

United Nations protection of human rights

Section A: Mechanisms for human rights protection by United Nations bodies

E. Steinerte

R.M.M. Wallace

This Study Guide was prepared for the University of London by:

- Elina Steinerte LLB, LLM, PhD, Research Associate, Human Rights Implementation Centre, The Law School, University of Bristol.
- Rebecca Wallace MA, LLB, PhD, Professor and Director, Centre for Rural Childhood, Perth College, UHI.

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Chapter 2: Mechanisms established by UN human rights treaties

Introduction

This chapter starts by looking at United Nations protection of human rights within a historical context. The first indicators that the UN would adopt a human rights protection role are identified. We then highlight the steps taken by the UN, from spelling out rights and freedoms in the Universal Declaration of Human Rights (UDHR) to the legally binding treaty provisions of the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR).

We provide an overview of the existing human rights protection afforded by the UN human rights treaties and their respective enforcement mechanisms, highlighting the common features of such bodies. We conclude by looking at the General Comments and the other tools available to the treaty bodies.

Learning outcomes

By the end of this chapter and the relevant readings you should be able to:

- ☐ identify and discuss the relevant human rights provisions of the UN Charter
- ☐ explain and discuss the initial steps taken by the UN towards affording human rights protection
- ☐ identify the important substantive human rights protected in the ICCPR and ICESCR
- ☐ explain and discuss the relationship between the various constituent elements of the International Bill of Human Rights
- ☐ identify the treaty bodies established under the various UN human rights instruments
- ☐ identify the common characteristics of these bodies
- ☐ explain and discuss the principal characteristics of the individual complaints procedure
- ☐ outline the other monitoring processes employed by the treaty bodies.

Essential reading

- ☐ Steiner et al., Chapter 3: Civil and political rights; Chapter 4: Economic and social rights; and Chapter 10: Treaty bodies: the ICCPR Human Rights Committee.
- ☐ Rehman, Chapter 4: The Universal Declaration of Human Rights; Chapter 5: The International Covenant on Civil and Political Rights; and Chapter 6: The International Covenant on Economic, Social and Cultural Rights.
- ☐ Universal Declaration of Human Rights [appended to this Study Guide].

2.1 The International Bill of Human Rights

The term 'International Bill of Human Rights' encompasses the human rights provisions of the 1948 Universal Declaration of Human Rights and the two international Covenants on human rights: the UN Covenant on the Civil and Political Rights, its two Optional Protocols and the International Covenant on Economic, Social and Cultural Rights.

The focus of this course is the mechanisms for the protection of human rights that have developed within the framework of the UN. This means that a consideration of the historical context of the UN and the UN Charter itself is necessary.

The UN was created in the wake of the Second World War as part of intergovernmental efforts to reconstruct the international community. The Preamble to the UN Charter declares a cardinal principle of the UN as being:

to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small...

However the predominant guiding principle of the founding fathers of the UN was to establish an international framework which would prevent further occurrences of major armed conflict by the promotion of international peace and security and cooperation among nation states. This international community was premised on 'faith in fundamental human rights': equality, the rule of law, social progress and cooperation between nations.

Article 1(3) of the UN Charter identifies one of the organisation's purposes as being:

To achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion...

The UN Charter set a benchmark for a certain standard of treatment. The language employed in the Charter was general and states were not under an obligation to do anything other than 'pledge' pursuant to Article 56 of the UN Charter 'to take joint and separate action in cooperation with the organisation for the achievement of the purposes set forth in Article 55'.

These purposes are:

- (a) higher standards of living, full employment, and conditions of social progress and development;
- (b) solution of international economic, social, health, and related problems; and international cultural and educational co-operation; and
- (c) universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language or religion.

These were recognised as purposes which would bring about the stability and well-being necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and the self-determination of peoples.

The UN Charter made no attempt to define the terms 'human rights' and 'fundamental freedoms'. The only substantive human right to receive specific mention in the UN Charter is that of equal protection (Articles 1(3), 13(1)(b) and 55). It was silent on mechanisms for the enforcement of human rights and contented itself with states 'pledging'. However, each UN member state has undertaken certain obligations in respect of the main aims of the organisation, and 'pledge' certainly means a moral obligation. Moreover, under Article 62(2) of the UN Charter the Economic, Social and Cultural Council (ECOSOC) was charged with a general duty to make 'recommendations for the purpose of promoting respect for, and

observance of, human rights and fundamental freedoms for all'. In pursuit of this aim the ECOSOC created the Commission on Human Rights, which became the central UN organ in the human rights area.

Thus the UN Charter acknowledged human rights and their realisation and protection as being of international concern. However, as Rehman states: 'The Charter does not establish any particular regime of human rights protection.' The cardinal principle remained that of non-intervention in the affairs of UN member states.

2.1.1 The Universal Declaration of Human Rights

The Universal Declaration of Human Rights (UDHR) was adopted early in the life of the UN, by a General Assembly Resolution on 10 December 1948. It was drafted by the Commission on Human Rights. As a General Assembly resolution, the UDHR is not a legally binding instrument. That was not the intention; rather, in the words of Eleanor Roosevelt, Chair of the UN Commission on Human Rights and US Representative to the General Assembly, the UDHR was to act as a 'common standard of achievement for all peoples of all nations'.

The UDHR set down minimum standards in respect of a number of wide-ranging identified rights and freedoms. It contains 30 Articles relating to those rights and freedoms which are regarded as being every person's birthright.

Articles 1 and 2 are regarded as fundamental, underlying all human rights: the right to freedom and equality and to freedom from discrimination.

Articles 3–21 set out civil and political rights whereas Articles 22–27 refer to economic, social and cultural rights. The last three Articles call for a social and international order safeguarding the universal enjoyment of all human rights in which, *inter alia*, individuals have duties to the community.

The rights and freedoms set out in the UDHR were not enforceable, although today most would be recognised as customary international law and some even as *jus cogens*. However, the UDHR did represent the first attempt to afford comprehensive international protection for the individual. It also provided the foundation for two legally binding UN documents, the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR), which were opened for signature in 1966 and entered into force in 1976.

The UDHR also served as a blueprint to young independent states as they sought to establish constitutions and Bills of Rights. The UDHR has continued to evolve as a living instrument, and many of the rights and freedoms that it contains have become international customary law.

The ICCPR and the ICESCR heralded the next stage in the UN's protection of human rights – protection by way of a legally binding treaty.

2.1.2 The Covenant on Civil and Political Rights

The ICCPR sets out in considerable detail the obligations incumbent on contracting parties and emphasises that the rights detailed are to be enjoyed by all without discrimination. The exercise of a right may only be restricted in very limited circumstances such as times of recognised state emergency. Any such restraint must be provided by law and be necessary for a legitimate purpose, and certain rights may not be suspended in any circumstances – the so-called non-derogable rights. Such rights are those protected by Articles 6, 7, 8(i) and (ii), 11, 15, 16 and 18. Contracting parties are obliged to fulfil the Covenant immediately on ratification.

The ICCPR has two Optional Protocols. The first relates to the right of individual petition and is considered below in section 2.5.

The Second Optional Protocol

The Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty (1989) reinforces Article 6 of ICCPR and calls for the abolition of the death penalty. It was opened for signature in 1990 and entered into force on 11 July 1991, three months after receipt of the tenth instrument of ratification/accession.

2.1.3 The Covenant on Economic, Social and Cultural Rights

The focus of the ICESCR is on the rights identified in Articles 22–27 of the UDHR. Each contracting state is required to take steps to the maximum of its available resources ‘to achieve progressively the full realisation of the rights’ without ‘discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status’. Thus states are not required to comply **immediately**, nor is there a time deadline for compliance stipulated. Rather, states parties are obliged to strive towards fulfilment and show the progress they have made towards achieving this aim.

The substantive rights under both Covenants are examined in detail in Section B of this course.

2.1.4 Summary

The idea of human rights protection coming under the auspices of the UN was sown in the Preamble to the UN Charter. It was further reflected in the provisions of the UN Charter and the UDHR. Human rights were then spelled out in the two UN Covenants, the ICCPR and the ICESCR, which represented much refining of the rights and freedoms set forth in the UDHR. The relatively recent introduction of the Second Optional Protocol on the abolition of capital punishment highlights that human rights are not static; they continue to evolve.¹

¹ The latest example of the continuing development of international human rights is the Convention on the Rights of Persons with Disabilities – the first international human rights instrument of the twenty-first century. This was adopted on 13 December 2006, opened for signature on 30 March 2007 and entered into force on 3 May 2008. An Optional Protocol to the Convention, designed to expand the competence of the Committee of the Rights of Persons with Disabilities, was opened for signature on 30 March 2007 and likewise came into force on 3 May 2008.

2.2 Implementing international human rights treaties

Although the benefit of international human rights instruments should accrue to the individual, such instruments are addressed to states. Primary responsibility for giving effect to the international human rights standards flowing from them therefore clearly rests with the national authorities of each contracting state.

How the provisions of international treaties become part of a state’s municipal law is a matter of domestic law:

- Some states are **dualist** in their approach to international law, meaning that treaties must be transformed into domestic legislation (e.g. by way of an act of the domestic legislature) before their provisions will be considered part of the domestic legal system.
- The approach of other states is **monistic**: international treaties automatically become part of domestic law at the time a state accedes or ratifies the instrument.

These processes may allow an individual to claim the rights that the particular international human rights treaty protects. Such is the primary *raison d’être* of each international human rights treaty, as clearly any treaty is only as good as its implementation and enforcement. So it is not surprising that the international community has created ways of ensuring the effective implementation of international human rights treaties. We will look at those shortly. First, though, it is worth mentioning the development of national human rights institutions.

2.2.1 National human rights institutions

As we have seen, the practical task of protecting and promoting human rights is primarily a national one, for which each state must assume responsibility. In the context of delivering human rights to individuals, national governments play a particularly important role. The need to harness states in the realisation of human rights was reflected in the Economic and Social Council's call in 1946 for member states to consider 'the desirability of establishing information groups or local human rights committees within their respective countries to collaborate with them in furthering the work of the Commission on Human Rights'. Throughout the next four decades the issue of national institutions was raised on a number of occasions and in the 1980s the UN demonstrated active interest which culminated in the Commission on Human Rights holding a workshop with relevant national and regional stakeholders. The task of the workshop was to review patterns of cooperation between national institutions and international institutions such as the UN and its agencies, and to explore ways of increasing their effectiveness. The conclusions emerging from these discussions became known as the 1991 Paris Principles.

The concept of a national human rights institution refers specifically to a body whose functions are defined in terms of the promotion and protection of human rights. Such institutions share a number of similarities which serve to differentiate them from other national entities. National institutions fall generally into one of two categories, 'human rights commissions' and 'ombudspersons'. There is no single national model, but the Paris Principles set out a comprehensive series of recommendations on the role, composition, status and functions of national human rights instruments. These recommendations were subsequently endorsed by the Commission on Human Rights in March 1992 and by the General Assembly in resolution A/RES/48/134 of 20 December 1993. The Paris Principles essentially articulate the responsibilities of national human rights institutions and the principles by which they should operate. The number of national human rights institutions has increased extensively over the last decade and the number is now put at over 100.²

The UN's promotion of national human rights institutions recognises that the UN cannot function alone, that relevant stakeholders have to work together and that the role of national institutions complements those of the international system.

2.2.2 The problem of ensuring compliance

As we have seen, although there are other entities on the international stage, states remain the primary actors. Individuals do have limited procedural capacity but the extent of that capacity is determined by states.

International human rights instruments are addressed to states and as a rule treaties do not require a contracting state to bestow rights on individuals. The obligation imposed on a state by a human rights instrument is to take steps within its domestic law to meet the prescribed goals of that instrument: what is necessary is that a state brings its domestic law into line with international human rights standards.

This gives rise to a central problem in ensuring compliance in the field of human rights: while human rights law gives rights to individuals, the international legal system is still predicated on the rights and duties of states.

² The International Coordinating Committee of National Human Rights Institutions, the representative body of national human rights institutions (NHRIs), has established a Subcommittee on Accreditation from among its members which then accredits NHRIs as being in compliance with the Paris Principles. The National Institutions Unit within the OHCHR is the secretariat of the International Coordinating Committee. See: www.nhri.net

As Steiner et al. say:

For individuals whose human rights are being violated, and for the groups that seek to defend them, the effectiveness of the UN's human rights system depends to an important degree upon its ability to 'enforce' respect for the legal norms that originated within it.

'Enforcement' here is a difficult and controversial term. In UN vocabulary the only use of enforcement in the UN Charter is in respect of measures adopted pursuant to Chapter VII of the UN Charter. Enforcement if interpreted in this context would be synonymous with the use of force. An alternative use of the term enforcement in relation to human rights is one which extends to all measures designed to encourage respect for human rights. Although such an interpretation has the advantage of being open-ended, and thus could include recommendations and statements, it provides no criteria for assessing and evaluating the UN's performance.

The objective of the human rights treaty system is to ensure human rights protection at the national level through the implementation of the human rights obligations contained in the treaties. Accordingly, the effectiveness of the treaty system must be assessed by the extent of the national implementation of the recommendations resulting from constructive dialogue under reporting procedures, decisions under the four individual complaints procedures currently in operation and the outcome of inquiries. It must also be assessed by how successful the system has been in providing States with authoritative guidance on the meaning of treaty provisions, preventing human rights violations, and ensuring prompt and effective action in cases where such violations occur. The system's effectiveness should also be assessed by how far the output of these procedures has been integrated into all national, regional and international efforts to protect human rights.

(Concept Paper on the High Commissioner's Proposal for a Unified Standing Treaty Body, Report by the Secretariat HRI/MC/2006/2, 22 March 2006)

2.2.3 Monitoring compliance: overview of treaty bodies

It is obviously important that UN human rights instruments be assessed as to their impact on promoting and protecting the human rights of individuals who are the nationals of contracting parties.

Accordingly a number of mechanisms have been introduced in an attempt to monitor compliance with each human rights treaty. The main international human rights treaties have established special committees which have been specifically entrusted with the task of supervising the way countries abide by their treaty obligations. These treaty bodies, of which there are currently nine, have been created pursuant to the relevant UN human rights treaties, as follows:

- ☐ the Human Rights Committee (HRC), created under the ICCPR
- ☐ the Committee on Economic, Social and Cultural Rights (CESCR), created under the ICESCR
- ☐ the Committee on the Elimination of Racial Discrimination (CERD), created under the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD)
- ☐ the Committee on the Elimination of Discrimination against Women (CEDAW), created under the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW).

- the Committee Against Torture (CAT), created under the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT)
- the Subcommittee on Prevention of Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (SPT), created under the Optional Protocol to the Convention against Torture (OPCAT)
- the Committee on the Rights of the Child (CRC), created under the Convention on the Rights of the Child (CRC)
- the Committee on Migrant Workers (CMW), created under the International Convention on the Protection of the Rights of All Migrant Workers and Their Families (ICRMW)
- the Committee on the Rights of Persons with Disabilities (CRPD), created under the Convention on the Rights of Persons with Disabilities (CRPD).

Similarly, a Committee on Enforced Disappearances is set to be created under the International Convention for the Protection of All Persons from Enforced Disappearance, which was opened for signature on 20 December 2006.

Although these treaty bodies are created in accordance with the provisions of their respective treaties, they possess certain common features:

- All are composed of experts, who, although nominated from states parties to the respective treaty, serve in their individual capacity and thus do not report to their respective governments.

The number of experts on each treaty body differs, but all are experts of 'high moral standing and recognised competence in the field of the Convention' (Article 43(2) of the Convention on the Rights of the Child). This requirement, albeit slightly differently worded, is replicated in all other treaties identified above.

When elections of experts take place, due consideration must be given to achieving an equitable geographical distribution and gender and minority balance. The term of office for experts is usually four years. The experts do not receive any salary for their work, but receive secretarial support from the UN. They meet regularly; the number of meetings depends on the provisions of the relevant treaty.

- The functions and mandates of each treaty body are defined by the relevant treaty, but in general the treaty bodies are given tools for ensuring compliance with treaty provisions. These tools differ between the treaties, but can be categorised as periodic reporting and individual measures – individual communications, complaints or applications, country visits and so on.

In the following parts of this chapter these tools are examined in more detail.

Activities 2.1 and 2.2

2.1 You can deepen your understanding of the issues discussed above by researching the situation in your own country.

Is your country monistic or dualistic in its approach to implementing human rights instruments?

Does your country have an NHRI? Is it a Commission or Ombudsperson's institution? Has it been accredited by the International Subcommittee on Accreditation?

Find the website of your NHRI (where appropriate) and read its latest Annual Report.

What has been its engagement with the UN system?

2.2 What is the difference between self-executing and non-self executing treaties?

No feedback provided.

2.3 Reporting obligations and Concluding Observations

On becoming a party to a treaty, a state undertakes certain legal obligations and is legally bound to implement the rights set out in that treaty. As we have seen, the guarantee of a right is only good if there is compliance with the treaty. In other words, an individual can only derive actual benefit from the UN human rights treaty provisions if their state is implementing the provisions of the treaty.

Compliance with the treaty needs to be monitored, and to this end reporting procedures have been introduced. So as to establish how a contracting party is giving effect to the rights it has pledged to provide within its territory, all UN human rights treaties impose the obligation of periodic reporting upon states parties. This normally means that on becoming a party to a convention, a state must submit an initial report (normally a year after joining the treaty). Following this initial report, a state is obliged to submit periodic reports – how often varies according to the treaty. In these reports states are required to elaborate on ‘the measures they have adopted which give effect to the rights recognised herein and on the progress made in the enjoyment of those rights’ (Art. 40 of the ICCPR).

Each state party must show:

- what it has done to implement the rights envisaged by the treaty – this can be demonstrated by legislative initiatives, amendments to existing legislation, administrative and social policies, educational campaigns and so on
- the progress that has been made towards achieving the full enjoyment of the rights protected by the treaty.

This recognises that realisation of the rights may be progressive. To this end, the state’s previous report serves as a good benchmark for gauging what has been achieved subsequently. This allows the treaty body to engage in a continuous dialogue with a state, aimed at helping the state to achieve full implementation of its obligations under the treaty.

One of the most important aspects of the reporting system is the so-called ‘alternative’ or ‘shadow’ reports. The treaty bodies may receive information from other bodies, such as other UN agencies, international and local non-governmental organisations (NGOs), academic institutions and so on. This information may be presented in the form of reports – that is, alternative reports to those submitted by the states pursuant to their reporting obligations. The advantage of such reports is that they may contain information different from that submitted by the state and thus allow the treaty body to obtain a more balanced view of what is going on in the state and determine whether there are any omissions in the state’s report.

The treaty body may then present the state with a number of issues and questions based on the report submitted. It is at this stage that shadow reports are of paramount importance as they may provide the treaty body with information different from that contained in the state report. It is also quite common for questions asked of the state to be communicated to those organisations that have submitted shadow reports, thus providing them with an additional avenue of access to the treaty body.

Upon receipt of the state’s responses, the treaty body engages in a process called ‘constructive dialogue’ which effectively involves an examination of the state report and the answers the state has submitted in response

to the treaty body's questions. This normally happens in a session and, depending on its rules of procedure, the treaty body may invite state representatives to appear before it and answer any questions posed by the experts. Some treaty bodies also invite representatives of NGOs to participate in these sessions.

The outcome of the reporting process is a document called the Concluding Observations, which is produced by the treaty body. The Concluding Observations contain the evaluation of compliance with the treaty obligations by the particular state. They contain recommendations of ways in which states may achieve better protection of the rights enshrined in the treaty. Particular areas of concern are also identified and highlighted.

The Concluding Observations represent the treaty body's 'jurisprudence' and reflect its understanding and interpretation of the substantive rights contained in the treaty and the way these should be implemented. They are normally made public, so the Concluding Observations of the situation in one state can be a good point of reference for other states.

The treaty bodies may also use the reporting obligation of the countries to request ad hoc reports. Thus, for example, according to Article 9 of ICERD, states parties are obliged to submit initial reports within one year of the entry into force of the Convention for the state concerned. Thereafter the reports must be submitted every two years and whenever the Committee so requests.

The reporting process is complex and can be very difficult for a state party. This is not surprising as the scope of these treaties is wide, and deciding what type of information should be included and how detailed it should be presents difficult questions for a state.

Therefore, to assist with this task, the UN Secretary-General compiled, at the request of the General Assembly, Guidelines on The Form and Content of Reports to be submitted by States Parties to the Human Rights Treaties: HRI/GEN/2/Rev.2; 7 May 2004; see: [www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/255f04bfca51adba802568f6005bc482?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/255f04bfca51adba802568f6005bc482?Opendocument)

In a report from 2002, *Strengthening the United Nations: an agenda for further change*, the Secretary-General called on the human rights treaty bodies to standardise their various reporting requirements. The task of preparing harmonised guidelines eventually fell to the UN Secretariat. Draft harmonised guidelines on reporting under the international human rights treaties, including guidelines on an expanded core document and treaty-specific targeted reports, were produced. A revised version was subsequently published and in March 2005, in the Secretary-General's report *In Larger Freedom: towards development, security and human rights for all* (A/59/2005), it was recorded that 'harmonized guidelines on reporting to all treaty bodies should be finalized and implemented so that these bodies can function as a unified system' (para. 147).

Some treaty bodies have also developed their own guidelines. For example, CERD has produced General Guidelines Regarding the Form and Contents of Reports to be Submitted by State Parties: CERD/C/70/Rev.5, 5 December 2000; see: [www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/CERD.C.70.Rev.5.En?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/CERD.C.70.Rev.5.En?Opendocument)

Similarly, CAT has guidelines for initial reports – Guidelines on the Form and Content of Initial Reports Under Article 19 to be submitted by the State Parties to CAT: CAT/C/4/Rev.3, 18 July 2005; see: [www.unhchr.ch/tbs/doc.nsf/898586b1dc7b4043c1256a450044f331/a3bd1b89d20ea373c1257046004c1479/\\$FILE/G0542837.pdf](http://www.unhchr.ch/tbs/doc.nsf/898586b1dc7b4043c1256a450044f331/a3bd1b89d20ea373c1257046004c1479/$FILE/G0542837.pdf)

For an up-to-date (at time of writing) compilation of guidelines, see: Compilation of Guidelines on the Form and Content of Reports to be Submitted by States Parties to the International Human Rights Treaties HRI/GEN/2/REV.5, 29 May 2008. This contains guidelines for reports to be submitted to the Committee on Migrant Workers and harmonised guidelines on reporting under the international human rights treaties, including guidelines on a common core document.

2.4 Individual communications

Submission of reports by state parties allows the treaty body to monitor the general situation in the country and see what measures governments are taking to implement the obligations they have undertaken pursuant to their treaty obligations. However, this does not address individual cases specifically when rights of a particular person are infringed and a remedy is sought.

Therefore a number of UN human rights treaties have introduced special provisions for individual communications – in effect, individual complaints of human rights violations.

These treaties are:

- ☐ ICCPR – First Optional Protocol
- ☐ ICERD
- ☐ CAT
- ☐ ICRMW
- ☐ CEDAW – Optional Protocol
- ☐ CRPD – Optional Protocol.

However, by becoming a party to a treaty, the state party does **not** automatically accept the individual complaints procedure. This can be done by either ratifying an optional protocol, as in the cases of the ICCPR and CEDAW, or by making a specific declaration accepting the individual complaints system, as with CAT, ICERD and the ICRMW.

Once again, each of these treaties contains provisions specifying how its individual complaints system operates, but there are some common features:

- ☐ In general, domestic remedies must have been exhausted for a communication to be held admissible. This rule respects the general principle of state sovereignty and provides each state party with the possibility of addressing the problem domestically before involving the international mechanism. However, if the applicant can show that the domestic remedy will be ineffective (for example, unduly long and cumbersome), the treaty body may still accept the communication.
- ☐ The communication must not be under consideration by any other international or regional human rights body or be subject to an international settlement procedure.
- ☐ The communication must not be anonymous.
- ☐ The communication must be submitted by a victim of the violation. This means that complaints of an *actio popularis* nature³ are not admissible and the applicant must show how his/her rights have been infringed. However, this does not mean that a communication cannot be submitted on someone's behalf. This can be done with authorisation from a victim, or even without explicit authorisation where the

³ Literally, a 'popular complaint'; when the complaint is not brought by or on behalf of a person who has been directly affected by the violation, but rather by 'potential' victims.

vicarious complainant has a close relationship to the victim. It should be noted that some treaties, for example the Optional Protocol to CEDAW, also allow communications from groups of victims (see Article 2).

- Communications which the treaty body deems to be an abuse of the right to individual complaint or to be incompatible with the provisions of the treaty are not considered. Thus the communication must be substantiated.

These criteria must be satisfied before a communication is declared admissible by the treaty body. The fact that a treaty body accepts a communication for consideration does not mean it is admissible – it may consider a communication and even request further information either from the author of the communication or from the state against which the allegation is made, or both, before deciding the admissibility question.

Once a communication is declared admissible, the treaty body moves to the consideration of the merits of the case. The state against which an allegation is made is normally requested to submit its considerations and explanations concerning the case. When a hearing takes place, normally the author of the complaint and the state representatives are present.

The treaty bodies have the right to impose interim measures of protection during either the admissibility stage or the merits stage of the communication. This means that the treaty body may request the state party concerned to take steps to avoid possible irreparable damage to the alleged victim of the alleged violation; for example, if a communication concerns the death penalty, the treaty body may issue interim measures of protection requesting the state party to stay the execution. This way, the person is offered protection prior to the decision of the treaty body, but without prejudging the treaty body's final decision.

As the final stage of the communication process, having considered the merits of the complaint, the treaty body then communicates its views to the parties concerned. The views of the treaty body are not, strictly speaking, legally binding. However, the state party will have expressly consented to the procedure of individual complaints by ratifying a separate international treaty or making a specific declaration to that effect, so it would be somewhat at odds for it to disregard the findings of the treaty body, having accepted the right for individual communication. Furthermore, the accumulated decisions of the treaty bodies in relation to individual petitions are often referred to as 'jurisprudence'.

Activity 2.3

How many human rights treaties has your country ratified? Has it accepted the right of individual communication for any of these treaties? Does any jurisprudence exist in relation to individual complaints against your country?

Find and read the latest report your country has submitted to one of the treaty bodies.

No feedback provided.

2.4.1 Summary

The foregoing is a general description of the individual communications or complaints procedure. However, it should be noted that each of the treaty bodies has established its own rules of procedure for dealing with individual complaints and their respective treaties also prescribe specific rules.

The individual complaints procedures available under various UN human rights treaties have been extensively used, but by far the most frequently used has been that available before the Human Rights Committee. These individual complaints and the findings of the treaty bodies contribute to the body of 'jurisprudence' under each of the treaties as these, like the country reports and Concluding Observations, represent the most authoritative interpretation of the treaty concerned.

2.5 Inter-state complaints

The inter-state complaints procedure is very similar to the individual complaints procedure. This procedure allows one state party to complain to the treaty body that another state party has failed to comply with its obligations under a treaty.

This procedure is available under the ICCPR, ICERD, CEDAW, CAT and the ICRMW.

CAT and the ICCPR require that states parties make specific declarations accepting the right of the treaty body to receive such inter-state complaints. However, in the case of ICERD such a separate declaration is not necessary.

In contrast to the individual complaints procedure, this procedure has never been used in respect of any of the UN human rights treaties – possibly because such inter-state complaints could jeopardise relations between states.

2.6 General Comments and other mechanisms available to the treaty bodies

Periodic reporting and the complaints systems are the two most common mechanisms for ensuring and monitoring state compliance with obligations imposed by UN human rights treaties. However, other devices have been employed by various treaty bodies, including among others General Comments and inquiries.

2.6.1 General Comments

The treaty bodies have developed the practice of publishing their interpretation of the provisions of the human rights treaties that they monitor. All the treaty bodies described in this section, apart from the Subcommittee against Torture and the Committee on Migrant Workers, have issued such 'General Comments', although some, such as CEDAW, call them 'General Recommendations'.

In essence, General Comments present the views of the treaty body about the rights contained in the relevant treaty, and constitute the most authoritative interpretation of the substantive rights contained in the treaty. They thus represent another important source of information for states parties in guiding their understanding of the obligations they have undertaken.

General Comments cover a wide range of subjects, including a comprehensive interpretation of substantive provisions, such as the right to life or the right to adequate food, and general guidance on the information that should be submitted in state reports relating to specific articles of the treaties. They have also dealt with wider cross-cutting issues, including, among others, the role of national human rights institutions, the rights of persons with disabilities, violence against women and the rights of minorities.

For example, pursuant to Article 40(4) of the ICCPR, the Human Rights (HR) Committee ‘shall transmit... such general comments as it may consider appropriate... to the states parties’. On the basis of Article 40(4), the HR Committee issues General Comments that are not specific to particular states. Comments have concerned both procedural matters and the HR Committee’s interpretation of the guarantee provided by the ICCPR. In the former category, the HR Committee has issued a General Comment on the information required from states in the reporting process, while substantive issues addressed have included the right to life and freedom from torture.

General Comments have been utilised to address the vagueness and open-ended nature which characterises so many international human rights instruments. (Indeed, Article 40(4) of the ICCPR, cited above, is itself notably terse.)

The reception given to General Comments has been somewhat varied. They have often been regarded as authoritative interpretations of the relevant treaty norms, but an alternative view holds that they are a de facto equivalent of Advisory Opinions which are to be given cognisance but no more than that. They have also been seen as broad, unsystematic statements not meriting any particular legal weight. These diverging views are reflected in the ways in which governments have responded to General Comments. Some view them as an attempt to attribute to the treaty provisions a meaning they do not possess. However, as Steiner et al. observe:

[T]his is a double-edged sword in the sense that while it reflects governmental dissent, both from the specifics of the Comment in question, and challenges the proposition that the committees have a powerful and legitimate interpretative weapon at their disposal, it also draws attention to the relevant interpretation and helps to establish it as a benchmark against which alternative interpretations will be forced to compete at something of a disadvantage.

The General Comments that have emanated from specific treaty bodies will be discussed where relevant in Sections B and C of this course.

2.6.2 Inquiries

Some of the treaty bodies are empowered to initiate inquiries. The Optional Protocol to CEDAW provides the Committee on the Elimination of Discrimination Against Women with the right to initiate inquiries if it has received reliable information attesting to well-founded instances of serious or systematic violation of Convention rights.

Similarly, CAT provides the Committee against Torture with the right to initiate inquiries if it has received reliable information on the commission of an act of torture.

Both CAT and the Optional Protocol to CEDAW give states a right to opt out from this at the time of ratification or accession.

2.6.3 The early warning system

This procedure is envisaged in the working paper adopted by CERD in 1993 (see: <http://www2.ohchr.org/english/bodies/cerd/early-warning.htm#about>, which contains a link to the paper). It is designed to help the Committee on the Elimination of Racial Discrimination develop measures to prevent and respond more effectively to violations of ICERD. Early warning measures are designed to prevent existing problems from escalating into conflicts, and can also include confidence-building measures to identify and support whatever strengthens and reinforces racial tolerance, particularly to prevent a resumption of conflict where it has previously occurred.

2.6.4 Visits

OPCAT created a Subcommittee on the Prevention of Torture (SPT) and provides for it to undertake regular visits to all places of deprivation of liberty under the jurisdiction and control of a state party that has signed the Optional Protocol, to monitor conditions of detention and treatment of those deprived of their liberty with the aim of issuing recommendations to the respective authorities and engaging in a dialogue with the relevant authorities on how to implement these recommendations.⁴

2.6.5 Other mechanisms

There are also other mechanisms devised by some treaty bodies. Thus, for example, the Committee on the Elimination of Racial Discrimination holds thematic discussions about issues related to racial discrimination such as the prevention of genocide. See: Thematic Discussion on the Prevention of Genocide, CERD/C/SR.1683 of 7 March 2005; available at: [http://www.unhchr.ch/tbs/doc.nsf/898586b1dc7b4043c1256a450044f331/327f813ccde22c2dc1256fc000397f77/\\$FILE/G0540585.pdf](http://www.unhchr.ch/tbs/doc.nsf/898586b1dc7b4043c1256a450044f331/327f813ccde22c2dc1256fc000397f77/$FILE/G0540585.pdf)

Similarly, the Committee on the Rights of the Child holds days of general discussion. The purpose of these discussions is to facilitate a better understanding of the contents and implications of the Convention on the Rights of the Child as they relate to specific articles or topics.

The General Comments and other mechanisms identified above add to the body of 'jurisprudence' of each of the treaty bodies in that they provide the interpretation of the duties that states have undertaken by becoming parties to a particular treaty.

⁴ Note that there is also provision for visits under Article 20 of the Convention against Torture as part of a Committee inquiry, but such visits may only be undertaken at the invitation of the state concerned; visits under OPCAT are by right.

Summary

This chapter has considered UN protection of human rights within a historical context and has then considered the treaty mechanisms established. The common characteristics of such bodies have been identified. The right of individual communication has been explained, and the use of General Comments and other monitoring tools highlighted.

Reminder of learning outcomes

Now that you have concluded this chapter you should be able to:

- ☐ identify and discuss the relevant human rights provisions of the UN Charter
- ☐ explain and discuss the initial steps taken by the UN towards affording human rights protection
- ☐ identify the important substantive human rights protected in the ICCPR and ICESCR
- ☐ explain and discuss the relationship between the various constituent elements of the International Bill of Human Rights
- ☐ identify the treaty bodies established under the various UN human rights instruments
- ☐ identify the common characteristics of these bodies
- ☐ explain and discuss the principal characteristics of the individual complaints procedure
- ☐ outline the other monitoring processes employed by the treaty bodies.

Useful further reading

Documents

- ☐ The Universal Declaration of Human Rights, UN General Assembly Res. 217 (LXIII) 10 December 1948, Art. 14
- ☐ ECOSOC Res. 1503. Available at: [www.unhchr.ch/huridocda/huridoca.nsf/\(Symbol\)/1970.1503.En?OpenDocument](http://www.unhchr.ch/huridocda/huridoca.nsf/(Symbol)/1970.1503.En?OpenDocument)

- ECOSOC Res. 2000/3. Available at: [www.unhcr.ch/huridocda/huridoca.nsf/\(Symbol\)/E.RES.2000.3.En?OpenDocument](http://www.unhcr.ch/huridocda/huridoca.nsf/(Symbol)/E.RES.2000.3.En?OpenDocument)
- UN Fact Sheet No. 7/ Rev.1, Complaints Procedure. Available at: www.ohchr.org/Documents/Publications/FactSheet7Rev.1en.pdf

Articles

- Hampson, F.J. 'An Overview of the Reform of the UN Human Rights Machinery' *Human Rights Law Review* (2007) 7:1, pp.7–27.
- Kayess, R. and P. French 'Out of Darkness into Light? Introducing the Convention on the Rights of Persons with Disabilities' *Human Rights Law Review* (2008) 8:1, pp.1–34.

Self-assessment questions

- To what extent are human rights mentioned in the UN Charter?
- Which two UN instruments had their origin in the UDHR?
- What constitutes the International Bill of Human Rights?
- What does the Second Optional Protocol to the ICCPR seek to do?
- How many treaty bodies are there?
- Who is eligible for membership of a treaty body?
- Where are the functions and mandates of a treaty body set out?
- When is the first report from a state normally required by a treaty body?
- What must a state show in its report?
- Why are shadow reports important?
- What is meant by 'constructive dialogue'?
- Why are Concluding Observations important?
- Which treaties provide for individual communication?
- What conditions must be satisfied before an individual communication can be examined?
- When may interim measures be requested?
- What other tools have been employed to assist treaty bodies in monitoring human rights?

Sample examination question

The protection of human rights depends upon an effective monitoring mechanism. Consider the steps taken by the UN to achieve this with regard to those human rights guaranteed by UN human rights treaty instruments.

Advice on answering the question

Recall the advice given on answering examination essays in the introduction, and read it again if you need to.

Start by considering what is meant by an effective monitoring mechanism and why such a mechanism is important.

You should then address the mechanisms that have been provided by the various UN instruments and highlight what has been adopted as the norm: the committee.

You should also consider the right of individual communication and the role of tools such as General Comments which have an important monitoring role.

Conclude by evaluating the development of this aspect of the UN protection system since its inception.