Thirdly, the concept of cultural genocide is not included,[94] and fourthly there is virtually no mention of means to prevent the crime (although the obligation is stated).

In the 1990s, the issue of genocide unfortunately ceased to be an item of primarily historical concern. Events in the former Yugoslavia and in Rwanda stimulated increasing anxiety in this context. The Statutes of both the International Criminal Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda provide for the prosecution of individuals for the crime of genocide and a significant case-law has now developed through these tribunals.[95] In addition, the question of state responsibility for the crime of genocide has been raised.[96] The International Court of Justice in the *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Yugoslavia (Serbia and Montenegro))* was faced with Bosnian claims that Yugoslavia had violated the Genocide Convention.[97] The Court in its Order of 8 April 1993 on the Request for the Indication of Provisional Measures[98] held that article IX of the Convention[99] provided a valid jurisdictional basis,[100] while reaffirming[101] the view expressed in the Advisory Opinion on *Reservations to the Genocide Convention* that the crime of genocide 'shocks the conscience of mankind, results in great losses to humanity . . . and is contrary to moral law and to the spirit and aims of the United Nations'.[102] The Court called upon both parties not to take any action that might aggravate or extend the dispute over the prevention or punishment of the crime of genocide. The government of

[94] See e.g. Kuper, *Genocide*, p. 31; Robinson, *Genocide Convention*, p. 64, and Ruhashyankiko, *Study*, pp. 21 ff.

[95] See further below, chapter 8, pp. 430 ff. [96] See further generally below, chapter 14.

[97] ICJ Reports, 1993, pp. 3 and 325; 95 ILR, pp. 1 and 43.

[98] ICJ Reports, 1993, pp. 3, 16; 95 ILR, pp. 1, 31. See also R. Maison, 'Les Ordonnances de la CIJ dans l'Affaire Relative à l'Application de la Convention sur la Prévention et la Répression du Crime du Génocide', 5 EJIL, 1994, p. 381.

[99] This provides that 'disputes between the Contracting Parties relating to the interpretation, application or fulfilment of the present Convention, including those relating to the responsibility of a state for genocide or for any of the other acts enumerated in article III, shall be submitted to the International Court of Justice at the request of any of the parties to the dispute'.

[100] The Court dismissed other suggested grounds for its jurisdiction in the case, ICJ Reports, 1993, p. 18; 95 ILR, p. 33.

[101] ICJ Reports, 1993, p. 23; 95 ILR, p. 38.

[102] ICJ Reports, 1951, pp. 15, 23; 18 ILR, pp. 364, 370, quoting the terms of General Assembly resolution 96 (I) of 11 December 1946.

Yugoslavia (Serbia and Montenegro) was requested to take all measures within its power to prevent commission of the crime of genocide, and was specifically called upon to ensure that 'any military, paramilitary or irregular armed units which may be directed or supported by it, as well as any organisations and persons which may be subject to its control, direction or influence, do not commit any acts of genocide'.[103] These provisional measures were reaffirmed by the Court in its Order on Provisional Measures of 13 September 1993 as measures which should be 'immediately and effectively implemented'.[104]

On 11 July 1996, the Court rejected the Preliminary Objections raised by Yugoslavia.[105] In particular, the Court emphasised that it followed from the object and purpose of the Genocide Convention that the rights and obligations contained therein were rights and obligations *erga omnes* and that the obligation upon each state to prevent and punish the crime of genocide was not dependent upon the type of conflict involved in the particular situation (whether international or domestic) and was not territorially limited by the Convention.[106] The type of state responsibility envisaged under article IX of the Convention did not exclude any form of state responsibility.[107] In addition, the Court observed that the Convention did not contain any clause the object or effect of which was to limit the scope of its jurisdiction *ratione temporis* so as to exclude events prior to a particular date.[108] Yugoslavia subsequently withdrew the counterclaims it had introduced against Bosnia,[109] while introducing an application in April 2001 for revision of the 1996 judgment on the basis that a 'new fact' had appeared since that state had become a new member of the UN during 2000. This was rejected by the Court.[110] On 26 February 2007, the Court rendered its judgment on the merits. The Court affirmed that the effect of the categorisation of genocide as a 'crime under international law', coupled with the obligation to prevent genocide contained in the Genocide Convention, is to prohibit states from committing

[103] ICJ Reports, 1993, pp. 3, 24; 95 ILR, pp. 1, 39.

[104] ICJ Reports, 1993, pp. 325, 350; 95 ILR, pp. 43, 68. See also the Separate Opinion of Judge Lauterpacht, ICJ Reports, 1993, pp. 407, 431–2; 95 ILR, pp. 125, 149–50.

[105] Now so called, rather than the former Yugoslavia (Serbia and Montenegro), as from, and in consequence of, the Dayton Peace Agreement initialled at Dayton, USA, on 11 November 1995 and signed in Paris on 14 December 1995.

[106] ICJ Reports, 1996, pp. 595, 615; 115 ILR, p. 1.

[107] ICJ Reports, 1996, p. 616.

[108] *Ibid.*, p. 617. See also the *Legality of the Threat or Use of Nuclear Weapons*, ICJ Reports, 1996, pp. 226, 240; 110 ILR, p. 163.

[109] ICJ, Order of 10 September 2001.

[110] ICJ Reports, 2003, p. 7. See further below, chapter 19, p. 1106.

genocide through the actions of their organs or persons or groups whose acts are attributable to them.[111] The Court also held that state responsibility could arise under the Convention for genocide and complicity, without an individual being convicted of the crime or an associated one,[112] and that such responsibility for genocide applied to a state wherever it may be acting.[113] It was noted that the essence of the intent, at the heart of the definition of genocide, is to destroy the protected group, in whole or in part, as such. It is a group which must have particular positive characteristics – national, ethnical, racial or religious – and not the lack of them. The intent must also relate to the group 'as such'. That means that the crime requires an intent to destroy a collection of people who have a particular group identity[114] and such intent refers to the intent to destroy at least a substantial part of the particular group and this may apply to a geographically limited area (such as Srebrenica).[115] The Court emphasised that claims against a state involving charges of exceptional gravity, such as genocide, must be proved by evidence that is fully conclusive.[116] However, the Court emphasised that the Convention established a separate and distinct duty to prevent genocide, which was both 'normative and compelling'[117] and an obligation of conduct, not of result,[118] provided that the offence was actually committed.[119] Such obligation arose at the instant that the state learned of, or should normally have learned of, the existence of a serious risk that genocide would be committed.[120] It was also held that Serbia was in violation of its duty to punish genocide.[121]

[111] ICJ Reports, 2007, paras. 161–7. See also *Democratic Republic of the Congo* v. *Rwanda*, ICJ Reports, 2006, pp. 6, 31–2, where the Court noted that the rights and obligations in the Genocide Convention were rights and obligations *erga omnes* and stated that the prohibition of genocide was 'assuredly' a norm of *jus cogens*.

[112] ICJ Reports, 2007, para. 182. [113] *Ibid.*, para. 183. [114] *Ibid.*, para. 193.

[115] *Ibid.*, paras. 198–9.

[116] *Ibid.*, para. 209 and see also para. 319. The Court, however, was not convinced, on the basis of the evidence before it, that it had been conclusively established that the massive killings of members of the protected group were committed with the specific intent (*dolus specialis*) on the part of the perpetrators to destroy, in whole or in part, the group as such, *ibid.*, para. 277, nor that deportations and expulsions of the protected group amounted to genocide for the same reason, *ibid.*, para. 334, nor indeed the imposition of terrible conditions on camp detainees and other allegations, *ibid.*, paras. 354, 370 and 376. The exception to this was with regard to Srebrenica, where the Court found that the necessary intent had been established to the required standard of proof, paras. 278–97.

[117] *Ibid.*, para. 427. [118] *Ibid.*, para. 430. [119] *Ibid.*, para. 431. [120] *Ibid.*

[121] *Ibid.*, para. 450.

Prohibition of discrimination

Apart from the overwhelming requirement of protection from physical attack upon their very existence as a group, groups need protection from discriminatory treatment as such.[122] The norm of non-discrimination thus constitutes a principle relevant both to groups and to individual members of groups.

The International Convention on the Elimination of All Forms of Racial Discrimination[123] was signed in 1965 and entered into force in 1969. It builds on the non-discrimination provisions in the UN Charter. Racial discrimination is defined 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.

States parties undertake to prohibit racial discrimination and guarantee equality for all in the enjoyment of a series of rights and to assure to all within their jurisdiction effective protection and remedies regarding such human rights.[124] It is also fair to conclude that in addition to the existence of this Convention, the prohibition of discrimination on racial grounds is contrary to customary international law.[125] This conclusion may be reached on the basis *inter alia* of articles 55 and 56 of the UN Charter, articles 2 and 7 of the Universal Declaration of Human Rights, the International Covenants on Human Rights,[126] regional instruments on human

[122] See e.g. Rehman, *International Human Rights Law*, chapter 10; W. Vandenhole, *Non-discrimination and Equality in the View of the UN Human Rights Treaty Bodies*, Antwerp, 2005; Joseph *et al.*, *International Covenant*, chapter 23; A. Bayefsky, 'The Principle of Equality or Non-discrimination in International Law', 11 HRLJ, 1990, p. 1; J. Greenberg, 'Race, Sex and Religious Discrimination' in Meron, *Human Rights in International Law*, p. 307; W. McKean, *Equality and Discrimination under International Law*, Oxford, 1983, and T. Meron, *Human Rights Law-Making in the United Nations*, Oxford, 1986, chapters 1–3.

[123] See e.g. N. Lerner, *The UN Convention on the Elimination of All Forms of Racial Discrimination*, 2nd edn, Dordrecht, 1980.

[124] See further below, p. 311, with regard to the establishment of the Committee on the Elimination of Racial Discrimination. Note also the Convention on the Suppression and Punishment of the Crime of Apartheid, 1973.

[125] See e.g. the Dissenting Opinion of Judge Tanaka in the *South-West Africa* cases, ICJ Reports, 1966, pp. 3, 293; 37 ILR, pp. 243, 455.

[126] See below, p. 314.

rights protection[127] and general state practice. Discrimination on other grounds, such as religion[128] and gender,[129] may also be contrary to customary international law. The International Covenant on Civil and Political Rights provides in article 2(1) that all states parties undertake to respect and ensure to all individuals within their territories and within their jurisdictions the rights recognised in the Covenant 'without distinction of any kind such as race, colour, sex, language, religion, political or other

[127] See below, pp. 347 ff.

[128] See e.g. the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, 1981, General Assembly resolution 36/55 and the appointment of a Special Rapporteur to examine situations inconsistent with the Declaration by the UN Commission on Human Rights, resolution 1986/20 of 10 March 1986. See also Odio Benito, *Elimination of All Forms of Intolerance and Discrimination Based on Religion or Belief*, New York, 1989, and Report on the Implementation of the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, E/CN.4/1995/91, 1994. In 2000, the Commission on Human Rights changed the mandate title to 'Special Rapporteur on freedom of religion or belief': see ECOSOC decision 2000/261 and General Assembly resolution 55/97. On 14 December 2007, the Human Rights Council extended the mandate of the Special Rapporteur for a further period of three years. The UN Human Rights Committee has produced a General Comment on article 18 concerning freedom of thought, conscience and religion: see General Comment 22, 1993, HRI/GEN/1/Rev.1, 1994, and Joseph *et al.*, *International Covenant*, chapter 17. Note also S. Neff, 'An Evolving International Legal Norm of Religious Freedom: Problems and Prospects', 7 *California Western International Law Journal*, 1975, p. 543; A. Krishnaswami, *Study of Discrimination in the Matter of Religious Rights and Practices*, New York, 1960, E/CN.4/Sub.2/200/Rev.1; N. Lerner, 'Towards a Draft Declaration against Religious Intolerance and Discrimination', 11 *Israel Yearbook on Human Rights*, 1981, p. 82; B. Tahzib, *Freedom of Religion or Belief: Ensuring Effective International Legal Protection*, Dordrecht, 1995, and B. Dickson, 'The United Nations and Freedom of Religion', 44 ICLQ, 1995, p. 327.

[129] See the Convention on the Elimination of All Forms of Discrimination Against Women 1979, below, p. 322. Article 1 of the Convention provides that 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 with men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field. See e.g. McKean, *Equality*, chapter 10; Bayefsky, 'Equality', and Meron, *Human Rights Law-Making*, chapter 2. See also J. Morsink, 'Women's Rights in the Universal Declaration', 13 HRQ, 1991, p. 229; R. Cook, 'Women's International Human Rights Law', 15 HRQ, 1993, p. 230; *Human Rights of Women* (ed. R. Cook), Philadelphia, 1994, and M. A. Freeman and A. S. Fraser, 'Women's Human Rights' in Herkin and Hargrove, *Human Rights: An Agenda for the Next Century*, p. 103. Note also the UN General Assembly Declaration on Elimination of Violence against Women, 33 ILM, 1994, p. 1049. See also the London Declaration of International Law Principles on Internally Displaced Persons adopted by the International Law Association, *Report of the Sixty-Ninth Conference*, London, 2000, p. 794.

opinion, national or social origin, property, birth or other status'.[130] Article 26 stipulates that all persons are equal before the law and thus, 'the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status'.[131] The UN Human Rights Committee established under this Covenant[132] has noted in its General Comment 18 on Non-Discrimination[133] that non-discrimination 'constitutes a basic and general principle relating to the protection of human rights'. The Committee, while adopting the definition of the term 'discrimination' as used in the Racial Discrimination and Women's Discrimination Conventions, concludes that it should be understood to imply any distinction, exclusion, restriction or preference which is based on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms.

The principle of non-discrimination requires the establishment of equality in fact as well as formal equality in law. As the Permanent Court of International Justice noted in the *Minority Schools in Albania* case,[134] 'equality in law precludes discrimination of any kind; whereas equality in fact may involve the necessity of different treatment in order to attain a result which establishes an equilibrium between different situations'.[135] The appropriate test of acceptable differentiation in such circumstances will centre upon what is just or reasonable[136] or objectively and reasonably justified.[137] The application of equality in fact may also require the

[130] See also, for example, articles 2(2) and 3 of the International Covenant on Economic, Social and Cultural Rights, 1966. See M. C. Craven, *The International Covenant on Economic, Social and Cultural Rights*, Oxford, 1995, chapter 4, and see further below, p. 308.

[131] Note that this provision constitutes an autonomous or free-standing principle, whereas article 2(1) of that Covenant and articles 2 of the Universal Declaration of Human Rights, 14 of the European Convention on Human Rights and 2(1) of the Convention on the Rights of the Child prohibit discrimination in the context of specific rights and freedoms laid down in the instrument in question: see Bayefsky, 'Equality', pp. 3–4, and the Human Rights Committee's General Comment on Non-Discrimination, paragraph 12.

[132] See further below, p. 314. [133] Adopted on 9 November 1989, CCPR/C/Rev.1/Add.1.

[134] PCIJ, Series A/B, No. 64, p. 19 (1935); 8 AD, pp. 386, 389–90.

[135] See also the Human Rights Committee's General Comment on Non-Discrimination, paragraph 8.

[136] See Judge Tanaka's Dissenting Opinion in the *South-West Africa* cases, ICJ Reports, 1966, pp. 3, 306; 37 ILR, pp. 243, 464.

[137] See e.g. the *Belgian Linguistics* case, European Court of Human Rights, Series A, No. 6, 1986, para. 10; 45 ILR, pp. 114, 165. See also the *Amendments to the Naturalisation*

introduction of affirmative action measures in order to diminish or eliminate conditions perpetuating discrimination. Such measures would need to be specifically targeted and neither absolute nor of infinite duration.[138]

The principle of self-determination as a human right[139]

The right to self-determination has already been examined in so far as it relates to the context of decolonisation.[140] The question arises whether this right, which has been widely proclaimed, has an application beyond the colonial context. Article 1 of both International Covenants on Human Rights provides that 'all peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development', while the Helsinki Final Act of 1975[141] refers to 'the principle of equal rights and self-determination . . . all peoples have the right, in full freedom, to determine, when and as they wish, their internal and external political status, without external interference, and to pursue as they wish their

Provisions of the Constitution of Costa Rica case, Inter-American Court of Human Rights, 1984, para. 56; 5 HRLJ, 1984, p. 172, and the Human Rights Committee's General Comment on Non-Discrimination, paragraph 13, which notes that 'not every differentiation of treatment will constitute discrimination, if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the Covenant'.

[138] See the Human Rights Committee's General Comment on Non-Discrimination, paragraph 10. See also article 1(4) of the Racial Discrimination Convention, article 4(1) of the Women's Discrimination Convention and article 27 of the International Covenant on Civil and Political Rights.

[139] See e.g. A. Buchanan, *Justice, Legitimacy and Self-Determination*, Oxford, 2004; J. Summers, *Peoples and International Law*, The Hague, 2007; K. Knop, *Diversity and Self-Determination in International Law*, Cambridge, 2002; T. D. Musgrave, *Self-Determination and National Minorities*, Oxford, 1997; W. Ofuatey-Kodjoe, 'Self Determination' in *United Nations Legal Order* (eds. O. Schachter and C. C. Joyner), Cambridge, 1995, vol. I, p. 349; A. Cassese, *Self-Determination of Peoples*, Cambridge, 1995; *Modern Law of Self-Determination* (ed. C. Tomuschat), Dordrecht, 1993; Higgins, *Problems and Process*, chapter 7; T. Franck, *The Power of Legitimacy Among Nations*, Oxford, 1990, pp. 153 ff.; Franck, 'Fairness in the International and Institutional System', 240 HR, 1993 III, pp. 13, 125 ff.; *The Rights of Peoples* (ed. J. Crawford), Oxford, 1988; *Peoples and Minorities in International Law* (eds. C. Brölmann, R. Lefeber and M. Zieck), Dordrecht, 1993, and P. Thornberry, 'Self-Determination, Minorities, Human Rights: A Review of International Instruments', 38 ICLQ, 1989, p. 867. See also M. Koskenniemi, 'National Self-Determination Today: Problems of Legal Theory and Practice', 43 ICLQ, 1994, p. 241; G. Simpson, 'The Diffusion of Sovereignty: Self-Determination in the Post-Colonial Age', 32 *Stanford Journal of International Law*, 1996, p. 255, and R. McCorquodale, 'Self-Determination: A Human Rights Approach', 43 ICLQ, 1994, p. 857.

[140] See above, chapter 5, p. 251.

[141] See further below, p. 372.

political, economic, social and cultural development'. Article 20 of the African Charter on Human and Peoples' Rights, 1981[142] stipulates that 'all peoples shall have the right to existence. They shall have the unquestionable and inalienable right to self-determination. They shall freely determine their political status and shall pursue their economic and social development according to the policy they have chosen.' The 1970 Declaration on Principles of International Law Concerning Friendly Relations[143] referred to the colonial situation and noted that subjection of peoples to alien subjugation, domination and exploitation constituted a violation of the principle. A number of UN resolutions have discussed the relevance of self-determination also to situations of alien occupation where the use of force has been involved.[144] The International Law Commission in 1988 expressed its view that the principle of self-determination was of universal application,[145] while the practice of the UN Human Rights Committee has been of particular significance.

Before this is briefly noted, reference must be made to the crucial importance of the principle of territorial integrity.[146] This norm protects the territorial framework of independent states and is part of the overall concept of the sovereignty of states. In terms of the concept of the freezing of territorial boundaries as at the moment of independence (save by mutual consent), the norm is referred to as *uti possidetis juris*.[147] This posits that boundaries established and existing at the moment of independence cannot be altered unless the relevant parties consent to change. It is supported by international instruments[148] and by judicial pronouncement. In the *Burkina Faso/Mali* case,[149] the Chamber of the International Court of Justice emphasised that *uti possidetis* constituted a general principle, whose purpose was to prevent the independence and stability of

[142] See further below, p. 391. [143] General Assembly resolution 2625 (XXV).

[144] See, for an examination of state practice, e.g. Cassese, *Self-Determination*, pp. 90–9.

[145] *Yearbook of the ILC*, 1988, vol. II, Part 2, p. 64.

[146] General Assembly resolution 1514 (XV) 1960 (the Colonial Declaration) underlines that 'any attempt at the partial or total disruption of the national unity and the territorial integrity of a country is incompatible with the purposes and principles of the Charter of the UN', while resolution 2625 (XXV) 1970 (the Declaration on Principles of International Law Concerning Friendly Relations) emphasises that 'nothing in the foregoing paragraphs shall be construed as authorising or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign or independent states'. See further below, chapter 10, p. 522.

[147] See further below, chapter 10, p. 525.

[148] See e.g. General Assembly resolutions 1514 (XV) and 1541 (XV) and Organisation of African Unity resolution 16 (I) 1964.

[149] ICJ Reports, 1986, pp. 554, 566–7; 80 ILR, pp. 440, 470–1.

new states from being endangered by fratricidal struggles provoked by the challenging of frontiers. This essential requirement of stability had induced newly independent states to consent to the respecting of colonial borders 'and to take account of it in the interpretation of the principle of self-determination of peoples'. The Arbitration Commission of the European Conference on Yugoslavia emphasised in Opinion No. 2[150] that 'it is well established that, whatever the circumstances, the right to self-determination must not involve changes to existing frontiers at the time of independence (*uti possidetis juris*) except where the states concerned agree otherwise'.

The principle of self-determination, therefore, applies beyond the colonial context, within the territorial framework of independent states. It cannot be utilised as a legal tool for the dismantling of sovereign states.[151] Its use, however, as a crucial principle of collective human rights[152] has been analysed by the Human Rights Committee in interpreting article 1 of the Civil and Political Rights Covenant.[153] In its General Comment on

[150] 92 ILR, pp. 167, 168. See further above, chapter 5, p. 256.

[151] The clause in the 1970 Declaration on Principles of International Law Concerning Friendly Relations (repeated in the UN Vienna Declaration on Human Rights, 1993), stating that nothing in the section on self-determination shall be construed as authorising or encouraging the dismembering or impairing of the territorial integrity of states conducting themselves in compliance with the principle of self-determination 'as described above and thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour', may be seen, first, as establishing the primacy of the principle of territorial integrity and, secondly, as indicating the content of self-determination within the territory. Whether it also can be seen as offering legitimacy to secession from an independent state in exceptional circumstances is the subject of much debate. Cassese, for example, concludes that 'a racial or religious group may attempt secession, a form of external self-determination, when it is apparent that internal self-determination is absolutely beyond reach. Extreme and unremitting persecution and the lack of any reasonable prospect for peaceful challenge may make secession legitimate', *Self-Determination*, p. 120. See also R. Rosenstock, 'The Declaration on Principles of International Law', 65 AJIL, 1971, pp. 713, 732, and J. Crawford, *The Creation of States in International Law*, 2nd edn, Oxford, 2006, pp. 118 ff. The Canadian Supreme Court in the *Quebec Secession* case discussed the question without reaching a conclusion, (1998) 161 DLR (4th) 385, 437 ff.; 115 ILR, pp. 536, 582–7. It would appear that practice demonstrating the successful application of even this modest proposition is lacking.

[152] Note Brownlie's view that the principle of self-determination has a core of reasonable certainty and this consists in 'the right of a community which has a distinct character to have this character reflected in the institutions of government under which it lives', 'The Rights of Peoples in International Law' in Crawford, *Rights of Peoples*, pp. 1, 5.

[153] See in particular D. McGoldrick, *The Human Rights Committee*, Oxford, 1994, chapter 5; Cassese, *Self-Determination*, pp. 59 ff., and M. Nowak, *UN Covenant on Civil and Political Rights, CCPR Commentary*, 2nd edn, Kehl, 2005, part 1.

Self-Determination adopted in 1984,[154] the Committee emphasised that the realisation of the right was 'an essential condition for the effective guarantee and observance of individual human rights'. Nevertheless, the principle is seen as a collective one and not one that individuals could seek to enforce through the individual petition procedures provided in the First Optional Protocol to the Covenant.[155] The Committee takes the view, as Professor Higgins[156] noted,[157] that 'external self-determination requires a state to take action in its foreign policy consistent with the attainment of self-determination in the remaining areas of colonial or racist occupation. But internal self-determination is directed to their own peoples.' In the context of the significance of the principle of self-determination within independent states, the Committee has encouraged states parties to provide in their reports details about participation in social and political structures,[158] and in engaging in dialogue with representatives of states parties, questions are regularly posed as to how political institutions operate and how the people of the state concerned participate in the governance of their state.[159] This necessarily links in with consideration of other articles of the Covenant concerning, for example, freedom of expression (article 19), freedom of assembly (article 21), freedom of association (article 22) and the right to take part in the conduct of public affairs and to vote

[154] General Comment 12: see HRI/GEN/1/Rev.1, p. 12, 1994.

[155] See the *Kitok* case, Report of the Human Rights Committee, A/43/40, pp. 221, 228; 96 ILR, pp. 637, 645; the *Lubicon Lake Band* case, A/45/40, vol. II, pp. 1, 27; 96 ILR, pp. 667, 702; *EP* v. *Colombia*, A/45/40, vol. II, pp. 184, 187, and *RL* v. *Canada*, A/47/40, pp. 358, 365; 96 ILR, p. 706. However, in *Mahuika et al.* v. *New Zealand*, the Committee took the view that the provisions of article 1 may be relevant in the interpretation of other rights protected by the Covenant, in particular article 27 on the rights of persons belonging to minorities, A/56/40, vol. II, annex X, A. See also *Diergaardt et al.* v. *Namibia*, A/55/40, vol. II, annex IX, sect. M, para. 10.3.

[156] A member of the Committee from 1985 to 1995.

[157] Higgins, 'Postmodern Tribalism and the Right to Secession' in Brölmann *et al.*, *Peoples and Minorities in International Law*, p. 31.

[158] See e.g. the report of Colombia, CCPR/C/64/Add.3, pp. 9 ff., 1991. In the third periodic report of Peru, it was noted that the first paragraph of article 1 of the Covenant 'lays down the right of every people to self-determination. Under that right any people is able to decide freely on its political and economic condition or regime and hence establish a form of government suitable for the purposes in view. To this effect Peru adopted as its form of government the republican system which was embodied in the constitution of 1979, which stated that Peru was a democratic and social independent and sovereign republic based on work with a unitary representative and decentralised government', CCPR/C/83/Add.1, 1995, p. 4.

[159] See e.g. with regard to Canada, A/46/40, p. 12. See also A/45/40, pp. 120–1, with regard to Zaire.

(article 25). The right of self-determination, therefore, provides the overall framework for the consideration of the principles relating to democratic governance.[160] The Committee on the Elimination of Racial Discrimination adopted General Recommendation 21 in 1996 in which it similarly divided self-determination into an external and an internal aspect and noted that the latter referred to the 'right of every citizen to take part in the conduct of public affairs at any level'.[161] The Canadian Supreme Court has noted that self-determination 'is normally fulfilled through *internal* self-determination – a people's pursuit of its political, economic, social and cultural development within the framework of an existing state'.[162]

The protection of minorities[163]

Various attempts were made in the post-First World War settlements, following the collapse of the German, Ottoman, Russian and Austro-Hungarian Empires and the rise of a number of independent nation-based states in Eastern and Central Europe, to protect those groups to whom sovereignty and statehood could not be granted.[164] Persons

[160] See T. Franck, 'The Emerging Right to Democratic Governance', 86 AJIL, 1992, p. 46. See also P. Thornberry, 'The Democratic or Internal Aspect of Self-Determination' in Tomuschat, *Modern Law of Self-Determination*, p. 101.

[161] A/51/18.

[162] The *Quebec Secession* case, (1998) 161 DLR (4th) 385, 437–8; 115 ILR, p. 536.

[163] See e.g. *Oppenheim's International Law*, pp. 972 ff.; Nowak, *UN Covenant*, pp. 480 ff.; M. Weller, *Universal Minority Rights: A Commentary on the Jurisprudence of International Courts and Treaty Bodies*, Oxford, 2007; R. Higgins, 'Minority Rights: Discrepancies and Divergencies Between the International Covenant and the Council of Europe System' in *Liber Amicorum for Henry Schermers*, Dordrecht, 1994, p. 193; Shaw, 'Definition of Minorities'; P. Thornberry, *International Law and Minorities*, Oxford, 1991, and Thornberry, 'Phoenix', and 'Self-Determination', p. 867; G. Alfredsson, 'Minority Rights and a New World Order' in *Broadening the Frontiers of Human Rights: Essays in Honour of A. Eide* (ed. D. Gomien), Oslo, 1993; G. Alfredsson and A. M. de Zayas, 'Minority Rights: Protection by the UN', 14 HRLJ, 1993, p. 1; Brölmann *et al.*, *Peoples and Minorities in International Law*; *The Protection of Ethnic and Linguistic Minorities in Europe* (eds. J. Packer and K. Myntti), Turku, 1993; *Documents on Autonomy and Minority Rights* (ed. H. Hannum), Dordrecht, 1993; N. Rodley, 'Conceptual Problems in the Protection of Minorities: International Legal Developments', 17 HRQ, 1995, p. 48; A. Fenet *et al.*, *Le Droit et les Minorités*, Brussels, 1995; J. Rehman, *The Weakness in the International Protection of Minority Rights*, The Hague, 2000, and *International Human Rights Law*, chapters 11 and 12; Musgrave, *Self-Determination*, and *Minority and Group Rights in the New Millennium* (eds. D. Fottrell and B. Bowring), The Hague, 1999. See also the Capotorti Study on the Rights of Persons Belonging to Ethnic, Religious and Linguistic Minorities, E/CN.4/Sub.2/384/Rev.1, 1979.

[164] The minorities regime of the League consisted of five special minorities treaties binding Poland, the Serbo-Croat-Slovene state, Romania, Greece and Czechoslovakia; special

belonging to racial, religious or linguistic minorities were to be given the same treatment and the same civil and political rights and security as other nationals in the state in question. Such provisions constituted obligations of international concern and could not be altered without the assent of a majority of the League of Nations Council. The Council was to take action in the event of any infraction of minorities' obligations. There also existed a petition procedure by minorities to the League, although they had no standing as such before the Council or the Permanent Court of International Justice.[165] However, the schemes of protection did not work well, ultimately for a variety of reasons ranging from the sensitivities of newly independent states to international supervision of minority issues to overt exploitation of minority issues by Nazi Germany in order to subvert neighbouring countries. After the Second World War, the focus shifted to the international protection of universal individual human rights, although several instruments dealing with specific situations incorporated provisions concerning the protection of minorities,[166] and in 1947 the Sub-Commission on the Prevention of Discrimination and the Protection of Minorities was established.[167] It was not, however, until the adoption of the International Covenant on Civil and Political Rights in 1966 that the question of minority rights came back onto the international agenda. Article 27 of this Covenant provides that '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 modest and rather negative provision as formulated centres upon 'persons belonging' to minorities rather than upon minorities as such

minorities clauses in the treaties of peace with Austria, Bulgaria, Hungary and Turkey; five general declarations made on admission to the League by Albania, Latvia, Lithuania, Estonia and Iraq; a special declaration by Finland regarding the Aaland Islands, and treaties relating to Danzig, Upper Silesia and Memel: see generally Thornberry, *International Law and Minorities*, pp. 38 ff.

165 In the early 1930s several hundred petitions were received but this dropped to virtually nil by 1939: see Thornberry, *International Law and Minorities*, pp. 434–6, and the Capotorti Report on the *Rights of Persons belonging to Ethnic, Religious and Linguistic Minorities*, 1979, E/CN.4/Sub.2/384/Rev.1, pp. 20–2. See also Macartney, *National States*, pp. 370 ff.; J. Stone, *International Guarantees of Minority Rights*, London, 1932, and Richard, *Le Droit de Petition*, Paris, 1932.

166 See e.g. Annex IV of the Treaty of Peace with Italy, 1947; the Indian–Pakistan Treaty, 1950, and article 7 of the Austrian State Treaty, 1955. See also the provisions in the documents concerning the independence of Cyprus, Cmnd 1093, 1960.

167 See further below, p. 307.

and does not define the concept of minorities.[168] Nevertheless, the UN Human Rights Committee has taken the opportunity to consider the issue in discussing states' reports, individual petitions and in a General Comment. In commenting upon states' reports made pursuant to the International Covenant, the Committee has made clear, for example, that the rights under article 27 apply to all members of minorities within a state party's territory and not just nationals,[169] and it has expressed concern with regard to the treatment of minorities within particular states.[170]

In the *Lovelace* case,[171] the Committee decided that there had been a violation of article 27 with regard to an Indian woman who, by having married a non-Indian, had lost her rights by Canadian law to reside on the Tobique Reserve, something which she wished to do upon the collapse of her marriage. The Committee noted that statutory restrictions affecting the right to residence on a reserve of a person belonging to the minority concerned had to have both a reasonable and objective justification and be consistent with the other provisions of the Covenant read as a whole. This had not been the case. There was no place outside the reserve where her right to access to her native culture and language could be conducted in community with other members of the minority in question.

In the *Kitok* case,[172] the Committee took the view with regard to a petition by a member of the Sami community in Sweden that where the regulation of economic activity was an essential element in the culture

[168] Attempts to define minorities have invariably focused upon the numerically inferior numbers of minorities and their non-dominant position, the existence of certain objective features differentiating them from the majority population (e.g. ethnic, religious or linguistic) coupled with the subjective wish of the minority concerned to preserve those characteristics. See e.g. Shaw, 'Definition of Minorities', and the Capotorti Report, p. 96. See also Council of Europe Assembly Recommendation 1255 (1955), H/Inf (95) 3, p. 88. Note that the Human Rights Committee in the *Ballantyne* case held that English-speaking citizens in Quebec did not constitute a minority since the term 'minority' applied to the whole state and not a part of it, 14 HRLJ, 1993, pp. 171, 176.

[169] See e.g. comments upon Norway's third periodic report, A/49/40, p. 23 and Japan's third periodic report, *ibid.*, p. 25. See also Joseph *et al.*, *International Covenant*, chapter 24.

[170] See e.g. with regard to the third periodic report of Romania, A/49/40, p. 29 and that of Mexico, *ibid.*, p. 35, and the fourth periodic report of Russia, CCPR/C/79/Add.54, p. 5 and that of Ukraine, CCPR/C/79/Add.52, p. 4. Note also the criticism of the Democratic Republic of the Congo for its marginalisation, discrimination and, at times, persecution of some of the country's minorities, including pygmies, see CCPR/C/SR.2358, 2006, and of the situation in Kosovo, CCPR/C/SR.2394, 2006.

[171] I *Selected Decisions of the Human Rights Committee*, 1985, p. 83; 68 ILR, p. 17.

[172] A/43/40, p. 221; 96 ILR, p. 637.

of an economic community, its application to an individual could fall within article 27. It was emphasised that a restriction upon an individual member of a minority must be shown to have a reasonable and objective justification and to be necessary for the continued viability and welfare of the minority as a whole.

In the *Lubicon Lake Band* case,[173] the Committee upheld the complaint that the Canadian Government, in allowing the Provincial Government of Alberta to expropriate the Band's territory for the benefit of private corporate interests, violated article 27. It was held that the rights protected under article 27 included the right of persons in community with others to engage in economic and social activities which were part of the culture of the community to which they belonged. However, measures with only a limited impact on the way of life and livelihood of persons belonging to a minority would not necessarily violate article 27.[174]

The Committee adopted a General Comment on article 27 in 1994 after much discussion and hesitation due to fears that such a comment might be perceived to constitute an encouragement to secession.[175] The General Comment pointed to the distinction between the rights of persons belonging to minorities on the one hand, and the right to self-determination and the right to equality and non-discrimination on the other. It was emphasised that the rights under article 27 did not prejudice the sovereignty and territorial integrity of states, although certain minority rights, in particular those pertaining to indigenous communities, might consist of a way of life closely associated with territory and the use of its resources, such as fishing, hunting and the right to live in reserves protected by law. The Committee, in an important part of the General Comment, underlined that persons belonging to a minority need not be nationals or permanent residents of the state concerned so that migrant workers or even visitors might be protected under article 27. Whether an ethnic, religious or linguistic minority exists was an objective question, not dependent upon a decision of the state party. Although article 27 is negatively formulated, the Committee pointed out that positive measures of protection were required not only against the acts of the state party itself, but also against the acts of other persons within the state party. Positive measures may also be necessary to protect the identity of the minority concerned and legitimate

[173] A/45/40, vol. II, p. 1; 96 ILR, p. 667.

[174] See the *Länsmann* cases against Finland, 511/92 and 671/95, 115 ILR, p. 300, and Report of the Human Rights Committee 2005, volume II, A/60/40, pp. 90 ff.

[175] General Comment No. 23, HRI/GEN/1/Rev.1, p. 38.

differentiation was permitted so long as it was based on reasonable and objective criteria.

The UN General Assembly adopted a Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities in December 1992.[176] Article 1 provides that states 'shall protect the existence and the national or ethnic, cultural, religious and linguistic identity of minorities within their respective territories' and shall adopt appropriate legislative and other measures to achieve these ends. The Declaration states that persons belonging to minorities have the right to enjoy their own culture, practise and profess their own religion and to use their own language in private and in public without hindrance. Such persons also have the right to participate effectively in cultural, social, economic and public life. The UN Sub-Commission has been considering the question of minorities for many years and in 1994 agreed to establish a five-person inter-sessional working group[177] to examine peaceful and constructive solutions to situations involving minorities and, in particular, to review the practical application of the Declaration, to provide recommendations to *inter alia* the Sub-Commission and the UN High Commissioner for Human Rights to protect minorities where there is a risk of violence and generally to promote dialogue between minority groups in society and between those groups and governments. In 2005, the Commission on Human Rights appointed an Independent Expert on Minorities with the mandate to promote the implementation of the Declaration; to identify best practices and possibilities for technical co-operation by the Office of the United Nations High Commissioner for Human Rights at the request of Governments; and to co-operate closely with existing relevant UN bodies, while taking into account the views of non-governmental organisations and applying a gender perspective.[178]

The issue of minority rights has also been taken up recently particularly by European states, primarily as a consequence of the demise of the Soviet Union and its empire in Eastern Europe and the reintegration of Eastern and Central European states within the political system of

[176] Resolution 47/135. See e.g. *The UN Minority Rights Declaration* (eds. A. Phillips and A. Rosas), London, 1993.

[177] E/CN.4/Sub.2/1994/56. This was authorised by the Commission on Human Rights on 3 March 1995: see resolution 1995/24. See also E/CN.4/Sub.2/1995/51.

[178] Resolution 2005/79. The Independent Expert has, for example, drawn attention to the rights of women facing multiple forms of discrimination, exclusion and violence, such as women from minority communities, Press Release of 7 March 2006, and to problems faced by the Roma in Hungary, Press Release of 4 July 2006.

Western Europe. The specific response to questions of minority rights within the Council of Europe and the Conference (as from 1995 Organisation) on Security and Co-operation in Europe are addressed below.[179]

As has been noted, the UN Human Rights Committee has pointed to the special position of indigenous peoples as minorities with a particular relationship to their traditional territory. It has been accepted that such communities form a specific category of minorities with special needs.[180] The International Labour Organisation adopted Convention No. 107 on Indigenous and Tribal Populations in 1957, an instrument with a predominantly assimilationist approach to the question of indigenous peoples. It was partially revised in Convention No. 169 on Indigenous and Tribal Peoples in Independent Countries, 1989. The change in terminology from 'populations' to 'peoples' is instructive[181] and the latter Convention focuses far more upon the protection of the social, cultural, religious and spiritual values and practices of indigenous peoples. Unlike the prevailing approach to the definition of minorities generally, which intermingles objective and subjective criteria, this Convention stipulates in article 1(2) that 'self-identification as indigenous or tribal shall be regarded as a fundamental criterion' for determining the groups to which the Convention applies. The Sub-Commission recommended that a study of discrimination against indigenous populations should be made and this was completed in 1984.[182] A definition of indigenous populations was suggested and

[179] See below, pp. 365 and 376.

[180] See e.g. P. Thornberry, *Indigenous Peoples and Human Rights*, Manchester, 2002; S. Marquardt, 'International Law and Indigenous Peoples', 3 *International Journal on Group Rights*, 1995, p. 47; J. Berger and P. Hunt, 'Towards the International Protection of Indigenous Peoples' Rights', 12 NQHR, 1994, p. 405; C. Tennant, 'Indigenous Peoples, International Institutions, and the International Legal Literature from 1945–1993', 16 HRQ, 1994, p. 1; E. Stamatopoulou, 'Indigenous Peoples and the United Nations: Human Rights as a Developing Dynamic', 16 HRQ, 1994, p. 58; Crawford, *Rights of Peoples*; R. Barsh, 'Indigenous Peoples: An Emerging Object of International Law', 80 AJIL, 1986, p. 369; J. Anaya, *Indigenous Peoples in International Law*, 2nd edn, Oxford, 2004, and G. Bennett, *Aboriginal Rights in International Law*, London, 1978. See also *Justice Pending: Indigenous Peoples and Other Good Causes* (eds. G. Alfredsson and M. Stavropoulou), The Hague, 2002. Note in particular the cases of *Delgamuukw* v. *British Columbia* (1998) 153 DLR (4th) 193; 115 ILR, p. 446, Canadian Supreme Court, and *Mabo* v. *State of Queensland (No. 1)* (1988) 83 ALR 14; 112 ILR, p. 412 and *(No. 2)* (1992) 107 ALR 1; 112 ILR, p. 457. See also *The Richtersveld Community* case, 24 March 2003, Supreme Court of South Africa, 127 ILR, p. 507.

[181] But note that the Convention provides that the use of the term 'peoples' is not to be construed as having any implication as regards the rights that may attach to the term under international law (article 1(3)).

[182] The Martinez Cobo Report, E/CN.4/Sub.2/1986/7 and Adds. 1–4.

various suggestions made as to future action. In 1982, the Sub-Commission established a Working Group on Indigenous Populations[183] and a Declaration on the Rights of Indigenous Peoples was finally adopted in 2007.[184] The Declaration notes that indigenous peoples have the right to the full enjoyment, as a collective or as individuals, of all human rights and fundamental freedoms as recognised in the Charter of the United Nations, the Universal Declaration of Human Rights and international human rights law (article 1). They have the right to self-determination (article 3) and, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions (article 4). They further have the right to maintain and strengthen their distinctive political, economic, social and cultural characteristics, as well as their legal systems, while retaining the right to participate fully in the life of the state (article 5), the right to a nationality (article 6) and the collective right to live in freedom and security as distinct peoples free from any act of genocide or violence (article 7(2)). They also have the right not to be subjected to forced assimilation or destruction of their culture, while states are to provide effective mechanisms for prevention of, and redress for, *inter alia* any action which has the aim or effect of depriving them of their integrity as distinct peoples, or of their cultural values or ethnic identities (article 8). The Declaration also lists their rights to practise their cultural traditions, and to education, access to media and health practices, together with a range of rights concerning their distinctive relationship to the land (articles 9–37). The United Nations, its bodies, including the Permanent Forum on Indigenous Issues, and specialised agencies, including at the country level, and states are called upon to promote respect for and full application of the Declaration (article 42). A special rapporteur on indigenous peoples was appointed in 2001 and a Voluntary Fund for Indigenous Populations established in 1985.[185] A Permanent Forum on Indigenous Issues was set up in 2000[186] and UN Development Group Guidelines on Indigenous

[183] See E/CN.4/Sub.2/1982/33.

[184] A Draft Declaration was adopted in 1994: see resolution 1994/45, E/CN.4/Sub.2/1994/56, p. 103. See also R. T. Coulter, 'The Draft UN Declaration on the Rights of Indigenous Peoples: What Is It? What Does It Mean?', 13 NQHR, 1995, p. 123.

[185] See General Assembly resolution 40/131.

[186] See ECOSOC resolution 2000/22. Note that 1993 was designated International Year of the World's Indigenous Peoples, see E/CN.4/1994/AC.4/TN.4/2, while the International Decade of the World's Indigenous Peoples was declared by the General Assembly on

Peoples' Issues were produced in 2008.[187] An expert mechanism, consisting of five independent experts, on the rights of indigenous peoples was called for in Human Rights Council resolution 6/36, 2007, in order to provide the Council with thematic expertise.

The question of an American Declaration on Indigenous Peoples has also been under discussion within the Organisation of American States.[188] The Inter-American Court of Human Rights discussed the issue of the rights of indigenous peoples to ancestral lands and resources in *The Mayagna (Sumo) Awas Tingni Community* v. *Nicaragua* in 2001.[189] The Court emphasised the communitarian tradition regarding a communal form of collective property of the land and consequential close ties of indigenous people with that land,[190] and noted that the customary law of such people had especially to be taken into account so that 'possession of the land should suffice for indigenous communities lacking real title'.[191] In *Sawhoyamaxa Indigenous Community* v. *Paraguay*, the Court emphasised that the close ties of members of the indigenous communities with their traditional lands and the natural resources associated with their culture had to be secured under article 21 of the Inter-American Convention on Human Rights concerning the right to the use and enjoyment of property. The Court, in interpreting this provision, also took account of Convention No. 169 of the ILO, which required *inter alia* respect for the special importance for the cultural and spiritual values of the communities concerned of their relationship with their lands. The collecture nature of property ownership was also noted. In addition, the Court found a violation of the right to recognition as a person before the law under article 3 of the Convention as there had been no registration or official documentation

10 December 1994. See also the Committee on the Elimination of Racial Discrimination's General Recommendation 23 on Indigenous Peoples, 1997, A/52/18, annex V.

187 www.2.ohchr.org/english/issues/indigenous/docs/guidelines.pdf.

188 See the Draft Declaration on the Rights of Indigenous Peoples adopted in 1995, OEA/Ser.L/V/II/90; Doc. 9, rev. 1. For further discussions on the Draft Declaration, see e.g. GT/DADIN/doc.1/99 rev.2, 2000; Report of the Rapporteur of the Working Group, GT/DADIN/doc.83/02, 2002 and OEA/Ser.K/XVI, GT/DADIN/doc.301/07, 2007. See also, for example, resolutions AG/RES.1780 (XXI-0/01), 2001 and AG/RES. 2073 (XXXV-0/05), 2007.

189 Series C, No. 79. 190 *Ibid*., para. 149.

191 *Ibid*., para. 151. Nicaragua was held to be obliged to create 'an effective mechanism for delimitation, demarcation and titling of the property of indigenous communities, in accordance with their customary law, values, customs and mores', *ibid*., para. 164. See also the cases of the *Moiwana Community* v. *Suriname*, Judgment of 15 June 2005, Series C, No. 124 and the *Indigenous Community Yakye Axa* v. *Paraguay*, Judgment of 17 June 2005, Series C, No. 125.

for the existence of several members of the indigenous community. The Court ordered the state to adopt all legislative, administrative and other measures to guarantee the members of the community ownership rights over their traditional lands.[192]

Other suggested collective rights

The subject of much concern in recent years has been the question of a right to development.[193] In 1986, the UN General Assembly adopted the Declaration on the Right to Development.[194] This instrument reaffirms the interdependence and indivisibility of all human rights and seeks to provide a framework for a range of issues (article 9). The right to development is deemed to be an inalienable human right of all human beings and peoples to participate in and enjoy economic, social, cultural and political development (article 1), while states have the primary responsibility to create conditions favourable to its realisation (article 3), including the duty to formulate international development policies (article 4). States are particularly called upon to ensure *inter alia* equal opportunity for all in their access to basic resources, education, health services, food, housing, employment and the fair distribution of income. Effective measures are to be undertaken to ensure that women participate in the development process and appropriate economic and social reforms are to be carried out with a view to eradicating all social injustices (article 8). The question of encouraging the implementation of this Declaration was the subject of continuing UN attention,[195] with the reaffirmation of the right to

[192] Judgment of 29 March 2006, Series C, No. 146, paras. 17 ff., 187 ff. and 210 ff.

[193] See e.g. *Le Droit au Développement au Plan International* (ed. R. J. Dupuy), Paris, 1980; A. Pellet, *Le Droit International du Développement*, 2nd edn, Paris, 1987; K. Mbaye, 'Le Droit du Developpement comme un Droit de l'Homme', 5 *Revue des Droits de l'Homme*, 1972, p. 503; *Report of the UN Secretary-General on the International Dimensions of the Right to Development as a Human Right*, E/CN.4/1334, 1979; O. Schachter, 'The Emerging International Law of Development', 15 *Columbia Journal of Transnational Law*, 1976, p. 1; R. Rich, 'The Right to Development as an Emerging Human Right', 23 Va. JIL, 1983, p. 287; K. de Vey Mestdagh, 'The Right to Development', 28 NILR, 1981, p. 31; I. Brownlie, *The Human Right to Development*, Commonwealth Secretariat Human Rights Unit Occasional Paper, 1989; C. Weeramantry, 'The Right to Development', 25 *IJIL*, 1985, p. 482; P. Alston, 'Revitalising United Nations Work on Human Rights and Development', 18 *Melbourne University Law Review*, 1991, p. 216, and T. Kunanayakam, *Historical Analysis of the Principles Contained in the Declaration on the Right to Development*, HR/RD/1990/CONF.1, 1990.

[194] General Assembly resolution 41/128.

[195] Note e.g. the Global Consultation carried out in 1990, E/CN.4/1990/9/Rev.1, 1990: see R. Barsh, 'The Right to Development as a Human Right: Results of the Global Consultation',

development by the UN Vienna Declaration and Programme of Action, 1993[196] and the establishment by the UN Commission on Human Rights of a Working Group on the Right to Development in the same year.[197] It should also be noted that Principle 3 of the Rio Declaration on Environment and Development, 1992 stipulated that 'the right to development must be fulfilled so as to equitably meet developmental and environmental needs of present and future generations'.[198] While the general issue of development is clearly on the international agenda in the context of economic issues and broad human rights concerns, it is premature to talk in terms of a legal right in international law of groups or peoples or states to development.[199] Other suggested collective rights have included the right to a healthy environment[200] and the right to peace.[201]

The United Nations system – implementation[202]

The United Nations system has successfully generated a wide-ranging series of international instruments dealing with the establishment of

13 HRQ, 1991, p. 322; the Report of the UN Secretary-General, E/CN.4/1992/10, 1991 and the Concrete Proposals of the UN Secretary-General, E/CN.4/1993/16, 1993.

196 See 32 ILM, 1993, p. 1661.

197 Resolution 1993/22. The first report of this Working Group was at the end of 1993, E/CN.4/1994/21. The most recent mechanism has been the creation of an open-ended Working Group on the Right to Development in 1998, resolution 1998/72. A high-level task force on the implementation of the right to development was established by the Working Group in 2004: see e.g. A/HRC/8/WG.2/TF/2, 2008.

198 31 ILM, 1992, p. 876. See also below, chapter 15.

199 Note that the Committee on Economic, Social and Cultural Rights has adopted a General Comment in which it is stated that international co-operation for development and thus the realisation of economic, social and cultural rights is an obligation for all states, General Comment 3 (1991), HRI/GEN/1/Rev.1, pp. 48, 52.

200 See e.g. S. Prakash, 'The Right to the Environment. Emerging Implications in Theory and Praxis', 13 NQHR, 1995, p. 403. See further below, chapter 15 on international environmental law.

201 See e.g. General Assembly resolutions 33/73 and 39/11. See also R. Bilder, 'The Individual and the Right to Peace', 11 *Bulletin of Peace Proposals*, 1982, p. 387, and J. Fried, 'The United Nations' Report to Establish a Right of the Peoples to Peace', 2 *Pace Yearbook of International Law*, 1990, p. 21.

202 See *The Future of UN Human Rights Treaty Monitoring* (eds. P. Alston and J. Crawford), Cambridge, 2000; *Human Rights: International Protection, Monitoring and Enforcement* (ed. J. Symonides), Aldershot, 2003; Steiner, Alston and Goodman, *International Human Rights*; Rehman, *International Human Rights Law*, chapters 2–5; Tomuschat, *Human Rights*, chapters 6–8; *United Nations Action in the Field of Human Rights*, New York, 1994; *The United Nations and Human Rights* (ed. P. Alston), Oxford, 1992; *Guide to International Human Rights Practice* (ed. H. Hannum), 4th edn, Ardsley, 2004; Ramcharan, *Human Rights: Thirty Years After the Universal Declaration*, and *UN Law/Fundamental*

standards and norms in the human rights field.[203] The question of implementation will now be addressed.

Political bodies – general

The General Assembly has power under article 13 of the Charter to initiate studies and make recommendations regarding *inter alia* human rights. Human rights items on its agenda may originate in Economic and Social Council (ECOSOC) reports or decisions taken by the Assembly at earlier sessions to consider particular matters, or are proposed for inclusion by the UN organs, the Secretary-General or member states. Most items on human rights go to the Assembly's Third Committee (Social, Humanitarian and Cultural Committee), but others may be referred to other committees such as the Sixth Committee (Legal) or the First Committee (Political and Security) or the Special Political Committee. The Assembly has also established subsidiary organs under Rule 161, several of which deal with human rights issues, such as the Special Committee on Decolonisation, the UN Council for Namibia, the Special Committee against Apartheid, the Special Committee to Investigate Israeli Practices in the Occupied Territories and the Committee on the Exercise of the Inalienable Rights of the Palestine People.[204] ECOSOC may, under article 62 of the Charter, make recommendations on human rights, draft conventions for the Assembly and call international conferences on human rights matters. It consists of fifty-four members of the UN elected by the General Assembly and hears annually the reports of a wide range of bodies including the UN High Commissioner for Refugees, the UN Children's Fund, the UN Conference on Trade and Development, the UN Environment Programme and the World Food Council. Of its subsidiary bodies, the Commission on

Rights (ed. A. Cassese), Alphen aan den Rijn, 1979. See also Lauterpacht, *International Law*, chapter 11; F. Ermacora, 'Procedure to Deal with Human Rights Violations', 7 *Revue des Droits de l'Homme*, 1974, p. 670; Robertson and Merrills, *Human Rights*, and A. A. Cançado Trindade, 'Co-existence and Co-ordination of Mechanisms of International Protection of Human Rights', 202 HR, 1987, p. 9.

[203] See also e.g. the Slavery Convention, 1926 and Protocol, 1953; the Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery, 1956; the Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others, 1949; the Convention on the Status of Refugees, 1951 and Protocol, 1967; the Convention relating to the Status of Stateless Persons, 1954 and the Convention on the Reduction of Statelessness 1961.

[204] See *UN Action*, chapter 1. Note also the relevant roles of the other organs of the UN, the Security Council, Trusteeship Council, International Court and Secretariat, *ibid.*

Human Rights and the Commission on the Status of Women have the most direct connection with human rights issues.[205] The Commission on Human Rights was replaced by the Human Rights Council in 2006.

The Commission on Human Rights (1946–2006)[206]

This was established in 1946 as a subsidiary organ of ECOSOC with extensive terms of reference, including making studies, preparing recommendations and drafting international instruments on human rights. Originally consisting of forty-three representatives of member states of the UN selected by ECOSOC on the basis of equitable geographic distribution,[207] that number was increased to fifty-three by resolution 1990/48 in May 1990. For its first twenty years, it took the view that it had no power to take any action with regard to complaints concerning human rights violations, despite receiving many via the Secretary-General.[208] However, in 1967, ECOSOC resolution 1235 (XLII) authorised the Commission and its Sub-Commission on Prevention of Discrimination and Protection of Minorities to examine information relevant to gross violations of human rights contained in communications, and to study such situations as revealed a consistent pattern of violations with a view to making recommendations to ECOSOC.[209] This constituted the public debate function of the Commission relating to specific situations. The situations in question referred at first primarily to Southern Africa. In 1967, also, the Commission set up an ad hoc working group of experts on South Africa and has since established working groups on Chile; Situations revealing a Consistent Pattern of Gross Violations of Human Rights; Disappearances; the Right to Development and structural adjustment programmes and economic, social and cultural rights. Special rapporteurs were appointed by the Commission to deal with situations in specific countries, such as, for

[205] *Ibid.*, pp. 13 ff. See also Assembly resolutions 1991B (XVIII) and 2847 (XXVI).

[206] See e.g. N. Rodley and D. Weissbrodt, 'United Nations Non-Treaty Procedures for Dealing with Human Rights Violations' in Hannum, *Guide to International Human Rights Practice*, p. 65; Lauterpacht, *International Law*, chapter 11; Steiner, Alston and Goodman, *International Human Rights*, chapter 9, and T. Buergenthal and J. V. Torney, *International Human Rights and International Education*, Washington, DC, 1976, pp. 75 ff. See also *UN Action*, p. 20, and H. Tolley, 'The Concealed Crack in the Citadel', 6 HRQ, 1984, p. 420. A Commission on the Status of Women was also created: see *UN Action*, p. 15, and below, p. 322.

[207] See ECOSOC resolutions 6 (I), 1946; 9 (II), 1946; 845 (XXXII), 1961; 1147 (XLI), 1966 and 1979/36, 1979.

[208] See e.g. Report of the First Session of the Commission, E/259, para. 22.

[209] See Tolley, 'Concealed Crack', pp. 421 ff., and ECOSOC resolution 728F.

example, Afghanistan, Cuba, El Salvador, Equatorial Guinea, Guatemala, Iran, Sudan, the Democratic Republic of the Congo and Iraq. Special Rapporteurs were also appointed to deal with particular thematic concerns such as summary executions, torture, mercenaries, religious intolerance and the sale of children. In an attempt to provide some co-ordination, the first meeting of special rapporteurs and other mechanisms of the special procedures of the Commission took place in 1994.[210]

A series of informal working groups were created to prepare drafts of international instruments, such as the Declaration on Religious Intolerance, the Convention against Torture and instruments on minority rights and the rights of the child.[211] The Commission also established a Group of Three pursuant to article IX of the Apartheid Convention to consider states' reports under that Convention. In 1970 a new procedure for dealing with human rights complaints was introduced in ECOSOC resolution 1503 (XLVIII).[212] By virtue of this resolution as modified in 2000,[213] the Sub-Commission appointed annually a Working Group on Communications to meet to consider communications received and to pass on to the Sub-Commission those that appeared to reveal 'a consistent pattern of gross and reliably attested violations of human rights'. These were examined by the Working Group on Situations of the Sub-Commission which then determined whether or not to refer particular situations to the Commission.[214] Those so transmitted were examined in two separate closed meetings by the Commission, which then decided whether or not to take further action, such as appointing an independent expert or discussing the matter under the resolution 1235 public procedure. The procedure, which was confidential until the final stage, did not fulfil initial high expectations. The confidentiality requirement and the highly political nature of the Commission itself combined to frustrate hopes that had been raised.[215]

[210] See E/CN.4/1995/5. See also the report of the meeting of special rapporteurs/representatives/experts and chairpersons of working groups of the special procedures of the Commission on Human Rights and of the advisory services programme, May 1995, E/CN.4/1996/50.

[211] See e.g. *UN Action*, pp. 20–3.

[212] See e.g. P. Alston, 'The Commission on Human Rights' in Alston, *United Nations and Human Rights*, pp. 126, 145 ff., and M. Bossuyt, 'The Development of Special Procedures of the United Nations Commission on Human Rights', 6 HRLJ, 1985, p. 179.

[213] ECOSOC resolution 2000/3.

[214] See also Sub-Committee resolution 1 (XXIV), 1971.

[215] See e.g. T. Van Boven, 'Human Rights Fora at the United Nations' in *International Human Rights Law and Practice* (ed. J. C. Tuttle), Philadelphia, 1978, p. 83; H. Möller, 'Petitioning the United Nations', 1 *Universal Human Rights*, 1979, p. 57; N. Rodley, 'Monitoring

Despite good work in the field of standard-setting and in drawing attention to abuses of human rights, albeit on rather less than a universalist basis, the Commission began to attract an increasing level of criticism, mainly concerning political selectivity and the failure to review objectively the situation in particular countries.[216] The High Level Panel on Threats, Challenge and Change convened by the United Nations Secretary-General concluded in its Report of 2004 that, 'In recent years, the Commission's capacity to perform these tasks has been undermined by eroding credibility and professionalism.'[217] As a result, the Human Rights Council was created to replace the Commission by General Assembly resolution 60/251 on 3 April 2006.

The Human Rights Council

The Council was established with a higher status in the UN hierarchy as a subsidiary organ of the General Assembly with forty-seven members,[218] elected by a majority of members of the Assembly for three years for up to two consecutive terms. The Commission's special procedures function was retained, although all functions and responsibilities of the Commission assumed by the Council are subject to a review aimed at their rationalisation and improvement. A new universal periodic review mechanism by which the human rights record of all countries is to be examined was also established. This was intended as a partial response to the criticisms of

Human Rights by the UN System and Non-governmental Organisations' in Kommers and Loescher, *Human Rights and American Foreign Policy*, p. 157, and Tolley, 'Concealed Crack', pp. 429 ff. Note that the Commission chairman began the practice of announcing the names of the countries subject to complaints under resolution 1503, although no further details were disclosed: see e.g. E/CN.4/1984/77, p. 151, naming Albania, Argentina, Benin, Haiti, Indonesia, Malaysia, Pakistan, Paraguay, the Philippines, Turkey and Uruguay.

[216] See e.g. the Amnesty International Report, 'Meeting the Challenge', AI Index, IOR 40/008/2005.

[217] www.un.org/secureworld/report3.pdf, at para. 283. See also the Secretary-General's Report, 'In Larger Freedom: Towards Development, Security and Human Rights for All', A/59/2005, at para. 182. It was noted that the Commission had been 'undermined by the politicisation of its sessions and the selectivity of its work', A/59/2005/Add.1, para. 2. Note also, for example, the inability of the Commission in 1990 even to discuss draft resolutions relating to China and Iraq: E. Zoller, '46th Session of the United Nations Commission on Human Rights', 8(2) NQHR, 1990, pp. 140, 142. Note also the election of Libya to chair the Commission in 2003.

[218] Distributed regionally with thirteen seats for the African group; thirteen seats for the Asian group; six seats for the Eastern European group; eight seats for the Latin American and Caribbean group and seven seats for the Western European and Other group.

the Commission's selectivity.[219] The Council adopted resolution 5/1 on 18 June 2007 entitled 'United Nations Human Rights Council: Institution-Building', which ranged over a wide area and established the details of the universal periodic review mechanism. The principles laid down for this mechanism include the universality of human rights, universal coverage and equal treatment of all states and the conduct of the review in an objective, transparent, non-selective, constructive, non-confrontational and non-politicised manner. This resolution also laid down details for the conduct and review of the special procedures, provided for the creation of the Human Rights Council Advisory Committee, composed of eighteen experts serving in their personal capacity, intended to function as a think-tank for the Council and work at its direction, and provided for the establishment of a confidential complaints procedure based upon the mechanism created by ECOSOC resolution 1503 (1970).[220]

Expert bodies established by UN organs

The Sub-Commission on the Promotion and Protection of Human Rights[221]

The Sub-Commission, initially entitled the Sub-Commission on Prevention of Discrimination and Protection of Minorities, was established by the Commission in 1947 with wide terms of reference.[222] It came to an end in 2006 as a consequence of General Assembly resolution 60/251, which established the Human Rights Council. The Sub-Commission was composed of twenty-six members elected by the Commission on the basis of nominations of experts made by the UN member states and it

[219] See e.g. F. J. Hampson, 'An Overview of the Reform of the UN Human Rights Machinery', 7 *Human Rights Law Review*, 2007, p. 7.

[220] The Council also adopted at its first session in June 2006 the International Convention for the Protection of All Persons from Enforced Disappearances and the UN Declaration on the Rights of Indigenous Peoples. A Code of Conduct for Special Procedures Mandate-holders was adopted at the fifth session of the Council.

[221] See e.g. A. Eide, 'The Sub-Commission on Prevention of Discrimination and Protection of Minorities' in Alston, *United Nations and Human Rights*, p. 211; Tolley, 'Concealed Crack', pp. 437 ff.; J. Gardeniers, H. Hannum and C. Kruger, 'The UN Sub-Committee on Prevention of Discrimination and Protection of Minorities: Recent Developments', 4 HRQ, 1982, p. 353, and L. Garber and C. O'Conner, 'The 1984 UN Sub-Commission on Prevention of Discrimination and Protection of Minorities', 79 AJIL, 1985, p. 168. See also *UN Action*, pp. 23–4.

[222] See e.g. *UN Action*, p. 23. See also resolutions E/259, 1947; E/1371, 1949, and 17 (XXXVII), 1981.

was renamed the Sub-Commission on the Promotion and Protection of Human Rights in 1999.[223] Members served in their individual capacity for four-year terms[224] and the composition reflected an agreed geographical pattern.[225] The Sub-Commission produced a variety of studies by rapporteurs[226] and established a number of subsidiary bodies. The Working Group on Communications functioned within the framework of the resolution 1503 procedure, while the Working Group on Contemporary Forms of Slavery[227] and the Working Group on the Rights of Indigenous Populations[228] prepared material within the areas of their concern.[229] The Sub-Commission from 1987 produced an annual report listing all states that had proclaimed, extended or ended a state of emergency.[230]

The International Covenant on Economic, Social and Cultural Rights[231]

The International Covenant on Economic, Social and Cultural Rights was adopted in 1966 and entered into force in 1976. Article 2 provides that each state party undertakes to take steps to the maximum of its available resources 'with a view to achieving progressively the full realisation of the rights recognised in the present Covenant'. In other words, an evolving programme is envisaged depending upon the goodwill and resources of states rather than an immediate binding legal obligation with regard to the rights in question. The rights included range from self-determination (article 1), the right to work (articles 6 and 7), the right to social security (article 9), adequate standard of living (article 11) and education

[223] See E/1999/INF/2/Add.2.

[224] See ECOSOC resolution 1986/35 with effect from 1988. Before this, the term was for three years and originally for two years.

[225] See ECOSOC resolution 1334 (XLIV), 1968, and decision 1978/21, 1978.

[226] See e.g. the Capotorti Study, above, footnote 165, and the Ruhashyankiko Study, above, footnote 90. See also the Daes Study on the *Individual's Duties to the Community*, E/CN.4/Sub.2/432/Rev.2, 1983 and the Questiaux Study on *States of Emergency*, E/CN.4/Sub.2/1982/15, 1982.

[227] Resolution 11 (XXVII), 1974, established the Working Group on Slavery. Its name was changed in 1988: see resolution 1988/42. See K. Zoglin, 'United Nations Action Against Slavery: A Critical Evaluation', 8 HRQ, 1986, p. 306.

[228] See resolution 2 (XXXIV), 1981. See also E/CN.4/Sub.2/1982/33, and above, p. 298.

[229] See e.g. the S. Chernichenko and W. Treat Study on *The Administration of Justice and the Human Rights of Detainees: The Right to a Fair Trial*, E/CN.4/Sub.2/1994/24, 1994.

[230] See e.g. E/CN.4/Sub.2/1987/19/Rev.1; E/CN.4/Sub.2/1991/28 and E/CN.4/Sub.2/1995/20 and Corr. 1.

[231] See e.g. Craven, *Covenant*.

(article 13) to the right to take part in cultural life and enjoy the benefits of scientific progress and its applications (article 15).

Under the Covenant itself, states parties were obliged to send periodic reports to ECOSOC.[232] In 1978, a Sessional Working Group was set up, consisting of fifteen members elected by ECOSOC from amongst states parties for three-year renewable terms. The Group met annually and reported to the Council. It was not a success, however, and in 1985 it was decided to establish a new committee of eighteen members, this time composed of independent experts.[233] Accordingly in 1987 the new Committee on Economic, Social and Cultural Rights commenced operation.[234] But it is to be especially noted that unlike, for example, the Racial Discrimination Committee, the Human Rights Committee and the Torture Committee, the Economic Committee is not autonomous and it is responsible not to the states parties but to a main organ of the United Nations. As will be seen by comparison with the other bodies, the Economic Committee has at its disposal only relatively weak means of implementation.

The implementation of this Covenant faces particular difficulties in view of the perceived vagueness of many of the principles contained therein, the relative lack of legal texts and judicial decisions, and the ambivalence of many states in dealing with economic, social and cultural rights. In addition, problems of obtaining relevant and precise information have loomed large, not least in the light of the fact that comparatively few non-governmental organisations focus upon this area.[235]

The Committee initially met annually in Geneva for three-week sessions, though it now meets twice per year. Its primary task lies in

[232] See articles 16–22 of the Covenant, and *UN Chronicle*, July 1982, pp. 68–70. See generally on implementation B. S. Ramcharan, 'Implementing the International Covenants on Human Rights' in Ramcharan, *Human Rights: Thirty Years After the Universal Declaration*, p. 159; P. Alston, 'Out of the Abyss: The Challenge Confronting the New UN Committee on Economic, Social and Cultural Rights', 9 HRQ, 1987, p. 332; P. Alston and G. Quinn, 'The Nature and Scope of States Parties' Obligations under the International Covenant on Economic, Social and Cultural Rights', 9 HRQ, 1987, p. 156; P. Alston, 'The Committee on Economic, Social and Cultural Rights' in Alston, *United Nations and Human Rights*, p. 473; B. Simma, 'The Implementation of the International Covenant on Economic, Social and Cultural Rights' in *The Implementation of Economic, Social and Cultural Rights* (ed. F. Matscher), Kehl am Rhein, 1991, p. 75, and S. Leckie, 'The Committee on Economic, Social and Cultural Rights' in Alston and Crawford, *Future*, chapter 6.

[233] See ECOSOC resolution 1985/17.

[234] See P. Alston and B. Simma, 'First Session of the UN Committee on Economic, Social and Cultural Rights', 81 AJIL, 1987, p. 747, and 'Second Session of the UN Committee on Economic, Social and Cultural Rights', 82 AJIL, 1988, p. 603.

[235] See Alston, 'The Economic Rights Committee', p. 474.

examining states' reports, drawing upon a list of questions prepared by its pre-sessional working group. The problem of overdue reports from states parties applies here as it does with regard to other human rights implementation committees. The Economic Rights Committee adopted a decision at its sixth session, whereby it established a procedure allowing for the consideration of the situation of particular states where those states had not produced reports for a long time, thus creating a rather valuable means of exerting pressure upon recalcitrant states parties.[236] Additional information may also be requested from states parties where this is felt necessary.[237] The Committee also prepares 'General Comments', the second of which on international technical assistance measures was adopted at its fourth session in 1990.[238] The third general comment, adopted in 1991, is of particular interest and underlines that although the Covenant itself appears promotional and aspirational, nevertheless certain obligations of immediate effect are imposed upon states parties. These include the non-discrimination provisions and the undertaking to take steps which should be taken within a reasonably short time after the Covenant has entered into force for the state concerned and which should be 'deliberate, concrete and targeted as clearly as possible towards meeting the obligations recognised in the Covenant'. The Committee also emphasised that international co-operation for development, and thus for the realisation of economic, social and cultural rights, was an obligation for all states.[239] General Comment 4, adopted in 1991, discussed the right to adequate housing,[240] while General Comment 5, adopted in 1994, dealt with the rights of persons with disabilities.[241] General Comment 6, adopted in 1995, concerned the economic, social and cultural rights of older persons,[242] General Comment 16, adopted in 2005, concerned the equal treatment of men and women with regard to the enjoyment of all economic, social and cultural rights,[243] while General Comments 18 and 19, adopted in 2005 and 2007 respectively, concerned the right to work and the right to social security. The Committee also holds general discussions on particular

[236] See e.g. E/C.12/1994/20, p. 18. [237] *Ibid.*, pp. 16–18.
[238] See HRI/GEN/Rev.1, p. 45. [239] *Ibid.*, p. 48. [240] *Ibid.*, p. 53.
[241] E/1995/22, p. 99. On disabilities and human rights, see also the final report of Leandro Despouy, Special Rapporteur on Human Rights and Disability, of the Sub-Commission on Prevention of Discrimination and Protection of Minorities, E/CN.4/Sub.2/1991/31; General Assembly resolution 3447 (XXX) of 9 December 1975 adopting the Declaration of the Rights of Disabled Persons, and General Assembly resolution 37/52 of 3 December 1982 adopting the World Programme of Action concerning Disabled Persons, A/37/351/Add.1 and Corr. 1, chapter VIII.
[242] E/C.12/1995/16, adapted in 1995. [243] E/C.12/2005/4.

rights in the form of a 'day of general discussion'.[244] It cannot hear individual petitions, nor has it an inter-state complaints competence.[245]

Expert bodies established under particular treaties[246]

A number of expert committees have been established under particular treaties. They are not subsidiary organs of the UN, but autonomous, although in practice they are closely connected with it, being serviced, for example, by the UN Secretariat through the UN Centre for Human Rights in Geneva.[247] These committees are termed 'UN Treaty Organs'.

The Committee on the Elimination of Racial Discrimination[248]

Under Part II of the Convention on the Elimination of All Forms of Racial Discrimination, 1965, a Committee of eighteen experts was established

[244] At the ninth session, for example, in the autumn of 1993, the Committee discussed the right to health, E/1994/23, p. 56, while at the tenth session in May 1994 the role of social safety-nets as a means of protecting economic, social and cultural rights was discussed: see E/1995/22, p. 70. See also generally C. Dommen, 'Building from a Solid Basis: The Fourth Session of the Committee on Economic, Social and Cultural Rights', 8 NQHR, 1990, p. 199, and C. Dommen and M. C. Craven, 'Making Way for Substance: The Fifth Session of the Committee on Economic, Social and Cultural Rights', 9 NQHR, 1991, p. 93.

[245] Note, however, that at its seventh session in 1992, the Committee formally proposed that an optional protocol providing for some kind of petition procedure be drafted and adopted: see E/1993/22, pp. 87 ff., and Craven, *Covenant*, pp. 98 ff. See also E/C.12/1994/12 and E/C.12/1995/SR.50, December 1995. A working group was established in 2003 to achieve this and the matter is still under consideration: see e.g. A/HRC/8/WG.4/3, 2008.

[246] See e.g. Alston and Crawford, *Future*, and S. Lewis-Anthony and M. Scheinin, 'Treaty-Based Procedures for Making Human Rights Complaints Within the UN System' in Hannum, *Guide to International Human Rights Practice*, p. 43. See also M. O'Flaherty, *Human Rights and the UN: Practice Before the Treaty Bodies*, 2nd edn, The Hague, 2002.

[247] This link with the Secretariat has been termed ambiguous, particularly in the light of the difficulties in performing the two functions carried out by the Secretariat (Charter-based political activities and expert activities): see e.g. T. Opsahl, 'The Human Rights Committee' in Alston, *United Nations and Human Rights*, pp. 367, 388.

[248] See e.g. M. Banton, 'Decision-Taking in the Committee on the Elimination of Racial Discrimination' in Alston and Crawford, *Future*, p. 55; K. J. Partsch, 'The Committee on the Elimination of Racial Discrimination' in Alston, *United Nations and Human Rights*, p. 339; T. Meron, *Human Rights Law-Making in the United Nations*, Oxford, 1986, chapter 1; K. Das, 'The International Convention on the Elimination of All Forms of Racial Discrimination' in *The International Dimension of Human Rights* (eds. K. Vasak and P. Alston), Paris, 1982, p. 307; Lerner, *UN Convention* and 'Curbing Racial Discrimination – Fifteen Years CERD', 13 *Israel Yearbook on Human Rights*, 1983, p. 170; M. R. Burrowes, 'Implementing the UN Racial Convention – Some Procedural Aspects', 7 Australian YIL, p. 236, and T. Buergenthal, 'Implementing the UN Racial Convention', 12 *Texas International Law Journal*, 1977, p. 187.

consisting of persons serving in their personal capacity and elected by the states parties to the Convention.[249] States parties undertook to submit reports every two years regarding measures adopted to give effect to the provisions of the Convention to the Committee, which itself would report annually through the UN Secretary-General to the General Assembly. The Committee may make suggestions and general recommendations based on the examination of the reports and information received from the states parties, which are reported to the General Assembly together with any comments from states parties.[250] The Committee is also able to operate early warning measures and urgent procedures. Early warning measures are directed at preventing existing problems from escalating into conflicts, while urgent procedures are to respond to problems requiring immediate attention to prevent or limit the scale or number of serious violations of the Convention. Decisions, statements or resolutions may be adopted. Such action has been taken in relation to more than twenty states parties. The Committee has, for example, conducted two field visits in connection with the procedure and has drawn the attention of the Secretary-General, the Security Council or other relevant bodies to issues in relation to six states parties. For example, in 1993, the Committee, concerned at events in the former Yugoslavia, sought additional information on the implementation of the Convention as a matter of urgency.[251] This information was provided during the autumn of 1994 and the spring of 1995.[252]

The Committee has also established a procedure to deal with states whose reports are most overdue. Under this procedure, the Committee proceeds to examine the situation in the state party concerned on the basis of the last report submitted.[253] At its forty-ninth session, the Committee further decided that states parties whose initial reports were excessively overdue by five years or more would also be scheduled for a review of implementation of the provisions of the Convention. In the absence of an initial report, the Committee considers all information submitted by the state party to other organs of the United Nations or, in the absence of such material, reports and information prepared by organs of the United

[249] Rules of Procedure have been adopted, see CERD/C/35/Rev. 3 (1986), and are revised from time to time: see, for example, A/48/18, p. 137.

[250] Articles 8 and 9 of the Convention.

[251] A/48/18, paras. 496–506.

[252] See e.g. CERD/C/248/Add.1 (Federal Republic of Yugoslavia); CERD/C/249/Add.1 (Croatia) and CERD/C/247/Add.1 (Bosnia and Herzegovina). See also CERD/C/65/DEC.1 (Darfur, 2004); CERD/C/66/DAR/Dec.2 (Darfur, 2005); CERD/C/DEC/1 (USA, 2006); and CERD/C/DEC/SUR/5 (Suriname, 2006).

[253] See e.g. A/48/18, p. 20.

Nations. In practice the Committee also considers relevant information from other sources, including from non-governmental organisations, whether it is an initial or a periodic report that is seriously overdue.[254]

Under article 11, one state party may bring a complaint against another state party and the Committee will seek to resolve the complaint. Should the matter not be so settled, either party may refer it back to the Committee and by article 12 an ad hoc Conciliation Commission may be established, which will report back to the Committee with any recommendation thought proper for the amicable solution of the dispute.[255] In addition to hearing states' reports and inter-state complaints, the Committee may also hear individual petitions under the article 14 procedure. This, however, is subject to the state complained of having made a declaration recognising the competence of the Committee to receive and consider such communications. If such a declaration has not been notified by a state, therefore, the Committee has no authority to hear a petition against the state.[256] Under this procedure, consideration of communications is confidential and the Committee may be assisted by a five-person working group making recommendations to the full Committee. The Committee began hearing individual communications in 1984 and a number of important cases have now been completed.[257]

The Committee regularly meets twice a year and has interpreted articles of the Convention, discussed reports submitted to it, adopted decisions[258] and general recommendations,[259] obtained further information from states parties and co-operated closely with the International Labour Organisation and UNESCO. Many states have enacted legislation as a consequence of the work of the Committee and its record of impartiality is very good.[260] The Committee also receives copies of petitions and

[254] See e.g. A/57/18, p. 99. [255] Article 13.

[256] The provision entered into force on 31 December 1982 upon the tenth declaration.

[257] See e.g. the Report of the Committee for its forty-eighth session, A/48/18, 1994, pp. 105 and 130, and for the sixtieth and sixty-first sessions, A/57/18, p. 128. Note, for example, the case of *Durmic* v. *Serbia and Montenegro* concerning discrimination against Roma in Serbia, CERD/C/68/D/29/2003, 2006.

[258] For example, the decision adopted on 19 March 1993 requesting the governments of the Federal Republic of Yugoslavia (Serbia and Montenegro) and Croatia to submit further information concerning implementation of the Convention: see A/48/18, p. 112.

[259] See, for example, General Recommendation XII (42) encouraging successor states to declare that 'they continue to be bound' by the obligations of the Convention if predecessor states were parties to it; General Recommendation XIV (42) concerning non-discrimination, A/48/18, pp. 113 ff. and General Recommendation XXIX concerning discrimination based upon descent, A/57/18, p. 111.

[260] See e.g. Lerner, *UN Convention*.

reports sent to UN bodies dealing with trust and non-self-governing territories in the general area of Convention matters and may make comments upon them.[261] The general article 9 reporting system appears to work well, with large numbers of reports submitted and examined, but some states have proved tardy in fulfilling their obligations.[262] The Committee has published guidelines for states parties as to the structure of their reports.[263]

The Committee, in order to speed up consideration of states' reports, has instituted the practice of appointing country rapporteurs, whose function it is to prepare analyses of reports of states parties.[264] The Committee has also called for additional technical assistance to be provided by the UN to help in the reporting process, while it has expressed serious concern that financial difficulties are beginning to affect its functioning.[265]

The Human Rights Committee[266]

The International Covenant on Civil and Political Rights was adopted in 1966 and entered into force in 1976.[267] By article 2, all states parties undertake to respect and to ensure to all individuals within their territory and subject to their jurisdiction the rights recognised in the Covenant. These rights are clearly intended as binding obligations. They include the right of peoples to self-determination (article 1), the right to life (article 6),

[261] Article 15. See e.g. A/48/18, p. 107.

[262] See e.g. A/38/18, pp. 14–24. Note, for example, that by late 1983 fifteen reminders had been sent to Swaziland requesting it to submit its fourth, fifth, sixth and seventh overdue periodic reports, *ibid.*, p. 21. See also A/44/18, pp. 10–16.

[263] See CERD/C/70/Rev.1, 6 December 1983.

[264] See e.g. A/44/18, 1990, p. 7 and A/48/18, 1994, p. 149.

[265] A/44/18, p. 91.

[266] See e.g. Joseph *et al.*, *International Covenant*; Nowak, *UN Covenant*; Steiner, Alston and Goodman, *International Human Rights*, pp. 844 ff.; McGoldrick, *Human Rights Committee*; Opsahl, 'Human Rights Committee', p. 367; D. Fischer, 'Reporting under the Convention on Civil and Political Rights: The First Five Years of the Human Rights Committee', 76 AJIL, 1982, p. 142; Ramcharan, 'Implementing the International Covenants'; E. Schwelb, 'The International Measures of Implementation of the International Covenant on Civil and Political Rights and of the Optional Protocol', 12 *Texas International Law Review*, 1977, p. 141; M. Nowak, 'The Effectiveness of the International Covenant on Civil and Political Rights – Stock-taking after the First Eleven Sessions of the UN Human Rights Committee', 2 HRLJ, 1981, p. 168 and 5 HRLJ, 1984, p. 199. See also M. Bossuyt, *Guide to the Travaux Préparatoires of the International Covenant on Civil and Political Rights*, The Hague, 1987; F. Jhabvala, 'The Practice of the Covenant's Human Rights Committee, 1976–82: Review of State Party Reports', 6 HRQ, 1984, p. 81, and P. R. Ghandhi, 'The Human Rights Committee and the Right of Individual Communication', 57 BYIL, 1986, p. 201.

[267] See Rehman, *International Human Rights Law*, p. 83.

prohibitions on torture and slavery (articles 7 and 8), the right to liberty and security of the person (article 9), due process (article 14), freedom of thought, conscience and religion (article 18), freedom of association (article 22) and the rights of persons belonging to minorities to enjoy their own culture (article 27).

A Human Rights Committee was established under Part IV of the Covenant. It consists of eighteen independent and expert members, elected by the states parties to the Covenant for four-year terms, with consideration given to the need for equitable geographical distribution and representation of the different forms of civilisation and of the principal legal systems.[268] The Committee meets three times a year (in Geneva and New York) and operates by way of consensus.[269] The Covenant is primarily implemented by means of a reporting system, whereby states parties provide information on the measures adopted to give effect to the rights recognised in the Covenant. Initial reports are made within one year of the entry into force of the Covenant for the state in question and general guidelines have been issued.[270] The Committee has decided that subsequent reports would be required every five years,[271] and the first of the second periodic reports became due in 1983. The reports are discussed by the Committee with representatives of the state concerned (following upon the precedent established by the Committee on the Elimination of Racial Discrimination).[272] The practice used to be that Committee members would informally receive information from sources other than the reporting state provided the source is not publicly identified. This enabled the Committee to be more effective than would otherwise have been the case.[273] However, no doubt due to the ending of Soviet control in Eastern Europe and the demise of the Soviet Union, there appears to be no

[268] See articles 28–32 of the Covenant.

[269] See e.g. Nowak, 'Effectiveness', p. 169, 1981 3 HRLJ, 1982, p. 209 and 1984, p. 202. See also A/36/40, annex VII, Introduction; CCPR/C/21/Rev.1 and A/44/40, p. 173.

[270] See article 40 and CCPR/C/5. Supplementary reports may be requested: see Rule 70(2) of the provisional rules of procedure, CCPR/C/3/Rev.1. See now the Rules of Procedure 2001, CCPR/C/3/Rev.6 and the revised consolidated guidelines 2001, CCPR/C/66/GUI/Rev.2.

[271] See CCPR/C/18; CCPR/C/19 and CCPR/C/19/Rev.1. See also CCPR/C/20 regarding guidelines. Several states have been lax about producing reports, e.g. Zaire and the Dominican Republic, while the initial report of Guinea was so short as to be held by the Committee as not providing sufficient information: see Nowak, 'Effectiveness', 1984, p. 200.

[272] See Buergenthal, 'Implementing', pp. 199–201, and Fischer, 'Reporting', p. 145.

[273] Fischer, 'Reporting', pp. 146–7.

problem now about acknowledging publicly the receipt of information from named non-governmental organisations.[274] The Committee may also seek additional information from the state concerned. For example, in October 1992, the Committee adopted a decision requesting the governments of the Federal Republic of Yugoslavia (Serbia and Montenegro), Croatia and Bosnia-Herzegovina to submit a short report concerning measures to prevent *inter alia* ethnic cleansing and arbitrary killings.[275] Such reports were forthcoming and were discussed with the state representatives concerned and comments adopted. The Committee thereafter adopted an amendment to its rules of procedure permitting it to call for reports at any time deemed appropriate.[276] The Committee has also noted that the peoples within a territory of a former state party to the Covenant remain entitled to the guarantees of the Covenant.[277] Where states parties have failed to report over several reporting cycles, or request a postponement of their scheduled appearance before the Committee at short notice, the Committee may continue to examine the situation in the particular state on the basis of material available to it.[278]

Under article 40(4), the Committee is empowered to make such 'general comments as it may deem appropriate'. After some discussion, a consensus was adopted in 1980, which permitted such comments provided that they promoted co-operation between states in the implementation of the Covenant, summarised the experience of the Committee in examining states' reports and drew the attention of states parties to matters relating to the improvement of the reporting procedure and the implementation of the Covenant. The aim of the Committee was to engage in a constructive dialogue with each reporting state, and the comments would be non-country-specific.[279] However, in 1992, the Committee decided that at the end of the consideration of each state party's report, specific comments would be adopted referring to the country in question and such comments

[274] Such documents may now be officially distributed, rather than being informally made available to Committee members individually: see McGoldrick, *Human Rights Committee*, p. liii.

[275] CCPR/C/SR/1178/Add.1.

[276] New Rule 66(2), see CCPR/C/SR/1205/Add.1. See also S. Joseph, 'New Procedures Concerning the Human Rights Committee's Examination of State Reports', 13 NQHR, 1995, p. 5.

[277] See, with regard to former Yugoslavia, CCPR/C/SR.1178/Add.1, pp. 2–3 and CCPR/C/79/Add.14–16. See, with regard to the successor states of the USSR, CCPR/C/79/Add.38 (Azerbaijan). See also I. Boerefijn, 'Towards a Strong System of Supervision', 17 HRQ, 1995, p. 766.

[278] See e.g. A/56/40, vol. I, p. 25.

[279] CCPR/C/18.

would express both the satisfaction and the concerns of the Committee as appropriate.[280] These specific comments are in a common format and refer to 'positive aspects' of the report and 'principal subjects for concern', as well as 'suggestions and recommendations'.[281] The Committee has also adopted the practice, where a due report has not been forthcoming, of considering the measures taken by the state party in question to give effect to rights in the Covenant in the absence of a report but in the presence of representatives of the state and of adopting provisional concluding observations.[282]

The Committee has also adopted a variety of General Comments.[283] These comments are generally non-controversial. One interesting comment on article 6 (the right to life), however, emphasised the Committee's view that 'the designing, testing, manufacture, possession and development of nuclear weapons are among the greatest threats to the right to life', and that the 'production, testing, possession and deployment and use of nuclear weapons should be prohibited and recognised as crimes against humanity'.[284]

In April 1989, the Committee adopted a General Comment on the rights of the child, as the process of adopting the Convention on the Rights of the Child neared its climax. It noted the importance of economic, social and cultural measures, such as the need to reduce infant mortality and prevent exploitation. Freedom of expression was referred to, as was

[280] See A/47/40, p. 4.

[281] See, for example, the comments concerning Colombia in September 1992, CCPR/C/79/Add.2; Guinea in April 1993, CCPR/C/79/Add.20; Norway in November 1993, CCPR/C/79/Add.27; Morocco in November 1994, CCPR/C/79/Add.44; the Russian Federation in July 1995, CCPR/C/79/Add.54; Estonia in November 1995, CCPR/C/79/Add.59 and the United Kingdom in July 1995, CCPR/C/79/Add.55 and, relating to Hong Kong, in November 1995, CCPR/C/79/Add.57. Note that in September 1995, Mexico responded to the Committee's Concluding Comments upon its report by issuing Observations, CCPR/C/108.

[282] See Rule 70 of its Rules of Procedure 2005. The procedures are described, for example, in the 2005–6 Report of the Committee, A/61/40, paras. 49 ff. (2006)

[283] See e.g. T. Opsahl, 'The General Comments of the Human Rights Committee' in *Festschrift für Karl Josef Partsch zum 75*, Berlin, 1989, p. 273.

[284] CCPR/C/21/Add.4, 14 November 1984. Note that the International Court of Justice gave an Advisory Opinion on 8 July 1996 at the request of the General Assembly of the UN concerning the *Legality of the Threat or Use of Nuclear Weapons*, in which it was noted that the right not to be arbitrarily deprived of one's life applied also in hostilities. Whether a particular loss of life was arbitrary within the terms of article 6 would depend on the situation and would be decided by reference to the law applicable in armed conflict and not deduced from the terms of the Covenant itself, ICJ Reports, 1996, para. 25; 110 ILR, pp. 163, 190.

the requirement that children be protected against discrimination on grounds such as race, sex, religion, national or social origin, property or birth. Responsibility for guaranteeing the necessary protection lies, it was stressed, with the family, society and the state, although it is primarily incumbent upon the family. Special attention needed to be paid to the right of every child to acquire a nationality.[285]

In November 1989, an important General Comment was adopted on non-discrimination. Discrimination was to be understood to imply for the purposes of the Covenant:

> any distinction, exclusion, restriction or preference which is based on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms.[286]

Identical treatment in every instance was not, however, demanded. The death sentence could not, under article 6(5) of the Covenant, be imposed on persons under the age of eighteen or upon pregnant women. It was also noted that the principle of equality sometimes requires states parties to take affirmative action in order to diminish or eliminate conditions which cause or help to perpetuate discrimination prohibited by the Covenant. In addition, it was pointed out that not every differentiation constituted discrimination, if the criteria for such differentiation were reasonable and objective and if the aim was to achieve a purpose which was legitimate under the Covenant.[287]

Important General Comments on Minorities[288] and Reservations[289] were adopted in 1994. In 1997, the Committee noted in General Comment 26 that the rights in the Covenant belonged to the people living in the territory of the state party concerned and that international law did not permit a state which had ratified or acceded or succeeded to the Covenant to denounce it or withdraw from it,[290] while in General Comment 28 the Committee pointed out that the rights which persons belonging to minorities enjoyed under article 27 of the Covenant in respect of their language, culture and religion did not authorise any state, group or person

[285] A/44/40, pp. 173–5. [286] CCPR/C/21/Rev.1/Add.1, p. 3.
[287] *Ibid.*, p. 4. See also above, p. 286.
[288] HRI/GEN/1/Rev.1, 1995. See further above, p. 293
[289] CCPR/C/21/Rev.1/Add.6. See further below, p. 913. [290] A/53/40, annex VII.

to violate the right to the equal enjoyment by women of any Covenant rights, including the right to equal protection of the law.[291]

Under article 41 of the Covenant, states parties may recognise the competence of the Committee to hear inter-state complaints. Both the complainant and the object state must have made such declarations. The Committee will seek to resolve the issue and, if it is not successful, it may under article 42 appoint, with the consent of the parties, an ad hoc Conciliation Commission.[292]

The powers of the Human Rights Committee were extended by Optional Protocol I to the Civil and Political Rights Covenant with regard to ratifying states to include the competence to receive and consider individual communications alleging violations of the Covenant by a state party to the Protocol.[293] The individual must have exhausted all available domestic remedies (unless unreasonably prolonged) and the same matter must not be in the process of examination under another international procedure.[294] The procedure under the Optional Protocol is divided into several stages. The gathering of basic information is done by the Secretary-General and laid before the Working Group on Communications of the Committee, which recommends whether, for example, further information is required from the applicant or the relevant state party and whether the communication should be declared inadmissible. The procedure before the Committee itself is divided into an admissibility and a merits stage. Interim decisions may be made by the Committee and ultimately a 'final view' communicated to the parties.[295]

[291] CCPR/C/21/Rev.1/Add.10, 2000. General Comment 29 adopted in 2001 dealt with the question of non-derogable provisions, see CCPR/C/21/Rev.1/Add.11. Note also General Comment 32 concerning the right to equality before courts and tribunals and to a fair trial, CCPR/C/GC/32, 2007.

[292] The inter-state procedure has not been used to date.

[293] Signed in 1966 and in force as from 23 March 1976. See e.g. H. Steiner, 'Individual Claims in a World of Massive Violations: What Role for the Human Rights Committee?' in Alston and Crawford, *Future*, p. 15; P. R. Ghandi, *The Human Rights Committee and the Right of Individual Communication: Law and Practice*, Aldershot, 1998; A. de Zayas, H. Möller and T. Opsahl, 'Application of the International Covenant on Civil and Political Rights under the Optional Protocol by the Human Rights Committee', 28 German YIL, 1985, p. 9, and *Selected Decisions of the Human Rights Committee under the Optional Protocol*, New York, vol. I, 1985 and vol. II, 1990. Two states (Jamaica and Trinidad and Tobago) have denounced the Protocol.

[294] Article 5, Optional Protocol.

[295] See Nowak, 'Effectiveness', 1980, pp. 153 ff., and 1981 Report of Human Rights Committee, A/36/40, pp. 85–91.

An increasing workload, however, began to cause difficulties as the number of parties to the Optional Protocol increased. By mid-2006, 1,490 communications had been registered. Of these, 547 had been the subject of a final view (of which 429 concluded that a violation had occurred), 449 were declared inadmissible and 218 were discontinued or withdrawn, leaving 276 yet to be concluded.[296] In order to deal with the growth in applications, the Committee decided at its thirty-fifth session to appoint a Special Rapporteur to process new communications as they were received (i.e. between sessions of the Committee), and this included requesting the state or individual concerned to provide additional written information or observations relevant to the question of the admissibility of the communication.[297] The Committee has also authorised its five-member Working Group on Communications to adopt a decision declaring a communication admissible, providing there is unanimity.[298] The Committee may also adopt interim measures of protection under Rule 92 of its Rules of Procedure 2005. This has been used primarily in connection with cases submitted by or on behalf of persons sentenced to death and awaiting execution.[299] Such a request was made, for example, to Trinidad and Tobago in the *Ashby* case pending examination of the communication, but to no avail. After the individual was executed, the Committee adopted a decision expressing its indignation at the failure of the state party to comply with the request for interim measures and deciding to continue consideration of the case.[300] Where the state concerned has disregarded the Committee's decisions under Rule 92, the Committee has found that the state party has violated its obligations under the Optional Protocol.[301]

The Committee, however, is not a court with the power of binding decision on the merits of cases. Indeed, in instances of non-compliance with its final views, the Optional Protocol does not provide for an enforcement mechanism, nor indeed for sanctions, although follow-up techniques are being developed in order to address such problems.[302]

[296] Report of the Committee for 2005–6, A/61/40, para. 89 (2006).

[297] A/44/40, pp. 139–40. See also Rule 91 of the amended Rules of Procedure, *ibid.*, p. 180.

[298] *Ibid.*, p. 140.

[299] See, in particular, *Canepa* v. *Canada*, A/52/40, vol. II, annex VI, sect. K. See also *Ruzmetov* v. *Uzbekistan*, A/61/40, vol. II, p. 31 (2006) and *Boucherf* v. *Algeria*, *ibid.*, p. 312.

[300] A/49/40, pp. 70–1.

[301] See *Piandiong et al.* v. *The Philippines*, A/54/40, para. 420(b).

[302] Note that in October 1990, the Committee appointed a Special Rapporteur to follow up cases, CCPR/C/SR.1002, p. 8. See Rule 101 of the Rules of Procedure 2005. In 1994, the Committee decided that every form of publicity would be given to follow-up activities, including separate sections in annual reports, the issuing of annual press communiqués and the institution of such practices in a new rule of procedure (Rule 99)

A variety of interesting decisions have so far been rendered. The first group of cases concerned complaints against Uruguay, in which the Committee found violations by that state of rights recognised in the Covenant.[303] In the *Lovelace* case,[304] the Committee found Canada in breach of article 27 of the Covenant protecting the rights of minorities since its law provided that an Indian woman, whose marriage to a non-Indian had broken down, was not permitted to return to her home on an Indian reservation. In the *Mauritian Women* case[305] a breach of Covenant rights was upheld where the foreign husbands of Mauritian women were liable to deportation whereas the foreign wives of Mauritian men would not have been.

The Committee has also held that the Covenant's obligations cover the decisions of diplomatic authorities of a state party regarding citizens living abroad.[306] In the *Robinson* case,[307] the Committee considered whether a state was under an obligation itself to make provision for effective representation by counsel in a case concerning a capital offence, in circumstances where the counsel appointed by the author of the communication declines to appear. The Committee emphasised that it was axiomatic that legal assistance be available in capital cases and decided that the absence of counsel constituted unfair trial.

The Committee has dealt with the death penalty issue in several cases[308] and has noted, for example, that such a sentence may only be imposed in accordance with due process rights.[309] The Committee has also taken the view that where the extradition of a person facing the death penalty may expose the person to violation of due process rights in the receiving state, the extraditing state may be in violation of the Covenant.[310]

emphasising that follow-up activities were not confidential, A/49/40, pp. 84–6. See also A/56/40, vol. I, p. 131.

303 These cases are reported in 1 HRLJ, 1980, pp. 209 ff. See, for other cases, 2 HRLJ, 1981, pp. 130 ff.; *ibid.*, pp. 340 ff.; 3 HRLJ, 1982, p. 188; 4 HRLJ, 1983, pp. 185 ff. and 5 HRLJ, 1984, pp. 191 ff. See also Annual Reports of the Human Rights Committee, 1981 to date.

304 1981 Report of the Human Rights Committee, A/36/40, p. 166.

305 *Ibid.*, p. 134.

306 See e.g. the *Waksman* case, 1 HRLJ, 1980, p. 220 and the *Lichtensztejn* case, 5 HRLJ, 1984, p. 207.

307 A/44/40, p. 241 (1989).

308 See e.g. *Thompson* v. *St Vincent and the Grenadines*, A/56/40, vol. II, annex X, sect. H, para. 8.2.

309 See e.g. the *Berry*, *Hamilton*, *Grant*, *Currie* and *Champagnie* cases against Jamaica, A/49/40, vol. II, pp. 20, 37, 50, 73 and 136.

310 See the *Ng* case, concerning extradition from Canada to the US. The Committee found that there was no evidence of such a risk, A/49/40, vol. II, p. 189.

The Committee has also noted that execution by gas asphyxiation would violate the prohibition in article 7 of cruel and inhuman treatment.[311] The issue faced in the *Vuolanne* case[312] was whether the procedural safeguards in article 9(4) of the Covenant on Civil and Political Rights, whereby a person deprived of his liberty is to be allowed recourse to the courts, applied to military disciplinary detention. The Committee was very clear that it did. One issue of growing importance concerns the question of the extraterritorial application of human rights treaties, that is whether a state party to a particular human rights treaty is obliged to apply it outside of its own territory where it is acting abroad either by way of its state agents or organs or because it is in control of an area beyond its border. The Committee has consistently taken the view that the Covenant does apply in such circumstances, whether it be with regard to state agents acting abroad[313] or with regard to the obligations of Israel within the occupied territories.[314]

It is already apparent that the Committee has proved a success and is performing a very important role in the field of human rights protection.[315]

The Committee on the Elimination of Discrimination Against Women

The Commission on the Status of Women was established in 1946 as one of the functional commissions of ECOSOC and has played a role both in standard-setting and in the elaboration of further relevant instruments.[316] The Committee on the Elimination of All Forms of

[311] *Ibid.* [312] *Ibid.*, p. 249.

[313] See e.g. *López Burgos* v. *Uruguay*, case no. 52/79, 68 ILR, p. 29, or *Lilian Celiberti de Casariego* v. *Uruguay*, case no. 56/79, 68 ILR, p. 41, concerning the activities of Uruguayan agents in Brazil and Argentina respectively.

[314] See e.g. CCPR/C/79/Add.93, para. 10 and CCPR/C0/78/1SR, para. 11 (concluding observations on Israel's reports). This approach was affirmed by the International Court of Justice in the *Construction of a Wall* case, ICJ Reports, 2004, pp. 136, 178–9; 129, ILR, pp. 37, 97–8.

[315] The second optional protocol aimed at the abolition of the death penalty was adopted in 1990, while the desirability of a third optional protocol to the Covenant, concerning the right to a fair trial and a remedy, has been considered by the Commission on Human Rights: see E/CN.4/Sub.2.1994/24, Sub-Commission resolution 1994/35 and Commission resolution 1994/107.

[316] See ECOSOC resolutions 1/5 (1946), 2/11 (1946) and 48 (IV) (1947). See also L. Reanda, 'The Commission on the Status of Women' in Alston, *United Nations and Human Rights*, p. 265. The mandate of the Commission was revised by ECOSOC resolutions 1987/22 and

Discrimination Against Women was established under article 22 of the 1979 Convention on the Elimination of all Forms of Discrimination Against Women.[317] This Convention is implemented by means of states' reports. It is composed of twenty-three experts serving in individual capacities for four-year terms. It held its first regular session in October 1982 and at its second session examined the reports of seven states parties regarding measures taken to comply with the terms of the Convention. It reports annually to the UN General Assembly through ECOSOC.[318] The Committee has provided guidelines to states parties on reporting, whereby initial reports are intended to be detailed and comprehensive with subsequent reports being of an updating nature.[319] Since 1990, subsequent reports are examined first by a pre-sessional working group. Following discussion of a report, the Committee provides concluding comments. The Committee, in addition to hearing states' reports, may make suggestions and general recommendations, which are included in the report.[320] Since 1997 the process of adopting a general recommendation is preceded by an open dialogue between the Committee, non-governmental organisations and others regarding the topic of the general recommendation

1996/6. There is also an individual petition procedure by which complaints are considered by a Working Group on Communications which then reports to the Commission. The Commission in turn reports to ECOSOC.

317 This came into force in 1981. See R. Jacobson, 'The Committee on the Elimination of Discrimination against Women' in Alston, *United Nations and Human Rights*, p. 444; A. Byrnes, 'The "Other" Human Rights Body: The Work of the Committee on the Elimination of Discrimination Against Women', 14 *Yale Journal of International Law*, 1989, p. 1; M. Galey, 'International Enforcement of Women's Rights', 6 HRQ, 1984, p. 463, and M. Wadstein, 'Implementation of the UN Convention on the Elimination of All Forms of Discrimination against Women', 6 NQHR, 1988, p. 5. See also R. Cook, 'Women's International Human Rights Law', 15 HRQ, 1993, p. 230; *Human Rights of Women* (ed. R. Cook), Philadelphia, 1994; M. Freeman and A. Fraser, 'Women's Human Rights' in Herlin and Hargrove, *Human Rights: An Agenda for the Next Century*, p. 103; Rehman, *International Human Rights Law*, chapter 13; Steiner, Alston and Goodman, *International Human Rights*, pp. 175 and 541; J. Morsink, 'Women's Rights in the Universal Declaration', 13 HRQ, 1991, p. 229; H. Charlesworth and C. Chinkin, *The Boundaries of International Law: A Feminist Analysis*, Manchester, 2000, and M. Bustelo, 'The Committee on the Elimination of Discrimination against Women at the Crossroads' in Alston and Crawford, *Future*, p. 79.

318 See articles 17–21 of the Convention and the first Report of the Committee, A/38/45, and *UN Chronicle*, November 1983, pp. 65–86.

319 See CEDAW/C/7Rev.3 and with regard to reports submitted from 1 January 2003, www.un.org/womenwatch/daw/cedaw/guidelines.PDF.

320 Article 21.

and a discussion of a draft prepared by a Committee member. General Recommendation No. 5 called upon states parties to make more use of 'temporary special measures such as positive action, preferential treatment or quota systems to advance women's integration into education, the economy, politics and employment', while General Recommendation No. 8 provided that states parties should take further measures to ensure to women, on equal terms with men and without discrimination, the opportunity to represent their government at the international level.[321] General Recommendation No. 12 called upon states parties to include in their reports information on measures taken to deal with violence against women, while General Recommendation No. 14 called for measures to be taken to eradicate the practice of female circumcision. General Recommendation No. 19 (1992) dealt at some length with the problem of violence against women in general and specific terms, and General Recommendation No. 21 is concerned with equality in marriage and family relations.[322] In 1999, the Committee adopted a General Recommendation No. 24 on women and health. General Recommendation No. 25 was adopted in 2004 and concerned temporary special measures.[323]

The Committee, however, met only for one session of two weeks a year, which was clearly inadequate. This was increased to two sessions a year from 1997.[324] An Optional Protocol adopted in 1999 and in force as from December 2000 allows for the right of individual petition provided a number of conditions are met, including the requirement for the exhaustion of domestic remedies. In addition, the Protocol creates an inquiry procedure enabling the Committee to initiate inquiries into situations of grave or systematic violations of women's rights where it has received reliable information of grave or systematic violations by a state party of rights established in the Convention.[325] In recent years, the importance of women's rights has received greater recognition. The Vienna Declaration and Programme of Action adopted in 1993 emphasised that the human rights of women should be brought into the

[321] A/43/38 (1988). [322] HRI/GEN/1/Rev.1, 1994, pp. 72 ff.

[323] HRI/GEN/1/Rev.7, 2004, p. 282.

[324] Although the Committee met exceptionally for three sessions during 2002 to deal with backlog reports. However, see General Assembly resolution 60/230 concering the extension of meeting time in 2005 and 2006.

[325] See, for example, for an earlier view, R. Cook, 'The Elimination of Sexual Apartheid: Prospects for the Fourth World Conference on Women', *ASIL Issue Papers on World Conferences*, Washington, 1995, pp. 48 ff.

mainstream of UN system-wide activity and that women's rights should be regularly and systematically addressed throughout the UN bodies and mechanisms.[326] In the light of this, the fifth meeting of Chairpersons of Human Rights Treaty Bodies in 1994 agreed that the enjoyment of the human rights of women by each treaty body within the competence of its mandate should be closely monitored. Each of the treaty bodies took steps to examine its guidelines with this in mind.[327] It should also be noted, for example, that the Special Rapporteur on Torture was called upon by the Commission on Human Rights in 1994 to examine questions concerning torture directed disproportionately or primarily against women.[328] In addition, the General Assembly adopted a Declaration on the Elimination of Violence Against Women in February 1994,[329] and a Special Rapporteur on Violence against Women, its Causes and Consequences was appointed in 1994.[330] The International Labour Organisation established the promotion of equality of opportunity and treatment of men and women in employment as a priority item in its programme and budget for 1994/5.[331] The Committee on the Rights of the Child has also discussed the issue of the 'girl-child' and the question of child prostitution.[332]

[326] See Part II, Section 3, 32 ILM, 1993, p. 1678. See also the Beijing Conference 1995, Cook, 'Elimination of Sexual Apartheid'; the Beijing plus 5 process, see General Assembly resolution 55/71. In 2000, the General Assembly adopted resolution S-23/3 containing a Political Declaration and a statement on further actions and initiatives to implement the Beijing Declaration and Platform for Action.

[327] See HRI/MC/1995/2. See also the Report of the Expert Group Meeting on the Development of Guidelines for the Integration of Gender Perspectives into Human Rights Activities and Programmes, E/CN.4/1996/105, 1995. This called *inter alia* for the use of gender-inclusive language in human rights instruments and standards, the identification, collection and use of gender-disaggregated data, gender-sensitive interpretation of human rights mechanisms and education and the promotion of a system-wide co-ordination and collaboration on the human rights of women within the UN.

[328] See resolution 1994/37. See also the Report of the Special Rapporteur of January 1995, E/CN.4/1995/34, p. 8.

[329] Resolution 48/104, see 33 ILM, 1994, p. 1049. Note also the adoption of the Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women in June 1994, *ibid.*, p. 1534 and the March 2002 Joint Declaration by the Special Rapporteur on women's rights of the Inter-American Commission on Human Rights, the Special Rapporteur on Violence Against Women, its Causes and its Consequences of the UN Commission on Human Rights, and the Special Rapporteur on the Rights of Women in Africa of the African Commission on Human and Peoples' Rights which called for the elimination of violence and discrimination against women: see www.cidh.org/declaration.women.htm.

[330] See E/CN.4/2003/75.

[331] E/CN.4/Sub.2/1994/5, p. 6.

[332] See further below, p. 331.

The Committee Against Torture[333]

The prohibition of torture is contained in a wide variety of human rights[334] and humanitarian law treaties,[335] and has become part of customary international law. Indeed it is now established as a norm of *jus cogens*.[336] Issues concerning torture have come before a number of human rights organs, such as the Human Rights Committee,[337] the European Court of Human Rights[338] and the International Criminal Tribunal on the Former Yugoslavia.[339]

The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment was signed on 10 December 1984 and entered into force in 1987. It built particularly upon the

[333] See e.g. M. Nowak and E. McArther, *The UN Convention Against Torture: A Commentary*, Oxford, 2008; A. Byrnes, 'The Committee Against Torture' in Alston, *United Nations and Human Rights*, p. 509; R. Bank, 'Country-Oriented Procedures under the Convention against Torture: Towards a New Dynamism' in Alston and Crawford, *Future*, p. 145; Rehman, *International Human Rights Law*, chapter 15; N. Rodley, *The Treatment of Prisoners under International Law*, 2nd edn, Oxford, 1999; A. Boulesbaa, *The UN Convention on Torture and Prospects for Enforcement*, The Hague, 1999; M. Evans, 'Getting to Grips with Torture', 51 ICLQ, 2002, p. 365; J. Burgers and H. Danelius, *The United Nations Convention against Torture*, Boston, 1988; Meron, *Human Rights in International Law*, pp. 126–30, 165–6, 511–15; S. Ackerman, 'Torture and Other Forms of Cruel and Unusual Punishment in International Law', 11 *Vanderbilt Journal of Transnational Law*, 1978, p. 653; Amnesty International, *Torture in the Eighties*, London, 1984; A. Dormenval, 'UN Committee Against Torture: Practice and Perspectives', 8 NQHR, 1990, p. 26; Z. Haquani, 'La Convention des Nations Unies Contre la Torture', 90 RGDIP, 1986, p. 127; N. Lerner, 'The UN Convention on Torture', 16 *Israel Yearbook on Human Rights*, 1986, p. 126, and R. St J. Macdonald, 'International Prohibitions against Torture and other Forms of Similar Treatment or Punishment' in *International Law at a Time of Perplexity* (ed. Y. Dinstein), Dordrecht, 1987, p. 385.

[334] See e.g. article 5 of the Universal Declaration; article 7 of the Civil and Political Rights Covenant; article 3 of the European Convention on Human Rights; article 5 of the Inter-American Convention on Human Rights; article 5 of the African Charter on Human and Peoples' Rights; the UN Convention against Torture, 1984; the European Convention on the Prevention of Torture, 1987 and the Inter-American Convention to Prevent and Punish Torture, 1985.

[335] See e.g. the four Geneva Red Cross Conventions, 1949 and the two Additional Protocols of 1977.

[336] See e.g. *Ex parte Pinochet (No. 3)* [2000] 1 AC 147, 198; 119 ILR, p. 135 and the *Furundžija* case, 121 ILR, pp. 213, 260–2. See also *Al-Adsani* v. *UK*, European Court of Human Rights, Judgment of 21 November 2001, para. 61; 123 ILR, pp. 24, 41–2.

[337] See e.g. *Vuolanne* v. *Finland*, 265/87, 96 ILR, p. 649, and generally Joseph *et al.*, *International Covenant*, chapter 9.

[338] See e.g. *Selmouni* v. *France*, Judgment of 28 July 1999.

[339] See e.g. the *Delalić* case, IT-96-21, Judgment of 16 November 1998.

Declaration on the Protection of All Persons from being subjected to Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment adopted by the General Assembly in 1975.[340] Other relevant instruments preceding the Convention were the Standard Minimum Rules for the Treatment of Prisoners, 1955, the Code of Conduct for Law Enforcement Officers, 1979 (article 5) and the Principles of Medical Ethics, 1982 (Principles 1 and 2).[341]

Torture is defined in article 1 of the Convention against Torture to mean:

> [a]ny act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or the acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.

The states parties to the Convention are under duties *inter alia* to take measures to prevent such activities in territories under their jurisdiction (article 2), not to return a person to a country where he may be subjected to torture (article 3), to make torture a criminal offence and establish jurisdiction over it (articles 4 and 5),[342] to prosecute or extradite persons charged with torture (article 7) and to provide a remedy for persons tortured (article 14).

The Committee against Torture was established under Part II of the Convention against Torture, 1984 and commenced work in 1987. It consists of ten independent experts. In an interesting comment on the proliferation of international human rights committees and the dangers of inconsistencies developing, article 17(2) provides that in nominating experts, states parties should 'bear in mind the usefulness of nominating persons who are also members of the Human Rights Committee'.

[340] General Assembly resolution 3452 (XXX).

[341] Note also the Principles on the Protection of Persons under Detention or Imprisonment adopted by the General Assembly in 1989. See generally *Human Rights: A Compilation of International Instruments*, United Nations, New York, vol. I (First Part), 1993, Section H.

[342] See, as far as the UK is concerned, sections 134 and 135 of the Criminal Justice Act 1988.

The Committee receives states' reports (article 19), has an inter-state complaint competence (article 21) and may hear individual communications (article 22). In both the latter cases, it is necessary that the state or states concerned should have made a declaration accepting the competence of the Committee.[343] Article 20 of the Convention provides that if the Committee receives 'reliable evidence' that torture is being systematically practised in the territory of a state party, it may invite the state in question to co-operate in examining the evidence. The Committee may designate one or more of its members to make a confidential inquiry. In doing so, it shall seek the co-operation of the state concerned and, with the latter's agreement, such an inquiry may include a visit to its territory. The Committee will transmit the findings of the inquiry to the state, together with appropriate comments or suggestions. The proceedings up to this point are to be confidential, but the Committee may, after consulting the state, decide to include a summary account of the results in its annual report. This additional, if cautiously phrased, power may provide the Committee with a significant role.[344] It should be noted that states parties have the ability to 'opt out' of this procedure if they so wish at the time of signature or ratification, or accession.[345]

The conduct of the reporting procedure bears much resemblance to the practice of the UN Human Rights Committee.[346] Guidelines have been issued for states parties and the discussions with state representatives are held with a view to establishing a constructive dialogue. Many problems facing other treaty bodies also appear with regard to the Committee against Torture, for example, overdue reports and problems relating to implementation of the Convention generally. The Committee may also make comments on states' reports in the form of concluding observations[347] and may issue general comments.[348] Interim measures of protection may also

[343] See e.g. the Committee's report of Spring 2002, A/57/44, p. 82.

[344] Note e.g. the report of the Committee on Sri Lanka in this context, A/57/44, p. 59 (2002). See also E. Zoller, 'Second Session of the UN Commission against Torture', 7 NQHR, 1989, p. 250.

[345] Article 28(1). See e.g. A/57/44, p. 81.

[346] As at May 2006, the Committee had received a total of 194 reports, with 192 overdue: see A/61/44, p. 5 (2006).

[347] See e.g. A/61/44, pp. 6 ff. (2006).

[348] To date only one has been issued on the implementation of article 3 concerning deportation to states where there is substantial reason to fear torture: see A/53/44, annex IX.

be granted under Rule 108(1) and this is monitored by the rapporteurs for new complaints and interim measures.[349]

The first three cases before the Committee under article 22 were admissibility decisions concerning Argentinian legislation exempting junior military officers from liability for acts of torture committed during the 1976–83 period and its compatibility with the Torture Convention.[350] The Committee noted that there existed a general rule of international law obliging all states to take effective measures to prevent and punish acts of torture. However, the Convention took effect only from its date of entry (26 June 1987) and could not be applied retroactively to cover the enactment of legislation prior to that date. Therefore, the communications were inadmissible. However, the Committee did criticise the Argentinian legislation and stated that Argentina was morally bound to provide a remedy to the victims of torture.[351] In May 2002, the Committee revised its rules of procedure and established the function of a Rapporteur for follow-up of decisions on complaints submitted under article 22.[352] The Committee has held that where substantial grounds exist for believing that the applicant would be in danger of being subjected to torture, the expulsion or return of the applicant by the state party concerned to the state in which he might be tortured would constitute a violation of article 3 of the Convention.[353] The Committee has also emphasised that the risk of torture must be assessed on grounds that go beyond mere theory or suspicion. The risk need not be highly probable, but it must be personal and present. While the Committee does give considerable weight to findings of fact made by the organs of the state party concerned, it is not bound by these and has the power of free assessment of the facts arising in the circumstances of each case. It has been particularly underlined that the prohibition enshrined in article 3 of the Convention was an absolute one.[354] It has also been noted that where complaints of torture are made during court

[349] *Ibid*., pp. 82–3. See also A/57/44, p. 219.

[350] *OR, MM and MS* v. *Argentina*, communications nos. 1–3/1988. Decisions of 23 November 1989. See 5 *Interights Bulletin*, 1990, p. 12.

[351] The Committee has, however, held that where the effect of the violations continues after the date that the Convention comes into force for the state concerned and where those effects constitute a breach of the Convention, then the matter can be considered: see e.g. *AA* v. *Azerbaijan*, A/61/44, pp. 255, 259 (2006).

[352] See e.g. A/61/44, p. 86 (2006).

[353] *Khan* v. *Canada*, CAT/C/13/D/15/1994.

[354] See *Dadar* v. *Canada*, A/61/44, pp. 233 ff. (2006).

proceedings, it is desirable that they be elucidated by means of independent proceedings.[355] A complaint must be submitted by the alleged victim, or by a close relative or a duly authorised representative, and must first be declared admissible. Requirements include that the matter must not be before another tribunal, that domestic remedies have been exhausted and that the complaint must reach a 'basic level of substantiation'.[356]

An Optional Protocol to the Convention to enable the Committee through a new Subcommittee on Prevention to conduct regular visits to places of detention and make recommendations to states parties was adopted by the General Assembly in December 2002 and came into force in 2006. Under the Protocol, states parties must establish a 'national preventive mechanism' for the prevention of torture at the domestic level. Visits by the Subcommittee and the national preventive mechanism to any place under the state party's jurisdiction and control where persons are, or may be, deprived of their liberty must be permitted by the state concerned.[357]

In 1985, the United Nations Commission on Human Rights appointed a Special Rapporteur on Torture to examine questions relevant to torture and to seek and receive credible and reliable information on such questions and to respond to that information without delay.[358] The work of the rapporteur includes the sending of urgent appeals and an increasing number of country visits. He is directed to co-operate closely with the Committee against Torture.[359] The rapporteur also works with other UN officials. In 1994, for example, the rapporteur accompanied the Special Rapporteur on Rwanda on a visit to that country, while later that year the rapporteur accompanied the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions on a visit to Colombia.[360] The rapporteur produces an annual report.[361]

[355] *Parot* v. *Spain*, CAT/C/14/D/6/1990.

[356] *RT* v. *Switzerland*, A/61/44, pp. 249, 253 (2006). See also article 22 of the Convention and Rule 107(b) of the Rules of Procedure.

[357] See General Assembly resolution 57/199. [358] Resolution 1985/33.

[359] See e.g. E. Zoller, '46th Session of the United Nations Commission on Human Rights', 8(2) NQHR, 1990, pp. 140, 166.

[360] See E/CN.4/1995/34, pp. 6–7. See also the European Convention on the Prevention of Torture, below, p. 362, and the African guidelines on torture adopted in 2002, www.achpr.org/english/communiques/communique32_en.html and www.apt.ch/africa/rig/Robben20Island%20Guidelines.pdf.

[361] See e.g. A/62/221 (2007).

The Committee on the Rights of the Child[362]

The Convention on the Rights of the Child was adopted by the General Assembly on 20 November 1989.[363] It provides that in all actions concerning children, the best interests of the child shall be a primary consideration. A variety of rights are stipulated, including the inherent right to life (article 6); the right to a name and to acquire a nationality (article 7); the right to freedom of expression (article 13); the right to freedom of thought, conscience and religion (article 14); the right not to be subjected to arbitrary or unlawful interference with privacy, family, home or correspondence and the right to the enjoyment of the highest attainable standard of health (article 24).

States parties agree to take all appropriate measures to protect the child from all forms of physical and mental violence (article 19) and from economic exploitation (article 32) and the illicit use of drugs (article 33), and there are specific provisions relating to refugees and disabled children. In addition, states parties agree to respect the rules of international humanitarian law applicable to armed conflicts relevant to children (article 38). This provision was one response to the use of children in the Iran–Iraq war.

Article 43 of the Convention on the Rights of the Child provides for the establishment of a Committee. This Committee, which was elected in 1991, was originally composed of ten independent experts[364] and has the competence to hear states' reports (article 44). The Committee itself submits reports every two years to the General Assembly through ECOSOC. The Committee can recommend to the General Assembly that the Secretary-General be requested to undertake on its behalf studies on

[362] See e.g. T. Buck, *International Child Law*, London, 2005; G. Lansdown, 'The Reporting Procedures under the Convention on the Rights of the Child' in Alston and Crawford, *Future*, p. 113; Rehman, *International Human Rights Law*, chapter 14; *Revisiting Children's Rights: 10 Years of the UN Convention on the Rights of the Child* (ed. D. Fottrell), The Hague, 2000; D. McGoldrick, 'The UN Convention on the Rights of the Child', 5 *International Journal of Law and the Family*, 1991, p. 132; M. Santos Pais, 'The Convention on the Rights of the Child and the Work of the Committee', 26 *Israel Law Review*, 1992, p. 16, and Santos Pais, 'Rights of Children and the Family' in Herkin and Hargrove, *Human Rights: An Agenda for the Next Century*, p. 183. See also G. Van Bueren, *The International Law on the Rights of the Child*, Dordrecht, 1995, and *The United Nations Convention on the Rights of the Child* (ed. S. Detrick), Dordrecht, 1992.

[363] The Convention came into force on 2 September 1990. Note also the Declaration on the Rights of the Child adopted by the General Assembly in resolution 1386 (XIV), 1959 and the proclamation of 1979 as the International Year of the Child in resolution 31/169.

[364] The membership has increased to eighteen.

specific issues relating to the rights of the child, an innovation in the functions of such treaty bodies, and it can make suggestions and general recommendations (article 45). The Committee (like the Committee on Economic, Social and Cultural Rights) sets aside time for general discussions on particular topics in accordance with Rule 75 of its provisional rules of procedure. For example, at its second session in 1992, the Committee discussed the question of children in armed conflicts,[365] while at its fourth session, the problem of the economic exploitation of children was discussed.[366] A general discussion on the 'girl-child' was held at the eighth session of the Committee in 1995,[367] and one on the administration of juvenile justice at the ninth session.[368]

As part of the general reporting process, the Committee adopted an urgent action procedure at its second session. Provided that the state concerned has ratified the Convention, that the situation is serious and there is a risk of further violations, the Committee may send a communication to the state 'in a spirit of dialogue' and may request the provision of additional information or suggest a visit.[369] At its fourth session, the Committee established a working group to study ways and means whereby the urgent action procedure could be pursued effectively.[370] The Committee has produced a set of guidelines concerning states' reports[371] and a pre-sessional working group considers these reports and draws up a list of issues needing further clarification which is sent to the state concerned.[372] As is the case with other reporting mechanisms, the state whose report is being considered by the Committee is invited to send representatives to the appropriate meetings. After the process is completed, the Committee issues Concluding Observations in which both the positive aspects of the report considered and the problems identified are noted, together

[365] A/49/41, pp. 94 ff. This led to a recommendation to the General Assembly to request the Secretary-General to undertake a special study on the means to protect children in armed conflicts: see CRC/C/SR.72, p. 2 and resolution 48/157. This led to the adoption of the Optional Protocol on the Involvement of Children in Armed Conflict, General Assembly resolution 54/263, 25 May 2000, which entered into force on 12 February 2002. Note that the question of the protection of children in armed conflicts was referred to in the Vienna Declaration and Programme of Action, 1993, Part II, B, 4: see 32 ILM, 1993, p. 1680. See also G. Van Bueren, 'The International Legal Protection of Children in Armed Conflicts', 43 ICLQ, 1994, p. 809, and M. Happold, *Child Soldiers in International Law*, Manchester, 2005.

[366] A/49/41, pp. 99 ff.

[367] See CRC/C/38, p. 47. This led to the adoption of the Optional Protocol on the Question of the Sale of Children, Child Prostitution and Child Pornography: see General Assembly resolution 54/263 of 25 May 2000 which entered into force on 18 January 2002.

[368] See CRC/C/43, p. 64. [369] See CRC/C/SR.42, p. 2 and A/49/41, pp. 69–71.

[370] *Ibid.* [371] See CRC/C/5. [372] See e.g. CRC/C/121, 2002.