CHAPTER 12

# HUMAN RIGHTS

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THE international protection of human rights has become a fundamental aim of modern international law in the century since states began creating permanent international organizations. During the early period, international law was defined as the law governing the relations between states (horizontal relations) and thus excluded the relations between a state and its citizens and residents, this being considered a matter exclusively within the domestic jurisdiction of states (vertical relations). The development of human rights as a distinct branch of international law is thus relatively recent, although a limited set of legal norms designed to protect individuals against mistreatment has been in existence since the beginnings of the modern law of nations in the seventeenth century.[1]

Even a cursory review of human rights law demonstrates the rapid expansion of this field since the end of World War II.[2] During this period, nearly all global organizations have adopted human rights standards and addressed human rights violations by member states.[3] Supplementing the global efforts, regional organizations in the Americas, Europe, Africa, and more recently the Arab League,

[1] For an extensive treatment of the history of human rights, see Louis B. Sohn and Thomas Buergenthal (eds.), *International Protection of Human Rights* (Indianapolis: Bobbs-Merrill, 1973).

[2] See Louis B. Sohn, "The New International Law: Protection of the Rights of Individuals Rather than States," *American University Law Review* 32 (1982): 1.

[3] Ibid., 19–20.

Association of Southeast Asian Nations, and other regional bodies,[4] have elaborated their own legal texts, institutions, and procedures for the promotion and protection of human rights.[5] As a consequence no state today can legitimately claim that its treatment of those within its jurisdiction is a matter solely of domestic concern.

This chapter examines the express and implied powers of international organizations to address human rights issues, standard-setting by such organizations, and the structure and functioning of the bodies and institutions they have established to consider this topic. Standard-setting in itself constitutes a multifaceted set of processes that has resulted in the complex web of treaties, political commitments ("soft law"), and jurisprudence that make up modern human rights law.

The chapter is focused on intergovernmental organizations, but the discussion will refer at times to the vast array of civil society and nongovernmental organizations (NGOs) that have contributed immeasurably to the development of human rights law, in particular through their formal and informal participation in the work of intergovernmental organizations, their subsidiary organs, and treaty bodies.[6] In fact, the creation of some NGOs and civil society networks preceded and to a certain extent stimulated the formation of intergovernmental organizations.[7]

In order to address the topic of this chapter both broadly and in some depth, the discussion will exclude, for the most part, international humanitarian law (IHL) and international criminal law. No doubt this division is somewhat artificial, because

[4] The Organisation of Islamic Cooperation (OIC), Mercado Común del Sur (Mercosur), the Economic Community of West African States (ECOWAS), and the European Union (EU).

[5] See generally R. Blackburn and J. Polakiewicz (eds.), *Fundamental Rights in Europe: The European Convention on Human Rights and Its Member States, 1950–2000* (Oxford: Oxford University Press, 2001); Rachel Murray, *Human Rights in Africa: From the OAU to the African Union* (Cambridge: Cambridge University Press, 2004); Fatsah Ouguergouz, *The African Charter on Human and Peoples' Rights: A Comprehensive Agenda for Human Dignity and Sustainable Democracy in Africa* (The Hague: Martinus Nijhoff Publishers, 2003); Christof Heyns, "The African Regional Human Rights System: The African Charter," *Penn State Law Review* 108 (2004): 679; Dinah Shelton, "The Inter-American Human Rights System," in *Guide to International Human Rights Practice*, ed. Hurst Hannum, 4th ed. (Ardsley, N.Y.: Transnational Publishers, 2004), 121.

[6] As of June 2013, more than 3,700 NGOs had been granted consultative status with the United Nations. United Nations Dept of Economic and Social Affairs: NGO Branch, http://esango.un.org/civilsociety/displayConsultativeStatusSearch.do?method=search&sessionCheck=false.

[7] See Jenny Martinez, "The Anti-Slavery Movement and the Rise of International Non-Governmental Organisations," in *The Oxford Handbook of International Human Rights Law*, ed. D. Shelton (Oxford: Oxford University Press, 2013); James T. Shotwell (ed), *The Origins of the International Labor Organization* (New York: Columbia University Press, 1934).

both humanitarian law[8] and international criminal law[9] increasingly overlap in substance and process with human rights law.

## Organizations and Activities Prior to the United Nations

As the history of international organizations reveals,[10] the emergence and proliferation of international organizations is largely a phenomenon of the last century. Nonetheless, relatively frequent ad hoc or periodic meetings of states took place earlier, nearly all of them at the regional level. From the beginning, matters were discussed that are today encompassed by human rights law, often due to their links with issues of peace and security. With the formation of permanent intergovernmental organizations, some of these issues were within the mandates of the new bodies, as illustrated in this section. Nonetheless, the definition of international law remained one that excluded individuals and other nonstate actors from its scope,

[8] Human rights bodies increasingly apply humanitarian law as *lex specialis* when addressing human rights issues in the context of internal or international armed conflicts. See, e.g., *Abella v Argentina*, Case 11.137, Inter-Am Comm'n HR, Report No. 55/97, OEA/Ser.L./V/II.9, Doc. 6 rev. P 161 (1998); UN Office of the High Commissioner for Human Rights, *International Legal Protection of Human Rights in Armed Conflict* (New York: United Nations, 2011), 1; Human Rights Council Res. 9/9 (referring to human rights law and IHL as complementary and mutually reinforcing). The International Court of Justice (ICJ) has made clear that parts of human rights law continue to apply during conflicts and occupation. In the advisory opinion on the Wall, the Court specified: "the Court considers that the protection offered by human rights conventions does not cease in case of armed conflict, Save through the effect of provisions for derogation of the kind to be found in Article 4 of the International Covenant on Civil and Political Rights. As regards the relationship between international humanitarian law and human rights law, there are thus three possible situations: some rights may be exclusively matters of international humanitarian law; others may be exclusively matters of human rights law; yet others may be matters of both these branches of international law. In order to answer the question put to it, the Court will have to take into consideration both these branches of international law, namely human rights law and, as lex specialis, international humanitarian law." *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, ICJ Reports 2004, para. 106, July 9, 2004, http://www.icj-cij.org/homepage/sp/advisory/advisory_2004-07-09.pdf. See also *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, ICJ Reports 1996, 240.

[9] Human rights bodies and international criminal tribunals both may have matters submitted that concern genocide or crimes against humanity, and address issues of due process, access to justice, and reparation and remedies for violations. See, e.g., ICTY, *Prosecutor v Anto Furundzija*, Case No. IT-95-17/1-T, Judgment of December 10, 1998 (finding torture to be a *jus cogens* violation); *Velásquez-Rodríguez v Honduras*, 1989 Inter-Am Ct HR (ser. C) No. 7 (July 21, 1989) (noting the regional recognition of forced disappearance as a crime against humanity).

[10] See Chs. 4–5 in this volume.

viewing them as objects or indirect beneficiaries of the law and not subjects with direct rights and responsibilities.

## Congresses and Conferences of States

Well before the formation of permanent international organizations, states began meeting in periodic or ad hoc congresses or conferences to address matters of collective concern, often including humanitarian or human rights matters such as combatting the slave trade or protecting religious minorities from persecution. Within Europe, in 1860 major European powers forced Turkey to accept, "in the name of Europe," French military action to protect the Christian minority in Lebanon.[11] Subsequently, the 1878 Treaty of Berlin included special provisions for the protection of religious minorities.[12] The Americas had a tradition of regional approaches to international issues, including human rights, growing out of regional solidarity developed during the movements for independence.[13] Pan American Conferences took action on several human rights matters during the nineteenth and early twentieth centuries. Simón Bolivar urged the initial 1826 Congress of Panama to consider a confederation of Latin American states, based on a Treaty of Perpetual Union, League, and Confederation, which foresaw joint action to combat the slave trade. Later Latin American Conferences adopted treaties on the rights of aliens,[14] nationality and asylum,[15] and the rights of women.[16] In addition, Conference resolutions dealt with labor conditions, women, and children, but with the approach of World War II resolutions reflected broader human rights concerns: Humanization of War (1936); Defense of Human Rights and Persecution for Racial or Religious Motives (both 1938); Humanization of

[11] A. Tibawi, *A Modern History of Syria* (London: Macmillan, 1969), 121–33. See also Sohn and Buergenthal, *supra* note 1, at 143–78.

[12] Ibid., 178–9.

[13] As early as 1907 some states in the region created the Central American Court of Justice. The court had jurisdiction over cases of "denial of justice" between a government and a national of another state, if the cases were of an international character or concerned alleged violations of a treaty or convention. See M. Hudson, *The Permanent Court of International Justice* (New York: Macmillan, 1943), 49–50.

[14] Treaty for the Extradition of Criminals and for Protection against Anarchism (1902); Convention Relative to the Rights of Aliens (1902); Convention on Private International Law (1928); Convention on the Status of Aliens (1928).

[15] Convention establishing the Status of Naturalized Citizens Who Again Take up Residence in the Country of Origin (1906); Convention on Asylum (1928); Convention on the Nationality of Women (1933); Convention on Nationality (1933); Convention on Extradition (1933); Convention on Political Asylum (1933).

[16] Convention on the Rights and Duties of States (1933); Convention for the Maintenance, Preservation and Reestablishment of Peace (1936); Convention Concerning Peaceful Orientation of Public Instruction (1936); Inter-American Convention on the Granting of Political Rights to Women (1948); Inter-American Convention on the Granting of Civil Rights to Women (1948).

War (1942); War Crimes, Free Access to Information, International Protection of the Essential Rights of Man, Racial Discrimination, and Persecution of the Jews (all 1945).

## International Labour Organization

The International Labour Organization (ILO), the oldest global organization, focuses on human rights related to employment, including "[working] conditions of freedom and dignity,"[17] trade union freedoms,[18] freedom from slavery and forced labor,[19] and freedom from child labor.[20] The ILO has concluded more than 180 conventions and has highly developed monitoring procedures,[21] which to some extent provided models for later human rights bodies.

## The League of Nations

Although the League of Nations was not intended to be a human rights organization, it gained a limited mandate to examine specific problems in select countries as a consequence of the Versailles Peace Conference (1919–20), whose outcome was partly shaped by the principle of self-determination. In order to promote ratification of the peace treaties in the states emerging from the defeated Central Powers and to secure the newly drawn state boundaries, the League of Nations obtained limited competence over minority issues, primarily in Central Europe and the Balkan states. Multilateral and bilateral peace treaties, as well as some unilateral commitments made in the context of securing admission to the League of Nations, contained provisions that guaranteed citizenship rights, prohibited discrimination, guaranteed freedom of religion and belief, and in some cases, ensured linguistic rights for minorities. A few special clauses concerned either territorial autonomy[22]

[17] Convention Concerning Discrimination (Employment and Occupation) (No. 111), June 15, 1960, 362 UNTS 31.

[18] Convention on Freedom of Association and Protection of the Right to Organize (No. 98), July 9, 1948, 68 UNTS 17.

[19] Convention Concerning Forced or Compulsory Labor (No. 28), June 28, 1930, 39 UNTS 55; Convention Concerning the Abolition of Forced Labor (No. 105), June 25, 1957, S. Treaty Doc. No. 88-11, 320 UNTS 291.

[20] Convention Concerning the Prohibition and Immediate Action for the Elimination of Worst Forms of Child Labor (No. 182), June 17, 1999, 2133 UNTS 161, 38 ILM 1207.

[21] See Lee Swepston, "Human Rights Complaint Procedures of the International Labour Organization," in *Guide to International Human Rights Practice*, *supra* note 5, at 89.

[22] The autonomy provided for in the Swedish-speaking Åland Islands and the Ruthenians in Czechoslovakia (never realized) included a regional parliament and a regional government according to the competences attributed to these territories. In contrast, the local judiciary and administration remained competences of the state.

or personal autonomy.[23] The minority treaties or declarations also contained general reference in their final articles to oversight by the Council of the League of Nations, on the basis of which the organization developed procedural rules for monitoring the implementation of commitments states made in favor of minorities. The procedures, even more than the substantive norms, influenced the development of modern human rights law.

The League of Nations Council was empowered to undertake the monitoring of state commitments, but the Permanent Court of International Justice (PCIJ), could also contribute through delivering advisory opinions at the request of the Council,[24] or deciding interstate cases based on dispute settlement provisions contained in the peace treaties.[25] After 1930, the Paris Agreement of Hungary, Romania, Yugoslavia, and Czechoslovakia, further empowered the PCIJ to act as an appellate body from decisions of the Mixed Arbitral Tribunals set up to ensure implementation of the peace treaties. Perhaps most importantly in setting a precedent for modern human rights law, a state or a person alleging a violation of any protected right could file a complaint with the League of Nations. The admissibility criteria for such petitions are largely retained by modern treaty bodies, including a bar on filing anonymous petitions or those previously dealt with.[26] The petition process was conducted through written submissions to a committee made up of members of the Council, but efforts were also made to secure friendly settlements, a practice also followed by many human rights bodies today.

Although the League of Nations system was rightly and heavily criticized for the double standard employed in limiting scrutiny to certain states only, it nonetheless established important substantive precedents on equality and nondiscrimination, as well as procedural innovations that have carried through to current human rights law.

[23] See, e.g., the freedom of Jews to hold their religious holidays (in the Polish treaty), the religious and cultural autonomy of the kutzo-valach (Aromanian) community, the special status of the monks of the monastery at Mount Athos (Greece), or the religious and schooling autonomy of Saxon and Szekler public bodies in Romania (between the eleventh and nineteenth centuries, the Hungarian speaking Szeklers had enjoyed a special status of collective nobility in Transylvania, when it belonged to Hungary).

[24] Nearly a dozen advisory opinions concerned minority problems: *Settlers of German Origin in Poland; Acquisition of Polish Nationality; Exchange of Greek and Turkish Populations; Interpretation of the Greco-Turkish Agreement of December 1 1926; Greco-Bulgarian Communities; Access to German Minority Schools in Upper Silesia; Treatment of Polish Nationals and Other Persons of Polish Origin or Speech in the Danzig Territory; Interpretation of the Greco-Bulgarian Agreement of 9 December 1927; Minority Schools in Albania; Consistency of Certain Danzig Legislative Decrees with the Constitution of the Free City*.

[25] Important precedent in this respect include the following cases: *Certain German Interests in Polish Upper Silesia* (*Germany v Poland*); *Factory at Chorzów*; *Rights of Minorities in Upper Silesia (Minority Schools)* (*Germany v Poland*); *Interpretation of the Statute of the Memel Treaty* (*United Kingdom v Lithuania*); *Administration of Prince von Pless* (*Germany v Poland*); *Polish Agrarian Reform and German Minority* (*Germany v Poland*).

[26] Unlike nearly all current procedures, however, the League's admissibility requirements did not include prior exhaustion of local remedies, although in practice petitioners sought local resolution before filing a petition.

Perhaps most significantly, the experience of the League of Nations contributed to enhancing the legal status of individuals, helping their transformation from objects to subjects of international law. As a corollary, emerging from the League of Nations precedents, human rights generally became a matter of legitimate international concern.[27]

## Human Rights in the UN Charter and Charter Bodies

Many of the states involved in negotiating the United Nations (UN) Charter, as well as many nongovernmental groups and individuals, successfully pressed for the inclusion of human rights within the mandate of the new organization. The objectives of the UN as stated in Charter Article 1 set the stage for the organization's human rights work, with particular emphasis on equality and nondiscrimination:

> The Purposes of the United Nations are:
> 1. To maintain international peace and security …
> 2. To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples …
> 3. To achieve international cooperation … in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion … [28]

Other provisions in the UN Charter contributed to placing human rights firmly on the organization's agenda.[29] Articles 55 and 56 create binding if vague obligations for all member states.[30] The organs of the UN have given content to these obligations and sought to ensure compliance with them by adopting a set of detailed human rights treaties and other legal instruments.

[27] For additional discussion, see Paul Gordon Lauren, *The Evolution of International Human Rights: Visions Seen* (Philadelphia: University of Pennsylvania Press, 1998), 82–138.

[28] UN Charter, Art. 1.

[29] See ibid., Preamble; ibid., Arts. 1, 13, 55, 56, 62, 68, 76 (mentioning human rights). For a discussion of UN activities on human rights, see generally John P. Humphrey, *Human Rights and the United Nations: A Great Adventure* (Dobbs Ferry: Transnational Publishers, 1984); Irwin Cotler and F. Pearl Eliadis (eds.), *International Human Rights Law: Theory and Practice* (Montreal: Canadian Human Rights Foundation, 1992); Philip Alston, *The United Nations and Human Rights: A Critical Appraisal* (New York: Oxford University Press, 1992).

[30] UN Charter, Art. 55 (establishing that the UN "shall promote universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion"); ibid., Art. 56 ("[A]ll Members pledge themselves to take joint and separate action in cooperation with the Organisation for the achievement of the purposes set forth in Article 55").

Governmental representatives of the member states sit in the main bodies of the UN concerned with human rights: the General Assembly (GA), the Security Council, the Economic and Social Council, and the Human Rights Council.[31] The former Sub-Commission on the Prevention of Discrimination and Protection of Minorities (renamed in 1999 the Sub-Commission on the Promotion and Protection of Human Rights) was composed of independent experts, nominated by states and elected by the Human Rights Commission,[32] but the decision to transform the Commission into the Council was coupled with the demise of the Sub-Commission. The UN High Commissioner on Human Rights is an independent official, with a mandate to act on behalf of the organization and to administer the office for human rights.[33] The Charter guarantees independence for the Secretariat working under her administration,[34] but it has been subject to outside political pressure at times.[35] Also sitting in an independent capacity are the fifteen judges of the International Court of Justice (ICJ), the "principal judicial organ of the United Nations."[36] The Court has jurisdiction to decide interstate cases and issue advisory opinions.[37] Until recently, relatively few cases involving human rights matters have come before the Court,[38] but litigating states have insisted on the human rights and duties reflected in the UN Charter.[39]

[31] "The General Assembly, the plenary body of the United Nations, shall … initiate studies and make recommendations" to assist in the "realization of human rights and fundamental freedoms." Ibid., Art. 13, ¶ 1(b). The Security Council's primary responsibility over peace and security includes a mandate to take action in response to any situation it concludes is a threat to the peace, breach of the peace, or act of aggression, including violations of human rights. Ibid., Arts. 39–42. The Economic and Social Council (ECOSOC), consisting of seventy-six UN member states, is authorized to made recommendations to promote respect for and observance of human rights and to draft conventions on the issue. Ibid., Art. 62. Pursuant to the directive in Charter, ECOSOC established the former UN Commission on Human Rights, replaced in 2006 by the Human Rights Council: GA Res. 60/251. The Commission on the Status of Women, created in 1946, consists of forty-five governmental representatives: ECOSOC Res. 2/11, UN Doc. E/RES/2/11 (June 21, 1946). See UN Charter, Arts. 9 and 23; GA Res. 60/251.

[32] The Commission on Human Rights created the Sub-Commission at its 1st Session in 1946. UN Charter, Art. 68. The General Assembly abolished the Commission and replaced it with the Council in 2006. GA Res. 60/251.

[33] See GA Res. 48/141, UN Doc. A/RES/48/141 (December 20, 1993). The General Assembly created the post of High Commissioner for Human Rights in 1993, with a mandate to promote observance of the Charter of the UN, the Universal Declaration of Human Rights (UDHR), and other human rights instruments. Ibid., ¶¶ 1, 3.

[34] UN Charter, Art. 100.

[35] See Iain Guest, *Behind the Disappearances* (Philadelphia: University of Pennsylvania Press, 1999) (describing pressure placed on UN human rights machinery during the 1980s).

[36] Statute of the International Court of Justice, Art. 1. [37] Ibid.

[38] See, e.g., *Application of Convention on Prevention and Punishment of Crime of Genocide (Bosn. & Herz. v Yugo.)*, 1993 ICJ 3 (October 7); *Legal Consequences for States of Continued Presence of South Africa in Namibia*, Advisory Opinion, 1971 ICJ 16 (June 21); *Reservations to Convention on Prevention and Punishment of Crime of Genocide*, Advisory Opinion, 1951 ICJ 15 (May 28).

[39] See, e.g., *Memorial of United States; United States Diplomatic and Consular Staff in Tehran (U.S. v Iran)*, 1980 ICJ Pleadings 182 (January 12, 1980) (asserting that the existence of fundamental rights for all human beings, with the existence of a corresponding duty on the part of every state to respect and observe them, are reflected in Arts. 1, 55, and 56 of the UN Charter).

## Human Rights Standard-Setting

Lawmaking is undoubtedly and deliberately a political process. The UN Charter did not define the term "human rights" but left the member states to give it meaning, which they began doing when the General Assembly adopted the Universal Declaration of Human Rights (UDHR) without dissent on December 10, 1948.[40] The same year, the General Assembly also adopted the Convention on the Prevention and Punishment of Genocide.[41] Standard-setting continued with a focus on nondiscrimination and equality for disadvantaged groups. The 1965 Convention on the Elimination of All Forms of Racial Discrimination[42] was the first of a series of treaties addressing equal rights.[43] The UN subsequently adopted instruments concerning women, children, migrant workers, and the disabled.[44] The UDHR became two Covenants, one on Civil and Political Rights (ICCPR), the other on Economic, Social and Cultural Rights (ICESCR).[45]

The standard-setting process continues as member states place items on the agenda for action. Standard-setting will not end, because new problems arise, and fears that human rights will become a "devalued currency" or lose importance are probably overstated given the need to obtain consensus before a new instrument can be adopted.

From the beginning, the moral leadership of key states has been important,[46] but, as John Humphrey has noted, "[t]he relatively strong human rights provisions in the Charter through which they run, as someone has said, like a golden thread, were

[40] UDHR, GA Res. 217A (III), Art. 10, at 71, UN Doc. A/ 810 (December 10, 1948). The Vienna Convention on the Law of Treaties indicates that in interpreting treaties, any subsequent agreement or practice of the parties regarding its interpretation or the application of its provisions shall be taken into account to give meaning to its terms. Vienna Convention on the Law of Treaties, Art. 31(3), May 23, 1969, 1155 UNTS 331, 8 ILM 679.

[41] Convention on the Prevention and Punishment of the Crime of Genocide of December 9, 1948, 78 UNTS 277.

[42] International Convention on the Elimination of All forms of Racial Discrimination of March 7, 1966, 660 UNTS 195.

[43] Thomas Buergenthal, Robert Norris, and Dinah Shelton, *Protecting Human Rights in the Americas*, 4th ed. (Kehl: N.P. Engel, 1995 [1982]), 20–21.

[44] Ibid.

[45] International Covenant on Civil and Political Rights (ICCPR), GA Res. 2200A, (XXI), Dec 19, 1966, 999 UNTS 171, 1057 UNTS 407, 6 ILM 368 (1967); International Covenant on Economic, Social and Cultural Rights, GA Res. 2200, UN Doc. A/6316 (December 16, 1966).

[46] The proposal to have the UN organization ensure respect for human rights and fundamental freedoms without discrimination was initially submitted by Brazil, the Dominican Republic, and Mexico. Amendments and Comments on Dumbarton Oaks Proposals, reprinted in *The United Nations Conference on International Organization, San Francisco, California, April 25 to June 26, 1945: Selected Documents* (Washington, DC: U.S. Government Printing Office, 1946), 87, 93. Uruguay proposed that the organization endorse the essential rights of mankind, internationally established and guaranteed. Ibid., 110. See also John P. Humphrey, *The United Nations and Human Rights: A Great Adventure* (Dobbs Ferry: Transnational Publishers, 1984), 14–17 (acknowledging the key role of Panama in efforts to draft an international bill of rights); Lauren, *supra* note 27, at 217 (discussing the role of key states and specifically the role of Panama in drafting the International Bill on Human Rights).

largely, and appropriately, the result of determined lobbying by non-governmental organisations at the San Francisco Conference."[47] NGOs and international civil servants working exclusively on human rights issues are clearly a major factor in agenda-setting. Felice Gaer has called human rights NGOs the engine for virtually every advance made by the UN in the field of human rights since its founding.[48] One example is Amnesty International's campaign on the death penalty,[49] which led to the drafting of three treaties: the Second Protocol to the ICCPR,[50] the Sixth Protocol to the European Convention on Human Rights (ECHR),[51] and the Inter-American Protocol to Abolish the Death Penalty.[52] A multiplicity of actors with divergent interests participate in any negotiations for new human rights norms. Successful negotiations on human rights issues thus typically involve coalition-building among states and nonstate actors. Negotiators may make trade-offs between the ideal and the possible; often the form and the content of the negotiated instrument reflect compromise and efforts to achieve consensus.

The media also play a significant role in identifying human rights issues that need resolution.[53] By documenting abuses, the media often generate public outrage that helps create coalitions of NGOs and others to mobilize action.[54] Compelling media imagery can thus bring an issue forward.[55]

During the standard-setting process one state may take a leadership role, sometimes out of conviction or sometimes because of domestic political pressure after national reforms have been instituted to address particular problems. Usually, however, governments are motivated by strategic and political considerations or historic rivalries. This can be useful; political motivation does not minimize real human rights problems. At the same time, the political motivation may create suspicion about the need for action, thereby undermining any effort to change state behavior. It also may

[47] John P. Humphrey, "The International Law of Human Rights in the Middle Twentieth Century," in *The Present State of International Law and Other Essays*, ed. Maarten Bos (New York: Springer, 1973), 75, 83.

[48] Felice D. Gaer, "Reality Check: Human Rights NGOs Confront Governments at the UN," in *NGOs, the UN, and Global Governance*, ed. Thomas G. Weiss and Leon Gordenker (Boulder: Lynne Rienner, 1996), 51–3.

[49] See generally Johanna K. Eyiolfsdottir, "Amnesty International: A Candle of Hope," in *International Human Rights Monitoring Mechanisms*, ed. Gudmundur Alfredsson et al. (The Hague: Martinus Nijhoff Publishers, 2001), 855 (discussing generally the role of Amnesty International in influencing the drafting of treaties against the death penalty).

[50] Second Optional Protocol to the ICCPR, Aiming at the Abolition of the Death Penalty, GA Res. 44/128, UN Doc. A/RES/44/128 (January 30, 1990).

[51] Protocol No. 6 to the Convention for the Protection of Human Rights and Fundamental Freedoms, concerning the abolition of the death penalty, Apr 28, 1983, Europ. T.S. 114.

[52] Protocol to the American Convention on Human Rights to Abolish the Death Penalty, June 8, 1990, OASTS No 73.

[53] See Dinah Shelton, "Human Rights," in *Managing Global Issues*, ed. P. J. Simmons and Chantal de Jonge Oudraat (Washington, DC: Carnegie Endowment for International Peace, 2001), 439–40.

[54] Ibid. [55] Ibid.

make the target state more intransigent when hostile states or traditional enemies raise issues. For this and other reasons, states often are reluctant to raise human rights matters, which constitute only one of many matters of international concern for them.

NGOs have nonetheless successfully aligned with medium and small powers to achieve considerable success. Groups representing torture survivors and other victims of abuse succeeded in obtaining provisions on victim compensation in the Statute of the International Criminal Court through alliance with key states, such as France and Canada.[56] In subsequent human rights negotiations, leadership of "repeat players," those with expertise and an impartial commitment to human rights, has enhanced the strategy of coalition-building.[57] Noteworthy, too, is the fact that the creation of regional human rights institutions has empowered local and regional NGOs throughout the world. In the twenty years of the African Charter, the number of NGOs accredited to the African Commission has grown to 370.[58]

## Monitoring and Enforcement

Politics supposedly disappear from enforcement and compliance; the fundamental principle of equality before the law demands fair and principled enforcement, with a hearing before an independent and impartial body.[59] It is an ideal that not even the most advanced legal systems always fulfill. A perception of politicization and lack of standards eroded the credibility and legitimacy of the UN Human Rights Commission,[60] leading to its replacement in 2006 by the Human Rights Council.[61] The evolution is important to recall:

> Human rights governance started with a revolutionary concept—that a government's treatment of those within its power is a matter of international concern—but it began with a

[56] See Gaer, "Reality Check: Human Rights NGOs Confront Governments at the UN," 55–7.

[57] See Leon Gordenker and Thomas G. Weiss, "Pluralizing Global Governance: Analytical Approaches and Dimensions," in *NGOs, the UN, and Global Governance*, ed. Thomas G. Weiss and Leon Gordenker (Boulder: Lynne Rienner, 1996), 17, 31.

[58] Twenty-First Activity Report of the African Commission on Human and Peoples' Rights, January 25–6, 2007, ¶ 15, African Union Doc. EX.CL/322 (X).

[59] The United States Constitution guarantees due process of law. US Const. amend. V; amend. XIV, § 1. Additionally, international human rights instruments provide for the right, in full equality, to a fair and public hearing by an independent and impartial tribunal in the determination of rights, obligations, and criminal charges. See UDHR, *supra* note 40, Art. 10; ICCPR, GA Res. 2200A (XXI), UN Doc. A/6316 (December 19, 1966).

[60] See Joint NGO Statement on UN Reform—Presented to the 61st Session of the UN Commission on Human Rights (April 12, 2005), http://hrw.org/english/docs/2005/04/12/global10463_.htm.

[61] GA Res. 60/251, UN Doc. A/RES/60/251 (April 3, 2006). The Council consists of forty-seven states elected by the General Assembly according to the principle of "equitable geographic distribution": ibid., ¶ 7. Africa and Asia each has thirteen seats: ibid. There are six seats for Eastern Europe, eight for Latin America and the Caribbean, and seven for Western Europe and others: ibid. The Council is authorized to meet three times a year for ten weeks but can also hold special sessions, and it reports directly to the

modest objective, declaring and defining a set of fundamental rights, leaving to states the choice of means and policies to implement the norms.[62]

Like standard-setting, human rights compliance mechanisms and enforcement procedures have evolved over time and become gradually stronger, certainly at the regional level.

The mechanisms for supervising the UN Charter obligations of member states were initially very limited, because the UN legal office insisted that the UN human rights bodies could not take action with respect to petitions alleging human rights violations.[63] This left few options for enforcement. This section looks first at supervision of the UN Charter obligations, then at the UN treaty bodies, and finally at the regional mechanisms.

## United Nations Charter-Based Procedures

Procedures to advance compliance with the UN Charter's human rights obligations range from debates in the General Assembly to investigations of particular countries or issues to decisions of the Security Council.[64] Most of these techniques have to be initiated by a member state or group of states and require the cooperation of other members.[65] In quite a few instances, the debates have led to investigations or denunciations of human rights violations in member states, but the political pressure placed on states sitting on the Commission to vote for or against such actions has considerably increased in recent years and led to concerns about the entire process.[66]

The enforcement procedures must be considered in the context of the UN Charter as a multilateral treaty. The Charter contains numerous references to human rights but only expressly mentions two: the right to self-determination[67] and the right

General Assembly: ibid., ¶ 10. The Council's mandate is to "be guided by the principles of universality, impartiality, objectivity and non-selectivity, with a view to enhancing the promotion and protection of all": ibid., ¶ 4. The Council is also to consider and make recommendations on situations of human rights violations, including gross and systematic violations: ibid., ¶ 3.

[62] Dinah L. Shelton, "Human Rights," 438–9.

[63] ECOSOC, Report of the Sub-Committee on the Handling of Communications, UN Doc. E/CN. 4/14.Rev. 2 (February 6, 1947).

[64] See Antonio Cassese, "The General Assembly: Historical Perspective 1945–1989," in *The United Nations and Human Rights: A Critical Appraisal*, ed. Philip Alston (New York: Oxford University Press, 1992), 25; Sydney D. Bailey, "The Security Council," in *The United Nations and Human Rights: A Critical Appraisal*, ed. Philip Alston (New York: Oxford University Press, 1992), 304.

[65] See Cassese, "The General Assembly"; Bailey, "The Security Council."

[66] See Anne Bayefsky, Editorial, "Ending Bias in the Human Rights System," *New York Times*, May 22, 2002, A27 ("A United Nations high commissioner for human rights will always need to withstand political pressure from member states to engage in a highly selective application of human rights norms."); Jonathan Fanton, "Taking Human Rights Seriously," *Chicago Tribune*, January 10, 2006, C17 ("Politics, which should not be a consideration, have come too often to dominate the [UN Human Rights] Commission's work").

[67] UN Charter, Art. 1, ¶ 2; Art. 55.

to nondiscrimination.[68] The UN Charter states as one of its objectives "to develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples."[69] Furthermore, all but one time that the phrase "human rights and fundamental freedoms" appears in the Charter, appended to it are the words "without discrimination on the basis of race, sex, language or religion."[70] The combined focus on equality and self-determination has directed much of the work of the UN political bodies on human rights issues.[71] While it is an intensely political topic, the UN's focus on equality and self-determination has its roots firmly in the language of the treaty.

The UN Charter references to equal rights allowed NGOs and governments to speak out against systematic discrimination from the outset.[72] India, for example, criticized segregation in the United States, which responded by pointing to the caste system in India.[73] During the First Session of the UN General Assembly, Egypt, supported by Latin American states, introduced a resolution, which passed unanimously, to condemn racial and religious persecution.[74] India then sought a resolution to condemn South Africa for its policies of racial discrimination, accusing the government of gross and systematic human rights violations in breach of the principles and purposes of the Charter.[75] The resolution passed with the required two-thirds majority, despite opposition from Australia, Great Britain, Canada, and the United States, each of which had its own racial policies that contravened the Charter guarantees.[76] The First Session of the General Assembly also produced action on genocide, declaring it to be a crime under international law.[77]

In fact, empirical studies indicate that racial discrimination has been the most discussed human rights topic, taking up almost as much time as all other rights combined.[78] Certainly, South Africa was long a pariah state at the UN. The question of discrimination in South Africa was the first human rights issue taken up by the UN General Assembly, beginning in 1946.[79] The General Assembly was originally concerned with the treatment of the Indian minority, but it expanded its examination after South Africa elected the nationalist government that officially

[68] UN Charter, Art. 1, ¶ 2 ("without distinction as to race, sex, language, or religion").

[69] Ibid.

[70] See UN Charter.

[71] See Cassese, "The General Assembly," 36–7.

[72] See Lauren, *The Evolution of International Human Rights*, 207.

[73] See ibid.

[74] GA Res. 103 (I), at 200, UN Doc. A/RES/1031 (November 19, 1946).

[75] Letter from the Indian Delegation to the Secretary-General of the United Nations, UN Doc. A/149 (June 22, 1946).

[76] See GA Res. 44(I), at 69, UN Doc. A/64/Add.1 (December 8, 1946). The issue of South Africa's racial policies remained on the agenda of the UN in every session until the end of apartheid.

[77] GA Res. 96 (I), at 188–9, UN Doc. A/64/Add.1 (December 11, 1946).

[78] Jack Donnelly, "Human Rights at the United Nations, 1955–1985: The Question of Bias," *International Studies Quarterly* 32 (1988): 275, 277–96, 282.

[79] A list of all resolutions from the General Assembly's 1st Session in 1946 is available at http://www.un.org/documents.

instituted apartheid.[80] In 1953 the General Assembly found that the racial policies of the government of South Africa and their consequences were contrary to the UN Charter, a finding that was repeated with increasing emphasis over the years.[81] Nearly a decade after the first condemnation, in 1962, the General Assembly established a permanent organ, the Special Committee on the policies of apartheid of the government of South Africa, with the mandate to keep the racial policies of South Africa under review when the Assembly was not in session.[82] In a 1971 advisory opinion concerning then South-West Africa under South African authority pursuant to a League of Nations mandate, the ICJ found that South Africa had committed a material breach of its obligations, that the supervisory powers of the Council of the League of Nations had passed to the General Assembly, and that the General Assembly in terminating the Mandate had acted within the framework of its competence.[83] The court noted that South Africa had pledged itself to observe and respect, in a territory having an international status as a League of Nations mandate, human rights and fundamental freedoms for all without distinction as to race.[84] To deny those rights on the basis of race constituted "a flagrant violation of the purposes and principles of the Charter."[85]

Member states pressed for action on sex discrimination as well: the Economic and Social Council (ECOSOC) voted to create the Commission on the Status of Women,[86] and the General Assembly urged states to grant political rights to women.[87] In 1949, the General Assembly declared that measures taken by the Soviet Union to prevent the wives of citizens of other nationalities from leaving in order to join their husbands was not in conformity with the UN Charter.[88] In sum, human rights issues have always been on the agenda of the General Assembly. Personal security issues (e.g., right to life, freedom from torture, and protection against slavery) have been prominent on the agenda,[89] not surprisingly given that

[80] See GA Res. 44 (I); GA Res. 616, at 8, UN Doc. A/2361 (December 5, 1952).

[81] See GA Res. 721 (VIII), at 6, UN Doc. A/2630 (December 8, 1953); GA Res. 820 (IX), at 9, UN Doc. A/2890 (December 14, 1954); GA Res. 917 (X), at 8, UN Doc. A/3116 (December 6, 1955); GA Res. 1016 (XI), at 5, UN Doc. A/3572 (January 30, 1957); GA Res. 1178 (XII), at 7, UN Doc. A/3805 (November 26, 1957); GA Res. 1248 (XII), at 7, UN Doc. A/4090 (October 30, 1958); GA Res. 1375 (XIII), at 7, UN Doc. A/4354 (November 17, 1959); GA Res. 1598 (XIV), at 5, UN Doc. A/4684/Add.1 (April 15, 1961); GA Res. 1663 (XV), at 10, UN Doc. A/5100 (November 28, 1961); GA Res. 1761 (XVII), at 9, UN Doc. A/5217 (November 6, 1962).

[82] GA Res. 1761 (XVII).

[83] *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276* (1970), Advisory Opinion, 1971 ICJ 16, 46–7 (June 21).

[84] Ibid. [85] Ibid., 57.

[86] ECOSOC, Resolution Establishing the Commission on the Status of Women, UN Doc. E/RES/2/11 (June 21, 1946).

[87] GA Res. 56 (I), at 90, UN Doc. A/64/Add.1 (December 11, 1946).

[88] See GA Res. 285 (III).

[89] Donnelly, supra n. 78.

these are rights that cannot be suspended even during times of emergency,[90] are accepted as customary international law, and are referred to by many as *jus cogens* or "peremptory rights."[91] These agenda items and discussions reflect the policies of the member states, some of which may lobby the UN, in order to avoid censure.[92]

As for the role of nonstate actors, until 1959 the UN received and considered only petitions from non-self-governing territories;[93] other claims of violations were met with silence.[94] ECOSOC began to open the door more widely with a resolution that permitted the UN Human Rights Commission to review summaries of communications received by the UN Secretary-General about human rights violations.[95] The resolution, however, denied the Commission the power to take any action.[96] After a controversial 1966 ICJ judgment concerning South Africa,[97] ECOSOC changed its mind. In 1967, with Resolution 1235, it approved the Commission adding a new agenda item, "Question of the violation of human rights and fundamental freedoms, including policies of racial discrimination and segregation and of apartheid,

[90] ICCPR, *supra* note 59.

[91] See, e.g., Dinah Shelton, "Normative Hierarchy in International Law," *America Journal of International Law* 100 (2006): 291, 302–5. For a judicial declaration that the prohibition of torture constitutes *jus cogens*, see *Prosecutor v Furundzija*, No. IT-95-17/1-T, ¶¶ 153–4 (December 19, 1998).

[92] See Ann Kent, *China, the United Nations, and Human Rights: The Limits of Compliance* (Philadelphia: University of Pennsylvania Press, 1999), 49–83 (arguing that China used its political and economic power to defeat efforts to condemn its human rights record at the UN).

[93] Art. 87(b) UN Charter provides that the Trusteeship Council has authority to accept and examine petitions concerning trust territories. The last trusteeship terminated in 1994 and the Council no longer meets regularly: Letter from the President of the Trusteeship Council to the President of the Security Council, UN Doc. S/1994/1234 (November 3, 1994). In 1961, the General Assembly created the Special Committee on the Situation with Regard to the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples: GA Res. 1654 (XVI), UN Doc. A/RES/1654(XVI) (November 27, 1961). The Special Committee may receive petitions from individuals and groups and, with the permission of the administering state, conduct on-site visits to territories. See Dep't of Pub. Info., *United Nations and Decolonization* (New York: United Nations, 2005), 6. Sixteen non-self-governing territories remain within its mandate. Press Release, General Assembly, "Decolonization United Nations Success Story, Albeit Unfinished One, Deputy Secretary-General Tells Special Committee" (February 22, 2007), http://www.un.org/News/Press/docs/2007/gaco13151.doc.htm.

[94] It is estimated that in the 1940s and 1950s, some 20,000 human rights complaints a year were received at the UN. Philip Alston, "The Commission on Human Rights," in *The United Nations and Human Rights: A Critical Appraisal*, ed. Philip Alston (New York: Oxford University Press, 1992), 126, 146. In 1948, the "paradox" of individuals in trusteeships having the right to petition, while those in the administering territories lacked the right, was noted during discussions in the General Assembly's Third Committee. See John Carey, "The United Nations' Double Standard on Human Rights Complaints," *American Journal of International Law* 60 (1966): 792, 792 (citing UN GAOR, 3d Sess., 3d Comm. at 699, UN Doc. A/C.3/SR.158 (1948)).

[95] ECOSOC, Res. 728F, ¶¶ 1–2, UN Doc. E/3290 (July 30, 1959).

[96] Ibid.

[97] *South West Africa Cases (Eth. v S. Afr.; Liber. v S. Afr.)* (Second Phase), 1966 ICJ 4 (July 18). The court was evenly divided, and its president cast a deciding vote to reject the claims against South Africa because Ethiopia and Liberia lacked standing. Ibid., 49. This decision effectively terminated the litigation and allowed South Africa to escape condemnation on the merits.

in all countries, with particular reference to colonial and other dependent countries and territories."[98] There was no doubt about the focus of attention, because the resolution expressly mentioned South Africa and Southern Rhodesia.[99] The resolution also authorized the Commission and Sub-Commission to examine information relevant to gross violations of human rights.[100] The Commission could then "in appropriate cases, and after careful consideration … make a thorough study of situations which reveal a consistent pattern of violations of human rights, as exemplified by … apartheid … and racial discrimination" and report and make recommendations to ECOSOC.[101]

In 1970, ECOSOC further expanded the process when it adopted Resolution 1503 (XLVIII),[102] which finally authorized the Commission and Sub-Commission to examine communications submitted to the UN.[103] Numerous restrictions were placed on this limited petition procedure: the examination had to be taken in closed session;[104] the consideration was limited to situations that appeared to reveal a consistent pattern of gross and reliably attested violations of human rights;[105] no hearings or redress were afforded the petitioner; and the outcome was limited to a thorough study or an investigation "with the express consent of the state concerned."[106]

Although the origins of the approval stemmed from efforts to combat colonialism and racism in Southern Africa,[107] other victims of widespread violations began filing complaints. It is important to remember that the Sub-Commission had no independent authority to identify violators, but depended on the communications brought to it.[108] Despite the secrecy enjoined by ECOSOC, the names of the targeted countries quickly became public.[109]

The primary deficiency of many human rights procedures, especially at the UN, is that states elect themselves to bodies where they investigate and judge allegations against themselves for violating the norms they have adopted. The result is self-judging political bodies that inevitably reflect the policies of the governments that sit on them. Governments generally respectful of human rights take into account trade, security, ability to influence, and other issues of national interest in deciding what issues to examine and how to vote. Governments violating human rights seek to avoid condemnation, often by lobbying for election to the human rights bodies. Overall, the UN attention to human rights matters is "like a dog's walking on his

[98] ECOSOC Res. 1235, UN Doc. E/4393 (June 6, 1967). [99] Ibid., ¶ 2. [100] Ibid.
[101] Ibid., ¶ 3. [102] ECOSOC Res. 1503, UN Doc. E/4832/Add.1 (May 27, 1970).
[103] Ibid. [104] Ibid. [105] Ibid., ¶ 1.
[106] Ibid., ¶ 7(a). The procedure was revised in 2000 to reduce the role of the independent Sub-Commission and enhance the role of the political Commission. ECOSOC Res. 2000/3, UN Doc. E/2000/99 (June 16, 2000).
[107] See Alston, "The Commission on Human Rights," 143–4 (describing how international efforts to eliminate South Africa's colonialism and racism in the 1960s led ECOSOC to adopt Res. 1503).
[108] ECOSOC Res. 1503, ¶ 1. [109] See Alston, "The Commission on Human Rights," 148.

hind legs. It is not done well. But you are surprised to find it done at all."[110] As Egon Schwelb noted in looking back over the first twenty-five years of the UN practice, "neither the vagueness and generality of the human rights clauses of the Charter nor the domestic jurisdiction clause have prevented the UN from considering, investigating, and judging concrete human rights situations, *provided there was a majority strong enough and wishing strongly enough to attempt to influence the particular development*."[111]

The Human Rights Council, like the former UN Human Rights Commission, is an elected body of state representatives chosen according to the principle of equitable geographic representation.[112] The Secretary-General's High Level Panel on Threats, Challenges and Change, which in part led to replacing the Commission with the Council, noted that states had sought membership on the Commission not to strengthen human rights but to protect themselves against criticism or to criticize others.[113] It asserted that the Commission could not be credible if it was seen as maintaining double standards in addressing human rights concerns.[114] Despite this critique, the new Council is not made up of independent experts, nor are there criteria governing membership.[115]

The political character and membership of the former Commission did affect its work when it came to targeting governments for violations. The United States typically sought resolutions against communist governments like China and Cuba, while ignoring widespread violations in countries with which it had economic or security ties, including Iraq in 1989.[116] The presence of violators was not always negative, however. The Commission was the principal forum to confront governments with allegations of violations that demanded response.[117] Nonetheless the election of states with egregious human rights records sometimes allowed them to escape condemnation and contributed to the perception of a double standard, damaging the Commission.[118]

A credible human rights system legally binds states to respect internationally guaranteed rights and holds governments accountable when they fail to fulfill their obligations. In this respect, the new Human Rights Council may not be a major

[110] Samuel Johnson used this phrase in 1763 to describe a woman preaching: *James Boswell's Life of Johnson*, I: *1709–1765*, ed. Marshall Waingrow (New Haven: Yale University Press, 1994 [1791]), 325. Johnson's attitude is not entirely absent from the modern scene.

[111] Egon Schwelb, "The International Court of Justice and the Human Rights Clauses of the Charter," *American Journal of International Law* 66 (1972): 337, 341 (emphasis added).

[112] GA Res. 60/251, ¶ 7.

[113] Chairman, "Report of the High-Level Panel on Threats, Challenges, and Change," delivered to the General Assembly, UN Doc. A/59/565 (December 2, 2004), ¶¶ 282–3.

[114] Chairman, "Report of the High-Level Panel on Threats, Challenges, and Change," ¶¶ 282–3.

[115] GA Res. 60/251.

[116] Lawrence Moss, "Will the Human Rights Council Have Better Membership than the Commission on Human Rights?," Human Rights Watch—Backgrounders, http:///hrw.org/backgrounder/un/un0406/.

[117] Ibid. [118] Ibid.

improvement over the prior Commission. Governments with poor human rights records are eligible for election, as they were before.

The mandate of the Council may be an improvement over the prior system, however. In addition to addressing gross and systematic violations, the Council is to scrutinize the human rights record of every member of the UN.[119] This peer-review process is akin to expanding the treaty-based reporting system and "constructive dialogue" to all states. The Council is charged with assessing compliance with human rights obligations based on "objective and reliable information," ensuring "universality of coverage and equal treatment" of all states.[120] It is intended to be fair, transparent, and effective, but its workings will largely depend on the composition of the Council. Moreover, it is unlikely that the Council will have sufficient meeting time to fulfill its mandate.

In contrast to the Charter-based organs and procedures, each UN human rights treaty creates a specific monitoring body, usually a committee of independent experts that meets in two to three sessions a year.[121] The procedures for reviewing state compliance are set forth in the treaties and almost always include state self-reporting. Among the major UN treaties, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment of Punishment,[122] the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families,[123] the International Convention on the Elimination of All Forms of Racial Discrimination (CERD),[124] and the ICCPR[125] also provide for interstate complaints, but only for CERD is acceptance/implementation of the procedure not optional.[126] All of the other treaties require a separate acceptance of the possibility of interstate complaints.[127] No interstate complaint has ever been filed under any of the treaties.[128]

The first UN human rights treaty containing a petition process, CERD, required a separate declaration by states parties to accept the procedure set forth in Article 14.[129] The ICCPR, adopted one year later, was even less accepting of petitions in that it included the possibility of individual "communications" in an Optional Protocol requiring separate ratification.[130] The independent Human

[119] GA Res. 60/251, Art. 5(e).

[120] Ibid. [121] See generally Alston, *supra* note 29, at 337–508.

[122] European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, November 26, 1987, Europ. T.S. 126 (Torture Convention), Art. 21

[123] International Convention on the Protection of the Rights of All Migrant Workers and their Families, Art. 76, GA Res. 45/158, UN Doc. A/RES/45/158 (December 18, 1990).

[124] International Convention on the Elimination of All Forms of Racial Discrimination, Art. 11, GA Res. 2106 (XX), UN Doc. A/RES/2106 (December 21, 1965).

[125] ICCPR, Art. 41(1)(a). [126] CERD, Art. 11. [127] See, e.g., ICCPR, Art. 41(1)(a).

[128] The reluctance of states to file formal complaints is also attested to by the fact that the Constitution of the ILO established an inter-state complaint mechanism that has been used only six times since 1919: ILO Const., Arts. 26–34.

[129] CERD, Art. 14.

[130] Optional Protocol to the ICCPR, Art. 2, GA Res. 2200 (XXI), at 59, UN Doc. A/RES/2200(XXI) (December 16, 1966).

Rights Committee has jurisdiction to receive communications from victims against a state that has accepted both the treaty and the Protocol, but its action is limited to reviewing the written record and issuing "views."[131] Many UN treaties were initially adopted without even this limited petition procedure, but some of them have been supplemented by later instruments allowing complaints.[132] The Office of the High Commissioner for Human Rights provides secretariat services for all the treaty bodies and procedures.

## Other Global Organizations

The UN system extends beyond the main and subsidiary UN organs to include not only treaty bodies established pursuant to UN human rights agreements but also UN specialized agencies such as the ILO, the United Nations Educational, Scientific and Cultural Organization (UNESCO), the World Health Organization (WHO), and the Food and Agriculture Organization, all of which have taken up human rights matters within their specific mandates. The strengthening of the UN's human rights work is reflected in the growing "mainstreaming" that has taken place, bringing human rights into the work of many UN specialized agencies. Agencies like the WHO and UNESCO have addressed issues such as discrimination against those afflicted with HIV/AIDS and guarantees of the cultural rights of indigenous peoples. The expertise of each agency helps to de-politicize some of the human rights issues by rendering them more technical. With a few exceptions, such as the Pan American Health Organization, regional organizations have not created similar agencies.

There are other organizations whose mandates do not include human rights, but whose work nonetheless may have a significant impact on the enjoyment of internationally guaranteed rights. These include the World Trade Organization (WTO), military alliances like NATO, and international financial institutions such as the World Bank group. The question of whether or not the mandate of each of these organizations allows human rights considerations to be taken into account is a matter of considerable controversy, but all of them have been pressed to consider the human rights impacts of their policies and programs.[133]

[131] Ibid., Art. 5. [132] See, e.g., ibid.

[133] The World Bank's Articles of Agreement do not mention human rights, but during the past decade, the Bank has addressed social issues through the development of ten Safeguard Policies and through the work of the Inspection Panel established in 1993. In doing so, the Bank recognized the connection between economic issues and social issues. In 1998 the Bank decided to reorganize its Operational Manual around related themes. Key policies were grouped together, including Involuntary Resettlement

The problem of "fragmentation" or "regime conflict" has arisen in particular in considering the human rights implications of international trade or investment law.[134] If a conflict is found to exist, the legal system may establish a hierarchy requiring priority be given to one body of law over another, allowing it to "trump." This is most likely to occur when a specialized court has been established to enforce a particular body of law. Not surprisingly, human rights courts enforce human rights law and the WTO dispute settlement bodies apply trade law, each without great effort to accord deference to norms and jurisprudence of the other. National courts of general jurisdiction are more likely to find contradictory legislative or constitutional provisions of equal normative value and thus face the task of reconciling them or otherwise resolving the conflict.

The problem of conflict has grown with the "fragmentation of international law" over time. The phrase has been used by the International Law Commission, which took up the topic, based on a feasibility study entitled "Risks Ensuing from Fragmentation of International Law" presented at its 52nd Session in 2000. The Commission subsequently established a Study Group to work on the issue between 2003 and 2006.[135] As international law has expanded into new subject areas over the past century, with a corresponding proliferation of international treaties and institutions, conflicts increasingly have arisen between substantive norms or procedures within a given subject area or across subject areas, necessitating means to reconcile or prioritize the competing rules. This is especially the case with human rights, which is often asserted to hold a higher place in international law, at least in respect to the core nonderogable rights whose violation is considered an international crime. Some human rights institutions go further and assert the priority of

(OP 4.12, December 2001), Indigenous Peoples (OD 4.20, September 1991), Cultural Property (OP 11.03, September 1986), Safety of Dams (OP 4.37, September 1996), International Waterways (OP 7.50, October 1994), and Projects in Disputed Areas (OP 7.60, November 1994). Disclosure of Information applies to all ten safeguard policies according to the new Disclosure Policy which came into effect in January 2002. The integration of human rights concerns into economic and financial policies has been encouraged by the General Assembly, which has devoted considerable attention to the eradication of poverty, considered as a human rights issue. See, e.g., Report of the Independent Expert on the Question of Human Rights and Extreme Poverty, A/HRC/7/15, February 28, 2008. In addition, the former UN Commission on Human Rights suggested that multilateral financial and trade institutions must conform their policies and practices to international human rights norms. For a general overview of the Bank's approach to human rights, see IBRD/World Bank, *Development and Human Rights: The Role of the World Bank* (Washington, DC: The World Bank, 1998), 2–4, 5–6, 8, 11, 12, 30.

[134] J. Harrison, *The Human Rights Impact of the World Trade Organisation: Studies in International Trade Law* (Oxford: Hart, 2007); S. Joseph, *Blame it on the WTO: A Human Rights Critique* (Oxford: Oxford University Press, 2011); S. Joseph, D. Kinley, and J. Waincymer (eds.), *The World Trade Organisation and Human Rights: Interdisciplinary Perspectives* (Cheltenham: Edward Elgar, 2009); A. Lang, *World Trade Law after Neoliberalism: Reimagining the Global Economic Order* (Oxford: Oxford University Press, 2011); Report of the United Nations High Commissioner for Human Rights, "Human Rights, Trade and Investment" (July 2, 2003) UN Doc. E/CN.4/Sub.2/2003/9; J. E. Stiglitz and A. Charlton, *Fair Trade for All* (Oxford: Oxford University Press, 2005).

[135] See Report of the International Law Commission, GAOR 60th Sess., Supp. No. 10 (A/60/10), Chapter XI.

human rights guarantees in general over other international law, without necessarily claiming that the entire body of law constitutes *jus cogens*.[136]

# Regional Organizations

Following World War II, the widespread movement for human rights also led newly created or reformed regional organizations to add human rights to their agendas. The stalled efforts of the UN on one or more human rights treaties to complete the international bill of rights[137] revealed that global compliance mechanisms would not be strong. The regional systems, therefore, focused on the creation of procedures of redress, establishing control machinery to supervise the implementation and enforcement of the guaranteed rights.[138] All of the regional institutions drew inspiration[139] from the human rights provisions of the UN Charter and the UDHR,[140] but different historical and political factors encouraged each region to focus on specific human rights issues.

## The Americas

The Organization of American States (OAS) referred to human rights in its Charter, opened for signature in Bogotá, Colombia, in 1948.[141] In the Charter, "the American

[136] The UN Committee on Economic, Social and Cultural Rights in a 1998 statement on globalization and economic, social, and cultural rights, declared that the realms of trade, finance, and investment are in no way exempt from human rights obligations. The Committee's concerns were raised a second time in a statement urging WTO members to adopt a human rights approach to trade matters, asserting that the "promotion and protection of human rights is the first responsibility of Governments." The claimed primacy of all human rights law has not been reflected in state practice. If eventually accepted, it will reject the notion of *lex specialis* for trade or other fields where states can claim to be free from human rights obligations.

[137] See Human Rights Commission, *Celebrating the Universal Declaration of Human Rights* (2001) (noting that the UN Covenants were not completed for nearly two decades after adoption of the UDHR).

[138] See Message to Europeans, adopted by the Congress of Europe, May 8–10, 1948, quoted in Council of Europe, "Report of the Control System of the European Convention on Human Rights" (H(92)14) (December 1992), 4 ("We desire a Charter of Human Rights guaranteeing liberty of thought, assembly and expression as well as the right to form a political opposition; We desire a Court of Justice with adequate sanctions for the implementation of this Charter.").

[139] See generally A.H. Robertson and J.G. Merrills, *Human Rights in the World: An Introduction to the Study of the International Protection of Human Rights* (Manchester: Manchester University Press, 1996).

[140] GA Res. 217A (III).

[141] Charter of the Organization of American States, April 30, 1948, 2 UST 2394, 119 UNTS 3. The Charter has been amended by several protocols: the Protocol of Buenos Aires, February 27, 1967, OASTS No. 1, TIAS No. 6847, 721 UNTS 324; the Protocol of Cartagena de Indias, December 5, 1985,

States proclaim the fundamental rights of the individual without distinction as to race, nationality, creed, or sex" among the principles to which they are committed.[142] Former Article 13, now Article 17, declares that "each State has the right to develop its cultural, political and economic life freely and naturally," but prescribes that "in this free development, the State shall respect the rights of the individual and the principles of universal morality."[143]

The OAS Charter did not define "the fundamental rights of the individual," nor did it create any institution to promote their observance.[144] However, the same diplomatic conference that adopted the OAS Charter also proclaimed the American Declaration of the Rights and Duties of Man,[145] some months before the UN completed the UDHR.[146] Promulgated in the form of a simple conference resolution, this instrument proclaims an extensive catalogue of human rights and gives definition to the Charter's general commitment to human rights.[147]

In 1969 the OAS adopted the American Convention on Human Rights.[148] Other human rights treaties establishing standards for the region have followed.[149] The OAS discharges its functions through various organs, including its two primary political bodies, the General Assembly and Permanent Council, both of which have jurisdiction to deal with human rights matters.[150] In 1959, the OAS created the Inter-American Commission on Human Rights,[151] conferring on it responsibility

OASTS No. 66, 119 UNTS 3, 25 ILM 529; the Protocol of Managua, June 10, 1993, OEA/Ser. A/2 Add. 3, 33 ILM 1009; and the Protocol of Washington, December 14, 1992, OEA/Ser. A/2 Add. 3, 33 ILM 1005.

[142] Charter of the Organisation of American States, Art. 3(1).

[143] Ibid., Art. 17. [144] Ibid., Art. 3.

[145] American Declaration of the Rights and Duties of Man, May 2, 1948, OEA/Ser.L/VI/1.4, rev. 10, reprinted in *Basic Documents Pertaining To Human Rights in The Inter-American System* (2014) (*Basic Documents*), available at http://www.oas.org/en/iachr/mandate/basic_documents.asp.

[146] *Basic Documents, supra* note 145, at 6. [147] American Declaration of the Rights and Duties of Man.

[148] American Convention on Human Rights, November 22, 1969, OASTS No. 36, 1144 UNTS 123, 9 ILM 673, reprinted in *Basic Documents, supra* note 145, at 27.

[149] These treaties include the Inter-American Convention to Prevent and Punish Torture, December 9, 1985, OASTS No. 67, 25 ILM 519, reprinted in *Basic Documents, supra* note 145, at 91; Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights, November 17, 1988, OASTS No. 69, 28 ILM 156, reprinted in *Basic Documents, supra* note 145, at 73; Protocol to the American Convention on Human Rights to Abolish the Death Penalty, June 8, 1990, OASTS No. 73, 29 ILM 1447, reprinted in *Basic Documents, supra* note 145, at 87; Inter-American Convention on the Prevention, Punishment, and Eradication of Violence against Women, June 9, 1994, 27 UST 3301, 33 ILM 1534, reprinted in *Basic Documents, supra* note 145, at 111; Inter-American Convention on Forced Disappearance of Persons, June 9, 1994, 33 ILM 1429, reprinted in *Basic Documents, supra* note 145, at 101; Inter-American Convention on the Elimination of All Forms of Discrimination against Persons with Disabilities, June 7, 1999, reprinted in *Basic Documents, supra* note 145, at 123.

[150] See *Basic Documents, supra* note 145, at 17.

[151] Org. of Am. States, "Fifth Meeting of Consultation of Ministers of Foreign Affairs, Santiago, Chile, August 12–18, 1959," *American Journal International Law* 55 (1961): 537. The Statute of the Commission described it as an autonomous entity of the OAS functioning to promote respect for human rights. Statute of the Inter-American Commission on Human Rights, Art. 1, reprinted in *Basic*

for promoting human rights in the hemisphere. The Commission began accepting communications and issuing reports on human rights violations.[152] It continues these functions with respect to OAS member states but also has responsibility for monitoring compliance with the human rights treaties adopted by the OAS.[153] The Inter-American Court on Human Rights, along with the Commission, monitors compliance with the obligations of state parties to the American Convention on Human Rights.[154]

## Europe

The European system, the first to be fully operational, began when ten Western European states signed the Statute of the Council of Europe on May 5, 1949.[155] After suffering the atrocities of World War II, Europe felt compelled to press for international human rights guarantees as part of European reconstruction. Faith in Western European traditions of democracy, the rule of law, and individual rights inspired belief that a regional system could avoid future conflict and stem post-war revolutionary impulses supported by the Soviet Union.[156] Article 3 of the Statute provides that "every Member of the Council of Europe must accept the principles of the rule of law and of the enjoyment by all persons within its jurisdiction of human

*Documents, supra* note 145, at 131. In 1967, the Protocol of Buenos Aires amended the Charter to make the Commission a principal organ of the OAS. See *Basic Documents, supra* note 145, at 9.

[152] In 1965, the Commission's competence was expanded to accept communications, request information from governments, and make recommendations to bring about more effective observance of human rights. "Second Special Inter-American Conference, Rio de Janeiro, Brazil, November 17–30, 1965," *American Journal International Law* 60 (1965): 445, 458.

[153] Ibid., 459 (stating that the Commission must monitor compliance with human rights treaties).

[154] Inter-American Court of Human Rights Home Page, http://oas.org/OASpage/humanrights.htm.

[155] Statute of the Council of Europe, Art. 3, May 5, 1949, Europ. T.S. 1. The original members were Belgium, Denmark, France, Ireland, Italy, Luxembourg, the Netherlands, Norway, Sweden, and the United Kingdom.

[156] In the Preamble to the ECHR, the contracting parties declare that they are:

> [r]eaffirming their profound belief in those Fundamental Freedoms which are the foundation of justice and peace in the world and are best maintained on the one hand by an effective political democracy and on the other by a common understanding and observance of the Human Rights upon which they depend.

Convention for the Protection of Human Rights and Fundamental Freedoms, November 4, 1950, Europ. T.S. 5. For a discussion of the ECHR's history, see J. G. Merrills, "The Council of Europe (I): The European Convention on Human Rights," in *An Introduction to the International Protection of Human Rights*, ed. Rhija Hanski and Markku Suksi (Turku: Institute for Human Rights, 1999), 287–9 ("Many statesmen of the immediate post-war epoch had been in resistance movements or in prison during the Second World War and were acutely conscious of the need to prevent any recrudescence of dictatorship in Western Europe."). Merrills also views the emergence of the East–West conflict as a stimulus to closer ties in Europe. Ibid., 287–8.

rights and fundamental freedoms."[157] The end of the Cold War enabled Central and Eastern European nations to join the Council of Europe after declaring their acceptance of the principles spelled out in Article 3;[158] total membership now stands at forty-six states.[159]

As the first human rights system, the ECHR initially contained a short list of civil and political rights.[160] Over time, ECHR protocols[161] and independent agreements have added additional guarantees.[162] The Contracting Parties to the European Convention thus have repeatedly lengthened the list of guaranteed rights. The European system was also the first to create an international commission and court[163] for the protection of human rights and to create a procedure for individual denunciations of human rights violations.[164] The role of the victim was initially limited

[157] Statute of the Council of Europe, Art. 3.

[158] Vienna Declaration of the Heads of State and Government of the Council of Europe, October 9, 1993, reprinted in D. Huber, *A Decade Which Made History: The Council of Europe 1989–1999* (1999), 247; see also Comm. of Ministers, Declaration on Compliance with Commitments Accepted by Member States of the Council of Europe, 95th Sess. (November 10, 1994), reprinted in Council of Europe, Information Sheet No. 35 (1995), 146. See Buergenthal, Norris, & Shelton, *supra* note 43, at 24.

[159] About the Council of Europe, see http://www.coe.int/T/e/Com/about_coe.

[160] See Convention for the Protection of Human Rights and Fundamental Freedoms, Nov 4, 1950 as amended by Protocol No. 11, Europ. T.S. 5, 213 UNTS 221.

[161] The Council of Europe has adopted fourteen protocols to the ECHR, expanding the list of guaranteed civil and political rights. Protocol No. 1 ECHR, March 20, 1951, Europ. T.S. 9 (adding a right to property and a right to education; requiring the Contracting Parties to hold free and secret elections at reasonable intervals); Protocol No. 4 ECHR, September 16, 1963, Europ. T.S. 46 (prohibiting deprivation of liberty for failure to comply with contractual obligations, guaranteeing the right to liberty of movement, and barring forced exile of nationals and the collective expulsion of aliens); Protocol No. 6 ECHR, April 28, 1983, Europ. T.S. 114 (abolishing the death penalty except during wartime); Protocol No. 7 ECHR, November 22, 1984, Europ. T.S. 117 (according aliens various due process safeguards before they may be expelled from a country where they reside; providing for rights of appeal in criminal proceedings, compensation in cases of miscarriage of justice, protection against double jeopardy, and equality of rights and responsibilities between spouses); Protocol No. 12 ECHR, November 4, 2000, Europ. T.S. 177 (augmenting the nondiscrimination guarantee in Art. 14 ECHR by providing that "the enjoyment of any right set forth by law shall be secured without discrimination on any ground" and that "no one shall be discriminated against by any public authority"); Protocol No. 13 ECHR, May 3, 2002, Europ. T.S. 187 (abolishing the death penalty under all circumstances); Protocol No. 14 ECHR, May 13, 2004, Europ. T.S. 194 (envisaging a revision of judicial procedures).

[162] See, e.g., European Social Charter, October 18, 1961, Europ. T.S. 35; the Torture Convention; European Charter for Regional or Minority Languages, November 5, 1992, Europ. T.S. 148; Framework Convention for the Protection of National Minorities, February 1, 1995, Europ. T.S. 15; Convention on Human Rights and Biomedicine, April 4, 1997, Europ. T.S. 164.

[163] Dinah Shelton, "The Boundaries of Human Rights Jurisdiction in Europe," *Duke Journal of Comparative & International Law* 13 (2003): 95, 100. The Commission acquired its competence to receive individual petitions in 1955, after six states accepted the right of petition. Ibid. Many states took decades to accept the right of individual petition. Ibid. The United Kingdom filed its first declaration on January 14, 1966. Ibid. France and Greece did not accept the right of petition until 1981; Turkey did not accept until 1987. Ibid.

[164] Ibid.

and admissibility requirements were stringent.[165] As the system has matured, however, the institutional structures and normative guarantees have been considerably strengthened.[166]

## Africa

In Africa, as states emerged from colonization, their human rights agenda focused on self-determination and racism. The African Charter on Human and Peoples' Rights, which entered into force October 21, 1986, established a system for the protection and promotion of human rights that was designed to function within the institutional framework of the Organization of African Unity (OAU), a regional intergovernmental organization that came into being in 1963 and was replaced in 2001 by the African Union.[167] The main objectives of the OAU included ridding the continent of the remaining vestiges of colonization and apartheid; promoting unity and solidarity among African states; coordinating and intensifying cooperation for development; safeguarding the sovereignty and territorial integrity of member states; and promoting international cooperation within the framework of the UN.[168] The end of colonialism and the ascent of democratic rule in southern Africa has led to a larger role for human rights issues in the new African Union and to the adoption of a Protocol for the establishment of an African Court of Human Rights.[169]

## Evolution of the Regional Organizations

Like the UN system, regional organizations have evolved over time, increasing the protections afforded and the rights guaranteed. The European, Inter-American, and African systems have all expanded their guarantees through the adoption of protocols and other human rights instruments, each one building on the normative advances at the UN and in other regions.[170] The Inter-American system, for example, has concluded the Inter-American Convention for the Prevention and Punishment of Torture;[171] the Additional Protocol to the American Convention on Human Rights in

[165] Ibid. [166] Ibid.

[167] Thomas Buergenthal, Dinah Shelton, and David Stewart, *International Human Rights* (St. Paul: West Publishing, 2002), 282–3.

[168] Charter of the Organization of African Unity, Preamble, Arts. 2, 3, in *Compendium of Key Human Rights Documents of the African Union* (Pretoria: Pretoria University Law Press, 2005), 2–3

[169] Ibid., 32.

[170] See Buergenthal, Norris, & Shelton, *supra* note 43, at 24–31 (summarizing the development of regional human rights organizations throughout the world).

[171] Inter-American Convention to Prevent and Punish Torture, Dec 9, 1985, OASTS No. 67.

the Area of Economic, Social and Cultural Rights;[172] the Second Additional Protocol to the American Convention on Human Rights to Abolish the Death Penalty;[173] the Inter-American Convention on the Prevention, Punishment, and Eradication of Violence against Women;[174] the Inter-American Convention on Forced Disappearance of Persons;[175] and the Inter-American Convention on the Elimination of All Forms of Discrimination Against Persons with Disabilities.[176] It has drafted a Declaration on the Rights of Indigenous Peoples, but the text has not yet been adopted.[177]

It is notable that virtually all the legal instruments in the various regional systems refer to the UDHR and the UN Charter,[178] providing a measure of uniformity in the fundamental guarantees and a reinforcement of the universal character of the American Declaration of the Rights and Duties of Man.[179] The rights contained in

[172] Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights, November 17, 1988, OASTS No. 69, OAS Doc. OEA/Ser A/42 (SEPF).

[173] Protocol to the American Convention on Human Rights to Abolish the Death Penalty, June 8, 1990, OASTS No. 73.

[174] Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women June 9, 1994, No. A-61.

[175] Inter-American Convention on Forced Disappearance of Persons, June 9, 1994, No. A-60.

[176] Inter-American Convention on the Elimination of All Forms of Discrimination Against Persons with Disabilities, June 7, 1999, OAS Doc. AG/RES. 1608 (XXIX-O/99).

[177] Press Release V, Inter-Am. Comm'n on Human Rights, Press Communiqué of 3/97, OAS Doc. OEA/Ser.L/V/II.98, Doc. 7 rev. (March 7, 1997), reprinted in OAS, *Annual Report of the Inter-American Commission on Human Rights* (1997), 1081.

[178] Only the American Declaration of the Rights and Duties of Man does not mention the UDHR, because it was adopted prior to the completion of the UDHR. The American Declaration indicates its origin in the "repeated occasions" on which the American States had "recognized that the essential rights of man are not derived from the fact that he is a national of a certain state, but are based upon attributes of his personality."American Declaration, Preamble. The European system, "considering the Universal Declaration of Human Rights," provides that the "like-minded" governments of Europe have resolved "to take the first steps for the collective enforcement of certain of the rights stated in the Universal Declaration."ECHR, Preamble. The Preamble to the American Convention on Human Rights also cites the UDHR, as well as referring to the OAS Charter, the American Declaration of the Rights and Duties of Man, and other international and regional instruments not referred to by name. The drafting history of the American Convention shows that the states involved utilized the ECHR, the UDHR, and the Covenants in deciding upon the Convention guarantees and institutional structure. See Buergenthal, Norris, & Shelton, *supra* note 43, at 41–3. The African Charter mentions the Charter of the UN and the UDHR in connection with the pledge made by the African States to promote international cooperation. African Charter on Human and Peoples' Rights Preamble, reprinted in Ouguergouz, *supra* note 5, at 803. In the Charter's Preamble, the African States also reaffirm in sweeping fashion "their adherence to the principles of human and peoples' rights and freedoms contained in the declarations, conventions and other instrument adopted by the Organization of African Unity, the Movement of Non-Aligned Countries and the United Nations." Ibid. The Revised Arab Charter on Human Rights was adopted with a preamble "reaffirming the principles of the Charter of the United Nations, the Universal Declaration of Human Rights and the provisions of the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights." League of Arab States, Revised Arab Charter on Human Rights, May 22, 2004, available at http://www.umn.edu/humanrts/instree/loas2005.html.

[179] See American Declaration of the Rights & Duties of Man, Preamble ("[T]he international protection of the rights of man should be the principal guide of an evolving American law.").

the treaties also reflect the human rights norms set forth in other global human rights declarations and conventions, in particular the UN ICCPR[180] and Covenant on Economic, Social and Cultural Rights.[181] The most recently adopted regional treaty, the 2004 Revised Arab Charter,[182] was drafted and approved in part to bring the regional norms more into conformity with global standards.[183]

In addition, as each successive system has been created it has looked to the normative instruments and jurisprudence of those systems founded earlier. Provisions regarding choice of law and canons of interpretation contained in the regional instruments have led to considerable convergence in fundamental human rights norms and their application. All of the systems have a growing case law detailing the rights and duties enunciated in the basic instruments. The jurisprudence of the regional human rights bodies has thus become a major source of human rights law. In many instances this case law reflects a convergence of the different substantive protections in favor of broad human rights protections. In other instances, differences in treaty terms or approach have resulted in a rejection of precedent from other systems.[184] In general, the judges and the commissioners have been willing to substantiate or give greater authority to their interpretations of rights by referencing not only their own prior case law but also the decisions of other global and regional bodies.

Some decisions cross-reference specific articles of other instruments. The European Court of Human Rights has utilized Article 19(2) ICCPR to extend the application of Article 10 ECHR to cover artistic expression.[185] It has referred to the UN Convention on the Rights of the Child in regard to education.[186] It has also referred to both the ICCPR and the American Convention in regard to the right to a name as part of Article 8 ECHR.[187] Most well-known is *Soering v United Kingdom*, where the court found that the obligation not to extradite someone who might face torture[188] is implicit in Article 3 ECHR.[189]

[180] ICCPR, *supra* note 45. [181] ICESCR, *supra* note 45.

[182] Revised Arab Charter on Human Rights, *supra* note 178.

[183] See Mervat Rishmawi, "The Revised Arab Charter on Human Rights: A Step Forward?," *Human Rights Law Review* 5 (2005): 361.

[184] e.g., the European and Inter-American courts take very different approaches to their remedial powers based on the different language of their respective treaties. In case law, the Inter-American court has also rejected the more stringent European restrictions on rights. See *Compulsory Membership in an Ass'n Prescribed by Law for the Practice of Journalism*, 5 Inter-Am Ct HR (ser. A) No. 5 (November 13, 1985), 15, http://www.corteidh.or.cr/docs/opiniones/seriea_05_ing.pdf.

[185] See *Muller v Switz.*, 133 ECtHR (ser. A) (1988), 19.

[186] See *Costello-Roberts v United Kingdom*, 247C ECtHR (ser. A) (1993), 50, 58.

[187] See *Burghartz v Switz.*, 280B ECtHR (ser. A) (1994), 19, 28.

[188] Torture Convention, Art. 3.

[189] See *Soering v United Kingdom*, 161 ECtHR (ser. A) (1989), 35. ("The fact that a specialised treaty should spell out in detail a specific obligation attaching to the prohibition of torture does not mean that an essentially similar obligation is not already inherent in the general terms of Article 3 of the European Convention." The former Commission stated that it found it useful in interpreting the ECHR to refer to provisions in other international legal instruments for the protection of human rights, especially

The Inter-American Court of Human Rights also frequently uses other international court decisions and international human rights instruments to interpret and apply Inter-American norms. It has referred to the ECHR,[190] the ICCPR, other UN treaties,[191] and decisions of the European Human Rights Commission and the European Court.[192] It has stated that it will use cases decided by the European Court of Human Rights and the Human Rights Committee when they augment rights protection[193] and has indicated a commitment not to incorporate restrictions from other systems.[194] Inter-American Commission and court decisions in turn provide extensive jurisprudence on due process,[195] conditions of detention and treatment of detainees,[196] legality of amnesty laws,[197] rape as torture,[198] disappearances,[199] obligations to ensure respect for rights,[200] direct applicability of norms,[201] exhaustion of local remedies,[202] burden and standard of proof,[203] admissibility of evidence,[204]

those that contain broader guarantees.); see also *Gestra v Italy*, App. No. 21072/92, 80B Eur. Comm'n HR Dec. & Rep. (1995), 89, 93.

[190] See, e.g., *Compulsory Membership*, Inter-Am Ct HR (ser. A) No. 5, 11–13; *Enforceability of the Right to Reply or Corr.*, Inter-Am Ct HR No. 7, (ser. A) (August 29, 1986), 6, available at http://www.corteidh.or.cr/docs/opiniones/seriea_07_ing.pdf.

[191] See *Compulsory Membership*, Inter-Am Ct HR (ser. A) No. 5, 11–14; *Proposed Amendments to the Naturalization Provisions of the Constitution of Costa Rica*, Inter-Am Ct HR (ser. A) No. 4, (January 19, 1984), 13–14, available at http://www.corteidh.or.cr/docs/opiniones/seriea_04_ing.pdf.

[192] See *Caballero Delgado & Santana Case (Preliminary Objections)*, Inter-Am Ct HR (ser. C) No. 17 (January 21, 1994), 14, available at http://www.corteidh.or.cr/docs/casos/articulos/seriec_17_ing%5B1%5D.pdf; *Gangaram Panday Case*, Inter-Am Ct HR (ser. C) No. 16 (January 21, 1994), 9, available at http://www.corteidh.or.cr/docs/casos/articulos/seriec_16_ing%5B1%5D; *The Word "Laws" in Article 30 of the Am. Convention on Human Rights*, Inter-Am Ct HR (ser. A) No. 6 (May 9, 1986), 5, available at http://www.corteidh.or.cr/docs/opiniones/seriea_06_ing.pdf; *Compulsory Membership*, Inter-Am Ct HR (ser. A) No. 5, 11–13, 19–20; *Proposed Amendments*, Inter-Am Ct HR (ser. A) No. 4, 15; *Viviana Gallardo v Gov't of Costa Rica*, Inter-Am Ct HR (ser. A) No. 101 (November 13, 1982), 3, 7–8, available at http://www.corteidh.or.cr/docs/opiniones/seriea_101_81_ing.pdf; *The Effect of Reservations on the Entry into Force of the Am. Convention*, Inter-Am Ct HR (ser. A) No. 2 (September 24, 1982), 8, available at http://www.corteidh.or.cr/docs/opiniones/seriea_02_ing.pdf.

[193] See *Compulsory Membership*, Inter-Am Ct HR (ser. A) No. 5, 15 ("[I]f in the same situation both the American Convention and another international treaty are applicable, the rule most favorable to the individual must prevail.").

[194] See ibid., 14 (stating that the comparison of the "American Convention with the provisions of other international instruments" should never be used to read into the "Convention restrictions that are not grounded in its text").

[195] See *Judicial Guarantees in States of Emergency*, Inter-Am Ct HR (ser. A) No. 9.

[196] See *Gangaram Panday Case*, Inter-Am Ct HR (ser. C) No. 16; *Viviana Gallardo*, Inter-Am Ct HR (ser. A) No. 101.

[197] See Enactment of the Amnesty Law and El Sal.'s Int'l Commitments, Inter-Am CHR, OEA/Ser.L/V/II.85, Doc. 28 rev. February 11, 1994.

[198] See Report on the Situation of Human Rights in El Sal., Inter-Am CHR, OAS/Ser.L/V/II.46, Doc. 23, Rev. 1, November 17, 1978.

[199] See *Velasquez Rodriguez Case*, Inter-Am Ct HR (ser. C) No. 4 (July 29, 1988).

[200] See *Gangaram Panday Case*, Inter-Am Ct HR (ser. C) No. 16.

[201] See Buergenthal, Norris, & Shelton, *supra* note 43, at 365–430.

[202] See *Caballero Delgado & Santana Case*, Inter-Am Ct HR (ser. C), No. 17, 15.

[203] See *Velasquez Rodriguez Case*, Inter-Am Ct HR (ser. C.) No. 4.

[204] See ibid.

and the general doctrine of interpretation of human rights treaties.[205] The African Commission has drawn upon these and other standards in deciding cases before it.[206] The Commission has adopted several doctrines from European and Inter-American case law: presumption of the truth of the allegations from the silence of government,[207] the notion of continuing violations,[208] continuity of obligations in spite of a change of government,[209] state responsibility for failure to act,[210] and the presumption that the state is responsible for custodial injuries.[211] In sum, standard-setting is a dynamic process of cross-referencing and progression in the development of human rights norms; the standard appears to be a single one, although there is diversity outside the core of protections.

[205] See *Caballero Delgado & Santana Case*, Inter-Am Ct HR (ser. C), No. 17, 5–8.

[206] See *Compilation of Decisions on Communications of the African Commission on Human and Peoples' Rights* (Banjul: Institute for Human Rights and Development, 1999) (*Compilation of Decisions*).

[207] See, e.g., Communication Nos. 59/91, 60/91, 87/93, 101/93, and 74/92. For example:

> The African Commission … has set out the principle that where allegations of human rights abuse go uncontested by the government concerned, even after repeated notifications, the Commission must decide on the facts provided by the complainant and treat those facts as given. This principle conforms with the practice of other human rights adjudicatory bodies and the Commission's duty to protect human rights.

Communication Nos. 25/89, 47/90, 56/91, and 100/93, *Free Legal Assistance Group, Lawyers' Comm. for Human Rights, Union Interafricaine des Droits de l=Homme, Les Témoins de Jehovah v. Zaire*, in *Compilation of Decisions*, 52–8. Article 42 of the Regulations of the Inter-American Commission allows it to presume the facts in the petition are true if the government fails to respond to the complaint. See Buergenthal, Norris, & Shelton, *supra* note 43, at 660.

[208] See, e.g., Communication No. 142/94, *Njoka v Kenya*, 13; Case No. 39/90, *Pagnoulle v Cameroon*.

[209] In a Communication against Malawi, the Commission held:

> Principles of international law stipulate … that a new government inherits the previous government's international obligations, including the responsibility for the previous government's mismanagement. The change of government in Malawi does not extinguish the present claim before the Commission. Although the present government of Malawi did not commit the human rights abuses complained of, it is responsible for the reparation of these abuses.

Communication Nos. 64/92, 68/92, and 78/92, *Amnesty Int'l v Malawi*, reprinted in *Compilation of Decisions*, 33; see Communication Nos. 83/92, 88/9, and 91/93, *Degli, Union Interafricaine des Droits de l'Homme, Comm. Int'l de Juristes v Togo* (determining based on the findings of a Commission delegation to Togo that the acts of the prior regime were being remedied by the present government); see also *Velasquez Rodriguez Case*, Inter-Am Ct HR (ser. C) No. 4.

[210] In regard to Communication 74/92, *Commission Nationale des Droits de l'Homme et des Libertes v Chad*, the Commission expounded on the state duty specified in Art. 1 to give effect to the rights and freedoms guaranteed by the African Charter. According to the Commission, "if a state neglects to ensure the rights in the African Charter, this can constitute a violation, even if the State or its agents are not the immediate cause of the violation." The Commission found that "Chad ha[d] failed to provide security and stability in the country, thereby allowing serious and massive violations of human rights." In language reminiscent of the *Velasquez Rodriguez Case*, the Commission said, "Even where it cannot be proved that violations were committed by government agents, the government had a responsibility to secure the safety and the liberty of its citizens, and to conduct investigations into murders. Chad therefore is responsible for the violations of the African Charter." Ibid.

[211] See Communication Nos. 64/92, 68/92, and 78/92, *Amnesty Int'l v Malawi*, reprinted in *Compilation of Decisions*, 33, 33–5; Communication No. 74/92; see also *Tomasi v France*, 241 ECtHR (ser. A) (1992), 3, 15–16.

In all the regional bodies, as in the global system, interstate cases are exceptionally rare. The European system has had fewer than two dozen cases filed by state parties.[212] The African system has had submitted only one interstate case in its history,[213] and the Inter-American system declared inadmissible its first interstate case.[214] States also show no inclination to denounce others before UN treaty bodies or the ICJ. Instead, human rights issues are generally raised for political reasons before political bodies.

At the regional level, the European system reflects the evolution toward stronger international supervision of treaty obligations. The "default setting" for the original 1950 ECHR's supervisory machinery was an interstate complaint brought to the European Commission on Human Rights. The Commission could investigate the situation, attempt a friendly settlement, and ultimately report the matter to the Committee of Ministers, a political body. The Committee of Ministers would then decide if a violation had taken place. The ECHR allowed submission of an individual petition only if the state in question had filed optional declarations accepting both the right of individual petition and the jurisdiction of the court. In such case, an individual petition could be brought before the former Commission, which would judge its admissibility and then report on its evaluation of admissible cases.[215] If the contracting party had accepted the court's jurisdiction, the state or the Commission could thereafter choose to bring the matter back before the court.[216] The individual had no standing to refer the case. Over time, this procedure was supplanted by increasing acceptance of individual complaints and recourse to the court.[217] Today, with the revisions of the Statute that require Member States to meet specific commitments on democracy, rule of law, and human rights, states could face suspension or revocation of membership through repeated commission of serious human rights violations.[218]

The European and other regional systems are in danger of becoming victims of their own success. The financial resources and personnel are inadequate to address the continually rising numbers of cases. The sheer volume of potential complaints from some of the new member states in Europe calls for a procedure to address systemic problems and prevent widespread violations from overwhelming the court. Part of the problem results from gross and systematic violations that cannot be remedied through the individual case system. It remains primarily the task of the UN to take action in response to the worst violations.

[212] See European Court of Human Rights Home Page—List of Judgments, http://www.echr.coe.int (follow "Case-Law" hyperlink; then follow "Lists of Judgments" hyperlink).

[213] Communication No. 227/99, *Democratic Republic of Congo v Burundi, Rwanda & Uganda*.

[214] *Nicaragua v Costa Rica*, Inter-state Case 01/06, Inter-Am CHR, Report No. 11/07 (March 8, 2007), available at http://www.cidh.oas.org/annualrep/2007eng/interstatecase.eng.htm - 06/10/2008.

[215] ECHR, Arts. 29–30. [216] Ibid., Art. 44.

[217] See Protocol No. 11 to the ECHR, May 11, 1994, Europ. T.S. 155 (restructuring the control machinery established therein).

[218] Statute of the Council of Europe, Art. 8.

# Conclusion

International organizations have no power as separate entities to develop policy; human rights law and its enforcement is in fact the combination of the foreign policies of the member states played out in multilateral forums. These policies are rarely neutral and altruistic; indeed, it has been argued that any human rights policy that does not enhance national security is unjustifiable.[219] Extensive trade, aid, or political ties may allow greater pressure to be placed on violators, but they also risk political fallout from domestic interests that gain from ongoing economic relations. Allies are willing to hear criticism that adversaries would reject. Alternatively, a government may wish to disassociate itself from violators and perceive itself as losing little by voting for UN condemnation of violators. However, little may be gained in improved human rights performance without imposition of effective targeted sanctions, which expends political capital.

Successfully raising human rights cases or issues in multilateral political bodies generally requires a coalition of NGOs, media coverage, and key state support. It also could be useful if the UN viewed itself as having a stake in the country, for example, because it monitored elections or sent peacekeepers. What remain debated and probably without resolution are questions about priorities of rights and countries. In general, though, it is increasingly acknowledged that there are different priorities and interpretations of substantive rights, as well as different definitions and appreciations of claimed violations.[220] In the end, it is probably inevitable that each country accused of human rights violations will claim it is being unfairly singled out for political purposes.

In "The Responsibility to Protect," a Canadian government initiative concluded that there are criteria for when intervention by the international community is not just authorized but required.[221] First, "there must be serious and irreparable harm occurring to human beings or imminently likely to occur."[222] The intervention should be for the purpose of preventing or halting such harm, it should be the last

[219] Alan Tonelson, "Human Rights: The Bias We Need," *Foreign Policy* 49 (1982–3): 52.

[220] For example, determining that there is systematic religious persecution depends on deciding that certain groups constitute religions entitled to exercise religious liberty and not cults or criminal enterprises claiming the mantle of religion for other purposes. See Maria Hsia Chang, *Falun Gong: The End of Days* (New Haven: Yale University Press, 2004) (discussing the Falun Gong and the response of the Chinese government to its activities); Douglas Lee Donoho, "Autonomy, Self-Governance, and the Margin of Appreciation: Developing a Jurisprudence of Diversity within Universal Human Rights," *Emory International Law Review* 15 (2001): 391.

[221] Int'l Comm'n on Intervention & State Sovereignty, *The Responsibility to Protect* (Ottawa: International Development Research Centre, 2001), http://responsibilitytoprotect.org/ICISS%20Report.pdf

[222] Ibid., xii.

resort, it should use proportional means, and it should have reasonable prospects of success.[223] The consequences of action should not be worse than the consequences of inaction.[224] The UN High Level Panel on Threats, Challenges and Change agreed that there is a norm emerging that imposes a collective international responsibility to protect people in the event of genocide, ethnic cleansing, other large-scale killing, or other serious violations of international humanitarian law.[225] Its criteria for intervention[226] echoed those of the Canadian report.[227]

In an ideal world, this independent body would have jurisdiction to investigate allegations of gross and systematic violations of human rights. The recent emphasis on criminal prosecutions on the one hand and truth commissions on the other sometimes seems to overlook the needs of survivors. Attention to the needs of the victims of human rights is beginning to receive greater attention, but it remains inadequate. A difficult part of this discussion must concern how far back to go in redressing past abuses. This is critical because historical injustices have a way of returning and becoming present-day conflicts.

Another human rights issue of concern to international organizations today stems from the fact that violations of human rights are not always committed by dictatorial and abusive governments. They are as likely to be committed by non-state actors in failed states, by powerful private interests taking over governmental functions through outsourcing and privatization, or by criminal enterprises. The UN and other intergovernmental organizations may themselves be implicated in human rights violations by individuals under their authority during peacekeeping missions or other exercises of power.

The UN Charter-based system does not afford a neutral examination of alleged human rights violations before an independent body. Global treaty bodies, in contrast to the UN Charter bodies, are made up of independent experts, but their investigative and other enforcement powers are generally constrained by states during the treaty-drafting process. Only the regional human rights systems offer the equivalent of domestic enforcement procedures, by creating independent commissions and courts to which victims of human rights violations can complain. Even these procedures are limited, however, because cases can be filed only against the states, not against individual perpetrators, and remedies are restricted. In addition, all of the courts and commissions depend on the political organs of the region to ensure adequate personnel, financial support, and enforcement of their decisions and judgments. The system works well for individual cases but has grave limitations when it comes to addressing gross and systematic human rights violations. Other

[223] Ibid. [224] Ibid.
[225] Chairman, "Report of the High-Level Panel on Threats, Challenges, and Change," 285, ¶ 201.
[226] Ibid., ¶ 207.
[227] Int'l Comm'n on Intervention and State Sovereignty, *The Responsibility to Protect*, xii–xiii.

regions remain dependent on the work of the UN to promote and protect human rights.[228] The role of civil society, especially human rights NGOs, will remain critical in pressing for stronger human rights enforcement. During the next twenty-five years, standard-setting will not be concluded, but prevention, accountability, and redress will be the priority matters.

[228] For a discussion of efforts to create a regional system in the Arab world, see Rishmawi, "The Revised Arab Charter on Human Rights," 361–2. For developments in Asia, see Vitit Muntarbhorn, "Asia, Human Rights and the New Millennium: Time for a Regional Human Rights Charter?," *Transnational Law & Contemporary Problems* 8 (1998): 407; Li-ann Thio, "Implementing Human Rights in ASEAN Countries: 'Promises to Keep and Miles to Go before I Sleep'," *Yale Human Rights & Development Law Journal* 2 (1999): 1.