HUMAN RIGHTS LAW NOTE

Chapter One: Introduction to Human Rights Law

1.1 Nature and Definition of Human Rights

Human rights are a special sort of inalienable moral entitlement. They attach to all persons equally, by virtue of their humanity, irrespective of race, nationality, or membership of any particular social group. Human rights belong to an individual as a consequence of being human.

The concept of human rights is based on the belief that every human being is entitled to enjoy her/his rights without discrimination.

Human rights differ from other rights in two respects. Firstly, they are characterised by being:

- Inherent in all human beings by virtue of their humanity alone (they do not have, *e.g.*, to be purchased or to be granted);
- Inalienable (within qualified legal boundaries); and
- Equally applicable to all.

The specific nature of human rights, as an essential precondition for human development, implies that they can have a bearing on relations both between the individual and the state, and between individuals themselves. The individual-state relationship is known as the 'vertical effect' of human rights vertical location has not elaborated to be clear for the students. While the primary purpose of human rights is to establish rules for relations between the individual and the state, several of these rights can also have implications for relations among individuals. This so-called 'horizontal effect' implies, among other things, that a government not only has an obligation to refrain from violating human rights, but also has a duty to protect the individual from infringements by other individuals. The right to life thus means that the government must strive to protect people against homicide by their fellow human beings.

1.2 Historical Development

1.2.1 Pre World War II Developments

The origins of human rights may be found both in Greek philosophy and the various world religions. In the Age of Enlightenment (18th century) the concept of human rights emerged as an explicit category. Man/woman came to be seen as an autonomous individual, endowed by nature with certain inalienable fundamental rights

that could be invoked against a government and should be safeguarded by it.

Before this period, several charters codifying rights and freedoms had been drawn up constituting important steps towards the idea of human rights. The first - were the *Magna Charta Libertatum* of 1215, *the Golden Bull* of Hungary (1222), the Danish *Erik Klippings Håndfaestning* of 1282, the *Joyeuse Entrée* of 1356 in Brabant (Brussels), the *Union of Utrecht* of 1579 (The Netherlands) and the English *Bill of Rights* of 1689. These documents specified rights, which could be claimed in the light of particular circumstances (*e.g*. threats to the freedom of religion), but they did not yet contain an all-embracing philosophical concept of individual liberty.

In the centuries after the Middle Ages, the concept of liberty became gradually separated from status and came to be seen not as a privilege but as a right of all human beings.

the work of Francisco de Vitoria (1486-1546) and Bartolomé de las Casas (1474-1566) should be highlighted. These two men laid the (doctrinal) foundation for the recognition of freedom and dignity of all humans by defending the personal rights of the indigenous peoples inhabiting the territories colonised by the Spanish Crown.

The Enlightenment was decisive in the development of human rights concepts. The ideas of Hugo Grotius (1583-1645), one of the fathers of modern international law, of Samuel von Pufendorf (1632-1694), and of John Locke (1632-1704) attracted much interest in Europe in the 18th century. Locke, for instance, developed a comprehensive concept of natural rights; his list of rights consisting of life, liberty and property. Jean-Jacques Rousseau (1712-1778) elaborated the concept under which the sovereign derived his powers and the citizens their rights from a social contract. The term human rights appeared for the first time in the French *Déclaration des Droits de l'Homme et du Citoyen* (1789).

All human beings are equal (American Declaration of Independence 1776) and it was based on the assumption that all human beings are equal. It also referred to certain inalienabe rights, such as the right to life, liberty and the pursuit of happiness.

1.2.2 Post World War II Developments

The atrocities of World War II put an end to the traditional view that states have full liberty to decide the treatment of their own citizens. The signing of the Charter of the United Nations (UN) on 26 June 1945 brought human rights within the sphere of international law.

ICCPR, ICESCR and UDHR form the International Bill of Human Rights.

Human rights have also been receiving more and more attention at the regional level. For example, in the European, the Inter-American and the African context, standards and supervisory mechanisms have been developed have already had a significant impact on human rights compliance in the respective continents, and promise to contribute to compliance in the future.

1.3.1 Classification of Human Rights

Although human rights have been classified in a number of different manners it is important to note that international human rights law stresses that all human rights are universal, indivisible and interrelated (*e.g.* Vienna Declaration and Programme of Action (1993), para. 5). The indivisibility of human rights implies that no right is more important than any other.

i. CLASSIC AND SOCIAL RIGHTS

One classification used is the division between 'classic' and 'social' rights. ' Classic' rights are often seen to require the non-intervention of the state (negative obligation), and 'social rights' as requiring active intervention on the part of the state, Classfying human rights in terms of negative and positive obligations may have its own defects for a certain right may involve both negative and positive obligations for its effective realization. In other words, classic rights entail an obligation for the state to refrain from certain actions, while social rights oblige it to provide certain guarantees. Lawyers often describe classic rights in terms of a duty to achieve a given result ('obligation of result') and social rights in terms of a duty to provide the means ('obligations of conduct'). The evolution of international law, however, has led to this distinction between 'classic' and 'social' rights has become increasingly awkward. Classic rights, such as civil and political rights, often require considerable investment by the state. The state does not merely have the obligation to respect these rights, but

must also guarantee that people can effectively enjoy them. Hence, the right to a fair trial, for instance, requires well-trained judges, prosecutors, lawyers and police officers, as well as administrative support.

On the other hand, most 'social' rights contain elements that require the state to abstain from interfering with the individual's exercise of the right. As several commentators note, the right to food includes the right for everyone to procure their own food supply without interference; the right to housing implies the right not to be a victim of forced eviction; the right to work encompasses the individual's right to choose his/her own work and also requires the state not to hinder a person from working and to abstain from measures that would increase unemployment; the right to education implies the freedom to establish and direct educational establishments; and the right to the highest attainable standard of health implies the obligation not to interfere with the provision of health care.

In sum, the differentiation of 'classic' rights from 'social' rights does not reflect the nature of the obligations under each set of rights.

i. CIVIL, POLITICAL, ECONOMIC, SOCIAL AND CULTURAL RIGHTS

Civil rights

The term 'civil rights' is often used with reference to the rights set out in the first eighteen articles of the UDHR, almost all of which are also set out as binding treaty norms in the ICCPR. From this group, a further set of 'physical integrity rights' has been identified, which concern the right to life, liberty and security of the person, and which offer protection from physical violence against the person, torture and inhuman treatment, arbitrary arrest, detention, exile, slavery and servitude, interference with one's privacy and right of ownership, restriction of one's freedom of movement, and the freedom of thought, conscience and religion.

The difference between 'basic rights' (see below) and 'physical integrity rights' lies in the fact that the former include economic and social rights, but do not include rights such as protection of privacy and ownership.

Although not strictly an integrity right, the right to equal treatment and protection in

law certainly qualifies as a civil right. Moreover, this right plays an essential role in the realisation of economic, social and cultural rights.

Another group of civil rights is referred to under the collective term 'due process rights'. These pertain, among other things, to the right to a public hearing by an independent and impartial tribunal, the 'presumption of innocence', the *ne bis in idem* principle and legal assistance (see, *e.g.*, Articles 9, 10, 14 and 15 of the ICCPR).

Political rights

In general, political rights are those set out in Articles 19 to 21 of the UDHR and also codified in the ICCPR. They include freedom of expression, freedom of association and assembly, the right to take part in the government of one's country, and the right to vote and stand for election at genuine periodic elections held by secret ballot (see Articles 18, 19, 21, 22 and 25 of the ICCPR).

Economic and social rights

The economic and social rights are listed in Articles 22 to 26 of the UDHR, and further developed and set out as binding treaty norms in the ICESCR. These rights provide the conditions necessary for prosperity and wellbeing. Economic rights refer, for example, to the right to property, the right to work, which one freely chooses or accepts, the right to a fair wage, a reasonable limitation of working hours, and trade union rights. Social rights are those rights necessary for an *adequate standard of living*, including rights to health, shelter, food, social care, and the right to education (Articles 6 to 14 of the ICESCR).

Cultural rights

The UDHR lists cultural rights in Articles 27 and 28. These include the right to participate freely in the cultural life of the community, to share in scientific advancement, and the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which one is the author (see also Article 15 of the ICESCR and Article 27 of the ICCPR).

ICCPRs are considered to be expressed in a very precise language, imposing merely negative obligations which do not require resources for their implementation, and which, therefore, can be applied immediately and they are justiciable (that only violations of civil and political rights

can be adjudicated by judicial or similar bodies). Whereas ICESCRs are considered to be expressed in vague terms, imposing only positive obligations conditional on the existence of resources and therefore involving a progressive realisation and they are not justiciable.

First, second and third generation rights

The division of human rights into three generations was first proposed by Karel Vasak at the International Institute of Human Rights in Strasbourg. His division follows the principles of *Liberté*, *Égalité* and *Fraternité* of the French Revolution.

First generation rights are related to liberty and refer fundamentally to civil and political rights. The second generation rights are related to equality, including economic, social and cultural rights. Third generation or 'cover group and collective rights, which include, *inter alia,* the right to development, the right to peace and the right to a clean solidarity rights' environment. The only third generation right which so far has been given an official human rights status - apart from the right to self-determination, which is of longer standing - is the right to development.

1.4 Sources of Human Rights Law

a) International conventions, whether general or particular;

b) International custom, as evidence of general practice accepted as law;

c) The general principles of law recognised by civilised nations;

d) Subsidiary means for the determination of rules of law such as judicial decisions and teachings of the most highly qualified publicists.

A. International Conventions

International treaties are contracts signed between states. They are legally binding and impose mutual obligations on the states that are party to any particular treaty (states parties). The main particularity of human rights treaties is that they impose obligations on states about the manner in which they treat all individuals within their jurisdiction.

i. UNIVERSAL CONVENTIONS FOR THE PROTECTION OF HUMAN RIGHTS

The UDHR, adopted by a resolution of the United Nations General Assembly (UNGA), although not a treaty, is the earliest comprehensive human rights instrument adopted by the international community. On

the same may that it adopted the Universal Declaration, the UNGA requested the UN Commission on Human Rights to prepare, as a matter of priority, a legally binding human rights convention. Wide differences in economic and social philosophies hampered efforts to achieve agreement on a single instrument, but in 1954 two draft conventions were completed and submitted to the UNGA for consideration. Twelve years later, in 1966, the International Covenant on Economic, Social 21 and Cultural Rights (ICESCR) and the International Covenant on Civil and Political Rights (ICCPR) were adopted, as well as the First Optional Protocol to the ICCPR, which established an individual complaints procedure. Both Covenants and the Optional Protocol entered into force in 1976. A Second Optional Protocol to the ICCPR, on the abolition of the death penalty, was adopted in 1989 and entered into force in 1991.

The 'International Bill of Human Rights' consists of the Universal Declaration of Human Rights, the ICESCR, and the ICCPR and its two Optional Protocols. The International Bill of Rights is the basis for numerous conventions and national constitutions.

II ***REGIONAL CONVENTIONS FOR THE PROTECTION OF HUMAN RIGHTS***

The UN Charter encourages the adoption of regional instruments for the establishment of human rights obligations, many of which have been of crucial importance for the development of international human rights law. The Council of Europe adopted in 1950 the European Convention for the Protection of Human Rights and Fundamental Freedoms, supplemented by the European Social Charter in 1961, the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment in 1987, and the Framework Convention on National Minorities in 1994.

The American Convention on Human Rights was adopted in 1969, under the auspices of the Organisation of American States. This Convention has been complemented by two protocols, the 1988 Protocol of San Salvador on Economic, Social, and Cultural Rights and the 1990 Protocol to Abolish the Death Penalty. Other Inter-American Conventions include the Convention to Prevent and Punish Torture (1985), the Convention on the Forced Disappearances of Persons (1994), and the Convention on the

Prevention, Punishment and Eradication of Violence against Women (1995).

In 1981, the Organisation of African Unity, now the African Union, adopted the African Charter on Human and Peoples' Rights. Two protocols to the Charter have been adopted: the Additional Protocol on the Establishment of the African Court on Human and Peoples' Rights (1998), and the Protocol on the Rights of Women in Africa (2003). Other African instruments include the Convention Governing the Specific Aspects of Refugee Problems in Africa (1969), and the African Charter on the Rights and Welfare of the Child (1990).

B. International custom

Customary international law plays a crucial role in international human rights law. The Statute of the International Court of Justice refers to 'general practice accepted as law'. In order to become international customary law, the 'general practice' needs to represent a broad consensus in terms of content and applicability, deriving from a sense that the practice is obligatory (*opinio juris et necessitatis*). Customary law is binding on all states (except those that may have objected to it during its formation), whether or not they have ratified any relevant treaty.

One of the important features of customary international law is that customary law may, under certain circumstances, lead to universal jurisdiction or application, so that any national court may hear extra-territorial claims brought under international law. In addition, there also exists a class of customary international law, *jus cogens*, or peremptory norms of general international law, which are norms accepted and recognised by the international community of states as a whole as norms from which no derogation is permitted. Under the Vienna Convention on the Law of Treaties (VCLT) any treaty which conflicts with a peremptory norm is void.

C. General principles of law

In the application of both national and international law, general or guiding principles are used. In international law, they have been defined as 'logical propositions resulting from judicial reasoning on the basis of existing pieces of international law'. At the international level, general principles of law occupy an important place in case-law regarding human rights. A clear example is the principle of proportionality, which is important for human rights supervisory mechanisms in assessing whether

interference with a human right may be justified.

Therefore, rules of law or principles that enable decision-makers and members of the executive and judicial branches to decide on the issues before them are needed.

General principles of law play two important roles: on the one hand, they provide guidelines for judges, in particular, in deciding in individual cases; on the other hand, they limit the discretionary power of judges and of members of the executive in their decisions in individual cases.

D. Subsidiary means for the determination of rules of law

According to Article 38 of the Statute of the International Court of Justice, *judicial decisions and the teachings of the most qualified publicists* are 'subsidiary means for the determination of rules of law'. Therefore, they are not, strictly speaking, formal sources, but they are regarded as evidence of the state of the law.

Chapter Two: Human Rights Systems :(Substantive Rights, Institutions and Procedures)

2.1 The Universal System: The UN System

2.1.1 The Legal Framework

A. The UN Charter

Adopted on 26 June 1945, the United Nations Charter was designed to establish the foundations of a new peaceful world order.

Drawing lessons from the appalling atrocities of the Second World War, the Charter's primary aim was thus to save succeeding generation from the scourge of war (preamble, paragraph 2) and to ensure the maintenance of international peace and security.

As reflected in the preamble to the Charter, the United Nations were guided, among others, by the motive to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small (preambular paragraph 3).

B The UDHR

The Declaration was adopted on 10 December 1948 during the third session of the Assembly at the Chaillot Palace in Paris.

The Declaration was adopted by forty-eight votes in favor, none against and eight abstentions (Byelorussia, Czechoslovakia, Poland, Saudi Arabia, South Africa, Ukraine, USSR and Yugoslavia).

The Universal Declaration was adopted through Resolution 217(III) which contained five parts: Part A, the text of the Declaration as such; Part B, Right of Petition; Part C, Fate of Minorities; Part D, Publicity to be Given to the Universal Declaration of Human Rights; and Part E, preparation of a Draft Covenant on Human Rights and Draft Measures of Implementation. Contained in part A of Resolution 217(III), the Universal Declaration is made up of the Preamble and 30 articles which comprise its operative part.

The Preamble to the Declaration is significant for several reasons.

- ✓ The Preamble refers to the concepts of inherent human dignity and the inalienable nature of human rights as the philosophical sources of the Declaration and inspirations for further development of human rights.
- ✓ The Preamble also reflects its pre-1945 roots by pointing out that disregard and contempt for human rights have resulted in barbarous acts which have outraged the conscience of mankind.
- ✓ Another important element of the Preamble is the recognition, in its final paragraph, of the rights and freedoms contained in the Declaration as a common standard of achievement for all peoples and nations.

The operative part of the Declaration can be divided into three groups of provisions.

- ✓ The first group (Article 1) contains an affirmation of the philosophical foundations of human rights by saying that all human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.
- ✓ The second group of provisions proclaims a number of general principles. One is the principle of equality and non-discrimination

(Article 2), the principle that plays a fundamental role in the whole of human rights law. The second principle relates to the concept of the duties of States in the form of 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 (Article 28).

- ✓ The third principle spells out a concept of the duties of everyone to the community (Article 29(1)) and permissible limitations in the exercise of the human rights and freedoms (Article 29(2)).
- ✓ And the fourth principle provides for the prohibition of activates by any State, group or person aimed at the destruction of the rights and freedoms set fourth in the Declaration (Article 30).

The legal and political status and significance of the UDHR.

There are, however, ongoing discussions among legal scholars as to whether the Declaration has, over the years, become a legally binding instrument. Proponents of the binding character of the Declaration argue for its status as a customary law. Opponents of such a view submit that the establishment of a customary international legal rule requires the existence of general, uniform and consistent practice by States followed by the mergence of an opino iuris that is of a conviction or belief by States in the obligatory character of such a practice.

By the adoption of the Universal Declaration, Members of the United Nations have made a political commitment to implement the rights contained therein. The legal and political significance of the Universal Declaration may be illustrated by several development and tangible achievements. As a universally accepted normative reference system, the Declaration permeated
domestic legal systems of numerous States by the incorporation of its provisions into national constitutions and other legislative instruments.

On the international level, the Declaration has established the very first international catalogue of human rights as a common standard of achievement for all peoples and all nations. This model catalogue may thus be said to play also the role of the first definition of human rights, the definition which is missing from the UN Charter. The

legal and political significance of such a function of the Declaration has further been strengthened by its adoption by the General Assembly of the United Nations. Consequently, the definition and catalog of human rights in the Declaration may safely be regarded as a quasi-authentic interpretation of the human rights provisions of the UN Charter. The universal message reflected in the Declaration is further strengthened by the fact that some of its provisions constitute general principles of law or represent elementary considerations of humanity.

Another important aspect in the adoption of the Universal Declaration has been the establishment of the basis for further international law-making in the field of human rights. This contribution has gone well beyond the program of the International Bill of Human Rights. In addition to the adoption of both the International Covenants on Human Rights in 1966, the Universal Declaration exerted a profound impact on the content and scope of other human rights instruments organizations. This impact may be identified not only in explicit references to the Declaration, contained usually in preambles, but above all in the very formulation of specific rights and freedoms.

The significance of the Universal Declaration has not been confined solely to influencing international standard-setting in the field of human rights. It has also created opportunities for developing international procedures and mechanisms for the implementation of human right's In the United Nations, the Declaration has become the main basis and references sources for establishing the communications and investigative procedures.

Similarly, the significance of the implementation of the Declaration has been explicitly emphasized in the Preamble to the European Convention for the Protection of Human Rights and Fundamental Freedoms, whose signatory governments declared their resolve to take the first steps for the collective enforcement of certain of the rights stated in the Universal Declarations.

The Universal Declaration of Human Rights should, therefore, be seen above all as a document that has exerted a profound and comprehensive impact internationally and domestically in furthering the promotion and protection of human rights. Its

inspirational role has not yet been exhausted.

C. The Covenants on Civil a political and Economic, social and Cultural Rights

As of January 2001, 146 states are parties to the Covenant on Civil and Political rights and 142 states to the covenant on Economic, Social and Cultural Rights.

The two covenants contain some identical or similar provisions, such as the right to self-determination (Article 17 both covenants) and the principle of non-discrimination (Article 2 of both covenants). Also the safeguard clauses that the rights should not be used as a pretext for the destruction of other rights, are the same (Article 5 of both covenants).

- **The International Covenant on Civil and Political Rights**

The International Covenant on Civil and Political Rights contains 53 articles, of which 27 are of a normative character. It also consists of a first optional protocol adopted at the same time as the Covenant in 1906, establishing a procedure for individual complaints, and a second optional protocol, adopted in 1989 aiming at the abolition of the death penalty. As of January 2001, 98 states are parties to the first protocol and 45 states to the second.

The International Covenant on Economic, Social and Cultural Rights

The International Covenant on Economic, Social, and Cultural Rights consists of 31 articles, of which the first 15 are of a normative character and the last 16 of a more procedural nature. In its normative articles it sets out many of the fundamentals for the well being and prosperity of an individual. Each state party is under an obligation to undertake steps “to the maximum of its available resources with a view to achieving progressively the full realization of the rights recognized in the present covenant, by all appropriate means, including particularly the adaption of legislative measures” (Article 27 the Covenant). A core provision is Article 11, which recognizes the rights of everyone to an adequate standard of living, including adequate food, clothing and housing, and to the continuous improvement of living conditions.

D The International Convention on the Elimination of All Forms of Racial Discrimination

In 1969, seven years before the afore discussed two covenants entered into force, the International Convention on the Elimination of All Forms of Racial Discrimination (CERD) entered into force after having been adopted in 1965 by the General Assembly. The Convention, which as of January 2001 has 156 states parties, was the first United Nations human rights instrument outside the provisions on Human Rights in the Charter that established an international monitoring system, including a procedure for individual complaints.

The Convention contains 25 articles, of which the first seven articles are of a normative character. A broad definition of racial discrimination is found in Article 1, and the Convention sets out a number of detailed prohibitions and obligations to prevent discrimination based on the grounds of race, color, descent, or national or ethnic origin. States are under an obligation to criminalize dissemination of ideas based on racial superiority and hatred and participation in racial organizations or activities.

E The Convention on the Elimination of Discrimination against Women

The commission on the status of women was established in the early days of the United Nations, in 1943. In 1967, the General Assembly adopted the Declaration on the Elimination of Discrimination Against Women (CEDAW). This was a reaction based on a growing concern that additional means for promoting and protecting equal enjoyment of human rights by women is necessary.

The Convention was adopted by the General Assembly in 1979, which is entered into force in 1981, and has as of January 2001 165 states parties.

The Convention consists of 30 Articles, of which the first 16 are of a normative character. The definition of discrimination against women, contained in the first article, is more detailed than in many other discrimination clauses. It was inspired by the definition of racial discrimination as contained in the convention on that subject. In both its definition and in other provisions the convention on the elimination of All Forms of Discrimination Against Women (Article 18 of the Convention) reflects the

depth of exclusion and restriction practiced against women because of their sex. It identifies many areas where there have been a notorious discrimination against women; for example in regard to political and civil rights, economic rights and employment. It calls for equal rights for women, regardless of their marital status. It calls for national legislation to ban discrimination. It allows for temporary special measures to accelerate the achievement of equality between men and women. The Convention recognizes that, even if women's equality is guaranteed by law and special measures taken in order to promote a de facto equally, there is still a necessity to take measures to remove the social, cultural and traditional patterns which perpetuate gender-role stereotypes and to create an overall framework in society that promotes the equal rights and responsibilities between men and women, including shared responsibilities in the domestic sphere. The Convention provides for equal rights of women in political and public life, equal access to education and employment, equality in access to health facilitates and an end to discrimination in the field of finance and areas of economic and social rights. The Convention also stresses the need to eliminate discrimination in all matters relating to marriage and family related matters and stresses the social services needed especially childcare facilities for a full participation of women in public life.

The issues of gender-based violence are not specifically addressed in the convention. The committee set up under the convention has also addressed this subject in its General Recommendation of Article 19, in which it formally extends the general prohibition on gender-based discrimination to include gender-based violence.

F The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

In 1966, with the adoption of the Covenant on Civil and Political Rights, the international community unequivocally repeated the prohibition against torture. Efforts continued to reach further through developing specific and detailed measures, of normative, practical and remedial nature, against torture and ill-treatment. In 1975 the General Assembly adopted a Declaration on the Protection of All Persons from being subjected to Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, which contained in its first article a definition of the term "torture."

Another way to proceed was to address the behavior of the various professional groups that normally were directly exposed to situations where acts of torture or ill-treatment might occur. In 1979, a code of conduct for Law Enforcement Officials was adopted by the General Assembly, which prescribes that "no law enforcement official may inflict, instigate or tolerate any act of torture or other cruel, inhuman or degrading treatment or punishment, nor --- invoke superior orders or exceptional circumstances such as state of war or threat of war, a threat to national security internal political instability or any other public emergence as a justification of such acts." (Article 5 of the Code of Conduct for Law Enforcement Officials). In 1982 the General Assembly adopted the 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, in human or degrading treatment or punishment.

On 10 December, 1984, another major step was taken when the General Assembly adopted the Convention Against Torture on Other Cruel, Inhuman or Degrading Treatment or Punishment, which entered into force in 1987. The Convention has, as of January 2001, 122 states parties. The provisions in this Convention build on elements from the other instruments mentioned above. The Convention provides for a definition of torture in its first article, which includes intentional acts for certain enumerated reasons which causes severe pain or suffering of physical or mental nature for a persons, "When such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public, official or other person acting in an official capacity" (Article 1 of the Convention Against Torture). During the negotiations a group of countries insisted on adding a clause explicitly precluding pain or suffering arising from lawful sanctions, an exception not found in earlier instruments containing provisions relating to torture (Article 1 of the Convention).

G The Convention of the Right of the Child

The Convention was adopted by the General Assembly in 1989, and entered into force in 1990. It soon received unprecedented support and achieved unique political commitments, *inter alia*, evidenced at the World Summit for Children in New York in 1990 and the World Conference on Human Rights in Vienna in 1993. The Convention

on the Rights of the Child is the first specific Human Rights treaty that has achieved an almost Universal adherence. As of January 2001 it has 190 states parties and only the United States and Somalia have failed to accede to the Convention.

The Convention consists of 54 articles, of which the first 42 are of a normative character. The Convention is all encompassing and sets up a holistic approach where civil, political, economic, social and cultural rights are included, all being of importance for safeguarding the dignity of the child and a harmonious development of his personality. A child is defined as "every human being below the age of eighteen years. Unless, under the law applicable to the child, majority is attained earlier" (Article 1 of the Convention).

Four general principles have guided the authors of the Convention, and later been highlighted by the committee on the Rights in the General Guidelines as the core message of the Convention. Firstly, the principle of the full and equal value of children and that each child shall enjoy the rights set out in the convention without discrimination (Article 2 and 4 of the Convention.) Secondly, the principle that in all actions concerning children the best interest of the child shall be the primarily consideration (Article 3 of the Convention). Thirdly, the principle of the right to life does not only entail the right to be protected against being killed but a right to survival and development (Article 6 of the Convention). Fourthly, the principle that children, who are capable of forming their own views, shall also have the right to participate and express their views, which shall be duly respected (Article 12 of the Convention).

2.1.2 Reservations and Declarations

When becoming party to a treaty, a state may, by formulating reservations, declarations and interpretative statements, seek to limit its domestic application beyond what is permissible under the limitations referred to above.

2.1.2.1 Reservation

In general terms, a reservation is a statement made by a state by which it purports to exclude or alter the legal effect of certain provisions of a treaty in their application to that state. A reservation may enable a state to participate in a multilateral treaty that it

would otherwise be unable or unwilling to participate in.

A state may, when signing, ratifying, accepting, approving or acceding to a treaty, formulate a reservation unless:
(a) The reservation is prohibited by the treaty;
(b) The treaty provides that only specified reservations, which do not include the reservation in question, may be made; or
(c) In cases not falling under subparagraphs (a) and (b), the reservation is incompatible with the object and purpose of the treaty.

Unless expressly permitted by a treaty, the effectiveness of a reservation is dependent on its acceptance by other states parties, and any other state party may object to it. As a rule, a reservation is considered accepted by another state party if that state party has raised no objection within twelve months after it has been notified of the reservation (Article 20(5)VCLT).

Article 57(1) of the ECHR prohibits reservations 'of a general character'.

2.1.2.2 Declarations

Some conventions allow or even require states parties to make declarations concerning the extent to which they are bound by a certain provision. Such statements may relate to the competence of a supervisory mechanism. For instance, Article 41 ICCPR stipulates that a state party may choose (not) to recognise the competence of the Human Rights Committee to receive state complaints regarding its human rights performance. This type of declaration, as provided by the instruments, does not pose major problems. However, a state party may also make interpretative declarations, otherwise known as understandings, whereby it does not intend to modify or limit the provisions of the treaty, but indicates merely how it interprets a particular article. Such interpretative declarations may raise certain problems in international law as to their differentiation with reservations.

One of the major differences between a 'reservation' and an 'interpretative declaration' lies in the author's purpose in making that declaration. While a reservation seeks to exclude or modify the legal effect of the treaty's provisions in their application to the state author, the interpretative declaration seeks only to clarify the meaning or scope of the treaty provisions.

2.1.3 Restrictions and Derogations

2.1.3.1 Restrictions

Conventions and other instruments may contain a number of restrictions or limitations to the rights they stipulate. It is generally accepted that only few rights and freedoms are 'absolute'. At the same time, such restrictions must be used only to establish the proper limits of the protected right and not as an excuse for undermining the right itself or destroying it altogether. In general, there must be a proportionate relationship between the restriction of the right as such and the reason for the restriction.

Article 32(2) of the American Convention on Human Rights (ACHR): 'The rights of each person are limited by the rights of others, by the security of all, and by the just demands of the general welfare, in a democratic society'.

The African Charter on Human and Peoples' Rights does not contain a specific provision on restrictions but Article 27(2) on 'duties' has come to play the role of a general limitation clause providing: 'The rights and freedoms of each individual shall be exercised with due regard to the rights of others, collective security, morality and common interest.'

Most human rights treaties contain specific provisions in various individual articles, which specify the limitations and restrictions that are allowed on the particular right. Such specific limitation clauses include 'prescribed by law', 'in a democratic society', 'public order (*ordre public*)', 'public health', 'public morals', 'national security', 'public safety' and 'rights and freedoms of others'. For a few rights, such as freedom from torture or slavery, no limitations have been formulated.

When a right is subject to a limitation, no other limitations are permitted and any limitation must comply with the following minimum requirements:

- The limitation must not be interpreted so as to jeopardise the essence of the right concerned;
- The limitation must be interpreted strictly in the light and context of the particular right;
- The limitation must be prescribed by law and be compatible with the object and purpose of the instrument;

- The restriction must be based on a law;
- The restriction must be necessary; there must be a pressing social need, assessed on a case-by-case basis. That the law would be useful is in itself not sufficient; it must be consistent with other protected rights. In some treaties, the condition that it be 'necessary' (in a democratic society) is added; and
- The restriction must be justified by the protection of a strictly limited set of well-defined public interests, which usually includes one or more of the following grounds: national security, public safety, public order (*ordre public*), the protection of health or morals, and the protection of the rights and freedoms of others.

In sum, any restriction on the enjoyment of the rights enshrined in human rights instruments must be legally established, non-discriminatory, proportional, compatible with the nature of the rights, and designed to further the general welfare. Finally, it is also important to stress that the burden falls upon states parties to prove that a limitation imposed upon the enjoyment of the rights is legitimate. This is, of course, a heavy burden of proof, but it is consistent with the object and purpose of human rights treaties to protect the individual.

2.1.3.2 Derogations

Some human rights instruments allow states to take measures derogating temporarily from some of their obligations. Derogating measures must be of an exceptional and temporary nature. There are derogation clauses in, *inter alia*, Article 15 of ECHR, Article 27 of ACHR and Article 31 of European Social Charter. Some human rights instruments, such as the Convention on the Right of the Child, the ICESCR, and the African Charter on Human and Peoples' Rights, do not contemplate any derogation clause.

The rationale for derogation provisions is to strike a balance between the sovereign right of a government to maintain peace and order during public emergencies, and the protection of the rights of the individual from abuse by the state.

When derogation measures are allowed, such derogations have to meet several criteria:

- There must be a war or general state of emergency threatening the life of the nation;
- The state of emergency must be officially proclaimed;
- Measures may not go beyond the extent strictly required by the situation;
- Measures may not be inconsistent with other obligations under international law; and
- Measures may not be discriminatory solely on grounds of race, colour, sex, language, religion or social origin.

❖ **Institutions and Procedures**

The numerous human rights conventions under the framework of the United Nations and the regional systems in Africa, the Americas and Europe have led to the creation of a wide range of mechanisms for monitoring compliance with the standards agreed upon.

There are two distinctive types of supervisory mechanism:

a) Treaty-based mechanism: supervisory mechanisms enshrined in legally binding human rights instruments or conventions. Within the UN framework these mechanisms are often called 'treaty bodies', *e.g.*, the Human Rights Committee and the Committee on the Rights of the Child. The African Commission and future Court on Human and Peoples' Rights, the European Court and commission of Human Rights and the Inter-American Court and Commission of Human Rights are also treaty bodies.

b) Non-treaty- based mechanisms: supervisory mechanisms not based on legally binding human rights treaty obligations. Generally, this type of mechanism is based on the constitution or charter of an intergovernmental human rights forum, or on decisions taken by the assembly or a representative body of the forum in question. Under the UN framework, the non-treaty-based mechanisms are referred to as 'charter-based' mechanisms, which include the 1503 procedure

and the country mandates. The European Commission against Racism and Intolerance under the Council of Europe is also an example of a regional non-treaty based mechanism.

2.1.3.3 Treaty Based Mechanisms

The six most well-known human rights treaties are the two Covenants (ICESCR and ICCPR), CERD, CEDAW, CAT and **CRC**. In addition, mention should be made of the CMW, which entered into force in 2003.

Each of these conventions has a supervisory body. These bodies consist of a number of experts of a high moral character and recognised competence in the field of human rights. They act in their personal capacity, which means that although they are normally nationals of a state party to the treaty in question, they are not acting under instructions from respective governments.

The various supervisory procedures established in human rights treaties can be divided into four main groups:

- Reporting procedures
- Inter-state complaint procedure
- Individual complaint procedure
- Inquiries and other procedures

➢ **Reporting procedures**

Most human rights treaties include a system of periodic reporting. States parties to them are obliged to report periodically to a supervisory body on the implementation at the domestic level of the treaty in question.

In general, reporting procedures under the different treaty-based mechanisms are meant to facilitate and initiate a 'dialogue' between the supervisory body and the State Party.

. In addition to the government report, the treaty bodies receive information on a country's human rights situation from other sources, including non-governmental organisations, UN agencies, other intergovernmental organisations, academic institutions, and the press.

All UN human rights conventions contain a reporting procedure: Article 16 of ICESCR, Article 40 of ICCPR, Article 9 of CERD, Article 19 CAT, Article 44 of CRC, Article 18 of CEDAW and Article 73 of CMW.

➢ **Inter-state-complaint procedure**

Some human rights instruments allow states parties to initiate a procedure against another state party, which is considered not to be fulfilling its obligations under the instrument. In most cases, such a complaint may only be submitted if both the claimant and the defendant state have recognised the competence of the supervisory body to receive this type of complaint.

The possibility to lodge complaints against another state party is contemplated in, *inter alia*, Article 41 of ICCPR; Article 21 of CAT; Article 11 of CERD. In practice, inter-state complaint mechanisms are seldom used. Inter-state relationships are delicate and inter-state mechanisms may not be ideal procedures as states bringing complaints may elicit reprisals. In addition, many states have not recognised the competence of the supervisory bodies to receive inter-state complaints.

- **Individual complaint procedure**

It seems reasonable that individuals, on whose behalf human rights were stipulated in the first place, should be enabled to initiate proceedings to protect their rights. Such a procedure, whereby an individual holds a government directly accountable before an international supervisory body aims to afford far-reaching protection to the individual. In order for an individual to bring a case/communication/petition under a human rights convention, the following requirements have to be met: a) the alleged violating state must have ratified the convention invoked by the individual; b) the rights allegedly violated must be covered by the convention concerned; and c) proceedings before the relevant body may only be initiated after all domestic remedies have been exhausted.

At the UN level, individual complaint mechanisms are found under five conventions: in the First Optional Protocol to the ICCPR; Article 22 of CAT; Optional Protocol to the CEDAW; Article 14 of CERD and Article 77 of CMW.

The two major stages in any case are known as the 'admissibility' stage and the 'merits' stage. The 'admissibility' of a case refers to the formal requirements that the complaint must satisfy before the relevant committee can consider its substance. The 'merits' of the case are the substance, on the basis of which the committee decides whether or not the rights under a treaty have been violated.

- **Inquiries and other procedures**

, for instance, act upon receipt of complaints or take an initiative itself. It may also initiate a visit *in loco* to gather information, or do so as part of a regular visit-programme. One example of a visit-programme - an enquiry – and *in loco* visits procedure - is that set out in Articles 126 and 132 of the Third Geneva Convention (1949), and the provision in Article 143 of the Fourth Geneva Convention providing for on-site visits to

places of internment or detention. Mention should also be made of the International Fact-Finding Commission established under Article 90 of Protocol I to the Geneva Conventions

2.1.4.2 Non-treaty Based (Charter Based) Mechanisms

A. International Court of Justice (ICJ)

The International Court of Justice is the principal judicial organ of the United Nations. Its statute is an integral part of the charter of the United Nations and, consequently, all member states of the United Nations are ipso facto parties to the statue of the court. Only states may be parties in cases before the courts and the jurisdiction of the court will comprise all cases which the parties refer to it. In addition, states parties to the statute may at any time declare that they recognize as compulsory ipso facto and without special agreement, in relation to any other state accepting the same obligation, the jurisdiction of the court in all legal disputes concerning: (a) the interpretation of a treaty; (b)any fact which, if established, would constitute a breach of an international obligation; and (d) the nature or extent of the reparation to be made for the breach of an international obligation.

B. Security Council

Under the charter of the United Nations member states have conferred on the Security Council primary responsibility for the maintenance of international peace and security and have agreed that in carrying out its duties under this responsibility the Security Council acts on their behalf. The Security Council may investigate any dispute, or any situation which might leads to international friction or give rise to a dispute, in order to determine whether the continuance of the dispute or situation is likely to endanger the maintenance of international peace and security. Any member of the United Nations may bring such dispute to the attention of the Security Council. When the Security Council determines the existence of any threat to the peace, breach of peace, or act of aggression, it may make recommendations, or decide what measures shall be taken to maintain or restore international peace and security measures which the security council may initially take include complete or partial interruption of economic relations and of rail, sea, air postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations.

C United Nations General Assembly

One of the functions of the United Nations General Assembly is to initiate studies and make recommendations for the purpose of 'assisting in the realization of human rights and fundamental freedoms for all without distinction as to race, languages or religion. Such matters are usually referred by the General Assembly to its Third Committee which deals with social, humanitarian and cultural matters.

The General Assembly has established a number of subsidiary organs which are concerned with human rights. These include;

(a) The International Law Commission; whose object is the promotion of the progressive development of international law and its codification. Among the international human rights instruments it has prepared are the Genocide Convention, the Refugees Convention, the Conventions Relating to the Status of Stateless Persons and the Reduction of Statelessness, the Declaration on Territorial Asylum, and the Statute of the Office of the United Nations High Commissioner for Refugees.

(b) The Office of the United Nations High Commissioner for Refugees, which provides protection and assistance for refugees and other displaced persons.

(c) The Special Committee on Declaration, or the 'Committee 24', whose principal function is to monitor the implementation of the Declaration on the Granting Independence to Colonial Countries and Peoples.

(d) Committee on the Exercise of the Inalienable Rights of the Palestinian People, which was required to consider and recommended to the General Assembly a programme of implementation designed to enable the Palestinian People to exercise 'its inalienable rights in Palestine; including the right to self determination and the right to return to their homes and property from which they had been displaced and uprooted.

D. Economic and Social Council

The Economic and Social Council is authorized by the charter of the United Nations to make recommendations for the purpose of promoting respect for, and observance of human rights and fundamental freedoms for all."

2.2 Regional Human Rights systems

2.2.1 The European Human Rights System

The statute creating the Council of Europe was signed in London on 5 May 1949. A common history and shared cultural traditions, coupled with what was perceived as a growing threat to their accustomed way life from an alien transplanted ideology, enabled its member states, barely two years after the proclamation of Human Rights and Fundamental Freedoms, (ECHR). Twelve states signed the EHCR in Rome on 4 November 1950. It entered into force in September 1953, and has now been ratified by all member states.

2.2.2 The Inter-American Human Rights System

The Charter of the Organization of American States (OAS) was singed on 30 April 1948 at the Ninth International Conference of American States convened in Bogota. The Charter enters into force on 13 December 1951. Its preamble stated that 'the historic mission of American is to offer to man a land of liberty, and a favorable environment for the development of his personality and the realization of his just aspirations,' and that 'the true significance of American solidarity and good neighborliness can only mean the consolidation on this continent, within the framework democratic institutions, of a system of individual liberty and social justice based on respect for the essential rights of man.'

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2.2.3 The African Human Rights System

The other regional human rights instrument is the African Charter on Human and Peoples' Rights (ACHPR). The initiative for an African Human Rights Charter was taken at a meeting of African jurists, the African Conference on the Rule of Law, convened by the International Commission of Jurists (ICJ) in Lagos in 1961.

In 1998, the thirty-fourth summit of Head of State and Government of the OAU adopted a protocol to the ACHPR for the establishment of an African Court on Human and People's Rights.

2.2.4 The Arab and Asian Human Rights Systems

The Arab and Asian states have not yet created regional human rights regimes, but some steps have been taken in that direction. In 1968, the Council of the Arab League

adopted a resolution relating to the creation of a Permanent Arab Commission on Human Rights. On September 15, 1994, the League of Arab States approved an Arab Charter on human Rights building on earlier texts adopted by regional non-governmental organizations and inter-governmental organizations. The Charter has not yet entered into force. It requires acceptance by seven states before it comes into force. As of January 1, 1998, only Egypt had ratified the Charter. Iraq signed it on February 5, 1996.

In Asia, despite efforts by NGOs and the U.N., governments in the region have been unwilling in general to ratify global human rights instruments, or create a regional human rights system. As of March 1998, for instance, 27 states in the region, including virtually all Pacific Island States, had not signed or ratified either the UN Covenants or the Torture Convention. The vastness of geographical scope of the region, the vast differences in culture, language, political ideology and economic development among nations, the recent economic crisis in Asia, coupled with a lack of a regional organization, constitute serious hurdles to the creation of an Asian- Pacific regional system. However, with ongoing effort by the UN, NGOs and political movements to enhance human rights respect and awareness in the region through the dismantling of the concept of "Asian values" which states often use to limit human rights, the opportunity to create a regional system may improve in the future.

Chapter three: Systems of Protection for Vulnerable Groups

This part focuses on groups that are especially vulnerable to abuse of human rights; groups that have difficulties defending themselves and are therefore in need of special protection. Twelve groups are discussed: 1) women and girls; 2) children; 3) refugees; 4) internally displaced persons; 5) stateless persons; 6) national minorities; 7) indigenous peoples; 8) migrant workers; 9) disabled persons; 10) elderly persons; 11) HIV positive persons and AIDS victims.

3.2 The rights of the child

Every child has the right to grow to adulthood in health, peace and dignity. Young children are vulnerable and dependent on adults for their basic needs, such as food, health care and education.

Intenational Human Rights Standards

In 1924, the League of Nations adopted a Declaration on the Rights of the Child (Declaration of Geneva), containing five basic principles reflecting the clear consensus that children were in need of special protection. In 1959, the UNGA unanimously adopted another more elaborate Declaration on the Rights of the Child, stating in the preamble that 'the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth'.

Serious work on drafting a convention on the rights of the child began in the final years of the 1970s, resulting in the UNGA adoption of the Convention on the Rights of the Child (CRC) on 20 November 1989. The Convention entered into force on 2 September 1990 and a few years later the majority of the world's states had ratified it. As of July 2004, 192 states had ratified the Convention, making the CRC the most universally accepted human rights treaty ever drafted. The United States and Somalia are the only UN members, which have not ratified the Convention.

The Convention is meant to be all encompassing and sets out civil, political, social, economic and cultural rights for 'every human being below the age of eighteen years, unless under the law applicable to the child, majority is attained earlier' (Article 1). Four general principles have guided the authors of the Convention:

· The principle of non-discrimination (Article 2);
· The best interests of the child (Article 3);
· The right to life, survival and development (Article 6); and
· Respect for the views of the child (Article 12).

Supervision

The CRC establishes the Committee on the Rights of the Child to supervise the progress made by the states parties in achieving the realisation of their obligations contained in the Convention. The Committee is composed of ten multidisciplinary experts from fields such as international law, medicine, education and sociology, whose main task is to review reports submitted by states on actions they have taken to implement the Convention, as it has no competence to receive individual complaints.

3.3 Minority protection regime

3.4 The rights of indigenous people

Indigenous peoples have only after World War II become the subject of international human rights debate. There have been numerous attempts to formulate a definition of the term 'indigenous peoples', but a generally accepted definition has not emerged.

In his Study of the Problem of Discrimination Against Indigenous Populations, the rapporteur of the Sub-Commission, Mr Martinez Cobo, has formulated a definition, which features the most important characteristics:

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

Looking at Mr Martinez Cobo's definition and the ILO Conventions mentioned below, a number of characteristics can be distinguished:

- Indigenous peoples have a strong affinity with the land they live on. Their environment is essential for their survival as a cultural entity; it is decisive for their social and cultural conditions;
- They are not dominant in their present national society, usually they have little if any influence on state policy;
- They generally speak their own language and have common cultural qualities; and
- Their political/organisational structure is generally of a decentralised nature.

International Human Rights Standards

The first international standard on indigenous populations was ILO 107 (1957), revised and reformulated in 1989 and amended in ILO 169. In this Convention, a definition of indigenous peoples is given in Article 1(1):

a) Tribal peoples in independent countries whose social, cultural and economic conditions distinguish them from other sections of the national community, and whose status is regulated wholly or partially by their own customs or traditions or by special laws or regulations.

b) Peoples in independent countries who are regarded as indigenous on account of their descent from the populations which inhabited the country, or a geographical region to which the country belongs, at the time of conquest or colonisation or the establishment of present state boundaries and who, irrespective of their legal status, retain some or all their own social, economic, cultural and political institutions.

Supervision

At the UN treaty-based level, the Human Rights Committee has been called upon several times by indigenous persons to decide on possible infringements of their human rights. A number of cases have involved complaints relating to the preservation of culture of indigenous groups, language rights and access to effective remedies. Issues include dispossession by the state of the ancestral land of indigenous groups; legality of rules stipulating loss of membership in an indigenous minority following marriage to a non-indigenous person; forced use of language other than the indigenous language during official court proceedings; indigenous rights to natural resources; and state interference with traditionally indigenous lands.

Three charter-based bodies have been established to deal with issues relating to indigenous peoples at the UN: a) the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People, b) the Working Group on Indigenous Populations, and c) the Permanent Forum on Indigenous Issues.

Rapporteur has under his mandate addressed a wide range of human rights issues. He has, for instance, formulated a proposal for a definition of indigenous peoples, and addressed the role of intergovernmental and non-governmental organisations, the elimination of discrimination, and basic human rights principles, as well as special areas of action in fields such as health, housing, education, language, culture, social and legal institutions, employment, land, political rights, religious rights and practices, and equality in the administration

of justice. His conclusions, proposals and recommendations mark important progress in United Nations consideration of the human rights problems facing indigenous peoples; many are still under consideration and others have been incorporated into resolutions of the Sub-Commission.

Apart from facilitating and encouraging dialogue between governments and indigenous peoples, the Working Group on Indigenous Populations has a two-fold mandate: a) to review developments pertaining to the promotion and protection of human rights and fundamental freedoms of indigenous peoples; and b) to give attention to the evolution of international standards concerning indigenous rights.

The Permanent Forum on Indigenous Issues serves as an advisory body to the Economic and Social Council, with a mandate to discuss indigenous issues relating to economic and social development, culture, the environment, education, health and human rights. The Forum focuses on the following issues: a) to provide advice and recommendations on indigenous issues to the Council, as well as to programmes, funds and agencies of the UN through the Council; b) to raise awareness and promote the integration and co-ordination of activities relating to the indigenous issues within the UN system; and c) to prepare and disseminate information on indigenous issues.

3.5 Protection of disabled persons, International Human Rights Standards

In general, international human rights instruments protect the rights of persons with disabilities through the principles of equality and non-discrimination. The UDHR refers expressly to disabled persons, stipulating in Article 25 that ‘everyone has the right to security in the event of disability’, but its derivatives, the ICCPR and ICESCR, do not contain any explicit reference to persons with disabilities.

Supervision

In 1994, the position of Special Rapporteur on Disability of the United Nations Commission for Social Development was established. The task of the Special Rapporteur is to monitor implementation of the Standard Rules on the Equalisation of Opportunities for Persons with Disabilities and to advance the status of people with disabilities throughout the world. Furthermore, under the auspices of

the UN, the Division for Social Policy and Development of the United Nations Secretariat is the focal point on matters relating to disability.

3.6 Elderly Persons

International Human Rights Standards

In general, the rights stipulated for the elderly in international instruments stem from the principles of dignity and non-discrimination. Neither the UDHR nor its derivatives, the ICCPR and ICESCR , contain any explicit reference to older persons, but many provisions of these instruments are of direct relevance to ensuring equal opportunities and the full participation of the elderly. Although the rights of older persons are not referred to in the Bill of Rights, the ICESCR Committee expressly addresses the economic, social and cultural rights of older persons in General Comment No. 6 - The economic, social and cultural rights of older persons.

Three regional human rights instruments expressly mention older persons as a group in need of special protection. In Article 18(4), the African Charter stipulates that the aged shall have the right to measures of special protection in keeping with their physical or moral needs. The Protocol to the African Charter on the Rights of Women in Africa sets out special protection for elderly women. Article 17 Protocol San Salvador stipulates that everyone has the right to special protection in old age and calls upon states to progressively provide suitable facilities, food and medical care for elderly persons that lack them; to undertake work programmes to enable the elderly to take part in productive activity; and to foster establishment of social organisations aimed at improving the quality of life of the elderly. The Revised European Social Charter sets out the right to social protection for the elderly in Article 23. According to this provision states parties undertake to adopt measures: a) to enable the elderly to remain full members of society for as long as possible by providing adequate resources and information about available services; b) to enable the elderly to choose their life-style freely and live independently for as long as possible by providing adequate housing and services; and c) to guarantee support for older persons living in institutions. In addition, the Charter on Fundamental Rights of the European Union (2000) sets out the rights of the elderly ‘to lead a life of dignity and independence and to participate in social and cultural life’ (Article 25).

Supervision

The protection of elderly persons is a topic that is increasingly being addressed by different treaty bodies. Several supervisory bodies are progressively developing the application of their respective instruments to afford protection to this group and now concluding observations frequently offer recommendations on the protection of elderly persons (see, for example, the Concluding Observations of the CESCR on Jamaica E/2002/22 (2001); CEDAW Committee on Iceland A/57/38 (2002) and CERD Committee on Iraq CERD/C/304/Add. 28 (1997)).

3.7 Refugees

In 1950, the Office of the United Nations High Commissioner for Refugees (UNHCR) was created to protect and assist refugees, and, in 1951, the United Nations adopted the Convention Relating to the Status of Refugees (1951 Convention), which is the cornerstone document of refugee protection. In addition, the Protocol relating to the Status of Refugees (the 1967 Protocol) helped to widen the definition of a refugee, as it lifted the time and geographic limits found in the 1951 Convention.

Who is a refugee?

According to the 1951 Convention relating to the Status of Refugees, a refugee is someone who:

- Has a well-founded fear of persecution because of his/her
    - Race
    - Religion
    - Nationality
    - Membership in a particular group, or
    - Political opinion;
- Is outside his/her country of origins; and

Is unable or unwilling to avail him/herself of the protection of that country, or to return there, for fear of persecution.

International Human Rights Standards

The 1951 Convention Relating to the Status of Refugees, as amended by the 1967 Protocol Relating to the Status of Refugees, is the most important international instrument protecting the rights of refugees.

In Article 33 of 1951 convention, the principle of *non-refoulement* is established. This principle forbids states to expel or return a refugee, in any manner whatsoever, to the frontiers of territories where his/her life or freedom would be threatened on

account of race, religion, nationality, membership of a particular social group or political opinion (the *non-refoulement* principle also encompasses non-rejection at the border and can oblige a state to accept a person on its territory). It does not oblige a state to grant the person asylum. The refugee may be expelled to another state where his life and freedom will not be in danger, provided that state is prepared to admit him. Granting of asylum may, however, be the result of *non-refoulement*, if no other state is prepared to admit the refugee.

In addition to the 1951 Convention and the 1967 Protocol, two regional instruments have been adopted expanding the definition found in the 1951 Convention, the OAU Convention Governing the Specific Aspects of Refugee Problems in Africa (1969) and the Cartagena Declaration on Refugees (1984) (see textbox above).

In addition to international and regional refugee conventions, international human rights law and international humanitarian law play a significant role in guaranteeing international protection of refugees.

Article 7 ICCPR has been interpreted to prohibit return to situations where the person might suffer torture or other cruel, inhuman and degrading treatment or punishment. Moreover, nearly all of ICCPR's provisions apply to non-citizens.

Article 3 of CAT provides for protection from *refoulement* in situations where there is a substantial risk of torture. The *non-refoulement* provision under CAT is absolute. Unlike the *non-refoulement* provision of the 1951 Convention it is not linked to cases where a person fears harm on account of race, religion, nationality, membership of a particular social group, or political opinion and it does not provide for exceptions based on national security. This means that the prohibition of return applies to all persons regardless of their past criminal conduct.

CRC applies to all children without discrimination, including child refugees and asylum seekers. CRC specifically stipulates that every child seeking refugee status has a right to protection and humanitarian assistance in the enjoyment of the rights set forth in the Convention, as well as other conventions to which the state is party.

Regional human rights conventions also establish important safeguards for refugees.

For example, Article 3 of European Convention has been interpreted by the European Court as prohibiting return of persons where there is a risk of torture while Article 22(7) of the American Convention recognises the right to seek and be granted asylum and Article 22(8) prohibits *refoulement.*

In humanitarian law, Article 44 of the Fourth Genena Convention Relative to the Protection of Civilian Persons in Time of War deals specifically with refugees and displaced persons. Moreover, the 1977 Additional Protocol which one provides that refugees and stateless persons are to be protected under the provisions of Parts I and III of the Fourth Geneva Convention.

Supervision

UNHCR was created to provide international protection to refugees and to find durable solutions to refugee problems. These functions include securing legal and practical protection to refugees with and through governments, overseeing the mobilisation and co-ordination of resources for the well-being and survival of refugees and encouraging conditions in conflict zones that will allow refugees to return voluntarily to their countries of origin. Both the 1951 Convention (Article 35) and its 1967 Protocol (Article II) bestow upon UNHCR responsibility for supervising implementation by states.

3.8 Stateless person

Nationality and citizenship are fundamental elements of human security because they provide people with a sense of belonging and identity. They provide a legal basis for the exercise of many human rights. Persons without a nationality are in many countries denied numerous human rights that citizens take for granted, like access to schools and medical care, ownership of property, marriage and foundation of a family and enjoyment of legal protection.

A stateless person is the person who is not considered a national of any state under operation of its law. Statelessness occurs for many different reasons. A person may loose her/his nationality and is not able to acquire a new one because of extended stay abroad or because of marriage or dissolution of marriage to a person of a different nationality (women are particularly vulnerable). In the case of children, if they are born to stateless persons or refugees, or in some cases out of wedlock, they may be denied citizenship. Some individuals may find themselves stateless because of faulty

administrative practices, such as excessive fees or the failure to be notified of registration or other obligations. Children who are not properly registered at birth can easily become stateless, as they are not able to show where or to whom they were born.

Internaional Human Rights Standards

The two primary international conventions on statelessness are the Convention relating to the Status of Stateless Persons (1954) and the Convention on the Reduction of Statelessness (1961). Article 1 Convention relating to the Status of Stateless Persons defines a stateless person as a person not considered a national (or citizen) under the law of any state. In addition to providing a definition to statelessness, the Convention seeks to improve the status of stateless persons and helps ensure that stateless persons enjoy fundamental rights and freedoms without discrimination. It regulates, *inter alia*, the legal rights of stateless persons, their access to work and welfare and urges states to facilitate their assimilation and naturalisation.

The Convention on the Reduction of Statelessness defines ways in which persons who would otherwise be stateless can acquire or retain nationality through an established link with a state through birth or descent. It deals with cases of statelessness resulting from, *inter alia*, a change of civil status, residence abroad, or the voluntary renunciation of nationality. It also stipulates that children should be granted the nationality of the state party in which a parent had citizenship. The Convention prohibits states parties from depriving people of their nationalities on racial, ethnic, religious, or political grounds. The Convention does not, however, oblige states to grant nationality to stateless persons who enter their territory, unless those persons already have strong connections with the state and do not have any chance of acquiring a nationality elsewhere.

Supervision

Similar to the situation of IDPs, there is today no specific body that deals with the problem of statelessness, or that supervises the 1954 and 1961 statelessness conventions. In order to fill this vacuum, upon the entry into force of the Convention on the Reduction of Statelessness in 1975, UNHCR was provisionally asked to assume the responsibilities foreseen in Article 11 Convention on the Reduction of Statelessness ‘of a body to which a person claiming benefit of this convention may

apply for the examination of his claim and for assistance in presenting it to the appropriate authority'. However, no mention was made of UNHCR's competence with regard to the Convention relating to the Status of Stateless Persons and UNHCR was not asked to assume any wider responsibilities regarding statelessness issues.

3.9 Migrant workers

Interantional Human Rights Standards

In 1990, the UNGA adopted the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families . The main thrust of the Convention is that persons who qualify as migrant workers under its provisions are entitled to enjoy their human rights regardless of their legal status. The Convention does not create new rights for migrants, but aims at guaranteeing equality of treatment and the same working conditions for migrants and nationals, as well as guaranteeing the rights of migrants to maintain ties to their countries of origin. The Convention aims at:

- Preventing inhumane living and working conditions, physical and sexual abuse and degrading treatment (Articles 10, 11, 25, 54).
- Guaranteeing migrants' rights to freedom of thought, expression and religion (Articles 12, 13).
- Guaranteeing migrants' access to information on their rights (Articles 33, 37).
- Ensuring their right to legal equality. This implies that migrant workers are subject to correct procedures, have access to interpreting services and are not sentenced to disproportionate penalties such as expulsion (Articles 16-20, 22).
- Guaranteeing migrants' equal access to educational and social services (Articles 27-28, 30, 43-45, 54).
- Ensuring that migrants have the right to participate in trade unions (Articles 26, 40).
- Ensuring that migrants can return to their country of origin if they wish to, that they are allowed to pay occasional visits, and that they are encouraged to maintain cultural links (Articles 8, 31, 38).
- Guaranteeing migrants' political participation in the country of origin (Articles 41, 42).
- Ensuring migrants' right to transfer their earnings to their home country (Articles 32, 46-48).

Chapter Four: Culture, Globalization and Human Rights

Section One: Culture and Human Rights

Universal Human Rights and Cultural Relativism

Cultural relativism is the assertion that human values, far from being universal, vary a great deal according to different cultural perspectives. Some would apply this relativism to the promotion, protection, interpretation and application of human rights which could be interpreted differently within different cultural, ethnic and religious traditions. In other words, according to this view, human rights are culturally relative rather than universal.

Taken to its extreme, this relativism would pose a dangerous threat to the effectiveness of international law and the international system of human rights that has been painstakingly constructed over the decades. If cultural tradition alone governs State's compliance with international standards, then widespread disregard, abuse and violation of human rights would be given legitimacy.

Accordingly, the promotion and protection of human rights perceived as culturally relative would only be subject to State discretion, rather than international legal imperative. By rejecting or disregarding their legal obligation to promote and protect universal human rights, States advocating cultural relativism could raise their own cultural norms and particularities above international law and standards.

Universal Human Rights and International Law

Largely through the ongoing work of the United Nations, the universality of human rights has been clearly established and recognized in international law. Human rights are emphasized among the purposes of the United Nations as proclaimed in its Charter, which states that human rights are "for all without distinction". Human rights are the natural-born rights for every human being, universally. They are not privileges.

The Charter further commits the United Nations and all Member States to action promoting "universal respect for, and observance of, human rights and fundamental freedoms".
UDHR, ICCPR, ICESCR are also recognize universality of human rights.
Human rights are common standard of all human beings.

The legal obligation is reaffirmed for all states to promote "universal respect for, and observance and protection of, all human

rights and fundamental freedoms for all". It is clearly stated that the obligation of States is to promote universal respect for, and observance of, human rights. Not selective, not relative, but universal respect, observance and protection.

Furthermore, the obligation is established for all States, in accordance with the Charter of the United Nations and other instruments of human rights and international law. No State is exempt from this obligation. All Member States of the United Nations have a legal obligation to promote and protect human rights, regardless of particular cultural perspectives. Universal human rights protection and promotion are asserted in the Vienna Declaration as the "first responsibility" of all Governments.

Everyone is entitled to human rights without discrimination of any kind. The non-discrimination principle is a fundamental rule of international law. This means that human rights are for all human beings, regardless of "race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status". Non-discrimination protects individuals and groups against the denial and violation of their human rights. To deny human rights on the grounds of cultural distinction is discriminatory. Human rights are intended for everyone, in every culture.

Human Rights, Cultural Integrity and Diversity

Universal human rights do not impose one cultural standard, rather one legal standard of minimum protection necessary for human dignity. As a legal standard adopted through the United Nations, universal human rights represent the hard-won consensus of the international community, not the cultural imperialism of any particular region or set of traditions.

Inherent Flexibility

Out of this process, universal human rights emerge with sufficient flexibility to respect and protect cultural diversity and integrity. The flexibility of human rights to be relevant to diverse cultures is facilitated by the establishment of minimum standards and the incorporation of cultural rights.

Cultural Rights

Every human being has the right to culture, including the right to enjoy and develop cultural life and identity. Cultural rights, however, are not unlimited. The right to culture is limited at the point at which it infringes another human right. No right can be used at the expense or destruction of

another, in accordance with international law.

Cultural rights do not justify torture, murder, genocide, discrimination on grounds of sex, race, language or religion, or violation of any of the other universal human rights and fundamental freedoms established in international law. Any attempts to justify such violations on the basis of culture have no validity under international law.

A Cultural Context

The argument of cultural relativism frequently includes or leads to the assertion that traditional culture is sufficient to protect human dignity, and therefore universal human rights are unnecessary. Furthermore, the argument continues, universal human rights can be intrusive and disruptive to traditional protection of human life, liberty and security.

Traditional culture is not a substitute for human rights; it is a cultural context in which human rights must be established, integrated, promoted and protected. Human rights must be approached in a way that is meaningful and relevant in diverse cultural contexts.

CHAPTER Five: RESPONSES TO GRAVE VIOLATION OF HUMAN RIGHTS

Mostly, the systematic & serious violations were/are committed by State officials as an instrument of achieving some policy, e.g., crushing opposition & sustaining their power, maintaining territorial integrity & the like. The serious & systematic violations in Chile during the Pinochet regime, Uganda during the Id Amine regime, South Africa during the Appartied regime, in Ethiopia during the Dergue regime were all committed as part of State policy to achieve some result.

Section One: National responses - Transitional Justice

It is an accepted principle that violations of rights shall first be addressed at national level. This holds true even in case of systematic & gross violations. Thus, the perpetrators of such violations/crimes shall be brought to justice at national level. The international system of addressing such violations becomes relevant if the domestic system is unable /unwilling to provide remedies.

The term transitional justice has two meanings. In one sense, it means justice at

the time of transition. It may also be understood as justice in transition it self, i.e., referring to the idea that our conception of justice is not static but dynamic. We use the first meaning for the purpose of this teaching material. We use the term transitional justice broadly to signify the mechanisms by which societies in transition deal with past violations. It thus represents the various modalities of addressing past violations.

Transitional justice has to address the needs of societies in transition. Societies in transition may have variety of needs/concerns related to past violations. The three main needs that arise in societies in transition are the following:

1. The need for justice. Victims of violations or their relatives and the society at large need to see the perpetrators of the violations are brought to justice. It is thus necessary that transitional justice should provide a mechanism by which this need may be satisfied. One of the questions in this respect is: What does justice mean? It is generally suggested that justice shall be rendered in order for a society to break with the past & move forward.

2. The need to know the truth. The society in general, and victims or relatives in particular, wants to know who among its members did participate in the violations. As the past violations were committed systematically & grossly, the society, even victims/relatives, may not know all that happened & all the perpetrators & the degree of their participation. Above all society needs to know why the violations happened. Thus, the need to know *who did what & why* is one of the basic issues that may arise at the time of transition. It is claimed that knowing the truth about the past is crucial to build a viable, rights-respecting & democratic society as well as to ensure that violations wouldn't happen again. Some commentators, however, argue that knowing the truth about is not desirable as it may lead to further suspicion & animosity between those that claim to be victims & their relatives on the one hand and alleged

perpetrators, who are usually former officials, & their relatives (& even supporters) on the other hand, and thereby motivating revenge & leading to further conflict. They thus suggest it is better to forget the past & move forward. Others criticize this by arguing society cannot move forward without knowing the past. Some rather propose 'you shall never forget but forgive'.

3. The need for conciliation. Society may also need to create conciliation among its members.

Thus, the main needs of societies in transition regarding past violations are the need for justice, the need to know the truth, & the need for conciliation. However, we have to make two remarks here. First, these needs are not exclusive of each other. In other words, they may overlap. Secondly, these needs are not exhaustive, i.e., there may be other needs for example, the need for compensation. These other needs may, however, be subsumed under any of the above main needs. For example, the need of victims/relatives for compensation may be considered as the need for justice. To conclude, societies should have a mechanism of addressing these different needs.

The modalities of transitional Justice

There are, however, certain modalities of transitional justice that are well known & well utilized by different socialites. Three of them are worth discussing because of their usual application.

1. Prosecution. This is one of the modalities of transitional justice often employed by societies to address past violations. This process involves the apprehension, investigation & prosecution of alleged perpetrators, and imposition of penalty if found guilty. Thus, it involves the apprehension of perpetrators, the gathering of evidence, and the filing of criminal charges, judicial hearing and decision according to the law. The main concern here is to maintain the rule of law, which is considered as the cornerstone of democracy.

2. Truth & reconciliation. This modality is the mechanism by which a society may identify truth about the past & create conciliation among its members. For this purpose, societies may establish truth commissions or truth and reconciliation commissions. The main priority of

this modality is to reveal truths about the past, create conciliation, and achieve a successful transition. However, there are variations among these commission on their mandate & emphasis. Usually, the commission/authorized organ seeks & documents the truth about the past by this procedure. Members of the society are encouraged to come forward and speak their stories. Thus, both victims/relatives & perpetrators give their statements and such other information relating to the past.

3. Amnesty. The third modality of transitional justice is amnesty. The term amnesty refers to an official act, usually through law, prospectively barring prosecutions of a class of persons for a particular set of actions or events. Amnesty is often contrasted with pardons, which usually refer to the exemption of criminals from serving all or part of their sentences but do not expunge the conviction. It is stated that amnesties shield from prosecution and are not pardons. However, it is commented that 'these distinctions are inexact; pardons, like amenities, can be used to foreclose prosecutions, and amnesties sometimes cover persons serving prison terms'.

However, these modalities are neither exhaustive nor exclusive to each other.

Section Two: International Responses

The international response is premised on the conviction that such violations constitutes crimes against the whole nations/international community, and results from the inadequacy/ non-existence of national responses. Thus, certain crimes do constitute international crimes for which the perpetrators are held individually responsible. The criminal responsibility of individuals under international law contributes to fight impunity, however, limited it is. The underlying idea is that the perpetrators of such crime shall not go free. The mechanism by which international law ensures that has taken different forms. These include: (1) the recognition & application of the principle of universal jurisdiction, (2) prosecution and trial by *ad hoc* international tribunal, and (3) prosecution & trial by a permanent international tribunal called the International Criminal Court.

(1) Application of the principle of Universal Jurisdiction.

The principle of universal jurisdiction is classically defined as 'a legal principle allowing or requiring a State to bring criminal proceedings in respect of certain crimes irrespective of the location of the crime and the nationality of the perpetrator or the victim'. This principle is said to derogate from the ordinary rules of criminal jurisdiction requiring a territorial or personal link with the crime, the perpetrator or the victim. The rationale behind it is broader: ' it is based on the notion that certain crimes are so harmful to international interests that states are entitled-and even obliged to bring proceedings against the perpetrator, regardless of the crime and the nationality of the perpetrator or the victim'. Universal jurisdiction allows for the trial of international crimes committed by anybody, anywhere in the world. There are offences recognized by international law as punishable by any country. Traditionally, piracy on the high seas is regarded as one of the first international crimes, grounded on the violation of international customary law.

After the Second World War, the London Agreement of 8 August 1945 establishing the International Military Tribunal at Nuremberg set out international crimes issuing from both treaty law & customary law (crimes against peace, war crimes & crimes against humanity). Later treaties & international conventions specified various forms of prohibited behaviour recognized as international crimes. Principle 2 of the Princeton Principles on Universal Jurisdiction reads: (1) for purpose of these principles, serious crimes under international law include (i) piracy, (ii) slavery, (iii) war crimes, (iv), crimes against peace, (v) crimes against humanity, (vi) genocide, and (vii) torture. Paragraph 2 provides the application of universal jurisdiction the crimes listed in paragraph 1 is without prejudice to the application of universal jurisdiction to other crimes under international law.

The derogation from the ordinary rules of criminal jurisdiction is traditionally justified by two main ideas. First, some crimes are so grave that they harm the entire international community. Secondly, no safe havens must be available for those who committed them.

(2) Prosecution and trial by *Ad hoc* tribunal

Another mechanism by which the international community has been

responding to gross violations is through prosecution of perpetrators before an international tribunal. Until recently, international prosecution has primarily been conducted before ad hoc tribunal. These tribunals have specific/limited jurisdiction over crimes listed under the instrument creating the tribunal. The first among these tribunals is the International Military Tribunal at Nuremberg established by the London Agreement of August 1945. The London Agreement has defined the jurisdiction of the tribunal. Many Nazi officials were prosecuted before this tribunal. Other ad hoc tribunal includes the International Criminal Tribunal for the former Yugoslavia & for Rwanda (ICTY & ICTR respectively). These tribunals are established pursuant to the Decision of the UN Security Council. The Statutes establishing these tribunals set out the crimes that fall with in the jurisdiction of each tribunal. These are ad hoc tribunal established to address certain crimes committed in certain geographic location or during specific period. However, we can understand that this is employed as a means of ending impunity.

(3) The procedure under the ICC

One of the most significant developments made in the direction of dealing with grave violations & fighting impunity is the establishment of the International Criminal Court. It is established pursuant to the Rome Statute of the International Criminal Court, which was adopted at a diplomatic conference in Rome, on 17 July 1998. The Statute entered in to force on 1 July 2002 and the Court is now fully functional at its seat in The Hague. Governments, legal experts and civil society all hailed the treaty as the most significant development in international law since the adoption of the United Nations Charter.

The Rome Statute provides for the creation of a permanent international criminal court to prosecute people accused of genocide, crimes against humanity and war crimes. The Court will be of particular importance because:

- It will serve as a permanent deterrent to people considering these crimes. In most cases in the last fifty years international mechanisms to prosecute people accused of these crimes have only been set up after the crimes have occurred;
- It will have a much wider jurisdiction than existing ad hoc

tribunals. For example, the work of the International Criminal Tribunals for the former Yugoslavia and Rwanda have been limited to crimes committed in a particular territory while crimes committed in other territories have not been addressed; and

- The Statute contains advanced provisions for the protection of victims from retraumatization as well as provision that the Court may order a convicted person to provide reparation, in the form of compensation, restitution, rehabilitation, satisfaction, guarantees of non-repetition, and any other type of reparation the Court deems appropriate.

As specified under Article 5 of the Rome Statute, the Court has jurisdiction over the most serious crimes to the international community. These crimes are genocide, crimes against humanity, war crimes & war of aggression. However, the court functions as complementary organ. Thus, the Rome Statute embodies the principle of complemntarity. The principle of complementarity can be defined as a functional principle aimed at granting jurisdiction to a subsidiary body when the main body fails to exercise its primary function. The principle of complementarity in international criminal law requires the existence of both national and international criminal justice systems functioning in a subsidiary manner for curbing crimes of international law: when the former fails to do so, the latter intervenes and ensures that the perpetrators do not go unpunished.