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Tamás Lattmann, Balázs Vizi

**INTERNATIONAL PROTECTION  
OF HUMAN RIGHTS**



Tamás Lattmann – Norbert Tóth – Balázs Vizi

# **INTERNATIONAL PROTECTION OF HUMAN RIGHTS**

Edited by  
Tamás Lattmann – Balázs Vizi

National University of Public Service  
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Budapest, 2014

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# 1. Introduction to international human rights law

## 1.1 Nature of human rights

To discover the nature and importance of human rights, with the application of a basic approach we may conclude that human rights provide for individual freedom and liberty in relation to state (which may exercise public power over individuals, but also in relation to other individuals, who may also be capable of violation of these liberties. In some cases human rights not only provide for these freedoms against the above mentioned, but at the same time may mean a legal possibility to the individual to force them to refrain from doing something against him – these human rights are often called justiciable human rights.

The basic concept of individuals bearing liberty against the state is not new, it has always been present during the development of societies and mankind. Of course this has not been recognised as “human rights” in today’s meaning, rather than a society-organising principle: given social groups has duties and liberties in a society. You can find this basic phenomenon in ancient tribes, archaic societies and feudal societies as well.

Social tensions have been present already at the feudal times, which has led to clashes similar than of today’s. The society organised with the monarch on top and the nobles serving as the “society”, so early human rights documents can be identified in the form of the contemporary legal documents providing for liberties of the nobles of the country. They had duties towards the monarch, representing the state (for example and most importantly military duty), but they also had liberties and exemptions (for example exemption from taxation). Early examples are the famous *Magna Carta Libertatum* from 1215, which has provided for the liberties of the English nobles from the King. It was the result of a given political situation, where the monarch (the state) has lost significant power, thus the nobles (the individuals forming the contemporary society) could secure their liberties (rights of theirs under the contemporary society). It may be interesting to mention, that in Hungarian history similar event have happened just a few years later, and in 1222 the so-called “Golden Sealed Bill” has been adopted by the King to the pressure of the nobles. This document serves as one of the leading sources of Hungarian historical constitutionality.

Though these documents have an utmost historical importance, they cannot be qualified as being human rights documents in today’s sense as they serve protection of privileges of certain social groups instead of all human beings. The modern concept

of human rights has been born with the recognition of the equality of human beings, the roles of the states and the governments, first by philosophers and scientific authors, followed by states' practice in their domestic laws. Of course this has not happened from one day to another and this advancement has taken place at different times in different countries. The historical role of the philosophy of the enlightenment era has been realised by the process as a result of which modern constitutions have been created with the interpretation of human rights being the recognised result of human dignity being equal to all.

The most important documents in the post-feudal societies are the Bill of Rights of Great Britain adopted in 1689, and the constitutional developments of the United States it has influenced. The 1774 Declaration of Rights in Philadelphia, the 1776 Bill of Rights of Virginia and the adoption of the Constitution of the United States in 1787, amended by the Bill of Rights in 1791. These first ten amendments to the Constitution have inserted human rights into the founding document of the federal state, thus making a protection and respect of human rights the obligation of not only the states creating that entity but also of the federal government. In France, the 1789 Declaration of Rights of Men and Citizens of 1789 has turned these theoretical principles into practice, later followed by the Constitution of 1791.

During the nineteenth century, most of the states and domestic legal systems have provided for some protection of human rights. Of course the pace of this development, the human rights recognised, the strength of this protection were different in the various countries, depending on the level of development of society, of economy and plenty other factors that may determine this.

## **1.2 Categories of human rights**

Human rights can be categorized many ways and according to many aspects. In international human rights law, the most widely applied method is that one that has been introduced by a milestone study, prepared by Karel Vasak and published in 1977 in the UNESCO Courier. Taking the famous motto of "Freedom! Equality! Solidarity!", Vasak has developed the interpretation based on the "three generations" of human rights. This creates groups of rights based on the kind of obligation they pose on states, but it also represents a chronological development.

The "first generation" of human rights are the civil and political rights. States shall respect these rights and a very important factor is that this respect usually requires: passive action or just minimal action from the states. To simplify it: by not doing anything, the states will not violate these human rights. As a logical consequence, ensuring these human rights is usually not a question of financial abilities, so the often heard argument about human rights being privileges of rich states simply does not stand. Another consequence is, that international treaties dealing with these human rights often pose the obligation of states party to ensure human rights covered by the treaty immediately, as soon as the given treaty enters into force. These treaties often

provide for some sort of complaint procedure, to make sure that states meet their obligations, and these obligations are easily measured.

Economic, social and cultural rights are often referred to as the “second generation” of human rights. Contrary to the previous group of human rights, these require active action from the states, they have to allocate funds, initiate governmental programmes and facilitate other actions to fulfil their obligations deriving from these human rights. It is easy to understand that in the most cases this takes time and money. And as a historical fact, states have different financial capacities and different levels of social development, which means that sometimes it is very difficult to find common standards or even to settle common expectations. Because of all these reasons, international human rights conventions covering economic, social and cultural rights operate differently than the ones dealing with civil and political rights. Instead of expecting prompt fulfilment of all human rights concerned, they are usually satisfied with states recognising them and taking the obligation to gradually implement them or to endeavour to that.

The so-called “third generation” of human rights is the result of the social-technological development of the second half of the twentieth century and of the phenomenon of globalisation. Professional literature is vivid on this subject. Some authors refer to it as “solidarity” rights, some as the “rights of future generations”, depending on the focus. Some build the concept of third generation of human rights around the requirements of developing countries, with the result of identifying human rights like “people’s right for equal share of the world’s resources”, some around political ideas with human rights like “people’s right for peace”, while some around recognised necessities with human rights like “right to a clean environment” as a result. There is no specific international treaty dealing with these human rights, as the whole idea has not been formed into one single concept, right now it is more of a philosophical than a legal category. In the same time, states’ evolving practice may give some indications about the future directions of development, and now this seems to be organised around building stronger rules about protection of environment.

## **1.3 International protection of human rights**

### **1.3.1 Need of international protection**

As we could see before, domestic legal systems have started to provide for protection of human rights already at the nineteenth century via constitutions and laws. It may be worthy to examine the question of international protection.

Nearly two hundred years of state practice and experience has made professional literature able to evaluate the advantages and disadvantages of international protection of human rights. Here we summarize the more important points as a general introduction before examining this field in more details – and we will get back to them in later chapters of the present volume.

The advantages of international protection of human rights may be summed up around the following factors:

1. Ensuring better control;
2. Development of common values and common standards;
3. Possibility to apply political pressure.

Positioning protection of human rights on the level of international law provides for a possibility of a better and stronger control over actions of states. Unfortunately sometimes states' domestic provisions prove to be ineffective or insufficient in this matter. In some occasions, mankind has also experienced that states use their legal system to violate human rights systematically and on a large scale. In a situation like that, domestic law becomes completely useless – the experience of the horrors of the Nazi and the communist regimes has proven this painfully. International law may become a second line of defence for human rights to make sure that states and their domestic legal systems do not lose outer control. Of course, this results in the possible weakening of the concept of state sovereignty, but this does not mean any conceptual problem, as human rights have always served as a possible limit to states' powers – as reflected already in early interpretations of sovereignty, for example in the writings of Jean Bodin in the sixteenth century.

International protection of human rights leads to the development of common values and standards on the level international relations. This is extremely important in a globalised world: while many differences may exist in the practice of states and various cultures, some basic values can be identified regarding human rights. For the protection of these values common standards have been developed, most of which are based on domestic legal solutions. These have gradually been introduced to international practice, for example via various international bodies, which has had its effect after on various domestic practice of states as well. By this, strong international protection of human rights makes a more robust domestic protection of human rights as well.

If the question of human rights raises to the level of international relations, the possibility of application of political pressure becomes real. Though this may be a dangerous advancement (examined in more details in the next paragraphs), in the present system of international relations politics is a very important piece of the set of tools available to influence actions of states. State practice violating human rights may lead to international condemnation, shaming of a government and altogether a weakening in international relations, a lack of ability to pursue a states' own interests. Of course it does not always work perfectly, as states usually calculate the effects of their behaviour, and as a result of this calculation they may find that human rights violations may not have such a bad effect on their international position. This is possible, but still, the fact that they have to calculate with this is a very serious advancement and contributes to a better protection of human rights.

Some of the disadvantages or deficiencies of international protection of human rights also have to be mentioned here. Some of them have political or ideological nature, some

of them are the consequence of the nature of the present system of international law. These can be organised around the following main points:

1. Existing political and ideological differences;
2. Questions about states' willingness to develop new or even enforce existing norms;
3. Chances of states to avoid legal binding power made possible by the system of international law.

International law by its nature has to tolerate some amount of the existing political and ideological differences between states. That means that its tools, like international treaties are not always capable of overcoming all existing differences and only have a limited capacity of creation of new norms, subject to the consensus of states. The latter is determined by many factors, most of them being far out of the reach of international law, but rather subject to domestic political or ideological relations and situations. With human rights this poses the danger of human rights also becoming subject to these, which can have bad effects uncalled for. This can be especially dangerous, when a group of states developing interpretations and practice providing for a stronger protection meets that of other states with a weaker system. This can be well visible in actual cases related to freedom of speech or religion.

State willingness is a defining question related to international human rights law. As international law is not built on a supreme legislation power capable of creating new norms but rather on consensus and cooperation of sovereign states, the genuine will of the states to operate this system gains vital importance. We can say that states are usually interested in developing new legal norms and enforcing already existing ones, but in many cases this does not reflect a genuine will, rather a political goal. We have identified international politics as an important tool to help ensuring human rights – in many cases human rights are used the other way around, to pursue states' foreign policy goals, for example to gain higher ground to their political adversaries in international relations. Sometimes international politics produces an enormous amount of hypocrisy within the framework of various international human rights organisations and bodies. This may have a seriously detrimental effect on the whole body and operation of the system of international human rights law.

The characteristics of international law provides for many chances to states if they want to avoid legal binding power. This is strongly connected to the question of the genuine will of states related to international protection of human rights: if a state does not want to take human rights obligations, but wants to project an image of being serious about those, it can find methods of achieving this goal. This can happen both to creation of new norms and to enforcement of existing ones. The first one is possible with the extensive application of so-called reservations to international human rights treaties. International law, according to customary law and the provisions of the Vienna Convention on the Law of Treaties, make reservations possible usually to help states overcome minor differences related to the text of a treaty being adopted or to put unresolvable questions out of the way of the future treaty – but many times are used by some states to tackle binding power of the treaty itself (reservations will be addressed in

a later chapter in more details). Additionally, human rights enforcement mechanisms are often made weak by states' actions claiming to protect their sovereignty, while they rather serve to get rid of international control and observance: these can surface in form of reservations or the state simply not consenting to the proceedings of various treaty bodies. It may be fully legal under international law, but it is contra productive related to international protection of human rights.

### **1.3.2 Historical development of international protection of human rights**

The historical development of international human rights law can be separated into three big periods of time. Not surprisingly, the sections are separated by the two world wars, which have brought such changes into international politics and to many aspects of international law that had their effect on international human rights law as well.

The historical era before the First World War has not been the prime time of international human rights law, but this is not a surprise as this period (especially the nineteenth century) has just seen the birth of modern international law as such. International protection of human rights in general has not been accepted at that time, this question was considered to be fully subject to domestic jurisdiction, to be domestic affair, with no international intervention allowed. While international human rights law has not existed in this form, some of its seeds could have already be seen in forming state practice: a few results have started the emergence of a new body of law.

- ✿ For example international action has been insisted against slavery and slave trade during the century – unfortunately this was not really aimed at building up a new field of international law, rather it was utilized by some states to pursue political goals, namely the endeavour of the US federal government to assert economic pressure on the southern “slave states” of the Union.
- ✿ Another field of international law that has started development at this age was the one protecting the rights of aliens – but this has not really shown a human rights profile, the subject of the protection was not the individual, but the subject of the other sovereign.
- ✿ Early international treaties of international humanitarian law, the rules regulating the conduct of states and of armed forces in cases of armed conflicts have forged some human rights into legally binding provisions. The basic rules protecting the life of persons not taking part in hostilities or the provisions providing for respect to civilian property and limitation of requisition can already be qualified as recognition of human rights in international law – but these have only been applicable in times of war between states and they were to be applied only related to the enemy.

The end of the First World War has brought tremendous change in international politics, which has had a serious effect on international law, and on international human

rights law as well. The reason of this is basically the fact that the new world order designed for the period after the war required stronger international rules, and some aspects have expectedly were to touch upon human rights-related matters.

- ✳ The human rights novelty in the period between the two world wars has been emerged in the form of a new body international law providing for the rights of minorities. This subject had to be regulated because of the new geopolitical situation created by the peace treaties and the post-war redrawing of the state borders. A painful consequence of this was the threat of problems with national minorities and of a de-stabilization of the new alliance system in Central and Eastern Europe. To circumvent this, rules providing for the protection of minorities have been incorporated into the peace treaties, and by ratifying these, the states gaining territories under these treaties have also taken the obligation of respect and protection of minority rights. Some methods of settlement of disputes have also been created in the framework of these treaties and the League of Nations – but unfortunately this new body of law has never properly been tested. The post-war political tensions unfortunately has just not made this possible, and after the Second World War, the question of protection of minorities have been incorporated into international human rights law.
- ✳ Some of the human rights questions originating from the pre-war period has gained the form of an international treaty during this period. For example the initiatives from the time before the war has led to the adoption of the Slavery Convention in 1926.
- ✳ The period after the war has seen the emergence of the economic, social and cultural rights in international relations. These rights had already been subject to serious debates within states' domestic legal sphere, and they have gradually become subject to international attention. With the globalisation of economy, states have gained interest to introduce some international cooperation on this matter, too. As a result, their attention has turned to international law and organisations and as a first step, the International Labour Organisation has been created in 1919. The success of this organisation was proven by the fact that later it has become a specialized agency of the UN.

After the Second World War the question of international protection of human rights have raised into a new dimension. The horrors of the war, and especially its effect on human rights has caused a paradigmatic changes on thinking about international human rights law. This has supplemented other major changes in international law, first of all the creation of the United Nations which has meant a brand new era in the history of international relations.

The first important change was the general change in thinking about the relationship between state sovereignty and human rights. The earlier understanding has changed: states have had to realize that trusting human rights solely to domestic jurisdiction is not only wrong but politically dangerous. The practices of the Nazi Germany, with special attention to human rights violations against its own citizens have proven that



some sort of international protection is needed to ensure basic protection of human rights. For that reason, they have included provisions in the UN Charter, which have provided for a significant change related to human rights: state sovereignty could not be invoked any more to hide violations of human rights, which could not be considered to be domestic matter anymore.

Another change was the individualization of human rights in general. As the practice of collective human rights, which minority protection had been built on after the First World War could not prove its worth, and the ideas of collective responsibility has been rejected by many, the strict individualist reading of human rights have become favoured. Though this also has been criticised by some important actors (for example states following the communist ideology), this has become the leading interpretation. The collective interpretation of general human rights still can be qualified as a dangerous concept, as it can find easy justifications for violations of individual liberties, it is important to stress, that for protection of minorities collective measures can be more efficient in some situations – however, today recognising collective rights of minorities is the exception, not the general rule.

A very important development after the Second World War is the transformation of the world order, which has an effect on international human rights law, too. The international order is organised on at least two levels: the so-called universal system, represented by the United Nations and the regional level, which is represented by various international organisations covering a continental group of states. Currently there are three well-developed regional structures with their own human rights protection structure and mechanisms:

1. European regional system, with the Council of Europe;
2. American regional system, with the Organisation of American States;
3. African regional system, with the African Union.

The general international human rights provisions are adopted on universal level, in the framework of the United Nations. The regional systems are capable of creating some more detailed rules or others for which the consensus cannot be reached at the universal level. Generally speaking, regional level organisations have a better chance of reaching state consensus on certain matters because of tighter and closer historical, political and cultural relationship. Regional cooperation is also strengthened by the fact that it may lead to a more effective foreign policy on the universal level. As a consequence, regional systems have more effective human rights mechanisms, for example all three of them has an operating international human rights court, which the UN system still misses. Some regional systems are not necessarily organised on a geographical but on a political-cultural basis, for example the Arab League, the Organisation of Islamic Cooperation. The Association of Southeast Asian Nations (ASEAN) is a very important regional organisation, but its human rights activities are in an embryonic phase. (These organisations and their human rights activities will be presented in more details in later chapters.)

## **1.4 International law and human rights**

### **1.4.1 Human rights documents in international law**

Most common documents adopted by states or other entities in the field of international human rights law are various declarations and international treaties. They serve as sources of law with a varying legal binding force.

Declarations are usually adopted by states and quite often by international organisations or their institutions in the form of resolutions. As these are not international treaties, their binding power is questionable – it has to be analysed on a case by case basis. Usually they serve to recognise and to set political goals and aims to future codification, so generally the content of these documents are not obligatory at the time of adoption, but later it may gain either customary power or get reaffirmed by an international treaty.

Some of these declarations may be of extreme significance, as being milestone founding documents regarding a given system or subsystem of international human rights. For example the Universal Declaration of Human Rights, adopted in 1948 by the UN General Assembly has become the first and most often referred human rights document of the United Nations for a long time. The American Declaration of the Rights and Duties of Man, adopted nearly the same time has the same importance regarding the American regional subsystem. The adoption of the Cairo Declaration on Human Rights in Islam in 1990 has shown the birth of a new regional-political subsystem, the Arab system of human rights protection. In 2012, members of the organisation have adopted the ASEAN Human Rights Declaration, which hopefully will lead to the emergence of a new human rights regional subsystem. The contents of these declaration are usually deemed to be having binding power, as reflecting customary law, even some of their provisions may be debated at the time of adoption.

Other declarations serve to set goals of smaller gravity, like recognising or giving political power to a newly recognised human right. For example the recognition of the explicit right to “safe drinking water and sanitation” is the result of last years’ development, it is not recognised in international treaties yet, but by numerous non-binding UN and other resolutions, supported by professional interpretation – it is on its way to gain general recognition and binding power. These declarations have a strong role in that. They can be qualified as the first step of codification.

Codification of international human rights generally happen via international treaties. Those are adopted by states, often in the framework of international organisations, the UN or a regional organisation. Exceptionally non-state entities may also get into contractual relationships but that is very rare related to human rights.

International treaties are the primary sources of international law so they have undebated binding power, which means that states party to them are bound to comply with their provisions. These documents are results of compromise between states, many times after long negotiations, so sometimes the final and adopted version of their text

differs from the states' original ideas and proposals. This is a very important factor when we examine states' relations to those and their willingness to enforce them.

Contents of international treaties in the field of international human rights law are usually organised around the same scheme. They identify and recognise human rights, either complete catalogues of rights or just a specific one, and provide for state obligations which are deemed to be necessary for ensuring it, both domestic and international. Finally, they may set up institutions responsible for monitoring states' fulfilment of these obligations.

### **1.4.2 International treaties protecting human rights**

International human rights law creates legal obligations to states, which are of binding nature. States becoming parties to international human rights treaties take on international legal obligation to respect and to protect human rights covered by those treaties – as it is their obligation under international customary law and the Vienna Convention on the Law of Treaties.

This is a complex obligation. First, it means that they have to refrain from interfering with or curtailing the enjoyment of human rights. Second, states have to protect individuals (and groups, if needed) against violations of human rights. Third, they also have to take effective steps towards facilitation of the enjoyment of human rights, even by legislative actions, if necessary.

Under ratified international human rights treaties, states party undertake to respect these and to introduce appropriate domestic measures and legislation to satisfy their obligations and duties deriving from these treaties – compatible with their general obligations under any other international treaty, as set out by general international law. States' own domestic legal system, therefore, has to provide the primary legal protection for human rights, even if they are guaranteed by international law, as it is usually reflected by states' constitutions. In the case of domestic law and proceedings are not capable or simply just fail to deal with human rights abuses or violations, international law is set into motion: mechanisms and procedures for complaints by individuals or by groups may be available in the framework of various international organisations, both at the regional and at the universal level. International human rights treaties usually address the possible procedures by expert bodies or international human rights courts for individual complaints, or the International Court of Justice for inter-state debates related to the given treaty.

### **1.4.3 Reservations and objections to human rights treaties**

The binding force of international human rights treaties may only be weakened by the application of reservations according to customary law and the provisions of the Vienna Convention on the Law of Treaties. International law basically allows for reservations

to help the creation of multilateral treaties: by their application states may amend their obligations from the given treaty, for example with excluding some provisions or applying their own interpretation to those. This is useful, because this way states are able to circumvent differences of smaller gravity related to the text of the treaty being adopted or unresolvable debated questions with other states party, but still they do not lose the chance to become a party to that treaty themselves. In most of the cases, it is more important to have more states party to a treaty than to have a full consensus on every small detail – that is the basic idea behind this possibility. To make sure that states do not use it to get rid of their obligations in whole, some restrictions apply. The most important is that reservations that are capable of jeopardising the general aim of the treaty, that are incompatible with the object and purpose of the given treaty or otherwise lead to tackling binding power of the treaty itself are prohibited.

With international human rights treaties, a very common reservation is the one which aims to limit the jurisdiction of the International Court of Justice. For example the countries of the communist bloc has all applied that kind of reservation to all human rights treaties they have ratified and which had this possibility. Similar reservations are also applied by states with regard to other institutions and their possible proceedings under various treaties. Some reservations are applied to provide for harmony between international human rights norms and states' domestic legal provisions – this may have a particular importance related to constitutional provisions. For example, a specific rule of the Convention against Racial Discrimination, the one providing for states' obligation to penalise various forms of hate speech may easily get into conflict with constitutional provisions guaranteeing freedom of speech: to avoid this, those states, for example the United States or the United Kingdom have applied a reservation when ratifying the convention. This happens very often with international human rights treaties so it is always very important to check not only the text of an international treaty, but also the reservations applied by states party to it.

A reservation may attract so-called objections from other states party to the given convention. Objections are applied when a reservation is either deemed to be illegal (because of it is against the aim and goal of the convention) or another state party simply does not want to accept it. An objection may be just a communication without any legal effect, or it may lead to the given convention not entering into force between the state with the reservation and the other one objecting. In the case of human rights treaties the latter is not usual, and it would not make too much sense anyway as human rights treaties are not based on mutual obligations between states party, so objections serve much more as very important political messages but also have a very important effect on development of international human rights law as they may represent the interpretation of states related to certain human rights questions. For example many Muslim states party to the Convention on the Elimination of All Forms of Discrimination against Women have applied reservations aiming to the applicability of norms of the Islamic Shari'ah law – most of these were claimed to be incompatible with the object and purpose of the Convention by other states party, and they have objected to those.

### 1.4.4 Violation of international human rights treaties

As indicated before, the goal of international human rights treaties is not to create mutual obligations between states party for their own good, but for the sake of the individuals under their jurisdiction, to protect their human rights. This means that in case of a violation of one party to the convention the applicability of the general solution provided by international law would not do any good to help the situation, what's more, it would just make it worse.

The principle of reciprocity is usually applied by the practice of international law in contractual relations. That means that for a violation of a state party, other states in that legal relationship may react with an in kind violation of the same gravity. The idea behind this is that states following the provisions of the treaty shall not get into less favourable position because of their legal bonds than the one actually violating those.

However, the application of the same method with human rights treaties would lead to a situation completely against the original ideas behind the system. If states had been allowed to react with violations to an existing violation of a human rights treaty, that could immediately lead to the collapse of the whole human rights protection mechanism. For this reason, violations in international human rights law have to be treated according to the provisions of the conventions, utilising the mechanisms provided for, and not the "classic" international legal solutions.

## 1.5 Overview of human rights protection mechanisms

More kind of human rights protection mechanisms are in existence in the present system of international human rights law. All of these can be found within the different organisations. Here we summarize their common elements and detail them in later chapters. Institutions providing for human rights protection mechanisms can be categorized according to the following:

1. Political bodies;
2. Expert bodies;
3. Judicial bodies.

Political bodies are usually institutions of international organisations, not necessarily with protection of human rights as their sole responsibility. Their members are usually states, that means that state representatives, diplomats are present at the sessions, who follow orders given to them by their respective governments. The working method of these bodies is not surprisingly political, meaning that states are working here to pursue their political aims and goals. They follow their interests, assist their allies, form *ad hoc* or permanent coalitions, depending on the circumstances. While this may seem to be far from the values behind the idea of human rights, it is important to realise that under specific circumstances this may be an effective way to stand up against violations of human rights. Systematic, mass atrocities can hardly be handled without a strong

political element – it all depends on the seriousness of states in their politics related to human rights. Politics can be bad and ineffective, unless it is used efficiently, that is the responsibility of states. The most important political body on the universal level is the UN Human Rights Council, on the regional level for example the Committee of Ministers in the Council of Europe.

Non-judicial, expert bodies are usually set up by various human rights treaties to provide monitoring and observance of the performance of states party to that given treaty. Their members are independent experts acting in their own capacity. The activities of these bodies may cover a wide array of responsibilities: monitoring states' actions, evaluation of reports prepared by them, examining situations, in some cases even entertaining complaints regarding states' activities. These bodies can be effective against individual violations and also represent a very important professional authority regarding the content of the given treaty, so their role is of utmost importance related to further development of law. On the universal level, the UN treaty bodies fulfil this role, while on the regional level the most important expert bodies are the Inter-American Commission on Human Rights and the African Commission on Human and Peoples' Rights.

Judicial bodies are international human rights courts, which provide for the highest possible level of protection of human rights within the present framework of international law. They are set up by treaties, which regulate in details the operation of these bodies, and especially their procedures and conditions of complaints to reach these fora. The members of these courts are judges, who adopt judgments, which can be legally binding on states. Currently three of these institutions exist, one in each regional system, in Europe, in America and in Africa. There is no human rights court on the universal level, though plans of the creation of a "World Court of Human Rights" have been existing for a long time, but currently this is far from being a reality.

## **1.6 Universalism v cultural relativism**

One of the most intriguing and exciting debate within the field of international human rights law is organised around the question of universality of human rights and the possible role of regionalism when it comes to respect of human rights.

The general concept of international human rights law is its universal nature, building on the assumption that respect for human rights constitute a universal nature, binding all states equally, regardless of ideological or cultural differences. There is a well-founded fear that other interpretations could lead to states finding excuses for violating their obligations regarding human rights. The Universal Declaration of Human Rights had been adopted in 1948, building on this foundation. Though its provisions have never been directly denied by any states, the past years have seen some differing ideas emerging in the field of international politics.

In 1990, the Cairo Declaration on Human Rights in Islam was adopted by the Organisation of the Islamic Conference (today: Organisation of Islamic Cooperation)

with the aim of building up an Islamic human rights subsystem. Some of its provisions has stirred serious debate not only in international politics, but human rights experts' circles. While its supporters claimed that it is complementary to the Universal Declaration and not willing to become its alternative, its text has made this very hard to believe to many. For example it has stated that all the rights and freedoms stipulated by it are "subject to the Islamic Shari'ah" and also made the Shari'ah the "only source of reference for the explanation or clarification of any of the articles of this Declaration". Many states, human rights experts, NGOs and even liberal Muslim groups have addressed heavy criticism to it, stating for example that the Cairo Declaration attempts to circumvent the principles of freedom and equality.

The Bangkok Declaration has been adopted in 1993 by ministers from Asian states. Though the Declaration has seemingly reaffirmed these states' commitment to the Universal Declaration of Human Rights, at the same time they have emphasized the principles of sovereignty and non-interference, and also have called for greater emphasis on economic, social, and cultural rights, placing for example the right to economic development over civil and political rights, differing from the principles and widely considered to be a critique of universalism of human rights. This declaration has been followed by the ASEAN Human Rights Declaration, adopted in 2012, which was criticized again by many for failing to include many key basic rights and fundamental freedoms. Additionally, some of its provisions are feared by numerous analysts to be capable of being used to undermine protection of human rights, for example the one stating that "the realization of human rights must be considered in the regional and national context".

The concept of "cultural relativism" may be useful as cultural differences unarguably exist within the ranks of mankind. But the ideas of domestic laws being able to precede over universally recognised human rights norms, or of creating regional human rights rules directly inconsistent with general international human rights standards is not acceptable and does not serve the interest of protection of human rights.

## **2. Protection of human rights in the framework of the UN**

The creation of the United Nations at the end of the Second World War has raised the question of protection of human rights into the sphere of international law. This meant a serious novelty as in the historical era before the war human rights had already been recognised by most domestic constitutional systems, but were largely unprotected by international law. Exceptions can be mentioned, for example, some of the provisions of contemporary international humanitarian law and some of the protection of rights of aliens, but generally human rights have been considered as being subject to domestic legislation.

### **2.1 UN basic documents and human rights**

#### **2.1.1 Human rights in the UN Charter**

The founding treaty of the United Nations, the UN Charter, adopted in 1945 has made a serious change. Among the purposes of the UN, it has included, the “promotion and encouragement of human rights and fundamental freedoms”. A very early prohibition to discrimination has also been added to this as the text stipulates “without distinction as to race, sex, language, or religion”, which can be considered as an exact legal obligation, stretching beyond general principles and political purposes. Additionally to this material legal base, methodological and institutional fundaments have also been created by the Charter. According to it, member states have to be committed to promote “universal respect for, and observance of, human rights and fundamental freedoms for all”. The previously mentioned prohibition of discrimination is once again reaffirmed related to this obligation, too.

The provisions of the Charter thus has made clear, that the new world order after 1945 does not consider human rights being domestic issue, under the absolute protection of state sovereignty. Ever since this giant step, the UN has proven to be instrumental in the process of developing international standards of human rights protection, by adopting international treaties and other documents setting out universally recognised human rights.

The first and most famous step had been the adoption of the Universal Declaration of Human Rights (UDHR) in 1948, which has been followed by (a few years later)



a series of international treaties protecting numerous human rights and human rights-related state obligations.

But written legal rules are not enough: the UN has also created more internal institutions and bodies with the aim to monitor and supervise states' actions and behaviour related to recognition and implementation of human rights. There are organs providing for political protection, such as the UN Human Rights Council (and its predecessor, the UN Commission on Human Rights) and bodies providing for experts' protection (treaty bodies, established under the various UN human rights treaties), monitoring implementation and enforcement of the relevant treaties.

### 2.1.2 Universal Declaration of Human Rights

The first list of human rights recognised by the United Nations appears in the Universal Declaration of Human Rights.

No state has voted against it on 10 December 1948 (10 December is "International Human Rights Day" ever since), as none of them has ever expressed any intention to denounce it. Though this may reflect a worldwide consensus, a disturbing element has to be pointed out. When decision has been made about the proposed document in the General Assembly, eight states abstained from the voting. The Soviet Union and its allies (Belarus, Czechoslovakia, Poland, Ukraine, Yugoslavia), Saudi Arabia and South Africa has not supported it with their votes. This does not necessarily mean a strong opposition against it, but is definitely a sign of the lack of full consensus on the matter of human rights.

Later, the Universal Declaration of Human Rights has been reaffirmed in the Vienna Declaration and Programme of Action, adopted after the World Conference on Human Rights in 1993 (see: GA Resolution 48/121 of 14 February 1994), and still remains the basic document to express universal human rights values. Its importance is shown by the fact that all international human rights treaties refer to the Declaration in their preambles.

As a resolution of the UN General Assembly, the Declaration was not adopted as a legally binding instrument. Today its binding force is not questionable any more, this argument stands on at least three legs. First, it is arguable that the content of the Declaration can be qualified as an authentic interpretation of the human rights provisions of the UN Charter, most of which are today recognised as peremptory international norms, or *jus cogens*, which mean provisions legally binding under all circumstances. While it may be questioned in the whole corpus of the Declaration, the second possible argument is aimed on that the Declaration's norms have turned to customary international law by today. While most of the rights embodied in the Declaration may satisfy the test of customary international law, that means the presence of a state practice, backed by appropriate *opinio juris*, such as the prohibition of torture, some questions can be asked in relation to all of those. For example the right to enjoy asylum, embodied in Article 14 has not been echoed by later conventions, only the

right to seek it. A third possible argument is that contents of the Declaration can be considered as reflecting internationally accepted principles of law, as they are enshrined by the constitutions and domestic legal provisions of many states. Whatsoever, today it is nearly impossible to argue against the legally binding nature of its norms, especially that all of them has been reaffirmed by legally binding international conventions.

The structure of the Declaration was compared to the portico of a Greek temple by René Cassin, who has had the leading role in its drafting: the steps leading to the entrance, four columns with foundations, and a pediment on the top had all had their role in his vision. The seven paragraphs of the preamble, which set out the reasons of the Declaration, represent the steps that take to the entrance, which is behind the four columns – meaning the main body of the Declaration. Articles 1 and 2 of the Declaration provide for the principles of dignity, liberty, equality, and brotherhood, more exactly, prohibition of discrimination. These represent the foundation blocks of the columns, without which the structure cannot stand. Human rights embodied in Articles 3-11 form the first column, constituting basic rights of the individual such as the right to life, or the prohibition of slavery and other human rights. The second column is built up by human rights embodied in articles 12-17, constituting rights of the individual related to the public power. The third column is represented by human rights in articles 18-21, which guarantee political freedoms, such as freedom of thought, conscience, religion, or association. Articles 22-27 make the fourth column, which provide for economic, social, and cultural rights. The last three articles of the Declaration is envisaged by René Cassin as the pediment which binds the structure together: those deal with the duty of the individual towards the society and the obligations of states vis-à-vis. It also emphasises the prohibition of use of rights in contravention of the purposes of the UN.

The UN's human rights protection activities, which have got off to a seemingly successful start with the relatively early adoption of the Universal Declaration of Human Rights, have soon had the face difficulties because of the emergence of the Cold War. Seamless operation of the UN's institutions themselves have become victim of this conflict. As a result, no new legal standards have been adopted in the UN until 1965, with the adoption of the International Convention on the Elimination of all Forms of Racial Discrimination and the two covenants of 1966, thus initiating a new period of time in the history of international human rights law.

## **2.2 UN main bodies and human rights**

If we consider the protection of human rights as a goal and a duty of international law and the UN, it is important to examine the competence of various UN bodies and institutions. Our present system of international law is organised around and built on the concept of state sovereignty, so this factor is still an inevitable factor. It also plays a crucial role in relation to enforcement of human rights, as mentioned earlier. It has long been regarded as the “Achilles heel” of international human rights protection system, as states have plenty of possibilities to oppose any possible international action.

Regardless of the fact that international human rights law has developed to a certain level, where states can no longer argue human rights being solely a domestic matter, there are still some serious limits to the ability and the capacity of the international community to react to violations or abuses of human rights by states, especially if they persist in their practices. Existing enforcement mechanisms seem to lag behind the development of legal norms which they should stand for.

As a result, enforcement mechanisms in the UN generally speaking are quite weak, the UN Security Council being the only body able to apply political-legal sanctions going beyond mere condemnation by the international community. Still, it is important to examine the various institutions of the UN and see what their tasks may be related to our subject.

Human rights institutions within the UN may be catalogued either as “Charter bodies” or as “treaty bodies”, depending on their origin. Charter bodies are created either by the UN Charter, or by bodies which exist on the Charter itself. On the other hand, treaty bodies are the results of UN human rights treaties, which usually always set up these institutions. The previous ones provide for “political”, while the latter ones for “experts” protection, based on the classification drafted up in a previous chapter. The political UN human rights institutions are usually made up by the representatives of member states, while the treaty bodies are composed of human rights experts acting in their individual capacity, regardless of their nationality and origin. All of these bodies are served and supported by the High Commissioner for Human Rights, whose Office is responsible for their operation.

Here we analyse the main UN bodies’ role in protection of human rights, some of them will be examined in details in a later chapter.

### **2.2.1 UN General Assembly**

The first Charter body worth mentioning is the UN General Assembly (UNGA). It is the principal organ of the United Nations, comprising all members states of the organisation (currently 193 member states), with one vote allocated to each of them. While its authority and competences are at best vague (sometimes problematic and even contra productive according to some authors) in international matters and politics, its political weight gives it a special role related to human rights. Article 13 of the UN Charter gives the Assembly the task of initiating studies and making recommendations to help realization of human rights and fundamental freedoms. From the institutional side, as the Assembly is the UN organ that all other UN human rights bodies report back to (also the Security Council through its annual report, which can be important related to situations with possible grave human rights problems), it has a general overview of the global human rights situation.

The General Assembly can also make recommendations for action via resolutions or declarations, which both are legally non-binding documents, but still may have a significant effect. Firstly because of their possible political weight in certain situations

(reflecting a majority opinion of member states), secondly because those resolutions are usually followed by the UN human rights and other bodies even if some states oppose them, and thirdly because of the possibility of gaining binding power after all. As in the case of resolutions reflecting unanimous opinion of states or a wide consensus: these may constitute strong evidence of the existence of a customary – thus binding – international legal norm. Many of the human rights-related UNGA resolutions are considered to have customary power, which is backed up by strong arguments from professional sources.

One of the most important subsidiary organ of the UNGA is the UN Human Rights Council (established by GA resolution 60/251), which holds the primary role among Charter bodies in the present UN system (examined in a later chapter).

### **2.2.2 Economic and Social Council**

The Economic and Social Council (ECOSOC) is responsible for the UN's wide range of activities related to economic and social issues. It consists of 54 member states, with equal voting status, like in the General Assembly. Member states are elected by the UNGA for three-year terms. Seats on the Council are allocated on the basis of equal geographical representation, with fourteen to African states, eleven to Asian states, six to Eastern European states, ten to Latin American and Caribbean states, and thirteen to Western European and other states.

Similarly to the General Assembly, the ECOSOC has a wide mandate related to protection of human rights. Article 62 of the UN Charter vests some important tasks to it, in general to “make or initiate studies and reports with respect to international, economic, cultural, educational, health and related matters”. The task is followed by competences, for example that the ECOSOC may “make recommendations for the purpose of promoting respect for, and observance of, human rights and fundamental freedoms”. This provision supplements the general idea of protection of human rights embodied in the Charter, by entitling the ECOSOC to take a leading institutional role on this field. This leadership role is also reflected by the fact, that it receives the reports of the treaty human rights bodies and transmits them to the General Assembly, and that it is also responsible for the coordination of a wide array of UN programmes related to human rights.

The ECOSOC has plenty of subsidiary bodies, mostly commissions, many of which are responsible for various fields of human rights: the Commission for Social Development, the Commission on the Status of Women, the Commission on Narcotic Drugs and the Commission on Crime Prevention and Criminal Justice are just a few worth mentioning.

### 2.2.3 UN Security Council

While not a human rights organ per se, the UN Security Council (UNSC) also has significant importance related to protection of human rights. While under the UN Charter its primary responsibility is the maintenance of international peace and security, its leading political role makes it inevitable in situations of crises going hand in hand with human rights violations, sometimes on a massive scale.

The UNSC has 15 members, each member states have one vote. Out of the fifteen, five are so-called “permanent members” with veto power, which means that a decision cannot be made in the UNSC without their consent or against their will. The other ten, so-called “non-permanent members” are elected by the General Assembly for a two-year term with a two-third majority. Permanent members are China, France, Russian Federation, the United Kingdom and the United States. Currently the ten non-permanent members are (with end of term date):

1. Argentina (2014)
2. Australia (2014)
3. Chad (2015)
4. Chile (2015)
5. Jordan (2015)
6. Lithuania (2015)
7. Luxembourg (2014)
8. Nigeria (2015)
9. Republic of Korea (2014)
10. Rwanda (2014)

As the present membership system of the Security Council is under serious criticism, the reform of the body, including its membership is under consideration, as part of the UN reform.

Meetings of the UNSC are called at times when the need arises.

The most important responsibility of the Security Council is to determine the existence of a threat to the peace or act of aggression. But it also has an important role in situations not of such gravity yet: it may call upon the parties to a dispute to employ settlement by peaceful means and may recommend methods of adjustment or terms of settlement to prevent the situation from getting more serious. In some cases, if the situation poses a threat to international peace and security, the Security Council can – acting under Chapter VII of the Charter – decide to impose sanctions or in the worst case, even to authorize use of force.

Under the UN Charter, all member states are obliged to comply with these “Chapter VII” resolutions of the Council, which is an exception in the present system of international law. Sovereign states has to accept and obey these orders from the Council. This may have a very strong effect on human rights, because massive human rights violations may amount to the level of a threat to international peace and security, thus making the Security Council a very important actor related to human rights.

Unfortunately, the political nature of the behaviour of the UNSC (because of the actions of some of its members, usually permanent members) does not always help it to meet this expectation.

## **2.3 The institutional centre of human rights protection of the UN**

Based on Article 68 of the UN Charter, the ECOSOC has delegated its human rights functions to the Commission on Human Rights in 1946. It has become the leading political institution of the UN's human rights activities, for example it has drafted most of the UN human rights documents and of the treaties. It was replaced by the Human Rights Council in 2006, which is now the main Charter body responsible for human rights-related activities of the UN.

### **2.3.1 UN Commission on Human Rights (1946-2006)**

The Commission on Human Rights had 53 states as members (in its final form), elected by the ECOSOC for three-year terms, which was renewable. Members were acting in their capacity as representatives of the governments of UN member states gaining a seat in the Commission.

Over its 60 years of existence, the Commission has made significant contribution to the establishment of the UN's constantly developing international human rights legal framework. It has taken a leading role in codifying international treaties, developing complaints mechanisms and special procedures. It had a very important role as being the most accessible UN body for non-government organisations: NGOs were present at its sessions, and the Commission has proven a standing opportunity to provide NGO input on human rights issues.

The Commission has not had any role in enforcement at the beginning, and was not entitled to take any action until 1967. Then the so-called "1235 procedure" was adopted (named after ECOSOC resolution 1235 (XLII) of 6 June 1967), which has provided for public debate focusing on violations in particular States. This has not only led to the possibility of public identification and discussion of country-specific human rights situations (with a possibility of political pressure), but also the appointment of a "special rapporteur" with a mandate to investigate and report on the human rights situation in a specific country. Later this possibility has evolved to the practice of not country-specific, but thematic situations. Thematic procedures could involve the appointment of experts to investigate and report on all aspects (including violations) of human rights relevant to a specific theme. Even though country-specific mandates have raised debates among states and those have not been applied many times, the special procedures (both country and thematic) have been considered to be the Commission's major achievements.

The so-called “1503 procedure” was another technique developed by the Commission to deal with alleged human rights violations (named after ECOSOC resolution 1503 (XLVIII) of 27 May 1970). This provided for a complaint procedure to be applied in the case of a “consistent pattern of gross and reliably attested violations of human rights and fundamental freedoms”. In a situation like this, the Commission could work with the affected State in relation to the complaint on a confidential base. While this was an advancement, the relative weakness of the Commission, the secrecy around the complaints and the inefficiencies in their processing have not led to an overall success, as other institutions could at this time provide better results.

Despite its initial successes and important role in advancement of protection of human rights, the Commission has become more and more unable to properly fulfil its functions, which has become increasingly visible during the years after 2000. Its declining credibility and professionalism was the result of many factors, for example the manipulation of its mechanisms by member states in order to achieve their own or their allies’ political goals. This has resulted in selectivity in the choice of states singled out for country-specific measures, or the election of states with poor human rights records into the ranks of the Commission. All these has led to the view that the Commission has to be radically reformed.

### **2.3.2 UN Human Rights Council (2006– )**

The Human Rights Council has started its operation on 15 March 2006. The creation of the Council was to replace the Commission as the key political UN human rights body (via GA Resolution 60/251). It has the general mandate to address human rights issues, in more details, it is responsible for promoting the protection of human rights, for fostering international cooperation on human rights, for providing capacity building assistance to states to help them to meet their human rights obligations, and for responding to violations of human rights.

The newly created Council has not become substantially different in composition to the Commission and has retained all of its same general mechanisms. Special procedures, complaints mechanism, significant access of NGOs have all been kept to the new institution. A new mechanism was introduced, the so-called universal periodic review (presented in a later chapter). The practice of thematic procedures has been continued under the Council, currently they include working groups on enforced or involuntary disappearances, the right to food, and the situation of human rights and freedoms of indigenous persons.

The question of membership in the Council was an important question during the reform debates as membership issues had become a leading factor in the political demise of the Commission. The size of the Council has been reduced to 47 members from the 53 of the Commission. Members may serve maximum two consecutive three-year terms. Membership can be suspended by a two-thirds majority of the UN General



Assembly, in the case of committing systematic and gross violations of human rights. This happened so far only once, in 2011, with Libya.

There have been proposals for a more dramatic cut to allow for a stricter selection of nominees and for universal membership as well, to simply circumvent the problem of political selectivity. There have also been ideas to avoid the risk of further politicisation with composing the Council only of non-state actors.

Seats for membership are allocated based on the equitable geographical distribution of member states via the regional groups formed in the framework of the UN. The distribution of seats is the following:

- ✿ 13 African states
- ✿ 13 Asian states
- ✿ 6 Eastern European states
- ✿ 8 Latin American and Caribbean states
- ✿ 7 Western European and other states

Some important new features have been introduced to keep states with poor human rights records from nomination to, being elected to, or keeping membership of the Council. During the elections, members of the General Assembly shall take into account the candidates' human rights record. Regional groups can nominate more candidates than the positions available to that group, which ensures a genuine vote taking place.

The Human Rights Council has gained a higher status in the UN as it is a subsidiary organ to the General Assembly, while the Commission had only been a sub-commission of the ECOSOC. This reflects a growth of importance of human rights within the institutional system of the United Nations. Other institutional novelties are present as well: compared to the Commission, which only met for one annual session (six weeks long), the Council is a standing body that meets for at least three sessions per year. Additionally, it has the possibility to convene special sessions if the need arises, at the request of a Council member with the support of one-third of the members of the Council.

Early performance of the Council has drawn mixed evaluations. It has successfully adopted important new human rights conventions, for example the Convention on the Rights of Persons with Disabilities and the Optional Protocol to International Covenant on Economic, Social and Cultural Rights. But unfortunately the Council has shown lot of elements of negative dynamics, last seen with the Commission, as it has been accused by applying of double standards and declining credibility. One of the worst practice was the continuous singling out of Israel's human rights violations, while no resolutions have been supported by the majority of the Council on other, equally serious situations. The majority of the special sessions convened by the Council, a vast proportion of these have focused only on Israel, and what's worse, the resolutions adopted has constantly shown a one-sided focus on these situations.



### **2.3.3 Universal Periodic Review**

One of the main tasks of the Human Rights Council is to run the Universal Periodic Review (hereinafter: UPR) mechanism of the UN. By means of UPR, the United Nations is capable to monitor and review regularly the situation of human rights in each UN-members by forming a troika composed of three UNHRC-members. There are so-called UPR-cycles within which the UN-members shall prove in every four and a half years their commitment to the human rights obligations and standards and explain their improvement in this field. UNHRC is authorized to gather information about states from different kind of sources. Firstly, States are obliged to submit official reports based on the structure requested by the UNHRC on the situation of human rights in the State under review. Furthermore, both the so-called National Human Rights Institutions (usually the ombudsman-type institution of a given state) of each State and the NGOs interested are authorized to file 'shadow reports' about the States under review. In addition, each member of the Human Rights Council as well as NGOs can provide information and also ask questions to the States under review either about general or particular issues. Finally, the so-called stake-holders of the UN (mainly rapporteurs of a particular question that relates to human rights) are also authorized to inform the UNHRC about such issues.

The most spectacular part of the UPR review process is when the State that is under UPR review ought to defend its standpoint in public at a regular session of the UNHRC. During this open public session, the member states and NGOs can ask questions about the situation of human rights in a particular state and also make recommendations to the State under review. The State under review must reply on these questions and recommendations (either immediately or some months later) whether it can accept, consider or even reject these recommendations. In case of accepting recommendations (compiled later by the HRC itself) the State under review shall take the necessary steps to be comply with the recommendations within four and a half years since it must explain the improvements on these questions at the forthcoming UPR-review cycle.

### **2.3.4 UN High Commissioner for Human Rights**

The post of a high commissioner responsible for human rights has been created by the UN General Assembly in 1993. The High Commissioner for Human Rights is the principal human rights official of the United Nations, the position itself is at the level of under-secretary-general, with the general aim of coordination of the UN's human rights activities. The activities cover many duties, one of the most important is the supervision of the Human Rights Council. This is a very important position, not only because of direct connection to states and the ability to influence their human rights practices but because of serving as a "face" to UN's human rights activities.

The present high commissioner is Navi Pillay from South Africa, she was approved by the General Assembly on 28 July 2008. Her mandate has been renewed for two years

beginning on 1 September 2012. From September 2014 she will most probably be followed by Zeid Ra'ad Zeid al-Husseini from Jordan, who was named as the successor by the UN Secretary General during late spring of 2014.

The most well-known high commissioner has been Sergio Vieira de Mello from Brazil, who tragically has only served less than one year. After he was appointed, he was asked by the UN Secretary-General, Kofi Annan, to serve in Iraq as his Special Representative. On 19 August 2003, he and 22 colleagues have been killed in a bomb attack against the UN headquarters in Baghdad.

The tasks of the High Commissioner are numerous. He/she has to play the leading role on human rights issues and to emphasize the importance of human rights at both the international and national levels. He has to promote international cooperation for human rights, and stimulates and coordinate action for human rights throughout the UN system. The Commissioner has important tasks regarding to codification of new norms: promotes universal ratification and implementation of international legal norms, and assists in the development of new ones. He/she supports human rights organs and treaty monitoring bodies, responds to serious violations of human rights with the means at disposal. Many of the tasks include activities not professional but of political nature, which requires the holder of this position not only human rights expertise but also a good ability to maneuver in international political relations.

The Office of the High Commissioner for Human Rights (OHCHR) employs more than thousand staff in Geneva, New York, and other country and regional offices, and a workforce of nearly seven hundred international human rights officers serving in various UN peace missions or political offices. Financial conditions are covered from the United Nations regular budget and from voluntary contributions from states, intergovernmental organizations, foundations and individuals.

## 2.4 UN treaty-based expert bodies

Based on the nine core international human rights treaties, ten human rights treaty bodies have been created. These are the institutions responsible for non-judicial, “expert” or “professional” protection of human rights, serving as the second level of protection.

Nine of these bodies has the task of monitoring implementation and enforcement of one given core international human rights treaty. The tenth treaty body has a special scope of activities, aiming rather on prevention: the Subcommittee on Prevention of Torture (established under the Optional Protocol to the Convention against Torture) is responsible for monitoring places of detention in states parties to the protocol.

These bodies are the following:

1. Human Rights Committee (CCPR)
2. Committee on Economic, Social and Cultural Rights (CESCR)
3. Committee on the Elimination of Racial Discrimination (CERD)
4. Committee on the Elimination of Discrimination against Women (CEDAW)
5. Committee against Torture (CAT)

6. Subcommittee on Prevention of Torture (SPT)
7. Committee on the Rights of the Child (CRC)
8. Committee on Migrant Workers (CMW)
9. Committee on the Rights of Persons with Disabilities (CRPD)
10. Committee on Enforced Disappearances (CED)

All of the treaty bodies are created and have to work in accordance with the provisions of the treaty that they monitor.

### **2.4.1 Common elements to treaty bodies**

All of these bodies are committees of independent experts. As all of the relevant treaties require, these persons have to be “experts of high moral standing and recognized competence in the field covered by” the given convention. Members of these committees shall be elected by secret ballot by the states party to the given convention, nominated from among their nationals. Each state party may nominate one person. All of the treaties set the expectation regarding to elected circle of members, that due consideration has to be given to equitable geographical distribution and the representation of all the principal legal systems of the world. This factor is very important to ensure a wide acceptance of the committees’ activities.

Members of the committees are usually elected for a fixed term, re-election is usually possible in case of re-nomination. In case of the death, resignation or any other reason of not being able to perform the duties of an elected member, usually the state party which nominated that member shall appoint another expert from among its nationals to serve for the remainder of the term, if that person is approved by the relevant committee.

Members of these committees shall serve in their personal capacity. Every treaty expects independency, neutrality, impartiality from the members and that their activities shall be driven by professionalism and professional standards rather than politics and especially not the pursuance of interests of the nominating states. Though it may be important for UN member states to have more experts in more committees as this reflects a moral-political weight and recognition within the UN, and for this reason, states usually lobby for their nationals, their activities has to stay non-political. This is helped by the fact that the committees’ activities are closely scrutinized by NGOs, academic and public attention, and expert members jeopardize their professional reputation.

If the UN General Assembly decides so, the members of the committees may receive emoluments from United Nations resources. Terms and conditions of these have to be decided by the General Assembly.

Every committee establishes its own rules of procedure and elects its own officers for a fixed time period, according to the detailed provisions of the treaty it overlooks. The meetings of the committees are organized according to a fixed time period, usually once or twice in a year, and they are usually held at the UN headquarters in Geneva, except

for the meetings of the CEDAW, which are usually held in New York. The conventions usually address the UN Secretary-General to provide the necessary staff and facilities for the effective performance of the functions of these committees, which practically means that the Office of the High Commissioner for Human Rights is responsible for supporting their work and for assisting them in their work. The office provides them with basic capacities of secretariats to handle their administrative duties.

#### **2.4.2 Current problems with the operation of treaty body system**

While the treaty bodies constitute a fundamental pillar of the UN's international human rights protection system, and it has grown significantly during the past decades (especially doubled in size over the last decade), some serious problems have also surfaced during this period.

One of these is the accumulation of a significant backlog of state reports and individual communications. Two reasons of this can be easily identified: under-resourcing of the treaty bodies and insufficient compliance by states with their reporting obligations. It may be interesting to mention, that the latter has its counterpart on the other side, too: during the last years, states tend to complain more and more about the growing burden of their reporting obligations, causing a serious workload to national authorities. An additional reason is the insufficient harmonization of working methods among the various treaty bodies, which results in a number of inefficiencies.

Since 2009, a process has been initiated by the High Commissioner for Human Rights, to address this problem, first as a process of consultation about possible remedy to that. In 2012, the High Commissioner has published a 100-page report with recommendations as the result of these consultations, which have focused on strengthening the system rather than reforming it, as the High Commissioner had come to the conclusion that "legal parameters of the treaties should not be altered". Among many other elements, the report has called attention to the utilization of new technologies, for example including webcasting and videoconferencing in operation of the bodies, which on one hand, could increase visibility and accessibility to these treaty bodies. But on the other hand, online activities – for example holding of online sessions – could lead to lower costs of operation as well.

The report was followed by a General Assembly resolution. It has launched an intergovernmental process to strengthen and enhance the effective functioning of the treaty body system. The next step of this process is a fresh General Assembly resolution adopted in April 2014 (GA resolution 68/268). The most important results of this resolution are additional meeting time and human and financial resources from the regular budget of the UN are granted to the treaty bodies. Additionally, a capacity building package was agreed upon to assist states in fulfilling their obligations deriving from the treaties. It recommends the harmonization of working methods by the ten treaty bodies.

## 2.5 UN international human rights treaties

Currently there are nine core international human rights treaties in force. The last one, entering into force on 23 December 2010 is the convention on enforced disappearance. These treaties are widely accepted by UN member states – all of them have ratified at least one out of the core international human rights treaties, and 80 percent of all member states have ratified four or more. Some of these convention enjoy a near-universal acceptance, meaning that they are ratified by nearly or by all member states.

The nine core human rights treaties are:

1965 – International Convention on the Elimination of All Forms of Racial Discrimination (ICERD)

1966 – International Covenant on Civil and Political Rights (ICCPR)

1966 – International Covenant on Economic, Social and Cultural Rights (ICESCR)

1979 – Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)

1984 – Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT)

1989 – Convention on the Rights of the Child (CRC)

1990 – International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICESCR)

2006 – International Convention for the Protection of All Persons from Enforced Disappearance (CPED)

2006 – Convention on the Rights of Persons with Disabilities (CRPD)

Optional protocols to the conventions aim to amend their provisions, to extend the protection they offer or to strengthen the monitoring and control mechanisms they provide for. These protocols are:

1966 – Optional Protocol to the International Covenant on Civil and Political Rights (ICCPR-OP1)

1989 – Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty (ICCPR-OP2)

1999 – Optional Protocol to the Convention on the Elimination of Discrimination against Women (OP-CEDAW)

2000 – Optional protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict (OP-CRC-AC)

2000 – Optional protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography (OP-CRC-SC)

2002 – Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (OP-CAT)

2006 – Optional Protocol to the Convention on the Rights of Persons with Disabilities (OP-CRPD)

2008 – Optional Protocol to the Covenant on Economic, Social and Cultural Rights (ICESCR-OP)

### 2.5.1 Convention on the Elimination of All Forms of Racial Discrimination

The International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) has been adopted by the United Nations General Assembly in 1965, and it has entered into force in 1969. It is a widely accepted international treaty, with nearly 180 states party to it. It is a very important human rights treaty, aiming the elimination of racial (and also other sort of) discrimination and the promotion of understanding among all races.

This treaty was the first UN human rights convention adopted after the long-time of apparent inactivity of the organization in the field of human rights following the adoption of the Universal Declaration of Human Rights. Another reason that makes this a very important international treaty is that it addresses a fundamental question without which the protection of human rights is hardly imaginable. The obligation of states embodied in the introductory part and Article 55 of the UN Charter, namely the prohibition of discrimination has lead the questions of discrimination widely open. The Convention can be considered as being the authentic interpretation of the text of the Charter on this field – and it is needed to be able to answer those questions.

The first of these questions is the definition of “racial discrimination”. Article 1 of the Convention defines it as:

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

The definition introduced by the convention represents an attempt to cover a wide array of possible discriminatory actions.

For the application of the Convention, discrimination does not need to be based on race or ethnicity. When considering if a certain action is falling under the ambit of the Convention or not, its effects have to be evaluated. To determine, whether the action’s effects are contrary to the Convention or not, that action’s unjustifiable disparate impact must be present to a group distinguished by race, colour, descent, or national or ethnic origin. Belonging to a particular group can be decided by self-identification, if no other factor is identifiable.

Additionally, as anthropologists had not produced a clear distinction between “ethnicity” and “race”, the convention does not distinguish between discrimination based on ethnicity and on race. The criticism of the practices of some societies have been given force to by the inclusion of descent, specifically covering discrimination on the basis of inherited status (for example caste).

The treaty makes for exceptions. Affirmative action policies and other measures taken to redress inequalities and develop equality are also possible. Distinctions made on the

basis of citizenship are specifically excluded from the definition, as these are widely applied by states' practice and not necessarily constitute discrimination.

The structure of the Convention reflects structure of the Universal Declaration of Human Rights, and has served as an example for other UN human rights conventions adopted in the future, for example one can see the same with the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, adopted later. The preamble is followed by twenty-five articles, which are divided into three parts – obligation, enforcement and closing provisions.

The first part details the obligations of the states party to the Convention. Their general obligation is to eliminate all forms of racial discrimination and to promote understanding among all races.

According to the Convention, States party take the obligation of not applying and not supporting discrimination prohibited by its provisions. They have to take effective measures against it, that includes prohibition by legislation and revision of its policies and actions to make that no discrimination is being applied. Article 5 lists specific areas and human rights in which discrimination shall be eliminated. Some discriminatory actions are even qualified to be crimes by the Convention, apart from the crime of apartheid (which has been criminalized by a previous specific international treaty), the incitement of racial hatred shall be prosecuted as a crime by states party according to Article 4. (This provision has drawn numerous reservations from states, as we have referred to it in a previous chapter.) Their additional obligations are to ensure judicial remedies for acts of racial discrimination, and as a preventive measure, to promote understanding and tolerance in public education.

The second part provides for the enforcement mechanism of the Convention. It establishes the first of the institutions we know today as “UN treaty bodies”, the Committee on the Elimination of Racial Discrimination (CERD). It may exercise the following tasks and powers:

1. to make general recommendations based on the Convention;
2. to conduct a dispute-resolution mechanism between parties, related to alleged violations of the Convention;
3. to hear individual an complaint, if the state party addressed by that recognises such competence of the Committee.

Article 22 of the Convention, similarly to other UN human rights conventions creates the possibility to refer any dispute between states party over the interpretation or application of a provision of the Convention to the International Court of Justice. This clause has been invoked only once ever since, by Georgia against Russia after their 2008 war. Georgia has argued that Russia had applied wide scale and systematic discrimination in South Ossetia, a territory in the process of succession from Georgia and tried to put the armed conflict in the context of this allegation, but the Court has found that it does not have jurisdiction.

The issue of positive discrimination is also surfaced in the Convention, which states that “when the circumstances so warrant” states party to it shall employ affirmative



action policies for specific racial groups to guarantee “the full and equal enjoyment of human rights and fundamental freedoms”. This is important, because the Convention itself denies the popular misunderstanding that “positive discrimination is the same as the negative, just the other way round”, often used by political actors to criticize equal treatment efforts.

### **2.5.2 The UN human rights covenants**

1966 has been a very important year in the history of the UN’s human rights activities. This year has marked the birth of the two human rights covenants serving as treaties of fundamental importance.

As their title shows, the International Covenant on Civil and Political Rights was adopted for the protection of civil and political (or “first generation”) human rights, while the International Covenant on Economic, Social and Cultural Rights has dealt with economic, social and cultural (or “second generation”) human right. As it is often called, “international bill of human rights” is comprised of the Universal Declaration of Human Rights from 1948 and the two covenants of 1966 (and the optional protocols) together.

The covenants has been supplemented by optional protocols. The first one, to the International Covenant on Civil and Political Rights was adopted together with the covenants and aimed for a stronger enforcement mechanism in relation to states party willing to accept that. The second optional protocol to the same covenant, adopted in 1989, has aimed to abolish the death penalty. 2008 has seen the birth of an optional protocol to the International Covenant on Economic, Social and Cultural Rights, too, which has also aimed on a more effective enforcement mechanism of this covenant.

Some common elements of the two covenants can easily be identified. In their preambles, both of the covenants remind states to their obligations under the UN Charter to promote and respect human rights, recognize the importance of the Universal Declaration of Human Rights and the idea that free human beings enjoying freedom and freedom from fear and want can only be achieved by creating the conditions whereby everyone may enjoy his human rights, being civil and political or economic, social and cultural rights.

Articles 1, 3 and 5 of the two covenants also show serious similarities, they are almost the same in the two documents. They all serve as provisions of fundamental importance.

Article 1 of the covenant recognize the right to self-determination of peoples as being universal, meaning that they may freely determine their political status and freely pursue their economic, social and cultural development”. This reference and its unusual positioning into a human rights treaty is explained by the contemporary international political environment, strongly determined by decolonization, and the tension it has caused in the system of states.

Article 3, using the same wording, reaffirms the equal right of men and women to the enjoyment of all human rights in both of the conventions, meaning in relation



to all of the human rights recognized by those, and obliges states party to provide for this principle a reality. Apart from this common provision, Article 2 of both of the covenants, which defines states' general obligations (different in the two, see later in the present chapter) provide for a general prohibition of discrimination, as it obliges states to fulfil their obligations "without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status". With this, prohibition of discrimination is also a very important common element of the covenants.

Article 5 with identical wording, in both covenants provides for protection against the destruction or undue limitation of human rights, and against misuse or misinterpretation of any of the provisions of the covenants to justify human right infringements. It also establishes a prevention against states limiting already recognized and existing human rights in their domestic regime on the ground that those human rights are not recognized yet, or recognized only to a lesser extent in the covenants.

The main differences of the covenants derive from their different nature. As previously mentioned, the first Covenant stands for first generation human rights, while the second one provides for those of the second generation. As presented already in an earlier chapter, presenting the different generations of human rights, international treaties usually can not install obligations on the states party on the same way with these different kind of rights.

This is very well reflected in the system of the two different covenants, and the obligations they impose on states, which are completely different. International Covenant on Civil and Political Rights require states to recognize, respect and ensure every human right contained in the Covenant immediately when enters into force related to that state, and to do it to a full extent, limitation is only possible with the conditions and to the extent that the Covenant provides for. On the other hand, according to the International Covenant on Economic, Social and Cultural Rights, a state party only "undertakes to take steps (...) to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized", which means much less of an obligation. This duality of international legal obligations related to different kind of human rights is not unusual, this approach is being applied in the regional systems as well.

### **2.5.3 International Covenant on Civil and Political Rights**

The International Covenant on Civil and Political Rights (ICCPR) serves as the fundamental UN treaty for the protection of civil and political rights, or first generation human rights. It has practically turned the moral and philosophical goals and aims of the Universal Declaration of Human Rights into legal reality.

This transformation could not be "perfect" though, as some important elements in the field of human rights have not been mentioned in the Declaration, but they surface in the Covenant, and the other way round, while some human rights elements

already had been addressed by the Declaration, they have been left out of the Covenant. Among the novelties of the Covenant we can mention minority rights and children's rights – both of these have become issues of higher importance in international politics than have been shortly after the Second World War, this explains their presence. Novelties aside, the questions of human rights seemingly disappearing from the list of recognized rights are even more interesting. To the sixties, some different human rights interpretations have already found weight in international politics: that explains for example the absence of the right to property from the Covenant, which was very much opposed most importantly by states of the Soviet power block, accepting the communist dogma of private property is not to be respected, what's more, it shall be abolished at all. Regardless of the correctness of this interpretation, if it is represented by numerous states, universal consensus on the matter is hardly possible. Another reason stands with the rights of refugees, already embodied in the Declaration but missing from the Covenant: nearly right after the Declaration, the Convention relating to the Status of Refugees has been adopted (in 1951), thus this field of law has started to develop a single new legal corpus (international refugee law), and it was not needed to drive these questions back to the territory of general human rights. It would not have been a good idea anyway: international refugee law have already come across serious criticism from the communist countries (who have usually been the origins of refugees and had the tendency to consider the legal regime protecting them a propaganda tool in the hands of the "west"), and nobody wanted to have those debates related to the Covenant as well.

The obligation of states party to the Covenant is easy and simple: to ensure the human rights embodied in it. Article 2 sets out more details of this:

1. they undertakes to respect and to ensure rights recognized by the Covenant to all individuals within their territory or subject to their jurisdiction, without discrimination;
2. they take the obligation of domestic legislation, that may be necessary to give effect to the rights recognized in the Covenant;
3. they take obligations regarding to the enforcement of these rights. They have to ensure that victims of human rights violations have an effective remedy, these claims have to be evaluated by competent judicial, administrative or legislative authorities, and finally they have to ensure that also competent authorities shall enforce these remedies, if those are granted.

The Covenant draws up a complex catalogue of first generation human rights, and provides for categories of these rights. These categories of rights are determined from the direction of the extent of states' obligations related to them. The here categories are the following:

1. human rights of absolute nature, from which no derogation is possible;
2. human rights of absolute nature, but derogation is possible;
3. human rights of not absolute nature.

The first category means human rights of absolute nature, meaning that no limitation is possible at all, and from which no derogation is possible under any circumstances. Not even wars, natural or other disasters threatening the existence of the state, whatsoever. These are the most important human rights and freedoms recognized by the Covenant.

Under the Covenant these human rights are:

- ✿ Right to life (embodied in Article 6). The Covenant itself does not consider the death penalty being the violation of the right to life, if it is imposed and executed by the judicial system in a lawful manner – its prohibition is added only later with the second Optional Protocol in 1989;
- ✿ Prohibition of torture, cruel, inhuman or degrading treatment or punishment and the prohibition of forced medical or scientific experimentation (embodied in Article 7);
- ✿ Prohibition of slavery and servitude (embodied in Article 8, Paragraph 1 and 2);
- ✿ Prohibition of imprisonment merely on the ground of inability to fulfil a contractual obligation (embodied in Article 11);
- ✿ The freedom provided for by the principles of *nullum crimen sine lege* and *nulla poena sine lege* (embodied in Article 15). These principles of criminal law provide for rule of law in case of criminal cases;
- ✿ Right to recognition everywhere as a person before the law (embodied in Article 16);
- ✿ Right to freedom of thought, conscience and religion (embodied in Article 18, Paragraph 1 and 2). It is important to emphasize here, that this freedom does not extend to the practice or dissemination of the same.

The second category of human rights are those which are considered to be of absolute nature, but under extreme circumstances it is allowed for the states party to derogate from them. Of course this possibility has to be allowed very carefully to avoid states' attempts to misuse it.

Article 4 of the Covenant makes this possible in cases of “time of public emergency which threatens the life of the nation” and sets the additional condition that “the existence of which is officially proclaimed” by the application of the relevant domestic rules. Additionally to this condition of domestic nature, international ones are also present: states deciding to derogate shall immediately inform other states party to the Covenant via the UN Secretary-General, and it shall inform them of the reason of derogation and the provisions this derogation touches upon. Termination of these derogations have to be communicated in the same manners. The possibility of these derogations are also limited by the Covenant: they may be applied only to the extent strictly required by the exigencies of the situation, and they must not be inconsistent with states' other obligations under international law, and additionally, they must not involve any prohibited discrimination, namely on the ground of race, colour, sex, language, religion or social origin.

These human rights are:

- \* Prohibition of forced or compulsory labor (embodied in Article 8, Paragraph 3);
- \* Rights of detained persons (embodied in Article 10);
- \* Judicial guarantees, except for the publicity of trials (embodied in Article 14);
- \* Protection of privacy, family, home, correspondence against unlawful or arbitrary interference (embodied in Article 17);
- \* Protection of family life, right to marriage (embodied in Article 23);
- \* Children's rights (embodied in Article 24);
- \* Equality before the law (embodied in Article 26);
- \* Rights of ethnic, religious or linguistic minorities (embodied in Article 27).

The third category of human rights are those which may be subject to limitations by states to ensure the operation of the state and the society. Most of the human rights are subject to these, but under the Covenant, these limitations have to meet the rules set by its provisions and those may not extend beyond the necessities justified, and they have to be imposed in conformity with the states' domestic constitutional provisions.

This category of rights covers most of the "classic" civil and political rights:

- \* Right to liberty and security of person (embodied in Article 9);
- \* Liberty to enter or leave a country and the movement within (embodied in Article 12);
- \* Rights of aliens on the territory of the state party (embodied in Article 13);
- \* Right to public trial (embodied in Article 14);
- \* Exercise of the right to freedom of thought, conscience and religion (embodied in Article 18, Paragraph 3);
- \* Freedom of expression (embodied in Article 19). Some limits are provided for by the Covenant itself, as it explicitly prohibits propaganda for war and any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence (embodied in Article 20);
- \* Right of peaceful assembly (embodied in Article 21);
- \* Right to freedom of association (embodied in Article 22);
- \* Right to participate in public matters (embodied in Article 25).

The enforcement of the provisions of the Covenant is observed by the Human Rights Committee (CCCPR – not to be confused with the UN Commission of Human Rights, existing between 1946-2006), which is similarly to UN treaty bodies, a body of eighteen independent individuals, composed of nationals of the states party to the Covenant who shall be "persons of high moral character and recognized competence in the field of human rights", elected by the states party. After getting elected, they shall serve in their personal capacity, similarly to the obligations of members of all UN treaty bodies.

The Committee has the main task of monitoring states' performance related to the Covenant. For this reason it examines regular reports prepared by states party in every five years, and after their analysis, it addresses the state party with its conclusions and opinions.

As a development of the interpretation and assistance to practical application, the Committee adopts so-called general comments to given provisions of the Covenant or relevant human rights questions. These are important documents in international human rights law as they reflect a professional interpretation of the text and additionally, they can be considered to be experts' opinions with serious relevance as auxiliary sources of international law.

In case of alleged violations, the Committee can entertain inter-state complaints, if this possibility is accepted by a declaration by the state the complaint was issued against.

The two optional protocols to the Covenant provide for important additional rules.

The first Optional Protocol to the International Covenant on Civil and Political Rights (ICCPR-OP1), adopted at the same time, enables the Human Rights Committee to receive and consider communications from individuals, with which they claim that any of their right recognized by the Covenant has been violated by a state party. Any state party to the Covenant becoming a party to the Protocol as well, recognizes the competence of Committee to entertain these complaints, a possibility that is missing from the Covenant itself.

Individuals, who want to make such a claim, first have to exhaust all available domestic remedies, and then are entitled to submit a written communication to the Committee. It has to decide on the admissibility of the complaint, the conditions of which are laid down in Articles 3 and 5, Paragraph 2. The complaint has to be brought to the attention of the state party it is directed against, who has to provide written explanations or statements clarifying the matter (and indicating the remedy applied, if any) within six months. Admissible communications are considered by the Committee at closed meetings, based on the written information made available to it by the state party and the complaining individual. The views of the Committee on the matter is then forwarded to both of them.

These views adopted as a result of individual complaints are not legally binding judicial decisions, or judgments. They are decisions of a body, which can be considered a quasi-judicial body of an immense professional experience, so their views can be considered as being authoritative interpretation of the text of the Covenant.

The Second Optional Protocol to the International Covenant on Civil and Political Rights (ICCPR-OP2), adopted by the General Assembly in December 1989, aims at the abolishment of the death penalty. States ratifying the Protocol take the obligation that nobody within their jurisdiction shall be executed. The provisions of the Protocol are considered to be additional provisions to the Covenant, thus amending its original rules related to right to life, which – as we have seen earlier – has not seen the death penalty as a violation of the right to life yet. The Human Rights Committee has an observation and control function regarding to this protocol as well, with respect to states party to the first Optional Protocol, it can receive and consider communications related to the provisions of the Second Optional Protocol as well, unless the state party has made a contrary statement when ratifying or accessing the Protocol.

## 2.5.4 The International Covenant on Economic, Social and Cultural Rights

The International Covenant on Economic, Social and Cultural Rights (ICESCR) aims to ensure the protection of economic, social and cultural rights. As mentioned in an earlier chapter, these second generation human rights require a different scheme of state actions than civil and political rights, which is reflected for example in the difference of obligations deriving from the two different covenants. While states party to the first Covenant are obliged to ensure human rights recognized and enumerated, the International Covenant on Economic, Social and Cultural Rights sets the obligation of states party to a somewhat lower level: they have to do their best to ensure these human rights. This is well shown in the text of the relevant Article 2:

*“Each State Party to the present Covenant undertakes to take 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 adoption of legislative measures.”*

The obligation of “taking steps” and especially “to the maximum of its available sources” may indicate no hard direct obligations of states, but this is only true at first sight. The first very important element of the Covenant is that economic, social, cultural rights have to be ensured by states party without discrimination, a second one is that as the Convention creates the obligation of at least trying to reach the “full realization”, the non-activity of a state party is considered to be a violation of the Covenant. Additionally, the Committee on Economic, Social and Cultural Rights later has also asserted (in its General Comment No. 3) that for all the rights enshrined in the Covenant, minimum requirements, so-called “core obligations” exist, which bind states party regardless of their available resources.

The Covenant recognizes the following human rights:

- ✳ Right to work (embodied in Articles 6 and 7);
- ✳ Right to form and join trade unions (embodied in Article 8);
- ✳ Right to social security (embodied in Article 9);
- ✳ Protection and assistance to the family (embodied in Article 10);
- ✳ Right to an adequate standard of living (embodied in Article 11);
- ✳ Right to health (embodied in Article 12);
- ✳ Right to education (embodied in Articles 13 and 14);
- ✳ Right to cultural freedoms (embodied in Article 15).

Article 4 provides for the possibility of the states parties to apply limitations of the rights contained in the Covenant. But it also emphasizes that any such limitations must be determined by law, and this limitation must still be compatible with the nature of the rights included in the Convention and its overall aims and goals as well, as the requirements of a democratic society.

Enforcement mechanism of the Covenant have been formed gradually.

The Committee on Economic, Social and Cultural Rights (CESCR) is a body of independent experts responsible for monitoring the performance of states party to the Covenant. The Covenant originally has not provided for this body, it has given this task to the United Nations Economic and Social Council. The Committee was created in 1985, by ECOSOC Resolution 1985/17, with the aim of having a body to which this task can be delegated, as the Covenant has assigned the monitoring function to the ECOSOC, but later it was found, that this task could be fulfilled better by an organ similar to other UN treaty bodies. The Committee has its meetings in Geneva, normally holds two sessions per year.

States party have to submit regular reports to the Committee on their actions regarding the rights recognized by the Covenant in every five years. These reports are examined by the Committee, which then addresses its concerns and recommendations to the state party examined. This takes the form of “concluding observations”.

The Committee also has the practice similar to other UN treaty bodies of publishing its interpretation of the provisions of the Covenant, titled as general comments.

However, call for a stronger mechanism has been present, and as a result, additional to the reporting procedure, the drafting of a complaint procedure has been initiated. It has turned reality, as the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (OP-ICESCR) has entered into force in 2013, five years after its adoption in 2008. The protocol has provided the Committee competence to receive and consider communications from individuals claiming for the violations of their rights under the Covenant by a state party. Next to the individual complaint procedure, inter-state complaint may also be entertained by the Committee, if states specifically consent to this. Similarly, on the same condition, the Committee may undertake inquiries on grave or systematic violations of any of the economic, social and cultural rights set forth in the Covenant. These new developments have not yet shown their full strengths, as they are fairly new procedures, but their existence may prove that second generation human rights may be justiciable, similarly to of first generation ones.

### **2.5.5 Convention on the Elimination of All Forms of Discrimination against Women**

A long debt has been settled by the adoption of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) in 1979 by the UN General Assembly. The convention, which consists of a preamble and thirty articles is often described as an „international bill of rights for women”. It defines „discrimination against women” and aims for international and national action to end such practices. Of course the convention, while setting up strong ambitions, has been facing and still faces serious challenges.



According to the Convention, discrimination against women means:

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

By becoming a party to the Convention, states take the obligation to undertake a series of measures to end discrimination against women in all forms. These measures may vary, the Convention sets a series of examples. First of all, states shall incorporate the principle of equality of genders in their domestic legal system, which means the abolishment of all discriminatory laws and adoption of appropriate legislation capable of prohibiting further discrimination against women. An institutional guarantee is also needed, thus the establishment of a judicial system, tribunals or other effective public institutions to ensure protection of women against gender-based discrimination is a must. An additional aspect is to make sure that elimination of acts of discrimination against women is ensured not only by the state and official institutions, but also by individuals, natural persons, organizations or enterprises. This last obligation definitely requires domestic legislation and is the greatest challenge as it may require an incursion into private sphere by law, which can be a difficult task because of many states' robust constitutional protection provided to this field.

Provisions of the Convention name some of the most important elements of realizing equality between women and men. For example, ensuring women's equal access to political and public life (the right to vote and the right to stand for election), to education, to health and to employment is of crucial importance, thus the convention emphasizes these. An early seed of gender studies can also be discovered: while the Convention affirms the reproductive rights of women, it also targets culture and tradition as influential forces shaping gender roles and family relations. To protect women, it affirms their right to acquire, change or retain their nationality and their children's nationality. To face the problem of protection against special dangers women have to face, the states have added the obligation of taking appropriate measures against all forms of trafficking and other exploitation of women.

States parties to the Convention have to implement its provisions into their domestic law and put them into practice. Their basic obligation regarding control is to submit national reports at least every four years to the Committee. These reports have to give an overview on measures they have taken to comply with their obligations deriving from the treaty or with the earlier conclusions by the Committee.

The control mechanism has been strengthened in 1999 by the adoption of the Optional Protocol to the Convention on the Elimination of all Forms of Discrimination against Women (OP-CEDAW), which is in force since December of 2000. The states ratifying this protocol recognize the additional competence of the Committee to receive and consider individual complaints and to conduct a stronger examination – very



similar to the practice of other UN human rights committees. Two procedures are created under the protocol:

1. Communications procedure, which creates the possibility of individuals or groups to submit complaints against of violations of the Convention.
2. Inquiry procedure, which enables the Committee to initiate an inquiry into situations of grave or systematic violations of rights protected by the Convention.

### **2.5.6 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment**

Prohibition of torture had been settled firmly in international law for a long time without adopting any exact definition. This gap has been filled by the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), which has been adopted by the General Assembly of the United Nations on 10 December 1984, and has entered into force in 1987.

The drafting of the Convention was conducted by the Commission on Human Rights in 1977, by the request of the General Assembly to complete the earlier preparatory work embodied in previous resolutions (see for example the “Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment” by the General Assembly on 9 December 1975, GA resolution 3452 (XXX) and GA resolution 3453). The working groups vested with the task have encountered some problems and debates for example around the questions of definition of torture, or jurisdiction, but finally these have been settled and the Convention (presented by Sweden) has been adopted. The general aim of the Convention is to prevent and punish torture, and to achieve this, it has obliged states party to cooperate when necessary.

The definition of torture under the Convention is the result of lengthy discussions, resulting in a complex text, found in Article 1, paragraph 1. According to this, torture is severe physical or mental pain or suffering inflicted by a public official, or a person acting in an official capacity or anybody with consent, acquiescence, or at the instigation of the previous persons, for specific purposes. It may be the obtainment of information or a confession from him or any third person, punishment for an act he or a third person has committed or is suspected of having committed, it can be intimidation or coercion against him or a third person. Furthermore, the Convention considers any reason based on discrimination of any kind as specific purpose qualifying for the commission of torture.

The general obligations of states party are to take effective measures to prevent acts of torture in any territory under their jurisdiction, to make acts of torture punishable, and to prohibit extradition to another state where there are substantial grounds for believing that a person would be in danger of being subjected to torture.

According to the Convention, a state party undertakes the following obligations:

- ✿ They have to take effective legislative, administrative, judicial or other measures to prevent acts of torture. It is of utmost importance, that the prohibition against torture shall be considered as being of absolute nature and shall be upheld under any kind of exceptional circumstance (like in a state of war), which would otherwise usually serve as a possibility to derogate from other human rights obligations;
- ✿ States party shall not expel or extradite any individual to a state where there are substantial grounds for believing that the individual would be in danger of being subjected to torture;
- ✿ States party have legislative obligations: they shall ensure that acts of torture are considered to be serious criminal offences within their domestic legal system;
- ✿ States party has to prosecute torture: they have to take a person suspected of the offence of torture into custody and make a preliminary inquiry into the facts, their authorities have to make investigations when there is reasonable ground to believe that an act of torture has been committed;
- ✿ States party have an obligation regarding international criminal cooperation: they shall either extradite a person suspected of the offence of torture or if not willing to do so, they have to submit the case to its own authorities for prosecution, to avoid impunity (see universal jurisdiction below);
- ✿ Under the Convention, states also have to mind victims: they shall ensure that an individual who alleges that he has been subjected to torture will have his case examined by the competent authorities, and that victims of torture shall have an enforceable right to fair and adequate compensation.

To give weight to the prohibition and to help states stepping up against this violation, Article 5 of the Convention has introduced the applicability of universal jurisdiction. It means that each state party shall exercise its jurisdiction in respect of torture, regardless of the territory the act is committed on or the offender's nationality. Any act of torture committed anywhere, outside of their territory, by any persons shall be prosecuted by them. This principle of universal jurisdiction had already been introduced by earlier international conventions, for example against terrorist acts, but most importantly related to grave breaches of international humanitarian law by the 1949 Geneva Conventions – which consider torture as one of these serious violations, a war crime.

To coordinate the international implementation of the Convention, similarly to other human rights conventions, a committee has been created. Article 17 of the Convention creates the Committee against Torture with the following wide array of tasks:

- ✿ To receive, study and comment on periodic reports from states party to the Convention on the measures they have taken to give effect to their undertakings under that;
- ✿ To initiate investigations in case of reliable information about torture being systematically practiced in the territory of a state party;

- ✿ To entertain complaints by states party against another state party of violations of the Convention;
- ✿ To entertain individual complaints against a state party.

While the above mentioned tasks seem to give certain power to the Committee, the investigation and the complaints procedures have not been made compulsory, so states party can find a way to weaken the competence of the Committee. These provisions apply with some modifications, as that a state party may declare that it does not recognize the Committee's competence to initiate investigations, and the Committee's competence to examine either inter-state or individual complaints only applies if the respective state party had specifically recognized this competence. These limitations clearly serve as possible protective elements to state sovereignty, but they can also be used to cover a state's unlawful actions, thus not helping the Convention's fulfilment.

The Committee holds two annual sessions, where it examines reports from states party. These examinations are conducted in the presence of representatives of the state concerned, who are informed in advance of the questions the Committee wishes to address. Usually the Committee collects information not only from official sources and the states' official reports (which are often quite optimistic), but it often uses findings and facts provided for example by human rights NGOs. After the examination, the Committee prepares a document, which sums its conclusions and recommendations. Apart from the reports procedure, the Committee may also adopt so-called general comments either on specific provisions of the Convention or other issues related to their implementation. These comments are widely considered to be authentic experts' commentaries of the Convention text, thus having serious relevance in application of that.

In relation to the communications the Committee may receive (if the above mentioned conditions fulfil), it has also set up a working group to prepare the examination of those. The working group has to examine the admissibility and the merits of these communications and has to make recommendation to the Committee.

To strengthen prevention, the Optional Protocol to the Torture Convention (OP-CAT) has been adopted by the UN General Assembly on 18 December 2002 (GA Resolution 57/199), which has entered into force on 22 June 2006. Its goal was to establish a system of regular visits to possible places of detention by states party, with the aim to prevent torture and other cruel, inhuman or degrading treatment or punishment. For this reason the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment has been set up (within the Committee) with the task of carrying out such visits and to support states and their domestic institutions.

### **2.5.7 Convention on the Rights of the Child**

Protection of the rights of the child is a very important and quickly evolving field of international human rights law. Today it also forms a subsystem, often referred to as the

“international bill of rights for children”. It consists of the Convention on the Rights of the Child (CRC) along with the Optional Protocol on the Involvement of Children in Armed Conflict (OP-CRC-AC) and on the Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography (OP-CRC-SC). Currently, there is a third optional protocol under consideration, which would provide for a possibility for individual complaints.

The Convention is the first legally binding international treaty giving universally recognized norms for protection of children’s rights in a single document. Its overall objective is to protect children from discrimination, neglect and abuse. It covers a range of civil, political, economic, social and cultural rights, and to provide for the implementation of those rights. It can be considered to be the most rapidly and widely ratified international human rights treaty in the world, with 193 states party to it. This unprecedented wide participation shows a strong consensus and political will to improve the situation of children.

Its provisions are applicable not only in peacetime, but also during armed conflicts, which strictly narrows the ordinary derogation possibilities, known from other treaties – usually which allow for derogation in case of war.

The Convention combines civil and political rights with economic, social and cultural rights and recognizes that the enjoyment of one right cannot be separated from the enjoyment of others, the enjoyment of which is a very important factor related to the situation of human rights. It considers the child as a holder of participatory rights and freedoms, whose rights shall be ensured by provisions aimed at protecting the rights and promoting positive action by both the state and the parents. The latter are acknowledged by the Convention as having the primary role in this task.

The system of the Convention builds on four general principles, which express the philosophy in the background and the general aim of the treaty. Understanding of these is essential to any national programme that aims to put that philosophy into effect and to implement the treaty into domestic law and practice.

These are

1. Prohibition of discrimination
2. Best interests of the child shall be made a primary consideration
3. Child’s right to life, survival and development
4. Views of the child

Next to strengthening already existing human rights, the Convention recognises new ones in relation to children, which have not been covered by previous international human rights treaties. One of these is the right of the child to freely express views and to have those views taken seriously, which adds an additional element to the well-known freedom of expression. The right of the child to a name and nationality from birth is also an important novelty, which is very important related to the protection of children. The Convention also mentions alternative care, the rights of disabled children, and refugee children. It emphasises the importance of juvenile justice and the need for recovery and social reintegration of a child victim of any violations of law.

For observation of the practice of states party, the Convention establishes the Committee on the Rights of the Child. It is the monitoring body consisting of ten experts whose task is to examine the progress states party to the Convention make via examining reports, and to develop its practice by adopting recommendations. Currently there is no complaint procedure present, but an additional optional protocol will provide for this possibility, which may be adopted in the upcoming years.

The first additional protocol to the Convention was adopted in 2000, under the title Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict. As the title shows, the objective of this protocol was to reflect to serious problem of international humanitarian law, to limit the participation, but especially the use of children in armed conflicts. The most important provision of the protocol is that it raises the minimum age for recruitment and actual participation in hostilities to eighteen years, while the Convention had previously set it to fifteen years. The protocol prohibits governments and other groups from recruiting people under this age, and requires that states shall do everything possible to keep individuals under this age from direct participation in hostilities. On the other hand, in case of voluntary recruitment, to which this prohibition is not applicable, states shall be mindful of it, and shall make sure, that such recruitment is genuinely voluntary, the individuals are fully informed of the duties involved in military service and that it is carried out with the informed consent of the parents or legal guardians. States party to the protocol also have to report to the Committee on their compliance with the provisions and the implementation of the Protocol.

A second protocol to the Convention has also been adopted in 2000, addressing another very serious danger children have to face. The Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography supplements the Convention with provisions needed to create the possibility, but even more the international legal requirement to criminalise actions in relation to the sale of children, child prostitution and child pornography. It defines “sale of children”, “child prostitution” and “child pornography” as punishable criminal offenses under international law thus making creating the obligation of states party to implement it into their domestic legal systems. It also sets legal standards to prevention efforts and to the protection of victims. Similarly to other treaties, it creates a framework for increased international criminal cooperation related to these crimes and to the prosecution of offenders.

### **2.5.8 International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families**

The International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICMW) has been adopted in 1990 and entered into force in July 2003. It focuses on the rights of a group of particularly vulnerable individuals, migrant workers and their families, whose situation has become a constantly

growing concern as migration itself has become a more and more important issue both in international relations and domestic politics of many states.

The Convention defines the rights of migrant workers organised under two main categories:

1. Part III of the Convention recognises the human Rights of migrant workers and members of their families in general, which are applicable to all migrant workers, even illegal or undocumented.
2. Part IV of the Convention recognises additional other Rights of migrant workers and members of their families, which are applicable only to migrant workers in a regular situation.

Related to human rights of all migrant workers and their families, the Convention does not propose new human rights for migrant workers, just reiterates those human rights which are recognised by earlier international human rights documents and treaties adopted by states. By this, the Convention reacts to the grave problem of dehumanization of migrant workers and members of their families, many of whom being deprived of their fundamental human rights in many states, often assisted by insufficient domestic legal provision and practice. In some states, domestic legislation seems to be sufficient in providing all of the relevant human rights to its citizens and residents, but many migrants, especially those in irregular situations seem to be excluded from the enjoyment of these.

The Convention reassures the right to leave and enter the state of origin. Right to life and prohibition against cruel, inhuman or degrading treatment or punishment is reaffirmed as a reaction to the often inhumane living and working conditions and physical (and often sexual) abuse that many migrant workers often have to face. Slavery or servitude, forced or compulsory labour is also a very common problem with migrants, that is why the Convention reaffirms this prohibition as well. The protection of these individuals' basic freedoms like the freedom of thought, conscience and religion, the right to hold and express opinions, and the right to property is an additional re-enforcement in relation to these individuals.

Due process rights are extremely important regarding migrant workers and their families, as these people are in close connection with states' authorities, thus they may be subject to many violations in this field. The Convention lays special emphasis on these rights, investigations, arrests and detentions have to be carried out by states in accordance with established procedures, as equality with nationals of the state before courts and other authorities must be respected as well. Necessary legal assistance as well as interpreters and information in a language understood by the migrant has to be provided, and arbitrary expulsion of the migrant is prohibited.

Additional provisions apply to migrant workers' right to privacy, equality with nationals regarding labour rules, the possibility to the transfer of their earnings and their right to information, which means they have the right to be informed by the states about their rights and obligations, which information should be made available to them free of charge and in a language they understand.

Part IV of the Convention recognises some other rights to those migrant workers and members of their families, who are documented or are in a regular situation. Providing additional rights for this group of individuals, the Convention seeks to discourage illegal labour migration, first of all because human problems are worse in the case of irregular migration, secondly because this approach meets the expectations and interests of states party to the Convention.

Documented migrant workers have the right to be temporarily absent, meaning that they shall be allowed to leave temporarily, for reasons of family needs and obligations, and it shall not have any effect on their authorization to stay or work. Similarly, they have the freedom of movement, so they can move freely in the territory of the state of employment and shall also be free to choose where they reside. They shall enjoy equal treatment with nationals of the state in many matters, for example access to educational, social and other services, together with their family members. Documented migrant workers shall enjoy equality of treatment in respect of labour law rules, like protection against unlawful dismissal, or other employment contract violations, just as they shall have the same access to competent authorities and courts established by law and capable of providing legal protection. They have the same right as the nationals of the state to enjoy unemployment benefits, the access to public work schemes intended to combat unemployment, or other alternative employment in the event of loss of work.

As it can be seen, the Convention favours documented migrant workers, thus it provides stronger legal protection for them. But it contains other provisions as well to prevent and eliminate illegal labour migration, for example it proposes collaboration by states concerned against dissemination of misleading information, to help detecting and eradicating illegal or clandestine movements of migrant workers and to impose sanctions on those who are responsible for organising and operating such movements, and employers of illegal migrant workers.

To monitor states' practice and implementation of the Convention, the Committee on the Protection of the Rights of All Migrant Workers and Members of their Families has been created. Like other treaty bodies, it is a committee of independent experts acting in their personal capacity. States party to the Convention are obliged to submit regular reports to the Committee on their activities every five years. These reports are examined and then "concluding observations" are prepared. The Commission is currently not entitled to consider individual complaints or communications from individuals claiming that their rights have been violated – according to the Convention this will be possible, when at least ten states party will accept this procedure in accordance with its article 77.

### **2.5.9 International Convention for the Protection of All Persons from Enforced Disappearance**

The International Convention for the Protection of All Persons from Enforced Disappearance (CPED) aims to prevent forced disappearance and make the practice



punishable. While this act may have constituted a crime under international law, as a war crime in an armed conflict, the Convention makes it an offence under all circumstances as a crime against humanity. It was adopted in 2006 and entered into force in 2010.

The Convention's structure is very similar to the Convention against Torture, examined in an earlier chapter. It defines the action as a punishable offence, and provides provisions to prevent or to punish it. Article 2 defines "enforced disappearance" as:

*"the arrest, detention, abduction or any other form of deprivation of liberty by agents of the State or by persons or groups of persons acting with the authorization, support or acquiescence of the State, followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person, which place such a person outside the protection of the law."*

Similarly to torture, the Convention excludes any exceptional circumstances (state of war or a threat of war, internal political instability or any other public emergency) as a justification for enforced disappearance. It defines the widespread or systematic use of enforced disappearance as a crime against humanity.

States party to the Convention take a complex set of obligations: to make enforced disappearance an offence under domestic criminal law and to investigate acts of enforced disappearance, and bring those responsible to justice. States party to the Convention has to establish jurisdiction over the offence, even if the perpetrator is not a citizen or resident. They have to cooperate with other states so that offenders are prosecuted or extradited, and they also have to assist the victims of enforced disappearance. These obligations are followed by others aiming protection of victims, reparations and compensation.

The Convention is monitored by a treaty body: the Committee on Enforced Disappearances is consisted of ten expert members, elected by states party. The Committee examines the reports states have to prepare on the steps they have taken to enforce and implement the Convention. The Convention optionally provides for the possibility for communications to the Committee, which allows individuals and groups to issue petitions, and to undertake inquiries in the case of grave and systematic violations. Article 30 provides for a special procedure: a request may be submitted to the Committee related to a disappeared person, as a matter of urgency, and the Committee (is some conditions are met) may request the State Party concerned to provide it with information on the situation of the person sought, within a time limit set by the Committee.

### **2.5.10 Convention on the Rights of Persons with Disabilities**

The goal of the Convention on the Rights of Persons with Disabilities (CRPD) is to elaborate the rights of persons living with disabilities in details and to set out a code of



implementation in domestic legal systems. The treaty has been adopted in 2006 and entered into force in 2008. Currently it has 147 states party, which shows a strong consensus among states in its subject-matter. It was the first human rights treaty that has been ratified not only by states, but by a regional integration organization, namely the European Union.

States ratifying the Convention engage themselves to recognise the rights embodied in the Convention, to develop and carry out policies as well as domestic laws and administrative measures for securing these rights and to abolish any laws, regulations, or practices that constitute discrimination towards persons with disabilities. They also take the obligation to combat stereotypes and prejudices, and to promote awareness of the capabilities of persons with disabilities, as this sort of change of perceptions is essential to improve their situation.

The Convention – similarly to the migrant workers' convention – recognises many already long-existing and well-known human rights, but applies them respectively to persons with disabilities. Some of these are the general prohibition of discrimination, inherent right to life on an equal basis with others, equal rights and advancement of women and girls with disabilities and protection of children with disabilities.

States party have to ensure persons with disabilities to have access to justice on an equal basis with others and to provide for their basic freedoms, for example the enjoyment of the right to liberty and security and not to be deprived of their liberty unlawfully or arbitrarily. They have to protect the physical and mental integrity of persons with disabilities, guarantee freedom from torture and from cruel, inhuman or degrading treatment or punishment, and prohibit medical or scientific experiments without the consent of the person concerned – these are basic human rights, but the Convention puts emphasis on them.

States also have to recognise rights which are needed for every day's life of persons with disabilities. For example their equal right to property, including the control of financial affairs and equal access to banking services. Their privacy has to be respected like that of others.

Domestic laws and any administrative measures has to provide for freedom from exploitation, violence and abuse, otherwise states have to promote the recovery, rehabilitation and reintegration of the victim and also is bound to investigate the abuse.

Accessibility is a fundamental issue to the life of persons with disability, so the Convention requires states party to identify and eliminate any obstacles and barriers to ensure that they can access their environment. That means for example means of transportation, public facilities and services, and information and communications technologies as well. The Convention also provides for persons with disabilities to be able to live independently, to be included in the community, to choose where and with whom to live and to have access to in-home, residential and community support services. All these obligations pose a serious challenge to states as the fulfilment of those require not only financial investments, but also efforts to transform social thinking. Accessibility is extended to public information intended for the general public, which shall be made public also in accessible formats and technologies, by facilitating the use

of Braille, sign language and other forms of communication. States shall encourage the media and Internet providers to make on-line information available in accessible formats.

Enforcement of the Convention is helped by more factors. It obliges states party to designate a focal point in their governments and to create domestic mechanism to promote and monitor its implementation. On the international level, a treaty body, the Committee on the Rights of Persons with Disabilities has been created with the same goals. It is made up of eighteen independent experts, its main task is to receive periodic reports from states party on their progress made in implementing and enforcing the Convention. The Optional Protocol to the Convention on the Rights of Persons with Disabilities (OP-CRPD), that has entered into force at the same time as the Convention provides for the possibility for communications to the Committee, which allows individuals and groups to issue petitions after domestic remedies have been exhausted, just as well as to undertake inquiries in the case of grave and systematic violations of the Convention.



## 3. European protection of human rights

### 3.1 Historical development of the Council of Europe

The Council of Europe (hereinafter: CoE) had been set up on the 5th of May in 1949 by signing its London Statute. Founders of the CoE were ten States of Western Europe: Belgium, Denmark, France, Ireland, Italy, Luxemburg, the Netherlands, Norway, Sweden and the United Kingdom. In fact, the Council of Europe was one of the first political organizations of Europe that were established after the end of the Second World War. CoE is both a product of the idea of pan-Europeanism and the right emerging Cold War. Speaking of CoE, it is important not to be confused with other European regional international organizations such as the European Union or certain institutions of the EU as its Council or the European Council. The seat of the CoE is in Strasbourg, France.

As the Statute of the CoE states:

*“The aim of the Council of Europe is to achieve a greater unity between its members for the purpose of safeguarding and realising the ideals and principles which are their common heritage and facilitating their economic and social progress.”*

Principles on which the cooperation is based are the following: principle of the rule of law and the enjoyment by all persons within the jurisdiction of the member states the human rights and fundamental freedoms. These principles form the basis of all genuine democracy according to the preamble of the Statute of the Council of Europe. Any European country may become the member of the CoE if it accepts the principles mentioned and ‘collaborates sincerely and effectively in the realization of the aim of the Council.’ However, there is no formal possibility of applying for the membership, the Committee of Ministers is authorized to invite States to become a member instead. In addition, any member may quit the organization at any time by notifying the Secretary General of the CoE on this issue. Also the Committee of Ministers has the possibility to either suspend or exclude a member from the organization if it fails to comply with the aim of the Council of Europe. Forty-seven European States have a membership in CoE so far. This means, all European countries are members, however with the exception of Belorussia and certain partially or non-recognized de facto States as Kosovo, Transnistria, North-Cyprus or South-Ossetia for instance.

Greece was not among the founders because of the Greek Civil War. Right after this conflict ended, Greece immediately acceded to the organization in 1949. Iceland,

Turkey and the Federal Republic of Germany became member in 1950. Austria acceded to the organization in 1956 after getting back its sovereignty and Cyprus in 1961 after becoming independent. Each European countries from the Western Bloc acceded until the end of the Cold War (except some micro States), whilst the former socialist States joined the CoE after the breakthrough years of 1989 an 1990.

Two of the organs of the Council of Europe were created by the London Statute, namely the Committee of Ministers and the Consultative Assembly of which the latter had been renamed to Parliamentary Assembly in 1974. Each of these organs are assisted by the Secretariat of the CoE headed by the Secretary General of the organization.

The Committee of Ministers is composed of the Ministers for Foreign Affairs, but usually their delegates (the Permanent Representatives to the Council of Europe) are taking part in the majority of the sittings of the Committee of Ministers, in practice. This means, Ministers for Foreign Affairs meet at least once in a year ('ministerial session') and their deputies once in a week ("meetings of the ministers' deputies'). The role and the responsibilities of the Committee of Ministers are multifaceted. These include the admittance of new member States and the suspension or even termination of their membership, the interaction with other organs of the CoE, drafting conventions and agreements, monitoring the respect of commitments of member States, adoption of recommendations to member States and serving as the principal guardian of the principles and values of the CoE.

The Parliamentary Assembly (hereinafter: PACE) is the deliberative organ of the CoE, it may 'debate matters within its competence and present its conclusions, in the form of recommendations, to the Committee of Ministers.' Each legislative assemblies elect from among their members delegates and their deputies to the PACE. Seats are allocated in the PACE on a proportional method based on the size of their members States' population, where none of the States is entitled to more than eighteen and less than two delegates. Under this rule, PACE is composed of 318 representatives and 318 substitutes. PACE meets in ordinary session once a year and it may create committees and other organs in order to be assisted during the fulfillment of its tasks.

Besides, the Council of Europe has other organs and bodies as well. The Congress of Local and Regional Authorities (hereinafter: CLRAE) is the assembly and forum of dialogue of the member States' local and regional municipalities. CLRAE may initiate, draft, prepare or simply comment on (draft) international conventions worked out under the aegis of the CoE. The Commissioner for Human Rights was first elected in 1999 however with a limited and non-ombudsman-like but rather advisory scope of authority. The European Commission against Racism and Intolerance (ECRI) is the body of CoE monitoring xenophobic and related hatred of any kind composed of forty-seven experts. CoE also has a very special body called European Commission for Democracy through Law or as it better and informally known the 'Venice Commission'. The Venice Commission is entitled to give advice and assistance to member States when drafting their most important pieces of legislation such as the constitution for instance. Finally, one of the most reputable institution that was established in the framework of CoE is the European Court of Human Rights what is to be reviewed in a forthcoming chapter.

### 3.2 Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols

The Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter: European Convention on Human Rights or ECHR (not to be confused with the former European Commission of Human Rights) or simply as Convention), as the core document of the entire system of human rights within the Council of Europe was adopted on the 4th of November in 1950 in Rome by the then fourteen members of the Council of Europe, namely: Belgium, Denmark, France, the Federal Republic of Germany, Greece, Iceland, Ireland, Italy, Luxemburg, the Netherlands, Norway, Sweden, Turkey and the United Kingdom. Only ten ratifications is required for entering into force it was done very soon, so that in 1953. Drafters of the ECHR took into consideration the Universal Declaration of Human Rights of 1948 and considered the Convention as a significant step to collectively enforce certain of the rights stated in the Universal Declaration. Legitimacy of the ECHR directly relies on the London Statute of the Council of Europe of 1949. According to the London Statute the main aims of the CoE is ‘to achieve a greater unity between its members for the purpose of safeguarding and realizing the ideals and principles which are their common heritage and facilitating their economic and social progress.’ Furthermore, this aim can be achieved ‘through (...) agreements (...) in legal matters (...) and in the maintenance and further realization of human rights and fundamental freedoms.’

Originally States and only those being the members of the Council of Europe could sign and ratify the European Convention for Human Rights only and all the current forty-seven member states are party to this convention. Even though formally it is not an obligation of members-to-be of the CoE to sign and ratify the ECHR, such obligation can be derived from the London Statute. According to the London Statute Article 3:

*“Every member of the Council of Europe must accept the principles of the rule of law and of the enjoyment by all persons within its jurisdiction of human rights and fundamental freedoms, and collaborate sincerely and effectively in the realization of the aim of the Council as specified in Chapter I.”*

However, the European Union, a separate international organization and its members in the 2007 Lisbon Treaty prescribed that the EU

*“(...) shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Such accession shall not affect the Union’s competences as defined in the Treaties. Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union’s law”*

In order to be able to receive the EU's request for accession, the ECHR was amended in 2010 by 'Protocol 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, amending the control system of the Convention' by inserting a new paragraph to article 59 as follows:

*"The European Union may accede to this Convention."*

This means, CoE member states and the European Union are allowed to be a party to the ECHR this time. Ratifications shall be deposited with the Secretary General of the Council of Europe who notifies all the members of the Council of Europe of the entry into force of the Convention, the names of the High Contracting Parties who have ratified it, and the deposit of all instruments of ratification which may be effected subsequently. ECHR was done both in French and in English and in these languages are the Convention authentic.

According to article 1 of the ECHR,

*"The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention."*

Section I. of the ECHR enumerates the human rights and fundamental freedoms being protected by the Convention being one of the most important part of the ECHR. Personal scope of the ECHR covers not only citizens but every human being within the jurisdiction of the State Parties. However, under the territorial application of the Convention, the ECHR itself, allows to make some exceptions when a State can at the time of ratifying the ECHR or later on notify the Secretary-General about on what exact territories under its jurisdiction the ECHR it wishes to apply or not to apply. Such declarations were made by Azerbaijan, France, Moldova, the Netherlands, Georgia, and the United Kingdom so far. Azerbaijan declared in 2002 that it could not guarantee the application of ECHR on certain territories being under the control of Armenia (mainly Nagorno-Karabakh and some neighboring settlements). Similarly, Georgia notified the Secretary-General of the CoE in 2002, that:

*"due to the existing situation in Abkhazia and Tskhinvali region (widely known as South Ossetia), Georgian authorities are unable to undertake commitments concerning the respect and protection of the provisions of the Convention and its Additional Protocols on these territories."*

Both Abkhazia and South Ossetia are disputed territories and self-proclaimed and partially recognized de facto states on the territory of Georgia, albeit Georgia is not able to fully control these territories. Moldova informed the Secretary-General in 1997, that it would be unable to guarantee the compliance with the provisions of the Convention in respect of omissions and acts committed by the organs of the self-proclaimed Trans-Dniester republic within the territory actually controlled by such organs, until the

conflict in the region is finally settled. France notified the Secretary-General in 1974, that it applies the ECHR to the whole territory of France including overseas territories having due regard – and in conform with the Convention’s relevant article – to local requirements. The Netherlands informed the Secretary-General in 1955 that it recognized the territorial application of ECHR to Suriname and the Netherlands Antilles. Due to Suriname became independent in 1975, the scope of the Convention cannot extend to this country anymore because of geographical reasons. In addition, the Netherlands Antilles split to two separate subjects: Aruba on the one hand and Curaçao, Sint Maarten and the Caribbean part of the Netherlands on the other. Despite these facts, the ECHR can be still applied to these parts of the Kingdom of Netherlands as well. The United Kingdom extended the scope of application of the ECHR step by step to those territories whose international relations the UK is responsible for. These territories include: Gibraltar, the Isle of Man, Guernsey and Jersey and some overseas territories and islands.

ECHR expressly allows to submit reservations by states when signing or when depositing the instrument of ratification, however with certain limitations. According to article 57 of the ECHR:

- “1. Any State may, when signing this Convention or when depositing its instrument of ratification, make a reservation in respect of any particular provision of the Convention to the extent that any law then in force in its territory is not in conformity with the provision. Reservations of a general character shall not be permitted under this Article.*
- 2. Any reservation made under this Article shall contain a brief statement of the law concerned.”*

To be more precise:

- \* Any state can make reservations *to any provision* of the ECHR; if
- \* a certain law already in force is not in conform with the given provision(s) of the ECHR; and
- \* the reservation must be limited to the extent of the said inconformity referred above; and
- \* reservations of a general character are not permitted.

Approximately the half of the State Parties made such reservations so far. Eight of the ECHR articles are touched with reservations like these. Fifteen States made reservations to Article 6 (right to a fair trial), thirteen States made reservations to article 5 (right to liberty and security), four States made reservations to article 10 (freedom of expression), three States made reservation to article 11 (freedom of assembly and association), two States made reservations to article 8 (right to respect for private and family life), while one State made reservations to article 7 (no punishment without law), article 13 (right to an effective remedy) and article 14 (prohibition of discrimination) respectively. Interestingly, Monaco made reservations to five, Spain to four, Azerbaijan to three, Andorra, Austria, the Czech Republic, France, Liechtenstein, Malta, Slovakia,



Ukraine to two articles, whilst Armenia, Croatia, Estonia, Finland, Ireland, Moldova, Montenegro, Portugal, Russia, and San Marino to one article of the ECHR respectively. Certainly, any reservations can be withdrawn at any time by the State Parties, however only Serbia (entirely) and Finland (partially) did so, yet.

ECHR can be denounced by State Parties due to the rules contained in article 58:

*“1. A High Contracting Party may denounce the present Convention only after the expiry of five years from the date on which it became a party to it and after six months’ notice contained in a notification addressed to the Secretary General of the Council of Europe, who shall inform the other High Contracting Parties.  
2. Such a denunciation shall not have the effect of releasing the High Contracting Party concerned from its obligations under this Convention in respect of any act which, being capable of constituting a violation of such obligations, may have been performed by it before the date at which the denunciation became effective.  
3. Any High Contracting Party which shall cease to be a member of the Council of Europe shall cease to be a Party to this Convention under the same conditions.  
4. The Convention may be denounced in accordance with the provisions of the preceding paragraphs in respect of any territory to which it has been declared to extend under the terms of Article 56.”*

Looking over the evolution of the number of State Parties to the ECHR, each State Parties could denounce – in theory – the Convention at any time. The only State that once denounced the Convention was Greece in 1970 (it also left the CoE at the same time) because of the Greek military junta regime, the country’s membership was suspended in 1969. After the downfall of the military junta, Greece ratified the ECHR in 1974 again and returned to the system of CoE.

Important to know, that the ECHR cannot be interpreted as limiting or derogating from any of the human rights and fundamental freedoms which may be ensured under the laws of any State Party or under any other agreement to which it is a party.

As it was referred above, Section I. of the ECHR enumerates the human rights and freedoms being protected by the Convention itself. Article 2 of the ECHR regulates the right to life as follows.

*“1. Everyone’s right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.  
2. Deprivation of life shall not be regarded as inflicted in contravention of this Article when it results from the use of force which is no more than absolutely necessary:  
(a) in defence of any person from unlawful violence;  
(b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;  
(c) in action lawfully taken for the purpose of quelling a riot or insurrection.”*

As it can be seen, right to life is not a human right of an absolute nature under the relevant provisions of ECHR. Due to article 2, both the State (and its authorities) and an individual or individuals could limit one's right to life in certain circumstances. One of the most important possible dimension in which one's right to life could be limited is the capital punishment. Death sentence is not banned by article 2 of the ECHR, the Convention only states the principle of *nulla poena sine lege*, so that one cannot be sentenced to death unless this kind of punishment is prescribed by law for the crime committed by the convict and this prescription was due at the time of committing the given crime. Moreover, one can be sentenced to death only by the verdict of a court. As a first major step to abolish capital punishment under the aegis of the CoE, the 'Protocol No. 6 to the Convention for the Protection of Human Rights and Fundamental Freedoms concerning the Abolition of the Death Penalty' was adopted in 1983. In its article 1 Protocol 6 states:

*"The death penalty shall be abolished. No-one shall be condemned to such penalty or executed."*

Despite this fact, in the next article, Protocol 6 makes an exception from under the rule as follows:

*"A State may make provision in its law for the death penalty in respect of acts committed in time of war or of imminent threat of war; such penalty shall be applied only in the instances laid down in the law and in accordance with its provisions. The State shall communicate to the Secretary General of the Council of Europe the relevant provisions of that law."*

Provisions of Protocol 6 should be read as additional articles to the Convention. All CoE members but Russia has ratified Protocol 6 so far. In spite of this fact, the Russian Constitutional Court nullified the provision of the Criminal Code that let the use of capital punishment either in wartime or peacetime in 2009. By adopting 'Protocol No. 13 to the Convention for the Protection of Human Rights and Fundamental Freedoms, concerning the abolition of the death penalty in all circumstances' in 2002, the Council of Europe aimed at completely abolishing death penalty. According to article 1 of Protocol 13:

*"The death penalty shall be abolished. No one shall be condemned to such penalty or executed."*

Each CoE member states are party to this protocol with the exception of Armenia, Azerbaijan and Russia. This means – taking into consideration of Russia's position mentioned before – it is possible to enforce death penalty during wartime in Armenia and in Azerbaijan. In fact, both Armenia and Azerbaijan abolished capital punishment a couple of years ago. Interestingly, Denmark made a declaration previously in which

it stated that both Protocol 6 and Protocol 13 cannot be applied on the autonomous territories of Greenland and the Faroe Islands, but a bit later on Denmark notified the Secretary-General of the CoE that it wished to withdraw these declarations. It is also important to mention that no reservations or derogations whatsoever could be made to these protocols.

In addition, right to life is not infringed if the deprivation of life is a result from the use of force which is no more than absolutely necessary. In its case-law, the European Court of Human Rights enshrined by carving out the 'principle of necessity', that 'Article 2 allows for exceptions to the right to life only when it is "*absolutely necessary*", a term indicating "that a stricter and more compelling test of necessity must be employed than that normally applicable when determining whether State action is "necessary in a democratic society" under paragraphs 2 of Articles 8 and 11 of the Convention" Furthermore, use of force of the authorities must comply with the 'principle of proportionality' as well. States Parties must also take some positive measures – putting in place effective criminal law provisions for instance – in order to be fully complied with article 2 of the ECHR. Finally, the rightful self-defense might not infringe the right to life either, if it met with certain strict conditions.

Article 3 of ECHR contains the 'prohibition of torture' principle as follows:

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

This prohibition is of an absolute in its nature and has to parallel goals. On the one hand it protects the dignity of the individual and it protects also, the individual's physical and mental integrity on the other.

No exception to the prohibition contained in Article 3, under Article 15 paragraph 2 can be made even in emergency situations. Thus, for example, nobody can refer to any extreme circumstances such as the order of the superior in proving his or hers act of torture or other related acts. In addition, the principle of the prohibition of torture was considered as a peremptory norm of public international law in a judgment delivered in the so-called 'Furundžija case' by the International Criminal Tribunal for the former Yugoslavia. It is important also to note that not only physical pain, but causing mental suffering is also prohibited by article 3. Furthermore, article 3 covers situations that occur not only in prisons but in certain medical and educational institutions as well. Looking over the relevant cases of the European Court of Human Rights the prolonged solitary confinement or life sentence can also lead to the breach of Article 3. In those states where death penalty is permitted, it shall be implemented to minimize the possible physical and mental suffering act together in order to avoid the infringement of article 3. Finally, a single and separate international treaty was adopted to make more effective the prohibition of torture and related acts in 1987, namely the 'European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment' of which each CoE members states are a party to.

Article 4 of the ECHR prohibits slavery and forced labor:

- 1. No one shall be held in slavery or servitude.*
- 2. No one shall be required to perform forced or compulsory labour.*
- 3. For the purpose of this article the term "forced or compulsory labour" shall not include:*
  - a) any work required to be done in the ordinary course of detention imposed according to the provisions of Article 5 of this Convention or during conditional release from such detention;*
  - b) any service of a military character or, in case of conscientious objectors in countries where they are recognised, service exacted instead of compulsory military service;*
  - c) any service exacted in case of an emergency or calamity threatening the life or well-being of the community;*
  - d) any work or service which forms part of normal civic obligations."*

According to the relevant case-law of the European Court of Human Rights, article 4 of the ECHR enshrines one of the fundamental values of democratic societies. Article 4 paragraph 1 contains an obligation of which no derogations is possible at any circumstances. In defining slavery, the European Court of Human Rights considers the definition used by the 1926 Slavery Convention as suitable for interpreting article 4. According to the Slavery Convention, slavery is *the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised*. Contrarily, servitude means an obligation to provide one's services that is imposed by the use of coercion, and is to be linked with the concept of slavery. Servitude is a specific, aggravated form of forced or compulsory labor in interpreting article 4. Similarly, what was seen in interpreting article 4 paragraph 1, the European Court of Human Rights took another document, namely the ILO Convention No.29, to define forced or compulsory labor. Accordingly, "*forced or compulsory labour*" means "*all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily*". In addition to refrain from certain acts to do, States have positive obligations in relation to article 4.

One of the most complex articles of the ECHR is article 5 and article 6. Article 5 deals with the right to liberty and security and sounds as follows:

- 1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:*
  - (a) the lawful detention of a person after conviction by a competent court;*
  - (b) the lawful arrest or detention of a person for noncompliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law;*

*(c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;*

*(d) the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority;*

*(e) the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants;*

*(f) the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.*

*2. Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him.*

*3. Everyone arrested or detained in accordance with the provisions of paragraph 1 (c) of this Article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.*

*4. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.*

*5. Everyone who has been the victim of arrest or detention in contravention of the provisions of this Article shall have an enforceable right to compensation.”*

Even though of containing old and well-established legal principles, rights and guarantees in criminal procedure crystallized mainly in British law, more than a quarter of States Parties made reservations to article 5. Majority of the states (Armenia, Azerbaijan, Czech Republic, France, Moldova, Portugal, Russia, Slovakia, Spain, Ukraine) that made reservations to this article because their legislation contains provisions contrary to the right to liberty in the field of the armed forces due to disciplinary reasons. Andorra wished only to specify the time limits what it considered as being contradictory to article 5, while Austria and Montenegro notified the Secretary-General about some minor conflicts between their administrative law and the article in question.

Article 6 relates to the right to a fair trial. Accordingly,

*“1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in*

*the opinion of the court in special circumstances where publicity would prejudice the interests of justice.*

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

*3. Everyone charged with a criminal offence has the following minimum rights:*

*a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;*

*b) to have adequate time and facilities for the preparation of his defence;*

*c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;*

*d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;*

*e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court.”*

Right to a fair trial has an extraordinary position in the system of human rights, since there can be no effective mechanism of protecting rights without it. Article 6 is one of the most complicated and most frequently cited articles in ECHR. Some CoE members as Hungary, Croatia, and Poland often have troubles to secure this right at domestic level. About 80 percent of the complaints against Hungary, for instance, are lodged because of the allegedly infringement of article 6. Right to fair trial has two main dimension. Firstly, there is a fundamental norm (article 6 paragraph 1) of this right which deals with three questions: who should be the judge in one's case, in what cases should it be a judges, and how should the case be judged? The European Court of Human Rights interprets these questions independently from the domestic legal regimes of the member states. In theory, article 6 paragraph 1 covers all kind of cases with the exception of certain decisions having a supervisory character. Right to fair trial include each type of criminal and civil law matters. In addition the fundamental norm, which must prevail in every cases, there are some guarantees stemming from the rights to fair trial which should be respected only in criminal procedures. These include the rights enumerated in article 6. paragraphs 2 and 3. Fifteen of the States Parties to the Convention made reservations to article 6. Analyzing thoroughly the reservations made by the States Parties, one can see that they wishes to limit the scope in which the provisions of article 6 must prevail. Six states excluded some cases of the military penal procedure. While the others intended to exclude some other matters. According to the Austrian reservation, article 6 shall be no prejudice to the principles governing public court hearings laid down in Article 90 of the 1929 version of the Federal Constitution Law. Reservations of Croatia and Montenegro relate to procedures of supervising individual administrative acts in which it cannot guarantee the right to a public hearing, whilst Estonia did the same manner in cases before the Appellate Court and Finland and Liechtenstein before the Supreme Court and certain special

courts and tribunals. Ireland does not interpret in its reservation Article 6.3. of the Convention as requiring the provision of free legal assistance to any wider extent than is now provided in Ireland. Malta made a reservation rather of an interpretative than an excluding or amending character against the presumption of innocence rule contained in article 6 paragraph 2. According to the Maltese reservation the Government of Malta declared that it interpreted paragraph 2 of Article 6 of the Convention in the sense that it does not preclude any particular law from imposing upon any person charged under such law the burden of proving particular facts. Finally, Monaco made a reservation of an interpretative character against article 6. paragraph 1. in which it excluded the prince from legal proceedings under its constitution and noted that the Monacan fundamental law gives priority to Monacan citizens in professional activities.

Article 7 of ECHR contains the *nullum crimen sine lege* and the *nulla poena sine lege* principles as follows:

*“1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.*

*2. This article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognised by civilised nations.”*

This article in fact aims at prohibiting the retroactive legislation and law enforcement in criminal law cases. Article 7 does not require to read criminal law provisions restrictively it only means that these rules must be clear enough and foreseeable by anybody. Only Portugal made a reservation to this article in which it noted that certain criminal offences remain applicable to police officers of the military junta after the coup d'état. Interestingly, the provision of the constitution – which allowed this possibility – had already been repealed, but Portugal not yet revoked its reservations.

Article 8 refers to the ‘right to respect for family and private life’ which is often interpreted together with the right to marry contained by article 12 of the ECHR. Article 8 regulates as follows:

*“1. Everyone has the right to respect for his private and family life, his home and his correspondence.*

*2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.”*



While article 12:

*“Men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right.”*

In one of its landmark cases the European Court of Human Rights clarified the object of article 8. Accordingly,

*“the object of the Article 8 is “essentially” that of protecting the individual against arbitrary interference by the public authorities. Nevertheless it does not merely compel the State to abstain from such interference: in addition to this primarily negative undertaking, there may be positive obligations inherent in an effective “respect” for family life.”*

Interesting to know that under the relevant jurisprudence of the European Court of Human Rights, article 12 does not protect the right to marry of same sex couples unless the state interested recognized this right in its domestic legislation previously. Only Liechtenstein and Monaco made reservations to article 8. Both of them wished to emphasize the relevance of their own citizens in this question.

Article 9 of the ECHR relates to the freedom of thought, conscience and religion:

*“1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief; in worship, teaching, practice and observance.  
2. Freedom to manifest one’s religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.”*

The European Court of Human Rights emphasized the fundamental value of this right in ensuring democratic principles. Right to religion or belief includes the view if someone choose not choosing any religions or beliefs as well. In interpreting this article, the Court found that Jehova’s Witnesses or the Church of Scientology are considered beliefs instead of religion.

Article 10 of ECHR regulates the freedom of expression:

*“1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.*



*2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.”*

Freedom of expression is a core human right in a genuine democratic society being one of the most important political right. Lack of freedom of expression, democracy is not possible. Article 10 protects: political opinions and expression, artistic opinion and expression, and commercial expression. According to the well-established case law of the European Court of Human Rights, freedom of expression

*“is applicable not only to “information” or “ideas” that are favorably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb. Such are the demands of pluralism, tolerance and broadmindedness, without which there is no “democratic society”. This freedom is subject to the exceptions set out in Article 10 § 2, which must, however, be strictly construed.”*

Four States made reservations to article 10. Azerbaijan noted that its internal law limited the establishment of mass media broadcasters by foreign nationals and legal persons. Malta notified the Secretary-General that ‘the Constitution of Malta allows such restrictions to be imposed upon public officers with regard to their freedom of expression as are reasonably justifiable in a democratic society. The Code of conduct of public officers in Malta precludes them from taking an active part in political discussions or other political activity during working hours or on official premises.’ Monaco and Spain made reservations of an interpretative character about the monopoly situation of public broadcasters in Monaco and the situation of broadcasting in Spain, respectively.

Article 11 refers to another extremely important political right, namely the ‘freedom of assembly and association’.

*“1. Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.*

*2. No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State.”*

According to the jurisprudence of the European Court of Human Rights, the exceptions set out in Article 11 are, where political parties are concerned, to be construed strictly; only convincing and compelling reasons can justify restrictions on such parties' freedom of association. In determining whether a necessity within the meaning of Article 11 § 2 exists, the Contracting States have only a limited margin of appreciation, which goes hand in hand with rigorous European supervision embracing both the law and the decisions applying it, including those given by independent courts. The Court has already held that such scrutiny was necessary in a case concerning a Member of Parliament who had been convicted of proffering insults (see the Castells judgment cited above, pp. 22–23, § 42); such scrutiny is all the more necessary where an entire political party is dissolved and its leaders banned from carrying on any similar activity in the future. San Marino and Andorra made reservations to article 11 in which they notified the Secretary-General about the special status and situation of trade unions in their domestic legislations. In addition, Spain wishes to limit the scope of application of article 11 to certain professions such as judges, law officers, members of the military etc.

Article 13 of the ECHR regulates the right to an effective remedy:

*"Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."*

The European Court of Human Rights clarified the scope of article 13 very soon in interpreting as it can be invoked without the infringement of another human right, too. Monaco made a reservation to this article also, in which it stated the person of the prince is sacrosanct and he or she cannot be the subject a legal proceeding at all.

Article 14 of the ECHR contains the so-called anti-discrimination clause of the Convention:

*"The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."*

In its relevant case law the European Court of Human Rights clarified, article 14 invoked by in conjunction together with a particular human right of ECHR does not prohibit every kind of distinction except among people being in the same situation. Difference in treatment is considered to be discriminatory, if it cannot objectively and reasonably be justified and it is not aiming at a legitimate purpose, or there is no justifiable proportionality between the means employed and the aim sought to be achieved. This argument is being deducted from the jurisprudence and traditions of democratic European states. However, the enumeration of the anti-discrimination clause is not exhaustive, and the 'other status' category is broad enough to cover every kind of distinctions such as on the basis of rank, or place of residence, disability,

fatherhood or discrimination based on sexual orientation. Monaco made a reservation to this article which deals with the advantages enjoyed by Monacan citizens in applying for certain type of jobs and professions.

From certain human rights it is possible to derogate in the event of emergency. Article 15 of the ECHR defines the conditions and the framework of such derogations:

*“1. In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law.*

*2. No derogation from Article 2, except in respect of deaths resulting from lawful acts of war, or from Articles 3, 4 (paragraph 1) and 7 shall be made under this provision.*

*3. Any High Contracting Party availing itself of this right of derogation shall keep the Secretary General of the Council of Europe fully informed of the measures which it has taken and the reasons therefor. It shall also inform the Secretary General of the Council of Europe when such measures have ceased to operate and the provisions of the Convention are again being fully executed.”*

Interestingly, Andorra and France made reservations even to this article in order to conciliate their Constitutions with article 15 of the Convention. Besides, only Armenia and Ireland informed the Secretary-General of the CoE about the derogation of certain human rights because of a state of emergency so far.

Remaining articles of Section I. of the ECHR are containing principles such as the ‘possibility of restricting the political activity of aliens’, the ‘prohibition of abuse of rights’ and the ‘limitation on use of restriction on rights’.

Sixteen plus one (Protocol 14bis) protocols have already been adopted in relation to the ECHR. There are two types of these protocols *in practice*:

- ✿ Protocols amending the ECHR; and
- ✿ Additional (and optional) protocols.

Each protocols to the ECHR amends the *system* of the Convention in a way, but formally only Protocols amending the ECHR modify the text of the Convention while supplementary protocols add new human rights to the system of ECHR. A further difference between these two types of protocols that to be highlighted is the following. Protocols amending the ECHR must be ratified by all States Parties to the Convention, while in the case of supplementary protocols it is not required for coming into force. Protocols No.2, No. 3, No. 5, No. 8, No. 9, No. 10, No. 11, No. 14, No. 14bis, No. 15 are such as they amend the ECHR’s text including mainly the control mechanism of the Convention. Protocol 16 is a unique one in the sense that it does not add a new human right to the ECHR’s system, but it allows highest courts and tribunals to request advisory opinions from the European Court of Human Rights ‘on questions of principle

relating to the interpretation or application of the rights and freedoms defined in the Convention or the protocols thereto.’ Despite it concerns on the human rights control mechanism of the ECHR, Protocol 16 is an optional one. Protocols No. 15 and No. 16 are not yet in force. Protocol 10 had never entered into force due to Protocol 11 and Protocol 9 had been repealed by Protocol 11. Of the supplementary protocols, protocol No. 1 added the ‘*right to property*’, ‘*right to education*’, ‘*right to free elections*’; protocol No. 4 added the ‘*prohibition of imprisonment for debt*’, the ‘*freedom of movement*’, the ‘*prohibition of expulsion of nationals*’, the ‘*prohibition of collective expulsion of aliens*’; protocol No. 7 added ‘*procedural safeguards relating to expulsion of aliens*’, the ‘*right of appeal in criminal matters*’, the ‘*compensation for wrongful conviction*’, the ‘*right not to be tried or punished twice*’, the ‘*equality between spouses*’; protocol 12. added the ‘*general prohibition of discrimination*’ and Protocol 6 and 13 deals with the abolition of death penalty. These human rights, fundamental freedoms and prohibitions are the *additional articles* of ECHR.

### **3.3 The European Social Charter**

The Council of Europe (CoE) at its origins was first of all working on the promotion of classic liberal rights and the work on elaborating a document on social rights started in the late 1950s as a response to the growing importance of economic and social issues in Europe. The adoption of the European Social Charter in 1961 (signed in Turin on 18 October) was a significant step ahead in extending the umbrella of CoE human rights protection regime. The Charter has been substantially revised in 1996 and is gradually replacing the original text. All the 47 member states of the CoE have signed the original document or any of its revised versions (and 39 member states have ratified it). An Additional Protocol to the Charter was concluded in 1988, it extended the list of rights covered under the Charter. In 1995 another Additional Protocol was signed that established a system for collective complaints (it entered into force on 1 July 1998). The full revision of the Charter in 1996 updated the previous documents and added some new rights as well (and entered into force on 1 July 1999). Hereinafter the description of the Charter refers only to this revised version.

#### **3.3.1 Human rights under the Charter**

The Charter declares a list of 31 “rights and principles” which shall guide the States Parties in their policies. These rights are proclaimed in general terms under Part I of the Charter, where States Parties declare that they “(...) accept as the aim of their policy, to be pursued by all appropriate means both national and international in character, the attainment of conditions in which (...) [these] rights and principles may be effectively realised.” The list includes among others, the right to just, safe and healthy conditions of work, the right to fair remuneration, the right to social security, to organize and bargain

collectively. It recognized the special rights of children, young people and of employed women. The Charter recognized also the right of the family to social, legal and economic protection, the right of mothers and children to social and economic protection, and even the right of migrant workers and their families to protection and assistance. Other rights recognized in the Charter include the right to social and medical assistance, the right to vocational training, and the right of persons with disabilities to independence, social integration and participation in the life of the community. It also includes the right of workers to equal treatment and non-discrimination on the grounds of sex, the right to be informed and consulted, and the right to take part in the determination and improvement of the working conditions and environment in their place of employment. It declares that “every elderly person has the right to social protection” and offers guarantees in case of termination of employment or employer insolvency.

As it was seen above, despite the fact that Part I of the Charter speaks about “rights and principles” these are more policy objectives than effective rights. Indeed the purpose of the Charter is to transform them into enforceable rights. To understand better states’ obligations under this instrument, Part II defines the meaning and elaborates in detail the “rights and principles” merely listed in Part I. For example, the “right of elderly people to social protection” is explained under Art. 23 as follows:

*“With a view to ensuring the effective exercise of the right of elderly persons to social protection, the Parties undertake to adopt or encourage, either directly or in co-operation with public or private organisations, appropriate measures designed in particular:*

- \* to enable elderly persons to remain full members of society for as long as possible, by means of:*
  - adequate resources enabling them to lead a decent life and play an active part in public, social and cultural life;*
  - provision of information about services and facilities available for elderly persons and their opportunities to make use of them;*
- \* to enable elderly persons to choose their life-style freely and to lead independent lives in their familiar surroundings for as long as they wish and are able, by means of:*
  - provision of housing suited to their needs and their state of health or of adequate support for adapting their housing;*
  - the health care and the services necessitated by their state;*
- \* to guarantee elderly persons living in institutions appropriate support, while respecting their privacy, and participation in decisions concerning living conditions in the institution.”*

This drafting method was aimed at establishing various types of obligations and to give states different compliance options. Part III of the Charter describes the specific undertakings by states. First, by becoming a party to the Charter, a State undertakes “to consider Part I of this Charter as a declaration of the aims which it will pursue by

all appropriate means...” (Art. A(1)a) Second the State must accept as binding upon it the undertakings contained in at least six out of nine articles found in Part II. The nine provisions are Art. 1. (right to work), Art. 5. (right to organize), Art. 6. (right to bargain collectively), Art. 7. (the right of children and young persons to protection), Art. 12. (right to social security), Art. 13 (right to social and medical assistance), Art. 16. (right of the family to social, economic and legal protection), Art. 19. (right of migrant workers and their families to protection and assistance) and Art. 20, (right to equal opportunities and equal treatment in matters of employment and occupation without discrimination on the grounds of sex). As a third element, each State Party has an obligation to select another specified number of rights with which it agrees to comply (Art. A(1)c).

This flexible system encourages states to ratify the Charter and gives them ample room to select among specific obligations. In this way states do not need to make complex reservations, and still all States Parties will be bound to guarantee some of the most basic rights.

The Charter established a reporting system to monitor the compliance by States Parties with their undertakings and a system of collective complaints.

### **3.3.2 The reporting procedure and the European Committee of Social Rights (ECSR)**

States Parties regularly submit a report indicating how they implement the provisions of the Charter. Each report concerns some of the accepted provisions of the Charter. These provisions are divided into the following four thematic groups: i) employment, training and equal opportunities; ii) health, social security and social protection; iii) labour rights; iv) children, families, migrants. They are requested to present a report on a part of the provisions annually and each provision of the Charter in this way will be reported once every four years.

The state reports are examined by the European Committee of Social Rights. The ECSR consists of 15 members who are independent experts “of the highest integrity and recognized competence in international social questions.” They are elected by the Committee of Ministers for a term of six years and their mandate is renewable once.

The Committee examines the situation in the country concerned and decides whether or not the situations are in conformity with the Charter. Its “conclusions”, are published every year.

If a state takes no action on a Committee decision to the effect that it does not comply with the Charter, the Committee of Ministers may issue a recommendation to that State, asking it to change the situation in law or in practice. A Governmental Committee prepares the work of the Committee of Ministers. The Governmental Committee is comprising representatives of the governments of the States Parties to the Charter, assisted by observers representing European employers’ organisations and trade unions.

### 3.3.3 A collective complaints procedure

Under a protocol opened for signature in 1995, which came into force in 1998, complaints of violations of the Charter may be submitted to the European Committee of Social Rights.

In the case of all states that have accepted the procedure the following organisations are entitled to lodge complaints to the ECSR: European Trade Union Confederation (ETUC), BusinessEurope (formerly UNICE) and International Organisation of Employers (IOE). Non-governmental organisations (NGOs) with participative status with the Council of Europe which are on a list drawn up for this purpose by the Governmental Committee.

In the case of states which have also agreed to this, even national NGOs may submit complaints to the Committee.

The complaint file must contain the following information:

- the name and contact details of the organisation submitting the complaint;
- proof that the person submitting and signing the complaint is entitled to represent the organisation lodging the complaint;
- the state against which the complaint is directed;
- an indication of the provisions of the Charter that have allegedly been violated;
- the subject matter of the complaint, i.e. the point(s) in respect of which the state in question has allegedly failed to comply with the Charter, along with the relevant arguments, with supporting documents.

The complaint must be drafted in English or French in the case of above mentioned international labour organisations and those NGOs having participative status with the CoE. Other organisations (national NGOs, etc.) may draft their complaints in the official language, or one of the official languages, of the state concerned.

The Committee examines the complaint and, if the formal requirements have been met, declares it admissible. Once the complaint has been declared admissible, a written procedure starts, with an exchange of memorials between the parties. The Committee may decide to hold a public hearing.

The Committee then takes a decision on the merits of the complaint. This decision will be forwarded to the parties concerned and the Committee of Ministers in a report. The report is made public within four months after its being forwarded.

Finally, the Committee of Ministers adopts a resolution. If appropriate, it may recommend that the state concerned take specific measures to bring the situation into line with the Charter.



### **3.4 Other human rights conventions concluded in the framework of the Council of Europe**

In addition to the Convention for the Protection of Human Rights and Fundamental Freedoms and its protocols, there are other international treaties being concluded under the aegis of the Council of Europe as well. ‘European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment’ (hereinafter: ECPT) and its two protocols are of a great importance. ECPT was signed in 1987 and all CoE-members have ratified it until now. Article 3 of the ECHR regulates the ‘prohibition of torture’ principle as follows: ‘no one shall be subjected to torture or to inhuman or degrading treatment or punishment.’ ECPT in fact was drafted to promote the enforcement of article 3 by establishing a special monitoring body called the ‘European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment’ (hereinafter: CPT). CPT is authorized to conduct visits in institutions where persons are deprived from their liberty to examine the treatment of such persons and each State is obliged to permit such visits. Members of CPT are chosen from individuals having specific knowledge on human rights issues including especially areas covered by ECPT and the number of members are equal to the number of States Parties to the Convention. CPT makes reports on its work to the Committee of Ministers each year. It is important to know, no reservations are allowed to make to the provisions of ECPT.

For combating against trafficking in human beings, the ‘Convention on Action against Trafficking in Human Beings’ was adopted in 2005 of which forty-two of the CoE-members are a party to. This treaty makes an emphasis on the prevention of such acts and obliges the contracting parties to pursue this phenomenon by any means.

Finally, the ‘Convention on preventing and combating violence against women and domestic violence’ (hereinafter: ‘Istanbul Convention’) needs to be stressed. Adopted in 2011, the Istanbul Convention has been ratified by eleven CoE-members so far. The primary aim of this Convention is to effectively combat against the violence against women including domestic violence as well, and for achieving this, the Istanbul Convention launched a special monitoring tool called the ‘Group of experts on action against violence against women and domestic violence’ or as it is commonly known: ‘GREVIO’. GREVIO is – *inter alia* – authorized to make general recommendations to the States Parties to the Istanbul Convention on the implementation of it.

### **3.5 The European Court of Human Rights**

The European Court of Human Rights (hereinafter: ECtHR or the ‘Strasbourg Court’) was set up by the ECHR and it started to function in 1959. ECtHR had no exclusive role in implementing the legal body under the aegis of ECHR until 1998 when Protocol 11 completely revised the control mechanism and abolished the European Commission of Human Rights. Instead of describing the historical evolution of this system, this



chapter mainly concentrates on the contemporary legal background of ECtHR. Section II of ECHR deals with the composition, the structure and the proceedings of the ECtHR.

ECtHR functions on a permanent basis being a *permanent international court of justice* primarily responsible for observing the engagements undertaken by the States Parties to ECHR and its protocols. The seat of ECtHR is in Strasbourg, France and that is why the Court is often dubbed informally as the ‘Strasbourg Court’. The Court may, however, perform its functions elsewhere in the territories of the member States of the Council of Europe.

### 3.5.1 Composition of the Strasbourg Court

Composition of the ECtHR is based on the ‘*one judge per member state*’-principle, which means the number of judges equal to the number of States Parties to the ECHR but it is not necessary that a judge elected on behalf of a given State Party to be the national of that State Party. San Marino or Liechtenstein sometimes nominates non-nationals as ECtHR-judges. It is not necessary also for judges to be a national of a European country. A judge elected once on behalf of Liechtenstein was a Canadian national. The Parliamentary Assembly of the Council of Europe elects the judges with respect to each States Parties to the ECHR by a majority of votes cast from a list of three candidates (in alphabetical order) nominated by the State Party. In the Court’s view, any of the States Parties may withdraw and replace a list of candidates for the post of judge at the Court, but only on condition that they do so before the deadline set for submission of the list to the Parliamentary Assembly. After that date, the High Contracting Parties will no longer be entitled to withdraw their lists. The selection of the three candidates nominated by the given State has to reflect the principles of democratic procedure, transparency and non-discrimination.

Important to know, in the absence of a real choice among the candidates submitted by a state party to the Convention, the Assembly rejects lists submitted to it. In addition, in the absence of a fair, transparent and consistent national selection procedure, the Assembly may reject such lists.

- \* candidates should possess an active knowledge of one official language of the Council of Europe and a passive knowledge of the other, and the official languages of the CoE (and certainly that of the Court) are English and French (‘language requirement’); According to the Court’s view, even though not mentioned explicitly, the language requirement ‘*can be legitimately considered to flow implicitly from*’ the wording of the ECHR;
- \* *Gender balance which means that among the three candidates both sexes should be represented* (‘gender requirement’), however the ECtHR in one of its advisory opinions noted, that ‘where a State had taken all the necessary and appropriate steps with a view to ensuring that the list contains a candidate of the under-represented sex, but without success, and especially where it has

followed the Assembly's recommendations advocating an open and transparent procedure involving a call for candidatures, the Assembly *may not reject the list in question on the sole ground that no such candidate features on it.*'

- \* when submitting the names of candidates to the Parliamentary Assembly, States should describe the manner in which they were selected (requirement of transparency');

The Parliamentary Assembly urges the governments of member states to set up appropriate national selection procedures to ensure that the authority and credibility of the ECtHR are not put at risk by ad hoc and politicized processes in the nomination of candidates.

The Parliamentary Assembly worked out a model curriculum vitae for candidates seeking election to the European Court of Human Rights. Before electing, each nominee is being interviewed by the Sub-Committee on the Election of Judges to the European Court of Human Rights of the Committee on Legal Affairs and Human Rights of the Parliamentary Assembly.

In addition there are other requirements *directly stemming from the ECHR*:

- \* Judges should be of high moral character ('moral requirement'); and they must be holders of a law degree;
- \* They must either possess the qualifications required for appointment to high judicial office ('professional requirement'); or
- \* They must be jurisconsults of recognized competence ('professional requirement').

After entering into force, Protocol 15 will add a new criterion to those enumerated above, as follows:

- \* Candidates shall be less than 65 years of age at the date by which the list of three candidates has been requested by the Parliamentary Assembly ('age requirement'). Besides, there is no age of candidacy (a minimum age for instance) of any kind to become a judge of the ECtHR.

After electing them, they sit on the Court in their individual capacity and during their term of office they shall not engage in any activity which is incompatible with their independence, impartiality or with the demands of a full-time office; all questions arising from the application of this paragraph shall be decided by the Court. According to the Court's Rules the judges shall not during their term of office engage in any political or administrative activity or any professional activity which is incompatible with their independence or impartiality or with the demands of a full-time office. Each judge shall declare to the President of the Court any additional activity. In the event of a disagreement between the President and the judge concerned, any question arising shall be decided by the Plenary Court.

Judges are elected for a non-renewable term of nine years in accordance with the amendments of Protocol 14. Terms of office of the judges expire automatically when they

reach the age of 70, albeit this rule will be repealed by Protocol 15. Before taking up office, each elected judge at the first sitting of the Plenary Court at which the judge is present or, in case of need, before the president of the Court, take an oath or make a solemn declaration. The judges shall hold office until replaced. An elected judge holds office until a successor has taken the oath or made the declaration. However, they continue to deal with such cases as they already have under consideration. Summing up the fact mentioned before, terms of office of a judge can be ceased due to the following matters:

- ✳ By completing the period of nine years;
- ✳ Reaching the age of 70 (this rule will be repealed by Protocol 15);
- ✳ Resignation;

Judges can resign at any time by a written notification forwarded to the president of the Court, who transmits this notification to the Secretary General of the Council of Europe.

- ✳ Death;
- ✳ Dismissal from office

Any judge may set in motion the procedure for dismissal from office. The plenary Court must hear the judge intended to be dismissed and by a majority of two-thirds the plenary Court may dismiss the judge if he or she has ceased to fulfil the required conditions for holding that office.

### **3.5.2 Office holders, bodies and organs of the ECtHR**

#### **3.5.2.1 President of the ECtHR**

The president of the ECtHR is elected by the Plenary Court from among the judges of ECtHR for a once renewable term of three years by an absolute majority of the elected judges who are present by a secret ballot. The President is the supreme office holder of the Court. The president of the Court has the following functions:

- ✳ Directing the work and the administration of the Court;
- ✳ Representing the Court;
- ✳ Contacting with the authorities of the Council of Europe;
- ✳ Presiding at the meetings of the Plenary Court;
- ✳ Presiding at the meetings of the Grand Chamber;
- ✳ Presiding at the meetings of the Panel of Five Judges;
- ✳ Taking part in the consideration of cases being heard by Chambers *only* if he or she is the judge elected in respect of a Contracting Party concerned.

#### **3.5.2.2 Vice-President(s) of the ECtHR**

The two Vice-Presidents are elected by the Plenary Court under the same conditions and terms as the President of the Court. The Vice-Presidents of the Court assist the President of the Court. They take the place of the President if the latter is unable to

carry out his or her duties or the office of President is vacant, or at the request of the President. They also act as Presidents of Sections.

### **3.5.3 Sections of the Court**

Sections are administrative entities of the Court which refer to geographical distribution and the gender balance and also the different legal systems of the CoE-members. Each judges must be a member of a Section. There shall be four Sections at least, while currently there are five of them. Sections are set up by the Plenary Court on the motion of the President of the ECtHR. In, addition of the ‘regular’ Sections, there is a Filtering Section composed of the judges are allowed to sit as a single-judge as well.

#### **3.5.3.1 Presidents of Sections**

The two Vice-Presidents of the Court are *ex officio* presidents of Sections and the other presidents of the Sections are elected by the Plenary Court. Presidents of Sections preside the Sections and the Chambers and direct the Section’s work. They are *ex officio* members of the Bureau.

#### **3.5.3.2 Bureau**

The Bureau of the Court is composed of the President and the Vice-Presidents of the Court and the Presidents of the Sections. The main task of the Bureau is to assist the President in carrying out his or hers duty in directing the work and the administration of the Court. Bureau also coordinates between the Sections and it can forward any questions to the Plenary Court.

#### **3.5.3.3 Plenary Court**

The Plenary Court is the supreme organ having non-judicial functions of the ECtHR presided by the President of the Court. Obviously, each judges are members of the Plenary Court. Functions of the Plenary Court are:

1. Electing the President, one or two Vice-Presidents, the Presidents of the Sections and the Chambers of the Court, the Registrar and one or more Deputy Registrars;
2. Setting up Sections and Chambers;
3. Adopting the Rules of the Court;
4. Making request to the Committee of Ministers to reduce the number of judges in Chambers from seven to five.
5. Dealing with questions filed by the Bureau.

Sessions of the Plenary Court are convened by the President when it is required. If at least the one-third of the judges so request, the President should convene the

session of the Plenary Court. In addition, at least once a year the Plenary Court must be convened for dealing with administrative matters. Quorum of the Plenary Court is the two-thirds of the elected judges.

### 3.5.3.4 Registry

The Court has a Registry consisted of Section Registries equal to the number of Sections set up by the Court and of the departments necessary to provide legal and administrative background to the Court. In fact the Registry is functioning as the office of the Court. Besides, the President of the Court has his or hers own office. Mainly lawyers, translators and technical and administrative staff work at the Registry. Currently, more than six hundred people work for the Registry. Registry is headed by the Registrar. The Registry has a library and also an archives.

#### **Registrar and Deputy Registrars**

Registrar and the two Deputy Registrars are elected for a renewable term of five years by the Plenary Court from among candidates of a high moral character and they must possess the legal, managerial and linguistic knowledge and experience necessary to carry out the functions attaching to the posts. The election process of these office-holders is the same as the process of electing the President or the Vice-Presidents of the Court. Core functions of the Registrar are:

- ✿ Operating the work of the Registry under the authority of the President of the Court;
- ✿ Having custody of the archives of the Court;
- ✿ Being the channel for communications and notifications made by or addressed to the ECtHR.

#### **Non-judicial Rapporteurs**

According to the ECHR, when sitting in a single-judge formation, the ECtHR is assisted by rapporteurs who function under the authority of the President of the Court. They form part of the Registry. These 'non-judicial rapporteurs' are being appointed by the President of the Court on a proposal by the Registrar. Heads and deputy heads of the Sections of the Registry ('Section Registrars' and 'Deputy Section Registrars') are *ex officio* acting as non-judicial rapporteurs. Non judicial Rapporteurs are not be confused with 'Judge Rapporteurs'.

According to the provisions of the ECHR:

*"[T]o consider cases brought before it, the Court shall sit in a single-judge formation, in committees of three judges, in Chambers of seven judges and in a Grand Chamber of seventeen judges."*

### 3.5.3.5 Grand Chamber

Grand Chamber consisted of seventeen judges (and at least three substitute judges) is the principal *judicial* organ of the ECtHR. Members of the Bureau (permanent members) and the judge elected in respect of a State Party (ad hoc member) concerned are *ex officio* members of the Grand Chamber. If a Chamber relinquishes its jurisdiction under certain circumstance in favor to the Grand Chamber in a given case, the President of the Chamber concerned become also a member (ad hoc member) of the Grand Chamber. If a party refers the case to the Grand Chamber after the judgment of the Chamber, the Chamber's president become a member of the Grand Chamber (ad hoc member). The remaining seats in the Grand Chamber are allocated from case to case by drawing of lots by the President of the Court and in the presence of the Registrar. In case of advisory proceedings only the members of the Bureau act as *ex officio* members of the Grand Chamber. If the case is referred to the Grand Chamber by the Committee of Ministers to decide whether a particular state fulfils its obligation to enforce a judgment, the judges of the Committee or the Chamber that delivered the judgment are also acting as *ex officio* members of the Grand Chamber.

### Panel of Five Judges

The Panel of Five Judges is the body of the Grand Chamber having the function to filter cases that referred to the Grand Chamber by parties of that case after the judgment of the Chambers. As a rule, members of the Panel of Five Judges are the President of the Court, two presidents of Sections designated by rotation and two other judges designated by rotation.

### 3.5.3.6 Chambers

Chambers are composed of seven judges and constituted from Sections. President of the Chambers are the presidents of Sections. In addition the judge elected on behalf of the state concerned in the procedure is also an *ex officio* member of the Chamber. The other members of the Chamber are designated by the president of the Section on a rotational basis. Number of members of the Chambers can be decreased from seven to five for a fixed period if on the motion of the Plenary Court the Committee of Ministers of the CoE unanimously decides so.

### 3.5.3.7 Committees

Committees can be set up within each Chambers for a fixed period of twelve months by rotation among the members of each Section. Total number of committees to be set up is decided on by the President of the Court.

### 3.5.3.8 Single Judges

Single judges are elected judges of the Court who are – if sitting as single judges – responsible for filtering the applications on grounds of the admissibility criteria. Single judges are appointed by the President of the Court and there are some *ex officio* single judges. When sitting as a single judge, a judge cannot examine any application against the State Party in respect of which that judge has been elected.

### 3.5.3.9 Ad hoc Judges

Ad hoc judges can be nominated by the States Parties in the same manner as ‘ordinary’ judges. When an elected judge in respect of State Party concerned is ‘unable to sit in the Chamber, withdraws, or is exempted, or if there is none, the President of the Court shall choose an ad hoc judge, from a list submitted in advance by the Contracting Party containing the names of three to five persons whom the Contracting Party has designated as eligible to serve as ad hoc judges for a renewable period of two years.’

### 3.5.3.10 Common-interest Judges

In case of two or more States Parties have common interest either as applicants or respondents, the President of the Court may call on them to appoint a common-interest judge acting on behalf one of the States Parties concerned. Common-interest judges are *ex officio* members of the judicial formation in which the case of the States Parties having common interest is to be debated.

## 3.5.4 Proceedings of the ECtHR

According to the provisions of the ECHR, the ECtHR has jurisdiction to all matters concerning the interpretation and application of the ECHR and the protocols thereto which are referred to it. In the question of whether the ECtHR has a jurisdiction or not, the Court decides.

Procedures of the Court can be initiated by filing a complaint at the Registry. This means also there is no procedure *ex officio* at the ECtHR. There are two main types of procedures of the Court:

- ✿ *Adversary procedure* (‘inter partes procedure’) or
- ✿ *Advisory procedure*.

### 3.5.4.1 Adversary procedure at the ECtHR

Adversary procedure can be initiated either by individuals (‘individual application’) or a State Party (‘inter-state cases’). While applicants can be both individuals and States Parties, only States Parties can be respondents in this type of procedure.

### **Individual applications**

Any individual claiming to be the victim of a violation by one of the States Parties of the rights set forth in the ECHR or its protocols may submit an application to the ECtHR. The term 'individual' covers any person, non-governmental organization and group of individuals. States Parties must not hinder in any way the effective exercise of this right. Before applying so, individuals should meet with certain preconditions called the admissibility criteria.

### **The Admissibility Criteria**

ECtHR rejects any application which it considers inadmissible at any stage of the proceedings. The application can be inadmissible on three type of grounds:

- ✿ Inadmissibility on procedural grounds;
- ✿ Inadmissibility on grounds relating to the Court's jurisdiction; and
- ✿ Inadmissibility based on the merits.

### **Inadmissibility on procedural grounds**

The ECtHR consider an application inadmissible on the following grounds:

- ✿ Non-exhaustion of domestic remedies;

According to the generally recognized rules of international law, exhaustion of domestic remedies in such situations is an obligation stemming from customary rules that was recognized – inter alia – by the case law of the International Court of Justice and it was confirmed by other international treaties, too. ECtHR is not an appellate body of the domestic judiciary but it has only a subsidiary function in this sense. Primary aim of this admissibility criterion is that the human rights violations should be remedied at domestic. Lack of effective and available domestic remedy in a given case, the applicant can directly apply for the ECtHR.

- ✿ Non-compliance with the time-limit;

There is a reasonable time-limit in which the victim of the alleged human rights violation should file his or hers application to the Court. Accordingly, the complainant must apply for the Court within a period of six months from the date on which the final domestic decision in his or hers case was taken. After entering to force, Protocol 15 will decrease this time-limit to four months. Starting point of the time period runs from the date on which the applicant and/or his or her representative has sufficient knowledge of the final domestic decision. If there is no effective remedy available the time-limit runs from the date on which the act complained of took place or the date on which the applicant was directly affected by or became aware of such an act or had knowledge of its adverse effects.

- ✿ Anonymous application;

ECtHR does not deal with any application that is anonymous.

- ✿ Redundant application;



ECtHR does not deal with any application that is substantially the same as a matter that has already been examined by the Court. An application is considered as being like this, where the parties, the complaints and the facts are identical.

- ✳ Application already submitted to another international body;

ECtHR does not deal with any application that has already been submitted to another procedure of international investigation or settlement and contains no relevant new information.

- ✳ Abuse of the right of application.

The following facts can be constituted as the abuse of the right of application: misleading information, use of offensive language, violation of the obligation to keep friendly-settlement proceedings confidential; application manifestly vexatious or devoid of any real purpose; and some other cases.

### **Inadmissibility on grounds relating to the Court's jurisdiction**

The Court declares inadmissible an application if it is incompatible with the provisions of the ECHR or its protocols. This relates to the question of whether the Court has a jurisdiction to decide, or not. The following aspects have relevance in connection with this issue:

- ✳ It is required, the alleged violation of the ECHR or its Protocols to have been committed by a Contracting State or to be in some way attributable to it ('rationae personae');
- ✳ It is not possible to bring an application against an individual ('rationae personae');
- ✳ Applicants must be individuals in the sense of the provisions of the ECHR ('rationae personae');
- ✳ Applicant must be able to show that they are victim of the alleged violation ('rationae personae');
- ✳ Applications can be brought only against states or international organizations that are parties to the ECHR or its protocols concerned ('rationae personae');
- ✳ The alleged violation had to be taken place within the jurisdiction of the respondent State or in territory effectively controlled by it; ('rationae loci');
- ✳ If the alleged violation was taken place in dependent territory of the respondent state, it is inevitable the state concerned made a declaration before the application was lodged, in which it extended the application of ECHR to the dependent territory in question; ('rationae loci');
- ✳ Firstly, the alleged violation should be occurred after the ECHR or its protocol concerned entered into force and also after the ratification of the respondent state; ('rationae temporis');
- ✳ The right that was allegedly violated must be protected by the ECHR or its protocols ('rationae materiae').

### **Inadmissibility based on the merits**

Inadmissibility of the application can be established in two cases:

- ✿ The ECtHR declares inadmissible any individual application if it is manifestly ill-founded; or
- ✿ The applicant has not suffered a significant disadvantage.

### **Proceedings at the Court**

The official languages of the ECtHR are the English and the French language. However, in case of individual applications, all communications between the applicants and the Court may be carried out in one of the official languages of the Council of Europe until the respondent has been given notice of the application. *As a rule*, after the respondent latch on to the proceeding the language of the procedure is one of the official languages of the Court. States Parties are represented by agents, who can call for the assistance of advocates or advisers. Individuals are either by represented or represent themselves in the initial stages of the proceedings. *As a rule*, individuals must be represented by advocates authorized to practice in any of the States Parties and resident in the territory of one of them, or any other person approved by the President of the Chamber after the respondent had been notified about the application.

First of all, a single judge examines the application on whether it is admissible. If he or she finds the application inadmissible based any of the criteria mentioned above, the ECtHR rejects the applications and the decision on admissibility is final. If the single judge considers the application admissible, he or she forwards it either to a Committee or a Chamber for further examination. Both the Committee and the Chamber can consider the application as inadmissible at any stage of the proceedings and reject the application. Decision on rejecting an application is final. If the application is admissible and it relates to an issue that is already the subject of the well-established case law of the ECtHR the Committee judge on the merits. One of the Chambers will render the judgment in any other cases. *As a rule*, the judgments of both the Committees and the Chambers are final. Judgments of Chambers are not final, if – under certain circumstances – the Grand Chamber renders a judgment. The Grand Chamber decides in the most important cases having the possibility to render judgments in the occasions, as follows:

- ✿ Relinquishment of jurisdiction;

Any of the Chambers may relinquish its jurisdiction in favor of the Grand Chamber in a case pending before it that raises a serious question affecting the interpretation of the Convention or its protocols, or where the resolution of a question before the Chamber might have a result inconsistent with a judgment previously delivered by the Court. The Chamber is not allowed to relinquish its jurisdiction if one of the parties to the case objects this step. After the Protocol 15 enters into force, the parties to the case cannot object the relinquishment any more.

- ✿ Referral to the Grand Chamber;

After the Chamber rendered a judgment in a case, any party to that case may request the case be referred to the Grand Chamber within three months from the date of the judgment if certain conditions occur. A panel of five judges of the Grand Chamber shall accept the request if the case raises a serious question affecting the interpretation or application of the Convention or the protocols thereto, or a serious issue of general importance. If the panel accepts the request, the Grand Chamber shall decide the case by means of a judgment.

- ✿ Decision on issues whether a State Party refuses to abide by a final judgment in a case to which it is a party.

This question can be referred to the Grand Chamber by the Committee of Ministers and by a majority of two-thirds. If the Grand Chamber finds a violation of the obligations of a State Party, it refers the case to the Committee of Ministers for consideration of the measures to be taken. All these judgments and decisions of the Grand Chamber are final. Final judgments and decisions of any kind are to be published. Reasons must be given for judgments as well as for decisions of any kind. Any judge may deliver a separate opinion if he or she, in whole or in part does not agree with the judgment. States Parties to the case undertake to abide by the final judgment of the Court.

### **Inter-State cases**

According to the provisions of the ECHR, any State Party may refer to the ECtHR any alleged breach of the provisions of the Convention and its protocols by another State Party. Chambers have jurisdiction to make decisions in inter-state applications. Inter-State cases are extremely rare as compared to individual applications. Only seventeen applications of this kind have been filed so far.

#### **3.5.4.2 Advisory procedure**

Similarly to many other international courts or tribunals, the ECtHR is also authorized to deliver advisory opinions under certain circumstances. Aim of the advisory procedure is to deal with legal questions concerning the interpretation of the ECHR and its protocols. Such opinions shall not deal with any question relating to the content or scope of the concrete human rights defined in the ECHR and its protocols or with any other question which the Court or the Committee of Ministers might have to consider in consequence of any such proceedings as could be instituted in accordance with the Convention. Only one organ of the Council of Europe is entitled to request an advisory opinion, namely the Committee of Ministers. Under the relevant provisions of ECHR the Committee of Ministers may request an advisory opinion by a majority vote of the representatives entitled to sit on the Committee. Request for an advisory opinion should indicate fully and precisely the question on which the opinion of the ECtHR sought and the date on which the Committee of Ministers adopted the decision on this issue. Besides, the request for an advisory opinion should also contain the name and address of the person appointed by the Committee of Ministers to give the ECtHR any

explanations which it may require in this case. States Parties are allowed to make written and oral comments in the advisory proceeding to the question asked by the Committee of Ministers. It is the duty of the Grand Chamber to decide on the admissibility of the request and also to deliver the advisory opinion. Contrary to judgments, advisory opinions have no binding effect but they are communicated to the Committee of Ministers. Similarly to judgments, advisory opinions are reasoned as well. Only in three occasions were the Court called up to deliver an advisory opinion so far, while only two of them felt within the jurisdiction of the ECtHR. One of the cases was related to the question of whether the ECHR's criteria for office of the judges are exhaustive, while the other was concerning on the issue whether the list of judges submitted by a State Party could be revoked or not.

The system of the advisory procedure will be significantly improved by Protocol 16 if it enters into force. Highest courts and tribunals may request advisory opinions from the Court under the new provisions on questions of principle relating to the interpretation or application of the rights and freedoms defined in the Convention or in the protocols. Possible highest courts and tribunals include only those which were authorized by doing so by the declaration of States Parties made at the time of signing or ratifying Protocol 16. In addition, these tribunals and courts are allowed to request such advisory opinions only in the context of cases pending before them. When sending the request, courts or tribunals should indicate the reasons for the request and provide the relevant legal and factual background of the pending case. After checking the request by the Panel of Five Judges, the Grand Chamber delivers the advisory opinion. Such advisory opinions are not binding either.

### **3.5.5 Execution of judgments and decisions of the European Court of Human Rights**

In case of adversary procedures, the execution of the Court's judgments and decisions becomes a question of vital importance.

Under the European Convention of Human Rights (Articles 46 and 39, Paragraph 4), states party have undertaken the obligation to comply with final judgments of the European Court of Human Rights, if it finds violations of the Convention. The same obligation is applicable to the cases, where a Court decision takes note of friendly settlement of a dispute.

The execution of decisions and judgments of the Court, and the adoption of the necessary execution measures needed for that is supervised by the Committee of Ministers of the Council of Europe. This is the most important political body of the Council of Europe, made up of ministerial representatives of the governments of the 47 member states, representing its whole political community. For this task, it is assisted by a separate department, the Department for the Execution of Judgments of the Court, which operates within the Directorate General of Human Rights and Rule of Law.

While states are under unconditional legal obligation to remedy the violations found by the Court, they enjoy a considerable margin of appreciation regarding the means they have to apply. The reason is, that many times the actual cases are so different that it would be nearly impossible to provide for a general solution, applicable to each and every situation. That is the reason, why the Convention itself does not address explicit and detailed solutions. Methods of execution of judgments are decided by the state concerned, but it has to calculate with the strict supervision of the Committee of Ministers, which generally does not allow states to ignore this obligation of theirs. If needed, even the Court itself can assist the execution of the judgment, this is the case in particular with the pilot-judgment procedure, which is to be used in situations of some major structural problems, resulting in a big number of human rights complaints against a particular state.

Depending on the case the Court's judgment was brought on, execution measures to be taken may be of individual or of general nature.

Individual measures are of utmost important as the primary aim of the execution of a judgment is to end the human right violation in the situation and provide remedy to the maximum possible extent for its negative consequences for the applicant. The most often method is the ordering of the payment of any sum by the Court as just satisfaction or in case of friendly settlement, according to the agreement between the parties. For the case of a late payment, a default interest to be paid is ordered by the Court's practice. However, in a lot of cases monetary compensation can not adequately handle the consequences of a violation, what's more, they would not help the prevention of other violations, for this reason, the Committee of Ministers has to make sure that the states' authorities remedy the violation by any other individual measures capable to achieve this goal. Even the judgments of the Court themselves may contain additional recommendations, if it is deemed to be necessary.

Individual measures may be (examples):

- ✿ reopening of criminal proceedings with a result or procedural elements found to be contrary to the Convention;
- ✿ reopening of any other official proceedings with a result or procedural elements found to be a violation of human rights recognised by the Convention;
- ✿ revocation of expulsion orders that are found to be contrary to the Convention, for example with which the applicant would be exposed to the risks of torture or ill-treatment, in the country of destination;
- ✿ restoration of contacts between children and parents separated either unlawfully or in a manner or due to a procedure later found a violation of the Convention.

General measures may be needed not only to execution judgments, but also to prevent possible violations of similar nature. These can be changes of legislation, changes in the practice of state authorities or the case law of domestic courts or other measures. In some cases the interpretation of the domestic constitution may depend on the Court's decisions, as states' constitutions usually provide for the supremacy of norms of international law, and legally binding judgments delivered as a result of an

adversary procedure are considered to be authoritative interpretations of the provisions of the Convention, having the same legal binding power. Whatever the solution applied by the states, effectiveness of these possible domestic remedies is of utmost importance.

Application of general measures may be considered obligatory by the states in situations, when it seems obvious from an actual case, that a similar cases will produce the same result in front of the Court. Still, it can be seen that sometimes states may tend to pre-calculate possible consequences of their actions, for example non-application of general measures, rather taking the risk of more lost cases – especially if the Court’s decision meets considerable resistance from the state’s political actors.

In many states domestic authorities are responsible for giving direct effect to the Court’s judgments and overall practice. On one hand, this is very useful as execution is not fully subject to the government, rather the (theoretically) independent judiciary. In these cases, publication and dissemination of the Court’s practice (translated and commented, if necessary) is also needed to ensure proper application and the existence of effective domestic remedies.

As mentioned earlier, the Committee of Ministers is responsible for supervision of the execution of judgments and decisions of the European Court of Human Rights. Every case is held under supervision right until it gets closed by the required measures, and affirmed by a final resolution from the Committee. This proceeding starts with the Court’s judgments and decisions becoming final. At this time, states have to inform the Committee about the measures they plan to take or have taken, which “action plan” is later evaluated in an “action report”. The supervision process provides for an additional very important possibility that serves the interests not only of the applicants, but the whole community and European system of human rights: the applicants, NGOs and the National Institutions for the promotion and protection of Human Rights can submit communications in writing, which may draw the Committee’s attention to possible malpractices or non-compliance of the states.

The execution of results of advisory procedures is a different issue: as these do not lead to a legally binding decision, this question does not seem to be important. However, it is important to mention that advisory opinions have a very important role in forming the Court’s own practice, state practice, and with the entering into force of Protocol 16, even the directly the practice of states’ domestic courts.

## **3.6 The European Union and Human Rights**

### **3.6.1 A historical development**

When the EU’s predecessor, the European Economic Community was founded in 1957, the protection of human rights was not seen as being a priority of the organization. The founding member states of the EEC were also members of the Council of Europe and they assumed international undertakings on human rights protection under the European Convention on Human Rights. At the core of integration process within the

EEC economic interests prevailed and little attention was paid to the question of human rights. Besides the existing international standards elaborated within the Council of Europe, each EEC member state was considered to have a solid constitutional structure for guaranteeing the protection of human rights, thus this question was considered to be irrelevant within the EEC. Nonetheless serious concerns emerged for the respect for fundamental rights in the activities of Community institutions, since these institutions were supranational in their character and in this way were not bound by the national constitutional law of any of its member states. The risk existed that EEC bodies may violate fundamental rights of individuals guaranteed them under their own domestic law and under CoE European Convention without there being a remedy against such violations.

These worries have become even more visible after the European Court of Justice (ECJ) proclaimed the principle of the supremacy of Community law over the domestic law of member states (*Costa v. ENEL* Case, 1964). This doctrine was challenged by various domestic courts on constitutional basis and as a reaction to these concerns the ECJ held in a series of decisions that fundamental rights are enshrined in the general principles of Community law protected by the Court and inspired by the constitutional traditions of member states (*Stauder v. Ulm* Case, 1969). The European Court of Justice was established in the EEC as a judicial forum entitled to interpret Community law and to take decisions in the legal disputes between community institutions and member states. Individuals and companies were also entitled to submit complaints at the ECJ against community institutions in disputes related to the application of community law. Under its legal authority the ECJ could set up the basic principles for the respect for human rights within the EEC even if special provisions on fundamental rights were missing for a long time in community law. This caused serious problems in understanding the specific content of human rights protection in the EEC.

For the first time, the Single European Act (1987) adopted the view of taking the European Convention as a basis in the EEC as well, and explicitly referred to the ECHR. In its Preamble it stated that signing states are determined "...to work together to promote democracy on the basis of the fundamental rights recognized in the constitutions and laws of the Member States, in the Convention for the Protection of Human Rights and Fundamental Freedoms and the European Social Charter, notably freedom, equality and social justice". A big step was taken on this road with the establishment of the European Union in 1992 by the Maastricht Treaty. The Treaty of European Union made human rights an obligation of the Union. Later, the Treaty of Amsterdam (1999) formally incorporated human rights by requiring that the "union shall respect fundamental rights, as guaranteed by the European Convention (...) as general principles of Community law" (at that time Art. 6). Parallel with these internal developments, the respect for human rights has become – in the so-called 1993 Copenhagen Criteria on membership – one of the political preconditions for any candidate country's accession to the EU. Still in its external relations, the EU is seen as a powerful promoter of human rights. Human rights clauses are included in more than fifty trade or aid agreements stipulated by the EU with foreign states. The European



Parliament is also active in this field, since 1998 it has issued annual reports on human rights in the world. These reports help determine the EU's bilateral and multilateral policies with non-member states.

The Treaty of Amsterdam introduced a new non-discrimination provision in Article 13 EC, which expressly confers legislative competence on the Community to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age, or sexual orientation. For its part, the ECJ also contributed to the strengthening of the principle of non-discrimination (among others see *Defrene v. Sabena* Case 1976; *Mangold v. Helm* Case 2005), and it also decided in cases which deal with freedom of religion, association and expression. The Treaty of Amsterdam also introduced a sanction mechanism for those member states which do not comply with the fundamental values of the European Union.

As it is formulated today under Art. 2:

*"The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail."*

According to present Art. 7:

*"On a reasoned proposal by one third of the Member States, by the European Parliament or by the European Commission, the Council, acting by a majority of four fifths of its members after obtaining the consent of the European Parliament, may determine that there is a clear risk of a serious breach by a Member State of the values referred to in Article 2. Before making such a determination, the Council shall hear the Member State in question and may address recommendations to it, acting in accordance with the same procedure. The Council shall regularly verify that the grounds on which such a determination was made continue to apply."*

As a real sanction under this provision those member states that are found in "serious and persistent breach" of these values are threatened that

*"(...) the Council, acting by a qualified majority, may decide to suspend certain of the rights deriving from the application of the Treaties to the Member State in question, including the voting rights of the representative of the government of that Member State in the Council."*

The Lisbon Treaty (2007) was innovative in different aspects in developing human rights protection within the EU. First of all, the Treaty proclaims under Art. 6:



*“(2) The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Such accession shall not affect the Union’s competences as defined in the Treaties.*

*(3) Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union’s law.”*

Even if the accession of the EU raises some legal problems – like the relation of the European Court of Human Rights to the Court of Justice, or the exceptional participation, representation of the EU in the CoE Committee of Ministers – it is usually seen as an important step towards a unified European human rights regime.

Secondly the Treaty incorporated into primary EU law the European Charter of Fundamental Rights.

### **3.6.2 The Charter of Fundamental Rights of the European Union**

The Council (representing the governments of member states) decided to elaborate a Charter of Fundamental Rights in 1999 at its meeting in Köln. The Charter was adopted – as a legally non-binding declaration – in 2000 at Nice as a joint declaration of the Council, the European Parliament and the European Commission. Later during the drafting of the European Constitution the Charter was incorporated in the Treaty as Chapter II of the Constitution. Since the Constitution of the EU was rejected in France and the Netherlands by referendum, it did not enter into force. The Lisbon Treaty replacing the failed Constitution reaffirmed that “the Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union (...) which shall have the same legal value as the Treaties” (Art. 6). Nonetheless the same article also reaffirms that “the provisions of the Charter shall not extend in any way the competences of the Union as defined in the Treaties.”

The Preamble of the Charter expresses its aim “to strengthen the protection of fundamental rights in the light of changes in society, social progress and scientific and technological developments by making those rights more visible in a Charter” and by reaffirming those rights deriving

*“from the constitutional traditions and international obligations common to the Member States, the Treaty on European Union, the Community Treaties, the European Convention for the Protection of Human Rights and Fundamental Freedoms, the Social Charters adopted by the Community and by the Council of Europe and the case-law of the Court of Justice of the European Communities and of the European Court of Human Rights.”*

The rights enlisted in the Charter are divided into six categories (chapters): dignity, freedoms, equality, solidarity, citizens' rights, and justice. Chapters I-III and VI basically restate the rights enshrined in the ECHR, but in some parts the Charter goes beyond the Convention guarantees: for example the Charter recognises the right to conscientious objection to military service (Art. 10(2)) and one may find other rights expressly mentioned in these chapters of the Charter but not incorporated in the Convention. These rights include: a prohibition on trafficking in human beings (Art. 5(3)); protection of personal data (Art. 8); respect for academic freedom (Art. 13); freedom to conduct a business (Art. 16); and rights of the child, elderly and disabled (Arts. 24-26). It is likely that the most innovative approach of the Charter is reflected in "Citizens' Rights" under Chapter V. This chapter offers a broad catalogue of political rights and principles of democratic governance: the right to vote and to stand for office in domestic and European Parliament elections (Arts. 39-40); the right to good administration (Art. 41); the right of access to documents (Art. 42); the right to petition (Arts. 43-44); and the right to diplomatic and consular protection (Art. 45).

### **3.6.3 The Fundamental Rights Agency**

The Fundamental Rights Agency (FRA) has been built upon the former European Monitoring Centre on Racism and Xenophobia (EUMC), established by Council in 1997. The EUMC's task was to provide the Community and its Member States with objective, reliable and comparable information and data on racism, xenophobia and anti-Semitism in the EU. The FRA was established in 2007 with a more extended mission. The FRA is requested to provide the EU institutions and Member States with independent, evidence-based advice on fundamental rights. The FRA works as a special agency of the EU and performs the following main tasks:

- i)* collecting and analysing objective and reliable information and data on the situation of fundamental rights in the EU;
- ii)* developing reliable methodology for comparative analysis of the data;
- iii)* executing and funding research activities and publication of scholar reports on issues related to the protection of fundamental rights
- iv)* providing assistance and expertise, writing reports and recommendations upon request – or on its own initiative – for the European Council, the European Commission or the European Parliament;
- v)* communicating and raising rights awareness, establishing good relations with the civil society in promoting the culture of fundamental rights.

The FRA maintains particularly close links with the European Commission, the European Parliament and the Council of the European Union and also with other international organisations, such as the Council of Europe, the United Nations (UN) and the Organization for Security and Co-operation in Europe (OSCE). To fulfil its mission it is also important to keep good contacts with governments, civil society

organisations, academic institutions, equality bodies and National Human Rights Institutions (NHRIs).

FRA covers the EU and its 28 Member States. In addition, candidate countries can participate in the work of the Agency as observers (Turkey, the FYROM – Former Yugoslav Republic of Macedonia), following a decision by the relevant Association Council determining the particular nature, extent and manner of their participation in FRA's work. The Council may also invite countries that have concluded a Stabilisation and Association Agreement with the EU to participate in FRA.

### **3.7 The Organisation for Security and Co-operation in Europe and Human Rights**

The Conference on Security and Co-operation in Europe was created by the Helsinki Final Act in 1975 by 33 European states, including the Soviet Union, the USA and Canada as well. The original mission of the CSCE was to offer a political forum for discussion of security and human rights issues in Europe bridging all European states independently of their deep ideological divides. After the collapse of the socialist bloc, the CSCE became in 1994 the Organisation for Security and Co-operation in Europe. Today the membership of the OSCE has grown to 57 nations, covering much of the Northern Hemisphere. The CSCE made significant contribution to the extension of international human rights principles in the socialist countries and this special mission on strengthening human rights protection has not changed in the past 25 years either. The experiences of the Cold War enabled the OSCE to continue to play a major role – often in close co-operation with the Council of Europe – in today's Europe and to influence human rights policies in many different states.

The Helsinki Final Act is a massive document consisting of four chapters or so-called “baskets”. Human rights issues are dealt with primarily in Basket I that proclaimed the guiding principles. Among these two deal with human rights: Principle VII (respect for human right and fundamental freedoms) and Principle VIII (equal rights and self-determination of peoples). In 1989 the Vienna Concluding Document consolidated the subject of human rights. It also established a mechanism for dealing with non-observance by states with their human dimension commitments. The Copenhagen Document (1990), the Moscow (1991) and Helsinki (1992) Documents also extended the scope of the Mechanism to make it more effective. Today this Mechanism consists of various processes including negotiations, mediation, and fact-finding. OSCE missions of experts and rapporteurs are assisted by the OSCE Office for Democratic Institutions and Human Rights (ODIHR).

The OSCE catalogue of rights is largely different from that of traditional human rights treaties – like the ICCPR, the IESCR or the European Convention on Human Rights – in that, besides proclaiming basic individual human rights it also deals with the rights of minorities, rule of law issues, democratic values, elections, etc. Thus OSCE commitments cover a broad set of democratic and human rights values.

OSCE undertakings do not have a legally binding character. Member States consider OSCE documents as non-binding instruments proclaiming political commitments. This implies that any Member State violating these commitments will face political but not legal consequences. Still, even if non-compliance will not have legal implications, it could have serious political repercussions. Nevertheless OSCE instruments even without legally binding force proved to be a useful tool for national and international NGOs seeking to promote the protection of human rights.



## **4. Regional protection of human rights**

### **4.1 American system of protection of human rights**

#### **4.1.1 Organisation of American States (OAS)**

Regional human rights protection system on the American continent has been developed in the framework of the Organization of American States (OAS).

Its founding document, the Charter of the Organisation of the American States has been adopted in Bogota in April, 1948. It has entered into force in 1951, and it has been amended later more times. Major amendments have been later the Protocol of Buenos Aires (in 1967, entering into force in 1970); the Protocol of Cartagena de Indias (in 1985, entering into force: 1988); the Protocol of Washington (in 1992, entering into force: 1997) and the Protocol of Mangua (in 1993, entering into force: 1996).

Today all thirty-five independent states are members of the organisation, some of them as founding members, while others have gained independency and membership later, during the sixties and the seventies. Membership has also been influenced by political tensions arising on the continent, for example membership of Cuba was suspended as a result of pressure by the United States, as a consequence of the Castro coup and communist takeover. The chance for its restoration has been opened by a resolution of the General Assembly in 2009, partly due to political changes on the continent after the end of the cold war, namely the weakening of the influence of the United States. This resolution on Cuba (AG/RES. 2438) has terminated the one of 1962, but it has only created the chance to Cuba to get his membership back, it has not created an automatic return. Cuba has declared numerous times ever since, that it does not wish to become a member again. The membership of Honduras has been suspended between 2009 and 2011, as an objection of member states against the ousting of the head of state deemed to be legitimate by them. Membership rights of Honduras have only been restored after democratic elections have been held.

The main body of the OAS is the General Assembly, which collects ministers of foreign affairs and responsible for decision making since 1970. It employs simple or two-third majority voting, and usually has one ordinary session every year. It can adopt legally binding resolutions or legally not binding declarations.

The Permanent Council is an executive organ, operated by diplomats delegated by member states. Its task is to execute decisions of the General Assembly and operation of the organization.

### **4.1.2 Historical development in the framework of the OAS**

The Charter of the OAS, similarly to the UN Charter does not contain much reference or exact provisions related to human rights. Protection of human rights is mentioned in Article 3 Paragraph 1, among basic principles of the organization, but apart from that, it does not contain enumeration of human rights or any guarantee of institutional system for their protection.

But in the very same conference in Bogota, not only the OAS has been founded, but also a very important resolution has been adopted at the same time. The American Declaration of the Rights and Duties of Man is considered as being the founding document of today's American human rights system. Similarly to the Universal Declaration of Human Rights, this resolution has not had direct binding power as a declaration, but it can be considered as an authentic interpretation of the OAS Charter and later its content has also gained recognized customary power. This very important document has recognized twenty-seven human rights (both civil and political, and economic, social and cultural rights), and identified ten duties. Although many of its provisions have been developed and some of those have also been made obsolete by future development, it still has an enormous effect.

Unfortunately, right after the adoption of the Declaration, the development has slowed down. The American continent had to face similar political and ideological differences, which were present in the UN system, and this has not provided for a chance to a quick development (contrary to the Council of Europe at that time).

### **4.1.3 Institutional development – the Inter-American Commission on Human Rights**

To strengthen the institutional environment of the American protection of human rights, the OAS Council has created the body called Inter-American Commission on Human Rights. Though this was an important step forward, there were some serious concerns at that time about the fact that this had not happened by an international treaty, and as a result, the Commission had to face some problems: its status was weak and argued by some OAS member states.

Its competences have also been limited, its primary task has been the preparation of studies and reports. Later the Commission has developed the practice of country reports based on these: that is being the practice of examining and analyzing a given state's human rights performance on a periodic base. An amendment of the rules of the Commission in 1965 has made it possible to the body to entertain individual complaints, but the lack of a sound international treaty basis of the operation of the Commission itself has still posed a significant problem.

This was redressed by the Protocol of Buenos Aires in 1967. It has introduced numerous amendments to the OAS Charter, its most important results have been the preparation of a general American human rights convention (later becoming the

American Convention on Human Rights) and the settlement of the status of the Commission.

#### **4.1.4 American Convention on Human Rights and its protocols**

Finally in 1969, the American Convention on Human Rights has been adopted in San José (entering into force in 1978). This serves as the basic treaty of the American human rights system. Twenty-four out of thirty-five OAS member states are party to the Convention, but unfortunately there are some important countries missing from this list. For example the United States or Canada has never ratified the treaty, and many smaller states also have not done it. What's more, in 1998 Trinidad and Tobago has withdrawn from the Convention.

By examining the reasons of some states staying away from it, we can find many reasons, but luckily none of these would indicate a general rejection against the Convention. For example Canada refuses to ratify the treaty because of its norms prohibiting abortion, drafted by states with strong catholic roots. The United States also finds a problem with these provisions, as ratifying the treaty with this interpretation could result in a serious domestic constitutional problem. While some commentators argue that the Convention does not impose an absolute prohibition on abortion at all.

The Convention enumerates first generation human rights and obliges states party to respect those. Next to these rights it also mentions second generation human rights in one article, but does not provide for detailed rules.

Similarly to other human rights treaties, the Convention allows for states derogating from its provisions in cases of war, public emergency, or dangers to the state's independency or security. But this is only possible for a reasonable and limited time, and other member states shall immediately be informed other states party via the secretary general of the OAS. Additionally, the Convention also sets up a category of human rights of "absolute" nature, regarding to which this derogation is not allowed to any states party.

These human rights are: right to juridical personality, embodied in Article 3; right to life, embodied in Article 4; right to humane treatment, embodied in Article 5; freedom from slavery, embodied in Article 6; freedom from ex post facto laws, embodied in Article 9; freedom of conscience and religion, embodied in Article 12; rights of the family, embodied in Article 17; right to a name, embodied in Article 18; rights of the child, embodied in Article 19; right to nationality, embodied in Article 20; right to participate in government, embodied in Article 23. The prohibition of derogation from these rights extend to all the judicial guarantees essential for the protection of these rights.

The Convention has later been amended by two additional protocols. The Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (or just "Protocol of San Salvador") has added economic, social and cultural rights to the catalogue of human rights protected by the Convention. The Protocol to the American Convention on Human Rights to Abolish the Death



Penalty (or “Protocol of Asunción”) amends the Convention in connection with the right to life, and abolishes the death penalty – but this has not become widely accepted yet, currently only thirteen states party to the Convention has ratified it.

The most important result of the Convention is the creation of the Inter-American Court of Human Rights, which is the highest organ of human rights protection on the American continent.

#### **4.1.5 American institutions of human rights protection after the Convention: the Commission and the Court**

By the Protocol of Buenos Aires in 1967, the Inter-American Commission of Human Rights has finally become an official organ of the Organisation of American States. With this, it has gained inarguable legal basis for its future operation, so the member states had to accept its existence, even if some of its competences could raise serious questions to be decided.

These questions have been raised around the core element of competences to be exercised by the Commission respective of various OAS member states. The adoption of the American Convention on Human Rights has become a reality in the close future, but it was foreseeable that not all OAS member states will ratify it immediately and definitely not in the same time, some of them may not even ratify at all. As a consequence of this fact, three possible set of competences have been allocated to the Commission:

1. competences related to every OAS member states;
2. competences related to OAS members who become party to the American Convention on Human Rights, thus becoming subject to other proceedings as well;
3. competences related to OAS members who do not become party to the American Convention on Human Rights.

The seat of the Commission is Washington D.C., United States. Its members are not states but individuals, seven human rights experts who are elected by the OAS General Assembly from the nominees put forward by OAS member states. Every member state may nominate three persons, at least one of which must be a citizen of another member state. Members of the Commission are eligible for re-election once. Elected members have to act in their individual capacity, independently and has to meet strict incompatibility criteria. The Commission acts on behalf of the whole Organisation of American States.

Tasks of the Commission are complex, they are organized around the general duty to supervise OAS member states’ human rights performance, via complaints by other states, NGOs or individuals, if needed. It may examine violations of the provisions of either the American Convention on Human Rights (if the state is a party to it) or the Declaration of 1948, if its preconditions are met (for example, domestic remedies have been exhausted). The results of its examinations are recommendations of confidential

nature, which are addressed to the member state affected, and the publication of which are the ultimate sanction. Member states may subject themselves to a stronger jurisdiction, in these cases the Commission may examine the complaint on the merits. If the proceeding leads to no result or any party requests, it may forward the complaint to the Inter-American Court of Human Rights. Contrary to the European system, there is no direct complaint procedure, so this is the only way for an individual complaint to reach the Court.

The Inter-American Court of Human Rights, the main body responsible for protection of human rights on the American continent with a seat in San José, the capital of Costa Rica, has been created by the American Convention on Human Rights. It has started its operation after the Convention has entered into force in 1979. Its most important task is to observe states' practice related to the Convention, its most important tool is that as a judicial organ, it is capable of adopting legally binding judgments. It has seven judges, elected by the OAS General Assembly for the term of six years, and they can be re-elected only once. During their activities they have to act in their personal capacity, independently and impartially.

Two kind of procedures are possible at the Court:

1. it can examine complaints leading to a legally binding judgment (adjudicatory function) or
2. give advisory opinions, which are recommendations (advisory function).

The adjudicatory function of the Court may be exercised only if some conditions are met. A very important difference from the European system is that individual complaints may only reach the Court through the Commission, as introduced earlier, which means that there is no direct individual complaint procedure yet – the Commission has to decide to take the case to the Court against the state concerned, not the individual. Additionally, another difference is, that the Court may only hear the case if that state had accepted its contentious jurisdiction by a declaration. This declaration may be given on a blanket basis or only related to a specific, individual case. Until today Argentina, Bolivia, Brazil, Chile, Colombia, Costa Rica, Dominican Republic, Ecuador, El Salvador, Guatemala, Haiti, Honduras, Mexico, Nicaragua, Panama, Paraguay, Peru, Suriname, Uruguay, and Venezuela have consented to the Court's jurisdiction on a permanent basis.

The proceeding consists of a written and an oral phase, the judgment is binding on the parties. Appeal is not possible, only an interpretation of the judgment may be requested from the Court within 90 days. Judgments may oblige the state concerned to pay compensation or even to amend its domestic legal provisions if needed.

The advisory function of the Court is a very important tool to develop a single legal practice related to human rights recognized by the Convention, and other American human rights treaties. It can be initiated by any OAS agencies or member states (not only states party to the Convention), and it is interpreted widely by the Court: it can even extend to questions regarding of member states' domestic legal provisions' or planned provisions' consistency with the provisions of the Convention.

Based on an agreement between the Court and Costa Rica, the Inter-American Institute of Human Rights has been founded in 1980. It is an independent international scientific institution, with the aim of the support and development of human rights education and research, with special attention paid to American matters.

#### **4.1.6 Other OAS human rights conventions**

Next to the Convention, more other international human rights law treaties have been adopted in the framework of the OAS, gradually building up a regional human rights system of the Americas.

Among the most important ones we find the Inter-American Convention to Prevent and Punish Torture, adopted in 1985, which has followed the UN Torture Convention (see Chapter 17). The definition of torture, obligations of states party is very similar to the provisions of the UN treaty. The Convention vests the Inter-American Commission on Human Rights with the task of observation of practice of states party, which includes any legislative, judicial, administrative, or other measures they adopt in application of the Convention.

Two human rights treaties of basic importance has been adopted on the twenty-fourth regular session of the OAS General Assembly, held in Belem do Para, Brazil, on September 6, 1994: the Inter-American Convention on Forced Disappearance of Persons and the Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women.

The Inter-American Convention on Forced Disappearance of Persons addresses a human rights problem that has unfortunately been a serious issue through the history of some American states, which explains its codification under these regional framework. The Convention qualifies forced disappearance a crime similarly to torture and provides for a similar set of legal rules being applicable regarding it. So far it has been ratified by fifteen OAS member states.

The Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women, often referred to only as the “Convention of Belem do Para” addresses “any act or conduct, based on gender, which causes death or physical, sexual or psychological harm or suffering to women, whether in the public or the private sphere”. This widely accepted Convention (only Canada and the United States have failed to ratify it so far) applies the same method as other OAS human rights treaties in relation to these actions, while additionally, its Article 5 also provides for gender equality concerning the enjoyment of civil, political, economic, social and cultural rights, and the full protection of those.

A very specific and important treaty has been adopted in 1999 by the OAS Assembly, the Inter-American Convention on the Elimination of All Forms of Discrimination against Persons with Disabilities.

The Inter-American Democratic Charter has been adopted by the OAS General Assembly at its special session held in Lima, Peru, on September 11, 2001. The states

party recognise respect for human rights as a general obligation and democracy as a precondition to it. The Charter provides for the right to democracy, to rule of law, fair elections and transparent character of the operation of states. Special attention is being paid by the Charter to possible joint actions in situations of unconstitutional changes of governments, to prevent these, election observers or sanctions can be applied.

## **4.2 African System of Human Rights**

### **4.2.1 Historical development in the framework of the OAU / AU, AU and the African system**

The Organization of African Unity (hereinafter: the OAU) was established by thirty-two African states by signing the OAU Charter in 1963 as the first regional (continental) international organization of Africa. OAU was based in Addis-Ababa, Ethiopia and its primary aim was to serve as a forum for dialogue and cooperation among the African states and also to foster the decolonization process throughout the continent. Each African States gained membership in the OAU in line with decolonization, however, Morocco renounced its membership in 1984 due to the admission of the Sahrawi Arab Democratic Republic (commonly known as ‘Western Sahara’) as a member of the organization. OAU was an international organization of a ‘traditional type’ since its functions could be sorted to three main areas: representative, executive and administrative functions. One of its purposes were ‘to promote international cooperation, having due regard to the Charter of the United Nations and the Universal Declaration of Human Rights’. The OAU Charter was replaced and the OAU was disbanded by the Constitutive Act of the African Union (hereinafter: the Constitutive Act) that was signed in Lomé in 2000 by fifty-three African states. The Constitutive Act entered into force a year later and every African states have a membership in the African Union (hereinafter: AU), however with the only exception of Morocco. The structural and the functional framework of the African Union was based both on ‘traditional type’ organizations as the UN and non-traditional organizations such as the European Union. AU is featured by organizational and functional diversity. One of the objectives of the AU is ‘to promote and protect human and peoples’ rights in accordance with the African Charter on Human and Peoples’ Rights and other relevant human rights instruments’ and for achieving this, the AU functions in accordance with the principle of respecting human rights.

### **4.2.2 The Banjul Charter and its protocols**

Signed in Nairobi, the core human rights instrument of Africa is the African Charter on Human and People’s Rights (hereinafter: Banjul Charter) that was adopted unanimously by the Assembly of the OAU in 1981 and entered into force in 1986. Each member

of the AU is party to the Banjul Charter with the only exception of South Sudan. 'Convention' would have been the title of these document originally, and by adopting the term 'charter', the drafters wished to emphasize the significance of this instrument.

Unlike European regional human rights treaties, Banjul Charter contains provisions of unusual and different kind. The preamble refers to Zionism pejoratively for instance which the signatories undertake to eliminate. One can find similar provisions only in certain UN General Assembly resolutions and in the Arab Charter of Human Rights. Furthermore, Banjul Charter protects not only individual human rights, but certain collective rights of peoples and even it regulates the duties of individuals either. Article 1 of the Banjul Charter concerns on the commitments of the States Parties including the legislative and other measures that the signatories should take to give effect to the rights and duties enlisted in the Charter. Certainly, the Banjul Charter contains a non-discriminatory clause in which besides the regular protected statuses one unusual feature occurs only such as the 'distinction on fortune'. Banjul Charter contains both civil and political rights and economic, social and cultural rights and even some 'third generation' rights that often overlap with certain collective rights as the 'right to development' or the 'right to general satisfactory environment'. The first and the second generations of human rights are considered as interrelated and dissociated by the Charter. It is obvious from the wording of the Banjul Charter, that the drafters and as a matter of course, the African States prefer men vis-à-vis women instead of being neutral in this sense. Even though the Charter intends to eliminate expressly the discrimination against women, it uses a rather paternalistic and androcentric approach through the text. Peoples are equal and for promoting this principle the Banjul Charter covers the following peoples' rights:

- ✿ Right to existence;
- ✿ Right to self-determination (which is unquestionable and inalienable); relating to the practice of this right, all peoples
  - have the right to the assistance of the States parties to Charter in their liberation struggle against foreign domination, be it political, economic or cultural; and all colonized and oppressed peoples
  - have the right to free themselves from the bonds of domination by resorting to any means recognized by the international community.
- ✿ Right to freely dispose natural resources and wealth;
- ✿ Right to the lawful recovery of property as well as to an adequate compensation in case of spoliation;
- ✿ Right to economic, social and cultural development;
- ✿ Right to national and international security;
- ✿ Right to a general satisfactory environment favorable to development.

States have the duty to promote, ensure and safeguard the collective rights enumerated above.

In addition, the Banjul Charter also have some provisions on the duties of individuals. In general, individuals have duties towards '*his* family and society, the State and other legally recognized communities and the international community.'

Accordingly, every individual should:

- ✿ respect and consider his fellow beings without discrimination, and to maintain relations aimed at promoting, safeguarding and reinforcing mutual respect and tolerance;
- ✿ preserve the harmonious development of the family and to work for the cohesion and respect of the family;
- ✿ respect his parents at all times, to maintain them in case of need;
- ✿ serve his national community by placing his physical and intellectual abilities at its service;
- ✿ Not to compromise the security of the State whose national or resident he is;
- ✿ preserve and strengthen social and national solidarity, particularly when the latter is threatened;
- ✿ preserve and strengthen the national independence and the territorial integrity of his country and to contribute to its defense in accordance with the law;
- ✿ work to the best of his abilities and competence, and to pay taxes imposed by law in the interest of the society;
- ✿ preserve and strengthen positive African cultural values in his relations with other members of the society, in the spirit of tolerance, dialogue and consultation and, in general, to contribute to the promotion of the moral wellbeing of society;
- ✿ Contribute to the best of his abilities, at all times and at all levels, to the promotion and achievement of African unity.

### **4.2.3 Enforcement of African regional human rights treaties**

The African Commission on Human and Peoples' Rights (hereinafter: ACHPR) has been created to ensure the enforcement and the applicability of the Banjul Charter. ACPHR is consisted of eleven members of high morality elected by the Assembly of Heads of States and Governments of the AU for a renewable period of six years. Even if not being mandatory, legal experience is an advantage for becoming a member of this Commission. Members of ACHPR must be nationals of States Parties and no more than one national of each State is allowed to be a member at the same time. The most important functions of ACHPR are the interpretation of the Banjul Charter and the deliberation of complaints submitted to it. Only States Parties, organs of the AU and any other African international organization may request the interpretation of the Banjul Charter. As regarding to complaint procedure, the Charter seems to prefer States that may file complaints against another State Party if the latter allegedly violated a provision of the Charter. Interestingly, it is obligatory to exhaust local remedies – if any – even in inter-State complaints. However, ACHPR may receive complaints other than those from States parties (practically from individuals). All such cases the ACHPR is allowed to decide on the merits and request the respondent State to do or not do something. ACHPR is seated in Banjul, the Gambia.

The Assembly of the Heads of States and Governments of the OAU adopted a Protocol to the Banjul Charter in 1998 by which the African Court on Human and Peoples' Rights (hereinafter: the African Court) was created. The Protocol came into force in 2004, but only twenty-seven States among the AU members are parties to it. According to the signatories' goal, the African Court is aiming at complementing the ACHPR by which it strengthens the African system of protecting human rights. Unfortunately, it is not easy to access to the African Court by individuals since only the ACHPR, the applicant or the respondent States of a particular case, the State Party whose citizen is a victim of human rights violation, and African Intergovernmental Organizations are entitled to initiate a procedure at the African Court. In case of deciding on the merits, the African Court renders a judgment that is final. Parties to the case undertake to comply with the judgment. The African Court composed of eleven judges whom elected by the Assembly of the AU for a renewable term of six years. The seat of the Court is in Arusha, Tanzania. A separate international court, namely the Court of Justice of the African Union was established by the Constitutive Act of the AU a couple a years later. To avoid the duplication of courts, a protocol was signed under the aegis of the AU in 2008 aiming at the merging of the two courts in question and establishing the African Court of Justice and Human Rights. However, this latter protocol has not come into effect, yet.

#### **4.2.4 Other relevant OAU/AU treaties on human rights**

In addition to the Banjul Charter, some other human rights-related international treaties have also been adopted in the framework of the African regional cooperation of which mainly two of them need a particular attention. Firstly, the African Charter on the Rights and Welfare of the Child that was adopted in 1990. This Charter provides a thorough protection of the rights of children in Africa and monitoring body, namely the Committee on the Rights and Welfare of the Child was created as a monitoring mechanism of this instrument. The Committee is authorized to receive communications either from States or individuals in case of violation of its articles. Finally, an additional protocol, the Protocol on the Rights of Women in Africa to the Banjul Charter was adopted in 2003 with special emphasis on parental rights and widows' rights. Unfortunately, the implementation mechanism of this protocol looks not sufficient enough, since nobody is entitled to turn to any of the African intergovernmental judicial or quasi-judicial bodies when a State Party allegedly violates its provisions.

### **4.3 The regional mechanism of protecting human rights in Asia**

As it is well known, a single and comprehensive regional human rights mechanism have not emerged in Asia so far. Documents of the vast majority of the different regional



and subregional Asian international organizations remain silent on this issue. Only the Charter of the Shanghai Cooperation Organization (SCO) adopted in 2002 refers to human rights as one of the main goals and tasks of the cooperation:

*“to promote human rights and fundamental freedoms in accordance with the international obligations of the member States and their national legislation.”*

However, another subregional forum, the Association of Southeast Asian Nations (ASEAN) has some achievements on this matter, therefore it seems important to present briefly the milestones of this organization.

ASEAN was founded by five Southeast Asian States, namely Indonesia, Malaysia, the Philippines, Singapore, and Thailand by signing a Declaration in Bangkok (ASEAN Declaration or Bangkok Declaration) in the year of 1967. Further five States acceded the organization since then: Brunei (1984), Vietnam (1995), Laos and Myanmar (1997), and Cambodia (1999). Papua New Guinea (observer but not submitted a formal application yet) and Timor-Leste (submitted its application in 2011) can gain membership in the future. The headquarters of the ASEAN is located in Jakarta (Indonesia). Three States of the East Asian subregion such as China, South Korea and Japan cooperate the organization within the so-called ASEAN Plus Three (APT). Both the ASEAN and the APT have goals mainly relevant to economic, financial and cultural fields and also to promote regional peace and stability. To achieve these, ASEAN established a Free Trade Area (AFTA) in 1992 and APT created an Asian Currency Unit in 2005. ASEAN members strengthened their cooperation in 2007, when they adopted the ASEAN Charter in Singapore. The supreme organ of the ASEAN is the Summit (held at least twice a year) composed of the heads of states or governments of the Member States. Besides the ASEAN has other organs: Coordinating Council (comprises the ministers for foreign affairs), Community Councils, a Secretariat (headed by the Secretary-General) and other bodies. The organization wishes to establish the ASEAN Community by the end of 2015 which will be based on following three pillars:

It was in 1993 when the question of human rights was first raised on the agenda of the organization. ASEAN Member States adopted a declaration in Vienna on this issue. One of the purposes of the ASEAN under the ASEAN Charter is to promote and protect human rights and fundamental freedoms. Cooperation in the ASEAN is based on the principle of respecting fundamental freedoms, promotion and protection of human rights and the promotion of social justice. Also in the ASEAN Charter the Member States decided to establish an ASEAN Human Rights Body which started to work in 2009 as the ASEAN Intergovernmental Commission on Human Rights (AICHR). One of the first and key task of AICHR was to draft and elaborate an ASEAN Human Rights Declaration which was finalized and adopted unanimously in 2012 (hereinafter: Phnom Penh Declaration). The Phnom Penh Declaration is featured by a balance of rights and duties influenced by certain Asian philosophical traditions. The Phnom Penh Declaration contains both civil and political rights and economic, social and cultural rights. Right to life is not absolute in this system since the Phnom



Penh Declaration does not ban capital punishment for instance. The Phnom Penh Declarations also recognizes some rights both as an individual and a collective human right such as the right to peace or the right to development.

AICHR is an advisory body entrusted with promoting human rights but it is not authorized to receive complaints from States or individuals or even reports from States. However every individual is allowed to send the AICHR information on human rights abuses about which the advisory body can get information from the State concerned. AICHR shall report on its work each year to the ASEAN.

#### **4.4 Arab system of protection of human rights**

The first Arab Human Rights Charter has been adopted in the framework of the League of Arab States in 1994, but it has never entered into force, mostly because of concerns regarding to some elements of its text and the overall political criticism it has been drawing. These concerns have been so serious that not even one single Arab state has ever ratified the Charter, and it had only been signed by Saddam Hussein's Iraq. The Charter's text was very political, while it has lacked of any human rights enforcement mechanism. After its adoption, a continuous criticism of its deficiencies (by experts, NGOs etc.) has ensured a momentum, and numerous experts' meetings and conferences have been organised to pressure Arab governments to amend it.

During 2002 and 2003 the Council of the League of Arab States adopted resolutions with the aim of "modernizing" the 1994 Charter, with the help of the Arab Standing Committee on Human Rights. After lengthy consultations with member states, independent experts and NGOs, the revised Arab Charter was adopted during the 16th Ordinary Session of the Arab Summit, held on 23 May 2004 in Tunis. It has entered into force according to Article 49, after the seventh ratification, in 2008. Currently, the Charter has been ratified by thirteen states, namely Algeria, Bahrain, Iraq, Jordan, Kuwait, Lebanon, Libya, Palestine, Qatar, Saudi Arabia, Syria, the UAE and Yemen.

The revised Charter still gives reason for debate. For example, the UN High Commissioner for Human Rights in office at that time, Louise Arbour, in 2008 has expressed concern over several of its provisions, similarly to some states and NGOs ever since its adoption.

The Charter protects civil, political, economic, cultural and social rights. States party undertake the obligation to implement and protect the rights and freedoms recognised by the Charter. In more than 40 articles it enumerates a catalogue of human rights very similar to other international human rights documents, on the basis of the principle non-discrimination, embodied in Article 3.

Similarly to other treaties, the Charter makes it possible to a state party to take measures derogating from its obligations under the Charter in some cases. But only in exceptional situations of emergency, which threaten the life of the nation, and with the condition that the state may only invoke this if it had officially proclaimed such an emergency, and these measures must not be inconsistent with their other

obligations under international law and must not involve any unlawful discrimination. Additionally, some provisions of the Charter are of absolute nature, from which no derogation is possible. These are for example, the right to life, prohibition of torture and slavery, right to fair trial and the right to not be imprisoned for being unable to fulfil a contractual obligation.

The new and important elements of the revised Charter are the confirmation of equality between men and women, guarantee of children's rights and of handicapped persons.

But not all of the criticism of the 1994 version have found a reassuring answer with the amended revised Charter. Gender equality, mentioned in the previous paragraph is vague at best: as Article 3 Paragraph 3 of the Charter provides for this equality "within the framework of the positive discrimination established in favour of women by the Islamic Shariah, other divine laws and by applicable laws and legal instruments", assurance of real equality is uncertain. The Charter clearly fails to reassure doubts of the international community, which had been echoed earlier in the objections to Islamic states' reservations to the CEDAW.

An other serious flaw of the Charter is the still obvious political nature of its text at some point. The statement of the Preamble "Rejecting all forms of racism and Zionism, which constitute a violation of human rights and a threat to international peace and security" and of Article 2 Paragraph 3., stating "All forms of racism, zionism, occupation and foreign domination pose a challenge to human dignity and constitute a fundamental obstacle to the realization of the basic rights of peoples. There is a need to condemn and endeavour to eliminate all such practices." are both directed against Israel, which is a political element quite unusual in international human rights documents. Paragraph 4 of the same article, which says "All peoples have the right to resist foreign occupation." is also a direct referral to the Palestinian-Israeli conflict.

Additionally, the main criticism of the 1994 version unfortunately remains unresolved, as no effective enforcement mechanism has been created. The Arab Human Rights Committee remains the only body responsible of monitoring states' execution and compliance. It has seven members, who are elected for four years by the states party, and then they shall serve in their personal capacity and fully independently and impartially. Though the Committee receives periodic reports from states parties, but the Charter creates no mechanism for accepting any petitions or complaints for violations of the Charter. And although there were ideas for a possible "Arab Court on Human Rights", the Charter has not made any steps towards this direction.



## 5. International protection of minorities

### 5.1 Introduction

Efforts by non-dominant groups to preserve their cultural, religious or ethnic differences emerged with the creation of modern nation-states in the eighteenth and nineteenth centuries. The ideal of a unitary nation-state dominated political discussion about the future of European nations in the 19th-20th century. Especially in this European context, national homogeneity has become a final goal for most nation-states. After World War I the creation of new states in Central Europe referring to the principle of peoples' right to self-determination lead to the need to address also the problems of national minorities. The recognition and protection of minority rights under international law began with the League of Nations through the adoption of several "minority treaties".

When the United Nations was set up in 1945 to replace the League of Nations, the international community largely lost interest in idea of creating a new regime of international protection of minority rights. The universal protection of human rights, the prohibition of discrimination in particular was thought to offer a remedy for minority rights claims. Nevertheless problems related to minorities did not fade away and later even the UN gradually developed a number of norms, procedures and mechanisms concerned with minorities.

The promotion and protection of the rights of minorities require particular attention to be paid to issues such as the recognition of minorities' existence; efforts to guarantee their rights to non-discrimination and equality; the promotion of multicultural and intercultural education, nationally and locally; the promotion of their participation in all aspects of public life; the inclusion of their concerns in development and poverty-reduction processes; disparities in social indicators such as employment, health and housing; the situation of women and the special concerns of children belonging to minorities. Persons belonging to national or ethnic, religious and linguistic minorities are also often victims of multiple discrimination and they may lack access to, among other things, adequate housing, land and property, and even a nationality. Nevertheless until the 1990s there have been only a few special instruments relevant for minorities at international level. Among these for a long time Art. 27 of the International Covenant on Civil and Political Rights (1966) was an outstanding provision in international treaty law.

From the 1990s parallel to the democratic transition of former socialist countries in Central and Eastern Europe, ethnic tensions and conflicts related to minorities raised concerns at international level as well. Minorities on other parts of the world are also

often the victims of armed conflicts and internal strife. Partly as a response to these challenges several documents have been adopted on the protection of minority rights within the UN (1992 Declaration – see below), the Council of Europe (1992 Language Charter, 1995 Framework Convention – see below) and the Organization for Security and Co-operation in Europe (1990 Copenhagen Document – see below).

## 5.2 Definition of “minority”

The discussion on the legal protection of minority rights at an international level, primarily regards minorities, which distinguish themselves from the majority on the basis of their “national or ethnic, religious and linguistic” identity (as most UN documents list minorities).

The brief overview of terminological problems will show below, that first of all political considerations impede the adoption of a universal terminology on minorities. Noting that the definition of “minority” is surely not a sine qua non of the effective protection of minorities OSCE High Commissioner on National Minorities Max van der Stoep stated:

*“[t]he existence of a minority is a question of fact and not of definition. [...] I may not have a definition of what constitutes a minority, I would dare to say that I know a minority when I see one.”*

The definition of “minority” is a highly sensitive issue: the inclusion or exclusion of specific groups or individuals from the definition is a crucial point, as it necessarily delimits the addressees of specific policy and legislative instruments. First, one has to face the conundrum of liberal democratic regimes built on the respect for individual human rights and fundamental freedoms, guaranteed to all citizens without any distinction. Second, there is a natural expectation in every legal order to define in objective terms the addressees of specific legal regulations, and it is a truism that minority protection ipso facto affects only a part of the population. To meet both pre-requisites has always been a great challenge.

It shall be noted that besides ‘minorities’ in international documents, other terms such as ‘people’ and ‘nation’ are also used interchangeably, without any clear definition. And existing practice in international relations does not always help in identifying the clear-cut boundaries of these terms and especially the rights and right-holders associated with them.

The case with the definition of ‘minority’ is very similar, inasmuch as the lack of a legal definition offers in many cases a relatively large margin of discretion to governments in selecting those minorities to which they want to provide legal protection.

After 1945 the first endeavours for a clarification of the term “minority” have appeared in the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities on the basis of a memorandum prepared by the Secretary General in

1949 on the Definition and Classification of Minorities. Without reaching a consensus, within the Sub-Commission various working definitions were formulated, still today the best reflecting the classic approaches. According to the definition provided by Capotorti as a special rapporteur, in 1978 (with regard to Article 27 of the ICCPR), a ‘minority’ is:

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

International documents on minority rights protection neither provide a definition of minorities nor set up clear-cut preferences on which minorities would be entitled to international and domestic protection. Recent international political initiatives to tackle minority problems in the Central and Eastern Europe have expressively focused on traditional national or ethnic minorities.

### **5.3 Security concerns and human rights in international minority protection**

From a legal point of view, the actual regime of international minority protection is a relatively recent development in international human rights law. Particularly relevant were the adoption of the Universal Declaration of Human Rights (UDHR) in 1948 and in a European context, the European Convention on Human Rights (ECHR) which do not provide any specific provision for minority rights, however the inclusion of the principle of non-discrimination and equality also at international level could be seen as a very important instrument also for the protection of the rights of persons belonging to minorities. Similarly the adoption of the Convention on Genocide or the inclusion of discrimination based on “national or ethnic origin” in the International Convention on Racial Discrimination reinforced respectively the right of minorities to existence and the principle of equality irrespective of belonging to the ethnic or national majority or minority within the state (on the principle of non-discrimination see also below).

The post-WWII pattern developed in the first place by the United Nations signalled a period of exclusive individual rights approach, and this was reflected also in the adoption of the International Covenant on Civil and Political Rights (ICCPR) in 1966 which declared for the first time in a UN treaty the specific rights of minorities under its Art. 27. Though this provision had a limited scope and was strongly rooted in the individualistic approach of human rights protection.

The international protection of minorities started to get more attention only in the 1990s, when first the UN General Assembly adopted a declaration on the rights of persons belonging to minorities, and when especially in Europe the rights of

minorities have become a central issue in international relations. In a European context international organizations took an active role in addressing minority rights protection in the 1990s both in the perspective of extending international human rights protection and in reinforcing international stability and security. The protection of minority rights emerged also strongly in a security perspective, signed by the adoption of CSCE Copenhagen Document and other CSCE/OSCE declarations including references to minorities. On the other hand in their legal protection under international law, the adoption of the Framework Convention for the Protection of National Minorities (FCNM) in 1995 and that of the European Charter for Regional or Minority Languages (Language Charter) in 1992 were the most determining developments, which codified the specific rights of minorities in different areas from linguistic to political rights. The FCNM was the first international treaty exclusively dedicated to the rights of minorities under international law as a legally binding document, establishing also a supervisory mechanism on its implementation.

The 'new regime' of international minority rights protection, which emerged in the 1990s however remains deeply embedded in the post-WWII international system of human rights protection and features some basic characteristics. 1.) In principle it does not depart from the individualist approach of modern human rights protection; 2.) it builds on the principle of equality and non-discrimination; 3.) minorities are not acknowledged as political communities, the right to self-determination is not assigned to them; 4.) the group character of minorities is not, or only, implicitly acknowledged; 5.) the rights of minorities are usually formulated in vague terms, offering an ample room for divergent governmental policies and interpretations.

The concept of international minority rights protection – in a rather simplistic formulation – may be seen as building on two equally powerful arguments: on one side it is seen as the full extension of human rights to persons belonging to minorities, while on the other hand from a political, security approach it is often conceived as an appropriate political instrument of conflict-prevention/conflict-resolution. Today most documents on minority rights – either, legally binding international treaties or political declarations – adopted after 1989 in a European framework, encompass both approaches.

## **5.4 Minority rights and the international protection of human rights**

In broad terms, internationally protected human rights – as embodied in major UN and CoE documents – have been said to present a number of basic properties. They are declared to be universal and inherent (they belong to each and every human being because of the inherent dignity of each and every human being and they are inalienable); protected on the basis of equality and non-discrimination (differential treatment has to be based on proper reasons and justifications); primarily designed to enable free choices and individual development; and they are indivisible and interdependent.

In this sense not only international legitimacy became closely related to the protection of human rights in individual states, but also the responsibility of the international community in promoting and protecting human rights gained a pre-eminent role.

International legal instruments grant protection to the right to identity, from which most of other specific minority rights can be derived. The protection from genocide, apartheid and from discrimination based on ethnic or national origin – which are also corner-stones of the present international protection of human rights, as they are declared in the relevant UN documents, mentioned above – all reflect the acceptance of the right to existence.

## **5.5 International organisations and the implementation of minority rights**

Under international law, international organisations are by rule formed by states, consequently the ambiguities characterising the treatment of minorities in general, and the conceptualisation of minority rights in particular, are necessarily reflected in the documents and actions adopted by international organisations.

The fundamental principles of the present international system are normatively based upon the classic nation-state ideal, as unitary, politically independent and sovereign entities of international relations. Thus, while human rights norms had become fully internationalised, their implementation and enforcement remained almost completely national. The values identified in human rights protection are common, but their realisation primarily belongs to national competence. It implies that despite the strong internationalisation of human rights protection, in practice the centrality of states has not been questioned in this field. This is particularly relevant for the international protection of minority rights. First of all, the establishment of peoples' right to self-determination, as a universal human right, often surfaces in debates over minority claims for any form of political control over a territory or a group of citizens (i.e. the minority community).

As it usually happens, the state cannot necessarily provide an identity neutral environment for its citizens in exercising their civil and political rights, thus substantial minority claims (for preserving minority identity) require more than formal equality. It also implies, that states, and international organisations face a challenge in defining identity-sensitive specific rights, without questioning the historical foundations of existing nation-states. Ideas on shared sovereignty, multi-level governance, and autonomy are only marginally present in international documents.

In sum, international documents on minority rights regularly reinforce both aspects of minority protection: acknowledging that specific rights of minorities form an integral part of universal human rights, while on the other hand stressing that the exercise of minority rights shall contribute to political stability and peace, and shall not in any way infringe the sovereignty of states. As the CSCE Copenhagen Document (1990) stated under art. 30. that



*“[The participating states] reaffirm that respect for the rights of persons belonging to national minorities as part of universally recognized human rights is an essential factor for peace, justice, stability and democracy in the participating States.”*

But the Document also reaffirms under art. 37 that

*“None of these commitments may be interpreted as implying any right to engage in any activity or perform any action in contravention of the purposes and principles of the Charter of the United Nations, other obligations under international law or the provisions of the Final Act, including the principle of territorial integrity of States.”*

The duality of political (security) and normative-ideational (human rights) considerations necessarily poses a quandary to the accommodation of minority claims, and minority rights always trigger a combined approach.

## **5.6 Normative Principles in Minority Rights Protection**

### **5.6.1 Non-discrimination and equal rights**

The very basis of the legal status of a minority is the principle of non-discrimination. Non-discrimination means that the law must not attach any negative consequences to the fact that an individual belongs to a minority. The prohibition of discrimination is indeed a fundamental element for the effective enjoyment of all human rights. It is a deeply embedded norm in international law on human rights and it's widely acknowledged also as a pre-requisite of the protection of minorities.

Equality in this sense requires abstention from and prevention of discrimination. In fact equality in dignity requires respect for the self-identification of the individual with her/his group, and hence a right for the community to preserve its identity.

Although, minorities benefit from the principles of equality and non-discrimination, an important distinction has to be made between the anti-discrimination approach and minority rights. The UN Sub-Commission on Prevention of Discrimination and Protection of Minorities gave useful indication on the matter by explaining the themes of its mandate:

1. Prevention of discrimination is the prevention of any action which denies to individuals or groups of people equality of treatment which they may wish.
2. Protection of minorities is the protection of non-dominant groups which, while wishing in general for equality of treatment with the majority, wish for a measure of differential treatment in order to preserve basic characteristics which they possess and which distinguish them from the majority of the population (...) [if] a minority wishes for assimilation and is debarred, the question is one of discrimination.

So, the prohibition of discrimination is the first step or the indispensable basis for 'real' minority protection policy or legislation, but in itself cannot be a sufficient instrument.

If the principle of non-discrimination is converted from its negative aspect (no negative consequences) into a positive formula, it says that minority members must not have fewer, but the same rights (and duties) as any other citizen.

### **5.6.2 Special rights**

As it was seen, non-discrimination and equal rights—even in a minority-centred approach—do not normally suffice to enable the minority to maintain a distinct collective identity. The special features of their identity are – by the very fact of being different - threatened numerically, socially, economically and culturally by the surrounding majority. The majority identity - or, as one could put it, the majority culture - exercises a certain pressure for assimilation, which is all the stronger the more a minority is integrated into the overall society, the more dispersed its members live and the more exposed they are to the majority culture and assimilation to it. Maintaining a distinct minority identity thus entails a 'fight' against the pressure of the majority culture. Special rights serve to equip the minority with the necessary means of defence.

Thus, special rights go further than mere equal rights (even in their minority-centred approach): they give the minority and/or its members rights which are different from those of the majority and which are specifically addressed to them. These special rights are designed to account for the cultural differences of the minority.

The basic forms of special minority rights are individual rights. The bearer of these rights is the individual member of the minority community. Indeed specific minority rights can be formulated as an identity-sensitive extension of universal human rights, i.e. there are few special individual human rights that are aimed exclusively at the protection of minority identity. To a certain extent though, the individual rights of minority members can create a space where minority identity can be expressed. In fact, specific minority rights, as they are embedded in international documents usually cover three main areas which are particularly relevant for the preservation of minority culture and identity: a.) linguistic rights may comprise a wide set of private and public relation and areas where the use of minority languages is acknowledged; b.) the second group of specific rights are related to education on minority language; and c.) the third specific group of rights can be delimited as covering the right of minorities to effective participation in political, economic and social life. The most important problems in this regard root in the vague formulation of state obligations which leave a substantial margin of discretion for states in shaping their legislation on minority rights. Even the legally binding treaties reflect a fragile consensus on specific minority rights.

### 5.6.3 Individual vs group rights

Furthermore, from a conceptual standpoint, it is also doubtful, whether rights assigned to persons on an individual basis can fulfil the primary goal of minority protection, i.e. the protection of a specific minority culture and identity.

Indeed, many minorities feel the need to be granted rights which address the minority as a group.

In fact an additional limitation to the concept of “minority” is that international documents in most cases acknowledge only the specific rights of individuals belonging to minorities, even if their rights can be exercised “*in community with other members of the group*,” (wording used in Art. 27 of ICCPR) the community as such is not overtly entitled to these rights. This legal formulation does not deny the existence of minority groups as such, but nor does it offer explicit legal protection to the group either.

Existing legal formulations of minority rights under international law are usually exclusively interpreted in an individualist context. This was reflected also in the rejection of CoE Parliamentary Assembly’s Recommendation 1201(1993) on the additional protocol on the rights of national minorities to the European Convention on Human Rights. Art. 11. of the Recommendation reads as follows: “*In the regions where they are in a majority the persons belonging to a national minority shall have the right to have at their disposal appropriate local or autonomous authorities or to have a special status, matching the specific historical and territorial situation and in accordance with the domestic legislation of the state.*” This reference to a “special status” or to “appropriate autonomous authorities” of minorities was seen by many member states as unacceptably offering group rights.

This restrictive interpretation of minority rights reflects indeed the cautious approach and the fears of many governments that the legal reinforcement of the community-character of minorities potentially would lead to conflict between majority and minority populations and this leads us to the more political justification of minority rights, i.e. the concerns of international community to maintain peace and security.

Minorities with access to collective rights would come to enjoy widely assured and accepted individual rights of persons belonging to minorities. Even though when collective rights are interpreted as rights conferred to minority institutions - either private or public - they typically centre on cultural issues. The establishment, maintenance and administration of minority schools (perhaps even including the drafting of teaching plans) are a typical example. However, culture is not necessarily the only field of collective rights. As a matter of fact, states can transfer competences to the institutions of minority communities on a wide range of policy areas from education, through cultural matters to local territorial governance.

### 5.6.4 The right to autonomy

In this aspect it is noteworthy to distinguish between the right to autonomy and other special minority rights. The right to autonomy has scarcely been addressed at

the international level. In fact, in minority demands for autonomy, states often see hidden claims for future secession. Thus the question of minority autonomy is often linked to security concerns and to the interests in maintaining political stability. While personal autonomy could hardly be seen as providing any basis for territorial claims, the main problem is seen in the close interrelation perceived existing between the right to autonomy and peoples' right to self-determination. The right to self-determination, as it is formulated under the UN Charter or the 1966 UN Covenants on human rights first and foremost describes the process whereby a people freely determines its own political status, which should not necessarily imply the creation of an independent state. Nevertheless, by offering specific competences to the minority community, minority autonomy - especially territorial autonomy - nourishes in many states political concerns on questioning the ruling concept of unitary nation-state.

Nonetheless, there are a few – legally non-binding – international documents, which may seem to accept the right of minorities to autonomy also at an international level. As a matter of fact, all forms of autonomy (territorial or personal) are dependent on domestic political developments, but in each case the community itself gains special institutions for the effective protection of the rights of the community and the individuals belonging to that minority group.

### **5.6.5 Affirmative action (positive discrimination)**

When talking about minority rights, the term 'affirmative action' or 'positive discrimination' is also often mentioned. This, however, does not denote a special class of rights such as the ones discussed above, but rather describes an attitude a state may take towards its minorities. Affirmative action means that the state does not only tolerate and accept the minority, but actively feels responsible for it and its well-being. Sometimes this attitude is enshrined in a country's constitution by pronouncing it as an objective principle without conferring subjective rights as such. International legal documents, such as the CoE Language Charter or the FCNM refer to the need of such a benign approach necessary on behalf of the state in implementing minority rights in a favourable environment. This responsibility, be it mandated by the constitution or not, may be legally codified. This takes place when the granting of special rights to minority members allots them more rights in fact than majority members legally have. The exemption of minority parties from suffrage thresholds in the electoral system is just a form of active care of the state as is the reservation of certain quotas for minority members in the public service. Most forms of affirmative action, however, take place outside the legal sphere, they are formulated in specific political programs and policies adapted for particular situations, for instance especially in the distribution of public funds for minority issues or in efforts to teach the spirit of tolerance and acceptance in state schools.

### **5.6.6 Control mechanisms for the implementation of international standards**

One of the main criticisms formulated in regard to the international protection of minority rights is the lack of an effective supervisory mechanism sanctioning governmental violations of minority rights. While individuals have the right to challenge their states when their human rights are infringed under the ECHR at the European Court of Human Rights, no such a legal remedy has been established for sanctioning minority rights violations.

A non-judicial 'model' of supervising the protection of minorities has been introduced in the Council of Europe both under the Framework Convention and the Language Charter. Both the monitoring mechanism applied under the FCNM and the similar procedure of the Language Charter reflect a functional approach: they have been purposely set up to review the implementation of a specific international instrument, moreover expert and political bodies involved in the reviewing take both the opinions of the states and those of minorities interested into consideration and the mechanism is primarily focusing on *implementation*. These non-judicial procedures, despite the lack of a powerful sanctioning mechanism, proved to be rather effective in raising awareness in international public on the specific problems of minorities in individual countries.

## **5.7 International Instruments of Minority Rights Protection**

### **5.7.1 The United Nations**

In the recognition of minority rights after the Second World War the UN played a primary role. The international community and academic scholars were both convinced that the pre-war system of minority treaties under the aegis of the League of Nations failed in a dramatic way. Thus instead of promoting specific minority rights, within the UN the international recognition of universal human rights gained pre-eminence. Within the context, the prohibition of discrimination was seen as an appropriate provision for safeguarding minorities as well. Thus specific references to minorities were omitted from the Universal Declaration of Human Rights (1948) and the first provision relevant for minorities was incorporated in the 1966 International Covenant on Civil and Political Rights.

Art. 27 of ICCPR reads as follows:

*"In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language."*

This provision offers a cautious approach to the recognition of minority rights, in theory one could have the impression that the expression used in the Article, “in those states...” gives a large room of discretion for states to recognise the existence of minorities on their territory, simply declaring that they are not belonging to “those states”. In a similar logic, the wording of the Article “shall not be denied the right...” may suggest that such a right already exists in state legislation and are guaranteed by the state. Thus there may not be any need for special state action in ensuring minority rights. And in the same way, one may argue that the right of persons belonging to minorities “to enjoy their own culture, to profess and practise their own religion, or to use their own language...” does not necessarily require any state action.

The Human Rights Committee however clarified in a more constructive way the meaning of this provision. In its commentary on Art. 27, the Committee argued that the existence of an ethnic, religious or linguistic minority in a State Party does not depend on the decision of that State, but shall be judged on objective criteria. The Committee also underlined the difference between the prohibition of discrimination (Art. 26) and the protection of minority rights and argued that for guaranteeing the latter states shall take special actions for guaranteeing the protection of minority identities.

On the other hand Art. 27 strengthens the individualistic language of human rights protection, when it uses the expression of “persons belonging to minorities...” even if it adds that these rights shall be enjoyed “in community with the other members of the group...”. Commenting on this approach the Human Rights Committee noted that individuals’ right to participate in certain fields of minority community life may be limited, but only if such a limitation does not endanger the survival and well-being of the minority group concerned. In sum, the Committee stressed the positive side of this provision, underlining the added value of Art. 27 to the principle of non-discrimination for the protection of minority identities.

For a long period of time Art. 27 was the only reference to the rights of minorities under international law. The UN General Assembly already in 1948 envisaged the adoption of a special instrument dedicated to the rights of minorities, the resolution on the Declaration on the Rights of Persons belonging to National or Ethnic, Religious and Linguistic Minorities was adopted only in 1992.

#### **5.7.1.1 UN Declaration on the Rights of Persons belonging to National or Ethnic, Religious and Linguistic Minorities**

The Declaration sets essential standards to ensure the rights of persons belonging to minorities and as such is a key reference for United Nations work. It offers guidance to States as they seek to manage diversity and ensure non-discrimination, and for minorities themselves, as they strive to achieve equality and participation. It is a legally non-binding document which was adopted by the UN General Assembly in 1992. Though it has no legal force under international law, its global approach and its universal language make it an important reference document on minority rights protection in

international law. The Declaration sets out a number of basic principles, which include among others the followings:

States must protect the existence of minorities. States must take measures to protect and promote the rights of minorities and their identity. Minorities should not have to hide away their cultures, languages and religions. Minorities have the right to participate fully in every aspect of society. Political participation enables the voices of minorities to be heard. Minorities can set up associations, clubs or cultural centres to maintain their cultural or religious life, including educational or religious institutions. Peaceful contacts of minorities must not be restricted. Members of minorities can exercise their rights individually or with others. Defending minority rights must not be punished. States are required to take positive action to help minority cultures flourish. Minority language education is a key component of protecting the identity of minorities.

Within the UN system in 2005 the Commission on Human Rights established the position of an Independent Expert on minority issues. This position was redefined as a UN Special Rapporteur on Minority Issues in 2014. The mandate of the Special Rapporteur was defined by the Human Rights Council in 2014 and according to this latest mandate, the Special Rapporteur is requested:

- “(a) To promote the implementation of the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, including through consultations with Governments, taking into account existing international standards and national legislation concerning minorities;*
- (b) To examine ways and means of overcoming existing obstacles to the full and effective realization of the rights of persons belonging to minorities;*
- (c) To identify best practices and possibilities for technical cooperation with the Office of the High Commissioner, at the request of Governments;*
- (d) To apply a gender perspective in his/her work;*
- (e) To cooperate and coordinate closely, while avoiding duplication, with existing relevant United Nations bodies, mandates and mechanisms and with regional organizations;*
- (f) To take into account the views of and cooperate closely with nongovernmental organizations on matters pertaining to his/her mandate;*
- (g) To guide the work of the Forum on Minority Issues, prepare its annual meetings, to report on its thematic recommendations and to make recommendations for future thematic subjects, as decided by the Human Rights Council in its resolution 19/23;*
- (h) To submit an annual report on his/her activities the Human Rights Council and to the General Assembly, including recommendations for effective strategies for the better implementation of the rights of persons belonging to national or ethnic, religious and linguistic minorities”*

It can be seen that the Rapporteur’s main task is to promote the implementation of the Declaration. In fulfilling her task, the Rapporteur may start consultations with



UN member states, and based on her/his country visits, may publish country reports as well, call the attention to eventual violations of minority rights, and issue press releases. Another important responsibility of the mandate is to guide the work of the UN Forum on Minority Issues. The Forum was established by the Human Rights Council in 2007

*“to provide a platform for promoting dialogue and cooperation on issues pertaining to national or ethnic, religious and linguistic minorities, as well as thematic contributions and expertise to the work of the Special Rapporteur.”*

### **5.7.1.2 The rights of indigenous peoples**

It may be debated why to include the rights of indigenous peoples in the overview of minority rights. There is a significant distinction between indigenous peoples and minorities, which is related to the “colonial” past, so indigenous peoples are those who lived on a territory before colonization. It allows a rather broad interpretation of colonialism, since even in European context, there are indigenous minorities, like the Sami in Scandinavian countries. But on the other hand the special rights claimed by indigenous peoples are close to those of minorities: a fundamental element for both groups is the right to preserve their special identity.

Within the International Labour Organisation in 1989 a special convention was adopted concerning “Indigenous and Tribal Peoples in Independent Countries” (No. 169). The Convention takes a distinction between indigenous and tribal peoples. It does not give a definition of indigenous peoples, but it establishes some criteria for describing the peoples it aims to protect. In this aspect the following elements can be identified for indigenous peoples: traditional life styles; culture and way of life different from the other segments of the national population; own social organization and political institutions; and living in historical continuity in a certain area, or before others “invaded” or came to the area. The ILO Convention underlines the principle of non-discrimination and stresses the need to respect the free wishes of indigenous peoples in pursuing their life-styles. On the other hand the Convention acknowledges the importance of social integration as well. The spirit of consultation and participation is the core principle of the Convention, thus indigenous and tribal peoples shall be consulted or involved in taking decisions on issues which affect them.

Within the UN, the General Assembly adopted a Declaration on the rights of indigenous peoples in 2007. The Declaration uses only the expression of “indigenous peoples” and it does not offer a definition to that, just stresses the importance of self-identification of peoples. This Declaration recognises the indigenous peoples’ right to self-determination. The Declaration establishes a universal framework of minimum standards for the survival, dignity, well-being and rights of the world’s indigenous peoples. The Declaration addresses both individual and collective rights; cultural rights and identity; rights to education, health, employment, language, and others. The document reinforces the principle of non-discrimination as well and promotes the



effective participation of indigenous peoples in decision-making, especially in those issues which directly affect them.

## **5.7.2 Council of Europe**

### **5.7.2.1 The European Charter for Regional or Minority Languages**

The European Charter for Regional or Minority Languages was adopted only on 5 November 1992 and entered in force on 1 March 1998. Unlike most documents related to the protection of minority rights, the Language Charter is not aimed at the protection of minority communities, its primary goal is the “protection of historical regional and minority languages of Europe” and it stresses that the “protection and promotion of regional or minority languages” is an “important contribution to the building of a Europe based on (...) cultural diversity” (see the Preamble).

The Charter does not acknowledge individual or collective minority rights, its fundamental goal is to provide an appropriate framework for the protection of regional or minority languages. The explanatory report explains that the ECRML does not conceive of regional, minority languages and official languages “in terms of competition or antagonism”, but it stresses the importance of a multicultural approach “in which each category of language has its proper place”. Thus, the terms “regional” and “minority” in regard to languages were used in the ECRML in reference to less widespread languages.

The fundamental concept of the ECRML is that regional or minority languages should be protected in their cultural functions, in the spirit of a multilingual, multicultural European reality. The Language Charter is composed of three main parts: the first part displays general provisions, including basic definitions. As Art. 1 states: (a) „regional or minority languages” means languages that are: i) traditionally used within a given territory of a State by nationals of that State who form a group numerically smaller than the rest of the State’s population; and ii) different from the official language(s) of that State; it does not include either dialects of the official language(s) of the State or the languages of migrants;

(b) ”territory in which the regional or minority language is used” means the geographical area in which the said language is the mode of expression of a number of people justifying the adoption of the various protective and promotional measures provided for in this Charter;

(c) “non-territorial languages” means languages used by nationals of the State which differ from the language or languages used by the rest of the State’s population but which, although traditionally used within the territory of the State, cannot be identified with a particular area thereof.”

Part II of the Language Charter enlists under the title “objectives and principles” general obligations, binding all signatory states. While the third part of the Charter offers concrete provisions for different activities of the use of language, providing for each activity different levels of commitments.

It should be stressed that the Charter explicitly excludes the languages of migrants.

The first part of the Charter (under Art. 2) requires each state party to specify in the ratification instrument all the languages on its territory which come under the definition of Art. 1, as regional or minority languages. But this selection is not exclusively based on the discretion of states; in essence, this is a question of fact.

The objectives and principles enshrined in Part II cover a wide area of application. The basic principles are among others: elimination of discrimination; promotion of respect and understanding between linguistic groups; recognition of the languages as an expression of cultural richness; respect for the geographical area of each regional or minority language (the ECRML is against devising administrative divisions which would constitute an obstacle to the survival of the languages); the need for positive action for the benefit of these languages; ensuring the teaching and study of these languages; relations between groups speaking a regional or minority language; establishment of bodies to represent the interests of regional or minority languages (see e.g. Art. 7.).

Probably the most important part of the Language Charter is its third part, however these obligations are open to states party's discretionary commitments, inasmuch it offers a menu *à la carte* for states, i.e. within limited boundaries states party can choose freely among the different levels of obligations at the time of signing the Charter. Usually states attach to the Charter a separate protocol in which they enlist those languages which they acknowledge as falling under the provisions of the Charter and the specific provisions which they take as legal obligations under the third part of the Language Charter.

Part III covers most of the relevant areas of minority language use: education (Art. 8.); judicial authorities (Art. 9.); administrative authorities and public services (Art. 10); media (Art. 11); cultural activities and facilities (Art. 12); economic and social life (Art. 13); transfrontier exchanges (Art. 14). In all these areas the Charter provisions cover a wide range of commitments among which each state party can select those which itself acknowledges as legal obligations towards minority languages recognised on the state's territory.

The Charter requires states to submit regular reports on the implementation of Part II and Part III, the first time within the year following entry into force for the state, and after that at each third year. State parties shall make their reports public; and the examination of the reports is delegated to a committee of independent experts. On the basis of country reports and information, the experts prepare a report for the Committee of Ministers. This report shall contain proposals for recommendations by the Committee of Ministers to one or more state parties. The Committee of Ministers take note of the report without changing the content, but it is free to adapt the suggestions for recommendations.

### **5.7.2.2 The Framework Convention for the Protection of National Minorities**

The Framework Convention for the Protection of National Minorities (FCNM) is the most extensive document in the Council of Europe regarding the protection of minority

rights. The text was adopted on 10 November 1994 and opened for signature on 1 February 1995. The FCNM entered in force on 1 February 1998. The Convention is usually considered to be the first legally binding multilateral treaty on national minority rights. The FCNM makes clear that the protection of minority rights is an integral part of the protection of human rights and as such “falls within the scope of international cooperation”. The title of the Convention immediately draws attention on its “framework” character suggesting, that FCNM does not provide strict normative standards, it offers a set of goals to be followed by states. Many observers see the title of the Convention as softening of legal obligations on states party, however from a strictly legal point of view the FCNM is a treaty under international law and it creates obligations in international law for states.

Still the explanatory report on the FCNM underlines that the Convention

*“contains mostly programme-type provisions setting out objectives which the parties undertake to pursue” and it also states that “these provisions, which will not be directly applicable, leave the States concerned a measure of discretion in the implementation of the objectives which they have undertaken to achieve, thus enabling them to take particular circumstances into account.”*

However, some states already seem to have committed themselves to understand obligations as rights. In general human rights treaties employ different mechanisms for supervising implementation, but the most important issue is that states transpose adequately the norms and guarantee rights to individuals through a mechanism which is appropriate for the goals of the treaty in question.

Even though, the task of interpreting the FCNM coherently is rather difficult: the Convention employs different qualifiers which formulate rather vague state obligations. Terms, like “promote” (Articles 5 and 12), “recognise” (Articles 8, 9, 10, 11, and 14.), “respect” (Articles 7, 19, and 20) have to gain a real meanings, and the Committee of Ministers assisted by the Advisory Committee in monitoring the implementation of the FCNM have great tasks in that.

The FCNM contains a non-judicial implementation procedure which is based on periodic state reporting placed under a mixed political and independent expert review. The procedure adopted is very similar to that implemented for the revision of the CoE Language Charter in 1992. States parties to the FCNM are asked to present a report containing full information on legislative and other measures taken to give effect to the principles of the Framework Convention, within one year of the entry into force. Further reports are requested to be made on a periodical basis (every five years) and whenever the Committee of Ministers so requests. The evaluation of the reports filed by states is evaluated by the Committee of Ministers, which is assisted in this work by an Advisory Committee (composed by independent experts). The Advisory Committee adopts an opinion, upon which the Committee of Ministers elaborates its decision on the implementation of the FCNM in individual countries.

### **5.7.3 OSCE and minority rights**

The Organisation for Security and Co-operation in Europe (OSCE; before 1994 Conference for Security and Co-operation in Europe – CSCE) adopted only political – i.e. legally non-binding – documents on minority rights. In 1975 the Helsinki Final Act in a limited approach already addressed minority issues, but the real turn in the OSCE’s activities in this field was the result of democratic transition in Central and Eastern Europe.

#### **5.7.3.1 The Copenhagen Document**

The so-called human dimension was reinforced under the Copenhagen Document (1990) which for the first time included a detailed list of minority rights. Chapter IV of the Copenhagen Document is dedicated exclusively to minority rights. It offers detailed provisions on the protection of national minorities: it recognises the right of persons belonging to minorities for a free choice of identity, their linguistic, cultural rights, acknowledges the right to keep contacts with minorities’ kin-states, etc. The document recognises the important role of non-governmental and minority organisations in promoting the peaceful co-existence of minority and majority populations. Paragraph 33 requires states to create conditions for the promotion of minority identities. Furthermore the document stresses the importance of prohibiting discrimination, hatred, xenophobia and anti-Semitism as well (para. 40)

The Copenhagen Document is considered to be a milestone in the international recognition of minority rights, in later years it was an important point of reference for the elaboration of detailed standards on minority rights within the Council of Europe as well, especially for the adoption of the Framework Convention for the Protection of National Minorities.

#### **5.7.3.2 OSCE High Commissioner on National Minorities**

The Conference for Security and Co-operation in Europe (CSCE; now the Organization for Security and Co-operation in Europe – OSCE) decided to establish the post of High Commissioner on National Minorities (HCNM) in 1992 to be an instrument of conflict prevention at the earliest possible stage in regard to tensions involving national minority issues. Mr. Van der Stoep was followed in the position from 2001 by Rolf Ekéus of Sweden, from 5 July 2007 who was succeeded by Ambassador Knut Vollebaek, a former Foreign Minister of Norway, as the High Commissioner on National Minorities. After his mandate ended in 2013 Astrid Thors of Finland was appointed by the OSCE as the new High Commissioner.

The High Commissioner’s function is to identify and seek early resolution of ethnic tensions that might endanger peace, stability or friendly relations between the participating States of the OSCE. The mandate describes the HCNM as “an instrument of conflict prevention at the earliest possible stage.”

The successive High Commissioners have employed an approach that can be characterized in three words: impartiality, confidentiality and co-operation.

The High Commissioner is not an instrument for the protection of minorities or a sort of international ombudsman who acts on their behalf; he or she is the High Commissioner *on*, and not *for* National Minorities. Adequate protection of the rights of persons belonging to national minorities contributes greatly towards a State's success in minimizing ethnic tension that could create a context for wider conflict. The High Commissioner's recommendations to States often focus on such concerns, but they are by no means restricted to these concerns. The co-operative and non-coercive nature of the High Commissioner's involvement is crucial. Durable solutions are only possible if there is a sufficient measure of consent from the parties involved. The office of the High Commissioner on National Minorities is in The Hague.

### **5.7.4 Minorities and the European Union**

The founding principles of European integration within the European Union are still based on the deep economic ties that helped the creation of a common market and a common currency. Although since the adoption of the Maastricht Treaty (1992) member states of the EU are increasingly extending the competencies of the Union to some core political areas, like security and foreign policy and more recently to the protection of human rights, the role of the EU in these policy areas remains complementary to the role of the member states. In the field of human rights protection regional international organisations like, the OSCE and the Council of Europe have been much more active in codification than the EU. And this difference is even more striking in regard to the protection of minority rights. While the principle of equality and the prohibition of discrimination has surfaced in EU law as well, one would hardly find any consensus among EU member states regarding the protection of minority rights. Thus it is hard to believe that the member states would ever extend EU competencies for the protection of minority rights.

The EU was mainly confronted with minority issues in the context of its Eastern Enlargement, having witnessed the violent inter-ethnic conflicts in the former Yugoslavia. When the member states set up the conditions of future accessions and formulated it in the Copenhagen criteria, among others the „respect for and protection of minorities” was included as a prerequisite for candidate states. This opened grounds for criticism as the member states required from candidate states a precondition what themselves have never been asked to meet. The argument of applying „double standards” in this field was later overpassed by the inclusion of a reference to the respect for the „rights of persons belonging to minorities” among the fundamental values of the EU in Art. 2. of the Lisbon Treaty.

Besides the enlargement context, even within EU law there are some elements what may be relevant to minorities.

#### 5.7.4.1 The principle of non-discrimination

The prohibition of discrimination emerged in EU law in regard to the principle of equality between men and women in the labour market which was already incorporated in the Treaties of Rome in 1957. Today, under Art. 19 of the Treaty on the Functioning of the European Union offers room for taking actions against discrimination under EU law. As para. 1 of Art. 19 formulates it:

*"Without prejudice to the other provisions of the Treaties and within the limits of the powers conferred by them upon the Union, the Council, acting unanimously in accordance with a special legislative procedure and after obtaining the consent of the European Parliament, may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation."*

The Racial Equality Directive (2000/43/EC) is the most important piece of EU legislation combating racial/ethnic discrimination. It was adopted in 2000 and prohibits discrimination in the areas of employment, education, social protection (including social security and healthcare), and access to and the supply of goods and services including housing.

The Directive provides the reversion of proof on the alleged perpetrator and requires the creation of specialised Equality Bodies promoting equal treatment in each Member State. One of the most important functions of these bodies is to provide victims of discrimination with assistance in making the legal system more accessible to them. The Directive is still today the most important legal instrument affecting in any ways the lives of minorities living in EU member states.

#### 5.7.4.2 European Charter of Fundamental Rights

In 2009, when the Lisbon Treaty entered into force, the European Charter of Fundamental Rights has become part of primary EU law. Art. 21. of the Charter states:

*"Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited."*

This list of prohibited grounds of discrimination is much more extensive than the formulation used in Art. 19. TFEU, but the Charter does not confer legislative competencies to the EU institutions, thus the difference between the two approaches is clear. The fact that prohibition of discrimination on the grounds of belonging to a national minority may gain legal relevance in a hypothetical case before the European Court of Justice when there may emerge the need to interpret Art. 19 TFEU and the Charter in a complementary way.

Another provision, potentially relevant to minorities in the Charter is Art. 22. which declares:

*„The Union shall respect cultural, religious and linguistic diversity”.*

The declaration of the respect for diversity in the Charter opens the debate over how diversity shall be interpreted within the EU: is it only the respect of diversity characterising the member states or it shall be extended to the diversity *within* member states. Art. 22 of the Charter does not resolve this debate since it is formulated in a vague and generalising way, nevertheless, minority representatives may claim that the concept of diversity here shall be interpreted as a recognition of diversity within member states.

## **6. Protection of human rights in armed conflicts**

International protection of human rights is important not only in peacetime, but it gets a special relevance during times of armed conflicts, which situations are usually especially dangerous to the fulfilment and respect of them. These situations are covered by the provisions of international humanitarian law or the laws of war (with this “classic” term), the treaty sources of which date back to 1864, the adoption of the first Geneva Convention, regulating and limiting military activities for humanitarian reasons. The international norms have made a significant advancement during the upcoming decades, moving from the basic protection of the wounded to a complex set of body of international law providing for legal protection of civilian, civilian property, prisoners of war, creating prohibition to certain type of weapons, means and methods of warfare.

At the first half of the twentieth century the development of norms of international humanitarian law have exceeded the norms of the international human rights regime, as a consequence of what we could have seen earlier, that until the revolutionary changes in the international order brought by the Second World War, states have not considered the question of human rights to be the subject of international relations. After that the constant development of international human rights regime parallel to international humanitarian law has made the question of human rights in armed conflict, and the duality of the two regimes more and more interesting.

### **6.1 Introduction to international humanitarian law**

The fields of international humanitarian law and international human rights law are two separate bodies of law, but in some cases they can be complementary to each other. They have many common elements: both of them serve for protection, and the subject of this protection is often the same. Both of the two regimes aim to protect life, health and dignity of individuals. A big difference is, that international humanitarian law applies only in cases of armed conflicts, while international human rights law has to be applied at all times, in peace and in war. Sometimes another interpretation tends to rise permanently (in the practice and communication of some states): that international human rights law is only applicable in peacetime, in wartime it is replaced by international humanitarian law. As of today, this is interpretation is not supported by the vast majority of commentators, decisions of the International Court of Justice (see for example the “Wall” case), practice of most of the states and the International



Committee of the Red Cross, and the texts of human rights treaties and observation bodies addressed with their monitoring.

As a conclusion, we can say that in case of an armed conflict, norms of international humanitarian law and of human rights are applicable parallel. However, there are significant differences. One of those is the fact that international human rights law allows states to derogate from a number of human rights in cases of situations of emergency, while international humanitarian law may not be suspended. We will analyse this in more details in a later chapter.

States are obliged to respect, ensure and implement the norms of both legal fields. The obligations are similar with humanitarian law: states have to introduce domestic legislation to implement its obligations from international law, they have to train military forces to help preventing any violations, and if that happens, they have to enforce these rules, mainly with bringing to trial the individuals responsible for breaches of law – this is very similar to obligations of states related to international human rights law also contains provisions requiring a State to take legislative and other appropriate measures to implement its rules and punish violations.

## 6.2 Sources of international humanitarian law

Present system of international humanitarian law is based on the four 1949 Geneva Conventions. These are:

1. Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field. Geneva, 12 August 1949.
2. Convention (II) for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea. Geneva, 12 August 1949.
3. Convention (III) Relative to the Treatment of Prisoners of War. Geneva, 12 August 1949.
4. Convention (IV) Relative to the Protection of Civilian Persons in Time of War. Geneva, 12 August 1949.

Today these conventions are universally accepted, with every country in the world have ratified them. Additionally, most of their provisions are accepted as binding customary legal norms.

The Geneva Conventions of 1949 reflect the newer vision for international human rights, becoming dominant after the Second World War (presented in more details in an earlier chapter). For this reason, the Conventions have a strong connection to human rights and as having a humanitarian nature, it has not dealt extensively with rules of warfare. At the time of adoption of the Conventions, these rules have still been based on the provisions of the fundamentally important “regulations of war on land” included in the Hague Conventions of 1899 and 1907:

1. Convention (II) with Respect to the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land. The Hague, 29 July 1899.
2. Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land. The Hague, 18 October 1907.

Most of the provisions of these regulations have remained to be applicable after the adoption of the 1949 Geneva Conventions, as they had covered many questions the Conventions have not. They are also widely accepted today as reflecting binding customary law related to questions not regulated differently by the Conventions or their Additional Protocols adopted later. These are:

1. Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts (Protocol I). Geneva, 8 June 1977.
2. Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of non-international armed conflicts (Protocol II). Geneva, 8 June 1977.
3. Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the adoption of an additional distinctive emblem (Protocol III). Geneva, 8 December 2005.

These protocols have provided for some very important rules missing from the Conventions. The first one is of special importance, as it has re-codified the provisions contained in the Hague regulations and create the new body of law regulating warfare. The reason why the Hague regulations have not completely lost their relevance is the fact, that many states have not ratified Protocol I (for various possible reasons, many of which are closely connected to their political or other situations) and because of this, their rules having customary force are still applicable beyond doubts, which is recognised by these states as well.

Many of the provisions of the Additional Protocols are also recognised to reflect customary law, and these are binding on non-ratifying states as well. For example, provisions of Protocol I prohibiting attacks against the civilian population have customary power regardless of ratification.

A series of international treaties has also been adopted during the past details to govern many additional questions related to waging war: these aim to provide special protection (for example to cultural objects or the environment) or to prohibit the use of certain weapons (for example different kind of mines, biological and chemical weapons, blinding laser weapons). The complete number of international treaties applicable to situations of war, raises over one hundred. A complete database of international humanitarian law treaties, compiled by the International Committee of the Red Cross is available on the internet: <http://www.icrc.org/ihl>

As indicated previously many times, international customary law has a special significance with international humanitarian law. Legal norms recognised to have customary power are binding even to those states who for any reason fail to ratify any international humanitarian law treaty. For this reason, the International Committee of the Red Cross has created an additional web-based database of legally binding customary norms. It is available under: <http://www.icrc.org/customary-ihl/eng/docs/home>

Compared to the field of international humanitarian law, international human rights law is more complex and it has also developed regional subsystems. The provisions of the global legal instruments (the Universal Declaration of Human Rights of 1948, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights of 1966, etc.) serve as fundamental norms, while regional instruments may create differing or more detailed or stricter human rights rules. While theoretically possible, the practice of international humanitarian law does not follow this scheme.

In situations of armed conflicts, the human rights obligations of states complement and reinforce the protections provided by the rules of international humanitarian law.

## **6.3 Situations of armed conflicts – applicability of IHL norms**

While warfare is commonly considered to be a state of armed conflict between two separate states, today the vast majority of armed conflicts do not follow this simple pattern. The importance of classifications of armed conflicts is a consequence of the fact, that different types of armed conflicts require the applicability of different rules, and this is very important as this determines the legal norms party to the conflict have to accept and respect. For example, an international armed conflict is regulated by the Geneva Conventions, which are applicable entirely, while in a non-international conflict situation the legal picture can be a bit more difficult, in many cases the domestic law of the state concerned may mean the only applicable set of rules – but even in these cases with the norms of international human rights law still in the background.

The existence of an armed conflict triggers the applicability of international humanitarian law. Without an armed conflict, the norms of international humanitarian law are not applicable, and domestic law governs the situation.

### **6.3.1 International armed conflicts**

An international armed conflict (IAC) means a conflict between states. The existence of an armed conflict is usually determined by the fact of intervention of states' armed forces. Though there are some differing opinions on this matter, generally we can conclude that neither the scope nor the duration of the conflict does not matter related

to the question of qualifying the situation. The existence of a formal declaration of war is neither needed to the applicability of international humanitarian law.

The analysis of Common Article 2 of the four Geneva Conventions shows us how the applicability of international humanitarian law is provided for:

*“the present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them.*

*The Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance.”*

An international armed conflict is regulated by the entire body of the Geneva Conventions adopted in 1949 and the Additional Protocol I of 1977 in their entirety, additionally with all other international treaties. Of course, domestic law is always applicable, and international human rights norms serve as background rules for them.

### **6.3.2 Non-international armed conflicts**

Non-international armed conflicts (NIAC) are armed conflicts not involving or not touching the territory of more states. The rules applicable to a non-international armed conflict are of the Common Article 3 of the 1949 Geneva Conventions, which originally has created some basic obligations, like all people have to be treated humanely and the wounded and sick shall be taken care of. These rules have been supplemented by the provisions of Additional Protocol II of 1977, but today most provisions of an international armed conflict are applicable in a non-international conflict as well, as a result of a gradual development of customary international law and states' and judicial practice. Some exceptions exist though: for example the rules regarding combatant status, prisoner of war status, or occupation are still only applicable in an international armed conflict.

International human rights law may get more significant in a non-international armed conflict. In these situations the provisions of domestic law are dominant, and therefore international human rights law may provide for the basic human rights rules.

## **6.4 Protection of civilians**

The other basic question related to human rights in armed conflicts, is the status of individuals: contrary to international human rights law, international law is building up categories of persons and provides for different protections and rights to them. Based on this, various human rights-related provisions are created and has to be applied by states party to an armed conflict.

Protection of civilians is a basic obligation under international humanitarian law. Geneva Convention IV builds up a body of law generally responsible to this task. It deals with the protection of aliens in the territory of a party to the conflict, persons living in occupied territory, and internees. Its provisions specially focus on especially vulnerable individuals, like children under fifteen, the elderly, women, pregnant women, or mothers of children under seven.

### **6.4.1 The principle of distinction**

Principle of distinction is one of the basic principles regarding the conduct of hostilities. It obligates parties to a conflict to distinguish between those who actively take part in hostilities and those who do not, or simply said, between combatants and civilians at all times. This rule is widely recognized as having customary force in its wider interpretation, meaning that the prohibition of attack applies to every person who by the legal definition could be considered a “combatant”, but is recognized to be hors de combat in a given situation, and to individuals who are legally “civilian”, but only if they do not take an active part in hostilities.

“Combatants” are those individuals who have the right recognised by international law (and usually a duty imposed by domestic law) to take part in hostilities. Currently the circles of individuals belonging to this category is defined by Article 4 of the Third Geneva Convention, when it regulates who shall have prisoner of war status when captured – and enjoy impunity for their legitimate, though harmful activities, like killing enemy soldiers. According to this, all members of the armed forces of a party to an international conflict are considered to be combatants, except medical and religious personnel. While civilians accompanying the armed forces are not classical combatants, but the Geneva Convention provides this status for them, and they have to accept the fact, that they can legitimately come under attack if acting together with the armed forces. The definition of “armed forces” means individuals who are acting on behalf of a party to a conflict and who subordinate themselves to its commands, and acting in a system of chain of responsibility. Members of militias and volunteer corps are also regarded as combatants, if they fulfil the conditions prescribed by the Geneva Convention, that is they are under command of a person responsible for the subordinates, they wear a distinctive emblem recognizable from a distance, they carry arms openly and they have to conduct their operations in accordance with the laws and customs of war. All of these conditions have to be met, otherwise the combatant status will not be granted. Combatant status may also be granted exceptionally without any action of the state in the situation of a so-called *levée en masse*. It means, that the inhabitants of a territory not yet been occupied, on the approach of the enemy forces, spontaneously, without explicit state order or authorization take up arms to resist the invading troops without having the needed time – or even the intention – to form themselves into regular armed forces. In a case like this, such individuals are civilians, but they are considered to be combatants as long as they carry arms openly and respect

the laws and customs of war with their activities. They are entitled to prisoner of war status if captured, but they can be attacked as long as they participate in the levée.

The category of “civilian” is usually defined negatively: all individuals not belonging to the category of combatants, are considered to be civilians. Civilian immunity is the privilege of persons who are neither members of the armed forces of a party to the conflict nor participants in a levée en masse presented earlier, and they enjoy protection under the principle of distinction. The obligation of the protection of civilians is one of the basic rules applicable in armed conflicts and it is of utmost importance related to protection of human rights in these situations. Articles 22 and 25 of the Hague Regulations has formed this rule into an international treaty first and are widely accepted customary norms. It is reaffirmed by Article 48 and Articles 51-57 of Additional Protocol I.

The prohibition applies to direct targeting of civilians, indiscriminate attacks and any actions whose primary purpose is to spread terror among the civilian population. These prohibited actions are qualified not only as human rights violations but also are war crimes.

This distinction is applied to non-international armed conflicts as well, but as in these type of conflicts the “combatant” status is not recognised, we have to apply the wider interpretation. State practice and professional literature is currently not clear as to whether members of armed opposition groups are considered to be civilians and enjoy protection or not. The common element is the rule that civilian immunity from attack is binding on parties to the conflict as long as the individuals do not take a direct part in hostilities. Similarly to the rules applicable in an international armed conflict, in a non-international armed conflict, the Common Article 3 to the Geneva Conventions provide for a prohibition to attack civilians, and for a prohibition of acts or threats of violence whose primary purpose is “to spread terror among the civilian population”. The prohibition is later reaffirmed in Article 13 of Additional Protocol II.

### **6.4.2 Collateral damage**

Collateral (or incidental) damage is an unfortunately common phenomenon of every situation of armed conflicts. We talk about collateral damage when an attack targeted at military objectives cause civilian casualties or damage to civilian objects. It occurs especially often, when legitimate military objectives, targets (for example military equipment, groups of combatants) are situated close to civilians or civilian objectives. The reality of warfare lead to international humanitarian law to accept this phenomenon, but it has provided for rules trying to create protection against it as much as possible. Attacks that are expected to cause collateral damage are not prohibited per se, but indiscriminate attacks or attacks leading to the disproportionate loss or damages are prohibited.

The provisions contained in Article 57, Paragraph 2 of Additional Protocol I serves as the basic treaty rule regarding collateral damage. It applies another principle of

international humanitarian law, the principle of proportionality to set states' obligations. In case of an armed attack presumably leading to disproportionate collateral damages, the attacker has to refrain from launching the attack, if already launched, suspend it, or re-plan it in a way that the amount of collateral damage stays proportional.

Ignoring this obligation may result in criminal liability for war crimes. But it is important to emphasise, that responsibility is not exclusively on the shoulder of the attacker. The defending party is also under an obligation to keep civilians away from war activities. In case of for example positioning military objectives in densely populated areas can lead to the responsibility of the defender as well.

### **6.4.3 Use of civilians as shields**

A grave violation of international humanitarian law is the use of civilians to shield military objectives or military operations from attack. Article 28 of Geneva Convention IV creates a general protection for civilians related to this. Article 51, Paragraph 7 of Additional Protocol I reaffirms this prohibition of this action as a method of warfare. It is also considered to be a war crime.

## **6.5 International humanitarian law and the international human rights law regime**

By having a look at norms of international humanitarian law, one can find many of those being of human rights nature, which is not surprising. At the time of codification, most of the rules of humanitarian law have aimed to make legal norms internally already acknowledged and established compulsory in situations of armed conflicts. State practice for a long time has simply been lagging behind in acknowledging these obligations at the level of international law, especially in cases which have been deemed to belong to internal affairs. This process has not necessarily begun at the exact time of the adoption of today's Geneva Conventions in 1949. Looking back to the time prior to their adoption –keeping in mind that the protection of human rights was not in an embryonic phase at best at that time – it is clearly visible that early documents of international humanitarian law and the laws of war has also served the protection of certain human rights.

For example the legal norms of warfare adopted in the Hague regulations have included limitations to warring parties for requisitions from inhabitants of the occupied territory under strict legal conditions, as well as they have strictly regulated services that can be demanded from them. Similarly to these provisions, personal belongings of prisoners of war could not be confiscated either. Concluding, these provisions, states have upheld the possibility to limit the right to private property during periods of emergency, but the rules set by Hague Regulations have acknowledged the rights to property and ensured the protection of that even in an armed conflict.

Of course neither professional literature, nor state practice is willing to accept an absolute unity of international humanitarian law and international human rights law, as this kind of unity does not exist. Nevertheless, it is a fact that the core documents of international humanitarian law and their normative provisions – especially those embodied in the Geneva Conventions of 1949 and their Additional Protocols adopted in 1977 – were significantly built on the norms of modern human rights law. The Geneva Conventions of 1949 – as well as their predecessors – included many regulations of human rights nature. One can observe such kind of norms of human nature while examining the four Geneva Conventions, especially the third one, dealing with the status of prisoners of war, and the fourth one, dealing with protection of civilians. To some extent, this is logical as these two conventions address situations where the individual directly meets a state's public power, which is usually dangerous to human rights, especially if this happens with a hostile state in a wartime environment.

The Geneva Convention III regulates a situation when the individual combatant gets under the direct power of the enemy state. Some obligations of the state party to an armed conflict had already been recognised here, which later become human rights obligations based on international law. Geneva Convention IV gains significance in cases of occupations, which means a situation, when one state gains effective control over the territory of the adversary state. In a situation like that the occupying power directly takes the role of the source of public power over that territory – human rights provisions of international humanitarian law are of vital importance in this case. The Convention provides for a wide catalogue of human rights that occupying powers have to respect – these provisions have later been incorporated to international human rights treaties.

## **6.6 Application of derogations in times of armed conflicts**

As mentioned earlier, international human rights treaties usually provide for the possibility of states to derogate from their human rights obligations under international law in cases of emergency situations. Article 4 of the International Covenant for Civil and Political Rights, Article 15 of the Convention for the Protection of Human Rights and Fundamental Freedoms creates this possibility, but it can be found in other documents as well.

One can argue that an armed conflict (either international or non-international) can be considered to be these situations, as international or internal violence can pose a danger to the state, and also it is capable of put obstacle to its normal operation. This has been surfaced on many analysis and interpretation, for example the UN Human Rights Committee has recognised it in its General Comment No. 29, which has examined states of emergency and the applicability of Covenant, especially Article 4 of it. The European Court of Human Rights has also had to deal with this question: in its earlier cases it had accepted the application of derogations in certain situations (see for example the cases *Lawless v. Ireland*, Application no. 332/57; *Ireland v. The*



United Kingdom, Application no. 5310/71; *Brannigan and McBride v. The United Kingdom*, Application no. 14553/89; 14554/89), but these derogations must not be applied based on an extensive interpretation.

The fact of the existence of armed conflict may not mean an authorisation of automatic application of derogations, as the Court's newer practice has clearly pointed out, for example in cases against the United Kingdom, related to the Iraq war and occupation of that country (see for example *Al-Saadoon and Mufdhi v. the United Kingdom*, Application no. 61498/08 or *Al-Jedda v. The United Kingdom*, Application no. 27021/08), where the Court has not accepted the fact of the armed conflict solely in itself as a reason for the application of derogations. The restrictive interpretation and application of the possibility of derogations becomes vital when it comes to "armed conflicts" not of the classical sense, but of political, not always in line with the definitions of international law, for example to "war on terror". The various institutions and bodies of the Council of Europe have expressed their opinion on this matter. The Parliamentary Assembly's resolution 1271, adopted in 2002, under the title "Combating terrorism and respect for human rights" has clearly reflected the view that counter-terrorism operations per se do not constitute a situation which could serve as a basis to derogations. This has been supported by the opinion of the Commissioner for Human Rights, Alvaro Gil-Robles, when he had addressed certain aspects of the United Kingdom's derogation from Article 5 paragraph 1 of the European Convention on Human Rights in 2001. This interpretation has been reaffirmed by the House of Lords (acting as the supreme court of the UK at that time) and by the European Court of Human Rights as well (see in more details: *A & others v. Secretary of State for the Home Department* [2004]; *A and others v. the United Kingdom*, Application no. 3455/05).

Even if we accept the possibility of derogations in times of war, some human rights must be respected under all circumstances. The right to life, the prohibition of torture and inhuman punishment or treatment, the prohibition of slavery or servitude, the principle of legality and non-retroactivity of the law, and the right to freedom of thought, conscience and religion are all such "core" human rights that cannot be derogated from.