curricula in your country's schools.
- Ensure that human rights obligations under constitutional and international law are implemented openly, constructively, innovatively and proactively.

**The Inter-Parliamentary Council “calls on all  
Parliaments and their members to take action  
at the national level to ensure that enabling**

**legislation is enacted and that the provisions of national laws and regulations are harmonized with the norms and standards contained in these (international) instruments with a view to their full implementation”.**

*Resolution adopted on the occasion of the 50th anniversary of the Universal Declaration of Human Rights, Cairo, September 1997, paragraph 3 (ii).*

#### **Box 34 The legislative process and international human rights standards: an example**

The legislative process in Finland – in particular the work of the parliamentary Constitutional Law Committee – exemplifies frequent use of international norms and standards, as well as the work of treaty bodies, in drafting and scrutinizing legislative proposals. The framework for such use is laid down in Section 22 of the Constitution (2000), which stipulates that “the public authorities shall guarantee the observance of basic rights and liberties and (international) human rights”, and Section 74, which provides that “the Constitutional Law Committee shall issue statements on the constitutionality of legislative proposals and other matters brought for its consideration, as well as on their relation to international human rights treaties”.

The mandate of the Constitutional Law Committee is to review the consistency of proposed bills with the Constitution and human rights norms, and to address relevant opinions to the parliament and other institutions. In order to carry out its mandate, the Committee also relies on external academic expertise.

In exercising its functions, the Constitutional Law Committee refers to the work of UN treaty bodies – particularly the output of the Human Rights Committee. The Committee primarily takes into account decisions on individual cases and general comments but also considers concluding observations, reporting guidelines and other material, including information relating to countries other than Finland.

#### **Box 35 Parliamentary action to promote the justiciability of economic, social and cultural rights**

In many States, individuals may not be able to claim their economic, social and cultural rights before a court of law. Parliaments can remedy that situation by enacting domestic laws enabling courts to rule on complaints regarding such rights, as is already the case in many jurisdictions regarding, for example, labour rights. International human rights bodies, such as the United Nations Committee on Economic, Social and Cultural Rights, recommend that legislation implementing economic, social and cultural rights, such as the rights to education, health, housing, food or social security, explicitly includes recourse

procedures in case of violation. Indeed, comparative research shows that the existence of recourse procedures regarding economic, social and cultural rights is a powerful mechanism to render the administration accountable when it comes to assessing the steps taken to achieve the full realization of these rights.

## Approving the budget

Guaranteeing enjoyment of human rights by all requires the allocation of resources. Effective measures to fulfil human rights obligations require considerable funds. In approving the national budget, thereby setting national priorities, the parliament must ensure that sufficient funds are provided for human rights implementation. Then, in monitoring government spending, the parliament can, if necessary, hold the government accountable for inadequate performance in the area of human rights. The use of human rights indicators can help to better understand existing gaps and challenges and make the budget cycle more amenable to stakeholder engagement, transparency, objectivity and accountability.<sup>1</sup>

### **Box 36 National budgets and human rights**

**"All rights can have budgetary implications. To this extent, national budgets have a significant and direct bearing on which human rights are realized and for whom. Budget analysis is a critical tool for monitoring gaps between policies and action, for ensuring the progressive realization of human rights, for advocating alternative policy choices and prioritization, and ultimately for strengthening the accountability of duty-bearers for the fulfilment of their obligations. A rights-based approach to the budget demands that policy choices be made on the basis of transparency, accountability, non-discrimination and participation. These principles should be applied at all levels of the budgetary process, from the drafting stage, which should be linked to the national development plans made through broad consultation, through approval by parliament, which in turn must have proper amendment**

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<sup>1</sup> For more information concerning the use of human rights indicators please consult the OHCHR publication *Human Rights Indicators: A Guide for Measurement and Implementation*, New York and Geneva, OHCHR, United Nations, 2012. Available at <https://shop.un.org> and <http://www.un-ilibrary.org>.

**powers and time for a thorough evaluation of proposals, implementation and monitoring.”**

*Human Rights in Budget Monitoring, Analysis and Advocacy, Training Guide, Geneva, OHCHR, 2010.*

**“To facilitate the implementation of civil, cultural, economic, political and social rights nationwide it is important for a State’s budgetary efforts to be aligned with its human rights obligations. This is only logical as budgets are the principal instrument for a State (Government) to mobilize, allocate and spend resources for development and governance. It is a means to create and support entitlements in implementing a State’s human rights obligations. At the same time, as a policy instrument a budget serves other interrelated objectives, which potentially makes it a vital tool for turning treaty obligations into a public programme of action.”**

*Human Rights Indicators, Human Rights Budgeting, Geneva, OHCHR, 2012.*

## **Overseeing the executive branch**

Through their oversight function, subjecting the policies and acts of the executive to constant scrutiny, parliaments and members of parliament can and must ensure that laws are actually implemented by the administration and any other bodies concerned. Under parliamentary procedure, the means available to members of parliament for scrutinizing government action include:

- written and oral questions to ministers, civil servants and other executive officials;
- interpellations;
- fact-finding or investigation committees or commissions;
- votes of no confidence, if the above attempts fail.

## **Following up on recommendations and decisions**

Members of parliament can use recommendations formulated by UN treaty-monitoring bodies, Special Procedures of the Human Rights Council, and regional monitoring bodies, as well as recommendations made during the Universal Periodic Review process, (see Chapters 5, 6 and 8) to scrutinize the compliance of executive action with the human rights obligations of the State. Likewise, parliaments should

pay attention to the judgments of regional human rights courts whose jurisdiction they have accepted, and monitor their implementation.

### **Box 37 Implementing recommendations of a regional human rights body: an example**

Parliaments, particularly their human rights committees, may be instrumental in ensuring the implementation of decisions or recommendations of international or regional human rights bodies. For example, the United Kingdom Parliament has established a Joint Committee on Human Rights which monitors the implementation of judgments by the European Court of Human Rights and scrutinizes the conformity of draft legislation with human rights norms. In its decision in *Gillan and Quinton v. UK* (2010), the European Court held that the stop and search powers granted to police under the United Kingdom's Terrorism Act had violated the complainants' right to privacy. The United Kingdom Parliament's Joint Committee on Human Rights drafted several reports, provided recommendations for the amendment of the legislation and requested that the Home Secretary issue an urgent remedial order to ensure compliance with the Court's ruling while the new legislation was pending. The modified Act was adopted by the United Kingdom Parliament in 2012.

## **What you can do as a parliamentarian**

Parliaments should regularly follow and contribute to the work of UN and regional human rights monitoring mechanisms (see Chapters 5, 6 and 8). Accordingly, you may wish to do the following:

- Verify the status of cooperation between your State and the UN monitoring bodies by requesting information from your government. You may wish to question your government on this subject.
- Ensure that your parliament is kept updated on the work of monitoring bodies and that relevant information is regularly made available to it by the parliamentary support services.
- Study and follow up on the recommendations, concluding observations and inquiries conducted by treaty bodies regarding your country.
- Use your powers to carry out on-the-spot visits to schools, hospitals, prisons and other places of detention, police stations and private companies to personally ascertain whether human rights are respected.
- Ensure that required national reports to human rights treaty bodies, the HRC and its UPR are submitted regularly, including by enquiring after your country's reporting timetable. When reporting is delayed, you may request an explanation and, if necessary, use parliamentary procedure to urge your government to comply with its obligation.

- Ensure that complete reports are submitted.

To that end, ensure the following:

- The parliament (through the competent committees) is involved in the preparation of the State report, provides information, ensures that its action is properly included in the report and that it is informed of its contents.
- The report complies with guidelines on reporting procedures (see Chapters 5 and 6) and takes account of the treaty bodies' general recommendations and concluding observations on preceding reports, with reference to any lessons learned.
- A member of your parliament is present when the report is presented to the relevant treaty body. If this is not possible, recommend that your country's permanent mission to the UN follows the work of the treaty body and ensures that its report is forwarded to your parliament.

Likewise, parliaments should contribute to the work of the UN special procedures (see Chapter 6). Accordingly, you may wish to do the following:

- Study the recommendations formulated by UN special procedures, particularly those addressing the situation in your country, if applicable.
- Check whether any action has been taken to implement these recommendations and, if not, use parliamentary procedure to determine the reasons and to initiate follow-up action.
- Make sure that on-site missions conducted under special procedures visit your parliament or the competent parliamentary committees and that your parliament receives a copy of their reports.
- Make sure that standing invitations to visit your country are extended to special procedures.

## Getting involved with the Universal Periodic Review

Although parliaments are not specifically mentioned as stakeholders in GA Resolution A/RES/60/251, which establishes the UPR (see Chapter 6), their participation in this human rights review mechanism is, as in the case of treaty bodies, crucial for its effectiveness. Parliaments were not systematically involved in the initial cycle of the UPR, but this has since changed: parliamentarians are now often included as members of national delegations to the UPR and at other stages of the process (see Human Rights Council Resolution 26/29 (2014)). Parliamentarians may contribute to the effectiveness of the UPR by:

- informing themselves of the results of the UPR concerning their country, including through NHRIs and civil society organizations;

- taking the necessary action to ensure that the recommendations accepted by their State are implemented;
- contributing to periodic reporting regarding implementation and encouraging the drafting of mid-term reports;
- organizing regular parliamentary monitoring of progress made;
- ensuring that their parliament contributes to national (follow-up) reports, and that these are debated in parliament together with any alternative reports that may have been prepared by NHRIs or NGOs;
- encouraging the inclusion of members of parliament in the national delegations presenting the follow-up reports to the HRC, and ensuring, in any event, that their parliament is well briefed about the hearing before the HRC;
- cooperating with NHRIs and civil society regarding the implementation of recommendations;
- taking stock of the impact of parliamentary action regarding the promotion and protection of human rights, in particular as regards UPR and treaty body recommendations.

#### **Box 38 Good practices of parliamentary involvement in UPR: the case of Mexico**

Mexico completed two UPR cycles in 2009 and 2013. The parliament of Mexico (*Congreso de la Unión*) has in some way been involved at every stage of the UPR process, especially during the second cycle.

The Parliament of Mexico has been involved in the drafting of the national reports for both UPR cycles. In particular, for the drafting of the national report during the second cycle, the Ministry of Foreign Affairs established a working group that included representatives from Parliament. Both the Mexican Senate and the Chamber of Deputies actively participated in the consultations for the drafting of the report through their respective committees on human rights, which were asked to elaborate a report on the legislative human rights reforms carried out during the past four years in Mexico. In addition, both committees were encouraged to present the main challenges and unmet needs that limit the full enjoyment of human rights from a legislative perspective.

In both UPR cycles, Members of Parliament took part in the official national delegation that presented the report to the Council. In the first cycle, there were three deputies, while in the second cycle, the number of representatives of the Congress went up to 11 (6 senators and 5 deputies). During the presentation of the national report in the second review, the Chairperson of the Senate's Committee on Human Rights, Senator Angélica de la Peña, participated actively by answering questions from the UPR Working Group about legislative issues.

In both cycles, the Parliament participated in a consultation process to define the position of Mexico concerning the recommendations and/or conclusions

made by the Council's Working Group. For the second cycle, this process of consultations and analysis was made within the same working group framework that was initially set up to prepare the national report, and it was coordinated by the Secretariat of the Interior and the Ministry of Foreign Affairs.

As regards implementation of the UPR recommendations, there have been significant advances regarding human rights legislation in recent years, as attested by the adoption of the General Law on the Rights of Children and Adolescents (December 2014) and the reform of the Code of Military Justice (June 2014). Additionally, a General Bill on Enforced Disappearances is being discussed in Parliament.

**The UN General Assembly "Welcomes the contribution of the Inter-Parliamentary Union to the work of the Human Rights Council, notably by providing a more robust parliamentary contribution to the universal periodic review and to the work of the United Nations human rights treaty bodies along the lines of the cooperation developed in recent years between the Inter-Parliamentary Union, the Committee on the Elimination of Discrimination against Women and national parliaments whose countries are under review".**

*UN General Assembly, Interaction between the United Nations, national parliaments and the Inter-Parliamentary Union: resolution adopted by the General Assembly, 25 July 2016, A/RES/70/298.*

## Mobilizing public opinion

Parliaments can contribute enormously to raising public awareness of human rights and mobilizing public opinion on related issues – all the more so since political debate often focuses on questions such as discrimination against various groups, gender equality, minority rights or social issues. Parliamentarians should be sensitive to the impact that their public statements on a human rights issue can have on the public's perception of the issue in question.

To raise general human rights awareness in their country, parliamentarians should work with other national actors involved in human rights activities, including NGOs.

**"Non-governmental organizations such as trade unions, private associations and human rights organizations constitute an invaluable source of information and expertise for parliamentarians who, in many countries, lack the resources and assistance needed if they are to be effective**

**in monitoring the policy and practice of the government in the field of human rights”.**

*IPU Symposium on “The Parliament: Guardian of Human Rights”, Budapest, May 1993, Deliberations.*

## What you can do as a parliamentarian

- Encourage parliamentary debate on human rights issues, particularly those that have been raised by the general public as matters of concern.
- Encourage debate within your own political party on human rights issues and your country’s international obligations in that area.
- Organize local, regional or national campaigns to raise awareness of human rights issues.
- Participate in debates on television or the radio or in meetings, or give interviews on human rights matters.
- Write articles on human rights for newspapers and magazines.
- Organize or contribute to workshops, seminars, meetings and other events in your constituency in favour of human rights.
- Support local human rights campaigns.
- Use International Human Rights Day, observed on 10 December, to draw public attention to human rights. Use other international days (such as International Women’s Day or International Day of Persons with Disabilities) to draw attention to the issues affecting those groups.

Likewise, parliaments can contribute to the effectiveness of the UPR. Accordingly, you may wish to:

- Discuss the draft national report before your government submits it to the HRC.
- Encourage the inclusion of members of parliament in the national delegation presenting the national report to the HRC.
- Encourage debate on the recommendations accepted by your State with a view to their implementation, including through specific parliamentary action in the area of legislation and oversight.

## Participating in international efforts

Parliaments and parliamentarians can contribute significantly to international human rights protection and promotion efforts. As discussed earlier, respect for human rights is a legitimate concern of the international community and, under international law, States Parties to human rights treaties have a legal interest in the fulfilment

of human rights obligations by other States Parties. The inter-State complaints procedure provided for in some of the core human rights treaties (see Chapter 5) and the Universal Periodic Review enable States to call attention to acts committed by another State in breach of a treaty. Parliaments, through their human rights bodies, may raise human rights issues involving such possible breaches and thereby promote compliance with human rights norms worldwide.

Parliaments and parliamentarians can support international human rights organizations by securing the funding that they require. They should participate actively in the work of the UN Human Rights Council and in drawing up new international human rights instruments that they will eventually be called upon to ratify.

In our increasingly globalized world, decisions taken at the international level have a significant impact on national politics and limit the scope of national decision-making. Major economic decisions affecting citizens' lives are increasingly being taken outside their country's borders by international bodies that are not accountable, but that have an impact on the ability of the State to ensure the exercise of human rights, particularly economic, social and cultural rights.

There is consequently a need to "democratize" these institutions if individual countries are to maintain their capacity to ensure human rights, especially economic, social and cultural rights. Parliaments and their members must therefore take a more active part in the deliberations of these institutions so as to make their voices heard.

### **Box 39 International trade agreements, human rights and the obligations of States**

At the request of the former UN Commission on Human Rights, OHCHR issued several reports on human rights and trade, in particular on the human rights implications of the World Trade Organization (WTO) Agreement on Trade-Related Aspects of Intellectual Property Rights, known as the TRIPS Agreement,<sup>2</sup> the WTO Agreement on Agriculture<sup>3</sup> and the WTO General Agreement on Trade in Services (GATS).<sup>4</sup> The reports point out that all WTO Members have ratified at least one human rights instrument, most of them have ratified ICESCR and all but one have ratified CRC. They also affirm that WTO Members should therefore ensure that international rules on trade liberalization do not run counter to their human rights obligations under those treaties. Trade law and policy should therefore "focus not only on economic growth, markets or economic development, but also on health systems, education, water supply, food security, labour, political processes and so on". States have a responsibility to ensure that the loss of autonomy which they incur when they enter into trade agreements "does not disproportionately reduce their capacity to set and implement national development policy". All this requires "constant examination of trade law and policy as it affects the enjoyment of human rights. Assessing the potential and real impact of trade policy and law on the enjoyment of human rights is perhaps

<sup>2</sup> E/CN.4/Sub.2/2001/13.

<sup>3</sup> E/CN.4/2002/54.

<sup>4</sup> E/CN.4/Sub.2/2002/9.

the principal means of avoiding the implementation of any retrogressive measure that reduces the enjoyment of human rights".<sup>5</sup>

In the same vein, CESCR-Committee general comment No. 14 on the right to health stipulates that States Parties should ensure that the right to health is given due consideration in international agreements and take steps "to ensure that these instruments do not adversely impact upon the right to health. Similarly, States Parties have an obligation to ensure that their actions as members of international organizations take due account of the right to health..." (paragraph 39).

The Human Rights Council has held Special Sessions on the impact of the world food crisis (A/HRC/S-7/2) and the economic and financial crisis (A/HRC/S-10/1) on the universal realization and effective enjoyment of human rights. The Council called upon States to take all necessary measures to guarantee human rights and emphasized that economic and financial crises do "not diminish the responsibility of national authorities and the international community" (A/HRC/2-10/1, paragraph 5).

Moreover, in June 2011, the UN Human Rights Council endorsed the "Guiding Principles on Business and Human Rights" which address corporate responsibility to respect human rights.

In this context, IPU has embarked on a process of bringing parliaments closer to institutions such as the WTO.

**The conclusions of the annual 2015 session of the Parliamentary Conference on the WTO, organized jointly by IPU and the European Parliament, stated that "The challenges facing the WTO show the need for the continued involvement of parliamentarians with this uniquely important world trade body. Parliamentarians not only ratify the results of negotiations, but they are a crucial point of contact between the WTO and the people they aim to serve. We urge the WTO to make full use of the Parliamentary Conference on the WTO, ensuring that parliamentarians have access to all the information they need to carry out their oversight role effectively and contribute meaningfully to trade policies."**

*Resolution adopted unanimously by the 128th IPU Assembly, Quito, 2013 on "Fair Trade and Innovative Financing Mechanisms for Sustainable Development", paragraph 1.*

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<sup>5</sup> E/CN.4/Sub.2/2002/9, paragraphs 7, 9 and 12.

## What you can do as a parliamentarian

Parliaments and parliamentarians should contribute to the promotion and protection of human rights at the international level and make their voices heard.

To this end, you may wish to do the following:

- Establish contacts with parliamentarians in other countries in order to (a) share experiences, success stories and lessons learned, and (b) discuss possibilities of bilateral or multilateral cooperation, particularly regarding human rights violations that require cross-border cooperation (such as trafficking, migration and health issues).
- Ensure that your parliament participates (through the competent committees) in the work of the UN Human Rights Council, or at least is kept abreast of your government's positions on the various issues debated in the Council. If appropriate, you may address questions to your government regarding the grounds for its positions.
- Ensure that your parliament is informed of any ongoing negotiations on new human rights treaties, and that it has the opportunity to contribute to such negotiations.
- Ensure that your parliament (through the competent committees) draws attention to breaches of human rights treaties in other countries and, if appropriate, invite your government to lodge an inter-State complaint (see Chapter 5).
- Participate in electoral observer missions and other international human rights missions.
- Ensure that your parliament is informed of any international negotiations whose outcome may negatively impact on your country's ability to comply with its human rights obligations and, if appropriate, ask your government how it intends to safeguard such compliance.

### Further reading

- *Parliamentary Oversight of International Loan Agreements & Related Processes*, Geneva and Washington, DC, IPU, 2013
- *Tools for Parliamentary Oversight*, Geneva, IPU, 2008





## **Chapter 11** **Parliamentary** **institutional structure** **and relations with other** **national stakeholders**

Stakeholders at the 4th Annual Seminar Series on National Human Rights Institutions (June 2016), in New York, discuss the role of national human rights institutions in conflict and fragile contexts and their contribution to peaceful, just and inclusive societies. © UN Photo/Eskinder Debebe

### **Establishing parliamentary human rights bodies**

Human rights should thoroughly permeate parliamentary activity. Within its area of competence, each parliamentary committee should consistently take into consideration human rights and assess the impact of bills and other proposed legal norms on the enjoyment of human rights by the population. To ensure that human rights are duly taken into account in parliamentary work, many parliaments have set up specialized human rights bodies or entrusted existing committees with the task of considering human rights issues. A large number of parliaments have also established committees for specific human rights issues, such as gender equality, child rights or minority rights. Moreover, informal groups of members of parliament are active in the area of human rights.

Parliamentary human rights bodies are assigned various tasks, including – almost always – assessing the conformity of bills or legislation with human rights obligations. In some cases such bodies are competent to receive individual petitions.

#### **Box 40 Ideal competence of a parliamentary human rights committee**

To be fully effective, a parliamentary human rights body should:

- Have a broad human rights mandate, encompassing legislative and oversight functions;
- Be competent to scrutinize bills and other acts as to their compatibility with the State's national and international human rights obligations
- Be competent to deal with any human rights issue it deems important, take legislative and other initiatives in the area of human rights and address human rights problems and concerns referred to it by third parties;
- Be competent to advise other parliamentary bodies on human rights issues;
- Have the power to request information, question witnesses and carry out on-site missions.

## **Creating and supporting an institutional infrastructure**

### **National human rights institutions**

Over the past 20 years, there has been growing awareness of the need to strengthen, at the national level, concerted action aimed at implementing and ensuring compliance with human rights norms and standards. One of the means used to do this has been the establishment of NHRIs. While the term covers a range of bodies whose name (national human rights commission, ombudsman, public defender, etc.), legal status, composition, structure, functions and mandates vary, all such bodies are set up by governments or parliaments to operate independently – like the judiciary – with a view to promoting and protecting human rights.

NHRIs must comply with the internationally agreed Paris Principles (see Box 41) that identify their human rights objectives and set core minimum standards with respect to independence, a broad human rights mandate, adequacy of funding, and inclusivity and transparency of selection and appointment processes. In 1993, they established the International Coordinating Committee of NHRIs in order to coordinate the activities of the NHRIs network. The Committee resolved to create an accreditation process and to this effect set up a Subcommittee on Accreditation. The Subcommittee on Accreditation reviews and analyses accreditation applications and makes recommendations to the Committee as to applicant compliance with the Paris Principles. The Committee grants "A" status to NHRIs found to be in compliance with

the Paris Principles, “B” status to NHRIs partially in compliance with them and “C” status to those not in compliance.

NHRIs should have the capacity and authority to:

- submit recommendations, proposals and reports to the government or parliament on any matter relating to human rights;
- promote the conformity of national laws and practices with international standards;
- receive and act upon individual or group complaints of human rights violations;
- encourage the ratification and implementation of international human rights instruments and contribute to reporting procedures under international human rights treaties;
- promote awareness of human rights through information and education, and carry out research in the area of human rights;
- cooperate with the United Nations, regional institutions, national institutions in other countries and NGOs.

Relations between NHRIs and parliaments have great potential for human rights protection and promotion at the national level. The March 2004 and February 2012 international workshops held in Abuja, Nigeria<sup>1</sup> and Belgrade, Serbia<sup>2</sup> focused on that relationship. The outcome of the first workshop was the Abuja Guidelines for strengthening cooperation between NHRIs and parliaments. The second concluded with the adoption of the Belgrade Principles on the relationship between NHRIs and Parliaments (see Box 43).<sup>3</sup>

#### **Box 41 The Paris Principles**

In 1993, the United Nations General Assembly adopted a set of principles applicable to the establishment of national human rights institutions. Known as the “Paris Principles”, these have become the internationally accepted benchmark setting out core minimum standards for the role and functioning of such institutions. According to these principles, national human rights institutions must:

- be independent, and their independence must be guaranteed by either statutory law or constitutional provisions;
- be pluralistic in their roles and memberships;
- have as broad a mandate as possible;
- have adequate powers of investigation;

<sup>1</sup> The workshop was organized by the National Human Rights Commission of Nigeria, the Committee on Human Rights of the Nigerian House of Representatives, the Legal Resources Consortium of Nigeria and the British Council, and was supported by the United Kingdom’s Foreign and Commonwealth Office.

<sup>2</sup> The Belgrade seminar was organized by the OHCHR, the International Coordinating Committee of NHRIs, the National Assembly and the Protector of Citizens of the Republic of Serbia, with the support of the UN country team in the Republic of Serbia.

<sup>3</sup> More information on NHRIs and their relationship with parliament can be found at <http://www.ohchr.org/EN/Countries/NHRI/Pages/NHRIMain.aspx>.

- be characterized by regular and effective functioning;
- be adequately funded;
- be accessible to the general public.

#### **Box 42 Countries with A status NHRIs (in compliance with the Paris Principles) (as of August 2016)**

*Asia and the Pacific:* Afghanistan, Australia, India, Indonesia, Jordan, Malaysia, Mongolia, Nepal, New Zealand, Philippines, Qatar, Republic of Korea, Samoa, State of Palestine, Timor-Leste

*Africa:* Burundi, Cameroon, Egypt, Ghana, Kenya, Malawi, Mauritania, Mauritius, Morocco, Namibia, Nigeria, Rwanda, Sierra Leone, South Africa, Tanzania (United Republic of), Togo, Uganda, Zambia, Zimbabwe

*Americas:* Argentina, Bolivia (Plurinational State of), Canada, Chile, Colombia, Costa Rica, Ecuador, El Salvador, Guatemala, Haiti, Mexico, Nicaragua, Panama, Peru, Uruguay, Venezuela (Bolivarian Republic of)

*Europe:* Albania, Armenia, Azerbaijan, Bosnia and Herzegovina, Croatia, Denmark, Finland, France, Georgia, Germany, Greece, Hungary, Ireland, Latvia, Luxembourg, Netherlands, Poland, Portugal, Russian Federation, Serbia, Spain, Ukraine, United Kingdom (Great Britain, Northern Ireland, Scotland)

32 NHRIs are accredited with B status (not fully in compliance with the Paris Principles) and 10 with C status (non-compliance with the Paris Principles).

#### **Box 43 Recommendations for parliamentarians from the Abuja Guidelines and the Belgrade Principles**

- *Founding law*
  - Parliaments, in consultation with relevant stakeholders, should produce an appropriate legislative framework for the establishment of NHRIs in accordance with the Paris Principles, securing its independence and direct accountability to parliament. Parliaments should have the exclusive competence to legislate for the establishment of an NHRI and for any amendments to the founding law.
  - Parliamentarians should carefully scrutinize any government proposals that might adversely affect the work of NHRIs, and seek the views of NHRI members on such proposals.
- *Financial independence*
  - Parliaments should ensure that adequate resources and facilities are provided to NHRIs to enable them to perform their functions effectively. Parliaments should also ensure that resources are made available to the NHRIs.

- NHRIs should submit to parliaments a strategic plan or annual programme, which parliament should take into account when discussing budget proposals.
- *Appointment and dismissal process*
  - Parliaments should clearly lay down in the founding law a transparent selection and appointment process, as well as procedures for the dismissal of NHRI members. These processes should include civil society where appropriate.
  - Parliaments should secure the independence of NHRIs by incorporating a provision on immunity for actions taken in an official capacity within the founding law.
- *Reporting*
  - NHRIs should report directly to parliament, which should develop a principled framework for debating the activities of the NHRIs consistent with respect for their independence.
  - NHRIs' annual reports and other reports should be debated – and the government's response presented – in regular and timely parliamentary discussions.
- *Forms of cooperation between parliaments and NHRIs*
  - NHRIs and parliaments should agree on the basis for cooperation, including by establishing a formal framework to discuss human rights issues.
  - Parliaments should identify or establish an appropriate parliamentary committee which will be the NHRI's main point of contact with parliament; that could be an all-party committee.
  - Members of NHRIs should be invited to appear regularly before the appropriate parliamentary committees to discuss the bodies' annual reports and other reports, and parliamentarians should invite members of NHRIs to meet regularly with them to discuss matters of mutual interest.
  - Parliamentarians should ensure that sufficient time is given to considering the work of NHRIs.
  - Parliamentarians should ensure that NHRI recommendations for action are followed up and implemented.
- *Cooperation between parliaments and NHRIs on legislation, international human rights mechanisms, education, awareness raising and monitoring of the executive's response to judgments delivered by courts or administrative bodies*
  - NHRIs should be consulted by parliaments on the content and applicability of new law so as to ensure that human rights norms and principles are reflected therein.
  - Parliaments should seek to be involved in the process of ratification of international human rights treaties, including by consulting NHRIs in the

process, and in monitoring the State's compliance with its international human rights obligations.

- NHRIs and parliaments should work together to encourage the development of a culture of respect for human rights; parliaments should ensure that constituents are aware of recommendations issued by NHRIs.
- Parliaments and NHRIs (as appropriate) should cooperate in monitoring the executive's response to judgments by courts (national, regional or international) and administrative tribunals regarding human rights related issues.

**"Parliaments should play a critical role in securing the independence and functioning of NHRIs. The Paris Principles require effective cooperation between NHRIs and parliaments and, in this regard, the adoption of the Belgrade Principles on the relationship between NHRI and parliament is welcomed. States are encouraged to use the Belgrade Principles as guidelines to strengthen cooperation between NHRIs and parliaments for the promotion and protection of human rights at the national level."**

*Report of the United Nations Secretary General to the General Assembly, A/HRC/20/9, 2012.*

## Ombudsperson's office

An ombudsperson's office is a national institution found in many countries. There is some overlap between the activities of an ombudsperson's office and those of a national human rights commission, but the ombudsperson's role is usually somewhat more restricted to ensuring fairness and legality in public administration. Ombudspersons generally report to parliament. Only an ombudsperson with a specific human rights mandate accredited by the International Coordinating Committee can be properly described as a national human rights institution.

## National human rights action plans

No State in the world has a perfect human rights record. Moreover, since every country must develop its human rights policy in the light of its specific political, cultural, historical and legal circumstances, there is no single approach for all countries to tackling human rights problems. Accordingly, the Vienna World Conference on Human Rights, held in 1993, encouraged States to draw up national human rights action plans so as to develop a human rights strategy suited to their own situations. The adoption of national action plans should be a truly national endeavour, free from

partisan political considerations. A national action plan must be supported by the government and involve all sectors of society, because its success largely depends on the extent to which the population takes ownership of it.

The main function of such a plan is to improve the promotion and protection of human rights. To that end, human rights improvements are expressed as tangible objectives of public policy, to be attained through the implementation of specific programmes, the participation of all relevant sectors of government and society and the allocation of sufficient resources. The plan should be based on a solid assessment of a country's human rights needs. It should provide guidance on the promotion and protection of human rights to government officials, NGOs, professional groups, educators and advocates and other members of civil society. It should also promote the ratification of human rights instruments and awareness of human rights standards, with particular regard for the human rights situation of vulnerable groups.

A national human rights action plan requires considerable organizational effort. Some of the factors that have a direct positive impact on its effectiveness are:

- ongoing political support;
- transparent and participatory planning;
- comprehensive assessment of the human rights situation;
- realistic prioritization of problems to be solved, and an action-oriented approach;
- clear performance criteria and strong participatory mechanisms for monitoring and evaluation;
- adequate commitment of resources.

#### **Box 44 Establishing a national human rights action plan: an example**

In Liberia, the national Government initiated the drafting of a national strategy to meet its international human rights obligations, including treaty ratification, reporting to the treaty monitoring bodies and implementation of their recommendations. During 2013, OHCHR worked with the Liberian Parliament and other authorities to assist in the development of a National Human Rights Action Plan. As part of that plan Liberia committed to conducting a compliance review, fulfilling its treaty reporting obligations and establishing a follow-up mechanism to track the implementation of treaty body and UPR recommendations. The plan was launched on 10 December 2013.

### **Relationship between parliaments and civil society**

Parliaments and civil society stand much to gain by working together. For this to happen, it is essential that parliaments and civil society organizations recognize that they fulfil different but, in many ways, complementary roles. This recognition is also

crucial to help dispel the mistrust or tension that may exist between parliament and its members on the one hand and civil society on the other.

Many parliaments and their committees now open their proceedings to the public or call for submissions and outside experts to testify. Parliaments increasingly reach out to civil society organizations through the organization of parliamentary public hearings. As a result, civil society organizations can make available their specialized expertise and advice to parliamentarians and legislative staff. Their contribution is particularly important when adequate legislative research capacity is not available in parliament. Moreover, civil society input to parliamentary deliberations can help to ensure a balance of views and provide an important opportunity for new perspectives to be developed. This is clearly borne out by the increased number of gender budgeting initiatives, which in several countries have emerged as a result of partnerships between parliamentarians interested in gender questions and relevant civil society organizations.

## What you can do as a parliamentarian

In view of the importance of parliamentary and non-parliamentary human rights mechanisms for human rights promotion and protection and for raising public awareness, you may wish to do the following:

- Promote the establishment in your parliament of a parliamentary committee specializing in human rights.
- Promote in your country the establishment of a national human rights institution, or support and strengthen an existing national human rights institution, in accordance with the Paris Principles and taking into consideration the Abuja Guidelines and Belgrade Principles (see Boxes 41 and 43).
- Propose the development of a national human rights action plan and, if so decided, ensure that your parliament participates in all stages of preparation, drafting and implementation.
- Identify key civil society actors and how they can contribute, through parliamentary processes, to the advancement of human rights.
- Liaise with NGOs and other national human rights actors and political parties to mobilize public opinion and, where appropriate, to develop information strategies on human rights issues.

### Further reading

- *Handbook on National Human Rights Plans of Action, Professional Training Series No. 10*, New York and Geneva, OHCHR, United Nations, 2002. Available at <http://www.ohchr.org/Documents/Publications/training10en.pdf>
- *OHCHR/UNDP Toolkit for Collaboration with National Human Rights Institutions*, New York and Geneva, 2010. Available at <http://www.ohchr.org/Documents/Countries/NHRI/1950-UNDP-UHCHR-Toolkit-LR.pdf>
- *National Human Rights Institutions: History, Principles, Roles and Responsibilities, Professional Training Series No. 4, Rev. 1*, New York and Geneva, OHCHR, United Nations, 2010. Available at <https://shop.un.org> and <http://www.un-ilibrary.org>



## Chapter 12

### What parliamentarians should know about civil and political rights

#### The right to life

##### Article 3 of UDHR

*"Everyone has the right to life, liberty and security of the person."*

##### Article 6 (1) of ICCPR

*"Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life."*

The right to life is the most fundamental human right and cannot be subject to derogation even in war or in states of emergency. Unlike the prohibition of torture or slavery, however, the right to life is not an absolute right. The death of a combatant as

The International Covenant on Civil and Political Rights, adopted in 1966, commits States Parties to respect and protect the civil and political rights of individuals and groups, including the right to freedom of religion, freedom of opinion and expression, freedom of assembly, participation in public affairs, and the right to due process of law and a fair trial. © CITIZEN SIDE/ Jorge Mejia Peralta

a result of a “lawful act of war” within the meaning of international humanitarian law does not constitute a violation of the right to life. Similarly, if law enforcement agents take a person’s life, that act may not violate the right to life either – for example if the death results from a use of force that was absolutely necessary for such legitimate purposes as self-defence or the defence of a third person, or from a lawful arrest. Only a competent judicial or quasi-judicial body, on a case-by-case basis, taking into account the principle of proportionality, can determine such absolute necessity. In addition, the right to life cannot be considered absolute in legal systems that authorize capital punishment (see below).

#### **Box 45 The right to life and supranational jurisprudence**

In several cases, the European and Inter-American Courts of Human Rights and the UN Human Rights Committee have ruled that summary and arbitrary killings are by definition a violation of the right to life.

Furthermore, since the landmark judgment of the Inter-American Court of Human Rights in the 1988 case of *Velásquez Rodríguez v. Honduras*, it has also been established that the practice of enforced disappearances, even when committed by non-State actors, constitutes a violation of, or at least a grave threat to, the right to life (among many other rights, such as the right to liberty or the right to fair trial).

#### **The right to life and State obligations**

As with all human rights, the right to life not only protects individuals against arbitrary interference by government agents, but also obliges States to take positive measures to provide protection from arbitrary killings, enforced disappearances and similar violent acts committed by paramilitary forces, criminal organizations or any private individual. States must therefore criminalize these acts and implement appropriate measures to prevent, protect and remedy violations of the right to life.

#### **Box 46 An example of case law on State obligations regarding the right to life: case of the massacres of El Mozote and nearby places v. El Salvador**

In 2012, the Inter-American Court of Human Rights issued a judgment declaring the Republic of El Salvador responsible under international law for human rights violations perpetrated by the Salvadorean Armed Forces in the region of El Mozote, in 1981. The armed forces were found to have engaged in “massive, collective and indiscriminate executions” of civilians they should have protected. The Inter-American Court held that by subsequently enacting a series of amnesty laws, the State had further failed to comply with its international obligations to effectively investigate and punish grave violations of human rights law – including the right to life (Article 4 of the American Convention on Human Rights). The Court held that the judgment itself should be considered as a form of reparation and ordered that the State take steps to remove all barriers to investigation and punishment of the

crimes established, provide development assistance to the communities concerned, engage in education and awareness raising about available remedies, create appropriate memorials and public commemoration of the victims of the massacre, and provide pecuniary and non-pecuniary compensation to the next of kin.

Accordingly, States have a duty to ensure that:

- a homicidal attack against a person by another person is an offence carrying appropriate penalties under domestic criminal law;
- any violent crime is thoroughly investigated in order to identify the perpetrators and bring them to justice;
- measures are taken to prevent and punish arbitrary killing by law enforcement officers;
- effective procedures are provided by law for investigating cases of persons subjected to enforced disappearance.

The Human Rights Committee has held that States often interpret the right to life too narrowly, and that their obligation to protect and fulfil it is broader than merely criminalizing murder, assassination and homicidal attacks. In general comment No. 6, the Committee affirmed that States should “take all possible measures to reduce infant mortality and to increase life expectancy, especially in adopting measures to eliminate malnutrition and epidemics”. This implies that States have a duty to take all possible measures to ensure an adequate standard of living – and that they have “a supreme duty to prevent wars, acts of genocide and other acts of mass violence causing arbitrary loss of life”.

Parliamentarians can contribute to the realization of the right to life by ensuring that:

- measures are taken to improve the situation with regard to the rights to food, health, security, peace and an adequate standard of living, all of which contribute to protecting the right to life;
- the government adopts and implements policies to provide law enforcement agents such as police officers and prison guards with training in order to minimize the probability of violations of the right to life;
- measures are taken to reduce infant mortality and increase life expectancy, especially by eliminating malnutrition and epidemics (see also Chapter 13).

### **Controversial issues related to the right to life**

#### *Capital punishment*

The issue of the death penalty is central to the right to life. The legal history of capital punishment shares many similarities with the history of – and debates on – two other practices: slavery and torture. Slavery, widely practised in the world throughout history, was abolished in law only in the nineteenth century, and torture was routinely accepted as part of criminal procedure until the Enlightenment. While both practices are now absolutely forbidden under customary and treaty-based international law, there has been only comparatively slow progress towards abolition of the death penalty.

#### **Box 47 Arguments and counter-arguments concerning capital punishment**

<b>Arguments and justifications for the death penalty</b>	<b>Counter-arguments against the death penalty</b>
Deterrence	The deterrent effect of the death penalty is not supported by evidence
Retribution and justice for the victims	Modern approaches to justice favour the rehabilitation and reintegration of offenders and recognize that offenders also have human rights
Limitation of appeals	This increases the risk of judicial error and the execution of innocent persons
International instruments recognize the application of lawful punishment as an exception to the guarantees relating to the right to life under international law	This exception legitimizes a form of cruel, inhuman and degrading punishment

In its Resolution 1984/50, ECOSOC adopted, and the United Nations General Assembly endorsed, safeguards to protect the rights of persons facing the death penalty (sometimes referred to as the "ECOSOC Safeguards"). Although these safeguards are minimum standards, largely reflecting ICCPR provisions, they continue to be violated. Some pertinent considerations are outlined below.

Specific categories of offenders are or should be exempt from capital punishment. They include:

- *Juveniles*: the ICCPR and the CRC clearly state that a person under 18 years of age at the time he or she commits an offence should not be subjected to the death penalty. That rule has become part of customary international law.
- *Older persons*: neither the ICCPR nor the ECOSOC Safeguards make any exemption from capital punishment for older persons, although in 1988 ECOSOC that States Members should be advised to establish a maximum age for sentencing or execution: Article 4 (5) of ACHR provides that capital punishment shall not be imposed on persons who, at the time the crime was committed, were over 70 years of age.
- *Pregnant women*: the Safeguards preclude the execution of pregnant women, given their status.
- *Persons with intellectual disabilities*: the principle that persons who are not mentally competent, including those with an intellectual disability, should not be sentenced to death or be executed is absent from the ICCPR and the regional human rights treaties but is included in the ECOSOC Safeguards.

Moreover, international law provides that fair trial guarantees must be scrupulously respected in all States, including those that apply the death penalty. The Human Rights Committee has found that the imposition of a death sentence upon conclusion of a trial

in which the provisions of Article 14 of the ICCPR have not been respected constitutes a violation of the right to life (views adopted on communication No. 250/1987). A lawyer must effectively assist those accused of capital offences at all stages of the proceedings. Under Article 6 (4) of the ICCPR, executions should not take place when an appeal or other recourse is pending, and it must be possible for the individual concerned to seek amnesty, pardon or commutation of the sentence.

Where it has not been abolished, the death penalty should constitute exceptional punishment, always meted out in accordance with the principle of proportionality. Article 6 of ICCPR refers to “the most serious crimes” and, under the ECOSOC Safeguards, the definition of the “most serious crimes” punishable by death “should not go beyond intentional crimes, with lethal or other extremely grave consequences”. The Human Rights Committee has also concluded that a mandatory death sentence for particular crimes is not compatible with human rights law in that it fails to take account of the circumstances in each case (see, for example, *Rolando v. Philippines* CCPR/C/82/D/1110/2002).

#### *Movement towards the abolition of capital punishment*

At the end of the Second World War, when international human rights standards were being drawn up, the death penalty was still applied in most States. Consequently, Article 6 of the ICCPR, Article 2 of the ECHR, and Article 4 of the ACHR provide for an exception to the principle of the right to life in the case of capital punishment. Since then, however, a clear trend for abolishing and prohibiting the death penalty has emerged.

The drafters of the ICCPR were already paving the way for the abolition of the death penalty in Article 6 of the Covenant, which provides that “nothing in this article shall be invoked to delay or prevent the abolition of capital punishment in any State Party to the Covenant”. As the United Nations General Assembly affirmed in its resolution 2857 in 1971, the right to life can be fully guaranteed only if the number of offences for which the death penalty may be imposed is progressively restricted, “with a view to the desirability of abolishing it in all countries”. As early as 1982, the Human Rights Committee noted in its general comment on the right to life that “all measures of abolition should be considered as progress in the enjoyment of the right to life”. To this end, the Second Optional Protocol to the ICCPR was adopted in 1989 to promote the universal abolition of the death penalty.

In December 2007, the General Assembly adopted a ground-breaking resolution calling for a moratorium on the use of the death penalty (A/RES/62/149), with a clear majority of States in favour. Several more resolutions on this issue have been adopted since (see 63/138, 65/206, 67/176 and 69/186), with an increasing majority in favour of abolition. These resolutions call on States to progressively restrict the death penalty’s use and not impose capital punishment for offences committed by pregnant women or anybody under 18 years of age. States are also asked to reduce the number of offences subject to the death penalty. Global UN action on the abolition of capital punishment has also focused on the problem of wrongful convictions, the failure of the death penalty to act as a deterrent to violent crime and the discriminatory application of capital punishment to people from marginalized groups.<sup>1</sup>

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<sup>1</sup> See the OHCHR web page on the death penalty, [www.ohchr.org/EN/Issues/DeathPenalty](http://www.ohchr.org/EN/Issues/DeathPenalty).

## **Abolition of capital punishment in Europe**

The Sixth Additional Protocol to ECHR, adopted in 1983 and ratified by all Council of Europe Member States, with the exception of the Russian Federation forbids the death penalty in peacetime. The thirteenth Additional Protocol to the European Convention, adopted in 2002, provides for an absolute prohibition of capital punishment in Europe (i.e. even in times of war). The abolition of capital punishment has since been adopted as an integral part of European Union and Council of Europe policy (and also as an admission requirement for new Member States). As a result, Europe, with the exception of Belarus and the Russian Federation, can today be considered a region free of the death penalty.

## **Efforts to abolish capital punishment in the Americas**

A similar trend towards abolition can be observed in the Americas. In 1990, the OAS adopted a Protocol to the American Convention on Human Rights abolishing the death penalty. By July 2016, 13 States (Argentina, Brazil, Chile, Costa Rica, Dominican Republic, Ecuador, Honduras, Mexico, Nicaragua, Panama, Paraguay, Uruguay and the Bolivarian Republic of Venezuela) had ratified the Protocol.

Although countries such as the United States of America, China, Pakistan, Saudi Arabia and the Islamic Republic of Iran continue to apply capital punishment and strongly oppose its abolition under international law, today more than two-thirds of States have abolished capital punishment, either by law or in practice. Almost three decades after its adoption, the Second Optional Protocol to the ICCPR had been ratified by more than 80 States (predominantly European and Latin American) and the death penalty had either been formally abolished or was not being practised in a further 140 countries (see Box 49).

### **Box 48 Trends in case law in support of non-extradition and the abolition of capital punishment**

- In 1989, hearing the case of *Soering v. the United Kingdom*, the European Court of Human Rights decided that the extradition by the United Kingdom of a German citizen to the United States of America, where he would remain on death row for many years, constituted inhuman treatment under Article 3 of ECHR.
- In 1993, in *Ng v. Canada*, another extradition case involving the United States of America, the Human Rights Committee decided that execution by gas asphyxiation, as practised in California, constituted inhuman punishment under Article 7 of ICCPR.
- In a landmark judgment of 1995, the South African Constitutional Court concluded that capital punishment as such, irrespective of the method of execution or other circumstances, was inhuman and violated the prohibition of inhuman punishment in South Africa.
- In 2003, hearing the case of *Judge v. Canada*, the Human Rights Committee considered “that Canada, as a State Party which has abolished the death penalty, irrespective of whether it has not yet ratified the Second Optional Protocol to the Covenant Aiming at the Abolition of the Death Penalty, violated the author’s right to life under Article 6, Paragraph 1, by deporting him to

the United States of America, where he is under sentence of death, without ensuring that the death penalty would not be carried out”.

- In the case of *Öcalan v. Turkey* (2005), the European Court of Human Rights held that the imposition of the death penalty after an unfair trial amounted to inhuman treatment and violated Article 3 of ECHR.
- On 1 March 2005, the United States Supreme Court ruled that capital punishment of persons convicted of crimes committed when they were minors was unconstitutional. The Court cited the “overwhelming weight of international opinion against the juvenile death penalty” as providing “respected and significant confirmation” of its decision, stating that “It does not lessen fidelity to the Constitution or pride in its origins to acknowledge that the express affirmation of certain fundamental rights by other nations and peoples underscores the centrality of those same rights within our own heritage of freedom.”

### *Abortion*

International human rights bodies have consistently expressed concern about the link between unsafe abortion and maternal mortality rates, which impacts women’s enjoyment of their right to life. Most international human rights law – including Article 6 of the ICCPR and Article 2 of the ECHR – has been interpreted as providing that the right to life starts at birth. Indeed, the negotiating history of many treaties and declarations, international and regional case law, and most legal analysis suggest that the right to life as spelled out in international human rights instruments is not intended to apply before the birth of a human being. The denial of a pregnant woman’s right to make an independent and informed decision regarding abortion violates or poses a threat to a wide range of human rights. International human rights bodies have characterized laws generally criminalizing abortion as discriminatory and a barrier to women’s access to health care (see for example general comment No. 22 CESCR-Committee). While Article 4 of the ACHR stipulates that the right to life is protected “in general, from the moment of conception”, the regional human rights monitoring bodies in the Americas have emphasized that this protection is not absolute. The Inter-American Court of Human Rights, in particular, has determined that embryos do not constitute persons under the Convention and may not be afforded an absolute right to life. The majority of international and regional human rights bodies have established that any prenatal protection must be consistent with the woman’s right to life, physical integrity, health and privacy as well as the principles of equality and of non-discrimination.

### **Box 49 The world situation with respect to capital punishment (2015)**

According to Amnesty International, in 2015 at least 1,634 people were executed in 25 countries and at least 1,998 people were known to have been sentenced to death. Three countries – Iran (Islamic Republic of), Pakistan and Saudi Arabia – were responsible for 89 per cent of the recorded executions.<sup>2</sup> These figures

<sup>2</sup> See the Amnesty International web page on the death penalty at [www.amnesty.org/en/death-penalty](http://www.amnesty.org/en/death-penalty).

include only cases known to Amnesty International; the real number of executions was probably higher.

The Amnesty report notes that the number of executions increased in 2015 by almost 54 per cent.

### **Abolitionist and retentionist countries as of December 2015**

Abolitionist for all crimes: 102

Abolitionist for ordinary crimes only: 6

Abolitionist in practice: 32

Total of countries that are abolitionist in law or practice: 140

Retentionist: 58

#### **Abolitionist for all crimes**

Countries and territories where the law does not provide for capital punishment for any crime:

Albania, Andorra, Angola, Argentina, Armenia, Australia, Austria, Azerbaijan, Belgium, Bhutan, Bolivia (Plurinational State of), Bosnia and Herzegovina, Bulgaria, Burundi, Cambodia, Cabo Verde, Canada, Colombia, Cook Islands, Congo (Republic of), Costa Rica, Côte d'Ivoire, Croatia, Cyprus, Czech Republic, Denmark, Djibouti, Dominican Republic, Ecuador, Estonia, Finland, Fiji, France, Gabon, Georgia, Germany, Greece, Guinea-Bissau, Haiti, Holy See, Honduras, Hungary, Iceland, Ireland, Italy, Kiribati, Kyrgyzstan, Latvia, Liechtenstein, Lithuania, Luxembourg, Macedonia, Madagascar, Malta, Marshall Islands, Mauritius, Mexico, Micronesia, Moldova (Republic of), Monaco, Montenegro, Mozambique, Namibia, Nepal, Netherlands, New Zealand, Nicaragua, Niue, Norway, Palau, Panama, Paraguay, Philippines, Poland, Portugal, Romania, Rwanda, Samoa, San Marino, Sao Tome and Principe, Senegal, Serbia (including Kosovo), Seychelles, Slovakia, Slovenia, Solomon Islands, South Africa, Spain, Suriname, Sweden, Switzerland, Timor-Leste, Togo, Turkey, Turkmenistan, Tuvalu, United Kingdom, Ukraine, Uruguay, Uzbekistan, Vanuatu, Venezuela (Bolivarian Republic of).

#### **Abolitionist for ordinary crimes only**

Countries where the law provides for capital punishment only for such crimes as may be committed under military law or other exceptional circumstances:

Brazil, Chile, El Salvador, Israel, Kazakhstan, Peru.

#### **Abolitionist in practice**

This category includes (a) countries that retain the death penalty for ordinary crimes such as murder but can be considered abolitionist in practice, insofar as they have not executed anyone during the past ten years and are believed to have a policy or established practice of not carrying out executions; and (b) countries that have made an international commitment not to apply the death penalty:

Algeria, Benin, Brunei Darussalam, Burkina Faso, Cameroon, Central African Republic, Eritrea, Ghana, Grenada, Kenya, Laos, Liberia, Malawi, Maldives, Mali, Mauritania, Mongolia, Morocco, Myanmar, Nauru, Niger, Papua New Guinea, Republic of Korea, Russian Federation, Sierra Leone, Sri Lanka, Swaziland, Tajikistan, Tonga, Tunisia, United Republic of Tanzania, Zambia.

### **Retentionist**

Countries and territories that retain the death penalty for ordinary crimes:

Afghanistan, Antigua and Barbuda, Bahamas, Bahrain, Bangladesh, Barbados, Belarus, Belize, Botswana, Chad, China, Comoros, Democratic People's Republic of Korea, Democratic Republic of the Congo, Cuba, Dominica, Egypt, Equatorial Guinea, Guyana, India, Indonesia, Iran (Islamic Republic of), Iraq, Jamaica, Japan, Jordan, Kuwait, Lebanon, Lesotho, Libya, Malaysia, Nigeria, North Korea, Oman, Pakistan, Palestine (State of), Qatar, Saint Kitts and Nevis, Saint Lucia, Saint Vincent and the Grenadines, Saudi Arabia, Singapore, Somalia, South Sudan, Sudan, Syria, Taiwan, Thailand, Trinidad and Tobago, Uganda, United Arab Emirates, USA, Viet Nam, Yemen, Zimbabwe.

The Human Rights Committee has consistently maintained that the ICCPR's right to life protections may be violated when women are exposed to a risk of death from unsafe abortion as a result of restrictive abortion laws. In the case of *K.L. v. Peru* (2005), the Committee established that the denial of a therapeutic abortion where continued pregnancy posed a significant risk to the life and mental health of the pregnant woman violated the woman's right to be free from cruel, inhuman or degrading treatment. This interpretation is reinforced in the case law of other human rights monitoring bodies at the international and regional levels.<sup>3</sup>

#### *Death penalty for drug-related offences*

In States that have not abolished it, the sentence of death can be applied, according to Article 6 of the International Covenant on Civil and Political Rights, only for the "most serious crimes". The Human Rights Committee has determined that drug-related offences do not reach that threshold (see CCPR/C/IDN/CO/1, paragraph 10, CCPR/CO/84/THA, paragraph 14, and CCPR/C/SDN/CO/3, paragraph 19). The United Nations High Commissioner for Human Rights, the Special Rapporteur on torture, the Special Rapporteur on extrajudicial, summary or arbitrary executions, the Economic and Social Council, the General Assembly and the Secretary-General support this interpretation.

Nevertheless, it has been estimated that 33 countries or territories continue to impose the death penalty for drug-related offences, resulting in approximately 1,000 executions annually. Drug-related offences account for the majority of executions carried out in some countries and are mandatorily punished by death in a number of States (see High Commissioner's report on the impact of the world drug problem on the enjoyment of human rights (A/HRC/30/65)).

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<sup>3</sup> See Center for Reproductive Rights, *Whose Right to Life?*, 2014, [www.reproductiverights.org](http://www.reproductiverights.org).

## *Genetic engineering*

The field of genetic engineering, which lies at the crossroads of ethics, human rights and biotechnological innovation, raises a number of controversial questions involving the right to life.

In 1997, the Universal Declaration on the Human Genome and Human Rights was adopted by UNESCO's General Conference. The following year, the Declaration was endorsed by the UN General Assembly. The Declaration emphasizes that the principles of human dignity; prior, free and informed consent; confidentiality; and non-discrimination must be respected in conducting any genetic research. According to Article 11 of the Declaration, practices contrary to human dignity, such as the reproductive cloning of human beings, are not permitted under international human rights law.

In 2003, UNESCO's General Conference adopted a Declaration on Human Genetic Data, which complements its earlier work on the human genome. Article 1 of the Declaration states that "Any collection, processing, use and storage of human genetic data, human proteomic data and biological samples shall be consistent with the international law of human rights."

The two UNESCO Declarations are presently the only international instruments that deal specifically with the human rights implications of genetic research, although other treaties do so at the regional level, including the 1997 European Convention on Human Rights and Biomedicine.

## *Euthanasia*

The obligation of States to protect the right to life applies to persons with terminal illnesses, persons with disabilities and persons potentially vulnerable to involuntary euthanasia. In the case of a terminally ill person who explicitly expresses a wish to die, the obligation to protect the right to life must be weighed against the person's other human rights, above all the rights to privacy and dignity. Domestic laws that limit criminal responsibility for active or passive euthanasia, providing for careful consideration of all rights involved and adequate precautions against potential abuse – as legislated in the Netherlands, for instance – are not necessarily inconsistent with the positive State obligation to protect the right to life. In 2002 and again in 2009, the UN Human Rights Committee expressed its concern that the legislation on assisted suicide in the Netherlands was incompatible with Article 6 of the ICCPR on the right to life, as it did not provide for independent judicial review of a patient's decision to terminate his or her life.

Faced with difficult questions that transcend the traditional boundaries of ethics and medicine, States may also decide to prohibit euthanasia, as illustrated by the judgment of the European Court of Human Rights in the case of *Pretty v. the United Kingdom* (2002) (see Box 50).

### **Box 50 The case of Pretty v. the United Kingdom (2002)**

Dianne Pretty was terminally ill and paralysed from the neck down from motor neurone disease. Her intellectual and decision-making capacity, however, was unimpaired and she wanted to end her life. Her condition prevented her from

performing this act alone. She therefore sought a guarantee from the Director of Public Prosecutions that her husband would not be prosecuted if he assisted her in ending her life. Her request was rejected pursuant to the relevant provisions of English law, which prohibit any assistance in committing suicide, and this decision was upheld in the last instance at the national level. In its decision on her application, which claimed that this judgment violated *inter alia* her right to life, the European Court of Human Rights held that the right to life, guaranteed under Article 2 of ECHR, could not be interpreted as conferring the diametrically opposite right, the right to die, whether at the hands of another person or with the assistance of a public authority. As a consequence of that judgment, a private members bill (known as the Patient Assisted Dying Bill) was subsequently introduced in the British Parliament with the aim of making it lawful for a physician to assist a person to die under very stringently defined conditions and circumstances. The authors of the bill considered that the right to assist a person to die derived from Article 8 (1) of ECHR, which guarantees the right to respect for private and family life, and that it was not incompatible with the positive obligation of the State to protect life.

## **Prohibition of torture and cruel, inhuman or degrading treatment or punishment: the right to personal integrity and dignity**

### **Article 5 of UDHR**

*"No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment."*

### **Article 7 of ICCPR**

*"No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation."*

### **Article 1 of CAT**

*"For the purposes of this Convention, the term 'torture' means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind."*

Torture is a serious human rights violation, as it constitutes a direct attack on the personality and dignity of the human being. The prohibition of torture and other forms of physical and mental ill treatment, i.e. the right to personal integrity and dignity,

is an absolute human right and is therefore not subject to derogation under any circumstances. This also means that no one may invoke an order from a superior as a justification of torture.

### **Box 51 Codification of the prohibition of torture**

The prohibition of torture is codified in the UDHR (Article 5), ICCPR (Article 7) and CAT, and also in regional treaties such as ECHR (Article 3), the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, ACHR (Article 5), the Inter-American Convention to Prevent and Punish Torture and the African Charter on Human and Peoples' Rights (Article 5), and in some standard-setting instruments, including the Standard Minimum Rules for the Treatment of Prisoners, the Basic Principles for the Treatment of Prisoners, the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, the United Nations Rules for the Protection of Juveniles Deprived of their Liberty, and the Principles on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. Torture is also prohibited by various provisions of the 1949 Geneva Conventions, in particular their common Article 3. Furthermore, the Rome Statute of the International Criminal Court defines torture as a "crime against humanity" when it is knowingly committed as part of a widespread or systematic attack against any civilian population.

**"The legal and moral basis for the prohibition of torture and other cruel, inhuman or degrading treatment or punishment is absolute and imperative and must under no circumstances yield or be subordinated to other interests, policies and practices."**

*Theo van Boven, former Special Rapporteur of the Commission on Human Rights on torture and other cruel, inhuman or degrading treatment or punishment.*

### **What is torture?**

Article 1 of CAT defines torture as any act – committed by a public official or other person acting in an official capacity or at the instigation of or with the consent of such a person – by which severe physical or mental pain or suffering is intentionally inflicted for a specific purpose, such as extortion of information or confession, punishment, intimidation or discrimination. This definition of torture is more limited than that contained in Article 7 of the ICCPR, which does not mention the requirement that the acts be carried out by someone acting in an official capacity and does not refer to the intentional nature or "specific purpose" elements. In recent years, however, the Committee Against Torture has begun to use an expanded definition of the scope of torture to include crimes, such as domestic violence against women and children or the use of forced labour by private persons, that the State has failed to act with due diligence to prevent, investigate and

remedy. Similarly, the UN Special Rapporteur on torture underlines that the failure of States to eliminate such persistent practices as intimate partner violence, child and forced marriage, female genital mutilation and so-called “honour crimes”, and their failure to criminalize marital rape and to repeal legislation that exculpates rapists who marry their victims, violates the obligation to prevent and prosecute torture and cruel, inhuman and degrading treatment or punishment (see 2016 Report to the Human Rights Council of the UN Special Rapporteur on torture, Juan E. Méndez, on the gender dimension of torture and ill-treatment (A/HRC/31/57)).

Under the definition of torture contained in CAT, acts that result in suffering but lack one of the essential elements of torture – intent, specific purpose and powerlessness of the victim – may, depending on the form, purpose and severity of suffering, be considered to constitute cruel, inhuman or degrading treatment or punishment. Given that all forms of legal punishment inflict a degree of suffering and contain some element of humiliation, punitive acts cannot be regarded as cruel, inhuman or degrading unless some additional aspect is present. Examples of acts considered cruel, inhuman or degrading punishment by the Committee Against Torture include solitary confinement beyond 7 days, routine strip searching of detainees and the enforced wearing of name badges rating a person’s proficiency in the local language, which was deemed to be both discriminatory and humiliating.

**“Torture is intended to humiliate, offend and degrade a human being and turn him or her into a ‘thing’.”**

*Antonio Cassese, former President of the Council of Europe’s Committee for the Prevention of Torture, in Inhuman States: Imprisonment, Detention and Torture in Europe Today, Cambridge Polity Press, 1996, p. 47.*

**“... It is the powerlessness of the victim that makes torture such an evil, the fact that one person has absolute power over another. This distinguishes torture from other forms of cruel, inhuman or degrading treatment... And this is why, like slavery, torture is the most direct attack on the core of human dignity, a special form of violence whose prohibition is the highest norm of international law, *jus cogens...*”**

*Manfred Nowak, former UN Special Rapporteur on Torture, in On Torture, edited by Adalah-The Legal Center for Arab Minority Rights in Israel, Physicians for Human Rights-Israel and Al Mezan Center for Human Rights, 2012, p. 22.*

### **What State obligations arise from the prohibition of torture?**

Governments must not restrict or allow derogations from the right to personal integrity and dignity, even in times of war and in states of emergency. The CAT-Committee has ruled that even when a suspect is believed to hold information about imminent

attacks that could endanger the lives of civilians, the State may not employ methods of interrogation that would violate the prohibition on torture and ill treatment.

### **Box 52 Procedural safeguards during police custody**

The human rights monitoring bodies have received numerous complaints regarding torture and ill treatment that have occurred during police custody. The following procedural safeguards limit considerably the exposure of arrested persons to that risk:

- notification of custody: the right of arrested persons to have the fact of their detention notified to a third party of their choice (family member, friend or consulate);
- the right of detainees to have access to a lawyer and his/her presence during interrogation;
- the right of detainees to request a medical examination by a physician of their choice (in addition to any medical examination carried out by a physician called by law enforcement authorities);
- availability of centralized registers of all detainees and places of detention;
- exclusion of evidence elicited through torture or other forms of coercion;
- audio- or videotaping of all police interrogations.

These prohibited forms of torture and ill-treatment may include restraining a person in a painful position, hooding, prolonged exposure to loud music or sleep deprivation, threats, violent shaking or use of cold air to chill the detainee. The absolute prohibition of torture and ill-treatment is founded on the premise that if any exceptions are permitted, the use of torture is likely to increase.

States have an obligation to prevent, investigate, prosecute and punish any act of torture. They must provide reparation to victims, including medical and psychological rehabilitation and compensation for material and moral damages (see Box 53).

### **Box 53 State obligations under the Convention against Torture and its Optional Protocol**

#### **States Parties to the Convention have a duty to:**

- enact legislation to punish torture, empower the authorities to prosecute and punish the crime of torture wherever it has been committed and whatever the nationality of the perpetrator or victim, and prevent these practices (principle of universal jurisdiction contained in Article 5 of the Convention);
- ensure that education and information regarding the prohibition of torture are fully included in the training of civil or military law enforcement personnel, medical staff, public officials and other persons who may be involved in

the custody, interrogation or treatment of arrested, detained or imprisoned individuals (Article 10 of the Convention);

- ensure that interrogation rules, instructions, methods and practices and the arrangements for the custody and treatment of persons subjected to any form of arrest, detention or imprisonment are systematically reviewed by independent bodies (Article 11 of the Convention);
- ensure that complaints of torture and ill-treatment are investigated thoroughly by competent authorities, that persons suspected of torture are brought to justice, that effective remedies are available to victims, and that laws are drawn up to implement measures that prevent torture and ill-treatment during detention (Articles 12–14 of the Convention);
- refrain from expelling or returning (“refoulement”) or extraditing a person to another State where it is likely that he or she will be exposed to torture (principle of “non-refoulement”) (Article 3 of the Convention);
- submit periodic reports to the CAT-Committee on the measures taken to give effect to the Convention, or other reports that the Committee may request (Article 19 of the Convention);
- establish independent national preventive mechanisms to carry out visits to all places of detention (OPCAT, adopted in 2002).

### **Prohibition of cruel, inhuman or degrading punishment**

Minimum standards for the prohibition of cruel, inhuman or degrading treatment or punishment vary from country to country. However, according to rulings by numerous bodies – the UN Human Rights Committee, the Committee on Economic, Social and Cultural Rights, the Committee Against Torture, the Committee on the Rights of the Child, the European Court of Human Rights, the Inter-American Court of Human Rights and the African Court of Human and Peoples’ Rights – corporal punishment in all its forms constitutes cruel, inhuman or degrading punishment and is therefore prohibited under contemporary human rights law.<sup>4</sup> Most of the world also treats capital punishment as cruel, inhuman and degrading punishment.

### **The right of detainees and prisoners to be treated with humanity**

Article 10 of the ICCPR guarantees the right of all persons deprived of their liberty to be treated with humanity and respect for their inherent dignity. According to the Human Rights Committee, people deprived of their liberty may not be “subjected to any hardship or constraint other than that resulting from the deprivation of their liberty”.

A number of soft law instruments specify minimum standards applicable to detention.

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<sup>4</sup> As at March 2016, 48 States had banned the corporal punishment of children in all settings, including the home; 53 were publicly committed to reform the law in this regard; 36 recognized corporal punishment as a sentence of the courts; and 21 had not yet fully prohibited it in any setting of children’s lives ([www.endcorporalpunishment.org](http://www.endcorporalpunishment.org)).

#### **Box 54 Selected United Nations minimum standards in respect of detention and the conduct of law enforcement**

- Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty, 1948
- Standard Minimum Rules for the Treatment of Prisoners, 1955 (revised and adopted as the “Nelson Mandela Rules” in December 2015)
- Code of Conduct for Law Enforcement Officials, 1979
- Principles of Medical Ethics relevant to the Role of Health Personnel, particularly Physicians, in the Protection of Prisoners and Detainees against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1982
- Safeguards guaranteeing Protection of the Rights of those facing the Death Penalty, 1984
- United Nations Standard Minimum Rules for the Administration of Juvenile Justice (the “Beijing Rules”), 1985
- Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, 1988
- Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, 1990
- Basic Principles for the Treatment of Prisoners, 1990
- United Nations Guidelines for the Prevention of Juvenile Delinquency (the “Riyadh Guidelines”), 1990
- United Nations Standard Minimum Rules for Non-Custodial Measures (the “Tokyo Rules”), 1990
- United Nations Rules for the Protection of Juveniles Deprived of their Liberty, 1990
- United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (the Bangkok Rules), 2010
- United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems, 2012

#### **Box 55 Human rights and privatization of prisons**

Private-sector involvement in prison operations – construction of penitentiaries, transport of prisoners, procurement of supplies and even the total management of detention centres – has been steadily increasing since the 1980s, when it was reintroduced in the United States of America (where it had been abandoned half a century earlier). At least 11 countries have privatized detention facilities to some extent. Prison privatization reduces the State’s capacity to ensure respect for prisoners’ rights and limits the ability of detainees to hold prison authorities and the State accountable

for violations of their human rights. The fact that corporate detention providers are motivated by profit often leads to substandard conditions of detention and increases the risk of violence and abuse against both detainees and staff.<sup>5</sup>

The Human Rights Committee has expressed concern over prison privatization. In a communication against Australia, it held that “the contracting out to the private commercial sector of core State activities, which involve the use of force and the detention of persons does not absolve a State Party of its obligations under the Covenant” (Communication No. 1020/2001, paragraph 7.2). In its concluding observations on the State report by New Zealand in 2010, the Committee stated that “While noting the steps taken by the State Party to address the risk of human rights violations in relation with the Corrections (Contract Management of Prisons) Amendment Bill 2009, the Committee reiterates its concern at the privatization of prison management. It remains concerned as to whether such privatization in an area where the State Party is responsible for the protection of human rights of persons deprived of their liberty effectively meets the obligations of the State Party under the Covenant and its accountability for any violations, irrespective of the safeguards in place (arts 2 and 10)” (CCPR/C/NZL/CO/5, 2010, paragraph 11).

## The right to personal liberty and security

### **Article 3 of UDHR**

*“Everyone has the right to life, liberty and security of the person.”*

### **Article 9 of UDHR**

*“No one shall be subjected to arbitrary arrest, detention or exile.”*

### **Article 9 (1) of ICCPR**

*“Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.”*

In its general comment No. 35 (2014), the Human Rights Committee stated “Liberty and security of person are precious for their own sake, and also because deprivation of liberty and security of person have historically been principal means for impairing the enjoyment of other rights.” The Human Rights Committee has defined liberty of

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<sup>5</sup> Cody Mason, *International Growth Trends in Prison Privatization*, The Sentencing Project, 2013, sentencingproject.org.

person as “freedom from confinement of the body, not a general freedom of action”,<sup>6</sup> and security of person as “freedom from injury to the body and mind”.<sup>7</sup>

The right to personal liberty and security provides protection against arbitrary or unlawful arrest and detention and against the intentional infliction of bodily or mental injury regardless of whether the victim is detained or not. These basic guarantees apply to everyone, including persons held in prison or remand on criminal charges or on such grounds as mental illness, vagrancy, institutional custody of children or for the purposes of immigration control. Other restrictions on freedom of movement, such as confinement to a certain region of a country, curfews, expulsion from a country or prohibition to leave a country, do not constitute interference with personal liberty or security, although they may violate other human rights, such as freedom of movement and residence (Article 12, ICCPR).

#### **Box 56 Article 5 of the European Convention for the Protection of Human Rights and Fundamental Freedoms: permissible grounds for arrest and detention**

- Imprisonment of a person after conviction for a criminal offence
- Police custody and pre-trial detention of a criminal suspect in order to prevent flight, interference with evidence or recurrence
- Detention in a civil context to ensure that a witness appears in court or undergoes a paternity test
- Detention of aliens in connection with immigration, asylum, expulsion and extradition
- Detention of minors for the purpose of educational supervision
- Detention of persons with mental disabilities in a psychiatric hospital
- Quarantine of sick persons in order to contain infectious diseases
- Detention of alcoholics, drug addicts and vagrants

#### **When is arrest or detention lawful?**

An individual may be deprived of his or her liberty only on legal grounds and under a procedure established by law. The procedure must conform not only to domestic law but also to international standards. The relevant domestic law must not be arbitrary, i.e. it must not be tainted by inappropriateness, injustice or unpredictability. Moreover, law enforcement in any given case must not be arbitrary or discriminatory, but should be proportionate to all of the circumstances surrounding the case. In addition, the Human Rights Committee noted in paragraph 12 of general comment No. 35 (2014) “Aside from judicially imposed sentences for a fixed period of time, the decision to

<sup>6</sup> Human Rights Committee, communication No. 854/1999, *Wackenheim v. France*, paragraph 6.3.

<sup>7</sup> Human Rights Committee, general comment No. 35 (2014), paragraph 3.

keep a person in any form of detention is arbitrary if it is not subject to periodic re-evaluation of the justification for continuing the detention.”

### **Box 57 Human Rights Committee jurisprudence on pre-trial detention**

According to the Human Rights Committee, pre-trial detention must be lawful, necessary and reasonable under given circumstances. The Human Rights Committee has recognized that the ICCPR allows authorities to hold a person in custody as an exceptional measure, if necessary to ensure that person’s appearance in court, but has interpreted the “necessity” requirement narrowly: suspicion that a person has committed a crime does not by itself justify detention pending investigation and indictment (see *A.W. Mukong v. Cameroon*, communication No. 458/1991). The Human Rights Committee has also held, however, that custody may be necessary to prevent flight, avert interference with witnesses and other evidence or prevent the commission of further offences (see *Hill v. Spain*, communication No. 526/1993, paragraph 12.3).

Typical examples of permissible grounds for arrest and detention are to be found in Article 5 of ECHR, which is understood to provide an exhaustive list of cases of lawful deprivation of liberty in Europe (see Box 56) and can serve as a basis for interpreting the term “arbitrary deprivation of liberty” in Article 9 of the ICCPR. Any imprisonment on mere grounds of inability to fulfil a contractual obligation, such as reimbursing a debt, is explicitly prohibited by Article 11 of the ICCPR, Article 7 (7) of ACHR and Article 1 of the Fourth Additional Protocol to the ECHR.

#### **What rights does a person have when in custody?**

- Arrested persons have the right to be informed promptly of the reasons for their arrest and detention and of their right to counsel. They must be promptly informed of any charges brought against them in order to be able to challenge the lawfulness of their arrest or detention and, if indicted, to prepare their defence (ICCPR, Article 9 (4)).
- Persons facing a possible criminal charge have the right to be assisted by a lawyer of their choice. If they cannot afford a lawyer, they should be provided with a qualified and effective counsel. Adequate time and facilities should be made available for communication with their counsel. Access to counsel should be immediate (ICCPR, Article 14 (3) (d)).
- Persons in custody have the right to communicate with the outside world and, in particular, to have prompt access to their family, lawyer, physician, a judicial official and, if the detainee is a foreign national, consular staff or a competent international organization. Communication with third parties is an essential safeguard against such human rights violations as secret and incommunicado detention, enforced disappearances, torture and ill-treatment and is vital to obtaining a fair trial (United Nations Body of Principles for the Protection of All Persons under Any Form of Detention, Article 16).

- Persons arrested on suspicion of a criminal offence have the right to be brought promptly before a judge or other judicial officer, who must (a) assess whether there are sufficient legal grounds for the arrest, (b) assess whether detention before trial is necessary, (c) safeguard the well-being of the detainee and (d) prevent violations of the detainee's fundamental rights (ICCPR, Article 9).
- Persons in pre-trial detention have the right to be tried within a reasonable time or else be released. In accordance with the presumption of innocence, people awaiting trial on criminal charges should not be held in custody, as a general rule (ICCPR, Article 9 (3)).
- Persons deprived of their liberty on whatever grounds have the right to habeas corpus, i.e. they may challenge the lawfulness of their detention before a court and have their detention regularly reviewed. The court must decide without delay, normally within a few days or weeks, on the lawfulness of the detention and order immediate release if the detention is unlawful. If detention for an unspecified period of time is ordered (for instance, in a psychiatric hospital), the detainee has a right to periodic review, normally every few months (ICCPR, Article 9 (4)).
- Any victim of unlawful arrest or detention has an enforceable right to compensation (ICCPR, Article 9 (5)).

## Administration of justice: the right to a fair trial

### **Article 6 UDHR**

*"Everyone has the right to recognition everywhere as a person before the law."*

### **Article 7 UDHR**

*"All are equal before the law and are entitled without any discrimination to equal protection of the law."*

### **Article 8 UDHR**

*"Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law."*

### **Article 10 UDHR**

*"Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him."*

### **Article 11 UDHR**

*"(1) Everyone charged with a penal offence has the right to be presumed innocent until proven guilty according to*

*law in a public trial at which he has had all the guarantees necessary for his defence.*

*(2) No one shall be held guilty of any penal offence on account of any act that did not constitute a penal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the penal offence was committed."*

### **Article 14 ICCPR**

*"1. All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The press and the public may be excluded from all or part of a trial for reasons of morals, public order (ordre public) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgment rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children.*

*2. Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.*

*3. In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:*

*(a) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;*

*(b) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;*

*(c) To be tried without undue delay;*

*(d) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without*

- payment by him in any such case if he does not have sufficient means to pay for it;*
- (e) *To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;*
- (f) *To have the free assistance of an interpreter if he cannot understand or speak the language used in court;*
- (g) *Not to be compelled to testify against himself or to confess guilt.*

4. *In the case of juvenile persons, the procedure shall be such as will take account of their age and the desirability of promoting their rehabilitation.*

5. *Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law.*

6. *When a person has by a final decision been convicted of a criminal offence and when subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him.*

7. *No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country.”*

### **Article 15 ICCPR**

*“1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed. If, subsequent to the commission of the offence, provision is made by law for the imposition of the lighter penalty, the offender shall benefit thereby.*

*2. Nothing in this article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal*

*according to the general principles of law recognized by the community of nations.”*

### **Article 16 ICCPR**

*“Everyone shall have the right to recognition everywhere as a person before the law.”*

Articles 6–11 of the UDHR can be grouped under a common heading: administration of justice. The right to a fair trial, also guaranteed by the ICCPR and regional human rights treaties, is a basic human right and requires procedural guarantees.

#### **Equality before the law and the courts**

The right to equality before the courts and tribunals is a key element of human rights protection and serves as a procedural means to safeguard the rule of law. The right to equality before the law means that laws must not be discriminatory and that judges and officials must not discriminate when enforcing the law. The right to equality before the law means that all persons must have equal access to legal and judicial systems and the right to equal treatment by legal and judicial authorities.

#### **Additional elements of the right to a fair trial**

The right to a fair trial applies to criminal or civil proceedings as defined by the Human Rights Committee in its general comment No. 32 (2007), and thus to criminal law, civil law and other types of proceedings falling within that definition. The basic elements of the right to a fair trial are the principle of “equality of arms” between the parties, and the requirement of a fair and public hearing before an independent and impartial tribunal.

- “Equality of arms” means that both parties – the prosecution and the accused in criminal proceedings, or the plaintiff and the defendant in civil proceedings – have equal rights and opportunities to be present at the various stages of the proceedings, to be kept informed of the facts and arguments of the opposing party and to have their arguments heard by the court (*audiatur et altera pars*).
- Court hearings and judgments must in general be public: not only the parties to the case, but also the general public, must have a right to be present. The idea behind the principle of a public hearing is transparency and oversight by the public, a key prerequisite for the administration of justice in a democratic society: “Justice must not only be done; it must be seen to be done”. It follows that, as a general principle, trials must not be conducted by a purely written procedure *in camera*, but by oral hearings to which the public has access. Not all stages of the proceedings, in particular at the appeal level, require public hearings; and the public, including the media, may be excluded for reasons of morals, public order, national security, private interests and, in exceptional cases, interests of justice. However, every judgment must be made public, by full oral delivery or by written announcement.

### **Box 58 Independent and impartial tribunals: independence of the judiciary**

Tribunals (courts) must be constituted in a way that ensures their independence and impartiality. Independence entails safeguards relating to the manner of appointment of judges, the duration of their office and the provision of guarantees against outside pressure. Impartiality means that, in hearing the cases before them, judges must not be biased or guided by personal interests or political motives. The United Nations Basic Principles on the Independence of the Judiciary provide clear guidelines in that area.

Appropriate measures to ensure the independence and impartiality of tribunals include the following:

- First and foremost, the independence of the judiciary should be enshrined in the constitution or in national law.
- The method of selection of judicial officers should be characterized by balance between the executive and an impartial body, many of whose members should be appointed by professional organizations, such as law societies.
- The tenure of judges should be guaranteed up to a mandatory retirement age or the expiry of their terms of office.
- Decisions on disciplinary action, suspension or removal of a judge should be subject to an independent review.

### **The rights of the accused in criminal trials**

In addition to the right to “equality of arms” and to a public hearing, international human rights law provides for a number of specific rights that persons charged with a criminal offence should enjoy:

- the right to be presumed innocent: The prosecution must prove the person’s guilt, and, in case of doubt, the accused should not be found guilty, but must be acquitted (ICCPR, Article 14 (2));
- the right not to be compelled to testify or to confess guilt: This prohibition is in line with the presumption of innocence, which places the burden of proof on the prosecution, and with the prohibition of torture and ill-treatment. Evidence elicited by torture or ill-treatment may not be used in court (ICCPR, Article 14 (3) (g));
- the right to defend oneself in person or through counsel of one’s own choosing, and the right to be provided with legal assistance free of charge (ICCPR, Article 14 (3) (d));
- the right to have adequate time and facilities for one’s defence, and the right to communicate with one’s counsel (ICCPR, Article 14 (3) (b));
- the right to be tried without undue delay, as “justice delayed is justice denied”. In principle, criminal proceedings must be conducted more speedily than other proceedings, particularly if the accused is in detention (ICCPR, Article 14 (3) (c));

- the right to be present at one's trial (ICCPR, Article 14 (3) (d));
- the right to call and examine witnesses (ICCPR, Article 14 (3) (e));
- the right to be provided with language interpretation free of charge if the accused cannot understand or speak the language used in court (ICCPR, Article 14 (3) (f));
- the right to appeal to a higher tribunal (ICCPR, Article 14 (5));
- the right not to be tried and sentenced twice for the same offence (prohibition of double jeopardy, or principle of *ne bis in idem*) (ICCPR, Article 14 (7));
- the right to receive compensation in the event of a miscarriage of justice (ICCPR, Article 14 (6));
- the principles of *nullum crimen sine lege* and *nulla poena sine lege* prohibit the enactment of retroactive criminal laws and ensure that convicted persons benefit from lighter penalties if they are enacted after the commission of the offence (ICCPR, Article 15).

**Box 59 The use of evidence obtained under torture violates the right to fair trial: an example of European Court of Human Rights case law**

In a widely commented judgment in the case of *Othman (Abu Qatada) v. the United Kingdom* (January 2012), concerning the deportation of terrorism suspect Mr Othman from the United Kingdom to Jordan, a country he fled in 1993, the European Court of Human Rights ruled that his deportation would violate Article 6 of the ECHR (right to fair trial) because there would be a real risk that evidence obtained through torture would be used against him during his retrial in Jordan. The Court held in particular that “no legal system based upon the rule of law can countenance the admission of such evidence – however reliable – which has been obtained by such a barbaric practice as torture. The trial process is a cornerstone of the rule of law. Torture evidence damages irreparably that process; it substitutes force for the rule of law and taints the reputation of any court that admits it. Torture evidence is excluded to protect the integrity of the trial process and, ultimately, the rule of law itself”.

### **Special courts and military courts**

Special, extraordinary or military courts have been set up in a number of countries to try specific types of offences. Frequently, such courts offer fewer guarantees of fair trial than ordinary courts as noted by the Human Rights Committee in its general comment No. 32 (2007).

The establishment of special courts is not explicitly prohibited under general international law; however, human rights instruments require that all specialized courts comply with fair trial guarantees relating to their competence, independence and impartiality.

## **Box 60 Military courts and the right to a fair trial**

In a series of reports and resolutions, various UN human rights mechanisms, including the Human Rights Council (A/HRC/RES/19/31) and the Special Rapporteur on the Independence of Judges and Lawyers (A/68/285), have highlighted that the establishment and functioning of military courts and special tribunals may pose significant challenges with regard to the full and effective realization of the fair trial rights and guarantees set out in the ICCPR and other international and regional human rights instruments. In her 2013 Annual Report to the UN General Assembly (A/68/285), the Special Rapporteur on the Independence of Judges and Lawyers noted that “In many countries, the use of military tribunals raises serious concerns in terms of access to justice, impunity for past human rights abuses perpetrated by military regimes, the independence and impartiality of the judiciary and respect for fair trial guarantees for the defendant”. The Rapporteur recommended that “the jurisdiction of military tribunals should be restricted to offences of a military nature committed by military personnel. States that establish military justice systems should aim to guarantee the independence and impartiality of military tribunals, as well as the exercise and enjoyment of a number of human rights, including the right to a fair trial and the right to an effective remedy.”

### **The right to fair trial in a state of emergency and in armed conflict**

As stated in Chapter 4, some human rights may not be suspended or derogated from under any circumstances. In its general comment No. 29 (2001), paragraph 16, the Human Rights Committee stated “the principles of legality and the rule of law require that fundamental requirements of fair trial must be respected during a state of emergency. Only a court of law may try and convict a person for a criminal offence. The presumption of innocence must be respected. In order to protect non-derogable rights, the right to take proceedings before a court to enable the court to decide without delay on the lawfulness of detention must not be diminished by a State Party’s decision to derogate from the Covenant.”

It is precisely during a national emergency that States are most likely to violate human rights. Parliaments should use their powers to ensure that fair trial guarantees and the independence of the judiciary, which are vital to the protection of human rights, are upheld during states of emergency (see also Chapter 10).

International humanitarian law governs the conduct of parties during armed conflict, although, as noted above, international human rights law also continues to apply in situations of armed conflict and crisis. The non-derogable right to a fair trial during international and internal armed conflicts is guaranteed in customary international humanitarian law as well as in international treaties such as the Geneva Conventions of 1949.<sup>8</sup>

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<sup>8</sup> Amnesty International, *Fair Trial Manual* (2nd Edition), 2014, 240.

# The right to privacy and the protection of family life

## **Article 12 of UDHR**

*"No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks."*

## **Article 16 of UDHR**

*"1. Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family. They are entitled to equal rights as to marriage, during marriage and at its dissolution.*

*2. Marriage shall be entered into only with the free and full consent of the intending spouses.*

*3. The family is the natural and fundamental group unit of society and is entitled to protection by society and the State."*

## **Article 17 of ICCPR**

*"1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.*

*2. Everyone has the right to the protection of the law against such interference or attacks."*

## **Article 23 of ICCPR**

*"1. The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.*

*2. The right of men and women of marriageable age to marry and to found a family shall be recognized.*

*3. No marriage shall be entered into without the free and full consent of the intending spouses.*

*4. States Parties to the present Covenant shall take appropriate steps to ensure equality of rights and responsibilities of spouses as to marriage, during marriage and at its dissolution. In the case of dissolution, provision shall be made for the necessary protection of any children."*

The right to privacy is central to the notion of freedom and individual autonomy. Many of the controversial issues that have arisen in the context of privacy litigation, such as State regulation of same sex relationships, transgender and intersex persons, prostitution, abortion, (assisted) suicide, dress codes and similar codes of conduct, private communication, marriage and divorce, sexual and reproductive rights, genetic engineering, cloning and the forced separation of children from their parents, touch upon fundamental moral and ethical issues that are viewed differently in various societies.

### **The right to privacy: a complex and multifaceted human right**

This right, sometimes also called the “right to be left alone” guarantees:

- respect for the individual existence of the human being, i.e. his or her particular characteristics, appearance, honour and reputation;
- protection for individual autonomy, entitling persons to withdraw from public life into their own private spheres in order to shape their lives according to their personal wishes and expectations. Certain institutional guarantees, such as protection of home, family, marriage and the secrecy of correspondence, support this aspect of the right to privacy;
- the right to be different and to manifest one's difference in public by behaviour that runs counter to accepted morals in a given society and environment. Government authorities and international human rights bodies, therefore, face a delicate and difficult task of striking a balance between the right to privacy and legitimate public interests, such as the protection of public order, health, morals and the rights and freedoms of others.

The following paragraphs touch upon a selection of issues that arise in connection with the right to privacy. In view of the controversial nature of most of the issues involved, it is often impossible to provide generalized answers, as conclusions are usually reached only by carefully weighing countervailing interests on a case-by-case basis, taking into account the special circumstances prevailing in a given society.

### **Major aspects of the right to privacy**

#### *Preservation of individual identity and intimacy*

Privacy starts with respect for an individual's specific identity, which includes one's name, appearance, clothing, hairstyle, gender, feelings, thoughts and religious and other convictions. Mandatory clothing or hairstyle rules, a forced change of one's name, or non-recognition of a name change, religion or gender (for instance, a State's refusal to alter the birth registration of a transgender person) or any form of indoctrination (“brainwashing”) or forced personality change interfere with the right to privacy. The intimacy of a person must be protected by respecting generally acknowledged obligations of confidentiality (for instance, those of physicians and priests) and guarantees of secrecy (for instance, in voting), and by enacting appropriate data protection laws with enforceable rights to information, correction and deletion of personal data.

### *Protection of individual autonomy*

The concept of individual autonomy is also part of the right to privacy. Individual autonomy – i.e. the area of private life in which human beings strive to achieve self-realization through action that does not interfere with the rights of others – is central to the liberal concept of privacy. In principle, autonomy gives rise to a right to one's own body, including in relation to sexuality and sexual conduct. International human rights bodies have affirmed that adult consensual sexual conduct is covered by the concept of privacy (See Toonen case, paragraph 8.2, Human Rights Committee). They have also found a violation of the right to privacy when access to legal abortion services is denied and a woman's decision to legally terminate her pregnancy is interfered with (see *KL v. Peru, VDA v. Argentina*, Human Rights Committee). Central to the concept of privacy is the ability of individuals to make decisions about the most intimate spheres of their lives, including whether, with whom and when to have sex; whether, whom and when to marry; whether, with whom and how often to have children; and how to express one's gender or sexuality. Protection of individual autonomy also comprises a right to act in a manner injurious to one's health, including taking one's own life. Nevertheless, some societies have deemed such behaviour to be harmful, and have often prohibited its manifestations (for instance, suicide, passive euthanasia and drug, alcohol and nicotine consumption).

### **Box 61 The human right to privacy in the digital age**

The rapid development of communication technologies has opened up new opportunities for individuals, including parliamentarians, human rights defenders and civil society organizations, to participate in online communications. But the Internet has also enabled States, corporations and others to invade the private sphere, including through mass surveillance, and make use of the extensive personal data being transferred for commercial and other purposes. The protection of personal data is crucial for parliamentarians all over the world who increasingly use digital networks to receive and share information.

OHCHR, in its report to the 27th Human Rights Council, noted "any capture of communications data is potentially an interference with privacy and, further, that the collection and retention of communications data amounts to an interference with privacy whether or not those data are subsequently consulted or used. Even the mere possibility of communications information being captured creates an interference with privacy, with a potential chilling effect on rights, including those to free expression and association. The very existence of a mass surveillance programme is itself an interference with privacy. The onus would be on the State to demonstrate that such interference is neither arbitrary nor unlawful" (A/HRC/27/37, paragraph 20).

**"Mass surveillance programmes regarding digital communications and other forms of digital expression constitute violations of the right to privacy, including when conducted**

**extraterritorially, and endanger the rights to freedom of expression and information, as well as other fundamental human rights, including the rights to freedom of peaceful assembly and of association, thus undermining participative democracy.”**

*Democracy in the digital era and the threat to privacy and individual freedoms. Resolution adopted unanimously by the 133rd IPU Assembly (Geneva, 21 October 2015).*

#### *Protection of the family*

Protection of the family is essential to the right to privacy. Institutional guarantees for the family (i.e. its legal recognition and specific benefits deriving from that status, and the regulation of the legal relationship between spouses, partners, parents and children, etc.) is intended to protect the social order and to preserve specific family functions (such as reproduction or bringing up children) – considered indispensable to a society's survival – rather than condone their transfer to other social institutions or the State. The human rights to marry and found a family, sexual and reproductive rights, equality between spouses, protection of motherhood and the special rights of children, as laid down in the CRC and CEDAW, are directly linked to the institutional guarantees relating to the family. Both parents have the same right to decide freely and responsibly on the number and spacing of their children; children have the right not to be separated from their parents; and both parents have equal rights and common responsibilities, irrespective of their marital status, for the upbringing and development of children. The rights to family reunification, foster placement and adoption are particularly important.

The right to privacy entails the protection of family life against arbitrary or unlawful interference, above all by State authorities. One form of interference in family life is the mandatory separation of children from their parents on grounds of gross disregard of parental duties and the placement of the children under the guardianship of the State. Having heard a number of cases, the European Court of Human Rights developed certain minimum guarantees for the parents and children concerned, such as participation in the respective administrative proceedings, judicial review and regular contact between parents and children during the time of their placement in foster homes in order to allow family reunification. In the same vein, following divorce, the general presumption in most jurisdictions is that both spouses should retain the right of access to their children.

#### **Box 62 What does “family” mean in international human rights law?**

The Universal Declaration of Human Rights recognizes the family as the “natural and fundamental group unit of society”. Families are also protected under Article 23 of the ICCPR, Article 10 of the ICESCR, Article 16 of the European Social Charter, Article 8 of ECHR, Article 17 of ACHR and Article 18 of the African Charter on Human and Peoples' Rights. Human rights instruments recognize that families may take many forms. In addition to blood relations and statutory ties

(marriage, adoption, registration of same sex partnerships, etc.), cohabitation, economic relationships and the specific social and cultural values of a particular society are the key criteria used by human rights mechanisms to determine whether a group constitutes a family.

#### *Protection of the home*

The protection of the home is another important aspect of privacy, since the home conveys a feeling of familiarity, shelter and security, and therefore symbolizes a place of refuge from public life where one can best shape one's life according to one's own wishes without fear of disturbance. In practice, "home" does not apply only to actual dwellings, but also to various houses or apartments, regardless of legal title (ownership, rental, occupancy and even illegal use) or nature of use (as main domicile, weekend house or even business premises). Every invasion of that sphere – described under the term "home" – that occurs without the consent of the individuals concerned represents interference. The classic form of interference is a police search for locating and arresting someone or finding evidence to be used in criminal proceedings. But it is not the only type of interference. The violent destruction of homes by security forces, forced evictions, the use of hidden television cameras or listening devices, electronic surveillance practices or forms of environmental pollution (such as noise or noxious fumes) may constitute interference with the right to protection of the home. Such interference is permissible only if it complies with domestic law and is not arbitrary, i.e. if it occurs for a specific purpose and in accordance with the principle of proportionality. Police searches, seizure and surveillance are usually permissible only on the basis of a written warrant issued by a court, and must not be misused or create disturbance beyond the pursuit of a specific purpose, such as securing evidence.

#### **Box 63 Limits on State interference with family life in relation to immigration, expulsion, deportation and extradition laws and policies**

Although there is no general right of non-nationals to enter and reside in a country, arbitrary and discriminatory immigration policies may violate the right to family protection and reunification. The longer a non-national has lived in a country, especially after establishing a family there, the stronger the arguments of the government must be to justify the person's expulsion and deportation. The Human Rights Committee emphasized that the ICCPR protects the right of families to live together in its general comment No. 15 (1986) on the position of aliens under the Covenant. Further, in paragraph 5 of its general comment No. 19 (1990) on protection of the family, the right to marriage and equality of spouses, the Committee stated "the possibility to live together implies the adoption of appropriate measures, both at the internal level and as the case may be, in cooperation with other States, to ensure the unity or reunification of families, particularly when their members are separated for political, economic or similar reasons."

In its decision in the case of *Francesco Madafferi v. Australia* (communication No. 1011/2001) the Human Rights Committee held that “In the present case, the Committee considers that a decision by the State Party to deport the father of a family with four minor children and to compel the family to choose whether they should accompany him or stay in the State Party is to be considered ‘interference’ with the family, at least in circumstances where, as here, substantial changes to long-settled family life would follow in either case.”

### *Protection of private correspondence*

Although the term “correspondence” was initially applied to written letters, it now covers all forms of communication at a distance: by telephone, electronic mail or other mechanical or electronic means. Protection of correspondence means respect for the secrecy of such communication. Any withholding, censorship, inspection, interception or publication of private correspondence constitutes interference. The most common forms of such interference are surveillance measures secretly taken by State agencies (opening letters, monitoring telephone conversations and intercepting emails, etc.) for the purpose of administering justice, preventing crime (e.g. through censorship of detainees’ correspondence) or combating terrorism. As is the case for house searches, interference with correspondence must comply with domestic and international law (i.e. as a general rule, it requires a court order) and with the principles of proportionality and necessity.

### **Box 64 The right to privacy and the fight against terrorism**

The right to privacy has been particularly affected by laws enacted in recent years in a number of countries to broaden the powers of police and security services to combat crime, including terrorism. But even these legal frameworks have been undermined by transnational networks of intelligence agencies coordinating surveillance practices to outflank the protections provided by domestic legal regimes. In addition to the extension of traditional police functions such as search, seizure and targeted surveillance (often without prior authorization by a court), human rights concerns have arisen particularly in relation to the mass screening, scanning, processing, combining, matching, storing and monitoring of private data, such methods as the automatic taking of fingerprints and blood and DNA samples from target groups, which may be selected through profiling, and the minimal levels of transparency associated with these policies, laws and practices.

In this area (as in connection with other human rights, such as the rights to personal liberty and fair trial), members of parliament bear a key responsibility: they must ensure that any extension of police and intelligence powers, if necessary at all, takes place:

- transparently and democratically;
- with due respect for international human rights norms and standards;

- without undermining the values of a free and democratic society: individual liberty, privacy and the rule of law.

Members of parliament also have a critical role in ensuring sufficient independent oversight of the police and intelligence services, particularly in the context of mass surveillance and the implementation by these bodies of related laws, policies and measures.

## Freedom of movement

### **Article 13 of UDHR**

*"1. Everyone has the right to freedom of movement and residence within the borders of each State.*

*2. Everyone has the right to leave any country, including his own, and to return to his country."*

### **Article 12 of ICCPR**

*"1. Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.*

*2. Everyone shall be free to leave any country, including his own.*

*3. The above-mentioned rights shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order, public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant.*

*4. No one shall be arbitrarily deprived of the right to enter his own country."*

### **Article 13 of ICCPR**

*"An alien lawfully in the territory of a State Party to the present Covenant may be expelled therefrom only in pursuance of a decision reached in accordance with law and shall, except where compelling reasons of national security otherwise require, be allowed to submit the reasons against his expulsion and to have his case reviewed by, and be represented for the purpose before, the competent authority or a person or persons especially designated by the competent authority."*

The Universal Declaration of Human Rights and the ICCPR protect the right of every person residing lawfully in a country to move freely and to choose a place of residence anywhere within the territory of that country. This right should be protected from both public and private interference.

### **Freedom of movement of non-nationals within a State**

Given that the right of freedom of movement applies to persons who are lawfully in the territory of a State, governments may impose restrictions on the entry of non-nationals. Whether a non-national is “lawfully” in the territory of a State should be determined according to domestic law, which may specify entry restrictions, provided that they meet the State’s international obligations.

Non-nationals who enter a country illegally but whose status is subsequently regularized must be considered to be in the territory lawfully. If a person is lawfully in a country, any restriction imposed on that person or any treatment of that person other than the treatment reserved to nationals must be justified under Article 12 (3) of the ICCPR.

An example of restrictions imposed on a non-national is provided in the case of *Celepli v. Sweden* before the Human Rights Committee (1994). Mr Celepli, a Turkish citizen of Kurdish origin living in Sweden, was ordered to leave the country on grounds of suspected involvement in terrorist activities. That order was not enforced, as the Swedish authorities believed Mr Celepli was at risk of persecution in Turkey; he was allowed to stay on provided that he reside in a particular municipality and report regularly to the police. The Human Rights Committee found that these restrictions on freedom of movement did not violate Article 12 (3) of the ICCPR.

### **Freedom to leave a country**

Article 12 (2) of the ICCPR stipulates that all persons (citizens and non-nationals, and even persons residing in a country illegally) are free to leave the territory of a State. This right applies to short and long visits abroad and to (permanent or semi-permanent) emigration. Enjoyment of this right should not depend on the purpose or duration of travel abroad.

This right imposes obligations on both the State of residence and the State of nationality. For instance, the State of nationality must issue travel documents or passports to all citizens both within and outside the national territory. If a State refuses to issue a passport or requires its citizens to obtain exit visas in order to leave, there is interference in their right to freedom of movement, which is difficult to justify. Moreover, in its general comment No. 27 (1999) on freedom of movement, the Human Rights Committee stated the following: “In examining State reports, the Committee has on several occasions found that measures preventing women from moving freely or from leaving the country by requiring them to have the consent or the escort of a male person constitute a violation of Article 12.”

## **Box 65 Barriers to freedom of movement: examples**

The Human Rights Committee notes in paragraph 17 of its general comment No. 27 (1999) that the right to freedom of movement is often subjected to the barriers listed below, which make travelling within or between countries difficult or impossible. Parliamentarians may wish to oppose such measures.

### **Movement within the country**

- Obligation to obtain a permit for internal travel
- Obligation to apply for permission to change residence
- Obligation to seek approval by the local authorities of the place of destination
- Administrative delays in processing written applications

### **Movement to another country**

- Lack of access to the authorities or to information regarding requirements
- Requirement to apply for special forms in order to obtain the actual application forms for the issuance of a passport
- Requirement to produce statements of support by employers or relatives
- Requirement to submit an exact description of the travel route
- High fees for the issuance of a passport
- Unreasonable delays in the issuance of travel documents
- Restrictions on family members travelling together
- Requirement to make a repatriation deposit or have a return ticket
- Requirement to produce an invitation from the State of destination
- Harassment of applicants

### **Limitations**

Freedom of movement must not be restricted, except where such restrictions are provided for by law and where they are necessary on grounds of national security, public order, public health or morals or the rights and freedoms of others (Article 12 (3) of ICCPR).

According to the Human Rights Committee, in paragraph 16 of its general comment No. 27 (1999), these requirements would not be met, for instance, "if an individual were prevented from leaving a country merely on the grounds that he or she is the holder of 'State secrets', or if an individual were prevented from travelling internally without a specific permit". On the other hand, restrictions on access to military zones on national security grounds or limitations on the freedom to settle in areas inhabited by indigenous or minority communities may, according to the Committee, constitute permissible restrictions.

## **Box 66 Enacting limitations and overseeing their implementation**

### **Drawing up legislation**

In adopting laws that provide for restrictions under Article 12 (3) of the ICCPR, parliaments should always be guided by the principle that the restrictions must not defeat the purpose of the right. The laws must stipulate precise criteria for the restrictions – which should be implemented objectively – and respect the principle of proportionality; the restrictions should be appropriate, should be the least intrusive possible, and should be proportionate to the interest to be protected.

### **Implementation**

If a State decides to impose restrictions, they should be specified in a law. Restrictions not provided for by law and not in conformity with Article 12 (3) of the ICCPR violate freedom of movement. Furthermore, the restrictions must be consistent with other rights provided for under the ICCPR and with the principles of equality and non-discrimination.

### **The right to enter one's own country**

Article 12 (4) of the ICCPR implies that one has the right to remain in one's own country and to return to it after having left. The right may also entitle a person to enter a country for the first time (if he or she is a national of that country but was born abroad). The right to return is particularly important for refugees seeking voluntary repatriation.

The wording “one's own country” refers primarily to citizens of that country. In exceptional cases, persons who have resided for a very long period in a country as non-nationals or who were born there as second-generation immigrants may consider their country of residence as their “own” country.

## **Freedom of thought, conscience and religion**

### **Article 18 of UDHR**

*“Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance.”*

### **Article 18 of ICCPR**

*“1. Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others*

*and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.*

*2. No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.*

*3. Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.*

*4. The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions."*

The right to freedom of thought, conscience and religion may not be subject to derogation, even during a state of emergency. What is known as the *forum internum*, i.e. the right to form one's own thoughts, opinions, conscience, convictions and beliefs, is an absolute right protected against any form of State interference, such as indoctrination ("brainwashing"). However, the public manifestation of religion or belief may be restricted on legitimate grounds.

The terms "religion" and "belief" should be interpreted broadly, to include traditional as well as non-traditional beliefs and religions. The freedom to have or to adopt a religion or belief includes the freedom to choose another belief or religion, which may entail replacing a previously held religion or belief with another, or to adopt atheist views, or to retain one's religion or belief.

### **Prohibition of coercion**

Under no circumstances may a person be coerced by the use or threat of physical force or penal sanctions to adopt, adhere to or recant a specific religion or belief. The prohibition also applies to policies or measures that have the same effect. As the Human Rights Committee states in general comment No. 22 (1993), paragraph 5, policies or practices such as "those restricting access to education, medical care, employment or the rights guaranteed by Article 25 and other provisions of the Covenant, are similarly inconsistent with Article 18.2. The same protection is enjoyed by holders of all beliefs of a non-religious nature."

### **Manifesting a religion or belief**

In paragraph 4 of general comment No. 22 (1993), the Human Rights Committee states "The freedom to manifest religion or belief may be exercised either individually or in community with others and in public or private". The Committee goes on to emphasize that the concept of "manifestation" of religion or belief is very broad. It encompasses:

- worship: performing ritual and ceremonial acts, building places of worship, using ritual formulae and objects, displaying symbols, and observing holidays and days of rest;

- observance: performing ceremonial acts, applying dietary regulations, wearing distinctive clothing or headgear, and using a specific language;
- practice and teaching: choosing religious leaders, priests and teachers, setting up seminaries or religious schools, and producing or distributing religious texts or publications.

Since the manifestation of one's religion or belief is necessarily active, it may affect the enjoyment of some rights by other persons, and in extreme cases even endanger public safety, order and health. Under Article 18 (3) of the ICCPR, therefore, it can be subject to specific limitations.

### **Limitations on the manifestation of one's religion or belief**

Limitations on the freedom to manifest one's religion or beliefs are subject to strictly specified conditions, and are allowed only if they are:

- prescribed by law;
- necessary for protecting public safety, order, health or morals or the fundamental rights and freedoms of others.

One example of permissible grounds for a limitation of the freedom to manifest one's religion or belief is when such manifestations amount to propaganda for war or advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence.

### **Box 67 The ban on overt religious symbols in French schools**

Controversy over a French law enacted in 2004 shows how sensitive the issue of placing limits on manifestations of religion or belief can be. A bill was passed by an overwhelming majority of members of parliament banning overt religious symbols from French State schools. The law has been widely seen as targeting the Islamic headscarf, although the ban also includes Jewish skullcaps and large Christian crosses.

While the French Parliament and Government justified the law by invoking the principle of secularity (strict separation of State and religion) and the need to protect Muslim girls against gender-specific discrimination, many human rights groups have argued that the ban violates the right to freedom of religion or belief and that it constitutes coercion, expressly forbidden under Article 18 (2) of the ICCPR.

### **Religious and moral education**

Article 18 (4) of the ICCPR requires States to respect the freedom of parents and legal guardians to bring up their children in accordance with their own religious and moral convictions.

Compulsory religious or moral education in public schools is not incompatible with that provision, if religion is taught in an objective and pluralistic manner (for instance, as

part of a course on the general history of religion and ethics). If one religion is taught in a public school, provisions should be made for non-discriminatory exemptions or alternatives, accommodating the wishes of all parents or legal guardians.

## Freedom of opinion and expression

### Article 19 of UDHR

*"Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers."*

### Article 19 of ICCPR

*"1. Everyone shall have the right to hold opinions without interference.*

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

*3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:*

*(a) For respect of the rights or reputations of others;*

*(b) For the protection of national security or of public order, or of public health or morals."*

Two main elements can be distinguished in the above provisions:

- freedom of opinion;
- freedom of expression.

### Freedom of opinion

The right to hold opinions is by nature passive and forms an absolute freedom: the ICCPR allows for no exceptions to or restrictions on its enjoyment. The right to express opinions, on the other hand, is not absolute. As we shall see, freedom of expression can and even must be restricted under some circumstances.

### Freedom of expression

Freedom of expression, along with freedom of assembly and association, is a cornerstone of democratic society. Democracy cannot be realized without a free

flow of ideas and information, and the possibility for people to gather, to voice and discuss ideas, criticize and make demands, defend their interests and rights and set up organizations for those purposes, such as trade unions and political parties. The United Nations Special Rapporteur on freedom of expression has described that right as “an essential test right, the enjoyment of which illustrates the degree of enjoyment of all human rights enshrined in the International Bill of Human Rights, and that respect for this right reflects a country’s standards of fair play, justice and integrity.”<sup>9</sup>

All international and regional human rights monitoring bodies have underlined the paramount importance of freedom of expression for democracy. The Human Rights Committee in general comment No. 34 (2011) stated that the rights to freedom of opinion and expression “constitute the foundation stone for every free and democratic society”. The Inter-American Commission on Human Rights approved the Inter-American Declaration of Principles on Freedom of Expression in 2000. The African Commission on Human and Peoples’ Rights adopted a Declaration of Principles on Freedom of Expression in Africa in 2002. The Parliamentary Assembly of the Council of Europe has adopted a number of instruments related to various aspects of the right to freedom of expression, including Recommendation 1506 (2001), on Freedom of Expression and Information in the media in Europe, and Resolution 1510 (2006), on Freedom of Expression and respect for religious beliefs.

Freedom of expression comprises not only the right of individuals to express their own thoughts, but also the right to seek, receive and impart information and ideas of all kinds. It therefore has an individual and a group dimension: it is a right that belongs to individuals, and also implies the collective right to receive information and to have access to the thoughts expressed by others.

#### **Box 68 Freedom of expression: a broad right**

The Human Rights Committee found in the case of *Vitaliy Symonik v. Belarus* (communication No. 1952 (2010)) that preventing an author from distributing political leaflets, confiscating the leaflets, arresting him, charging him with an administrative offence and subsequently sentencing him to a fine, unjustifiably restricted his right to freedom of expression as guaranteed in Article 19 of the Covenant.

In *A.W.P. v. Denmark* (communication No. 1879 (2009)), the complainant alleged that “by not fulfilling its positive obligation to take effective action against the reported incidents of hate speech against Muslims in Denmark, the State Party has violated the author’s rights”. The Human Rights Committee found the complaint inadmissible, as the author had failed to demonstrate that he was a direct ‘victim’ of discriminatory speech within the meaning of the ICCPR.

In the case of *Irina Fedotova v. Russian Federation* (communication No. 1932 (2010)), the applicant was convicted of an administrative offence and fined 1,500 roubles for displaying two posters stating “Homosexuality is normal” and

<sup>9</sup> UN Commission on Human Rights, *Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression* (E/CN.4/2002/75), January 2002.

“I am proud of my homosexuality” near a secondary school. In its decision, the Human Rights Committee found that the applicant’s conviction under the Ryazan Law on Administrative Offenses, which prohibits “public actions aimed at propaganda of homosexuality among minors”, violated her right to freedom of expression, read in conjunction with her right to freedom from discrimination, under the ICCPR.

**“Freedom of expression is a cornerstone upon which the very existence of a democratic society rests. It is indispensable for the formation of public opinion. It is also a condition sine qua non for the development of political parties, trade unions, scientific and cultural societies and, in general, those who wish to influence the public. It represents, in short, the means that enable the community, when exercising its options, to be sufficiently informed. Consequently, it can be said that a society that is not well informed is not a society that is truly free.”**

*Inter-American Court of Human Rights, Advisory Opinion OC-5/85, paragraph 70.*

#### *Freedom to impart information and ideas*

This aspect of the freedom of expression is of particular importance to parliamentarians, because it entails the freedom to express oneself politically. In the case of *Kivenmaa v. Finland* (1994) concerning a demonstration to denounce the human rights record of a foreign head of State who was on an official visit to Finland, the Human Rights Committee found that “the right for an individual to express his political opinions, including obviously his opinions on the question of human rights, forms part of the freedom of expression guaranteed by Article 19 of the Covenant”. As the Human Rights Committee notes in its general comment No. 34 (2011), the scope of freedom of expression “embraces even expression that may be regarded as deeply offensive”. However, such expression may be subjected to the restrictions contained in Article 19 (3) and Article 20 of the ICCPR.

#### *Freedom to seek and receive information*

**“Public bodies hold information not for themselves but as custodians of the public good and everyone has a right to access this information, subject to clearly defined rules established by law.”**

*Declaration of Principles on Freedom of Expression in Africa, Article IV.*

The right to seek and receive information is “an essential element of the right to freedom of expression”. As well as being a standalone right, the right to information is also “one of the rights upon which free and democratic societies depend”, as

access to information may act as an important “enabler” for the exercise of a range of other human rights (UN Special Rapporteur on the Right to Freedom of Opinion and Expression, A/68/362, paragraphs 18 and 19).

Article 19 of the ICCPR encompasses “a right of access to information held by public bodies”. This requires States to “proactively put in the public domain governmental information of public interest ... [and] ... make every effort to ensure easy, prompt, effective and practical access to such information” (UN Human Rights Committee, general comment No. 34 (2011), paragraph 19). To this end, States must put in place systems to ensure that requests for information are dealt with in a timely fashion under clear rules that are compatible with human rights law, and that fees for information requests “do not constitute an unreasonable impediment” to access. In addition, appeals processes should be made available so that people can challenge refusals to supply requested information (UN Human Rights Committee, general comment No. 34 (2011), paragraph 19).

The Human Rights Committee has stressed that elements of the right to access information are included within many of the articles of the ICCPR. For example, Article 2 entails an obligation for States to ensure that individuals are provided with information about their Covenant rights; Article 27 provides that “decision-making that may substantively compromise the way of life and culture of a minority group should be undertaken in a process of information-sharing and consultation with affected communities” (UN Human Rights Committee, general comment No. 34 (2011), paragraph 18).

Without the freedom to seek and receive information held by public bodies, it would not be possible for the media, members of parliament or individuals to expose corruption, mismanagement or inefficiency; ensure transparent and accountable government; or access information concerning themselves that may affect their individual rights (UN Special Rapporteur on the Right to Freedom of Opinion and Expression, A/68/362, paragraph 19).

### **Box 69 Access to information concerning human rights violations**

As noted above, Article 19 of the ICCPR requires States Parties to proactively put in the public domain government information of public interest, *inter alia* by enacting freedom of information legislation and other measures (Human Rights Committee, general comment No. 34 (2011), paragraph 19). The UN Special Rapporteur on Freedom of Opinion and Expression has emphasized that (a) the right to access information and the right to know the truth are “closely interrelated”; and (b) States are under an obligation to produce information concerning alleged human rights violations so that victims can hold the relevant authorities accountable and public debate can take place on the circumstances surrounding the violations (A/68/362, paragraphs 24 and following).

Access to information about human rights violations is still beset, however, by many obstacles. The Inter-American Court of Human Rights has held that State authorities cannot resort to such mechanisms as officially declaring such information secret or confidential, or invoking public interest or national security

to deny information required for judicial or administrative investigations or proceedings in such cases.<sup>10</sup>

In this context, the UN Special Rapporteur on Freedom of Opinion and Expression has also emphasized the importance of the Global Principles on National Security and the Right to Information (the Tshwane Principles). Section A of Principle 10 provides that “Information regarding violations of human rights or humanitarian law is subject to a high presumption of disclosure, and in any event may not be withheld on national security grounds in a manner that would prevent accountability for the violations or deprive a victim of access to an effective remedy” (A/68/362, paragraph 66 (b)).

### *Media freedom*

A crucial aspect of freedom of expression is freedom of the press and other media, including online information sources, as well as the right of individuals to access media output. The Human Rights Committee stated in its general comment No. 34 (2011) that the free communication of information and ideas between citizens, candidates and elected representatives – crucial for democratic functioning – necessitates a free, diverse and independent media. In paragraph 15 of the general comment, the Committee emphasizes the role of new mobile and internet-based communication technologies and urges States to “take all necessary steps to foster the independence of these new media and to ensure access of individuals thereto.”

### *Restrictions*

Article 19 (3) of the ICCPR underscores that the exercise of the right to freedom of expression carries with it special duties and responsibilities. Restrictions are permitted in two areas: (a) respect for the rights or reputations of others; and (b) the protection of national security, public order (*ordre public*) or public health or morals. Restrictions imposed by a State Party on the exercise of freedom of expression must not, however, put the right itself in jeopardy.

Any restriction on the right to freedom of expression must meet the following strict tests of justification:

- The restriction must be provided by law (legislation enacted by parliament, common law articulated by the courts or professional rules). The restriction must be precise and meet the criteria of legal certainty and predictability: it must be accessible to the individual concerned and its consequences for him or her must be foreseeable. Laws that are too vague or allow for excessive discretion in their application fail to protect individuals against arbitrary interference and do not constitute adequate safeguards against abuse.
- The restriction must be *necessary* for the legitimate purpose of:
  - respecting the rights or reputations of others; or

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<sup>10</sup> Inter-American Court of Human Rights, *Myrna Mack Chang v. Guatemala*, Judgment of 25 November 2003, Series C, No. 101, paragraph 180; and *Tiu Tojín v. Guatemala*, Judgment of 26 November 2008, Series C, No. 190, paragraph 77.

- protecting national security, public order, public health or morals.

The latter criterion can be met only if the restriction addresses a specific, well-defined social need and is proportionate to the legitimate aim pursued, so that the harm to freedom of expression does not outweigh the benefits.

### **Box 70 Safeguarding freedom of the media**

Parliament may take a number of steps that can contribute to ensuring that there are free, diverse and independent media, including the following measures:

- revising media and defamation laws and amending them, if necessary, to bring them into conformity with Article 19 of the ICCPR, in particular, by abolishing any laws that provide for the punishment of journalists and other commentators with imprisonment, except in cases involving racist or discriminatory comments or calls to violence, and ensuring that any fines for offences such as libel, defamation and insults are not out of proportion with the harm suffered by the victims;
- reviewing counter-terrorism legislation to ensure that it is compatible with Article 19 (3) of the ICCPR and does not lead to unnecessary or disproportionate interference in media activities;
- encouraging plurality and independence of all forms of media;
- ensuring that broadcasters are protected against political and commercial influence, including through the appointment of an independent governing board and respect for editorial independence;
- ensuring that an independent broadcasting licensing authority is set up and providing for a system of licensing that is not unduly restrictive or onerous;
- establishing clear and transparent criteria for payment and withdrawal of government subsidies to the media, in order to avoid the use of subsidies for stifling criticism of the authorities;
- avoiding excessive concentration of media control; and implementing measures ensuring impartial allocation of resources and equitable access to the media; and adopting antitrust legislation regarding the media;
- promoting universal access to the Internet.

### **Restriction on the ground of respect for the rights and reputation of others**

The notion of the “rights” of “others” (as individuals and as members of particular communities) refers to all of the human rights recognized in the ICCPR as well as in other international human rights instruments. For example, it may be legitimate to restrict freedom of expression in order to protect the right to vote under Article 25 of the Covenant by ensuring that voters are not subjected to forms of expression that constitute coercion or intimidation. These restrictions should not, however, be used to

stifle political debate (UN Human Rights Committee, general comment No. 34 (2011), paragraph 28).

The Human Rights Committee has emphasized in its jurisprudence that there is a presumption that public debate concerning public figures and political institutions should not be restricted: “the mere fact that forms of expression are considered to be insulting to a public figure is not sufficient to justify the imposition of penalties, albeit public figures may also benefit from the provisions of the Covenant” (UN Human Rights Committee, general comment No. 34 (2011), paragraph 38). For this reason, the Committee has expressed concern at the existence and application of laws criminalizing criticism of government officials and institutions.

Any restrictions on freedom of speech justified on the grounds of protecting the rights or reputations of others must be both necessary and proportionate. For example, a prohibition on commercial advertising in one language, with a view to protecting the language of a particular community, violates the test of necessity if the protection could be achieved in other ways that do not restrict the freedom of expression (Human Rights Committee, *Ballantyne, Davidson & McIntyre v. Canada*, communication No. 359/385/89). On the other hand, the Committee has considered that a State Party complied with the test of necessity when it transferred a teacher who had published materials that expressed hostility toward a religious community to a non-teaching position in order to protect the rights and freedom of children of that faith in a school district (Human Rights Committee, *Ross v. Canada*, communication No. 736/97).

### **Restriction on grounds of national security and public order**

In its general comment No. 34 (2011), the Human Rights Committee notes that States will be in violation of their obligations under Article 19 (3) if they do not ensure that treason or sedition laws are narrowly applied. In paragraph 30 of the general comment, the Committee states “It is not compatible with paragraph 3, for instance, to invoke such laws to suppress or withhold from the public information of legitimate public interest that does not harm national security or to prosecute journalists, researchers, environmental activists, human rights defenders, or others, for having disseminated such information.”

In its decision in the case of *Sohn v. Republic of Korea* (communication No. 518 (1992)), the Human Rights Committee held that national security did not provide legitimate grounds for restricting the applicant’s right to issue a statement supporting labour rights and calling for a national strike.

### **Restriction on grounds of public morals or health**

The Human Rights Committee observed in general comment No. 22 (1993) that “the concept of morals derives from many social, philosophical and religious traditions; consequently, limitations ... for the purpose of protecting morals must be based on principles not deriving exclusively from a single tradition”. Any such limitations must be understood in the light of universality of human rights and the principle of non-discrimination.

### **Box 71 Freedom of expression and parliamentarians: closer scrutiny of any interference with their freedom of expression, but also greater tolerance of criticism**

The IPU Committee on the Human Rights of Parliamentarians has consistently stressed that, in accordance with their mandates, parliamentarians must be able to express themselves freely as defenders of the rights of the citizens who elect them. The IPU Committee frequently calls on governments to ensure that parliamentary immunity provisions and freedom of expression for all parliamentarians, in particular those belonging to opposition parties, are effectively upheld. In its 2015 report on human rights abuses of members of parliament, IPU documented violations against 320 parliamentarians in 43 countries with violations of freedom of expression the third most common form of human rights abuse after arbitrary detention and a lack of a fair trial. Opposition party members of parliament were far more likely to suffer violations of their right to free expression and other human rights than those from majority or governing parties ([www.ipu.org](http://www.ipu.org)).

In the case of *Castells v. Spain* (1992), which involved a member of parliament who had been convicted for publishing an article accusing the Government of complicity in several attacks and murders, the European Court of Human Rights stated that “while freedom of expression is important for everybody, it is especially so for an elected representative of the people. He represents his electorate, draws attention to their preoccupations and defends their interests. Accordingly, interferences with the freedom of expression of an opposition member of parliament … call for the closest scrutiny on the part of the Court …” It also affirmed “the limits of permissible criticism are wider with regard to the government than in relation to a private citizen, or even a politician. In a democratic system the actions or omissions of the government must be subject to the close scrutiny not only of the legislative and judicial authorities but also of the press and public opinion. Furthermore, the dominant position which the government occupies makes it necessary for it to display restraint in resorting to criminal proceedings, particularly where other means are available for replying to the unjustified attacks and criticisms of its adversaries or the media …” In other cases, the European Court has ruled that in order to protect freedom of expression, people should be allowed to criticize politicians more harshly than those who have not chosen to be public figures (see, for instance, the cases of *Lingens v. Austria* (1986) and *Dichand and Others v. Austria* (2002)).

### **Mandatory limitations on freedom of expression**

Article 20 of the ICCPR provides that States must adopt legal prohibitions on both “propaganda for war” and “advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence”. The Human Rights Committee has explained, however, in its general comment No. 34 (2011), that any restrictions on freedom of expression based on legislation adopted under Article 20 must also meet the necessity and proportionality requirements contained in Article 19

(3) of the ICCPR. It notes in paragraph 48 of the comment that “Prohibitions of displays of lack of respect for a religion or other belief system, including blasphemy laws, are incompatible with the Covenant, except in the specific circumstances envisaged in Article 20, paragraph 2, of the Covenant.” Legislation favouring or penalizing particular religions or belief systems, or measures preventing or punishing criticism of religious leaders or doctrine, would therefore not be permitted under the ICCPR.

The Human Rights Committee has encouraged governments to take legal measures to restrict the publication or dissemination of obscene and pornographic material portraying women and girls as objects of violence or degrading or inhuman treatment (general comment No. 28 (2000)).

### **Box 72 “Memory laws” and freedom of expression**

In general comment No. 34 (2011), the Human Rights Committee states “Laws that penalize the expression of opinions about historical facts are incompatible with the obligations that the Covenant imposes on States Parties in relation to the respect for freedom of opinion and expression. The Covenant does not permit general prohibition of expressions of an erroneous opinion or an incorrect interpretation of past events.”

The Committee refers in its comment to its decision in the case of *Faurisson v. France* (Communication No. 550 (93)), concerning an author’s conviction under the Gayssot Act. The Gayssot Act made it an offence to contest the existence of crimes against humanity, as defined in the London Charter (1945) establishing the Nuremberg Tribunal. A majority of the Committee found that the restriction on Mr Faurisson’s speech was justified because his words constituted an incitement to anti-Semitism and the measures imposed were necessary to protect the rights of others. Several members of the Committee, however, expressed concern at the non-specific nature of the Gayssot Act. They argued that it could be used in other situations to unjustifiably limit speech in connection with bona fide historic research and that such far-reaching restrictions on free speech are not allowed under the ICCPR.

## **Freedom of peaceful assembly and association**

### **Article 20 of UDHR**

*“1. Everyone has the right to freedom of peaceful assembly and association.*

*2. No one may be compelled to belong to an association.”*

### **Article 21 of ICCPR**

*“The right of peaceful assembly shall be recognized. No restrictions may be placed on the exercise of this right other than those imposed in conformity with the law*

*and which are necessary in a democratic society in the interests of national security or public safety, public order, the protection of public health or morals or the protection of the rights and freedoms of others.”*

### **Article 22 (1) and (2) of ICCPR**

*“1. Everyone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests.*

*2. No restrictions may be placed on the exercise of this right other than those which are prescribed by law and which are necessary in a democratic society in the interests of national security or public safety, public order, the protection of public health or morals or the protection of the rights and freedoms of others. This article shall not prevent the imposition of lawful restrictions on members of the armed forces and of the police in their exercise of this right.”*

Freedom of peaceful assembly and of association are, together with freedom of expression, key rights in a democratic society, since they enable the people to participate in the democratic process.

### **Freedom of assembly**

#### **Scope**

Protecting freedom of assembly means guaranteeing the right to hold meetings to publicly discuss or disseminate information or ideas – but only if they are “peaceful”, a term that must be interpreted broadly. For instance, States Parties must prevent a peaceful assembly from leading to a riot as a result of provocation or the use of force by security forces or private parties, such as counter-demonstrators or agents provocateurs.

States are under an obligation to take positive measures to guarantee this right and protect it against interference by State agencies and private parties alike. To that end, authorities must take measures to ensure the smooth functioning of gatherings and demonstrations. Accordingly, they should be informed of the location and time of a planned assembly with sufficient advance notice, and should be granted access to it.

#### **Limitations**

The right to assemble peacefully is subject to restrictions, which must be:

- in conformity with the law: interference with freedom of assembly can be undertaken independently by administrative authorities, particularly the police, on the basis of a general statutory authorization;
- necessary in a democratic society: they must be proportional and compatible with the basic democratic values of pluralism, tolerance, broad-mindedness and popular sovereignty;

- aimed at a legitimate purpose, such as national security, public safety, public order, public health and morals and the rights and freedoms of others (for instance, an assembly may be broken up if it constitutes a specific threat to persons or passers-by).

## **Freedom of association**

### *Scope*

Protecting freedom of association means guaranteeing the right of anyone to found an association with like-minded persons or to join an existing association. Thus, a strict one-party system that precludes the formation and activities of other political parties violates freedom of association. The formation of and membership in an association must be voluntary; nobody may be forced – directly or indirectly – by the State or by private parties to join a political party, a religious society, a commercial undertaking or a sports club. States are under an obligation to provide the legal framework for setting up associations and to protect this right against interference by private parties.

Freedom of association includes the right to form and join trade unions to protect one's interests. Trade union rights are laid down more specifically in Article 8 of ICESCR.

### **Box 73 The case of Socialist Party of Turkey (STP) and Others v. Turkey (European Court of Human Rights, 2003)**

STP was formed on 6 November 1992, but on 30 November 1993 the Constitutional Court of Turkey ordered its dissolution on the grounds that its programme was liable to undermine the territorial integrity of the State and the unity of the nation. It found that STP had called for a right of self-determination for the Kurds and supported the right to "wage a war of independence", and likened its views to those of terrorist groups. The applicants alleged, *inter alia*, that the party's dissolution had infringed their rights, as guaranteed under Article 11 of ECHR on freedom of association.

The European Court of Human Rights found that the dissolution of STP amounted to a violation of the applicants' right to freedom of association. It said there could be no justification for hindering a political group merely because it sought to debate in public the situation of part of the State's population and to participate in the nation's political life in order to find, by democratic means, solutions capable of satisfying every group concerned. Moreover, since the Constitutional Court had ruled even before STP had begun its activities, the European Court found that there was no evidence before it to support the allegation that STP had any responsibility for the problems posed by terrorism in Turkey. According to the European Court, the dissolution was therefore disproportionate and unnecessary in a democratic society.

## *Limitations*

Freedom of association is subject to the same restrictions as freedom of assembly: any limitations must be provided for by law, must be necessary in a democratic society, and must serve one of the purposes justifying interference, namely protection of national security, public safety, public order, public health or morals and the interests and freedoms of others. Associations that advocate national, racial or religious hatred should be banned in the interest of others, pursuant to Article 20 (2) of ICCPR, which prohibits any advocacy of national, racial or religious hatred.

# The right to participate in public affairs

## **Article 21 of UDHR**

*"1. Everyone has the right to take part in the government of his country, directly or through freely chosen representatives.*

*2. Everyone has the right to equal access to public service in his country.*

*3. The will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures."*

## **Article 25 of ICCPR**

*"Every citizen shall have the right and the opportunity:*

*(a) To take part in the conduct of public affairs, directly or through freely chosen representatives;*

*(b) To vote and to be elected at genuine periodic elections, which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors;*

*(c) To have access, on general terms of equality, to public service in his country."*

The right to take part in government is a cornerstone of modern democracy and therefore crucial for parliament. The correct implementation of this right has direct implications for the democratic nature of parliament, and ultimately for the legitimacy of the government and its policies.

The right has three components, which are explained below:

- the general right to public participation;
- the right to vote and be elected;

- equal access to public service.

### **The general right to public participation**

The right to public participation consists of (a) indirect participation in public affairs through elected representatives, and (b) direct participation in public affairs.

#### *Indirect participation*

It is mainly through elections and the constitution of representative bodies – national parliaments in particular – that the people participate in the conduct of public affairs, express their will and hold the government to account. The Human Rights Committee has stated that the powers of representative bodies should be legally enforceable and should not be restricted to advisory functions, and that representatives should exercise only the powers given to them in accordance with constitutional provisions (general comment No. 25 (1996)).

For parliaments truly to reflect the will of the people, elections must be genuine, free and fair and held at not unduly long intervals. In 1994, IPU adopted the Declaration on Criteria for Free and Fair Elections, which specifies criteria for voting and election rights; candidature, party and campaign rights and responsibilities; and the rights and responsibilities of States. The United Nations – as part of its electoral assistance and electoral observation activities – has also established clear criteria for what should be common elements of electoral laws and procedures.<sup>11</sup>

For elections to be free and fair, they must take place in an atmosphere free from intimidation and respectful of human rights – particularly the rights to free expression, assembly and association – with independent judicial procedures and protections against discrimination. The right to vote should be established by law on the basis of non-discrimination and equal access of all persons to the election process. Although participation in elections may be limited to the citizens of a State, no restriction on unreasonable grounds, such as physical disability, illiteracy, educational background, party membership or property requirements, is permitted.

#### *Direct participation*

Direct participation means that not only elected representatives, but citizens too, are able to participate directly in public affairs, either through public debate and dialogue with elected representatives, referendums and popular initiatives, or through self-organization, guaranteed under the freedoms of expression, assembly and association. In the case of *Marshall v. Canada* (1991), however, the Human Rights Committee recognized a broad margin of discretion of States with regard to granting direct rights of political participation:

"It must be beyond dispute that the conduct of public affairs in a democratic State is the task of representatives of the people, elected for that purpose, and public officials appointed in accordance with the law. Invariably, the conduct of public affairs affects the interests of large segments of the population or even the population as a whole, while in other instances it affects more directly the interests of more specific groups. Although prior consultations, such as public hearings or consultations with the most

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<sup>11</sup> UNDP, Online Toolkit for Electoral Assistance, <http://toolkit-elections.unteamworks.org/?q=node/17>.

interested groups, may often be envisaged by law or have evolved as public policy in the conduct of public affairs, Article 25 (a) of the Covenant cannot be understood as meaning that any directly affected group, large or small, has the unconditional right to choose the modalities of participation in the conduct of public affairs. That, in fact, would be an extrapolation of the right to direct participation by the citizens, far beyond the scope of Article 25 (a)."

#### **Box 74 The IPU Declaration on Criteria for Free and Fair Elections (1994)**

The authority of parliament derives largely from its capacity to reflect faithfully the diversity of all components of society, and this in turn depends on the way elections are organized. IPU has therefore put considerable effort into the formulation of election criteria. An important outcome of that work is the Declaration on Criteria for Free and Fair Elections, which was adopted in 1994. It is mainly based on a study of the international law on democratic rights and State practice in respect of elections, covering the entire electoral process, from electoral laws to balloting, monitoring the poll, counting ballots, proclaiming the results, examining complaints and resolving disputes.

#### **The right to vote and be elected**

The right to vote and be elected is crucial for parliament as a democratic institution, for members of parliament, and for democracy as a whole. Its proper implementation and realization has a direct impact on the way voters perceive their elected representatives, on the legitimacy of the legislation that parliament enacts and on the decisions it takes. It is therefore directly related to the essence of parliament and the idea of popular rule through representatives. Any breach of this right has direct consequences for parliament's legitimacy, and even – in the most serious cases – for law and order and stability in a country. Moreover, parliamentarians are guardians of the right to vote and stand for election.

Elections must be organized so that the will of the people is freely and effectively expressed and the electorate is offered an actual choice. It is also essential to ensure non-discriminatory access of candidates and competing political parties to the media

##### *The right to vote*

Persons entitled to vote should be able to register, and any manipulation of registration and the voting itself, such as intimidation or coercion, should be prohibited by law. The elections should be based on the principle of "one person, one vote". The drawing of electoral boundaries and the methods of vote allocation should not distort the distribution of voters or discriminate against any social groups.

Positive measures should be taken to remove obstacles to participation, such as illiteracy, language barriers (information should be made available in minority languages), poverty, non-accessibility for persons with disabilities and obstacles to freedom of movement.

Citizens should be protected from coercion or from attempts to compel them to reveal their voting intentions or preferences, and the principle of the secret ballot must be upheld.

#### *The right to be elected*

The right to stand for election may be subject to restrictions, such as those based on minimum age or citizenship, but these must be justifiable and reasonable.

Physical disability, illiteracy, educational background, party membership or property requirements should never apply as restrictive conditions.

Furthermore, conditions relating to nomination dates, fees or deposits should be reasonable and non-discriminatory (Human Rights Committee, general comment No. 25 (1996), paragraph 16).

#### *Voting procedures*

Free, fair and periodic elections should be guaranteed by national law. Voters should be free to support or oppose the government and form opinions independently. Elections must be held by secret ballot, ensuring that the will of the electors is expressed freely.

One such crucial measure is the establishment of an independent authority to supervise the electoral process. It is important to ensure the security of ballot boxes during voting. After the voting, ballots should be counted in the presence of (international) observers, candidates or their agents.

**"No matter who you are, or where you live, under international law, your voice counts. Governments should ensure that this is not a dream. It should be a reality."**

*Ms Navi Pillay, former United Nations High Commissioner for Human Rights, speech on the occasion of Human Rights Day 2012.*

### **Box 75 Women's rights in public and political life**

Although women's right to vote has been secured in nearly every country of the world, in practice the right to vote can sometimes be meaningless when other conditions make it virtually impossible or very difficult for both men and women to vote, such as the absence of free and fair elections, violations of freedom of expression, or lack of security, which tends to affect women disproportionately. In some countries, women cannot register to vote for lack of a birth certificate or identity papers, which are issued only to men. Other obstacles, such as stereotyping and traditional perceptions of men's and women's roles in society, as well as lack of access to relevant information and resources, also inhibit women's ability or willingness to vote. In addition to discriminatory attitudes and practices, the traditional working patterns of many political parties and governments continue to impede women's participation in public life. Women may be discouraged from seeking political office in particular because of their double burden of work and the high cost of seeking and holding public office. Few of

the countries that have ratified the Convention on the Elimination of All Forms of Discrimination against Women legally bar women's eligibility to stand for election, yet women remain seriously underrepresented at all levels of government.

The CEDAW-Committee's general recommendation No. 25 (2004) promotes temporary special measures to achieve substantive gender equality, which is required by the Convention. Since the Beijing World Conference, States have increasingly adopted quotas to boost women's participation, counter discrimination and accelerate the slow pace at which the number of women in politics is rising. The most common are political party quotas, legislative quotas and reserved seats.

However, if adopted in isolation, these measures are usually not enough to ensure equality. Quotas for women need to be coupled with other measures to create an enabling environment for women to participate. Particularly, the positive impact of increasing women's representation in public and political life will not be felt if the women who gain access are not also empowered to actively participate in the discussions and exercise influence in decision-making.

"Women's rights in public and political life", in *Women's Rights are Human Rights*, New York and Geneva, OHCHR, United Nations, 2014. Available at <https://shop.un.org> and <http://www.un-ilibrary.org>

## **Equal access to public service**

As regards public service positions, the basic principle of equality must govern the criteria and processes for appointment, promotion, suspension and dismissal, which should be objective and reasonable.

In their oversight functions, parliamentarians should pay particular attention to conditions for access, existing restrictions, the processes for appointment, promotion, suspension and dismissal or removal from office, and the judicial or other review mechanisms available with regard to these processes.

## **Information and media**

It is essential that citizens, candidates and elected representatives are able freely to discuss and communicate information and ideas on political affairs, hold peaceful demonstrations and meetings, publish political material and campaign for election. An independent press, free media expressing a variety of political views – key elements of such an environment – and respect for freedom of association, ensuring the possibility to form and join political parties, are crucial for a well-functioning democracy.

### **Further reading**

- *The right to privacy in the digital age*, OHCHR, A/HRC/27/37
- *Rabat Plan of Action on the prohibition of advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence*, OHCHR, 2013, [www.ohchr.org/Documents/Issues/Opinion/SeminarRabat/Rabat\\_draft\\_outcome.pdf](http://www.ohchr.org/Documents/Issues/Opinion/SeminarRabat/Rabat_draft_outcome.pdf)
- *Factors that impede equal political participation and steps to overcome those challenges*, OHCHR, A/HRC/27/29
- *Moving Away from the Death Penalty: Arguments, Trends and Perspectives*, New York, OHCHR, United Nations, 2014, [www.ohchr.org/Lists/MeetingsNY/Attachments/52/Moving-Away-from-the-Death-Penalty.pdf](http://www.ohchr.org/Lists/MeetingsNY/Attachments/52/Moving-Away-from-the-Death-Penalty.pdf)



## Chapter 13

# What parliamentarians should know about economic, social and cultural rights and the right to development

The right to education is enshrined in the UN Convention on the Rights of the Child. In conflict zones, this right is threatened daily. In 2016, the UN Children's Fund estimated that nearly 24 million children living in crisis zones are out of school. © NurPhoto/Samer Bouidani

Economic, social and cultural rights are those human rights relating to the workplace, social security, family life, participation in cultural life, and access to housing, food, water and sanitation, health care and education. As with the civil and political rights discussed in Chapter 12, economic, social and cultural rights have become increasingly well defined in national, regional and global legal systems. Accepting economic, social and cultural rights as human rights legally obliges States to ensure that everyone can enjoy these rights and to provide remedies if they are violated. Recognizing economic, social and cultural rights, in line with the crosscutting principle

of non-discrimination, means giving priority, in policies, legislation and resource allocation, to the needs of the most marginalized groups in society.<sup>1</sup>

Economic, social and cultural rights apply to people throughout the world, but violations of these rights tend to occur most systematically and pervasively in settings where poverty is widespread.

## Globalization, development and economic, social and cultural rights

Rapid globalization is affecting the enjoyment of all human rights. At the World Summit for Social Development, held in Copenhagen in 1995, it was underscored that while the enhanced mobility and communications, increased trade and capital flows and technological advances generated by globalization had opened new opportunities for sustained economic growth and development worldwide, and for creative sharing of experiences, ideals, values and aspirations, globalization had also been “accompanied by intensified poverty, unemployment and social disintegration”.<sup>2</sup>

In many countries, deregulation, trade liberalization, privatization and similar trends have led to a diminished role for the State and a transfer of traditional governmental functions to non-State actors. This has negatively affected the enjoyment of the rights to education, health care, housing, water, sanitation and social security, as well as labour rights – especially in the case of vulnerable groups. The following sections, which set out international standards in the area of economic, social and cultural rights, show a significant and widening gap between State obligations and the capacity or willingness of States to fulfil them. In many countries, non-State actors, including transnational corporations, private security companies, paramilitary and guerrilla forces, and organized crime and terrorist groups, are responsible for serious and widespread human rights abuses (see Box 55 on the privatization of prisons). The UN Human Rights Council expressed concern at how the world food crisis (A/HRC/S-7/2) and the economic and financial crisis (A/HRC/2-10/1) impacted on human rights. The Council clarified that such crises relieve neither States nor the international community of their obligations to realize the effective enjoyment of human rights.

### **Box 76 Business and human rights**

**“Business enterprises should respect human rights. This means that they should avoid infringing on the**

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1 See *Frequently Asked Questions on Economic, Social and Cultural Rights, Fact Sheet No. 33*, New York and Geneva, OHCHR, United Nations, 2008. Available at <http://www.ohchr.org/Documents/Publications/FactSheet33en.pdf>.

2 World Summit for Social Development, Copenhagen Declaration (2005), paragraph 14.

**human rights of others and should address adverse human rights impacts with which they are involved.”**

*Guiding Principles on Business and Human Rights, OHCHR, 2011.*

**“It has long been recognized that business can have a profound impact on human rights. This impact can be positive, for example by delivering innovation and services that can improve living standards for people across the globe. It can also be negative, for example where business activities destroy people’s livelihoods, exploit workers or displace communities. Companies can also be complicit in human rights abuses committed by others, including States – for example, if they collude with security forces in violently suppressing protests or provide information on their customers to States that then use it to track down and punish dissidents.**

**However, international human rights treaties generally do not impose direct legal obligations on private actors, such as companies. Instead, States are responsible for enacting and enforcing national legislation that can have the effect of requiring companies to respect human rights – such as laws mandating a minimum working age ... [t]he [UN] Guiding Principles on Business and Human Rights: Implementing the ‘Protect, Respect and Remedy’ Framework are a set of 31 principles directed at States and companies that clarify their duties and responsibilities to protect and respect human rights in the context of business activities. According to the framework: [a]ll States have a duty to protect everyone within their jurisdiction from human rights abuses committed by companies; [c]ompanies have a responsibility to respect human rights – i.e. avoid infringing on the rights of others wherever they operate and whatever their size or industry, and address any impact that does occur. This responsibility exists independently of whether States fulfil their obligations; and, [w]hen abuses occur, victims must have access to effective remedy, through judicial and non-judicial grievance mechanisms.”**

*Frequently Asked Questions About the Guiding Principles on Business and Human Rights, OHCHR, 2014.*

### **Box 77 Human rights, international trade and investment**

The global trade and investment regime has a profound impact on human rights, given that the promotion of economic growth in itself may not lead to inclusive, sustainable or equitable development outcomes. General Assembly Resolution 67/171 affirms human rights as a guiding consideration for multilateral trade negotiations. The resolution calls for mainstreaming of the right to development and strengthening of the global partnership for development within international trade institutions.

Trade and investment regimes also overlap and interface with regimes for intellectual property, transfer of technology, climate change and energy, and any evaluation must address how the convergence, divergence and intersection of these regimes impact on the realization of human rights.

In a human rights-based approach to trade and investment, consideration is given to how States' obligations under trade/investment law/agreements might impact on their ability to fulfil their human rights obligations; what measures States and other actors should be taking to ensure positive and avoid negative impacts; and what action is required to mitigate any negative impacts that do occur.

The gap between rich and poor countries, and within the same society between rich and poor people, has continued to widen. Roughly one billion people live in conditions of extreme poverty worldwide, without adequate food, shelter, education and health care. Globalization helps to provide accurate information on living conditions in any part of the world, to make societies ever more interdependent and to develop advanced technology to combat poverty. In our "global village", it is inadmissible that such a significant part of humanity is being deprived of human rights.

#### **Poverty as a human rights violation**

**"Poverty is an urgent human rights concern in itself. It is both a cause and a consequence of human rights violations and an enabling condition for other violations. Not only is extreme poverty characterized by multiple reinforcing violations of civil, political, economic, social and cultural rights, but persons living in poverty generally experience regular denials of their dignity and equality."**

*Final draft of the Guiding Principles on Extreme Poverty and Human Rights, submitted by the Special Rapporteur on Extreme Poverty and Human Rights, Magdalena Sépulveda Carmona, A/HRC/21/39, paragraph 3.*

In the light of the considerations cited above, poverty eradication has emerged in recent decades as an overarching objective of human development. Poverty represents the denial not only of a person's economic, social and cultural rights,

but also of his or her civil and political rights.<sup>3</sup> Every day, 24,000 children under five die from hunger and preventable diseases. These facts are not new, and yet the gap between rich and poor is widening, making the failure to address poverty effectively in the face of rapid globalization increasingly indefensible. In that context, in September 2000, the United Nations General Assembly adopted the Millennium Development Goals (MDGs), including the goal to halve the number of people living in extreme poverty by 2015. The ambitious targets to be achieved by the same year included universal primary education; reduction of under-five child mortality by two thirds, and of maternal mortality by three quarters; and a halving of the proportion of people who suffer from hunger and lack access to safe drinking water.

The MDGs served as a proxy for certain economic and social rights but ignored other important human rights linkages. By contrast, an ambitious new global development framework, the 2030 Agenda for Sustainable Development, now strongly reflects human rights principles and standards.

The 2030 Agenda was adopted in September 2015 by 170 world leaders gathered at the UN Sustainable Development Summit in New York. It covers a broad set of 17 Sustainable Development Goals (SDGs), and 167 targets and will serve as the overall framework to guide global and national development action for the next 15 years.

The SDGs are the result of the most consultative and inclusive process in the history of the United Nations. Grounded in international human rights law, the agenda offers critical opportunities to further advance the realization of human rights for all people everywhere, without discrimination.

## The Sustainable Development Goals

 TRANSFORMING OUR WORLD: THE 2030 AGENDA FOR SUSTAINABLE DEVELOPMENT	<b>1 NO POVERTY</b> 	<b>2 ZERO HUNGER</b> 	<b>3 GOOD HEALTH AND WELL-BEING</b> 	<b>4 QUALITY EDUCATION</b> 	<b>5 GENDER EQUALITY</b> 
<b>6 CLEAN WATER AND SANITATION</b> 	<b>7 AFFORDABLE AND CLEAN ENERGY</b> 	<b>8 DECENT WORK AND ECONOMIC GROWTH</b> 	<b>9 INDUSTRY, INNOVATION AND INFRASTRUCTURE</b> 	<b>10 REDUCED INEQUALITIES</b> 	<b>11 SUSTAINABLE CITIES AND COMMUNITIES</b> 
<b>12 RESPONSIBLE CONSUMPTION AND PRODUCTION</b> 	<b>13 CLIMATE ACTION</b> 	<b>14 LIFE BELOW WATER</b> 	<b>15 LIFE ON LAND</b> 	<b>16 PEACE, JUSTICE AND STRONG INSTITUTIONS</b> 	<b>17 PARTNERSHIPS FOR THE GOALS</b> 

<sup>3</sup> The report "Making the Law Work for Everyone", published in 2008 by the UN Commission on Legal Empowerment of the Poor, concluded that around four billion people, the majority of the world's population, are excluded from the rule of law. As affirmed in the report, they are "not protected adequately by law and by open and functioning institutions and, for a range of reasons, are unable to use the law effectively to improve their livelihoods".

## **Box 78 How are SDGs different from MDGs?**

**Universal:** While the MDGs applied only to so-called “developing countries”, the SDGs are a truly universal framework and will be applicable to all countries. All countries have progress to make in the path towards sustainable development, and face both common and unique challenges to achieving the many dimensions of sustainable development captured in the SDGs.

**Transformative:** As an agenda for “people, planet, prosperity, peace and partnership”, the 2030 Agenda offers a paradigm shift from the traditional model of development. It provides a transformative vision for people- and planet-centred, human rights-based, and gender-sensitive sustainable development that goes far beyond the narrow vision of the MDGs.

**Comprehensive:** Alongside a wide range of social, economic and environmental objectives, the 2030 Agenda promises “more peaceful, just and inclusive societies which are free from fear and violence”, with attention to democratic governance, rule of law, access to justice and personal security (in Goal 16), as well as an enabling international environment (in Goal 17 and throughout the framework). It therefore covers issues related to all human rights, including economic, civil, cultural, political and social rights and the right to development.

**Inclusive:** The new Agenda strives to leave no one behind, envisaging “a world of universal respect for equality and non-discrimination” between and within countries. It embraces gender equality in particular by reaffirming the responsibilities of all States to “respect, protect and promote human rights, without distinction of any kind as to race, colour, sex, language, religion, political or other opinions, national and social origin, property, birth, disability or other status”.

The 2030 Agenda acknowledges the essential role parliaments can play to advance the SDGs by adopting enabling legislation, including that contained in key budget bills. It also recognizes that parliaments are uniquely placed to hold governments to account for the effective implementation of the SDGs.

As the world organization of national parliaments, IPU has developed a series of tools and activities to help parliaments institutionalize the SDGs, so as to provide a broader frame of reference for all acts of legislation and oversight for the next 15 years. IPU also organizes national and regional workshops for parliamentarians as well as a parliamentary event at each annual session of the High-level Political Forum on Sustainable Development (HLPF) – the main global review mechanism of the United Nations (<https://sustainabledevelopment.un.org/index.html>).

## **What you can do as a parliamentarian**

- Encourage parliamentary debate on issues related to SDGs, and take action to ensure that your parliament adopts a motion or resolution to take stock of the goals and outline the steps needed to implement them. A model parliamentary

resolution prepared by IPU (available at [http://www.ipu.org/un-e/model\\_SDG.pdf](http://www.ipu.org/un-e/model_SDG.pdf)) recommends such steps as:

- making sure your government prepares a national plan for the SDGs to identify country-specific goals as well as the policies required to carry them forward, and that the parliament reviews this plan before it is adopted;
  - requiring an annual progress report from your government to the parliament on the implementation of the national plan for the SDGs.
- Ensure your parliament is “fit for purpose”, i.e. that it is able to integrate the SDGs as an interlinked policy framework; representative of all citizens and minority groups; equipped to translate the national plan for the SDGs into appropriate legislation and budgetary allocations; and capacitated to hold the government accountable for implementation of the national plan. To assist with this, IPU has prepared a parliamentary self-assessment toolkit (forthcoming).
- Seek to join your national delegation to the HLPF review session every year in July. Each session of the HLPF will perform an overall review of progress on the SDGs based on a theme (e.g., leaving no one behind; eradicating poverty) as well as a more in-depth review of progress on a select number of goals. In addition, and on a voluntary basis, a number of countries will report on their own progress based on the outcome of national reviews.
- Ensure that your parliament is involved at all stages of the national review that your government will likely volunteer to perform at least twice during the life of the SDGs. According to UN guidelines, national reviews should be conducted through an open and inclusive process.
- Seek to participate in the assessment of how parliaments are engaging in the SDGs, to be conducted each year during the spring session of IPU Standing Committee on UN Affairs (<http://www.ipu.org/un-e/un-cmt.htm>). This session will provide a dedicated space for parliamentarians to share their best practices in implementing the SDGs and will help prepare parliaments for the global review of the UN HLPF.
- Organize or contribute to workshops, seminars and other events in your constituency related to SDGs. Add a link to the national plan for the SDGs to your personal website and make sure your parliament’s website includes a dedicated space for the SDGs.

### **Box 79 Examples of parliamentary engagement on the SDGs**

A number of parliaments have begun to mainstream the SDGs in their internal processes and to participate in national and global reviews of progress. In Finland, a total of 17 Members of Parliament representing all political parties and drawn from two specialized bodies (the Development Policy Committee of Parliament, and the National Commission for Sustainable Development) participated in the public hearings and other meetings for the national review. The Government

presented the findings of the review to the HLPF session. In Germany, a Parliamentary Advisory Council on sustainable development provided written comments on the draft Government report to the HLPF session; two Council members participated in the session as part of the national delegation and were expected to report back to the Council during the fall session of Parliament. In Trinidad and Tobago, a parliamentary motion was tabled in the Senate along the lines of IPU model resolution; the motion was adopted unanimously after three sittings over a period of several weeks. In Mali, the National Assembly adopted a parliamentary motion and plan of action to mainstream the SDGs into the work of Parliament. In Pakistan, a parliamentary taskforce was instituted for the SDGs. In Indonesia and Nigeria, existing MDG committees have been reconstituted to work on the new goals.

In response to a request made by the UN Committee on Economic, Social and Cultural Rights in July 2001, Ms Mary Robinson, the United Nations High Commissioner for Human Rights at that time, with the assistance of three experts, developed Draft Principles and Guidelines: A Human Rights Approach to Poverty Reduction Strategies (the final version was published by Ms Robinson's successor, Ms Louise Arbour, in 2006; HR/PUB/06/12, 2006). Furthermore, pursuing a specific mandate of the Human Rights Council, the former Special Rapporteur on Extreme Poverty and Human Rights, Ms Magdalena Sepúlveda, elaborated a set of Guiding Principles on extreme poverty and human rights, which was adopted by the Human Rights Council in 2012 (HRC Resolution 21/11). The UN General Assembly took note, with appreciation of the adoption of the Guiding Principles, considering them "a useful tool for States in the formulation and implementation of poverty reduction and eradication policies, as appropriate" (A/RES/67/164, paragraph 17).

In defining poverty, these documents adopt the widely accepted view, first advocated by Amartya Sen, that a poor person is an individual deprived of basic capabilities, such as the capability to be free from hunger, live in good health and be literate. Examples of human rights with constitutive relevance to poverty are the rights to food, housing, health and education. Many other related rights also have an impact on poverty reduction. For example, the enjoyment of the right to work is conducive to the enjoyment of such other human rights as the rights to food, health and housing. Civil and political rights, including the rights to personal security and equal access to justice, as well as political rights and freedoms, are also of direct relevance to the fight against poverty.

#### **Box 80 Human rights and the 2030 Development Agenda**

The OHCHR and Center for Economic and Social Rights publication *Who Will be Accountable? Human Rights and the Post-2015 Development Agenda* (2013), argues that tailoring post-2015 development goals and targets to the national and subnational levels should involve the following steps:

- Align national and subnational goals and targets with the human rights treaty standards applicable to the country concerned.

- Set national and subnational goals, targets, indicators and benchmarks, and monitor progress, through participatory processes.
- Integrate the principles of non-discrimination and equality, ensuring that the most disadvantaged communities and regions are prioritized.
- Address major bottlenecks and constraints where rights are not being realized, select interventions that multiply positive outcomes and create an enabling environment for human rights fulfilment.
- Look for synergies and gaps in the overall framework of goals, and ensure that it reflects an adequate balance of human rights and sustainable development concerns.
- Define a time frame and level of ambition consistent with an objective assessment of the “maximum resources” available to the country.
- Set targets and indicators for fiscal and policy effort, as well as outcomes.
- Use a range of indicators and all available information (subjective as well as objective; qualitative as well as quantitative), across the full range of human rights (civil, cultural, economic, political and social), to help monitor progress.

## **International financial institutions and the fight against poverty**

Since 1996, the international financial institutions have recognized the importance of poverty reduction for human development. In their Comprehensive Development Programme, the World Bank Group and the International Monetary Fund (IMF), also known as the Bretton Woods Institutions, make poverty reduction a basis for debt relief and development cooperation strategies. Highly indebted and other poor countries are encouraged to develop, in a participatory process, poverty reduction strategy papers (PRSPs) specifying poverty reduction and eradication targets and benchmarks in various areas, such as food production, health, education, labour, justice, good governance and democratization.<sup>4</sup> Still, such programmes have been criticized by many, including the United Nations Special Rapporteurs, for insisting on macroeconomic discipline and effectively negating the claims of local ownership and participation.

Evaluations of the use of PRSPs by the United Nations Population Fund (UNFPA) led the UN to make explicit reference to human rights in the guidance issued to UN field presences regarding their engagement in PRSPs<sup>5</sup>. The general United Nations policy of human rights integration will lead to a human rights approach to poverty reduction strategies in the activities of the United Nations Development Programme (UNDP), the Bretton Woods Institutions and other multilateral and bilateral donor agencies.

This chapter’s remaining sections – largely based on the general comments of the Committee on Economic, Social and Cultural Rights and the work of the UN

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<sup>4</sup> See the IMF Factsheet on Poverty Reduction Strategy Papers, 2014, [www.imf.org/external/np/exr/facts/prsp.htm](http://www.imf.org/external/np/exr/facts/prsp.htm).

<sup>5</sup> See for example United Nations Development Group, Guidance for UN country team engagement in PRSPs, adopted on 30 August 2004.

Special Procedures – focus on a selection of the economic, social and cultural rights guaranteed under the Universal Declaration of Human Rights and the ICESCR, highlighting related practical issues.

## The right to development

### What is the right to development?

According to Article 1 of the 1986 Declaration on the Right to Development it is “an inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realized. The human right to development also implies the full realization of the right of peoples to self-determination, which includes, subject to the relevant provisions of both International Covenants on Human Rights, the exercise of their inalienable right to full sovereignty over all their natural wealth and resources.”

The starting point for understanding the right to development, as so defined in the Declaration and affirmed in subsequent United Nations resolutions and other related instruments, is that it is a human right on a par with all other human rights. It is neither an all-encompassing “super right” nor a highly restricted “mini right”; it is on an equal footing with all other human rights: universal, inalienable, interrelated, interdependent and indivisible.

Secondly, the right to development is both an individual and a collective right. It belongs to all individuals and all peoples. As a human right, the right to development is universal; it applies to all people, in all countries, without distinction as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

Like other human rights, the right to development contains specific entitlements, including the right “to participate in, contribute to, and enjoy economic, social, cultural and political development”. The Declaration sets out the elements of this right and the means for realizing it. The key principles include the following:

- A people-centred development: the Declaration identifies “the human person” as the central subject, participant and beneficiary of development (Article 2).
- A human rights-based approach: the Declaration requires that development be carried out in a manner “in which all human rights and fundamental freedoms can be fully realized” (Article 1).
- Participation: the Declaration insists on the “active, free and meaningful participation” of individuals and populations in development (Article 2).
- Equity: the Declaration highlights the importance of the “fair distribution of the benefits” of development (Article 2).

- Non-discrimination: the Declaration allows no “distinction as to race, sex, language or religion” (Article 6).
- Self-determination: the Declaration requires the full realization of the right of peoples to self-determination, including full sovereignty over their natural wealth and resources (Article 1).

Everyone who plays a role in creating and shaping policy, including, but not only, parliamentarians and policymakers, can contribute to the formulation of policies that are in line with the right to development and that incorporate its principles and elements.

## **The right to development in the context of the 2030 Agenda, the Sustainable Development Goals and related processes**

The right to development will continue to inform the 2030 Agenda and the Sustainable Development Goals and the Addis Ababa Action Agenda of the Third International Conference on Financing for Development. Importantly, there are explicit references to the right to development in both the 2030 Agenda (paragraph 35) and the Addis Ababa Action Agenda, in which States commit to respecting all human rights, including the right to development” (paragraph 1). In order to realize the vision of the 2030 Agenda for Sustainable Development and the Addis Ababa Action Agenda for a world in which the benefits of development are equitably shared by all, States will need to ensure that right-to-development principles guide the implementation of their commitments.

The preamble to the 2030 Agenda describes it as “a plan of action for people, planet and prosperity” in which “all countries and all stakeholders, acting in collaborative partnership, ... are resolved to free the human race from the tyranny of poverty and want and to heal and secure our planet” while leaving no one behind. The key principles contained in the Declaration on the Right to Development, including participation, non-discrimination, self-determination, individual and collective responsibility, international cooperation and equity, are reaffirmed throughout the 2030 Agenda. The Sustainable Development Goals set out in the Agenda, adopted by Member States without a vote, outline development objectives that are rooted in human rights commitments, including the right to development. The SDGs, by taking a rights-based approach and calling for equitable development, improve upon the Millennium Development Goals and present new opportunities for development that benefits everyone.

In order to help realize the SDGs, the 2030 Agenda directly integrates the Addis Ababa Action Agenda and its commitment to respect all human rights, including the right to development. The Addis Ababa Action Agenda: (a) calls for increased accountability for development financing commitments (paragraph 58), including accountability for businesses (paragraphs 35 and 37); (b) renews pledges to provide a social protection floor for everyone (paragraph 12); (c) establishes a new technology facilitation mechanism (paragraph 123); and (d) includes for the first time a follow-up and review mechanism for development financing (paragraphs 130–134). The implementation of the Addis Ababa Action Agenda requires an international system of financing for development that is just, equitable, cooperative, transparent and accountable; that

integrates human rights commitments; and that places the human person at the centre of development.

In this regard, measures to ensure the participation and empowerment of marginalized and excluded groups will be critical. This applies to the planned reviews of financing for development commitments and the 2030 Agenda for Sustainable Development.

### **Box 81 The right to development: a landmark decision of the African Commission on Human and Peoples' Rights**

In a decision in 2010, the African Commission on Human and Peoples' Rights found that the Kenyan Government had violated the rights of the country's indigenous Endorois community by evicting them from their lands to make way for a wildlife reserve. The decision constitutes a major legal precedent, recognising indigenous people's rights over traditionally owned land and their right to development.

In the 1970s, the Kenyan Government evicted hundreds of Endorois families from their land around Lake Bogoria to create a game reserve for tourism. The displaced Endorois communities did not receive compensation and benefits promised to them and their access to the land was restricted at the discretion of the Game Reserve Authority. This prevented the community from practicing its pastoral way of life, using ceremonial and religious sites and accessing traditional medicines. The Commission found that the Kenyan Government had violated the Endorois rights to religious practice, to property, to culture, to the free disposition of natural resources and to development. The Commission stated that the restrictions on access to land, the lack of consultation with the community and its inadequate involvement in the process of developing the region as a game reserve had violated the community's right to development under the African Charter on Human and Peoples' Rights. The Commission added that "the failure to provide adequate compensation and benefits, or provide suitable land for grazing indicates that the Respondent State did not adequately provide for the Endorois in the development process. It finds ... that the Endorois community has suffered a violation of Article 22 of the Charter (guaranteeing the right to development)."<sup>6</sup>

#### Further reading

- *Frequently Asked Questions on the Right to Development, Fact Sheet No. 37*, New York and Geneva, OHCHR, United Nations, 2016. Available at [http://www.ohchr.org/Documents/Publications/FSheet37\\_RtD\\_EN.pdf](http://www.ohchr.org/Documents/Publications/FSheet37_RtD_EN.pdf)

## The right to social security

### **Article 22 of UDHR**

*"Everyone, as a member of society, has the right to social security and is entitled to realization, through national*

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<sup>6</sup> Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v. Kenya, 276/2003.

*effort and international cooperation and in accordance with the organization and resources of each State, of the economic, social and cultural rights indispensable for his dignity and the free development of his personality.”*

### **Article 25 of UDHR**

*“1. Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.*

*2. Motherhood and childhood are entitled to special care and assistance. All children, whether born in or out of wedlock, shall enjoy the same social protection.”*

### **Article 9 of ICESCR**

*“The States Parties to the present Covenant recognize the right of everyone to social security, including social insurance.”*

### **What is a social security system?**

Ideally, a social security system should aim to provide comprehensive coverage against all situations that may threaten a person's ability to earn an income and maintain an adequate standard of living. Social security areas are summed up in the ILO Social Security (Minimum Standards) Convention, 1952 (No. 102). They are:

- medical care;
- sickness benefits;
- unemployment benefits;
- old-age benefits;
- employment injury benefits;
- family and maternity benefits;
- invalidity benefits;
- survivors' benefits.

The Committee on Economic, Social and Cultural Rights has provided guidance about the content of the right to social security in its general comment No. 19 (E/C.12/GC/19), and the UN Guiding Principles on Extreme Poverty and Human Rights (A/HRC/21/39) also expand on the human rights framework applicable to social security. In a social security system, a distinction is drawn between social insurance programmes – which provide for benefits tied to the interruption of employment earnings – and social assistance programmes – which provide for benefits that supplement insufficient

incomes of members of vulnerable groups. Both types of programme are intended to guarantee the material conditions required for an adequate standard of living and to offer protection from the effects of poverty and material insecurity. The ILO and other UN agencies recommend that States adopt national social protection floors, guaranteeing basic income security to children, older persons and persons of working age who are unable to earn sufficient income (in particular in cases of sickness, unemployment, maternity and disability) and universal access to essential health care benefits.<sup>7</sup>

As regards low-income countries, the following observations on social security are in order:

- Few countries have set up comprehensive social security schemes providing universal coverage.
- Social security schemes tend to target specific groups (such as children or pregnant women).
- Social security schemes are often emergency relief programmes providing support in the event of calamities.

Obstacles frequently encountered in low-income countries in trying to establish a social security system include lack of resources, administrative incapacity, debt and the structural adjustment policies imposed by international financial institutions.

#### **Box 82 Parliamentarians submit petition to the Latvian Constitutional Court regarding a social security issue (Case 2000-08-0109; 13 March 2001)**

Twenty members of the Latvian parliament petitioned the Constitutional Court claiming that a law that did not ensure employee pension rights, regardless of the amount of their employer's contribution, was unconstitutional. The parliamentarians affirmed that the law was a breach of the constitutional right to social security and of Articles 9 and 11 of the ICESCR. The Constitutional Court found that the law was inconsistent with the right to social security, since it did not provide for an effective mechanism for the implementation of social security protections. This had the effect of denying the right to social security to employees whose employers did not pay the mandatory contributions.

#### **Key factors to be considered in relation to the right to social security**

In their efforts to ensure the implementation and full enjoyment of the right to social security, States and particularly parliaments should take the following steps:

- Adopt a national plan of action – including goals, measurable progress indicators and clear time frames – establishing appropriate mechanisms to monitor advancement in realizing the right.

<sup>7</sup> See ILO Recommendation 202 concerning National Floors of Social Protection, adopted on 14 June 2012.

- Establish social security systems by law in a transparent, sustainable and inclusive manner.
- Expand nationally funded comprehensive social security systems that encompass social insurance and social assistance, in line with the ILO's recommendations on a social protection floor.
- Allocate the resources necessary to progressively ensure universal access to social security for all and the enjoyment of at least the minimum essential levels of economic, social and cultural rights. While all persons should be progressively covered by social security systems, priority should be accorded to the most disadvantaged and marginalized groups.
- Ensure non-discrimination and equality in access to social security by equalizing the compulsory retirement age for both men and women, ensuring that women receive the equal benefit of public and private pension schemes and guaranteeing maternity leave for women, paternity leave for men and parental leave for both men and women.
- Take specific measures to ensure that persons living in poverty, in particular women and persons working in the informal economy, have access to social security benefits, including social pensions, sufficient to ensure an adequate standard of living and access to health care for them and their families.
- Make administrative and judicial appeals procedures available to allow potential beneficiaries to seek redress.
- Devise and implement measures to avoid corruption and fraud with regard to social security benefits.

## The right to work and rights at work

### **Article 23 (1) of UDHR**

*"Everyone has the right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment."*

### **Article 6 of ICESCR**

*"1. The States Parties to the present Covenant recognize the right to work, which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts, and will take appropriate steps to safeguard this right.*

*2. The steps to be taken by a State Party to the present Covenant to achieve the full realization of this right shall include technical and vocational guidance and training programmes, policies and techniques to achieve steady economic, social and cultural development and full and*

*productive employment under conditions safeguarding fundamental political and economic freedoms to the individual.”*

### **Article 7 of ICESCR**

*“The States Parties to the present Covenant recognize the right of everyone to the enjoyment of just and favourable conditions of work which ensure, in particular:*

*(a) Remuneration which provides all workers, as a minimum, with:*

*(i) Fair wages and equal remuneration for work of equal value without distinction of any kind, in particular women being guaranteed conditions of work not inferior to those enjoyed by men, with equal pay for equal work;*

*(ii) A decent living for themselves and their families in accordance with the provisions of the present Covenant;*

*(b) Safe and healthy working conditions;*

*(c) Equal opportunity for everyone to be promoted in his employment to an appropriate higher level, subject to no considerations other than those of seniority and competence;*

*(d) Rest, leisure and reasonable limitation of working hours and periodic holidays with pay, as well as remuneration for public holidays.”*

### **The right to work**

The right to work primarily protects individuals against exclusion from the economy, and also the unemployed against social isolation.

Free choice of work and the prohibition of forced labour are provided for in Article 6 (1) of the ICESCR. According to the UN Committee on Economic, Social and Cultural Rights, in its general comment No. 18 (2005), “The right to work is essential for realizing other human rights and forms an inseparable and inherent part of human dignity. Every individual has the right to be able to work, allowing him/her to live in dignity. The right to work contributes at the same time to the survival of the individual and to that of his/her family, and insofar as work is freely chosen or accepted, to his/her development and recognition within the community.”

### **Box 83 Work-related duties of States under Article 1 of the European Social Charter**

- To accept as one of their primary aims and responsibilities the achievement and maintenance of as high and stable a level of employment as possible, with a view to the attainment of full employment.

- To protect effectively the right of the worker to earn his or her living in an occupation chosen freely.
- To establish and maintain free employment services for all workers.
- To provide or promote appropriate vocational guidance, training and rehabilitation.

When legislation is being drafted on the right to work and its implementation through national employment policies, particular attention should be paid to prohibiting discrimination with regard to access to work. Legislation should also aim to facilitate the entry of specific groups – such as the elderly, young people and persons with disabilities, and particularly women among those groups – into labour markets. Women experience systemic barriers in almost every aspect of work, ranging from whether they have paid work at all, to the type of work they obtain or are excluded from, the availability of support such as childcare, the level of their pay, their working conditions, their access to higher-paying “male” occupations, the insecurity of their jobs, the absence of pension entitlements or benefits, and the lack of time, resources or information necessary to enforce their rights. Measures should also be taken by States to reduce the number of workers in the informal economy and to extend the protection provided by labour legislation to all areas of the economy, including the domestic and agricultural sectors.

The main goal of employment policies should be the attainment of full employment as quickly as possible, in accordance with a nation’s resources. Over and above social benefits, those policies should address the concerns of the long-term unemployed and low-income earners through the development of public work programmes.

The State should ensure that generally accessible and free or reasonably priced technical and vocational guidance and training programmes are established and that free employment services for all workers are put in place.

### **Rights at work**

Article 7 of the ICESCR guarantees the right of every person to just and favourable conditions of work. These conditions include:

- remuneration that provides all workers, as a minimum, with:
  - fair wages and equal payment for work of equal value, without any discrimination (particularly against women);
  - a decent living for the workers and their families;
- safe and healthy working conditions;
- equal opportunities for promotion on the basis of seniority and competence;
- reasonable working hours, rest, leisure, periodic paid holidays and remunerated public holidays.

Therefore, in line with the recommendations made by the UN Committee on Economic, Social and Cultural Rights in general comment No. 18 (2005), and by

the UN Special Rapporteur on Human Rights and Extreme Poverty, parliamentarians should ensure that the following key elements are stipulated in legislation and implemented through relevant strategies, policies and programmes:

- Adopt rigorous labour regulations and ensure their enforcement through a labour inspectorate with adequate capacity and resources to guarantee enjoyment of the right to decent working conditions;
- Ensure that all workers are paid a wage sufficient to enable them and their family to have access to an adequate standard of living.
- Extend legal standards regarding just and favourable conditions of work to the informal economy, and collect disaggregated data assessing the dimensions of informal work.
- Take positive measures to ensure the elimination of all forms of forced and bonded labour and harmful and hazardous forms of child labour, in addition to measures that ensure the social and economic reintegration of those affected and avoid reoccurrence;
- Ensure that caregivers are adequately protected and supported by social programmes and services, including access to affordable childcare.
- Put in place specific measures to expand opportunities for employment in the formal labour market, including through vocational guidance and training and skills development.
- Eliminate discrimination in access to employment and training, and ensure that training programmes are accessible to those most vulnerable to unemployment, including women, migrants and persons with disabilities, and tailored to their needs.
- Respect, promote and realize freedom of association so that all workers are effectively represented in social and political dialogue about labour reforms.

#### **Box 84 Labour rights before the Inter-American Court of Human Rights (Baena, Ricardo et al. (270 workers) v. Panama)**

In February 2001, the Inter-American Court of Human Rights ruled on an application concerning the arbitrary dismissal of 270 public officials and union leaders. The persons concerned organized a demonstration after the government had rejected a petition concerning labour rights and announced a strike the following day. The day of the demonstration, 4 December 1990, military officers escaped from a prison and occupied the National Police headquarters for several hours. The trade union cancelled the strike. The Government insisted that there had been a connection between the two events and dismissed the persons by means of a simple letter, invoking a law that was adopted after the facts, and which replaced the applicable procedure before labour courts with an administrative one. The Court concluded that the State of Panama had violated the rights of the workers to freedom of association, judicial guarantees and judicial protection, as well as the principles of legality and non-retroactivity. The Court ruled further that the due process guarantees set forth in Article 8 (2)

of the ACHR must be observed in administrative proceedings as well as in any other proceedings leading to a decision affecting the rights of persons, including labour rights. Consequently, the Court ordered the State to reassign the workers to their previous or equivalent positions, pay them the missed salaries and pay each of them US\$ 3,000 for moral damages, in addition to the legal cost.<sup>8</sup>

## The right to an adequate standard of living

### Article 25 of UDHR

*"1. Everyone has the right to a standard of living adequate for the health and well-being of himself and his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.*

*2. Motherhood and childhood are entitled to special care and assistance. All children, whether born in or out of wedlock, shall enjoy the same social protection."*

### Article 11 of ICESCR

*"1. The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international cooperation based on free consent.*

*2. The States Parties to the present Covenant, recognizing the fundamental right of everyone to be free from hunger, shall take, individually and through international cooperation, the measures, including specific programmes, which are needed:*

*(a) To improve methods of production, conservation and distribution of food by making full use of technical and scientific knowledge, by disseminating knowledge of the principles of nutrition and by developing or reforming agrarian systems in such a way as to achieve the most efficient development and utilization of natural resources;*

<sup>8</sup> [www.escri-net.org/docs/I405986](http://www.escri-net.org/docs/I405986).

*(b) Taking into account the problems of both food-importing and food-exporting countries, to ensure an equitable distribution of world food supplies in relation to need."*

### **Article 12 of ICESCR**

*"1. The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.*

*2. The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for:*

*(a) The provision for the reduction of the stillbirth-rate and of infant mortality and for the healthy development of the child;*

*(b) The improvement of all aspects of environmental and industrial hygiene;*

*(c) The prevention, treatment and control of epidemic, endemic, occupational and other diseases;*

*(d) The creation of conditions which would assure to all medical service and medical attention in the event of sickness."*

Article 25 of the UDHR guarantees a social right that – in a way – is an umbrella entitlement: the right to an adequate standard of living. In addition to the right to social security dealt with above, this right also comprises the following rights:

- the right to adequate food;
- the right to adequate clothing;
- the right to housing;
- the right to health.

Article 11 of the ICESCR covers the core of the right to an adequate standard of living (food, clothing and housing) and recognizes the right to continuous improvement of living conditions. States Parties to the Covenant commit themselves to "take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international cooperation based on free consent". Under Article 11 of the ICESCR, the Committee on Economic, Social and Cultural Rights has also derived the rights to water and sanitation.

### **The right to food**

Although the international community has often reaffirmed the importance of respecting fully the right to adequate food, there are still considerable gaps in this area between international law standards and the situation that currently prevails in many parts of the world.

According to statistics from the UN Food and Agriculture Organization (FAO) about 805 million people were chronically undernourished during the period 2012–14 among whom an estimated 60 per cent were women or girls, down more than 100 million from the previous decade, and 209 million lower than in 1990–92. The FAO report notes, however, that “Despite overall progress, marked differences across regions persist. Sub-Saharan Africa has the highest prevalence of undernourishment, with only modest progress in recent years. Around one in four people in the region remains undernourished. Asia, the most populous region in the world, still has the highest number of undernourished.”<sup>9</sup>

The UN Committee on Economic, Social and Cultural Rights has observed that “malnutrition and undernutrition and other problems which relate to the right to adequate food and the right to freedom from hunger also exist in some of the most economically developed countries”.

UN human rights mechanisms have noted that food insecurity and related violations of the right to adequate food are caused by high domestic food prices, lower incomes and increasing unemployment. Food insecurity is exacerbated by the sale of land to other States or transnational corporations and the increasing use of agricultural land to grow crops for export and bioethanol production. The Human Rights Council held special sessions on the food crisis (A/HRC/S-7/2) and the global economic crisis (A/HRC/S-10/2) addressing their impact on the enjoyment of human rights.

*How can the right to food be realized?*

**“Hunger and malnutrition are by no means  
dictated by fate or a curse of nature; they are  
man-made”**

*Jean Ziegler, former United Nations Special Rapporteur  
on the right to food, Report on the right to food  
(E/CN.4/2001/53), 2001, paragraph 6.*

The right to adequate food is inseparable from the inherent dignity of the person and indispensable to the enjoyment of other human rights.

The right to food is realized when every woman, man and child, alone or in community with others, has physical and economic access at all times to adequate food or to means for its procurement. It does not mean that a government must hand out free food, but it entails a government’s obligation to respect, to protect and to fulfil, including, under certain circumstances, to provide for that right.

### **Box 85 A framework law on food**

While under the ICESCR States have an obligation to ensure the exercise of the right to food and must legislate to that effect, hungry citizens may seek redress only if the Covenant can be directly invoked before the national courts – which is rarely the case – or has been incorporated into the national laws.

<sup>9</sup> FAO, IFAD and WFP. *The State of Food Insecurity in the World 2014. Strengthening the enabling environment for food security and nutrition*. Rome, FAO, 2014.

Therefore, the Committee on Economic, Social and Cultural Rights, which monitors implementation of the Covenant, has emphasized the obligations of States Parties to pass laws protecting the right to food, and has recommended in particular that States consider the adoption of a framework law ensuring, inter alia, that redress is provided for violations of the right to food.

The Committee on Economic, Social and Cultural Rights' general comment No. 12 (1999) states: "The framework law should include provisions on its purpose; the targets or goals to be achieved and the time frame to be set for the achievement of those targets; the means by which the purpose could be achieved, described in broad terms, in particular the intended collaboration with civil society and the private sector and with international organizations; institutional responsibility for the process; and the national mechanisms for its monitoring, as well as possible recourse procedures. In developing the benchmarks and framework legislation, States parties should actively involve civil society organizations."

Specific examples of measures to take and activities to carry out follow.

A framework law should be adopted as a key instrument for drawing up and implementing national strategies on food and food security for all. The Committee on Economic, Social and Cultural Rights, as well as the UN Special Rapporteur on the Right to Food and the UN FAO, have all developed legislative and policy recommendations in relation to the right to food.<sup>10</sup>

In reviewing the constitution and national laws, and in aligning them with international human rights law on the right to food, particular attention should be paid to the need to prevent discrimination in relation to access to food or to related resources. The following measures are called for:

- Guaranteeing access to food, both economically and physically, to the members of all groups, including the poor and segments of society that are vulnerable or suffer from discrimination.

No acts should disrupt access to adequate food (for instance, evicting people from their land arbitrarily, introducing toxic substances into the food chain knowingly, or, in situations of armed conflict, destroying productive resources and blocking the provision of relief food supplies to the civilian population).

Measures should be adopted to prevent enterprises or individuals from impairing people's access to adequate food. The obligation to protect entails enactment of consumer protection laws and action if, for instance, a company pollutes water supplies or if monopolies distort food markets or the seed supply.

- Guaranteeing that all persons, and particularly women, have full and equal access to economic resources, including the right to inherit and own land and other property and access to credit, natural resources and appropriate technology. According to

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<sup>10</sup> See, for example, UN Committee on Economic, Social and Cultural Rights' general comment No. 12 (1999); [www.righttofood.org](http://www.righttofood.org).

the FAO, while women make up 80 per cent of the world's agricultural labour force, they own less than 1 per cent of the land and account for less than 1 per cent of the credit offered to farmers globally.

To guarantee and strengthen people's access to and use of resources and means of livelihood, measures should be taken to ensure that:

- people have adequate wages or access to land, respectively, to buy or produce food;
- vulnerable groups are identified and policies are implemented to provide them with access to adequate food by enhancing their ability to feed themselves (for example, through improved employment prospects, an agrarian reform programme for landless groups or the provision of free milk in schools to improve child nutrition).
- Measures should be taken to respect and protect self-employment and remunerated work that ensures decent living conditions for workers and their families, and to prevent denial of access to jobs on the basis of gender, race or other discriminatory criteria, since such discrimination would affect the ability of workers to feed themselves.
- Maintaining land registries.

The government should devise adequate farmer-support programmes with particular emphasis on those most in need, for example by securing indigenous peoples' rights to their ancestral lands, empowering women and supporting small-scale producers and peasants in remote locations (such as mountains or deserts).

Food should be provided whenever individuals or groups are unable to feed themselves for reasons beyond their control, including natural or other disasters (forms of support might include direct food distributions, cash transfers or food-for-work programmes).

#### *Must action be taken immediately?*

Like other economic, social and cultural rights, the obligation of States to fulfil and protect the right to adequate food is subject to progressive realization, which means that States are not required to achieve its full realization immediately, but must take measures to achieve it progressively by maximum use of available resources. However, the following obligations are not subject to progressive realization, and States have a duty to take immediate action in respect of them:

- refraining from any discrimination in relation to access to food and to means and entitlements for its procurement;
- providing basic minimum subsistence (thereby ensuring freedom from hunger);
- avoiding retrogressive measures.

## **The right to housing**

The right to adequate housing should not be understood narrowly – as the right to have a roof over one's head – but as the right to live somewhere in security, peace and dignity.

Homelessness is the extreme form of denial of the right to housing and is constitutive of poverty. But the precarious situation of millions living in slums and remote rural areas, who face problems of overcrowding, lack of sewage treatment, pollution, seasonal exposure to the worst conditions and lack of access to drinking water and other infrastructure, also constitutes a serious denial of the right to adequate housing. The Millennium Development Goal for this area is "to achieve a significant improvement in the lives of at least 100 million slum-dwellers by 2020".

### **Box 86 Examples of national jurisprudence on the right to adequate housing**

#### **Hungarian Constitutional Court striking down legislation on homelessness**

Hungarian legislation passed in 2010–2011 criminalized sleeping and performing other life-sustaining activities in public spaces as a misdemeanour, punishable by incarceration or fine; the legislation empowered local authorities to confiscate the property of persons doing so. The legislation potentially affected more than 30,000 homeless persons in various Hungarian municipalities. In December 2012, the Constitutional Court annulled this legislation, deeming it contradictory to the Constitution's requirement of legal certainty and of protection for the right to human dignity and the right to property. Commenting on the decision, the UN Special Rapporteur on Extreme Poverty and Human Rights stressed that it rightly highlighted the fact that homelessness is a social issue, which needs to be addressed by the provision of adequate services. Unfortunately, the Government chose to ignore the Constitutional Court decision, passing a constitutional amendment and a new law that still allows for the criminalization of homeless persons.

#### **Kenyan High Court ordering remedy for evicted persons**

In a judgment of November 2011, the Kenyan High Court ruled upon a petition of more than 1000 individuals (Constitutional Petition No. 2 of 2011 (Garissa)) who had been violently removed from their homes, which were then demolished by officials of the provincial administration and Garissa Municipal Council. In its ruling, the High Court recognized the interdependence of civil, political and economic and social rights. It stressed that under the new constitution, ratified international treaties were part of Kenyan law and therefore based its decision on the ICCPR and the ICESCR. The Court concluded that the State had violated the right to adequate housing, to water and sanitation, to physical and mental health, to education, to information, to fair administrative decisions and to freedom from hunger, as well as the right of the elderly to pursue personal development, to live in dignity, respect and freedom from abuse and to receive reasonable care. The Court issued a permanent injunction compelling the State

to return petitioners to their land and to reconstruct their homes and/or provide alternative housing and other facilities, including schools, and it awarded each of the petitioners KSh 200,000 (approx. US\$ 2,000) in damages. The ruling has been hailed as establishing an important normative precedent and breaking new ground by ordering the reconstruction of demolished homes and awarding punitive damages (see <http://www.escr-net.org/node/364786>).

### *The right to housing: realization of its core elements*

The Committee on Economic, Social and Cultural Rights' general comment No. 4 (1991) on the right to adequate housing and general comment No. 7 (1997) on forced evictions define the right to housing as comprising a number of specific freedoms and entitlements, including legal security of tenure, availability of infrastructure, affordability, accessibility, location, cultural adequacy, habitability and protection against forced evictions. The core elements of the right to housing are also described in reports by the Special Rapporteur on Adequate Housing and by the United Nations Human Settlements Programme (UN-Habitat).<sup>11</sup>

- Legal security of tenure: all persons should possess a degree of security of tenure guaranteeing legal protection against forced eviction, harassment and other threats. Governments should consequently take immediate measures aimed at conferring legal security of tenure on households that have none. Such steps should be taken in consultation with the affected persons and groups. Women are disproportionately affected by forced evictions, protection against which is a key element of security of tenure and the right to adequate housing.
- Availability of services, materials and infrastructure: all beneficiaries of the right to adequate housing should have sustainable access to natural and common resources: clean drinking water, energy for cooking, heating and lighting, sanitation and washing facilities, food storage facilities, refuse disposal, site drainage and emergency services.
- Affordable housing: personal or household costs associated with housing should be such that they do not compromise or threaten the satisfaction of other basic needs. Housing subsidies should be available for those unable to obtain affordable housing, and tenants should be protected from unreasonable rent levels or rent increases. Plans of action must be drawn up, including public expenditure programmes for low-income housing and housing subsidies, giving priority to the most vulnerable groups, such as persons with disabilities, the elderly, minorities, indigenous peoples, refugees and internally displaced persons, and particularly women among those groups. In societies where the main housing construction materials are natural, steps should be taken by the authorities to ensure the availability of such materials.

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<sup>11</sup> See *The Right to Adequate Housing, Fact Sheet No. 21 Rev. 1*, New York and Geneva, OHCHR, United Nations and UN-Habitat, 2014. Available at [http://www.ohchr.org/Documents/Publications/FS21\\_rev\\_1\\_Housing\\_en.pdf](http://www.ohchr.org/Documents/Publications/FS21_rev_1_Housing_en.pdf).

- Habitable housing: to be adequate, housing must provide the occupants with adequate space and protect them from cold, damp, heat, rain, wind or other threats to health, structural hazards and disease vectors. The physical safety of the occupants must be guaranteed.
- Accessible housing: to be adequate, housing must be accessible to those entitled to it. Disadvantaged groups must be provided with full and sustainable access to adequate housing resources. Accordingly, such groups as the elderly, children, persons with disabilities the terminally ill, HIV-positive individuals, persons with persistent medical problems, mentally ill persons, victims of natural disasters, and people living in disaster-prone areas should enjoy priority in respect of housing. Housing laws and policy should take into account the special housing needs of these and other vulnerable groups.
- Fitting location: to be adequate, housing must be located so as to allow access to employment, health-care services, schools, childcare centres and other social facilities; it should not be built on polluted sites or in immediate proximity to pollution sources that would infringe on the occupants' right to health.
- Culturally adequate housing: housing construction, the building materials used and the underlying policies must preserve cultural identity and diversity. The cultural dimensions of housing should not be sacrificed to facilitate housing development or modernization projects.

The list of these extensive rights highlights some of the complexities associated with the right to adequate housing, and reveals the many areas that a State must consider in fulfilling its legal obligation to satisfy the housing needs of the population. Any persons, families, households, groups or communities living in conditions below the level of these entitlements may reasonably claim that they do not enjoy the right to adequate housing as enshrined in international human rights law.

Furthermore, it is necessary to:

- ensure that this right is protected from:
  - arbitrary demolitions;
  - forced or arbitrary evictions;
  - ethnic and religious segregation and displacement;
  - discrimination;
  - harassment and similar interferences;
- take positive measures to reduce the number of homeless people and to provide them with adequate living space, protected from harsh weather and health hazards;
- set up judicial, quasi-judicial, administrative or political enforcement mechanisms capable of providing redress to victims of any alleged infringement of the right to adequate housing.

### **Box 87 Constitutional Court of South Africa in the case The Government of the Republic of South Africa and others v. Grootboom and others (2000)**

Ms Grootboom and others, evicted from private property and living on the edge of a sports field in appalling conditions, launched a legal action for immediate relief when winter rains made their temporary shelter unsustainable. The Court determined that, although comprehensive housing legislation and policy were in place, aimed at the progressive realization of the right to adequate housing, they failed to take into account the situation of people in desperate need.

The Court applied a test of reasonableness to the housing policy and found it wanting: a reasonable part of the national housing budget was not devoted to people in desperate need. While the Court found that the State had no obligation to provide housing immediately upon demand, it did hold that the State must provide relief for those in desperate need. Additionally, the Court held that the obligation to progressively provide housing included the immediate obligation to draft and adopt a plan of action to devote reasonable resources towards the implementation of that plan.

### **The right to health**

Article 25 (1) of the Universal Declaration of Human Rights, which provides for health and well-being guarantees, lays down the basis for an international legal framework ensuring the right to health. Article 12 of the ICESCR further elaborates upon the right to the highest attainable standard of physical and mental health and outlines relevant State obligations.

In its general comment No. 14 (2000) on the right to health, the UN Committee on Economic, Social and Cultural Rights stated “the right to health embraces a wide range of socioeconomic factors that promote conditions in which people can lead a healthy life, and extends to the underlying determinants of health, such as food and nutrition, housing, access to safe and potable water and adequate sanitation, safe and healthy working conditions, and a healthy environment”. The right to health, therefore, includes both access to health care and State obligations to guarantee the underlying determinants of health.

Article 12 of the International Covenant on Economic, Social and Cultural Rights requires States Parties to adopt measures in at least four separate areas:

- maternal, child and reproductive health;
- healthy workplaces and natural environments;
- prevention, treatment and control of diseases, including access to essential medicines and basic medical services;
- access for all to medical service and medical attention in the event of sickness.

### **Box 88 Health and poverty**

Calling attention to a “vicious circle of poverty”, in which “persons experiencing ill health are more likely to become poor, while persons living in poverty are more vulnerable to accidents, diseases and disability”, the UN Guiding Principles on Extreme Poverty and Human Rights (A/HRC/21/39, paragraph 82) call upon States to:

- take multidimensional measures to tackle the relationship between ill health and poverty, recognizing the many and varied determinants of health and the agency and autonomy of persons living in poverty;
- enhance the accessibility and quality of preventive and curative health care for persons living in poverty, including sexual and reproductive health care and mental health care;
- ensure that persons living in poverty have access to safe and affordable medicines and that inability to pay does not prevent access to essential health care and medicine;
- establish health-care facilities within the safe physical reach of communities living in poverty, including in rural areas and slums, and ensure that such facilities have all resources necessary for their proper functioning;
- take special measures to target the main health conditions affecting persons living in poverty, including neglected diseases. This should include free immunization, educational programmes and training for health practitioners to identify and treat such illnesses;
- implement specific and well-resourced policies to tackle gender-based violence, including accessible preventive and treatment services that protect the dignity and privacy of persons living in poverty;
- provide tailor-made services for groups whose access to health services may raise particular challenges, such as language, geographical barriers, cultural barriers, age, discrimination or existing health status. Women living in poverty should have access to high-quality sexual and reproductive health services and information.

Various measures can be taken to ensure that the right to health is implemented; a number of these are outlined in the UN Committee on Economic, Social and Cultural Rights’ general comment No. 14 (2000) and in documents by the UN Special Rapporteur on the Right to Health, the OHCHR and the World Health Organization.<sup>12</sup> By bringing their own functions and powers to bear, parliaments can play a decisive role in that process.

Generally speaking, enjoyment of the right to health requires State action to improve the underlying determinants of health and ensure primary health care for all, without

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12 See, for example, *The Right to Health, Fact Sheet No. 31*, New York and Geneva, OHCHR, United Nations and WHO, 2008. Available at <http://www.ohchr.org/Documents/Publications/Factsheet31.pdf>.

discrimination; a national public health strategy and plan of action to make health facilities, services and goods, including essential medicines, available, accessible, acceptable and of good quality; and the establishment of national health indicators, benchmarks and monitoring mechanisms.

Health insurance mechanisms and educational programmes on health problems and prevention are also necessary, and members of parliament should ensure that sufficient funding is made available for such efforts and for health-related research and development.

#### *Groups in need of special attention*

Health issues specific to particular groups, such as persons with disabilities, the poor, children and people living with HIV/AIDS – and particularly women among those groups – require special attention. Targeted policies, developed with the participation of the groups concerned and sufficient health budgets geared to the needs of these groups, are necessary.

Regarding people living in poverty, key health issues include the enhancement of access to health services, the introduction of appropriate immunization programmes and the implementation of basic environmental measures (especially waste disposal). Members of parliament can be highly instrumental in drafting relevant laws, ensuring their implementation and raising public awareness of the situation of the poor.

Women's access to health care, including maternal and sexual and reproductive health services and information, requires special attention and resources.

Laws ensuring the provision to all children of necessary medical assistance and health care should be enacted and implemented. It is essential to launch programmes designed to reduce infant and child mortality and to conduct information programmes on children's health and nutrition, the advantages of breastfeeding, the importance of hygiene and environmental sanitation, and accident prevention.

Persons with disabilities should have equal access to health-care services, including those required as a result of their disabilities, and should benefit from habilitation and rehabilitation services and programmes, particularly in the areas of health, employment, education and social services.

Programmes should also be developed to respond to the needs of persons affected by chronic diseases, such as HIV/AIDS, malaria and tuberculosis. Specific legislative provisions should be enacted to ensure that persons are not discriminated against in their access to education, housing, employment or political education as a result of their health status.

#### **Box 89 Free AIDS treatment**

In April 2004, the Constitutional Tribunal of Peru ruled upon the petition (amparo action) of a person living with HIV requesting full medical care. The petitioner affirmed lacking enough financial resources to face the high cost of the treatment. The Tribunal held that economic and social rights were not simply programmatic rights, but required implementation of their core content as this

was not only necessary for the enjoyment of political and civil rights, but was also a requirement of solidarity and respect for human dignity. Stressing that the ultimate aim of the Peruvian Constitution was to defend the dignity of the human person, the Court stated that the right to life and to health were inextricably linked. It held that the constitutional norm stipulating that constitutional norms requiring new and high expenses were to be implemented progressively did not mean inaction and did not relieve the State of its duty to provide for timetables and concrete action to implement State policies. Referring in this context to the Constitutional Development Plan concerning, *inter alia*, the fight against HIV/AIDS and the subsequent law No. 28243, providing for free medical treatment of vulnerable persons living in extreme poverty, the Court ordered the State to provide free medical treatment to the petitioner.<sup>13</sup>

### **Box 90 Women's sexual and reproductive health rights**

Women's sexual and reproductive health is related to multiple human rights, including the right to life, the right to be free from torture, the right to health, the right to privacy, the right to education, and the prohibition of discrimination. The Committee on Economic, Social and Cultural Rights has clearly held that States have obligations to respect, protect and fulfil rights related to women's sexual and reproductive health, which rights imply that women are entitled to sexual and reproductive health care services, goods and facilities that are (a) available in adequate numbers; (b) accessible physically and economically; (c) accessible without discrimination; and (d) of good quality (see general comment No. 22 (2016)). Human rights law further obliges States, *inter alia*, to provide comprehensive sexual and reproductive health services; remove barriers to accessing these services, including criminal laws; address the underlying and social determinants of health, including discrimination against women in terms of access to health services; and ensure women have access to evidence-based information in order to make informed choices about their health and their lives. (See <http://www.ohchr.org/EN/Issues/Women/WRGS/Pages/HealthRights.aspx>).

Despite these obligations, violations of women's sexual and reproductive health rights are frequent and take many forms. For instance, unacceptable numbers of women and girls are still dying or suffering grievous harm in pregnancy and childbirth, despite agreement within the medical community that such deaths and injuries are almost entirely preventable. The crisis of maternal mortality and morbidity is directly linked to a web of human rights denials, including failures within the health system as well as wider discrimination against women. Women's rights are also violated when they are denied access to health services that only women require, such as abortion or emergency contraception. Laws and practices that subject women's access to health services to third party authorization and the performance of procedures related to women's reproductive and sexual health without the woman's consent, including forced sterilization, forced virginity examinations and forced abortion, are also denials

13 <http://www.escr-net.org/docs/i/405156>.

of human rights. Women's sexual and reproductive health rights are also at risk when they are subjected to female genital mutilation and early marriage.

Violations of women's sexual and reproductive health rights are often deeply engrained in societal values pertaining to women's sexuality. Patriarchal concepts of women's roles within the family mean that women are often valued based on their ability to reproduce. Early marriage and pregnancy, or repeated pregnancies spaced too closely together, often as the result of efforts to produce male offspring because of the preference for sons, has a devastating impact on women's health with sometimes fatal consequences. Women are also often blamed for infertility and subjected to ostracism and various human rights violations as a result.

#### **Box 91 Rwanda: example of parliamentary action for reproductive health and family planning**

In 2015, with IPU support, the Parliament of Rwanda promoted briefings for Members of Parliament on a Reproductive Health Bill then under consideration. Parliamentarians provided final comments and amendments that were resubmitted to the Parliament's Standing Committee on Social Affairs. Law No. 21/2016, relating to human reproductive health, was finally published in the Official Gazette on 6 June 2016. Recognizing the right to access reproductive health services and the need for family planning, the law provides for effective Government action on sexual and reproductive health.

The Parliament of Rwanda also organized a one-day training session on how parliamentarians can fully engage in the budget process for health, including advocacy, analysis, appropriation and tracking of budget resources approved for sexual and reproductive rights. Members of Parliament pledged to establish health budget analysis meetings every year before voting on the national budget in order to better understand what health budget items are under-resourced and what members can do to prevent vital components of health delivery from being overlooked in the national budget. Members of Parliament also recognized the critical need for continuous quality training in budget advocacy and proposed to increase the frequency of sessions, especially at the beginning of new legislatures, to provide orientation on the budget process for new Members of Parliament who would otherwise likely be unfamiliar with this fundamental parliamentary process.

Access to sexual and reproductive health for adolescents was another area of focus for the Parliament of Rwanda in 2015. It organized a two-day consultative meeting on adolescents' access to sexual and reproductive rights services in high schools and universities. The Speaker of the Chamber of Deputies; prominent Members of Parliament; national maternal, newborn and child health champions; officials from the Ministries of Health, Education and Gender and Family Promotion; representatives of students and youth groups; and organizations promoting family planning and access to reproductive health gathered in Parliament to discuss how high schools and universities can facilitate

adolescents' access to sexual and reproductive rights. Recommendations to that effect were agreed upon by participants with the aim also of guaranteeing their right to informed choice through adequate sexual education. The recommendations took the form of an action plan to spark collaboration with academic institutions throughout the country and raise awareness of adolescents' rights. The consultative meeting and recommendations that followed prepared the ground for a talk show on ten community radio stations, enabling Members of Parliament to discuss how young people in rural settings can obtain access to sexual and reproductive rights, family planning and maternal, newborn and child health services. Interaction with listeners brought to light people's needs and the daily challenges they face in gaining access to sexual and reproductive rights services. A renewed focus on adolescent health led to capacity-building and community outreach efforts with IPU support.

### **The rights to water and sanitation**

In addition to the rights to food, housing and clothing (provided for explicitly under Article 25 of the Universal Declaration of Human Rights and Article 11 of the ICESCR), the right to an adequate standard of living may comprise other underlying determinants of these rights. General comment No. 15 by the Committee on Economic, Social and Cultural Rights, adopted in 2002, identifies the "human right to water" as an essential component of that umbrella right, stating that it "clearly falls within the category of guarantees essential for securing an adequate standard of living, particularly since it is one of the most fundamental conditions for survival". The right to water is also referred to in Article 14 (2) of CEDAW and Article 24 (2) of CRC. In Resolution 64/292 of 28 July 2011, the UN General Assembly recognized the right to safe and clean drinking water and sanitation as a human right that is essential for the full enjoyment of life and all human rights.

#### *What is the right to water?*

The right to water entitles all human beings to sufficient, safe, physically accessible and affordable water for personal and domestic uses. It is essential for the realization of many other rights, such as the right to life, health and food. Although what constitutes water adequacy varies depending on conditions, the following factors apply in all circumstances:

- **Availability:** a regular water supply must be available to every person in a quantity sufficient for personal and domestic uses. These uses ordinarily include drinking, personal hygiene, food preparation, sanitation, washing clothes and household cleanliness. The volume of water available for each person should meet the periodically revised WHO Guidelines for Drinking-water Quality. Some individuals and groups may need additional water because of particular health, climatic and work conditions.
- **Quality:** the water available for personal and domestic use must be safe, i.e. free from micro-organisms, chemical substances and radiation detrimental to health. Its colour, odour and taste should be appropriate for personal and domestic uses.

- **Accessibility:** water and water facilities and services must be accessible to all persons living in the territory of a State, without discrimination. Accessibility has four overlapping dimensions:
  - **Physical access:** for all population groups, water and adequate water facilities and services must physically be within safe reach. Enough, safe and acceptable water must be accessible in every household, educational institution, health-care establishment and workplace, or in their immediate vicinity. The quality of all water facilities and services must be sufficiently good and culturally appropriate, and must meet gender, life-cycle and privacy requirements. The physical security of persons accessing water facilities and services must be guaranteed.
  - **Economic access:** water and water facilities and services must be affordable for all. The direct and indirect costs and charges associated with securing water must be reasonable and not compromise or threaten the enjoyment of other rights guaranteed under the ICESCR.
  - **Non-discriminatory access:** by law and in practice, water and water facilities and services must be accessible to all, including the most vulnerable or marginalized population groups, without discrimination on any grounds; States should take steps to ensure that women are not excluded from decision-making processes concerning water resources and entitlements, and that the disproportionate burden on women to collect water is alleviated.
  - **Information access:** accessibility includes the right to seek, receive and impart information concerning water issues.

### **Box 92 Poverty and the rights to water and sanitation**

The UN Guiding Principles on Extreme Poverty and Human Rights (A/HRC/21/39) observe in paragraph 77 that “Unsafe water and lack of access to sanitation are a primary cause of diarrhoeal diseases linked to high levels of child and infant mortality among families living in poverty and restrict the enjoyment of many other rights, including those to health, education, work and privacy, thereby seriously undermining the possibilities of escaping poverty. Persons living in poverty often inhabit areas in which access to water and/or sanitation is restricted owing to cost, lack of infrastructure, denial of services to persons without secure tenure, poor resource management, contamination or climate change. Lack of access to water and sanitation particularly affects women and girls living in poverty.”

Paragraph 78 provides that “States should:

- (a) Ensure that persons living in poverty have access to at least the minimum essential amount of water that is sufficient and safe for personal and domestic uses (including drinking, personal sanitation, laundry, food preparation and personal and household hygiene) and sanitation that is gender-sensitive, safe, physically accessible and affordable;

- (b) In the context of informal settlements, lift legal barriers related to land tenure to allow inhabitants to obtain a formal and official connection to water and sanitation services. No household should be denied the rights to water and sanitation on the grounds of its housing or land status;
- (c) Ensure access to water and sanitation for homeless persons, and refrain from criminalizing sanitation activities, including washing, urinating and defecating in public places, where there are no adequate sanitation services available;
- (d) Implement measures to ensure that persons living in poverty are not charged higher rates for water services owing to consumption levels;
- (e) Organize large-scale public information campaigns on hygiene through channels accessible to persons living in poverty."

### **Box 93 Types of violations of the right to water**

#### **Violations of the obligation to respect the right to water**

- arbitrary or unjustified disconnection or exclusion from water services or facilities;
- discriminatory or unaffordable increases in the price of water;
- pollution and diminution of water resources, affecting human health.

#### **Violations of the obligation to protect the right to water**

- failure to enact or enforce laws to prevent the contamination and inequitable extraction of water;
- failure to effectively regulate and control private water-service providers;
- failure to protect water distribution systems (e.g., piped networks and wells) from interference, damage and destruction.

#### **Violations of the obligation to fulfil the right to water**

- failure to adopt or implement a national water policy designed to ensure the right to water for everyone;
- insufficient expenditure or misallocation of public resources, resulting in non-enjoyment of the right to water by individuals or groups, particularly vulnerable or marginalized groups;
- failure to monitor the realization of the right to water at the national level, *inter alia* by using right-to-water indicators and benchmarks;
- failure to take measures to reduce the inequitable distribution of water facilities and services;
- failure to adopt mechanisms for emergency relief;
- failure to ensure that everyone enjoys the right at a minimum essential level;

- failure of a State to take into account its international legal obligations regarding the right to water when entering into agreements with other States or with international organizations.

## **What activities can contribute to ensuring the enjoyment of the right to water?**

First, governments should provide for the availability, adequate quality and accessibility of water, as outlined above. Progressive implementation of all of the measures described above will eventually lead to full realization of the right to water. Parliaments can monitor and promote the following specific government measures:

- If necessary, governments should adopt a national water strategy and plan of action to ensure a water supply and management system that provides all inhabitants with a sufficient amount of clean and safe water for their personal and domestic use. The strategy and plan of action should include tools – such as right-to-water indicators and benchmarks – for monitoring progress closely, and should specifically target all disadvantaged or marginalized groups;
- Governments should take effective measures to prevent third parties, including transnational corporations, from obstructing equal access to clean water, polluting water resources and engaging in inequitable water extraction practices;
- Governments should take measures to prevent, treat and control water-related diseases and, in particular, ensure access to adequate sanitation.

### **Box 94 Right to water under the African Charter on Human and Peoples' Rights: Case Centre on Housing Rights and Evictions (COHRE) v. Sudan**

In July 2010, the Assembly of Heads of States of the African Union made public the decision of the African Commission on Human and Peoples' Rights on the case of *Case Centre on Housing Rights and Evictions (COHRE) v. Sudan*, which concerned atrocities committed in the Darfur region of Sudan since February 2003. The decision looks not only at violations of the right to life and to be free from torture, but examines also violations of economic, social and cultural rights, including the right to water. The ACHPR had already found earlier that failure to provide basic services such as safe drinking water and electricity constituted a violation of the right to health enshrined in Article 16 of the Charter. In the case at hand, it held that "the destruction of homes, livestock and farms as well as the poisoning of water sources such as wells amounted to a violation of Article 16. It referred in this context to general comment No. 14 by the UN Committee on Economic, Social and Cultural Rights, which sets out that "the right to health extends not only to timely and appropriate health care, but also to the underlying determinants of health such as access to safe and potable water, an adequate supply of safe food, nutrition and housing". With regard to the State's obligation to respect, protect and fulfil, the Commission noted that "violations of the right to health can occur through the direct action of States or other entities insufficiently regulated by States" and that "States should ... refrain from unlawfully polluting air, water and soil ... during armed conflicts" and "should also ensure that third

parties do not limit peoples' access to health-related ... services" and that "failure to enact or enforce laws to prevent the pollution of water [violated the right to health]".<sup>14</sup>

## The right to education

### Article 26 (1) of UDHR

*"Everyone has the right to education. Education shall be free, at least in the elementary and fundamental stages. Elementary education shall be compulsory. Technical and professional education shall be made generally available and higher education shall be equally accessible to all on the basis of merit."*

### Article 13 of ICESCR

*"1. The States Parties to the present Covenant recognize the right of everyone to education. [...]*

*2. The States Parties to the present Covenant recognize that, with a view to achieving the full realization of this right:*

*(a) Primary education shall be compulsory and available free to all;*

*(b) Secondary education in its different forms, including technical and vocational secondary education, shall be made generally available and accessible to all by every appropriate means, and in particular by the progressive introduction of free education;*

*(c) Higher education shall be made equally accessible to all, on the basis of capacity, by every appropriate means, and in particular by the progressive introduction of free education;*

*(d) Fundamental education shall be encouraged or intensified as far as possible for those persons who have not received or completed the whole period of their primary education;*

*(e) The development of a system of schools at all levels shall be actively pursued, an adequate fellowship system shall be established, and the material conditions of teaching staff shall be continuously improved.*

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<sup>14</sup> See Housing and ESC Rights Law Quarterly, Vol. 7, No. 3 September 2010.

*3. The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to choose for their children schools, other than those established by the public authorities, which conform to such minimum educational standards as may be laid down or approved by the State and to ensure the religious and moral education of their children in conformity with their own convictions.*

*4. No part of this article shall be construed so as to interfere with the liberty of individuals and bodies to establish and direct educational institutions, subject always to the observance of the principles set forth in paragraph 1 of this article and to the requirement that the education given in such institutions shall conform to such minimum standards as may be laid down by the State."*

#### **Article 14 of ICESCR**

*"Each State Party to the present Covenant which, at the time of becoming a Party, has not been able to secure in its metropolitan territory or other territories under its jurisdiction compulsory primary education, free of charge, undertakes, within two years, to work out and adopt a detailed plan of action for the progressive implementation, within a reasonable number of years, to be fixed in the plan, of the principle of compulsory education free of charge for all."*

In addition to the above-mentioned human rights instruments, the right to education is also referred to in Articles 28 and 29 of the Convention on the Rights of the Child. The right is inextricably linked to the dignity of the human being, and its realization is conducive to the development of the individual and of society as a whole. It empowers economically and socially marginalized people, is crucial in the fight against poverty, safeguards children from exploitation and has a limiting effect on population growth. It is therefore key to the realization of many other human rights.

**"A sustained state of democracy thus requires a democratic climate and culture constantly nurtured and reinforced by education and other vehicles of culture and information. Hence, a democratic society must be committed to education in the broadest sense of the term, and more particularly civic education and the shaping of a responsible citizenry."**

*Inter-Parliamentary Union, Universal Declaration on Democracy, Cairo, September 1997, paragraph 19.*

The above provisions of the Universal Declaration of Human Rights and the ICESCR set clear goals that States Parties should aim to meet in order to ensure the realization

of the human right to education. But what are the practical implications of those provisions for States, and in particular for parliaments? To provide an answer, the right to education may be broken down into the following two components:

- enhancement of access to education;
- freedom to choose the type and content of education.

### **Box 95 Poverty and education**

The UN Guiding Principles on Extreme Poverty and Human Rights (A/HRC/21/39) observe in paragraph 87 that "Education is a crucial means by which persons can develop their personalities, talents and abilities to their fullest potential, increasing their chances of finding employment, of participating more effectively in society and of escaping poverty. The economic consequences of not finishing primary or secondary school are thus devastating and perpetuate the cycle of poverty. Girls are more commonly denied their right to education, which in turn restricts their choices and increases female impoverishment." Accordingly, the Guiding Principles provide in paragraph 88 that "States should:

- (a) Ensure that all children, including those living in poverty, are able to enjoy their right to free and compulsory primary education through the provision of high-quality education in schools within safe reach and without indirect costs;
- (b) Provide schools in disadvantaged areas with high-quality, trained teachers and adequate infrastructure, including gender-sensitive sanitation facilities, water and electricity;
- (c) Take steps to progressively ensure the availability, accessibility, acceptability, adaptability and quality of education in all forms and at all levels. This includes allocating, as a priority, resources to persons living in poverty to compensate for socioeconomic disadvantages (e.g. proactive measures to combat school dropout rates, grants and school meal provisions);
- (d) Take measures to progressively introduce free education for secondary and higher levels, in particular for girls and groups vulnerable to poverty and marginalization such as children with disabilities, minorities, refugees, children of undocumented migrants, stateless persons, children living in institutions and those living in remote areas and slums;
- (e) Review and reform legislation to ensure consistency between the minimum school leaving age and the minimum age of marriage and employment;
- (f) Provide high-quality early childhood education centres to improve the education and health of children living in poverty;
- (g) Take measures to eradicate illiteracy, including for adults;
- (h) Ensure that persons living in poverty are able to know, seek and receive information about all human rights and fundamental freedoms and have access to human rights education and training."

These two components can be further subdivided into four areas of obligation: availability, accessibility, acceptability and adaptability, as stipulated in general comment No. 13 by the Committee on Economic, Social and Cultural Rights (1999). These concepts comprise the following practical measures:

### **Availability of functioning educational institutions and programmes**

- obligatory and free primary education for all (to protect children from child labour);
- teacher training programmes;
- adequate working conditions for teachers, including the right to form unions and bargain collectively.

### **Accessibility of education to everyone**

- economically affordable secondary and higher education;
- non-discriminatory access to education;
- adequate education-grant system for disadvantaged groups;
- adequate funding for education in remote and disadvantaged areas;
- mechanisms for monitoring policies, institutions, programmes, spending patterns and other practices in the education sector.

### **Acceptability of form and substance**

- legislation guaranteeing the quality of curricula and teaching methods;
- minimum educational standards (on admission, curricula, recognition of certificates, etc.) and related monitoring mechanisms;
- guarantee of the right to establish private institutions.

### **Adaptability of curricula**

- curriculum design and education funding in conformity with the pupils' and students' actual needs.

### **Box 96 Judicial enforcement of free primary and inclusive education: the example of Colombia**

In its decision C-376/10 (19 May 2010), the Colombian Constitutional Court ruled that, under the international human rights instruments ratified by Colombia and thus binding upon the State, providing free education is an unequivocal obligation which must be immediately enforced with respect to primary education. The Court held that charging fees at the primary education level could become a barrier to accessing the education system.

In another decision (T-051/11, 4 February 2011), concerning a hearing-impaired pupil who was prevented from attending school past the first year as the number of pupils required to appoint sign language interpreters had not been reached, the Constitutional Court concluded that his right to education had been violated

and ordered his reintegration into school. The Court found that the Decree, which conditioned the appointment of sign language interpreters on a minimum enrolment of hearing impaired pupils, was unconstitutional and argued that such requirements deepened the marginalization of students with hearing disabilities. It ordered the authorities to make the necessary corrections in the budgets, planning, curricula and organization of its educational institutions so as to effectively guarantee the right to education to the population with hearing disabilities. Since this decision, Colombia became the 100th State to ratify the CRPD in May 2011.

#### *Plans of action*

State efforts to realize the right to education should be progressive. They should be effective and expeditious to a warranted degree. State obligations are not of equal urgency in all areas (basic, primary, secondary and higher education): governments are expected to give priority to the introduction of compulsory and free primary education while taking steps to realize the right to education at other levels.

States that at the time of ratification of the ICESCR had not been able to secure compulsory and free primary education should adopt and implement a national educational plan, as laid down in Article 14 of the Covenant. The plan should be drawn up and adopted within two years for the progressive implementation, within a reasonable number of years to be fixed in that plan, of the principle of compulsory education free of charge for all. The two-year specification does not absolve a State Party from this obligation in case it fails to act within that period.

#### **Box 97 Equal enjoyment of the right to education by every girl**

Despite the progress made, discrimination against girls persists, including in the form of child marriage, early pregnancy, sexual violence and harassment inside and outside schools. Together with social and cultural stereotypes that enforce obedience and fixed gender constructs, violence against girls and the targeting of schools by extremist movements continue to impair girls' access to education.

The right to education is a multiplier right. States have an obligation to translate their international obligations into national policies with an adequate legal framework based on the principle of the best interests of the child. In the area of education, this obligation includes temporary special measures ensuring gender parity and access to education by marginalized communities, including rural communities. Institutional frameworks need to prioritize education in budgetary allocations, support early childhood education, provide a safe and supportive environment in schools and integrate a gender perspective into education policies.

States have to remove structural barriers to education, such as gender bias and stereotypes, from curricula and teaching and learning materials. They need to ensure girls' safety in schools, including through the provision of adequate

sanitary facilities and safe drinking water, as well as protection from sexual harassment, abuse and violence in the school environment.

Human Rights Council panel discussion on the equal enjoyment of the right to education by every girl, June, 2015 (A/HRC/30/23)

**The 105th Inter-Parliamentary Conference “asserts that education is a prerequisite for promoting sustainable development, securing a healthy environment, ensuring peace and democracy and achieving the objectives of combating poverty, slowing population growth, and creating equality between the sexes; culture is a fundamental component of the development process”.**

*Resolution on “Education and culture as essential factors in promoting the participation of men and women in political life and as prerequisites for the development of peoples”, Havana, April 2001, paragraph 1.*

## Cultural rights

### Article 27 of UDHR

*“1. Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits.*

*2. Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.”*

### Article 15 ICECSR

*“1. The State Parties recognize the right of everyone:*

*(a) To take part in cultural life;*

*(b) To enjoy the benefits of scientific progress and its applications;*

*(c) To benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.*

*2. The steps to be taken by the State Parties to the present Covenant to achieve the full realization of this right shall include those necessary for the conservation, the development and the diffusion of science and culture.*

*3. The State Parties to the present Covenant undertake to respect the freedom indispensable for scientific research and creative activity;*

*4. The State Parties to the present Covenant recognize the benefits to be derived from the encouragement and development of international contacts and co-operation in the scientific and cultural fields."*

Cultural rights other than the right to education and the above-mentioned rights have for a long time received relatively little attention. This changed towards the end of the 20th century, and today the right to participate in cultural life, including the right of members of ethnic groups to preserve and develop their culture, as well as intellectual property rights, are considered increasingly important. The main components of the cultural rights contained in Article 27 of the UDHR and Article 15 of the ICECSR are:

- the right to take part in cultural life;
- the right to enjoy the benefits of scientific progress and its applications;
- the right to protection of intellectual property;
- the freedom indispensable for scientific research and creative activity.

Cultural rights are closely linked to other human rights, such as freedom of expression and information, the right of all peoples to self-determination and the right to an adequate standard of living. Many references to cultural rights can be found in provisions and instruments relating to minorities and indigenous peoples. Likewise, Articles 43 (1 g) and 45 (1 d) of the International Convention on the Protection of the Rights of All Migrant Workers enshrine the right for migrant workers and their families to access and participate in cultural life and to have their cultural identities respected.

International organizations engaged in the field of cultural rights include UNESCO, which is concerned with the preservation of the cultural heritage of humanity, and the World Intellectual Property Organization (WIPO), responsible for the protection of moral and material benefits for the authors of scientific and artistic production. The promotion and protection of cultural rights was strengthened in October 2009 by the appointment of an Independent Expert in that field (subsequently transformed into a Special Rapporteur), with the mandate of identifying best practices and obstacles to promoting and protecting cultural rights. The Special Rapporteur's reports have explored, *inter alia*, the meaning and scope of cultural rights, access to cultural heritage, the right to benefit from scientific progress and its applications, the right to artistic freedom, the writing and teaching of history and memorialization processes and the cultural rights of women.<sup>15</sup>

**Cultural rights are an integral part of human rights and, like other rights, are universal, indivisible and interdependent. The full promotion of and respect for cultural rights is essential for the maintenance**

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<sup>15</sup> More information can be found at <http://www.ohchr.org/EN/Issues/CulturalRights/Pages/SRCulturalRightsIndex.aspx>.

**of human dignity and positive social interaction  
between individuals and communities in a diverse  
and multicultural world.**

*Committee on Economic, Social and Cultural Rights,  
general comment No. 21, paragraph 1, November 2009.*

**Further reading**

- *Fact Sheet No. 35, The Right to Water*, New York and Geneva, OHCHR, United Nations, UN-Habitat, WHO, 2010. Available at <http://www.ohchr.org/Documents/Publications/FactSheet35en.pdf>
- *Fact Sheet No. 34, The Right to Adequate Food*, New York and Geneva, OHCHR, United Nations, FAO, 2010. Available at <http://www.ohchr.org/Documents/Publications/FactSheet34en.pdf>
- *Fact Sheet No. 33, Frequently Asked Questions on Economic, Social and Cultural Rights*, New York and Geneva, OHCHR, 2008. Available at <http://www.ohchr.org/Documents/Publications/FactSheet33en.pdf>
- *Guiding Principles on Extreme Poverty and Human Rights*, New York and Geneva, OHCHR, United Nations, 2012. Available at [http://www.ohchr.org/Documents/Publications/OHCHR\\_ExtremePovertyandHumanRights\\_EN.pdf](http://www.ohchr.org/Documents/Publications/OHCHR_ExtremePovertyandHumanRights_EN.pdf)
- *Land and Human Rights: Standards and Applications*, New York and Geneva, OHCHR, United Nations, 2015. Available at [http://www.ohchr.org/Documents/Publications/Land\\_HR-StandardsApplications.pdf](http://www.ohchr.org/Documents/Publications/Land_HR-StandardsApplications.pdf)
- *Women and the Right to Adequate Housing*, New York and Geneva, OHCHR, United Nations, 2012. Available at <https://shop.un.org> and <http://www.un-ilibrary.org>





## Chapter 14

# Human rights, terrorism and counter-terrorism

Numerous people continue to be victims of terrorist attacks across the globe, the human cost of which should not be underestimated. At the same time, measures taken by States to counter terrorism have resulted in multiple human rights violations. These issues came to great prominence in the aftermath of the atrocious attacks on the World Trade Center in New York on 11 September 2001 and have received renewed impetus as States respond to the threat of foreign fighters and a renewed wave of devastating terrorist attacks around the world.

While terrorism had long been an issue, the 9/11 attacks prompted a wave of counter-terrorism measures at the international and domestic level that dramatically affected the way States responded to these threats. In the wake of these attacks and since, the United Nations Security Council has passed a number of resolutions calling on States to take measures to combat terrorism. These included measures to criminalize acts of terrorism and to prevent and suppress the financing of terrorism. Critically, the United Nations Security Council, General Assembly and Human Rights Council have underscored that counter-terrorism and security policies, strategies and practices

Terrorism aims at the destruction of the State and authorities, peace and stability, and social harmony in general. This also undermines human rights. However, counter-terrorism measures must be firmly grounded in human rights and respect for the rule of law, in order to be effective and sustainable. © AFP/Geoffroy Van Der Hasselt

must be firmly grounded in the protection of human rights and respect for the rule of law to be effective and sustainable. This was explicitly set out in the United Nations Global Counter-Terrorism Strategy adopted by the United Nations General Assembly in 2006.

### **Box 98 The United Nations Global Counter-Terrorism Strategy**

In 2006, the General Assembly adopted its Global Counter-Terrorism Strategy in its Resolution 60/288. The strategy consists of four pillars:

- tackling the conditions conducive to the spread of terrorism;
- preventing and combating terrorism;
- building countries' capacity to prevent and combat terrorism and to strengthen the role of the United Nations system in that regard;
- ensuring respect for human rights for all and the rule of law while countering terrorism.

The United Nations Global Counter-Terrorism Strategy reaffirms the inextricable links between human rights and security and places respect for the rule of law and human rights at the core of national and international counter-terrorism efforts. Through the Strategy, Member States have committed to ensuring respect for human rights and the rule of law as the fundamental basis of the fight against terrorism. In its Resolution 70/291 of 2016, the General Assembly reaffirmed the Strategy and its four pillars and called upon Member States, the United Nations and other appropriate international, regional and subregional organizations to step up their efforts to implement the Strategy in an integrated and balanced manner and in all its aspects.

In spite of these commitments, domestic counter-terrorism measures adopted by States have resulted in multiple human rights violations, impacting, for example, on the rights to life, liberty and security of person, the prohibition of torture, the rights to freedom of expression, association and assembly, and fair trial and due process rights, among others.

## **Is terrorism a violation of human rights?**

As has been reaffirmed by the United Nations Security Council, the General Assembly and the Human Rights Council, terrorism aims at the very destruction of human rights. It has a direct impact on the enjoyment of a number of human rights, in particular the rights to life, liberty and physical integrity. Terrorist acts can destabilize governments, undermine civil society, jeopardize peace and security and threaten social and economic development and have especially negative effects on certain groups.

Accordingly, the rights of victims of terrorism are of paramount concern. In particular, victims of terrorism should be accorded the rights enshrined in international and regional instruments for victims of crime, gross violations of international human rights law and serious violations of international humanitarian law. These include the right to be treated with humanity and dignity, to be informed and represented throughout any relevant legal processes and to receive appropriate restitution and compensation.

## The notion and definition of terrorism

Many of the human rights violations associated with counter-terrorism measures derive from vague or sweeping definitions of terrorism at the domestic level. Overly broad terrorism legislation across the globe has had a severely detrimental impact on human rights, leading to both deliberate misuse and unintended abuses, affecting due process and fair trial rights, diminishing the space in which civil society can operate and resulting in the criminalization of legitimate conduct, including the actions of human rights defenders.

The problem has been compounded by the international community's failure, despite protracted efforts, to reach agreement on a definition of terrorism as part of a comprehensive convention, although a number of conventions have identified specific forms of terrorism.<sup>1</sup>

Terrorism and related offences must be clearly and narrowly defined to be consistent with international human rights law and not open to abuse. This means that any given law must be sufficiently clear for a person to be able to foresee the consequences of their conduct and judge whether or not his/her "act" and/or action amounts to an infringement of the law. The principle of legality, as enshrined in Article 15 of the International Covenant on Civil and Political Rights and explained by the Human Rights Committee to mean "the requirement of both criminal liability and punishment being limited to clear and precise provisions in the law that was in place and applicable at the time the act or omission took place, except in cases where a later law imposes a lighter penalty", is absolute and can never be limited or derogated from.<sup>2</sup>

### **Box 99 Counter-terrorism legislation**

The importance of ensuring that the notion of terrorism is carefully defined in domestic law cannot be understated. A clear, narrowly drawn and precise definition can help to ensure that human rights are respected. The former Special Rapporteur on the promotion and protection of human rights and fundamental

<sup>1</sup> These include, for example, the International Convention against the Taking of Hostages, 1979, and the International Convention for the Suppression of the Financing of Terrorism, 1999. For a full list of universal and regional instruments, see Report of the Secretary-General on Measures to eliminate international terrorism, 29 July 2015, UN doc. A/70/211.

<sup>2</sup> Article 4(2), International Covenant on Civil and Political Rights; Human Rights Committee, general comment No. 29: States of Emergency (Article 4), 2001, UN Doc. CCPR/C/21/Rev.1/Add.11, paragraph 7.

freedoms while countering terrorism, Martin Scheinin, offered the following as a model definition in his final report to the Human Rights Council:

Terrorism means an action or attempted action where:

1. the action:
  - (a) constituted the intentional taking of hostages; or
  - (b) is intended to cause death or serious bodily injury to one or more members of the general population or segments of it; or
  - (c) involved lethal or serious physical violence against one or more members of the general population or segments of it; and
2. the action is done or attempted with the intention of:
  - (a) provoking a state of terror in the general public or a segment of it; or
  - (b) compelling a government or international organization to do or abstain from doing something; and
3. the action corresponds to:
  - (a) the definition of a serious offence in national law, enacted for the purpose of complying with international conventions and protocols relating to terrorism or with resolutions of the Security Council relating to terrorism; or
  - (b) all elements of a serious crime defined by national law.<sup>3</sup>

## States of emergency and the normal operation of counter-terrorism law and practice

Frequently, governments will invoke emergency provisions and take drastic measures in response to the threat of terrorism. While there is no doubting that the threat of terrorism is a very serious one to which States must respond, the principle of normalcy should apply to all actions taken. This means that, when taking counter-terrorism measures, governments should, to the greatest extent possible, act within the existing civilian structures, due process guarantees, court processes and ordinary means of response, which are frequently the most effective means available.

Only in the most extreme circumstances should deviations from this principle be considered. As set out in Chapter 4, international human rights law provides that some human rights may be subject to limitations and derogations in times of a public emergency threatening the life of a nation, but only within narrowly circumscribed conditions. Limitations must be permissible for the right in question, provided for by law, necessary, proportionate and for a legitimate purpose. Derogations must be

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<sup>3</sup> Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Martin Scheinin, 22 December 2010, A/HRC/16/51, paragraphs 26–28.

officially proclaimed, and each measure must be strictly required by the exigencies of the situation and lifted as soon as the situation permits.

### **Box 100 The response to the threat of foreign fighters, countering violent extremism and human rights**

While not a new phenomenon, the issue of foreign fighters has attracted increasing attention in recent years. In response, States have taken a wide range of administrative and legislative measures to deter individuals who have or seek to become foreign fighters. The Security Council has also taken decisive action. In its Resolution 2178 (2014), the Security Council decided that Member States should, in a manner consistent with international law, prevent the recruiting, organizing, transporting or equipping of individuals who travel to a State other than their States of residence or nationality for the purpose of perpetrating, planning or participating in terrorist acts.

Concerns have been raised regarding the lack of a definition of “terrorism” or “terrorist” in the resolution. Other concerns have been raised about the fact that the measures envisaged in the resolution may be implemented in a way that negatively impacts a whole range of human rights, even though resolution 2178 includes important provisions requiring compliance with international human rights law. Accordingly, any efforts at domestic implementation of Resolution 2178 must be carried out carefully and precisely to ensure consistency with international human rights law, international refugee law and, as applicable, international humanitarian law, as required by both international law and the resolution itself.

Security Council Resolution 2178 also linked these efforts to the broader but related notion of preventing and countering violent extremism. Many States have taken action in this regard. While some of these measures represent a move away from a “security-only” approach, the absence of an agreed definition of violent extremism, particularly where States have sought to broaden the notion beyond “violent extremism” to merely “extremism”, has raised concerns regarding respect for the rights to freedom of opinion, expression, religion and belief.

### **Box 101 The United Nations Secretary-General’s Plan of Action to Prevent Violent Extremism**

In 2015, the United Nations Secretary-General developed a comprehensive Plan of Action to Prevent Violent Extremism (A/70/674).

The Plan of Action recommends that each Member State develop its own national plan of action to prevent violent extremism, with a focus on seven priority areas:

- dialogue and conflict prevention;

- strengthening good governance, human rights and the rule of law;
- engaging communities;
- empowering youth;
- gender equality and empowering women;
- education, skill development and employment facilitation;
- strategic communications, including through the Internet and social media.

In addressing these strategic priority areas, the Plan of Action puts forward an interdisciplinary “all-of-society”, “all-of-government” and “all-of-United Nations” approach to addressing the drivers of violent extremism.

In its Resolution 70/291, the General Assembly recommended that Member States consider implementing relevant recommendations in the Plan of Action, as applicable to the national context. It also encouraged United Nations entities to implement relevant recommendations in the Plan, in line with their mandates, including by providing technical assistance to Member States upon their request. The Resolution went on to invite Member States and regional and subregional organizations to consider developing national and regional plans of action to prevent violent extremism as and when conducive to terrorism, in accordance with their priorities and taking into account, as appropriate, the Secretary-General's Plan of Action and other relevant documents.

#### Further reading

- *United Nations Secretary-General's Plan of Action to Prevent Violent Extremism (A/70/674)*
- *Basic Human Rights Reference Guide on the Conformity of National Counter-terrorism Legislation with International Human Rights Law*, New York, OHCHR, United Nations, CTITF, 2014. Available at <http://www.ohchr.org/EN/newyork/Documents/CounterTerrorismLegislation.pdf>
- *Fact Sheet No. 32, Human Rights, Terrorism and Counter-Terrorism*, New York and Geneva, OHCHR, 2008. Available at <http://www.ohchr.org/Documents/Publications/Factsheet32EN.pdf>



## Chapter 15

### Combating impunity: the international criminal court

An appalling series of the worst crimes known to humanity – war crimes, genocide and crimes against humanity, including systematic practices of torture, extrajudicial executions and enforced disappearances – were committed throughout the world in the twentieth century, during armed conflict and in times of peace. The vast majority of the perpetrators of such crimes – “that deeply shock the conscience of humanity”<sup>1</sup> – have not been punished. The first efforts to end such impunity followed in the aftermath of the Second World War, when the Allies established two international military tribunals in Nuremberg and Tokyo to bring major war criminals to justice. Both tribunals had jurisdiction over war crimes, as well as crimes against the peace (now commonly referred to as the crime of aggression) and crimes against humanity (when committed in connection with a conflict).

The atrocities of the 20th century were the tragic impetus for the establishment of the International Criminal Court in 2002. The Court has the right to prosecute individuals for international crimes of genocide, war crimes or crimes against humanity. © AFP/Pool/Jerry Lampen

<sup>1</sup> *Rome Statute of the International Criminal Court (ICC), preamble.*

Since then, the focus has gradually shifted. Today international criminal law covers both war crimes (which are serious violations of international humanitarian law that can only be committed during armed conflict) and the major “human rights crimes” of genocide and crimes against humanity (whether committed during conflict or peacetime). Although the establishment of an “international penal tribunal” was envisaged as early as 1948 under Article 6 of the United Nations Convention on the Prevention and Punishment of the Crime of Genocide, the first such tribunal was not established until 1993, by means of a Security Council resolution adopted under Chapter VII of the Charter of the United Nations and relating exclusively to the former Yugoslavia. Since then, not only have a number of ad hoc international criminal tribunals and so-called “hybrid” tribunals been established (see below), but also, the international penal tribunal envisaged after the Second World War has finally came into existence, with the adoption and entry into force of the Rome Statute of the International Criminal Court in 2002.

## **Ad hoc international criminal tribunals: the International Criminal Tribunal for the former Yugoslavia (ICTY); the International Criminal Tribunal for Rwanda (ICTR); and internationalized (hybrid) tribunals**

Under Security Council Resolution 827 (1993), the competence of the ICTY to prosecute crimes against humanity is restricted to acts committed during armed conflict. Security Council Resolution 955 (1994) established the ICTR one year later and gave it competence to prosecute the main perpetrators of the Rwandan genocide and related crimes against humanity, without any reference to armed conflict.

Since the founding of those institutions, the international community has not replicated the ICTY/ICTR model but has instead worked with affected countries to establish “internationalized” or so-called “hybrid” courts that combine elements of national and international systems. There is no standard model of such courts or tribunals; each of those created has been unique. The most important hybrid courts are the Special Court for Sierra Leone (SCSL), the Extraordinary Chambers in the Courts of Cambodia (ECCC), the War Crimes Chamber of the Court of Bosnia-Herzegovina and the Special Tribunal for Lebanon (STL). In 2015, the Central African Republic adopted the Organic Law 15/003, which established a Special Criminal Court to investigate, prosecute and try serious human rights violations, including crimes against humanity and war crimes committed in the country after 1 January 2003. The Special Criminal Court will be composed of both national and international judges and an international prosecutor.

In August 2012, Senegal and the African Union signed an agreement to establish a special court, the Extraordinary African Chambers, in the Senegalese justice system to try former Chadian President Hissène Habré, who has been in exile in Senegal since 1990. He is accused of thousands of political killings and systematic torture,

allegedly committed when he ruled Chad from 1982 to 1990. The agreement follows a landmark ruling by the International Court of Justice in July 2012 ordering Senegal to bring Habré to justice “without further delay”, either by prosecuting him domestically or extraditing him for trial. The Extraordinary African Chambers were inaugurated in February 2013 and Habré was indicted in July 2013 for crimes against humanity, war crimes and torture. On 30 May 2016, the Extraordinary African Chambers sentenced Hissène Habré to life in prison.

## The International Criminal Court

The competence of the International Criminal Court (ICC), like that of the ICTR, is not restricted to armed conflict. Established pursuant to the adoption of the Rome Statute of the International Criminal Court on 17 July 1998, the ICC has jurisdiction over war crimes, as well as genocide and a broad range of crimes against humanity, irrespective of the existence of an armed conflict. The Court also has jurisdiction over the crime of aggression but is not competent to exercise it until the definition of that crime, as adopted in Kampala at the 2010 Review Conference on the Rome Statute of the ICC, enters into force. Its entry into force is subject to (a) a decision to activate the jurisdiction, to be taken by a two-thirds majority of States Parties after 1 January 2017; and (b) ratification of the amendment concerning this crime by at least 30 States Parties.

The Rome Statute establishes individual criminal responsibility – as distinct from State responsibility – for both State and non-State actors that commit gross and systematic human rights violations. It can therefore be considered an important victory in the fight against impunity – a major reason such violations occur – and thus one of the most significant and innovative developments in the protection of human rights at the international level.

**“Successive generations have for over a century progressively weaved an impressive fabric of legal and moral standards based on respect for the dignity of the individual. But the Court is the first and only permanent international body with the power to bring to justice individuals – whoever they are – responsible for the worst violations of human rights and international humanitarian law. We are finally acquiring the tools to translate fine-sounding words into action ...”**

*Sergio Vieira de Mello, former United Nations High Commissioner for Human Rights, statement on the occasion of the inauguration of ICC on 11 March 2003.*

### **Box 102 Rome Statute of the International Criminal Court**

- Adopted on 17 July 1998 by 120 votes to 7 (China, Iraq, Israel, Libyan Arab Jamahiriya, Qatar, United States of America, Yemen), with 21 abstentions
- Signed by 139 States
- Ratified by 124 States Parties (as of July 2016)

#### **Significant dates**

- Entry into force: 1 July 2002
- Election of the Court's first 18 judges by the Assembly of States Parties: February 2003
- Election of the Court's first prosecutor, Luis Moreno Ocampo, by the Assembly of States Parties: 21 April 2003; the Court's second prosecutor, Ms Fatou Bensouda, took up office on 16 June 2012
- Review Conference on the Rome Statute of the ICC, held in Kampala, Uganda, in May/June 2010. The Assembly of States Parties adopted Article 8 bis of the Statute, defining the crime of aggression, as well as Article 15 bis, detailing the circumstances under which the Court can exercise jurisdiction over this crime.

### **Box 103 ICC: concept and jurisdiction**

#### **Why was the ICC created?**

- to end impunity;
- to help end conflicts and prevent further conflict;
- to deter future perpetrators;
- to assist when national criminal justice bodies are unable or unwilling to act and to make up for any shortcomings of ad hoc tribunals (such as the ICTY and the ICTR).

## **How is the ICC's jurisdiction defined in the Rome Statute?**

*Article 5:* crimes within the jurisdiction of the ICC are genocide,<sup>2</sup> crimes against humanity,<sup>3</sup> war crimes<sup>4</sup> and the crime of aggression.<sup>5</sup>

*Article 25:* every (natural) person shall be responsible for a crime within the jurisdiction of ICC, if he or she – as an individual, jointly or through another person – commits, orders or solicits such a crime or induces, aids, abets or otherwise assists in its commission.

*Articles 11–13:* the ICC has jurisdiction only with respect to crimes committed after the entry into force of the Statute (1 July 2002). Its jurisdiction extends to (i) crimes committed on the territory of a State Party; or (ii) crimes committed by nationals of a State Party anywhere in the world; or (iii) cases in which a State otherwise accepts the jurisdiction of the Court; or (iv) situations referred to the Prosecutor by the United Nations Security Council, irrespective of the nationality of the accused or the location of the crime.

## **Who can refer cases to the Court?**

- a State Party (Article 14);
- the United Nations Security Council (Article 13 (b));
- the ICC Prosecutor, launching investigations on his/her own initiative based on credible information received from States, NGOs, victims or any other source (Article 15).

## **Can high-level government officials or military commanders be prosecuted by the ICC?**

Yes. Criminal responsibility will be applied equally to all persons without distinction as to whether he or she is a head of state or government, a member of a government or parliament, an elected representative or a government official. Such official capacity does not constitute a ground for reduction of

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- 2 Genocide occurs when acts are “committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group”, *Rome Statute of the International Criminal Court*, Article 6.
- 3 Crimes against humanity are crimes “committed as part of a widespread or systematic attack directed against any civilian population”. They include murder, extermination, enslavement, deportation, forcible transfer of population, imprisonment, torture, rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, other forms of sexual violence, persecution against any identifiable group or category of people, enforced disappearance of persons, apartheid, and similar inhuman acts intentionally causing suffering or serious injury to the body or to mental or physical health. *Ibid*, Article 7.
- 4 War crimes are serious violations of international humanitarian law, including grave breaches in the context of international armed conflict (as set out in the Four Geneva Conventions and Additional Protocol I to the Geneva Conventions), as well as violations of Article 3 common to the Four Geneva Conventions, and other serious violations of international humanitarian law, as set out in Article 8 of the Rome Statute. *Ibid*, Article 8.
- 5 The crime of aggression is “the planning, preparation, initiation or execution, by a person in a position effectively to exercise control over or to direct the political or military action of a State, of an act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations”. An “act of aggression” is further defined as “the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations”, and includes the acts set out in United Nations General Assembly resolution 3314 (XXIX) of 14 December 1974. *Ibid*, Article 8 bis.

sentence. The fact that a crime has been committed by a person on the orders of a superior will not normally relieve that person of criminal responsibility. A military commander may be held criminally responsible for crimes committed by forces under his/her command and control. Criminal responsibility may also arise when a military commander knew or should have known that the forces were committing or were about to commit such crimes but nevertheless failed to prevent or repress their commission. In addition, civilians effectively acting as military commanders may be held criminally responsible when they knew of or consciously disregarded information clearly indicating that crimes were being or were about to be committed.

### **What sentence can the ICC impose? Can the ICC impose the death penalty?**

The ICC has no competence to impose a death penalty. The Court can impose lengthy terms of imprisonment of up to 30 years or life imprisonment when so justified by the gravity of the case. The Court may, in addition, order a fine or forfeiture of proceeds, property or assets derived from the committed crime.

### **Relationship between the ICC and other courts**

*ICC and national courts:* national courts have jurisdiction in all relevant cases and, under the principle of "complementarity", the ICC may only act when national courts are unable or unwilling genuinely to carry out an investigation or prosecution.

*ICC and the International Court of Justice (ICJ):* the ICJ deals only with disputes between States, not criminal acts committed by individuals.

*ICC and the ad hoc international tribunals (ICTY, ICTR, SCSL, STL, ECCC, War Crimes Chambers in Bosnia and Herzegovina):* ad hoc tribunals are subject to time and place limits ("selective justice"), while a permanent court such as the ICC can operate with greater consistency.

### **The agreement on the privileges and immunities of the Court**

Under Article 48 of the Rome Statute, the Court shall "enjoy in the territory of each State Party such privileges and immunities as are necessary for the fulfilment of its purposes". An agreement on ICC privileges and immunities concluded concurrently with the Statute's adoption provides for appropriate protection and assurances, and specifically for ICC staff, defence counsel, victims and witnesses during an investigation. It entered into force on 22 July 2004.

### **State obligations under the Rome Statute of the ICC**

By ratifying the Rome Statute, States Parties assume the following three fundamental obligations.<sup>6</sup> Parliamentarians play a key role in ensuring their fulfilment.

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<sup>6</sup> Amnesty International, The International Criminal Court: Updated Checklist for effective implementation, May 2010

- *Obligation to cooperate fully*: under Article 86 of the Rome Statute, States Parties shall “cooperate fully with the Court in its investigation and prosecution of crimes within the jurisdiction of the Court”. States must therefore enable the Prosecutor and the defence to conduct effective investigations in their jurisdictions and ensure that national courts and other authorities cooperate fully in the areas of obtaining documents, conducting searches, locating and protecting witnesses, and arresting and surrendering persons indicted by the ICC. States should also cooperate with the ICC in enforcing sentences and in developing and implementing public information initiatives as well as training programmes for public officials on implementing the Rome Statute.
- *Obligation to ratify the Agreement on the Privileges and Immunities of the Court (APIC)*, thus enabling the ICC to function independently and unconditionally.
- *Obligation resulting from the ICC’s complementary nature*: since the ICC may act only when States are unable or unwilling to do so, States carry primary duty for bringing to justice the perpetrators of crimes under international law. States must therefore enact and enforce national legislation that recognizes international crimes as crimes under their national law, irrespective of where they were committed, who committed them or who the victims were.

#### **Box 104 Challenges for the ICC**

- failure to reach a consensus in Rome when drafting the Statute of the ICC: as a result, the United States of America concluded bilateral agreements with States Parties exempting its nationals from the jurisdiction of the ICC;
- presence of indicted criminals in countries that have not ratified the ICC Statute or refuse to cooperate with the ICC;
- narrow definition of crimes against humanity;
- the role of the Security Council: when blocked by the veto of one of its permanent five members, the Council is unable to refer situations to the ICC pursuant to article 13(b) of the Rome Statute;
- weakness in the principle of complementarity: how is the ICC to determine that national courts are unwilling or unable genuinely to carry out an investigation or prosecution? This question has been considered by the Court in cases arising from post-election violence in Kenya in 2009, and in Libya;<sup>7</sup>
- perceived lack of legitimacy: efforts by international human rights mechanisms to monitor certain national acts or the international prosecution of certain international crimes are not always understood and are often resisted. To investigate facts, arrest people and execute sentences, the ICC depends

<sup>7</sup> See *Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang*, ICC-01/09-01/11, Pre-Trial Chamber II, (30 May 2011); *Prosecutor v. Francis Kirimi Muthaura and Uhuru Muigai Kenyatta*, ICC-01/09-02/11-96, Pre-Trial Chamber II (30 May 2011); *Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, Decision on the admissibility of the case against Abdullah Al-Senussi, ICC-01/11-10/11, Pre-Trial Chamber I (11 October 2013).

entirely on the cooperation of external actors, in particular States. Since the Rome Statute does not apply universally, the Court cannot intervene in all the situations where its involvement might otherwise be justified. This is inevitably perceived as a double standard in the selection of situations. More widespread ratification of its Statute is therefore critical to the Court's effectiveness and legitimacy;

- need for more efficient, and thus more effective and expeditious, judicial proceedings.

## Set of principles for the protection and promotion of human rights through action to combat impunity

The United Nations has accomplished considerable work on the issue of combating impunity, primarily through the United Nations Commission on Human Rights, the Sub-Commission on the Promotion and Protection of Human Rights, and the Human Rights Council (see Chapter 6). Amnesty laws, invoked in the 1970s for the release of political prisoners, and thus symbolizing freedom, were later used to ensure impunity for the perpetrators of human rights violations. Aware of this problem, the Vienna World Conference on Human Rights (1993) supported, in its Declaration and Programme of Action, the efforts of the Commission and the Sub-Commission to examine all aspects of the issue. Accordingly, the Sub-Commission requested one of its members, Mr Louis Joinet, to prepare a set of principles for the protection and promotion of human rights through action to combat impunity. The expert submitted his report and a set of such principles to the Sub-Commission in 1997.<sup>8</sup> In 2004, the Commission on Human Rights endorsed an Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity, prepared by independent expert Diane Orentlicher.<sup>9</sup> Both versions refer to the following victim rights:

- *The right to know:* this right entails the right of victims and families to know the truth about the circumstances in which human rights violations took place, and in the event of death or disappearance, the victim's fate (principle 4). In addition, every people has the inalienable right to know the truth about past events concerning the perpetration of heinous crimes and about the circumstances and reasons that led, through massive or systematic violations, to the perpetration of those crimes (principle 2). Finally, States are obliged to preserve the collective memory, including a duty to preserve archives and other evidence concerning violations of human rights and humanitarian law and to facilitate knowledge of those violations (principle 3).

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<sup>8</sup> E/CN.4/Sub.2/1997/20/Rev.1.

<sup>9</sup> E/CN.4/2005/102/Add.1 (8 February 2005). See also the Independent study on best practices, including recommendations, to assist states in strengthening their domestic capacity to combat all aspects of impunity, by Diane Orentlicher, E/CN.4/2004/88 (27 February 2004).

- *The right to justice*: this right assures access for all victims to a readily available, prompt and effective remedy in the form of criminal, civil, administrative or disciplinary proceedings. In addition, States shall undertake prompt, thorough, independent and impartial investigations of violations of human rights and international humanitarian law and take appropriate measures in respect of the perpetrators, particularly in the area of criminal justice, by ensuring that those responsible for serious crimes under international law are prosecuted, tried and duly punished (principle 19).
- *The right to reparation*: this right entails individual and collective measures. Details are laid down in a document entitled *Basic Principles and Guidelines on the Right to Reparation for Victims of Gross Violations of Human Rights and Humanitarian Law*, drawn up by Mr Theo van Boven for the Sub-Commission in 1996, and further developed by Mr M. Cherif Bassiouni in 2000 at the request of the United Nations Commission on Human Rights.<sup>10</sup> These principles and guidelines were adopted by the General Assembly on 16 December 2005 (A/RES/60/147). They foresee that victims should be provided with full and effective reparation, proportional to the gravity of the violation and the circumstances of each case, in the form of restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition.

In September 2011, the Human Rights Council (see Chapter 6) adopted Resolution A/HRC/18/7, creating the mandate of the Special Rapporteur on the promotion of truth, justice, reparations and guarantees of non-recurrence. In May 2012, Pablo de Greiff was appointed first Special Rapporteur. The four components of the Special Rapporteur's mandate aim to redress the legacies of massive human rights abuses, and can assist in providing recognition to victims, fostering trust and national reconciliation, and strengthening the rule of law.

#### Further reading

- *Basic Principles and Guidelines on the Right to Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*. A/RES/60/147 (16 December 2005)
- *Updated set of principles for the protection and promotion of human rights through action to combat impunity*, E/CN.4/2005/102/Add.1 (8 February 2005)
- *Rule-of-Law Tools for Post-Conflict States: Amnesties*, New York and Geneva, OHCHR, United Nations, 2009. Available at <https://shop.un.org> and <http://www.un-ilibrary.org>
- *Rule-of-Law Tools for Post-Conflict States: Prosecution Initiatives*, New York and Geneva, OHCHR, United Nations, 2006. Available at <http://www.ohchr.org/Documents/Publications/RuleoflawProsecutionsen.pdf>
- *Rule-of-Law Tools for Post-Conflict States: Maximizing the Legacy of Hybrid Courts*, New York and Geneva, OHCHR, United Nations, 2008. Available at <https://shop.un.org> and <http://www.un-ilibrary.org>
- *Rule-of-Law Tools for Post-Conflict States: Archives*, OHCHR, 2015. Available at <https://shop.un.org> and <http://www.un-ilibrary.org>

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<sup>10</sup> E/CN.4/Sub.2/1996/17 and E/CN.4/2000/62, respectively.



# **Annex:**

## **The core international human rights instruments**

- **International Convention on the Elimination of All Forms of Racial Discrimination** (<http://www.ohchr.org/EN/ProfessionalInterest/Pages/CERD.aspx>)
- **International Covenant on Economic, Social and Cultural Rights** (<http://www.ohchr.org/EN/ProfessionalInterest/Pages/CESCR.aspx>)
- **Optional Protocol to the Covenant on Economic, Social and Cultural Rights** (<http://www.ohchr.org/EN/ProfessionalInterest/Pages/OPCESCR.aspx>)
- **International Covenant on Civil and Political Rights** (<http://www.ohchr.org/EN/ProfessionalInterest/Pages/CCPR.aspx>)
- **First Optional Protocol to the International Covenant on Civil and Political Rights** (<http://www.ohchr.org/EN/ProfessionalInterest/Pages/OPCCPR1.aspx>)
- **Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty** (<http://www.ohchr.org/EN/ProfessionalInterest/Pages/2ndOPCCPR.aspx>)
- **Convention on the Elimination of All Forms of Discrimination against Women** (<http://www.ohchr.org/EN/ProfessionalInterest/Pages/CEDAW.aspx>)
- **Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women** (<http://www.ohchr.org/EN/ProfessionalInterest/Pages/OPCEDAW.aspx>)
- **Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment** (<http://www.ohchr.org/EN/ProfessionalInterest/Pages/CAT.aspx>)
- **Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment** (<http://www.ohchr.org/EN/ProfessionalInterest/Pages/OPCAT.aspx>)
- **Convention on the Rights of the Child** (<http://www.ohchr.org/EN/ProfessionalInterest/Pages/CRC.aspx>)
- **Optional Protocols to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography** (<http://www.ohchr.org/EN/ProfessionalInterest/Pages/OPSCCRC.aspx>)
- **Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict** (<http://www.ohchr.org/EN/ProfessionalInterest/Pages/OPACCRC.aspx>)

- **Optional Protocol to the Convention on the Rights of the Child on a communications procedure** (<http://www.ohchr.org/EN/ProfessionalInterest/Pages/OPICCRC.aspx>)
- **International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families** (<http://www.ohchr.org/EN/ProfessionalInterest/Pages/CMW.aspx>)
- **Convention on the Rights of Persons with Disabilities** (<http://www.ohchr.org/EN/HRBodies/CRPD/Pages/ConventionRightsPersonsWithDisabilities.aspx>)
- **Optional Protocol to the Convention on the Rights of Persons with Disabilities** (<http://www.ohchr.org/EN/HRBodies/CRPD/Pages/OptionalProtocolRightsPersonsWithDisabilities.aspx>)
- **International Convention for the Protection of All Persons from Enforced Disappearance** (<http://www.ohchr.org/EN/HRBodies/CED/Pages/ConventionCED.aspx>)

Other universal instruments relating to human rights can be found at <http://www.ohchr.org/EN/ProfessionalInterest/Pages/UniversalHumanRightsInstruments.aspx>



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« Таким образом, вся полнота ответственности гитлеровского правительства и командования за проводимое германской армией опустошение захваченных советских земель... и весь причиняемый этим советскому государству и отдельным гражданам ущерб, — должна считаться точно и документально установленной.

— Молотов, «О чудовищных злодеяниях», 28 апреля 1942 »

Заметно сильнее, чем в годы Первой мировой войны, стало и убеждение, что лидеры страны-противника сформировали преступный режим: что военные преступления являлись частью преднамеренной политики и что нацистские руководители являются теми, кто нёс наибольшую ответственность и заслуживал наиболее сурового наказания[16].

Начавшееся в конце войны освобождение концентрационных лагерей привёло к первому пониманию размера будущей проблемы ответственности за «политическую систему убийств». В годы войны правительства союзников также стали выдвигать угрозы наказания за военные преступления, что отражало как общественные настроения, так и надежду удержать отдельных акторов от новых преступных действий. Впервые в истории наказание за военные преступления стало не просто результатом самой войны, но было объявлено официальной политикой в ходе неё[16]. При этом сами формулировки призывов к правосудию — инициаторами которых выступали восточноевропейские правительства в изгнании, прежде всего правительства Польши и Чехословакии, — оставались расплывчатыми. Так в октябре 1941 года, когда Соединённые Штаты всё ещё формально были нейтральной державой, президент Франклин Рузвельт обратил внимание общественности на массовую казнь заложников во Франции и предупредил, что «однажды произойдёт ужасное возмездие». В том же месяце британский премьер-министр Уинстон Черчилль присоединился к Рузвельту — добавив, что «зверства, совершенные в Польше, Югославии, Норвегии, Голландии, Бельгии и, особенно, на русском фронте, превосходят всё, что было известно в самые мрачные и самые зверские эпохи человечества». Черчилль также отметил, что «наказание за эти преступления теперь должно считаться одной из главных целей войны». Британское правительство особенно остро отреагировало на казнь пяти десятков британских лётчиков, совершивших побег из лагеря для военнопленных «Stalag Luft III» в Загане. Кроме того, во время Варшавского восстания 1944 года союзники предупреждали национал-социалистические власти, что к захваченным польским солдатам следовало относиться как к законным комбатантам, то есть в рамках Женевской конвенции[16][24].

опрос о конкретных мерах наказания оставался открытым. В январе 1942 года представители девяти оккупированных стран Европы — Бельгии, Чехословакии, Греции, Люксембурга, Нидерландов, Норвегии, Польши, Югославии и Франции — провели в Лондоне конференцию, где затронули вопросы наказания. 13 января была опубликована совместная декларация, гласившая, что «международная солидарность необходима для того, чтобы избежать актов мести как ответа на акты насилия». Также предполагалось, что международная солидарность поможет «удовлетворить чувство справедливости, свойственное цивилизованному миру». Привлечение к ответственности не только тех, кто непосредственно совершал преступления, но и тех, кто их организовывал, также стало частью декларации (см. командная ответственность). Амбициозная Сент-Джеймская декларация[en] («Декларация, подписанная в Сент-Джеймском дворце») была одобрена правительствами

Великобритании, США и СССР, которые присутствовали на конференции в качестве наблюдателей, наряду с Китаем, Британскими Доминионами и Индией[16][25][26].

Комиссия ООН по военным преступлениям (UNWCC)

Основная статья: Комиссия ООН по военным преступлениям

Московская конференция (1943)

Основная статья: Московская конференция (1943)

Московская конференция (октябрь 1943)

Значительным шагом в прояснении ключевых вопросов деятельности UNWCC стала Московская конференция министров иностранных дел, состоявшаяся в конце октября 1943 года: после конференции Великобритания, СССР и США выпустили совместную декларацию, как осуждавшую «зверства нацистов» в оккупированной Европе, так и гласившую, что «германские офицеры и солдаты и члены нацистской партии... будут отосланы в страны, в которых были совершены их отвратительные преступления, для того чтобы они могли быть судимы и наказаны в соответствии с законами этих освобождённых стран». Ключевым же стало то, что лиц, «преступления которых не связаны с определённым географическим местом» (руководителей), предполагалось передать международному суду. Таким образом, министры иностранных дел создали две группы военных преступников и предложили две формы обращения с ними: (i) национальные действия для «локализованных» преступлений и (ii) международные действия против тех, чьи приказы исполнялись сразу в нескольких странах. Однако, сам термин «суд» в отношении второй группы не упоминался. Декларация, включавшая в список нацистских преступлений и Катынский расстрел, стала единственным влиятельным документом по вопросу о наказании преступников, опубликованным от имени трёх союзных держав в годы войны в Европе[38][39][40]. Идея расстрела руководства Третьего рейха на месте имела на тот момент множество сторонников — включая и госсекретаря США Корделла Халла. На Тегеранской конференции в конце 1943 года у участников сложилось впечатление, что советский лидер Иосиф Сталин был готов пойти дальше: он предложил тост «за то, чтобы над всеми германскими военными преступниками как можно скорее свершилось правосудие и чтобы они все были казнены». Советский лидер полагал, что расстрел 50 000 немецких руководителей был бы достаточно показательным (см. Катынский расстрел и репрессии в РККА); позднее Сталин и Молотов утверждали, что вся идея была только шуткой. Черчилль, присутствовавший на банкете, выразил своё несогласие со сталинским масштабом массовой казни, но не с самой идеей: в течение нескольких предшествующих месяцев он пытался настроить британский кабинет министров против любой формы судебного разбирательства — премьер предпочитал расстрел небольшой группы «архи-преступников» и министр иностранных дел Энтони Иден составил для него список из сорока одной фамилии[41][42][43].

И. Сталин в 1943 году

Расправа над Бенито Муссолини и Кларой Петаччи в апреле 1945 года, напоминавшая линчевание, вызвала в странах антигитлеровской коалиции некоторое возмущение своей формой — но не сутью. Так в марте 1945 года, отвечая в Палате общин на прямой вопрос, Иден передал решение о судьбе Адольфа Гитлера «тому британскому солдату», которому предстояло встретить фюрера. Подобное поощрение линчевания прямо нарушало действовавшие военные нормы, которые исключали расстрел на месте любых военнопленных, вне зависимости от их ранга или личного отношения[41][44].

Казнь Б. Муссолини (29 апреля 1945)

Кроме того, сам термин «суд» по-разному понимался участниками дискуссии: так британское министерство иностранных дел в 1944 году рассчитывало, что весь судебный процесс над руководителями Третьего рейха займет около шести часов. Роль политиков в процессе над нацистскими преступниками также была неясна: многим казался логичным аргумент, что вина Гитлера и его сподвижников не требовала доказательств (см. ссылка Наполеона Бонапарта на остров Святой Елены). В итоге — в связи с невысоким в годы войны приоритетом проблем, связанных с военными преступлениями — вплоть до окончания боевых действий каждая из основных возможностей: линчевание, формальный суд или полноценный процесс — оставалась открытой[41].

Высадка в Нормандии. Позиция США

Высадка союзников в континентальную Европу перевела проблему военных преступлений из теоретической в практическую: США и Великобритания встали перед необходимостью выработки согласованной политики в отношении главных военных преступников. Академическая дискуссия о понятии «военные преступления» получила с лета 1944 года фактическое воплощение. Будущий председатель UNWCC Райт в сентябре сообщал Черчиллю, что многие преступники просто сбегут, если не будут немедленно созданы механизмы для их поимки, удержания и суда; Райт предложил создать большое количество военных трибуналов. Черчилль передал письмо Идену, который осознал проблему и написал ответ, в котором предложил, что — поскольку армии союзников брали пленных — они должны быть снабжены списками разыскиваемых лиц и доказательствами их преступлений. Министерство иностранных дел таким образом впервые потребовало от UNWCC отчёта о её деятельности[45][43].

« Мы не хотим снова попасть в ловушку Первой мировой войны, когда мы не задержали разыскиваемых лиц ещё на стадии перемирия. — министр Иден, 1944 »

В этот период, 19—20 января 1946 года, в Токио был создан Международный военный трибунал для Дальнего Востока

18 мая 1946 года во Дворце правосудия прошло собрание Международной ассоциации по уголовному праву[en], организованное судьёй Вабром. Никитченко предложил собравшимся юристам разработать устав, чтобы донести цели своего союза до всех стран,

После вынесения приговора правительства СССР, США, Франции и Великобритании начали соревноваться друг с другом, чтобы определить наследие Нюрнберга через новые послевоенные институты, включая ООН. 11 декабря 1946 года Генеральная ассамблея ООН единогласно приняла резолюцию, которая подтвердила «принципы международного права, признанные statutum Нюрнбергского трибунала и нашедшие выражение в решении этого Трибунала». В 1950 году Комиссия международного права ООН приняла заявление, в котором были сформулированы данные «нюрнбергские принципы». Кроме того, ООН одобрила Конвенцию о геноциде в 1948 году, а через два года приняла Конвенцию о защите прав человека и основных свобод[227][228].

Практически каждая попытка применения международного уголовного права, предпринятая после 1946 года, сопровождалась ссылкой к Нюрнбергскому процессу и уставу МВТ: включая процесс в Мюнхене над Иваном Демьянюком в 2009—2011 годах, попытку привлечения к ответственности за нарушения прав человека корпорации в процессе[en] против Royal Dutch Petroleum в 2012—2014 годах и дело против конголезского полевого командира Томаса Лубанга Дыило[en] в 2009 году. Дыило стал первым человеком, приговорённым Международным уголовным судом (МУС) в Гааге — постоянным судебным органом, за создание которого на протяжении десятилетий выступал целый ряд нюрнбергских прокуроров[229][224]. Внимание международных трибуналов к высшим руководителям — а не к непосредственным исполнителям преступлений — начавшееся в Нюрнберге, было продолжено в трибуналах по бывшей Югославии (МТБЮ), Руанде (МТР) и Сьерра-Леоне (SCSL) [230].

Новая юридическая доктрина — членство в преступной организации — использованная МВТ, впоследствии была практически полностью отвергнута в международном праве. Однако на национальном уровне у данной доктрины появились аналоги: так, в 1970 году в США был принят закон RICO, который криминализовал любой вклад обвиняемого в деятельность группы, занятой рэкетом. Кроме того доктрина совместных преступных действий, применявшаяся МТБЮ, напоминала исследователям «спорные стратегемы [прокуратуры] в Нюрнберге»[231][232].

Работа нюрнбергского трибунала повлияла и на деятельность организаторов новых массовых убийств. После Нюрнбергского процесса у прокуроров, пытавшихся доказать виновность лидеров государств, обычно не было прямых доказательств того, что преступления были результатом исполнения распоряжений вышестоящих руководителей: руководители, за редкими исключениями, старались не оставлять никаких записей о подобных приказах. Так, свидетельские показания в МТБЮ подтвердили, что сербские чиновники «стирали записи и вычищали архивы» — а члены аргентинских военных хунт в ходе планирования «Грязной войны» прямо зафиксировали своё стремление избежать «ещё одного Нюрнберга». В начале XXI века суданские лидеры обратились за помощью к юристам — с целью провести этническую чистку в Дарфуре так, чтобы не продемонстрировать mens rea (умысел), достаточного для обвинения в геноциде[233].

Полная стенограмма была опубликована на всех четырёх официальных языках трибунала в сорока двух томах: 22 тома стенограмм и 20 томов представленных суду доказательств образовали «Голубую серию» (Blue Series).